NORTH CAROLINA REPORTS

VOLUME 207

This book is an exact photo-reproduction of the original Volume 207 of North Carolina Reports that was published in 1935.

Published by
THE STATE OF NORTH CAROLINA
RALEIGH
1972

Reprinted by
COMMERCIAL PRINTING COMPANY
RALEIGH, NORTH CAROLINA

NORTH CAROLINA REPORTS

VOL. 207

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1934

SPRING TERM, 1935

REPORTED BY

ROBERT C. STRONG

RALEIGH
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1935

CITATION OF REPORTS

Rule 46 of the Supreme Court is as follows:

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

1 and 2 Martin, Taylor & Conf.	as	1	N. C.	9 Iredell Law	as	31	N. C.
1 Haywood	"	2	"	10 " "	"	32	"
2 "	"	3	"	11 " "	"	33	"
1 and 2 Car. Law Repository & N. C. Term	"	4	"	12 " "	"	34	"
				13 " "	"	35	"
1 Murphey	"	5	"	1 " Eq.	"	36	"
2 "	"	6	"	2 " "	"	37	"
3 "	"	7	"	3 " "	"	38	"
1 Hawks	"	8	"	4 " "	"	39	"
2 "	"	9	"	5 " "	"	40	"
3 "	"	10	"	6 " "	"	41	"
4 "	"	11	"	7 " "	"	42	"
1 Devereux Law	"	12	"	8 " "	"	43	"
2 " "	"	13	"	Busbee Law	"	44	"
3 " "	"	14	"	" Eq.	"	45	"
4 " "	"	15	"	1 Jones Law	"	46	"
1 " Eq.	"	16	"	2 " "	"	47	"
2 " "	"	17	"	3 " "	"	48	"
1 Dev. & Bat. Law	"	18	"	4 " "	"	49	"
2 " "	"	19	"	5 " "	"	50	"
3 & 4 " "	"	20	"	6 " "	"	51	"
1 Dev. & Bat. Eq.	"	21	"	7 " "	"	52	"
2 " "	"	22	"	8 " "	"	53	"
1 Iredell Law	"	23	"	1 " Eq.	"	54	"
2 " "	"	24	"	2 " "	"	55	"
3 " "	"	25	"	3 " "	"	56	"
4 " "	"	26	"	4 " "	"	57	"
5 " "	"	27	"	5 " "	"	58	"
6 " "	"	28	"	6 " "	"	59	"
7 " "	"	29	"	1 and 2 Winston	"	60	"
8 " "	"	30	"	Phillips Law	"	61	"
				" Eq.	"	62	"

☞ In quoting from the *reprinted* Reports, counsel will cite always the marginal (*i. e.*, the original) paging, except 1 N. C. and 20 N. C., which have been repaged throughout without marginal paging.

The opinions published in the first six volumes of the reports were written by the "Court of Conference" and the Supreme Court prior to 1819.

From the 7th to the 62nd volumes, both inclusive, will be found the opinions of the Supreme Court, consisting of three members, for the first fifty years of its existence, or from 1818 to 1868. The opinions of the Court, consisting of five members, immediately following the Civil War, are published in the volumes from the 63rd to the 79th, both inclusive. From the 80th to the 101st volumes, both inclusive, will be found the opinions of the Court, consisting of three members, from 1879 to 1889. The remaining volumes contain the opinions of the Court, consisting of five members, since that time or since 1889.

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1934.

CHIEF JUSTICE:

W. P. STACY.

ASSOCIATE JUSTICES:

HERIOT CLARKSON, WILLIS J. BROGDEN,
GEORGE W. CONNOR, MICHAEL SCHENCK.

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:

JOHN A. LIVINGSTONE.

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*Died—5 February, 1935. Succeeded by A. A. F. Seawell.
†Succeeded as Assistant Attorney-General by John W. Aiken.

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.
J. WILL PLESS, JR.	Eighteenth	Marion.
P. A. MCELROY	Nineteenth	Marshall.
FELIX E. ALLEY, SR.	Twentieth	Waynesville.

SPECIAL JUDGE

FRANK S. HILL	Murphy.

EMERGENCY JUDGES

THOS. J. SHAW	Greensboro.
F. A. DANIELS	Goldsboro.
T. B. FINLEY	North Wilkesboro.

*Succeeded by Clawson L. Williams, 1 January, 1935.

‡Succeeded by F. Donald Phillips, 1 January, 1935.

†Succeeded by J. A. Rousseau, 1 January, 1935.

SOLICITORS

EASTERN DIVISION

Name	*District*	*Address*
HERBERT R. LEARY	First	Edenton.
DONNELL GILLIAM	Second	Tarboro.
W. H. S. BURGWIN	Third	Woodland.
CLAWSON L. WILLIAMS[1]	Fourth	Sanford.
D. M. CLARK	Fifth	Greenville.
JAMES A. POWERS	Sixth	Kinston.
J. C. LITTLE[2]	Seventh	Raleigh.
WOODUS KELLUM[3]	Eighth	Wilmington.
T. A. MCNEILL	Ninth	Lumberton.
LEO CARR	Tenth	Burlington.

WESTERN DIVISION

CARLISLE HIGGINS[4]	Eleventh	Sparta.
H. L. KOONTZ	Twelfth	Greensboro.
F. D. PHILLIPS[5]	Thirteenth	Rockingham.
JOHN G. CARPENTER	Fourteenth	Gastonia.
ZEB. V. LONG[6]	Fifteenth	Statesville.
L. SPURGEON SPURLING	Sixteenth	Lenoir.
JNO. R. JONES	Seventeenth	N. Wilkesboro
C. O. RIDINGS	Eighteenth	Forest City.
Z. V. NETTLES	Nineteenth	Asheville
JOHN M. QUEEN	Twentieth	Waynesville.

[1] Elected Judge of the Superior Court, 1 January, 1935. Succeeded as Solicitor by Claude C. Canaday.

[2] Succeeded by William Y. Bickett, 1 January, 1935.

[3] Succeeded by John J. Burney, 1 January, 1935.

[4] Succeeded by Allen H. Gwyn, 1 January, 1935.

[5] Succeeded by Rowland S. Pruette, 1 January, 1935.

[6] Succeeded by Charles L. Coggin, 1 January, 1935.

LICENSED ATTORNEYS

FALL TERM, 1934.

List of applicants granted law license by the North Carolina Board of Law Examiners at Raleigh, N. C., 23 August, 1934:

ALLEN, CHARLES B.....Wadesboro.
ATKINS, BILL.....Sioux.
BOGER, WILLIAM GORDON.....Morganton.
BRANDIS, HENRY PARKER, JR.....Greensboro.
BROOKS, THORNTON HIGBIE.....Greensboro.
CARTER, MELVIN EDMONDSON.....Asheville.
CORBETT, LEON HENRY.....Burgaw.
COWPER, ALBERT WALLACE.....Kinston.
EISENBERG, LEONARD.....Winston-Salem.
ELLISBERG, BERNARD E.....Raleigh.
FARTHING, WILLIAM PATRICK.....Durham.
FISHER, HENRY COLEMAN.....Asheville.
FRANKLIN, GEORGE COOPER.....Asheville.
GRIMES, BRYAN.....Washington.
HANEWINCKEL, WILLIAM A., JR.....Winston-Salem.
HARMON, JOHN CALVIN, JR.....Stumpy Point.
HAWORTH, BYRON.....High Point.
HEWLETT, ADDISON, JR.....Wilmington.
HOLTON, ALFRED EUGENE.....Winston-Salem.
HOWARD, SAMUEL AUGUSTUS, JR.....Salemburg.
HUDSON, JAMES ANDERSON.....Salisbury.
KENNON, ALBERT WILSON, JR.....Durham.
KILLEN, FRANK MILLER, III.....Asheville.
KLEEMEIER, JOHN AUGUSTUS, JR.....Greensboro.
LANSCHE, WILLIAM JOSEPH, JR.....New Bern.
LIVENGOOD, CHARLES HARRIS.....Durham.
MCMAHAN, JAMES K.....Cliffside.
MARKHAM, WILLIAM SATER, JR.....Durham.
MASON, WILLIAM ALEXANDER.....Belmont.
MOORE, BEVERLY COOPER.....Greensboro.
MOORE, HAZEL ARLENE.....Asheville.
MOORE, JOHN THOMAS.....Charlotte.
PAUL, MALCOLM CARLYLE.....Ransomville.
PICKARD, CARL GLENN.....Asheville.
RAMSEY, CRAIGE KERR.....Salisbury.
REYNOLDS, OTTIS JAMES.....Roanoke Rapids.
SAMS, LEROY WARREN.....Winston-Salem.
SAYRE, WILLIAM CLARKE.....Asheville.
SKINNER, LOUIS CHERRY.....Greenville.
SMITH, ORA LEE.....Albemarle.
TUCKER, BESSIE JANE.....Charlotte.
WHITE, JAMES COLVIN.....Asheville.
WHITMORE, HAROLD BIRNIE.....Chapel Hill.
WILLIS, EMMETT C., JR.....Southmont.
WILSON, DUNCAN CAMPBELL.....Dunn.
WILSON, WESTRAY EDWIN.....Asheville.

COMITY LICENSEES.

ANTHONY, JOSEPH LYNCH .....Charlotte.

SPECTOR, BORIS M. (license withheld pending establishing residence in North Carolina).

I, H. M. London, Secretary of the North Carolina Board of Law Examiners, do hereby certify that the foregoing is a true and correct copy of the list of attorneys granted law license by the said Board, August 23, 1934.

Witness my hand and seal, this the 23d day of August, 1934.

(SEAL) H. M. LONDON,
Secretary.

LICENSED ATTORNEYS

SPRING TERM, 1935.

List of applicants granted law license by the North Carolina Board of Law Examiners at Raleigh, N. C., 30 January, 1935:

ADAMS, JOEL BARBER	Asheville.
BATTON, RUFUS EDWIN	Smithfield.
BIDDIX, LUCIUS EUGENE	Asheville.
BOYD, HENRY ARMISTEAD	Warrenton.
BRITTON, WAYLAND PATEN	Norfolk.
BRYAN, THOMAS RHUDY	Traphill.
CALLOWAY, HENRY WALTER, JR.	Concord.
COCKE, GEORGE DILWORTH	Asheville.
COX, WILLIAM HENRY, JR.	Laurinburg.
DENNING, LOIS HELOISE	Raleigh.
ESKRIDGE, JOSEPH DUMONT	Elkin.
GRAHAM, JOHN STEPHENS	Winston-Salem.
HAIRSTON, PETER W., JR.	Advance.
HERRING, WILLIE ARTHUR	Seven Springs.
HOUK, GUY LACKEY	Franklin.
HOWARD, JAMES OSCAR	Asheville.
HOYLE, FRANK LEWIS, JR.	Shelby
HUMPHRIES, WOFFORD FORREST, JR.	Asheville.
JARRETT, J. NELSON	West Asheville.
JENKINS, ARTHUR MIFFLIN	New Bern.
KUYKENDALL, EDGAR DAVIS, JR.	Greensboro.
LOBDELL, HUGH LEWIS	Charlotte.
LONG, ZEB VANCE, JR.	Statesville.
MOONEYHAM, ALVIE ONEGA	Asheville.
OAKES, ALBERT WOMBLE, JR.	Weldon.
OLMSTEAD, WARREN F.	Chapel Hill.
RATLEY, CHARLES DURHAM	Red Springs.
SANDERS, JULIUS TAFT	Chester, S. C.
SEAWELL, MALCOLM BUIE	Chapel Hill.
SHEPHERD, WILLIAM VASS	Raleigh.
SMATHERS, JAMES CARROL	Asheville.
WILKINSON, JAMES ARCHBELL	Pantego.

COMITY LICENSEES.

GROOVER, EMORY CLIFFORD	Charlotte.
PHILLIPS, BERNARD J. M.	Asheville.
TILLINGHAST, WILLIAM P.	Charlotte.

I, H. M. London, Secretary of the North Carolina Board of Law Examiners, do hereby certify that the foregoing is a true and correct copy of the list of attorneys granted law license by the said Board, January 30, 1935.

Witness my hand and seal, this the 28th day of February, 1935.

(SEAL)

H. M. LONDON,
Secretary.

SUPERIOR COURTS, SPRING TERM, 1935

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

Spring Term, 1935—Judge Cranmer.

Beaufort—Jan. 14* (2); Feb. 18† (2); Mar. 18* (A); April 8†; May 6† (2).
Camden—Mar. 11.
Chowan—April 1.
Currituck—Mar. 4; April 29†.
Dare—May 27.
Gates—Mar. 25.
Hyde—May 20.
Pasquotank—Jan. 7†; Feb. 11†; Feb. 18* (A); Mar. 18†; May 6† (A) (2); June 3*; June 10† (2).
Perquimans—Jan. 14† (A); April 15.
Tyrrell—Feb. 4†; April 22.

SECOND JUDICIAL DISTRICT

Spring Term, 1935—Judge Sinclair.

Edgecombe—Jan. 21; Mar. 4; April 1† (2); June 3 (2).
Martin—Mar. 18 (2); April 15† (A) (2); June 17.
Nash—Jan. 28; Feb. 18 (2); Mar. 11; April 22 (2); May 27.
Washington—Jan. 7 (2); April 15†.
Wilson — Feb. 4*; Feb. 11†; May 13 (2); June 24†.

THIRD JUDICIAL DISTRICT

Spring Term, 1935—Judge Devin.

Bertie—Feb. 11; May 6 (2).
Halifax—Jan. 28 (2); Mar. 18† (2); April 29*; June 3; June 10†.
Hertford—Feb. 25*; April 15‡ (2).
Northampton—April 1 (2).
Vance—Jan. 7*; Mar. 4*; Mar. 11†; June 17*; June 24†.
Warren—Jan. 14 (2); May 20 (2).

FOURTH JUDICIAL DISTRICT

Spring Term, 1935—Judge Small.

Chatham—Jan. 14; Mar. 4†; Mar. 18†; May 13.
Harnett—Jan. 7*; Feb. 4† (2); April 1† (A) (2); May 6†; May 20*; June 10† (2).
Johnston—Jan. 7† (A) (2); Feb. 11 (A); Feb. 18† (2); Mar. 4* (A); Mar. 11; April 15 (A); April 22† (2); June 24*.
Lee—Jan. 28† (A) (2); Mar. 25 (2).
Wayne—Jan. 21; Jan. 28†; Mar. 4† (A) (2); April 8; April 15†; May 27; June 3†.

FIFTH JUDICIAL DISTRICT

Spring Term, 1935—Judge Barnhill.

Carteret—Mar. 11; June 10 (2).
Craven—Jan. 7*; Jan. 28† (3); April 8‡; May 13†; June 3*.
Greene—Feb. 25 (2); June 24.
Jones—April 1.
Pamlico—April 29 (2).
Pitt—Jan. 14†; Jan. 21; Feb. 18†; Mar. 18 (2); April 15 (2); May 6 (A); May 20†; May 27†.

SIXTH JUDICIAL DISTRICT

Spring Term, 1935—Judge Parker.

Duplin—Jan. 7* (2); Jan. 28*; Mar. 11† (2); May 27† (2).
Lenoir—Jan. 21*; Feb. 18† (2); April 8; May 13† (2); June 10† (2); June 24*.
Onslow—Mar. 4; April 15† (2).
Sampson—Feb. 4† (2); Mar. 25† (2); April 29† (2).

SEVENTH JUDICIAL DISTRICT

Spring Term, 1935—Judge Williams.

Franklin—Jan. 14 (2); Feb. 18† (2); May 13.
Wake—Jan. 7*; Jan. 28†; Feb. 4*; Feb. 11†; Mar. 4*; Mar. 11† (2); Mar. 25† (2); April 8*; April 15† (2); April 29†; May 6*; May 20† (2); June 3*; June 10† (2).

EIGHTH JUDICIAL DISTRICT

Spring Term, 1935—Judge Frizzelle.

Brunswick—Jan. 7†; April 8; June 17†.
Columbus—Jan. 28; Feb. 18† (2); April 29 (2); June 24*.
New Hanover—Jan. 14*; Feb. 4† (2); Mar. 4† (2); Mar. 18*; April 15† (2); May 13*; May 27† (2); June 10*.
Pender—Mar. 25 (2).

NINTH JUDICIAL DISTRICT

Spring Term, 1935—Judge Grady.

Bladen—Jan. 7; Mar. 11*; April 29†.
Cumberland—Jan. 14*; Feb. 11† (2); Mar. 4* (A); Mar. 25† (2); May 6† (2); June 3*.
Hoke—Jan. 21; April 22.
Robeson—Jan. 28* (2); Feb. 25† (2); April 8†; April 15*; May 20† (2); June 10†; June 17*.

TENTH JUDICIAL DISTRICT

Spring Term, 1935—Judge Harris.

Alamance — Jan. 28† (A); Feb. 25*; April 1†; May 13* (A); May 27† (2).
Durham—Jan. 7† (3); Feb. 18*; Feb. 25† (A); Mar. 4† (2); Mar. 18† (A); Mar. 25*; April 22† (A); April 29† (2); May 20*; May 27† (A) (3); June 24*.
Granville—Feb. 4 (2); April 8 (2).
Orange—Mar. 18; May 13†; June 10; June 17.
Person—Jan. 22 (A); Jan. 28†; April 22.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

Spring Term, 1935—Judge Pless.

Ashe—April 8 (2).
Alleghany—May 6.
Caswell—April 1; May 6† (A).
Forsyth—Jan. 7 (2); Jan. 21† (A) (2); Feb. 4 (A) (2); Feb. 18†; Feb. 25† (A); Mar. 4 (A); Mar. 11; Mar. 18† (2); April 1 (A) (2); April 15† (A) (2); May 6 (A) (2); May 20† (2); June 3 (2); June 24 (2).
Rockingham—Jan. 21* (2); Feb. 25† (2); April 15† (A); May 13; June 10† (A); June 17†.
Surry—Jan. 14† (A) (2); Feb. 4 (2); Mar. 18† (A) (2); April 22 (2).

TWELFTH JUDICIAL DISTRICT

Spring Term, 1935—Judge McElroy.

Davidson—Jan. 28*; Feb. 18† (2); April 1† (A) (2); May 6*; May 27† (2); June 24*.
Guilford—Jan. 7† (2); Jan. 21; Feb. 4† (2); Feb. 18† (A) (2); Mar. 4* (2); Mar. 18† (2); April 1† (A) (2); April 15† (2); April 29*; May 13† (2); June 3† (A); June 10†; June 17*.
Stokes—April 1*; April 8†.

THIRTEENTH JUDICIAL DISTRICT

Spring Term, 1935—Judge Alley.

Anson—Jan. 14*; Mar. 4†; April 15 (2); June 10†.
Moore—Jan. 21*; Feb. 11† (A); Mar. 25† (A) (2); May 20*; May 27†.
Richmond—Jan. 7*; Feb. 4† (A); Mar. 18†; April 8*; May 27† (A); June 17†.
Scotland—Mar. 11; April 29†; June 3.
Stanly—Feb. 4† (2); April 1; May 13†.
Union—Jan. 28*; Feb. 18† (2); Mar. 25†; May 6†.

FOURTEENTH JUDICIAL DISTRICT

Spring Term, 1935—Judge Clement.

Gaston—Jan. 14*; Jan. 21† (2); Mar. 11* (A); Mar. 18† (2); April 22*; May 20† (A) (2); June 3*.
Mecklenburg—Jan. 7*; Feb. 4† (3); Feb. 25*; Mar. 4† (2); April 1† (2); April 29† (2); May 13*; May 20† (2); June 10*; June 17†.

FIFTEENTH JUDICIAL DISTRICT

Spring Term, 1935—Judge Sink.

Cabarrus—Jan. 7 (2); Feb. 25†; April 22 (2); June 10† (2).
Iredell—Jan. 28 (2); Mar. 11†; May 20 (2).
Montgomery—Jan. 21*; April 8† (2).
Randolph—Mar. 18† (2); April 1*.
Rowan—Feb. 11 (2); Mar. 4†; May 6 (2).

SIXTEENTH JUDICIAL DISTRICT

Spring Term, 1935—Judge Phillips.

Burke—Feb. 18; Mar. 11† (2); June 3 (3).
Caldwell—Feb. 25 (2); May 20† (2).
Catawba—Jan. 14† (2); Feb. 4 (2); April 8† (2); May 6† (2).
Cleveland—Jan. 7; Mar. 25 (2).
Lincoln—Jan. 21 (A); Jan. 28†.
Watauga—April 22 (2).

SEVENTEENTH JUDICIAL DISTRICT

Spring Term, 1935—Judge Harding.

Alexander—Feb. 18.
Avery—April 8*; April 15†.
Davie—Mar. 18; May 20† (A).
Mitchell—Mar. 25 (2).
Wilkes—Mar. 4 (2); June 3† (2).
Yadkin—Feb. 25*; May 13† (2).

EIGHTEENTH JUDICIAL DISTRICT

Spring Term, 1935—Judge Oglesby.

Henderson—Jan. 14† (2); Mar. 4 (2); April 29† (2); May 27† (2).
McDowell—Jan. 7*; Feb. 18† (2); June 10 (3).
Polk—Feb. 4 (2).
Rutherford—April 15† (2); May 13 (2).
Transylvania—April 1 (2).
Yancey—Jan. 28; Mar. 18 (2).

NINETEENTH JUDICIAL DISTRICT

Spring Term, 1935—Judge Warlick.

Buncombe—Jan. 14 (2); Jan. 18; Feb. 4† (2); Feb. 18; Mar. 4† (2); Mar. 18; April 1† (2); April 15; April 29; May 6† (2); May 20; June 3† (2); June 17.
Madison—Feb. 25; Mar. 25; April 22; May 27.

TWENTIETH JUDICIAL DISTRICT

Spring Term, 1935—Judge Rousseau.

Cherokee—Jan. 21† (2); April 1 (2); June 17† (2).
Clay—April 29; May 6 (A).
Graham—Jan. 7† (A) (2); Mar. 18 (2); June 3† (2).
Haywood—Jan. 7† (2); Feb. 4 (2); May 6† (2).
Jackson—Feb. 18 (2); May 20 (2).
Macon—April 15 (2).
Swain—Jan. 14† (A) (2); Mar. 4 (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.

CASES REPORTED

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1934

KESLER CONSTRUCTION COMPANY v. DIXSON HOLDING CORPORATION.

(Filed 19 September, 1934.)

1. **Principal and Agent A b: Master and Servant A b—**

Where a contract of employment is in writing and is unambiguous it is a question of law for the court whether the employee is an agent or an independent contractor.

2. **Same—Contract of employment determines whether employee is agent or independent contractor.**

In determining whether a contract of employment constitutes the employee an agent or an independent contractor, the terms used in the contract to designate the parties are not controlling, but the question must be determined by the intent of the instrument and the meaning of the terms used, the employee being an independent contractor if the owner has no interest in the performance of the contract, but only in the finished product.

3. **Same—Contract in this case held to constitute employee an agent and not an independent contractor in the erection of a building.**

Where the contract for the erection of a building expresses a nominal consideration given by the builder and the further consideration of "services to be rendered" by him, and the owner agrees to pay the builder a "fee for services," and the contract provides that if the building should cost less than estimated the saving should be divided between the owner and builder up to a certain sum, and that if the owner should retain any savings in excess of the sum stipulated, and that the owner should reim-

burse the builder monthly for all moneys expended for payrolls, materials, etc., *is held* to constitute the builder an agent of the owner in the construction of the building and not an independent contractor, agency being implied by the use of the terms "fee" and "services to be rendered," and the owner retaining some interest in and control over the cost of the building, and certain contradictory terms used in the specifications do not alter this result, the contract of employment specifying that the owner should so pay for materials notwithstanding stipulations in the specifications to the contrary.

4. Payment C c—Payment of materialman's lien by owner held not available to owner as credit on amount due builder for erecting building.

Where a builder contracts to erect a building as an agent of the owner, the builder to receive a certain "fee" for his services, and the owner to reimburse the builder monthly for sums expended for payrolls and materials, the builder may not claim that a sum paid by him to discharge a materialman's lien for material used in the construction of the building should be allowed as a credit against the amount due the builder for services rendered under the contract, since under the contract the owner and not the builder was bound to pay for materials. The owner would have been entitled to such credit against the builder if the builder had been an independent contractor in the erection of the building, since in such case the builder would have been liable for payment of materialmen.

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

CIVIL ACTION, before *Cowper, Special J.*, at November Term, 1933, of FORSYTH.

On 17 June, 1927, the plaintiff and the defendant entered into a written contract for the construction by the plaintiff of a building for the defendant on Trade, Cherry and Fifth streets in the city of Winston-Salem, "according to plans and specifications prepared by and under the supervision of Hall Crews, architect." The pertinent provisions of the contract are as follows:

(1) "The contractor is to receive from the owner a flat fee of $8,000 for his services in the erection of this building. The contractor further agrees and guarantees that the total cost of the work included under this contract shall cost the owner a sum not to exceed $141,003. The contractor further agrees that if the cost of this work exceeds the sum of $141,003, it being mutually understood that this amount covers all fees for the contractor, then the contractor shall wholly bear such loss."

(2) "It is further mutually agreed by and between the parties hereto that if the total cost of this building, including the fee of eight thousand dollars to the contractor, shall be less than $141,003, then such saving as shall be effected to the extent of $4,000, or fraction thereof, shall be divided equally between the contractor and the owner. Any saving effected in excess of four thousand dollars shall be solely the property of the owner."

(3) "The owner agrees, for the sum of one dollar, paid by the contractor, receipt whereof is hereby acknowledged, and for the further consideration of the personal services to be rendered by the contractor, to pay the contractor for its services as follows: A flat fee of $8,000, provided the total cost of the building does not exceed $141,003, including this fee. After this fee of $8,000 has been deducted from the contractor's guaranteed total cost of $141,003, if it is found any saving has been effected to the extent of $4,000, or fraction thereof, the owner agrees to divide equally such saving between himself and the contractor."

(5) "It is further mutually agreed by and between the parties hereto, notwithstanding stipulations in the specifications to the contrary, that the owner, between the first and tenth day of each month, shall reimburse the contractor for all moneys that it, the contractor, may have expended, on account of this work during the preceding month, for payrolls, etc., and that the owner shall pay between the first and tenth day of each month for all materials purchased and delivered on the site during the preceding month; all of these payments to be made and authorized by architect's certificate of payment."

(6) "It is further mutually agreed by and between the parties hereto that the owner is to pay the contractor its fees for services, as referred to above, when this work has been completed in all its parts and accepted by the architect and owner, with the further understanding that the owner may make part payments on account of these fees before the work is finished, if it so desires, and take a receipt therefor."

(10) "The contractor further estimates time of completion and agrees to complete this building in all its parts, ready for occupancy by the owner, on or before December 1, 1927."

After the building was completed, a dispute arose between the parties with reference to the settlement, and the contractor instituted suit against the defendant owner, alleging that said defendant was indebted to the plaintiff in the sum of $2,618.70. The defendant filed an answer alleging that it had been required to pay the sum of $2,805.67 in settlement of a judgment obtained by Monon Stone Company for material purchased and used in said building, and for which the said Stone Company had filed a lien on the property of the defendant. This sum so paid by the defendant was pleaded as payment or "adjudication of the matters involved in this controversy and as a bar to plaintiff's right to recover."

The cause was tried in the Forsyth County Court. The defendant made the following admissions at the trial: "It is admitted by the defendant that the plaintiff performed the contract and that the defendant would be indebted to the plaintiff in the sum of $2,618.70, with interest from July 1, 1928, but the defendant alleges payment in full of said

indebtedness by reason of the defendant having paid the judgment of the Monon Stone Company against this defendant for the materials furnished in the construction of the building, as alleged in the defendant's further defense and counterclaim."

The court ruled that the admissions of the parties cast the burden of proof of payment upon the defendant. Thereupon the defendant offered the judgment of the Superior Court in the Monon Stone Company case, before mentioned, and further offered proof that said judgment had been paid by it. The defendant further offered certain portions of the printed "Specifications for Store Building." Article 9 of said Specifications and General Conditions provides that "unless otherwise stipulated, the contractor shall provide and pay for all materials, labor, water, tools, equipment, light, power, transportation, and other facilities necessary for the execution and completion of the work," etc. Article 36 provides that "the contractor agrees that he is as fully responsible to the owner for the acts and omissions of his subcontractors and of persons either directly or indirectly employed by them, as he is for the acts and omissions of persons directly employed by him. Nothing contained in the contract documents shall create any contractual relation between any subcontractor and the owner."

The judge of the county court held that the evidence offered by the defendant did not constitute payment, and directed the jury to answer the issues in favor of the plaintiff. The verdict awarded the plaintiff the sum of $2,618.70, with interest thereon, and from judgment upon the verdict the defendant duly appealed to the Superior Court.

The judge of the Superior Court overruled the exceptions and assignments of error filed by the defendant and affirmed the judgment of the county court. Whereupon, the defendant appealed to the Supreme Court.

Parrish & Deal for plaintiff.
Ingle & Rucker for defendant.

BROGDEN, J. Does the contract between the parties constitute the plaintiff an independent contractor or an agent for the defendant, owner, in erecting and completing the building?

Manifestly, if the plaintiff was an independent contractor it was bound to pay for materials, and hence, under the circumstances, the amount paid by the defendant to the Stone Company which furnished material for the project should be credited upon the gross contract price, and the plaintiff would not be entitled to recover. Upon the other hand, if the plaintiff was agent for the defendant owner, and contracted to perform personal services for such owner, then the owner was bound to pay for all materials used in the building, and the sum paid to the Stone

Company would not be chargeable to the plaintiff. If a contract of employment is in writing and is unambiguous, the court must determine from the terms and intent of such writing whether the employee is an independent contractor or an agent. *Lumber Co. v. Motor Co.*, 192 N. C., 377, 135 S. E., 115. The contract in the case at bar is in writing and its terms are plain. It is admitted that the plaintiff performed the contract. Did he perform such contract as agent or independent contractor? The rights of the parties under the contract are not to be determined solely by the names they call each other, but rather by intent and meaning of the terms of the instrument. The broad definition of independent contractor is "one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified." *Young v. Lumber Co.*, 147 N. C., 26, 60 S. E., 654. Moreover, in determining the relation of the parties certain tests have been considered and held persuasive. Thus, in *Lumber Co. v. Motor Co.*, 192 N. C., 377, it was held that one of the vital tests was the right of the owner "to control the work in every detail and at every stage." It was further held that the "mode of payment provided in the contract is sometimes an important element to be considered in determining whether the party who has agreed to do work for another is an independent contractor, but it is not controlling. The circumstance that the workman is to receive no compensation until the satisfactory termination of his employment does not require that he be classed as an independent contractor." Another test may be found in *Inman v. Refining Co.*, 194 N. C., 566, 140 S. E., 289, which holds that the right of control or interest in the means by which the work is done is important in determining the relation. Speaking in general terms, if the owner has no interest in the performance of the contract except that the finished product shall be in accordance with the plans and specifications, then all the authorities agree that the workman is an independent contractor, unless, of course, there is evidence tending to show that the writing was not executed in good faith.

Consequently, the question arises as to whether the owner, in this particular case, had an interest in the performance of the work other than in the finished product. The contract itself must either furnish or withhold the answer to this question. Construing the contract as a whole, the Court is of the opinion that it constitutes a contract of agency. This conclusion rests upon the following considerations: (a) The parties agree in Article 3 that the consideration is the nominal sum of one dollar, and "the further consideration of the personal services to be rendered by the contractor in the erection of the building." In Article 6 the owner agrees "to pay the contractor its fee for services."

Manifestly, compensation for services implies agency. (b) The owner retained an interest and a certain control over the cost of the building. For instance, if the contractor constructed the building for $4,000 less than the specified price, one-half of this sum of $4,000 was to be retained by the owner and the other half added to the compensation of the contractor. Moreover, if the contractor saved more than $4,000, the owner retained the entire sum in excess thereof. Therefore, it is apparent that the owner retained an interest in the cost of materials and labor for the plain reason that he was sharing in what might be deemed the profit resulting from wise and economical operations by the contractor. (c) In Article 5 it is stipulated "that the owner, between the first and tenth day of each month, shall reimburse the contractor for all moneys that the contractor may have expended on account of this work during the preceding month for payroll, etc., and that the owner shall pay, between the first and tenth day in every month, for all materials purchased and delivered on the site during the preceding month," etc. The clause that the "owner shall pay, between the first and tenth of each month, for all materials furnished" would seem to clearly establish the liability of the owner for the payment of materials, and thus impose upon it the duty of paying the claim of the Stone Company.

While there is some clash between the language of the printed specifications and the written contract, it was expressly specified in Article 5 that "notwithstanding stipulations in the specifications to the contrary," the owner would reimburse the contractor each month and pay for materials each month as purchased and delivered.

Upon a consideration of the entire record, the Court is of the opinion and so holds, that the judgment rendered correctly interpreted the law.

Affirmed.

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

LESLIE WEIL AND LIONEL WEIL, TRADING AS H. WEIL & BROTHERS, v. W. B. HERRING, BETTY E. HERRING, AND R. A. HERRING.

(Filed 19 September, 1934.)

1. Fraudulent Conveyances A b: Chattel Mortgages G b—Transfer of property by mortgagor in payment of pre-existing debt held valid as to mortgagee in unregistered mortgage who has no equity.

While the sale of property to a creditor in possession in partial payment of a preëxisting debt is not good as against the equity of a mortgagee having a prior unregistered chattel mortgage against the property, since

the creditor takes the property subject to the equities existing against it in the hands of the debtor, the chattel mortgage in itself creates no equity in favor of the mortgagee therein, and where the mortgagee shows no equity existing in his favor, the creditor takes the property free from the lien of the unregistered chattel mortgage. C. S., 3311.

2. Payment B b—

Where the debtor does not direct the application of the proceeds of sale of his property in the hands of the creditor, the creditor selling the property may in his own judgment apply the proceeds of sale to any one of the debtor's several accounts.

3. Appeal and Error B b—

An appeal will be determined in accordance with the theory of trial in the lower court.

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

CIVIL ACTION, before *Daniels, J.*, at August Term, 1933, of WAYNE.

On 16 July, 1928, the defendants executed and delivered a negotiable promissory note to H. Weil & Bros. for the sum of $420.00. This note was not paid, and on 16 June, 1931, Weil brought suit thereon. The defendants answered, alleging that R. A. Herring signed the note as surety and that the makers, W. B. Herring and wife, Betty Herring, had deposited with Weil eight bales of cotton and requested him to sell the same and apply the proceeds to the payment of said note. They further allege that Weil sold the cotton and applied the proceeds to other indebtedness of W. B. Herring, and that the proceeds of the sale were more than sufficient to pay the note involved in this litigation with a balance of $62.75, which said defendant sought to recover by way of counterclaim. The plaintiffs replied to the answer, alleging that W. B. Herring, the owner of the cotton, delivered the same to the plaintiffs to be applied on the general indebtedness of said Herring, and that said plaintiffs so applied said proceeds.

The issue submitted to the jury was as follows:

"Did W. B. Herring direct that the cotton be sold and applied to his indebtedness to the plaintiff without specifying application to the $420.00 note?"

The jury answered the issue "Yes."

Thereupon, the parties agreed upon certain facts, which are as follows:

"1. That on 16 July, 1928, W. B. Herring and wife, Betty Herring, and R. A. Herring executed a note under seal to H. Weil & Brothers for $420.00, being the note referred to in the complaint.

"2. That on 19 January, 1928, for an account extending over several years, W. B. Herring and wife executed a note to Weil & Brothers for $9,605.62, said note being secured by a second or subsequent deed of trust

on land; and said lands were, prior to the fall of 1928, sold under the prior lien or liens, and the proceeds were insufficient to pay off the prior encumbrances, and the said note for $9,605.62 remained unpaid in the fall of 1928. That W. B. Herring and wife were also indebted to Weil Brothers at that time on a note for $500.00, executed 13 April, 1928, upon which was due a balance of more than $150.00.

"3. That on 13 April, 1929, W. B. Herring and wife, Betty E. Herring, executed to Weil Brothers a crop lien on all their crops of cotton and tobacco for the year 1929, on their farm in Sampson County, owned by the *feme* defendant, Betty E. Herring, which crop lien was not to exceed $2,000.

"4. That the defendants, W. B. Herring and wife, Betty E. Herring, executed a second crop lien (unrecorded) on said crop for the same year to the defendant R. A. Herring for the sum of $2,000, which was made subject to the prior lien of the plaintiff H. Weil & Brothers. This crop lien was unrecorded and Weil Brothers had no notice of it.

"5. That during the fall of 1929 the defendants W. B. Herring and wife, Betty Herring, delivered to the plaintiff Weil Brothers eight bales of cotton, produced in 1929, on the lands referred to above, which was stored in the plaintiff's warehouse in Goldsboro, and also delivered to the plaintiff the proceeds of their tobacco sales, and these proceeds from the sale of tobacco paid off in full the plaintiff's crop lien, except a small balance of eight or nine dollars.

"6. That the plaintiff H. Weil & Brothers sold said cotton on 10 May, 1930, and after paying the storage and weighing and other charges, the net proceeds amounted to $486.25, and thereupon the said Weil Brothers paid the $9.00 balance due on their crop lien and applied the balance of $477.75 on the $9,605.62 note."

Upon the verdict and the agreed facts aforesaid, the trial judge decreed that the plaintiffs recover of defendants the sum of $420.00, with interest, etc.

From judgment so rendered defendants appealed.

Kenneth C. Royall and Allen Langston for plaintiffs.
Butler & Butler and P. D. Herring for defendants.

BROGDEN, J. Can the owner of cotton which is covered by an unrecorded crop lien or chattel mortgage sell the same to a creditor then in possession thereof, in partial payment of a preëxisting debt held by such creditor and due by such owner, free of the lien of such unregistered instrument?

The head note in *McArthur v. Mathis,* 133 N. C., 142, declares the applicable principle of law as follows: "Where the owner of lumber authorizes a creditor in possession thereof to sell it and pay himself, such trans-

action constitutes a present sale of the lumber and passes title, freed from the lien of an unregistered mortgage." This head note is fully supported by the opinion.

The defendants, however, assert that Weil was not a purchaser "for a valuable consideration" within the purview of C. S., 3311, North Carolina Code of 1931, by reason of the fact that the proceeds from the sale of the cotton were credited or applied to a preëxisting indebtedness of W. B. Herring, the owner of the cotton, and rely upon *Small v. Small*, 74 N. C., 16; *Day v. Day*, 84 N. C., 408; *Southerland v. Fremont*, 107 N. C., 565. The principle of law so relied upon by the defendants is stated in *Small, Admr., v. Small, supra*, as follows: "Counsel of the appellants did not refer to any case or give any reason in support of the position that a creditor who takes a deed of trust conveying a tract of land, to secure an existing debt, stands in a better condition than the debtor in regard to an equity which has attached to the land in the hands of the debtor. The creditor who takes a deed of trust is not out of pocket one cent, so he stands in the shoes of the debtor and takes subject to any equity binding the land in the hands of the debtor." Relying upon the principle so declared, the defendants assert that, as a chattel mortgage is good between the parties without registration, the cotton in the hands of W. B. Herring was subject to the equity of the unregistered lien of R. A. Herring, and consequently Weil received the cotton subject to such equity. But what equity has R. A. Herring by virtue of his unregistered lien? Manifestly, an unregistered lien cannot in itself create an equity. Indeed, this Court, in *Wallace v. Cohen*, 111 N. C., 103, 15 S. E., 892, commenting upon *Brem v. Lockhart*, 93 N. C., 191; *Potts v. Blackwell*, 56 N. C., 449, and *Southerland v. Fremont, supra*, said: "The true ground for the decision seems to be that although the assignee, Lockhart, was a purchaser for value, and notwithstanding he took the property subject to the rights and equities attaching to it in the hands of the debtor, there was, in fact, no such right of equity which, *under the policy of the registration laws*, could be recognized or enforced in favor of anyone." Such policy of the registration law was discussed in *Bank v. Cox*, 171 N. C., 76, 87 S. E., 967. The Court declared: "They contend that plaintiff was not a purchaser for value within the meaning of the registration laws, because its mortgage was made to secure an antecedent debt; but we have decided otherwise in numerous cases. . . . It is next contended that plaintiff had actual knowledge of the Whedbee deed of trust when it took the mortgage from E. L. Crumpler. It is thoroughly well settled that 'no notice, however full or formal, will supply the want of registration.'" See, also, *Sykes v. Everett*, 167 N. C., 600, 83 S. E., 585; *Fowle v. McLean*, 168 N. C., 537, 84 S. E., 852.

The jury found that the debtor, W. B. Herring, disposed of the cotton without specifying the application of the proceeds. Consequently, the creditor had the right to apply the money according to his own judgment. *Baker v. Sharpe,* 205 N. C., 196, 170 S. E., 657.

The point is made that the cotton was grown upon the land of Betty Herring, the wife of the debtor, and that her husband, W. B. Herring, had no right to sell the same to the plaintiff Weil. An examination of the record discloses that the cause was not tried upon that theory, and the law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court.

No Error.

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

THOMAS H. BRIGGS & SONS, INC., v. J. E. ALLEN, JOHN W. HUDSON, JR., RALEIGH BANKING & TRUST COMPANY, BANKERS REALTY COMPANY, AND NATIONAL SURETY COMPANY OF NEW YORK, GURNEY P. HOOD, COMMISSIONER OF BANKS, SUCCESSOR TO NORTH CAROLINA CORPORATION COMMISSION.

(Filed 19 September, 1934.)

1. Appeal and Error F a—

Where there is no exception to a finding of fact by the court, the fact so found will be assumed correct and the appeal determined in accordance with such finding.

2. Laborers' and Materialmen's Liens B c—After notice to owner, amount due contractor is trust fund for materialmen for limited purposes.

Where a material furnisher gives notice to the owner of his claim, and there is a sufficient sum due or to become due by the owner to the contractor under the terms of the contract to pay such claim, it is the duty of the owner to retain out of the funds due or to become due to the contractor a sum sufficient to pay the materialman, the amount due the contractor by the owner being considered a trust fund for the material furnishers giving notice for the purpose of enabling the materialmen to sue to have the fund so applied, and to attain a pro rata distribution of the fund to the materialmen.

3. Same: Banks and Banking H c—Notice of materialman to bank owner does not entitle materialman to preference upon bank's insolvency.

The fiction that the amount due a contractor by the owner after notice to the owner by material furnishers of their claims is a trust fund for the benefit of the materialmen will not be extended so as to give a materialman furnishing material for a building owned by a bank a preference in the bank's assets upon its later insolvency, especially where there is no

finding that the bank paid anything to the contractor after notice by the materialman, and no finding as to the amount of cash the bank had when taken over by the statutory receiver, the giving of notice by the materialman not augmenting the bank's assets.

4. Banks and Banking H e—

The mere fact that a bank at the time of its failure held trust funds does not in itself entitle the beneficiary to a preference in its assets.

5. Same—

Where a judgment is rendered against a bank after it has been placed in the hands of the statutory receiver, the judgment creditor is not entitled to a preference in the bank's assets merely by reason of the judgment.

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

CIVIL ACTION, before *Harris, J.*, at February Term, 1934, of WAKE.

The cause was referred to a referee, who stated the facts. Such facts as are pertinent to a decision of the principle of law involved may be capitulated as follows:

1. The Raleigh Banking and Trust Company, a banking corporation, and the Bankers Realty Company, a corporation, as owners, entered into a contract with John W. Hudson, Jr., contractor, for the erection of an eight-story addition to the bank building of said owner in the city of Raleigh.

2. The contractor, Hudson, thereafter entered into a subcontract with J. E. Allen, wherein Allen agreed to do all the plastering work in said building for a stipulated price.

3. The plaintiff is a mercantile corporation and on various days between 15 April, 1929, and 26 August, 1929, sold and delivered to said Allen certain materials and hardware, consisting of lime, plaster and other goods of the total value of $3,059.98. All of said material was used in the building.

4. On 8 August, 1929, the plaintiff gave notice to the contractor of the amount due it by Allen, and thereafter, on 26 August, 1929, Allen gave to the plaintiff an order upon the contractor for the payment of $2,708.01 on said account.

5. "Prior to 28 August, 1929, and prior to the final settlement between the owner and the contractor, plaintiff gave notice to said owner of its said claim, which notice was duly acknowledged. Notwithstanding said notice, the owner made final settlement with and paid to said contractor without reserving any sum for plaintiff's said claim or making payment to plaintiff."

6. On 6 February, 1920, plaintiff filed notice and claim of a lien against the property of the owner, and brought a suit in apt time to protect said lien.

The referee found that the plaintiff was entitled to recover of defendants, J. E. Allen, Raleigh Banking and Trust Company, Bankers Realty Company, and John W. Hudson, Jr., the sum of $3,059.98, with interest and cost for filing lien. It does not appear that any exceptions were filed to the referee's report, and subsequently, at the December Term, 1932, of Wake Superior Court, Hon. N. A. Sinclair, judge presiding, entered judgment in favor of plaintiff and against said defendants for the sum of $3,059.98, and said sum was adjudged a lien upon the land and premises of defendant from and after 28 August, 1929, "the date notice was given to the owner."

On or about 12 April, 1933, the plaintiff filed a petition in the cause, alleging that the Raleigh Banking and Trust Company was in process of liquidation by Gurney P. Hood, Commissioner of Banks, and praying "that an order be made in the within action allowing the plaintiff's judgment as a preferred claim in said liquidation." The defendant Gurney P. Hood filed an answer to said motion and petition, alleging that there were first and second mortgages or deeds of trust upon the property superior to the lien of the plaintiff, and further that plaintiff's judgment was not entitled to a preference over the claims of other creditors.

The petition and motion was heard by Judge Harris, who found that the title to the property "was held in the name of the Bankers Realty Company, the said Raleigh Banking and Trust Company being the owner of all the capital stock of said Bankers Realty Company, and the officers and directors of the two said corporations being the same." It was further found that the land and premises upon which the plaintiff had a lien "has been foreclosed and sold under a deed of trust executed prior to the aforesaid debt, and that the said material furnisher's lien was thereby destroyed; the court further finds as a fact, and so holds, that it was the duty of said Raleigh Banking and Trust Company, upon notice duly given as found by the referee and confirmed by the judgment rendered by his Honor, N. A. Sinclair. . . . to have reserved for the said material furnisher the aforesaid sum before a payment of the amount in excess of said sum which said bank then had on hand and due the subcontractor, J. E. Allen, . . . and that by virtue of the aforesaid notice the said Raleigh Banking and Trust Company became and was a trustee for Thomas H. Briggs & Sons, Inc., to the amount of $3,509.98, with interest, . . . and that the said Thomas H. Briggs & Sons, Inc., should have the right to be permitted to file a claim with Gurney P. Hood, Commissioner, . . . and that the said claim be allowed as a preferred claim."

From the foregoing judgment Gurney P. Hood, Commissioner of Banks, appealed.

Briggs & West for plaintiff.
I. M. Bailey for Gurney P. Hood, Commissioner.

BROGDEN, J. Are funds in the hands of an owner bank, due or to become due to a contractor erecting a building for said bank, and thereafter disbursed after notice from a material furnisher, subject to a preference asserted by such material furnisher against the liquidator of the bank?

The plaintiff as a material furnisher gave notice to defendant bank on 28 August, 1929, that it had not been paid for material so furnished and used upon the property of the bank. The referee in his report states "that defendants, Raleigh Banking and Trust Company and Bankers Realty Company, entered into a contract with defendant Hudson . . . for the erection of an eight-story addition to the bank building of said owner in the city of Raleigh." There is no exception to this finding of fact, and it is therefore assumed that the bank was owner. When the notice was given by the material furnisher to the owner, it then became the duty of the owner to retain a sufficient sum due or to become due to the contractor by virtue of the terms of the contract to pay the claim of such materialman. After such notice such sum is referred to by textwriters and in decided cases as a trust fund. For instance, in *Foundry Co. v. Aluminum Co.*, 172 N. C., 704, 90 S. E., 923, this Court said that "when a lien upon the property is once acquired by giving notice, the amount due the contractor shall be distributed among the claimants pro rata. The lien is acquired by notice to the owner, and not by filing with some officer, . . . and the amount due the contractor at the time of notice is not a debt due by the owner in the ordinary sense, but a trust fund." To like effect is the statement in *Home Building, Inc., v. Nash,* 200 N. C., 430, 157 S. E., 134, as follows: "Such contract price is not deemed by the law to be a trust fund until notice has been given to the owner. . . . Moreover, the legal fiction of a trust fund after notice is designed exclusively for the purpose of enabling the claimant to share in the fund or proceeds undistributed and then remaining in the hands of the owner and due upon the contract price." See, also, *Bond v. Cotton Mills,* 166 N. C., 20, 81 S. E., 936, and *Mfg. Co. v. Andrews,* 165 N. C., 285, 81 S. E., 418.

However, the trust imposed by giving notice is limited. As the materialman has no contractual relation with the owner, the trust-fund fiction was resorted to in order to enable the claimant to maintain an action to have the fund applied to the claim. The fiction was further designed for the purpose of distributing the fund pro rata among those entitled thereto. Manifestly, it was not contemplated that such a limited trust could create a preference upon the general assets of an insolvent bank when it happened to be the owner of the premises.

Furthermore, there is no finding of fact as to how much was due the contractor by the bank on the date of notice. There is a finding that "both said contractor and said surety made substantial payments to various and sundry material furnishers, in amounts in excess of the amount due by said Allen to the plaintiff after the said notice of claim was filed by plaintiffs with said contractor and with said owner." But there is no finding that the bank paid anything to the contractor on the contract price after 28 August, 1929; nor is there any finding as to the amount of cash the bank had at the time the Commissioner of Banks entered upon the liquidation. No deposit was received by the bank in consequence of the notice and nothing occurred to swell the assets thereof in the hands of the liquidator by virtue of such notice. Indeed, the mere fact that a bank at the time of its failure held trust funds does not constitute in itself a preference in behalf of the beneficiary. *Bank v. Corporation Commission,* 201 N. C., 381; *Hicks v. Corporation Commission,* 201 N. C., 819.

The judgment was rendered after the bank was in the custody of the liquidator, and hence the principle pronounced in *Zachery v. Hood,* 205 N. C., 194, 170 S. E., 641, is not applicable.

Reversed.

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

WILLIAM J. COCKE, JR., AND T. A. UZZELL, JR., TRUSTEE FOR THE MORTGAGE POOL ACCOUNT, v. GURNEY P. HOOD, COMMISSIONER OF BANKS, EX. REL. CENTRAL BANK & TRUST COMPANY.

(Filed 19 September, 1934.)

1. Banks and Banking H e—Bank's consolidation of small trust accounts does not constitute consolidated account a special deposit.

A bank consolidated a number of small accounts due guardians, executors, administrators and other fiduciaries into one account, denominated "Mortgage Pool Account," which it deposited in its commercial department, issuing certificates for each account for its pro rata share of the consolidated account, and with the funds of the consolidated account purchased notes and securities at their face value from other departments of the bank and from corporate affiliates. The securities thus purchased were worth at the time of the purchase only sixty per cent of their face value, resulting in loss. *Held,* the consolidation of such small accounts did not constitute the consolidated account a special deposit for a special purpose, nor did the bank's purchase of securities from other trust ac-

counts and departments of the bank, evidenced by book transactions within the bank, swell its assets or put new money in the bank, and the trustee appointed by the court for the "Mortgage Pool Account" is not entitled to a preference in the bank's assets upon its insolvency and receivership.

2. Same—

The mere fact that a bank holds and dissipates trust funds does not establish a preference in favor of the beneficiaries upon the bank's insolvency.

3. Same—Bank's purchase of securities from itself with trust deposits does not entitle depositors to preference for resulting loss.

A bank consolidated a number of small accounts due guardians, executors, and other fiduciaries into one account, and purchased with the funds of the consolidated account notes and securities at their face value from other departments of the bank and from corporate affiliates. The securities thus purchased were worth at the time of the purchase only sixty per cent of their face value. The trustee appointed by the court for the beneficiaries of the consolidated account claimed a preference in the bank's assets upon its later insolvency and receivership for the loss resulting to the beneficiaries by the bank's dealings with itself upon the theory that the bank was trustee *ex maleficio*. *Held*, the trustee was not entitled to the allowance of his claim as a preference. The right of preference, or equity of priority, in an insolvent bank's assets and the right to follow funds and recover certain specific property under the theory of a trust created *ex maleficio* is pointed out by BROGDEN, J.

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

CIVIL ACTION, before *Schenck, J.*, at January Term, 1934, of BUNCOMBE.

In the Trust Department of the Central Bank and Trust Company of Asheville there were approximately two hundred small accounts, representing small balances due guardians, executors, administrators and other fiduciaries. These funds were in the Trust Department Account in the Commercial Department and were not supported by any security or collateral. On or about 29 June, 1929, these small balances amounted to $155,940 in cash and the officers of the bank consolidated all of these sums into a separate trust account, designated as the "Mortgage Pool Account."

Thereupon a fractional certificate of investment was issued by the bank as trustee for the fractional part or portion that each guardian, administrator or other fiduciary account contributed to form the consolidated fund known as "Mortgage Pool Account." These certificates provided that "the securities constituting said Mortgage Pool Account are held by said Central Bank and Trust Company as trust investments belonging to holders of these Fractional Certificates of Investment to

the extent of the total amount of said certificates outstanding and are held and owned by said trust accounts in as ample manner and to the same extent as though said securities were physically divisible and filed in the respective trust accounts," etc. The bank then took the money constituting the "Mortgage Pool Account and purchased securities, which it placed in the Pool Account in order to make the Fractional Certificates" total par.

The banking procedures in handling the transactions were described by Mr. Alexander, assistant trust officer of the bank, as follows: "The Central Bank and Trust Company had several departments, one called the Trust Department, one the Insurance Department, another the Bond Department, and perhaps some other departments, and then a Commercial Department. In this Trust Department were handled the funds of guardians, administrators and executors and other fiduciary accounts. There were approximately two hundred of these. In a great many of these accounts there were fragmentary or small balances and the officials of the bank put these small or fragmentary balances of certain of the accounts into an account called the Mortgage Pool Account . . . because individually they were too small to invest in any particular investment, and in the place of the money taken from the various trusts, these Fractional Certificates of Investment were issued to the various trusts. . . . To each of the beneficiary trusts, that is, guardian or administrator as the case may be, there were issued Fractional Certificates of Investment showing his interest in the Mortgage Pool Account. . . . The money was deposited in the Commercial Department of the Central Bank and Trust Company in the name of the Trust Department. . . . The certificate would be filled out, Central Bank and Trust Company as guardian or as administrator or trustee of a certain trust account, number so and so, and also the amount of the certificate would be shown in two places. The amount of cash that appeared as face value for the certificate represented the amount of money taken from that particular trust. . . . If the bank was guardian of John Jones and had in that fund $100.00, and it took that fund to put in the pool, it would issue a certificate to the guardian account of John Jones for $100.00, and set out its proportionate part that he had in that fund or in that investment which they had made, and the account of John Jones would hold the certificate. . . . The certificates never went out of the bank. . . . The bank set up this Mortgage Pool Account, then purchased notes that belonged to some other trust account in the bank, the money simply went from one trust account to another trust account, and the security simply passed from one trust account to another trust account. I would not say that these transactions were mere book entries because checks were always drawn and Fractional Certificates issued and deposited in

the trust which purchased the securities. . . . A check was simply drawn, signed B. W. Barnard, or C. W. Brown, as the case may be, trust officer, and the effect of that was that the same money stayed in the bank but one account debited and the other credited. When they bought securities on the outside the bank, the people from whom they bought the securities got the money. . . . When the Mortgage Pool Account had money on hand and wished to buy securities for the account, the Trust Department would issue its check to the holder of the securities, whoever it happened to be. The check would be made payable to the Central Bank and Trust Company, signed by the Trust Department. It would draw on the Trust Department, charging it to the Mortgage Pool Account, and it would be payable to the Central Bank and Trust Company, and the Trust Department account there would be charged with the amount of the check. The check would be paid as any other check. The Trust Department had an account in the Commercial Department."

When the bank closed on 19 November, 1930, the aggregate face amount of securities purchased by the bank as trustee for the Mortgage Pool Account was $151,867.34, and there was to the credit of said account cash in the amount of $4,072.66. On 11 February, 1933, the plaintiffs were duly appointed trustees for the Mortgage Pool Account by Judge Felix E. Alley. Thereafter, on or about 17 July, 1933, an order was made by Judge P. A. McElroy permitting plaintiffs to file a claim with the defendant for the sum of $60,746.93. The alleged basis of the claim is that the Central Bank and Trust Company, as trustee for the Mortgage Pool Account, took from said account $151,867.34 and purchased from itself for its affiliated corporations securities which were worth at the time of the purchase only sixty per cent of their face value, thus resulting in a loss of $60,746.93.

At the time the bank closed it had in cash or in depositories approximately $65,000. The plaintiffs alleged and offered evidence tending to show that many of the securities so purchased were procured from the Bond Department, Investment Account, Commercial Department of the Central Bank and Trust Company and from affiliated corporations of the bank.

At the conclusion of the evidence there was judgment of nonsuit, and the plaintiffs appealed.

T. A. Uzzell, Jr., and William J. Cocke, Jr., for plaintiffs.

Alfred S. Barnard, C. I. Taylor, and Johnson, Smathers & Rollins for defendants.

BROGDEN, J. The paramount question of law produced by the facts is whether the plaintiffs are entitled to a preference.

The right to a preference rests upon two theories:

1. That the facts disclose a deposit for a specific purpose or special deposit.

2. That the bank was trustee *ex maleficio.*

The record discloses that no new money went into the bank by virtue of creating a separate division of the Trust Department, known and designated as the "Mortgage Pool Account." All the money involved was already in the bank and consisted of balances too small for profitable investment. The consolidation of such funds is not deemed to constitute a special deposit for a special purpose within the boundary of the decisions in *Parker v. Trust Co.,* 202 N. C., 230, 162 S. E., 564, and *Flack v. Hood,* 204 N. C., 337, 168 S. E., 520. The assistant trust officer of the bank, testifying in behalf of plaintiffs, described the procedure as follows: "The bank set up this 'Mortgage Pool Account,' it purchased notes that belonged to some other trust account in the bank, the money simply went from one trust account to another trust account, and the security simply passed from one trust account to another trust account. . . . The effect was that the same money stayed in the bank, but one account debited and the other credited." Such banking procedure is apparently no more than the shifting of credits upon the books of the bank.

Nor does the mere fact that a bank holds and dissipates trust funds establish a preference upon its assets in liquidation. *Bank v. Corporation Commission,* 201 N. C., 381; *Hicks v. Corporation Commission,* 201 N. C., 819; *Briggs & Sons, Inc., v. Allen, ante,* 10.

The second theory proceeds upon the principle announced in *Edwards v. Culberson,* 111 N. C., 342, 16 S. E., 233, "that whenever a person has obtained the property of another by fraud, he is a trustee *ex maleficio* for the person so defrauded for the purpose of recompense or indemnity. . . . Equity declares the trust in order that it may lay its hand upon the thing and wrest it from the wrongdoer." See, also, *Bank v. Waggoner,* 185 N. C., 297, 117 S. E., 6. But as pointed out in *Flack v. Hood, supra,* "much of the confusion apparently has come from failure to distinguish between the right of preference, or equity of priority, and the right to have certain specific property returned to the creditors, as under claim and delivery, on the principle of fungible goods or because of direct ownership." In the case at bar plaintiffs were not attempting to recover the particular property or the securities in which the money was invested. The case of *Lauerhass v. Hood,* 205 N. C., 190, 129 S. E., 413, involved the recovery as a preference of losses sustained as a result of selling securities for less than face value. However, the case was decided upon the principle that the money placed in the bank by Lauerhass was a special deposit. The original record

in the case discloses that on 26 January, 1926, Lauerhass deposited certain securities of a substantial amount in the bank and took a receipt from the bank specifying that such funds and securities were "to be held, managed and controlled for his benefit as agents for him," etc.

Upon a consideration of the entire record, the Court is of the opinion that the trial judge ruled correctly.

Affirmed.

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

JOHN F. SPENCE ET AL. v. E. B. GRANGER ET AL.

(Filed 19 September, 1934.)

1. Drainage Districts B a—Notice and hearing are necessary to validity of levy of drainage assessments.

Where drainage assessments are levied against lands under C. S., 5275, either original assessments or additional assessments to cover unforeseen expenses in the construction of the drainage ditch, the parties whose lands are assessed are entitled to notice and an opportunity to be heard.

2. Drainage Districts B d: Courts A d — Superior Court held to have obtained jurisdiction to retain cause for hearing upon appeal from clerk's order setting aside drainage assessments.

Additional assessments were levied against lands to cover expenses not foreseen when original assessments were levied against the lands in accordance with law, but the additional assessments were levied without notice to the owners of the lands, as required by law, and certain owners appeared before the clerk, filed exceptions to the report of the commissioners, and moved to set aside the additional assessments, and the clerk sustained their exception based upon their contention that their lands did not drain into the ditch in question. On appeal to the Superior Court, the clerk's order was reversed on the ground that the assessments were *res judicata*. On further appeal the Supreme Court reversed the judgment of the Superior Court. *Held*, the appearance of the protestants to move to set aside the additional assessments was not a waiver of notice of such assessments, but the Superior Court, upon certification of the opinion of the Supreme Court, had jurisdiction to retain the cause for hearing upon the appeal from the clerk's order sustaining protestants' exception and setting aside the additional assessments, the statute, C. S., 5287, providing that appeals from the clerk in drainage assessment proceedings should be the same as in special proceedings, and C. S., 637, giving the Superior Court jurisdiction to hear and determine all matters in controversy upon appeal from the clerk in special proceedings.

APPEAL by certain defendants, movants, from *Barnhill, J.*, at August Special Term, 1933, of PASQUOTANK. Affirmed.

The judgment or order of the court below is as follows: "This is a proceeding to establish a jury ditch under the provisions of C. S., 5275, *et seq.*, in which commissioners or jurors were appointed, the jury ditch established, and an assessment made against certain landowners and the lands of W. A. Foster, E. B. Granger, N. I. Williams, E. A. Spence, J. A. Spence, W. J. Gregory, J. F. McDonald, Sam McDonald, Sarah White, Frank Williams, S. E. Williams, Mrs. Grady Felton, Mrs. N. R. Jones, Hersey Hewitt, and Mattie Hewitt, hereinafter referred to as protestants, were included. The above named were made parties to the original proceeding and served with process in due form. Thereafter the commissioners or jurors under order of the clerk without notice to the protestants undertook to make a further or additional assessment to provide for unforeseen expenses in constructing said jury ditch. After the commissioners or jurors had filed their report making an additional assessment, and said assessment had been confirmed by the clerk, the protestants came into court and moved to set the same aside. The said judgment of confirmation was set aside, as will appear of record, and the judgment of the clerk setting aside said decree of confirmation was on appeal to the Superior Court affirmed. Thereafter the protestants filed exceptions to the report of the commissioners or jurors making additional assessments, and by consent a hearing upon said exceptions was had before the clerk.

"Upon said hearing the clerk sustained Exception No. 1 as filed by the protestants, Exceptions Nos. 2 and 3 having been abandoned by the protestants, and entered judgment relieving said protestants from said additional assessment, as will appear by order in the record in this cause. Upon appeal to the judge of the Superior Court the judgment of the clerk was set aside as a matter of law upon the finding by the judge that the original assessment was *res judicata*. The said judgment reversing the clerk was on appeal to the Supreme Court reversed, *Spence v. Granger*, 204 N. C., 247.

"This cause now comes on to be heard upon the decision of the Supreme Court, whereupon the protestants moved for judgment confirming the judgment of the clerk of the Superior Court as a matter of law, for that the judgment of the Supreme Court in effect adjudicates the matter in controversy. The motion is denied and the protestants except.

"The court holds that the matter is now pending in the Superior Court upon appeal from the judgment of the clerk of the Superior Court setting aside the assessment against the protestants as if the judgment by Judge Hill had never been entered, except that this court is bound by the ruling of the Supreme Court that the respondents are not entitled to judgment as a matter of law for that the original assessment is *res judicata*. The protestants object and except.

"The Supreme Court having held, in *Spence v. Granger,* above cited, that the general law relative to drainage districts controls in this cause as to matters of procedure, and it appearing to the court that the general drainage law provides that appeals may be had from orders of the clerk as in special proceedings, and that said law likewise provides that unless a jury trial is demanded when exceptions are filed before the clerk, the same is waived. The court holds that this matter is now pending in the Superior Court for review of the clerk's order upon the Exception No. 1 filed by the protestants, *de novo,* and that neither the protestants nor the respondents are, as a matter of law, entitled to a jury trial.

"The parties not being ready to proceed with the hearing of the evidence upon the issues raised, this cause is retained upon the civil issue docket, and is continued to the end that the judge presiding may hereafter, in his discretion, impanel a jury for a determination of the issues of fact raised by Exception No. 1 or may have same determined by reference, or by hearing before him, as he may elect.

"It is understood and agreed that the protestants and the respondents may each file a bill of exceptions to the findings of fact and conclusions of law contained in this order and attach the same hereto as a part hereof."

To the foregoing order or judgment, the movants or protestants except and assign error and appeal to the Supreme Court.

McMullan & McMullan and H. Clarence Dozier for appellants.
Thompson & Wilson for appellees.

CLARKSON, J. The question involved: Was the court below correct in retaining the cause on the docket to the end that a determination of the issues of fact raised by Exception No. 1 of movants or protestants may be considered? We think so. This cause has heretofore been before this Court. *Spence v. Granger,* 204 N. C., 247. One of the fundamental principles of law which has come down to us "from time whereof the memory of man runneth not to the contrary" is that every party affected by an action or proceeding is entitled to notice and an opportunity to be heard. The original trouble in this whole matter was that there was no notice of the supplemental order assessing against each landowner an increase of 40 per cent over the former assessment. This was vital. *Staton v. Staton,* 148 N. C., 490; *Banks v. Lane,* 170 N. C., 14. A party to an action can waive notice in many ways, and this waiver amounts in law to a general appearance. *Buncombe County v. Penland,* 206 N. C., 299; *Smith v. Haughton,* 206 N. C., 587.

In *Harrell v. Welstead,* 206 N. C., 817 (819-820), it is written: "Nor did the corporate defendant's appearance by motion to vacate said judg-

ment 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."

On the former appeal to this Court the movants or protestants relied on Exception No. 1, which is as follows: "That they except to the apparent reassessment levied against them by said jurors for the reason that their lands do not drain from the Shepherd Jury Ditch; that it was so understood at the time of the original assessment, as is stated in the affidavit of J. B. Leigh, heretofore filed, which is incorporated herein and by reference made a part of this paragraph; and that the costs placed against them on the original assessment were for the costs of an intercept ditch, for which they voluntarily agreed to pay."

In the former *Spence case, supra,* page 251, we said: "We think this exception and assignment of error well taken. Although this proceeding is under the statute establishing a 'jury ditch,' yet the principle under the general drainage act is analogous and applicable."

N. C. Code, 1931 (Michie), C. S., 637, is as follows: "Whenever a civil action or special proceeding begun before the clerk of a Superior Court is for any ground whatever sent to the Superior Court before the judge, the judge has jurisdiction; and it is his duty, upon the request of either party, to proceed to hear and determine all matters in controversy in such action, unless it appears to him that justice would be more cheaply and speedily administered by sending the action back to be proceeded in before the clerk, in which case he may do so."

In *Hall v. Artis,* 186 N. C., 105 (106), speaking to the subject: "Referring to the question, in *Anderson's case,* 132 N. C., 244, *Montgomery, J.,* 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. *Roseman v. Roseman,* 127 N. C., 494; *Ledbetter v. Pinner,* 120 N. C., 455; *Faison v. Williams,* 121 N. C., 152.' See, also, C. S., 637." *In re Estate of Wright and Wright v. Ball,* 200 N. C., 620 (628). N. C. Code, 1931 (Michie), sec. 5287, under "Drainage," provides that appeal may be had from orders or judgment of the clerk, as in special proceedings.

We think the court below had the authority to make the order or judgment appealed from. The same is

Affirmed.

J. T. MOORE ET AL. v. CHARLES E. LAMBETH ET AL.

(Filed 19 September, 1934.)

1. Municipal Corporations F a—Verdict held to establish that contract for municipal construction was let in violation of statute.

Where, in an action to recover for a city moneys expended by it for municipal construction, the verdict of the jury establishes that the contract for such construction was in excess of one thousand dollars, and that the contract was let to the corporate defendant without first advertising for bids, in violation of C. S., 2830, and that no emergency involving the safety or health of the people or their property existed, and that the corporate defendant conspired with the other defendants to obtain the contract in violation of the statute, and charged excessive and exorbitant prices therefor, the corporate defendant doing the work is entitled to the reasonable value of the work as determined by the jury on the issue of *quantum meruit*, and it is liable to the city for the amount by which the price paid exceeds the reasonable value of the work performed.

2. Public Officers C c—Municipal officers held liable to city for loss sustained by their wilful and unlawful disbursement of city funds.

Where municipal officers wrongfully, wilfully and knowingly disburse municipal funds in payment for municipal construction under a contract let without advertising for bids, as required by C. S., 2830, and it appears that the contract price was excessive and exorbitant, and was let by such officers with intent to evade the law, such officers may be held liable, for the benefit of the city, in a suit by taxpayers of the city, for the amount by which the contract price paid exceeds the reasonable worth of work performed thereunder, even though they did not act corruptly and of malice. The distinction between the suits by individuals to recover for themselves and suit to recover on behalf of the city is pointed out by STACY, C. J.

3. Trial D b—

Where there is no real conflict in the evidence as it relates to certain of the issues, the court may instruct the jury to answer such issues as directed if they believe the evidence.

4. Evidence B a—

Where a party claims the benefit of an exception in a statute, he has the burden of showing that he comes within the exception.

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

APPEAL by defendants from *Hill, Special, J.*, at December Special Term, 1933, of MECKLENBURG.

Civil action by taxpayers (demand having been made upon mayor and city council to bring suit and declined or refused) to recover for and on behalf of the city of Charlotte moneys alleged to have been exorbitantly and unlawfully paid for repairs to a municipal incinerator.

The original contract for the repairs, which was based upon the requisite estimate at the time of 347 cubic feet of masonry, was awarded to

the Porter Construction Company for the lump sum of $1,370, after public advertisement for bids. Three days after the execution of this contract another agreement, in the form of a letter addressed to C. D. Isom, city engineer, and accepted by him, was entered into without public bidding, for additional repairs, based upon an unit price per cubic foot of masonry, which amounted to approximately four times the original letting. The total work done under both contracts resulted in the construction of 1,487.37 cubic feet of masonry, and the total price paid reached the sum of $6,240.89.

With respect to this additional work, the president of the Porter Construction Company testified as follows: "I knew at the time I put in my bid that there was extra work to be done; all the other bidders knew the same. I knew that the work called for by the specifications would not put the incinerator in first-class condition. I knew that contracts had to be advertised and that Mr. Isom did not have the authority to make a new contract. I would not have done the extra work except for the letter of 2 July, 1932, from the Porter Construction Company to Mr. Isom. I knew before I got my copy from the city there was to be four times as much work to be done as called for in the specifications."

To like effect is the testimony of Mayor Charles E. Lambeth: "I knew at the time there was to be extra work, amounting to about $5,000; that there had not been any public letting on the basis of the letter of 2 July, 1932; that the bid by the corporate defendant did not cover the repairs necessary to be done on the incinerator; that I voted to let the work to the Porter Construction Company for $1,370, a lump-sum price for certain specified repairs, and I did not bring up the question of additional work."

On the question of alleged fraud and collusion, the president of the corporate defendant testified: "There was a difference in the kind of work we did and that called for in the specifications"; and the secretary-treasurer of the corporate defendant testified that while "there were 8 or 10 on the job in addition to the foreman and myself," the payrolls "show a list of 18 to 20 men per week on the job."

Upon denial of liability and issues joined, the jury returned the following verdict:

"1. Did the city of Charlotte, after advertisement as provided by law, let and award to the defendant Porter Construction Company a contract for repairs on the city incinerator for a price of $1,370, as alleged in the complaint? Answer: 'Yes.'

"2. If so, did the city of Charlotte thereafter let additional repair work on said incinerator to the defendant Porter Construction Company in the further sum of $4,870.61 without advertising and public letting of such additional work, as alleged in the complaint? Answer: 'Yes.'

"3. Was such additional repair work a case of special emergency involving the health or safety of the people or their property, as alleged in the answer? Answer: 'No.'

"4. Did any of the defendants, and if so, which ones, unlawfully, wilfully and knowingly let, or aid and abet in the letting of said additional work to the Porter Construction Company with intent to evade the law with regard to advertisements and public letting of municipal contracts? Answer: 'Yes, as to Charles E. Lambeth, John F. Boyd, J. B. Pridgen, Porter Construction Company, C. D. Isom.'

"5. Did the defendants C. D. Isom and the Porter Construction Company wrongfully and unlawfully conspire to obtain said additional work for the Porter Construction Company without advertisement and public letting, and make and establish excessive prices therefor, with intent to defraud the city of Charlotte, as alleged? Answer: 'Yes.'

"6. What was the reasonable and just value of the labor performed and the materials furnished by the Porter Construction Company as included in the said additional work? Answer: '$2,630.'"

Judgment on the verdict that the plaintiffs recover of the defendants, and each of them, for and on behalf of the city of Charlotte, the sum of $2,240.61, and costs, from which the defendants appeal, assigning errors.

E. T. Cansler, Sr., Henry F. Fisher, and Chase Brenizer for plaintiffs W. W. Watt and J. T. Moore.

J. F. Flowers, J. Louis Carter, and Jas. L. DeLaney for defendants Charles E. Lambeth, J. B. Pridgen, and John M. Boyd.

John A. McRae for defendant Porter Construction Company.

J. Clyde Stancill for defendant C. D. Isom.

STACY, C. J. It is provided by C. S., 2830, that, except in special emergencies involving the health or safety of the people or their property, no contract for municipal construction or repair work, estimated to cost a thousand dollars or more, shall be awarded without first inviting proposals for the same by advertisement, etc.; and provision is also made against division of any bid or contract for the purpose of evading the law.

That this statute was violated in the instant case is established by the verdict, and we have discovered no reversible error on the record.

The case is clear with respect to the corporate defendant. In addition to the finding of fraud, which vitiates the second agreement, it is made to appear that the prices charged for the additional work were exorbitant and excessive. Its just and reasonable worth, *quantum meruit,* has been allowed the defendant. This would seem to be fair enough. *Abbott Realty Co. v. Charlotte,* 198 N. C., 564, 152 S. E., 686.

But it is stressfully contended by the other defendants that what they did was done in their official capacity, and that no liability attaches to them as individuals in the absence of express statutory provision imposing such liability, unless they acted corruptly and of malice. For this position they rely, *inter alia,* upon the following authorities: *Noland v. Trustees,* 190 N. C., 250, 129 S. E., 577; *Hipp v. Farrell,* 173 N. C., 167, 91 S. E., 831; *Templeton v. Beard,* 159 N. C., 63, 74 S. E., 735.

The case rests upon another principle. Where public funds are wrongfully, wilfully and knowingly disbursed by municipal officers without adequate consideration moving to the municipality and with intent to evade the law, as found upon the present record, those responsible for such illegal withdrawal of said funds may be required to make good the loss to the public treasury. *Brown v. Walker,* 188 N. C., 52, 123 S. E., 633; 19 R. C. L., 1142; 43 C. J., 718. The plaintiffs are not to recover for themselves individually, as in the cases cited by the defendants, but for and on behalf of the city of Charlotte. *Waddill v. Masten,* 172 N. C., 582, 90 S. E., 694.

Speaking to the subject in *Burns v. Van Buskirk,* 163 Minn., 48, 203 N. W., 608, it was said: "The vote of the council under which the city's money was withdrawn from the treasury, the ministerial acts of the mayor and clerk in issuing the orders upon which the money was withdrawn, and the act of the treasurer in paying the orders, were the successive steps taken to transfer the money from the city treasury to the pockets of Saari Brothers. It is alleged that all who took part in the transaction knew that their acts were illegal, and it is a fair inference from the facts pleaded that there was concerted action. If there was, all concerned were jointly and severally liable."

There is no real conflict in the evidence as it relates to the first two issues, hence the court was justified in instructing the jury to answer them in the affirmative if they believed the witnesses and found the facts to be as all the evidence tended to show.

The burden of proof on the third issue was properly placed upon the defendants. One who claims the benefit of an exception in the statute has the burden of showing that he comes within the exception. *S. v. Hicks,* 143 N. C., 689, 57 S. E., 441; *S. v. Connor,* 142 N. C., 700, 55 S. E., 787; *Batts v. Batts,* 128 N. C., 21, 38 S. E., 132.

The remaining assignments of error have all been examined with care. They are not sustained. Nothing appears on the record which would warrant the Court in disturbing the verdict or the judgment. They will therefore be upheld.

No error.

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

W. E. REED AND WIFE, ANNIE REED, v. CAROLINA MORTGAGE COMPANY, TRUSTEE.

(Filed 19 September, 1934.)

1. Injunctions D b—Where plea in abatement raising issues of fact is filed in suit for injunction, continuance of temporary order to hearing on issues raised by the plea is not error.

Where suit is instituted for an accounting and to restrain the foreclosure of a deed of trust on the ground that defendant had made certain overcharges which should be allowed as credits on the mortgage debt, and defendant files answer denying the allegations of the complaint and entering a plea in abatement upon allegations of a prior action pending between the same parties involving the same subject-matter, and defendant files a reply to the plea in abatement alleging certain differences between the actions and that defendant had agreed to take a nonsuit in the pending action: *Held*, upon the court's finding that the plea in abatement raised issues of fact for a jury, its order continuing the temporary restraining order until the issues raised by the plea in abatement could be heard and determined is not error.

2. Abatement and Revival B d—

The pendency of a suit as ground for abatement may be taken advantage of by demurrer where the pendency of the suit appears upon the face of the complaint, N. C. Code, 511(3), and where it does not appear upon the face of the complaint, by answer.

3. Abatement and Revival B c—

Where a nonsuit has been entered in an action, it is no longer pending, and will not support a plea in abatement.

STACY, C. J., dissents.

APPEAL by defendant from *Alley, J.*, 1 June, 1934. From JACKSON. Affirmed.

This was a civil action instituted in the Superior Court of Jackson County on 16 April, 1934. The plaintiffs filed complaint alleging that defendant was advertising for sale certain property of the plaintiff under a deed of trust given by plaintiffs to defendant; that defendant had made certain overcharges for which plaintiffs should be entitled to credits; asking for an accounting and praying the court to restrain the foreclosure sale until the accounting could be had. The defendant filed answer pleading first a suit pending in Wake County as a plea in abatement, and then answering generally to the plaintiffs' complaint. A temporary restraining order was issued by Hon. P. A. McElroy, and was made returnable 25 April, 1934; by consent, the hearing was continued until 10 May, 1934, before his Honor, F. E. Alley, at Waynesville, N. C., and when the cause came on for hearing before said judge, counsel for plaintiffs requested a further continuance in order to file

his reply to the defendants' plea in abatement. Thereafter, the case was calendared for trial at May Term of Jackson County Superior Court, being set for Thursday, 24 May, 1934. By consent, same was continued until 30 May, 1934, and then by consent of counsel it was agreed that the matter should be heard at Waynesville before Judge F. E. Alley, on 1 June, 1934, and was heard.

After hearing affidavits and argument of counsel, his Honor, Felix E. Alley, took the case under advisement by consent of counsel, and thereafter rendered the following judgment: "This cause coming on to be heard before the undersigned resident judge of the 20th Judicial District, upon the motion of the plaintiffs to continue the temporary restraining order heretofore issued herein until the final hearing, and for a reference, and upon the motion of the defendant to adjudge a plea in abatement in favor of the defendant and to dissolve said restraining order; and the same having been heard by consent at Waynesville, N. C.; and it appearing to the court that issues of fact arise upon the pleadings with respect to said plea in abatement which require the intervention of a jury, which should be determined before the court undertakes to adjudicate the motion for the continuance of said restraining order to the hearing on the merits, for that if said plea in abatement shall be determined in favor of the defendant, the defendant will be entitled to have said injunction dissolved, and further for that if said plea in abatement shall be finally determined in favor of the plaintiffs they will be entitled to a hearing of their said motion for the continuance of said restraining order until the final hearing, and their demand for an accounting herein.

"Whereupon, the said cause is continued without prejudice to the rights of either party until such time as the issues raised by the pleadings in reference to said plea in abatement may be determined by a jury, and in the meanwhile the restraining order heretofore issued herein is continued until such issues have been determined, as aforesaid. This 1 June, 1934. Felix E. Alley, Resident Judge, etc."

To the foregoing judgment the defendant excepted and assigned error, and appealed to the Supreme Court.

W. R. Sherrill and F. E. Alley, Jr., for plaintiffs.
W. G. Mordecai for defendant.

CLARKSON, J. Is the judgment in the court below correct? We think so. The pendency of another suit as a ground of abatement may be taken advantage of by demurrer where it appears from the face of the complaint, N. C. Code, 1931 (Michie), sec. 511 (3), where it does not appear from the face of the complaint by way of answer. *Emry*

v. Chappell, 148 N. C., 327. In the present action the defendant in its answer says: "Before answering generally the allegations of the plaintiffs' complaint, the defendant Carolina Mortgage Company enters a plea in abatement, and in support of said plea alleges: (1) That on the 17th day of August, 1932, Carolina Mortgage Company instituted a suit in the Superior Court of Wake County, North Carolina, against W. E. Reed and wife, Annie Reed, and on said day, to wit, August 17, 1932, summons was issued from said Superior Court of Wake County to the sheriff of Jackson County, which said summons was duly served on said W. E. Reed and wife, Annie Reed, by the sheriff of Jackson County on the 22d day of August, 1932; that the Carolina Mortgage Company at the time of instituting said suit filed in the Superior Court of Wake County a verified complaint, copies of which were duly served on the defendants at the same time the summons was served. (2) That the foregoing action pending in the Superior Court of Wake County is between the same parties as are parties to the above-entitled suit; that said suit involves the same subject-matter, and that the said W. E. Reed and wife, Annie Reed, could have and should have set up any and all defense in the said suit in Wake County which they now affirmatively set out in the above-entitled action," etc.

The answer to defendant's plea in abatement is as follows: "That the plaintiffs, answering the defendant's alleged plea in abatement, for their answer thereto allege: (1) That paragraph 1 as therein stated is substantially correct, and is therefore admitted. (2) That in answer to paragraph 2 of the defendant's alleged plea in abatement, the plaintiffs admit that suit in Wake County and the suit in Jackson County were between the same parties and involved, in part, only the same subject-matter. That the suit in Wake County was unnecessary and uncalled for; the defendant, at the time it brought that suit, had the same rights, remedy and privileges to foreclose upon default then as it had on the 14th day of March, 1934, at the time it advertised the plaintiffs' home for sale. That in that suit only a default in the monthly installments is alleged. In this suit, pending in Jackson County, overcharges, diversions, retentions or usury are alleged and an accounting is demanded by the plaintiffs; that all other allegations in paragraph 2, as therein stated, not herein admitted, are untrue and therefore denied."

The defendant further alleged in its answer as to its plea in abatement that the action in Wake Superior Court "is still pending." The plaintiffs set up an agreement with the president of defendant company that "the matter was compromised and adjusted," and that they paid the cost of $8.00 in the action to the president, and also that a nonsuit was agreed to be taken, and further set forth: "The reason that no action is or should have been pending in Raleigh against the plaintiffs

herein, and that they relied on the Carolina Mortgage Company, its attorneys, officers and agents to carry out its agreement with the plaintiffs, and therefore no suit in law, equity or good conscience could now be pending in the city of Raleigh between Carolina Mortgage Company and the plaintiffs herein. That the plaintiffs are advised and believe and so aver that they had then the right to rely on the statements of the officers, agents and attorneys of the Carolina Mortgage Company, and that if they have been misled by the defendant herein they are advised and believe that the defendant cannot now take advantage of their own wrong."

It is well settled that if a nonsuit is taken there is no action pending. In *Barnett v. Mills,* 167 N. C., 576 (584), speaking to the subject: "The plea of the pendency of the action in Rutherford County was properly overruled, because that action had been dismissed by judgment of nonsuit. *Cook v. Cook,* 159 N. C., 48; *Brock v. Scott,* 159 N. C., 513; 1 Corpus Juris, 60 and 94."

The court below continued the present action until the disputed fact as to the plea in abatement was determined by a jury. We see no objection to this procedure. We think the injunction proper under the facts and circumstances of this case. *Parker Co. v. Bank,* 200 N. C., 441.

As to whether there are two actions pending between the same parties and for the same causes of action, we do not now determine. The judgment of the court below is

Affirmed.

STACY, C. J., dissents.

BEATRICE BOYD v. C. F. WILLIAMS, ADMINISTRATOR OF THE ESTATE OF W. V. BOYD.

(Filed 19 September, 1934.)

1. Evidence D b—

C. S., 1795, rendering incompetent testimony by an interested party as to transactions or communications with a decedent, applies to actions in tort as well as actions on contract.

2. Same—Testimony of transaction with decedent which is material to establishment of liability of estate to witness is incompetent.

A husband driving a car owned and controlled by him had an accident resulting in his death and serious injury to his wife, who was riding with him. The wife sued his estate to recover for her injuries and the only evidence of negligence was her testimony that he was traveling at an excessive speed upon a curve, and that the accident occurred when the car failed to make the curve, and that she had spoken to him in regard to

the speed he was driving the car: *Held*, the driving of the car was a transaction within the meaning of the term as used in C. S., 1795, and her testimony of his manner of driving and her statement to him regarding the speed was incompetent under the statute, her testimony of the transaction and communication being an essential or material link in the chain establishing liability of the estate to her.

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

CIVIL ACTION to recover damages for personal injury, tried before *Clement, J.*, at January Term, 1934, of GUILFORD.

The plaintiff is the wife of the deceased, W. V. Boyd, and was injured on 16 March, 1934. Certain medical testimony was offered tending to show the extent of the injuries sustained by plaintiff, but the only evidence offered as to what actually occurred was contained in her testimony. She said: "About the 16th I came to High Point with Mr. Boyd. We came in Mr. Boyd's car. . . . We left High Point about five or five-thirty the same day. . . . We stopped outside of Statesville . . . long enough to get something to eat. We started from Statesville to go to Hickory. We did not get to Hickory. . . . Mr. Boyd was driving the car. I did not drive it any at all. I could not drive a car. . . . At or just before we got to the place of the wreck, there was kind of a winding road. We were coming down grade, and there was a short curve. I don't guess you could see it over one hundred and twenty-five feet . . . before you get to it. . . . We came down grade and started the curve and hit the center of the curve and couldn't make it. . . . I don't think you could hardly see a car coming until you got on the curve. . . . As to what happened in the wreck, it happened so quick I don't know. The next thing I knew was when they were picking me up to take me to the hospital. I was not conscious all the time. . . . All of my body except my head was under the car. I don't know where Mr. Boyd was. He was killed. He lived about twenty-four hours, I think."

While the plaintiff was testifying in her own behalf she was asked the following questions: (a) "At what rate of speed was he driving, would you say, just before the wreck?" (Ans.) "Between forty-five or fifty miles." (b) "What do you mean by center of the curve?" (Ans.) "Well, he hit about the center of the curve, he couldn't make the curve." (c) "When you started in the curve, what rate of speed would you say he was running?" (Ans.) "Forty-five or fifty miles an hour." (d) "Did you make a statement to Mr. Boyd about the rate of speed at which he was driving?" (Ans.) "Yes."

The defendant objected to all the foregoing evidence upon the ground that, as she was suing the estate of her deceased husband for damages, she was an interested witness and disqualified by C. S., 1795, to testify

as to transactions and communications with her husband. The evidence was admitted at the trial in the county court and a verdict rendered in favor of plaintiff in the sum of $5,481. The defendant appealed to the Superior Court, assigning as error the admission of the testimony of the wife as heretofore indicated. The judge of the Superior Court overruled the exceptions and affirmed the judgment of the county court. Whereupon the defendant appealed.

Walser & Casey for plaintiff.
Dalton & Pickens for defendant.

BROGDEN, J. A wife, living with her husband, is riding with him along the highway, in a car owned, controlled and driven by the husband. The car fails to make a curve and is apparently wrecked or turned over, killing the husband and seriously injuring the wife. She sues the estate of the deceased husband for damages and is allowed to testify as to violations of the statute regulating the operation of automobiles, and that she made a statement to her deceased husband at the time "about the rate of speed at which he was driving."

These facts produce two questions of law:

1. Does C. S., 1795, apply to actions in tort, or is the statute confined to actions on contract?

2. Does the testimony of the wife constitute a transaction or a communication with her deceased husband within the contemplation of said statute?

No case has been called to our attention in this jurisdiction deciding the question as to whether C. S., 1795, applies to tort actions. However, no sound reason occurs to the Court for limiting the application of the statute to actions on contract. Furthermore, the question has been considered in other jurisdictions and the general result of such consideration is expressed in 28 R. C. L., p. 494, as follows: "Ordinarily a statute excluding the testimony of the surviving party, where one of the original parties to a contract or cause of action is dead, applies to an action in tort as well as to an action on contract." The author of an annotation on the subject in 36 A. L. R., 959, says: "Practically all of the cases within the scope of the present annotation assume that the disqualifying provision may apply to an action *ex delicto* and is not limited to actions *ex contractu.*" See *Van Meter v. Goldfarb,* 148 N. E., 391, 41 A. L. R., 343; *Souther v. Belleau,* 262 S. W., 619, 36 A. L. R., 956.

Consequently, the first question of law is answered in the affirmative.

The second question of law is not free from difficulty. There is a host of cases construing and interpreting C. S., 1795, and as there is

apparently no case directly in point, it would doubtless be both confusing and useless to undertake to dissect the cases or capitulate the various aspects of the statute which they present. A concise statement of the general purpose of the statute is found in the following utterances in *Brown v. Adams,* 174 N. C., 490, 93 S. E., 989: "It shocks our ideas of fair play thus to place one of the parties at the mercy of the other by allowing one to speak in his own behalf when he is under the power and influence of self-interest, by silencing the other, so that he cannot reply. This is an unjust advantage, not contemplated by the statute."

Also, in *Davidson v. Bardin,* 139 N. C., 1, 51 S. E., 779, this Court said: "Under these decisions the plaintiff was competent to testify that she went to the house of defendant's intestate, and his condition, and what she saw or heard, so long as these were independent facts and did not tend to show a 'communication or personal transaction' between her and the deceased, whereby a liability to her, express or implied, would accrue." The words "whereby a liability to her, express or implied, would accrue" would seem to mean that transactions and communications essential to the cause of action are excluded by the statute. Indeed, an analysis of many cases leads to the conclusion that, where the transactions and communications become an essential or material link in the chain establishing liability against the defendant, the philosophy of the statute, as interpreted and applied in the decisions, would exclude them from the consideration of the jury.

In the case at bar the only evidence of negligence, and thus the only evidence establishing the liability of the deceased, was the speed of the car at the curve. Such operation of the car by the dead husband was certainly a transaction within the broad meaning of that term heretofore pronounced in the decisions. The wife was present in the car and undertakes to recover damages from the estate of the deceased solely by reason of such transaction. Without such evidence she could not recover upon the record in this case. Therefore, it would seem that such personal transaction is one "between the witness and the deceased person."

The statement of the wife on the witness stand that she made a statement to her husband about the speed of the car at the time of the wreck is clearly an invasion of the statute, because she had previously testified that the speed was excessive.

The Court is of the opinion that the evidence is incompetent and should have been excluded.

Error.

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

N. B. MARRINER, GUARDIAN OF H. W. MIZZELLE, LUNATIC, v. H. W. MIZZELLE, LUNATIC, W. D. PRUDEN, HIS GUARDIAN AD LITEM, ET AL.

(Filed 19 September, 1934.)

1. Insane Persons C c — Guardian depositing funds without negligence pending investment is not liable for loss through bank's failure.

Where a guardian of a lunatic deposits funds of the estate in a bank temporarily pending investment of the funds, and is not guilty of negligence in making the deposit or in allowing the funds to remain on deposit until the bank's failure, the guardian is not liable for loss to the estate caused by the bank's subsequent failure, but if the guardian does not exercise due diligence in making the deposit, or is guilty of negligence or bad faith in allowing the deposit to so remain until the bank's failure, or if the deposit is made for a fixed period of time, the guardian would be liable, since in the latter case the deposit would be regarded as a loan to the bank without security, and liability would attach although the guardian acts in good faith and the bank is solvent at the time of the deposit.

2. Same—Burden is on guardian to prove that deposit was temporary and that he was not guilty of negligence in respect thereto.

In an action by a guardian of a lunatic to have credited on his accounts sums lost to the estate by reason of the failure of the banks wherein the guardian had deposited moneys of the estate, the burden is on the guardian to prove that the deposit was temporary pending investment, and that he was not guilty of negligence in respect thereto.

3. Trial E g—

A charge to the jury will be construed contextually as a whole, and detached portions thereof will not be held for error when the charge considered as a whole contains no reversible error.

4. Insane Persons D e—Commissions to which guardian is entitled must be first passed upon by clerk.

In an action by a guardian of a lunatic to have credited on his account as guardian sums lost to the estate by reason of the failure of the bank in which the guardian had deposited moneys of the estate, the commissions which the guardian may retain must be passed upon by the clerk after decision of the court on the question of whether the guardian is entitled to the alleged credits.

APPEAL by W. D. Pruden, guardian *ad litem* of the next of kin of H. W. Mizzelle, lunatic, from *Devin, J.*, at April Term, 1934, of CHOWAN. No error.

This proceeding was begun by petition filed by the plaintiff with the clerk of the Superior Court of Chowan County, and was transferred by the clerk to the civil issue docket for the trial of issues raised by the pleadings.

On the facts alleged in his petition, the plaintiff prayed for an order allowing him credit on his accounts as guardian for certain sums of

money which he had deposited in certain banks, and which had been lost by reason of the subsequent insolvency thereof, and fixing the amount of his bond with relation to such credit. The plaintiff alleged that said losses were not due to any negligence on his part. The defendants, who had been made parties to this proceeding on motion of the plaintiff, denied this allegation, and alleged that said losses were due to the negligence and lack of good faith of the plaintiff in failing to invest said funds as authorized by law.

The controversy was submitted to the jury upon the following issues, both of which were answered in the affirmative, to wit:

"1. Is the plaintiff entitled to a credit in his guardian account for moneys deposited in the Farmers Bank of Belhaven and lost by reason of the failure of said bank?

"2. Is the plaintiff entitled to a credit in his guardian account for moneys deposited in the Citizens Bank of Edenton and lost by reason of the failure of said bank?"

Whereupon judgment was entered adjudicating that the plaintiff had on deposit temporarily in the Farmers Bank of Belhaven, awaiting suitable investment, the sum of $6,785.05 at the time of its failure, and had on deposit, under like conditions, in the Citizens Bank of Edenton, at the time of the failure, the sum of $1,321.14, and that such moneys were a part of the funds turned over to him upon his qualification as guardian and were held pending proper investment; and adjudging that the plaintiff, N. B. Marriner, guardian of H. W. Mizzelle, lunatic, was not guilty of any breach of duty or condition of his bond in keeping and having said moneys on deposit in said banks; and remanding the cause to the clerk to the end that the accounts of the guardian might be revised in accord with the verdict, by eliminating the amounts that were on deposit in the two closed banks, less such dividends as were or may be paid thereon.

To the judgment of the court the defendants in apt time objected and excepted, and appealed to this Court.

W. D. Pruden and J. A. Pritchard for appellants.
Ward & Grimes for appellee.

SCHENCK, J. In the case of *Bane v. Nicholson et al.*, 203 N. C., 104, this Court quoted with approval 12 R. C. L., p. 1133, part of section 30, as follows: "The deposit of funds in an incorporated bank of good reputation temporarily, while they are awaiting investment or needed for current use, is proper; but a deposit in bank for a fixed period of time has been held to be a loan without security, and to render the guardian responsible for any loss."

There are two questions involved on this appeal. First, were the funds in the banks mentioned in the issues deposited temporarily while awaiting investment or needed for current use, or were such deposits in said banks for a "fixed period of time," and therefore a loan to the banks without security; and, second, if such funds were deposited temporarily awaiting investment or to meet current needs, was the loss thereof proximately caused by the negligence of the guardian in failing otherwise to invest such funds as authorized by law?

These questions, in our opinion, both arose upon the pleadings, and were properly submitted to the jury under the issues in a clear and impartial charge. The court charged the jury substantially that, in the absence of negligence, deposit of funds by a guardian in an incorporated bank temporarily, while awaiting investment or while needed for current use of his ward, was proper, and if funds were lost under such circumstances there would be no liability on the part of the plaintiff; but that deposit of funds in a bank for a fixed period of time was a loan without security, and a guardian would be liable for any loss thereof, notwithstanding he acted in good faith and the bank was solvent when he made the deposit.

The court further charged the jury, in effect, that if the plaintiff guardian placed the funds on deposit in the banks awaiting an opportunity of investment, and exercised due care in so doing, there would be no liability on his part for the loss thereof; but, on the other hand, even if the guardian did so place the funds on deposit, and failed to exercise due care with respect to the preservation of his ward's estate in allowing to remain in the bank a large portion of such estate without taking security therefor, or was otherwise negligent in so depositing said funds, the plaintiff would be liable for any loss resulting from the failure of the banks, and would not be entitled to have credit therefor on his accounts. The court properly placed the burden of proof of the issues upon the plaintiff. We think this charge was a correct statement of the law applicable to the theory upon which this case was tried.

The liability of a guardian for a loss to the estate of the ward caused by the failure of a bank in which the guardian kept deposits of the estate, does not attach when it is found that the guardian exercised good faith and due diligence. *Pierce v. Pierce,* 197 N. C., 348. The allegation that the plaintiff in this case failed to exercise good faith in his handling of the estate of his ward seems to have been abandoned by the defendants and the allegation of negligence alone relied on.

We have examined the exceptions taken to portions of the charge but are of the opinion that when considered with the whole charge they contain no reversible error. "We are not permitted to select detached portions of the charge, even if in themselves subject to criticism, and

assign errors as to them, when, if considered with the other portions of the charge, they are readily explained and the charge in its entirety appears to be correct." *Kornegay v. R. R.*, 154 N. C., 390. The charge must be considered contextually as a whole and not disconnectedly and disjointedly. *Kennedy v. Telegraph Co.*, 201 N. C., 756.

We agree with his Honor's holding that the question of commissions to be retained by the plaintiff as guardian was one to be passed upon by the clerk after the decision of this Court is rendered with respect to the alleged and desired credits on the guardian accounts.

No error.

STATE OF NORTH CAROLINA ON RELATION OF A. J. MAXWELL, COMMISSIONER OF REVENUE, v. S. J. HINSDALE, M. W. McPHERSON AND R. H. ANDREWS, TRUSTEES IN BANKRUPTCY OF CENTRAL LOAN AND TRUST COMPANY, BANKRUPT.

(Filed 19 September, 1934.)

Taxation E c—Claim for refund of income taxes held barred by failure to make application for revision within three years from return.

Where a taxpayer, claiming a refund for overpayment of income taxes to the State by reason of error in its return, fails to apply to the Commissioner of Revenue for a revision within three years from the filing of its return, its claim is barred, N. C. Code, 7880 (155), nor will the fact that the application for a revision is made within three years of redetermination of income tax by the Federal Government avail the taxpayer where he does not make a new return within thirty days after such redetermination by the Federal Government, N. C. Code, 7880 (152), since the limitation prescribed by N. C. Code, 7880 (155), is explicit and unequivocal, and since the procedure prescribed by N. C. Code, 7880 (155), that such new return be made within thirty days of redetermination by the Federal Government is exclusive and must be followed to entitle the taxpayer to the relief therein provided.

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

CIVIL ACTION, before *Devin, J.*, 13 February, 1934. From ALAMANCE.

The Central Loan and Trust Company paid income taxes to the State of North Carolina as follows: From 1 December, 1922, to 30 November, 1923, $1,305.40; from 1 December, 1923, to 30 November, 1924, $1,243.77; from 1 December, 1924, to 30 November, 1925, $1,502.63.

The taxpayer thereafter became a bankrupt, and the trustees of said bankrupt asserted that they were entitled to a refund of taxes for said years by reason of the fact that in the return of the taxpayer there was "erroneously included as income the annual appreciation of unsold real estate over cost price. This statement was made in return filed with

the Commissioner of Revenue for the State of North Carolina, and the erroneous tax was paid to said Commissioner."

On 3 December, 1929, the Federal Government redetermined the taxes due "by said bankrupt for said years, and made refund of Federal taxes erroneously collected because of a like erroneous overstatement in the return made to the Federal Government." More than two years thereafter, to wit, on 30 December, 1932, the bankrupt, through its trustees, "filed with the Commissioner of Revenue for the State of North Carolina . . . claims for a refund of taxes paid by the Central Loan and Trust Company." It was stipulated "that there was no return oath made to the Commissioner of Revenue after the redetermination made by the Federal Government until 30 December, 1932."

The Commissioner of Revenue declined to order the refund and rejected the claim, asserting that on account of the lapse of time all records "pertaining to the years at issue were, under authority of statute, destroyed," etc. The taxpayer appealed from the ruling of the Revenue Commissioner to the judge of the Superior Court, who disallowed the claim and affirmed the ruling of the Revenue Commissioner. Thereupon the trustees in bankruptcy appealed to the Supreme Court.

Edwin Martenet for trustees in bankruptcy.

Attorney-General Brummitt and Assistants Attorneys-General Seawell and Bruton for Commissioner of Revenue.

BROGDEN, J. C. S., 7880 (155), provides that "a taxpayer may apply to the Commissioner of Revenue for revision of tax assessed against him at any time within three years from the time of the filing of the return or from the date of the notice of the assessment of any additional tax," etc. The record discloses that the taxpayer filed no claim with the Commissioner of Revenue for the revision of said tax until 30 December, 1932, which was more than three years from the date required for the filing of income tax returns. The taxpayer, however, asserts that the three-year limitation begins to run from the date of the redetermination by the Federal Government, as provided in C. S., Michie's Code of 1931, 7880 (152), and that as such action was taken on 3 December, 1929, the claim is not barred. This contention, however, cannot be sustained for the reason that the statute of limitations above referred to is explicit and unequivocal. Moreover, the taxpayer is not saved by the application of C. S., 7880 (152), *supra,* for the reason that this statute provides that "such taxpayer, within thirty days after receipt of final determination by the United States Government of his corrected net income, shall make return under oath or affirmation to the Commissioner of Revenue of such final determined income." The new return contem-

plated by the foregoing statute was not made by the bankrupt until 30 December, 1932. Therefore, there was a total failure to comply with the positive provision of the law. It was said in *Association v. Strickland,* 200 N. C., 630, 158 S. E., 110, that "the courts everywhere are in accord with 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." See *Mann v. North Carolina State Board of Examiners in Optometry,* 206 N. C., 853.

Affirmed.

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

DENNIS HIGDON v. NANTAHALA POWER AND LIGHT COMPANY, SELF-INSURER.

(Filed 19 September, 1934.)

1. Courts A c—

Where no procedure for appeal is prescribed by statute, the rules regulating appeals from a justice of the peace are applicable and controlling.

2. Master and Servant F i—

The statutes regulating appeals from a justice of the peace are applicable and control in appeals from the Industrial Commission to the Superior Court, N. C. Code, 8081 (ppp), failing to provide the procedure for such appeals.

3. Same—Notice of appeal from award of Industrial Commission held not given appellee as required by statutes applicable.

A carbon copy of a letter written by the secretary of the Industrial Commission to the attorneys for appellant relating to the appeal, which carbon copy is sent by the secretary of the Industrial Commission to the attorneys for appellee, is not sufficient notice to appellee of an appeal from an award of the Industrial Commission, appeals from the Industrial Commission, N. C. Code, 8081 (ppp), being governed by the statutes regulating appeals from a justice of the peace, and such notice being insufficient under the statutes applicable, C. S., 1530, 1531, the appeal was properly dismissed in the Superior Court.

CIVIL ACTION, before *Alley, J.,* at May Term, 1934, of JACKSON.

The plaintiff sustained an injury to his right ankle on 7 June, 1933, and asserted that he was in the employ of the defendant at the time of the injury. The defendant asserted that the plaintiff was an independent contractor. A claim was filed with the Industrial Commission and a hearing had thereon, and the hearing commissioner found that the

plaintiff was not entitled to recover, and denied an award. Upon appeal to the full Commission the award of the hearing commissioner was approved and the claim denied. On 9 January, 1934, the attorney for the plaintiff gave notice of appeal to the Industrial Commission, and on 12 January, 1934, the secretary of the Industrial Commission wrote a letter to plaintiff's attorney, stating: "Enclosed herewith certified copy of the record in the above case for your use in docketing appeal in the Superior Court of Jackson County, together with bill covering same. In order to complete our records, please let us have information as to date this appeal is docketed and let us have copy of judgment. Yours very truly, E. W. Price, Secretary. cc to: Messrs. Black & Whitaker, Attorneys, Bryson City, N. C." Black & Whitaker are attorneys of record for the defendant. Thereafter the defendant made a special appearance in the Superior Court to dismiss the appeal of plaintiff for the reason "that no notice of appeal from the award of said Industrial Commission in North Carolina has ever been served on the said defendant or its attorney by the said plaintiff, acting either for himself or by and through his attorney, as is provided for or required by law."

Thereupon the trial judge, after considering the motion, dismissed the appeal, and the plaintiff appealed to this Court.

E. P. Stillwell for plaintiff.
S. W. Black for defendant.

BROGDEN, J. Does the carbon copy of the letter of the secretary of the Industrial Commission to the attorneys of defendant constitute a notice of appeal as contemplated by law?

C. S., Michie's Code, 8081 (ppp), provides that "either party to the dispute may, within thirty days from the date of such award, or within thirty days after receipt of notice to be sent by registered mail of such award, but not thereafter, appeal from the decision of said Commission to the Superior Court . . . for errors of law, under the same terms and conditions as govern appeals in ordinary civil actions," etc. It is obvious that the Compensation Act provides no specific machinery for appeal to the Superior Court, except the words, "under the same terms and conditions as govern appeals in ordinary civil actions." It has been held in this State that where no procedure is prescribed by statute for appeals, the rules regulating appeals from a justice of the peace are applicable and control. This principle was first expressed in *Blair v. Coakley*, 136 N. C., 405, 48 S. E., 804, as follows: "In the absence of any procedure prescribed by statute, we must proceed by analogy to the practice in other like cases, so that the intent and purpose of the Legislature may be effectuated as near as may be, and that the right of appeal

may be preserved to the citizen, and at the same time not abused. It is well, therefore, to adopt the rules regulating appeals from justices' courts as being more nearly analogous to those which should govern in cases like the one under review, and more likely to carry out the intention of the Legislature and less apt to work injustice to the parties. We think, further, that those rules are reasonable and necessary to prevent delay, and they can easily be observed." See *S. v. Carroll*, 194 N. C., 37, 138 S. E., 339.

The statutes regulating appeals from judgments rendered by justices of the peace are C. S., 1530 and 1531. The carbon copy of a letter from the secretary of the Industrial Commission to the attorney for the defendant cannot be construed as a compliance with the applicable statutes. McIntosh, in North Carolina Practice and Procedure, p. 776, section 677, says: "An appeal is the act of the party and not of the court, and it requires the entering of the appeal and giving notice in the manner provided by statute." In the case at bar the appealing party did not give notice as required by law. The trial judge therefore ruled correctly.

Affirmed.

LEE ARP v. E. A. WOOD & COMPANY AND THE UNITED STATES FIDELITY AND GUARANTY COMPANY.

(Filed 19 September, 1934.)

Master and Servant F h—Compensation allowed injured employee, including amount for facial disfigurement, may not exceed $6,000.

The amount allowed by the Industrial Commission for serious facial or head disfigurement is to be included with other amounts allowed an injured employee in determining the total compensation allowed such employee, which in no case may exceed six thousand dollars. N. C. Code, 8081 (kk), 8081 (mm), 8081 (ww).

THIS was an action instituted under the Workmen's Compensation Act, chapter 133-A, Consolidated Statutes of North Carolina (Acts of 1929, chapter 120), for serious personal injuries sustained by the plaintiff on 14 July, 1930, and serious facial and head disfigurement as a result of the injury, and heard before his Honor, *McElroy, J.*, at the April Term, 1934, of MACON, upon appeal by the plaintiff from the decision and award of the full Commission. Affirmed.

E. P. Stillwell for appellant.

J. M. Horner, Jr., Thos. A. Banks, and F. M. Tongue for appellees.

SCHENCK, J. On 17 February, 1931, the plaintiff was awarded the following: (1) Compensation for temporary total disability, $18.00 per week for 23 3/7 weeks; (2) for 40 per cent loss of visibility in right eye, $18.00 per week for 40 weeks; (3) for total loss of left eye, $18.00 per week for 100 weeks; and (4) a lump sum of $2,500 to cover serious facial and head disfigurement, all of which amounted to $5,441.71. The cause was then retained for further hearing.

At a hearing on 7 June, 1931, it was found that the plaintiff had suffered a 50 per cent loss of the use of his left hand, which would extend over a period of 75 weeks, and at $18.00 per week would aggregate $1,350. Commissioner Wilson adjudged that, since $1,350 added to the $5,441.71 theretofore paid would exceed $6,000, the plaintiff would be entitled to recover only $558.29 of the $1,350, as the total compensation payable should in no case exceed $6,000.

There was an appeal from Commissioner Wilson and his adjudication was reviewed and affirmed by the full Commission, and further appeal was taken to the Superior Court, where the decision and award of the full Commission was affirmed by the judgment of McElroy, judge. From this judgment affirming the action of the North Carolina Industrial Commission in holding, as a matter of law, that the $2,500 lump-sum payment to the plaintiff for serious facial and head disfigurement was within and constituted a part of the maximum compensation of $6,000 provided by the act, the plaintiff appealed to this Court.

Section 8081 (kk), C. S., fixes a maximum and minimum weekly rate to be paid in cases of total disability, and the maximum number of weeks that such payments shall be made, and also the total amount of all compensation to be paid under the act. (Acts of 1929, ch. 120, sec. 29.)

Section 8081 (mm), C. S., after fixing a schedule of weekly rates and periods of compensation in specified cases, contains the following provision:

"In case of serious facial or head disfigurement, the Industrial Commission shall award proper and equitable compensation, not to exceed $2,500.

"The weekly compensation payments referred to in this section shall all be subject to the same limitations as to maximum and minimum as set out in paragraph 8081 (kk): *Provided, however,* that the foregoing schedule of compensation shall not be deemed to apply and compensate for serious disfigurement resulting from any injury to any employee received while in and about the duties of his employment." (Acts 1929, ch. 120, sec. 31.)

The effect of this proviso is to exclude the compensation for facial and head disfigurement from only the "*weekly* compensation payments" contained in the "foregoing schedule of compensation," and does not

exclude such compensation from the limitation upon total compensation under the act.

Section 8081 (ww), C. S., reads as follows: "The total compensation payable under this chapter shall in no case exceed six thousand dollars ($6,000)." Since the provision for proper and equitable compensation for facial and head disfigurement is contained in the same chapter of the Consolidated Statutes as is section 8081 (mm) above quoted, and since this section provides specifically that the total compensation payable under this chapter (in the original act "under this act," Acts 1929, ch. 120, sec. 41) shall in no case exceed $6,000, it is manifest that the judgment of the judge below affirming the decision and award of the full Commission should be affirmed.

Affirmed.

MRS. D. C. (HERMIE) STOCKTON ET AL. v. ATLANTIC FIRE INSURANCE COMPANY.

(Filed 19 September, 1934.)

1. **Insurance P b—Evidence of agent's knowledge of prior encumbrance at time policy was issued held competent under plea of waiver.**

Evidence that insurer's agent knew at the time of the issuance of a fire insurance policy that the property was subject to a prior encumbrance is competent in an action on the policy in which plaintiff's plea that insurer waived the provisions of the policy relating to encumbrances.

2. **Same—**

Under the evidence in this case the right of the mortgagee to recover under his separate contract of insurance contained in the standard mortgagee clause in the policy of fire insurance in suit should have been submitted to the jury, and the granting of insurer's motion as of nonsuit was error.

3. **Insurance N c—Rights of mortgagee named in standard mortgagee clause of fire insurance.**

A standard mortgagee clause in a policy of fire insurance creates a separate contract between the mortgagee and the insurer to the extent, at least, of not being invalidated, *pro tanto* or otherwise, by any act or omission on the part of the owner or mortgagor which is unknown to the mortgagee, whether done prior or subsequent to the issuance of the policy.

4. **Same—**

The fact that a mortgagee named in a standard mortgagee clause in a policy of fire insurance hypothecates the mortgage note and policy as collateral security for his note does not *ipso facto* render the standard mortgagee clause void as to his interest.

STOCKTON *v.* INSURANCE CO.

APPEAL by plaintiffs from *McElroy, J.*, at April Term, 1934, of MACON.

Civil action to recover for loss by fire under a policy of insurance issued by the defendant.

The facts are these:

1. On 20 June, 1932, the defendant issued to Mrs. D. C. (Hermie) Stockton fire insurance policy in amount $1,350, on two-story, frame building, occupied by tenant as a dwelling-house, with loss payable, under New York Standard Mortgagee Clause, to D. C. Stockton, husband of insured, as his interest may appear under a $1,000 deed of trust on said property.

2. Prior to the issuance of the policy in suit, D. C. Stockton had pledged his note and deed of trust to H. Arthur Osborne Company, A. B. Slagle, and J. W. Hastings as collateral security.

3. The Federal Land Bank of Columbia held a first and prior mortgage on said property (executed by plaintiff's predecessor in title), and had also insured the same for its benefit, at the time of the issuance of the policy in suit.

4. The plaintiffs offered to show, under their plea of waiver, that the defendant's agent had full knowledge of this prior encumbrance before issuing the policy in suit. Evidence excluded, and plaintiffs except.

5. Foreclosure proceedings were instituted by the Federal Land Bank on 22 June, 1932.

6. The dwelling covered by the policy in suit was totally destroyed by fire 12 January, 1933.

From a judgment of nonsuit entered at the close of all the evidence the plaintiffs appeal, assigning errors.

George B. Patton, Jones & Jones, R. D. Sisk, and J. H. Stockton for plaintiffs, intervenors.

J. M. Broughton and A. Hall Johnston for defendant.

STACY, C. J. Under their plea of waiver it was competent for the plaintiffs to show that defendant's agent had full knowledge of the encumbrance held by the Federal Land Bank at the time of the issuance of the policy in suit. *Houck v. Ins. Co.*, 198 N. C., 303, 151 S. E., 628; *Aldridge v. Ins. Co.*, 194 N. C., 683, 140 S. E., 706; *Johnson v. Ins. Co.*, 172 N. C., 142, 90 S. E., 124.

The correctness of the judgment as it affects the owner, Mrs. Stockton, was conceded on the argument. *Bank v. Ins. Co.*, 187 N. C., 97, 121 S. E., 37. But the case of D. C. Stockton, who claims under a separate contract of insurance, the Standard Mortgagee Clause, would seem to be

one for the jury. *Bank v. Ins. Co., supra; Mahler v. Ins. Co.,* 205 N. C., 692, 172 S. E., 204.

It is the generally accepted position that the New York Standard Mortgagee Clause, engrafted on a policy of fire insurance, operates as a distinct and independent contract of insurance for the separate benefit of the mortgagee, as his interest may appear, to the extent, at least, of not being invalidated, *pro tanto* or otherwise, by any act or omission on the part of the owner or mortgagor, unknown to the mortgagee; and accordingly, as such, it affords protection against previous as well as subsequent acts of the assured. *Bennett v. Ins. Co.,* 198 N. C., 174, 151 S. E., 98, 72 A. L. R., 275; *Bank v. Bank,* 197 N. C., 68, 147 S. E., 691.

The fact that, prior to the issuance of the policy in suit, the mortgagee had hypothecated his note and mortgage as collateral security did not *ipso facto* render the Standard Mortgagee Clause void as to his interest. There is nothing in the separate contract of insurance to this effect.

Reversed.

THOMAS T. WYCHE v. NEW YORK LIFE INSURANCE COMPANY ET AL.

(Filed 19 September, 1934.)

Insurance R c—Findings held not to support judgment for insured in action on disability clause, and case is remanded for further findings.

Where, in an action by insured to recover an annual premium paid under protest upon the ground that payment of the premium was waived under the disability clause of the policy, the parties agree that the court should find the facts, and the court finds that insured was disabled within the terms of the policy, and enters judgment for insured, but it does not appear from the findings when insurer received due proof of such disability, or that such disability had then existed for not less than sixty days as required by the policy, the findings do not support the judgment, and the case will be remanded for further proceedings.

APPEAL by defendant from *Pless, J.,* at July Term, 1934, of HAYWOOD.

Civil action to recover 1934 annual premium on insurance policy paid under protest.

The facts are these:

1. On 26 February, 1919, the defendant issued to the plaintiff a policy of insurance containing, among other things, the following provisions:

"TOTAL AND PERMANENT DISABILITY BENEFITS.

"Whenever the company receives due proof, before default in the payment of premium, that the insured, before the anniversary of the policy

on which the insured's age at nearest birthday is 60 years and subsequent to the delivery hereof, has become wholly disabled by bodily injury or disease so that he is and will be presumably thereby permanently and continuously prevented from engaging in any occupation whatsoever for remuneration or profit, and that such disability has then existed for not less than sixty days . . .

"(1) Waiver of Premium. Commencing with the anniversary of the policy next succeeding the receipt of such proof, the company will on each anniversary waive payment of the premium for the ensuing insurance year," etc.

2. The annual premiums on said policy have been duly paid up to and including the premium of $75.60 due 26 February, 1934, which was paid under protest, because at that time, it is alleged, the plaintiff was "less than sixty years of age and has become wholly disabled by disease so that he is now and will be presumably thereby permanently and continuously prevented from engaging in any occupation whatsoever for remuneration or profit, and such disability has existed for more than sixty days prior to the commencement of this action, which was instituted 19 April, 1934."

3. On appeal to the Superior Court, a jury trial was waived and the court found the facts as alleged by the plaintiff.

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

Thomas Troy Wyche in propria persona.
Johnson, Rollins & Uzzell for defendant.

STACY, C. J. The demurrer to the evidence was properly overruled on authority of the first *Mitchell case,* 205 N. C., 721, 172 S. E., 497. But the facts found by the court are insufficient to support the judgment, in that it is not made to appear when the defendant received due proof of plaintiff's disability, and that such disability had then existed for not less than sixty days, as provided by the policy. *Hundley v. Ins. Co.,* 205 N. C., 780, 172 S. E., 361; *Rhyne v. Ins. Co.,* 199 N. C., 419, 154 S. E., 749; *Guy v. Casualty Co.,* 151 N. C., 465, 66 S. E., 437. Hence, the cause will be remanded for further proceedings as to justice appertains and as the rights of the parties may require.

Error and remanded.

STATE OF NORTH CAROLINA v. RAVENSFORD LUMBER COMPANY ET AL.

(Filed 19 September, 1934.)

1. Appeal and Error E a—

The pleadings are a necessary part of the record proper upon appeal, and where the pleadings are omitted from the record, the appeal must be dismissed. Rule of Practice No. 19, sec. 1.

2. Appeal and Error E g—

The Supreme Court can judicially know only what properly appears on the record.

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

APPEAL by respondent, Ravensford Lumber Company, from *Schenck, J.*, at May Term, 1934, of BUNCOMBE.

Special proceeding, instituted under authority of chapter 48, Public Laws 1927, to condemn lands for park and recreational purposes in the Great Smoky Mountains of North Carolina.

It appears from the record that the jury of view made its award, from which the respondents appealed to the Superior Court, where the issue of damages was tried *de novo* before a jury.

Certain alleged items of expenses, including taxes and insurance premiums, paid by respondent *pendente lite,* were not allowed as elements of damage, the court being of opinion that their recoverability could not arise until after final judgment and "after the commissioners have determined whether they elect to acquire the title." Objection; exception.

Judgment on the verdict was entered at the November Special Term, 1933, from which an appeal was noted, but not prosecuted, and the same was canceled by payment 30 April, 1934.

Thereafter, upon motion in the cause, it was determined that respondent is precluded from claiming, by way of expenses incurred, taxes and insurance premiums paid *pendente lite,* as damages for the lands condemned in this proceeding. From this ruling the respondent appeals, assigning errors.

Winborne & Proctor and Johnston & Horner for petitioner.
Jones & Ward and Johnson, Rollins & Uzzell for respondents.

STACY, C. J. It may well be doubted whether any valid exceptive assignment of error has been made to appear, but as the pleadings on which the case was tried have been omitted from the record, the appeal must be dismissed in accordance with the uniform practice in such cases. *Payne v. Brown,* 205 N. C., 785, 172 S. E., 348; *Parks v. Seagraves,*

203 N. C., 647, 166 S. E., 747; *Armstrong v. Service Stores,* 203 N. C., 231, 165 S. E., 680; *Everett v. Fair Association,* 202 N. C., 838, 162 S. E., 896; *Pruitt v. Wood,* 199 N. C., 788, 156 S. E., 126. Failure to send up necessary parts of the record proper has uniformly resulted in dismissal of the appeal. *Riggan v. Harrison,* 203 N. C., 191, 165 S. E., 358; *Waters v. Waters,* 199 N. C., 667, 155 S. E., 564.

It is provided by Rule 19, sec. 1, of the Rules of Practice, that "the pleadings on which the case is tried, the issues, and the judgment appealed from shall be a part of the transcript in all cases." The pleadings are essential in order that we may be advised as to the nature of the action or proceeding. *Waters v. Waters, supra.* We can judicially know only what properly appears on the record. *Chesson v. Bank,* 190 N. C., 187, 129 S. E., 403; *S. v. Wheeler,* 185 N. C., 670, 116 S. E., 413; *Walton v. McKesson,* 101 N. C., 428, 7 S. E., 566.

Appeal dismissed.

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

A. R. CAHOON, J. S. MANN AND HENRY JONES v. THE BOARD OF COMMISSIONERS OF HYDE COUNTY AND THE BOARD OF EDUCATION OF HYDE COUNTY.

(Filed 19 September, 1934.)

1. Appeal and Error J f—

While the Supreme Court on appeal in injunctive proceedings may review questions of fact as well as of law, there is a presumption that the proceedings in the lower court are correct, and appellant must show error.

2. Appeal and Error A e—

Where it appears upon appeal in proceedings to enjoin the borrowing of money by the board of commissioners of a county, that the money has already been borrowed, the question sought to be presented becomes academic.

CIVIL ACTION, before *Devin, J.,* at June Term, 1934, of HYDE.

This action was brought by the plaintiffs to restrain the defendants from borrowing the sum of $15,000 from the State Literary Fund for the purpose of enlarging a school building. The plaintiffs asserted that the public debt of Hyde County for school purposes exceeded eight per cent of the total valuation of property in the county, and as a result the defendants were without power to borrow money.

The trial judge found certain pertinent facts, which are as follows:

(a) "The assessed value of all property in Hyde County, the last assessment, was $3,709,348. Its indebtedness for school purposes is less than five per cent of the assessed value."

(b) "There is now outstanding a county bond issue of $275,000, issued to refund indebtedness incurred for roads and bridges, for necessary county expense, and for school purposes. Of this only $75,000 is definitely shown to cover indebtedness for schools. Of the remainder, two amounts are duplications and there is no record whatever to show for what purpose the original indebtedness was incurred or where the money originally went. These properly ought not to be added to the indicated indebtedness for school purposes. While the school indebtedness included in the refunding bond issue may be larger than the specific items indicated, the court finds as a fact that the total indebtedness for schools is less than the statutory limit."

(c) "The court further finds that the county of Hyde is now in default in the payment of interest on its bonds in the sum of approximately $56,941, and on principal approximately $31,000, and that the county now has on hand to be applied to said indebtedness the sum of $34,868.78."

Upon the foregoing facts the court was of opinion that the defendants were authorized to borrow the said sum of $15,000 for the purpose indicated, and dissolved the injunction.

Thereupon the plaintiff appealed.

H. C. Carter for plaintiff.

Geo. T. Davis and MacLean & Rodman for defendants.

BROGDEN, J. "It is well settled that in an action of this kind this Court can review the evidence and determine questions of fact as well as of law, but there is a presumption that the proceedings in the court below are correct, and the appellant must show error." *Parker v. Debnam,* 195 N. C., 56, 141 S. E., 535; *Castle v. Threadgill,* 203 N. C., 441, 166 S. E., 313; *Shelly v. Grainger,* 204 N. C., 488, 168 S. E., 736.

There was evidence to support the findings of fact made by the trial judge. Moreover, it has been made to appear to the court that $10,000 of the sum involved in the proceeding has already been borrowed and used by the county for the purpose indicated. Consequently, the question presented is academic. *Moore v. Monument Co.,* 166 N. C., 211, 81 S. E., 170; *Rousseau v. Bullis,* 201 N. C., 12.

Affirmed.

VIRGINIA-CAROLINA JOINT STOCK LAND BANK OF NORFOLK v. BOARD OF COUNTY COMMISSIONERS OF PASQUOTANK COUNTY ET AL.

(Filed 19 September, 1934.)

Taxation C c—Where value of bank stock for taxation has not been determined according to statute, commissioners may be restrained from listing such stock for taxation.

Where, in a suit by a bank against a board of commissioners of a county to restrain the board from listing shares of stock of plaintiff bank for taxation, it appears that the method for determining the value of the bank stock for taxation, prescribed by sec. 600, ch. 204, Public Laws of 1933, has not been followed, judgment continuing the temporary restraining order to the hearing will be affirmed.

APPEAL by defendants from *Devin, J.*, at Chambers, Elizabeth City, 5 May, 1934. From PASQUOTANK.

Civil action to restrain the defendants from attempting to list for taxation for the years 1924 to 1933, inclusive, shares of stock in plaintiff bank, the same never having been listed nor the value thereof determined by the State Board of Assessment, as provided by the several Machinery Acts.

From an order continuing the injunction to the hearing the defendants appeal, assigning errors.

Worth & Horner for plaintiff.

John B. McMullan and John H. Hall for defendants.

STACY, C. J. The liability to taxation of shares of stock in plaintiff bank was not decided in the Court below, nor is the question before us for decision.

The appeal presents a question of procedural law only. It is conceded that in the instant case the method prescribed by section 600, chapter 204, Public Laws 1933, for determining the value of bank stock for taxation, has not been followed. *Rockingham v. Hood, Comr.*, 204 N. C., 618, 169 S. E., 191; *Mfg. Co. v. Comrs. of Pender*, 196 N. C., 744, 147 S. E., 284. The injunction, therefore, was properly continued to the hearing.

The cases cited and relied upon by defendants are distinguishable, in that they deal with species of property other than shares of stock in banks, banking associations, and trust companies, segregated for special consideration or administration under the Machinery Act.

Affirmed.

WILMA E. FERRELL v. METROPOLITAN LIFE INSURANCE COMPANY.

(Filed 19 September, 1934.)

Trial D b: Insurance P d—Evidence on issue of payment of premium held conflicting, and directed verdict in insurer's favor was error.

Where the right of plaintiff to recover upon a policy of life insurance in which she is named beneficiary is made to depend solely upon whether a premium thereon had been paid, and plaintiff introduces insurer's receipt therefor, but insurer introduces evidence that the insured's check given in payment was worthless and was returned to insured upon his written acknowledgment that the receipt had been lost, and plaintiff testifies that the purported signature of insured to the acknowledgment was not genuine: *Held*, the evidence as to payment was conflicting and raised an issue for the jury, and the direction of a verdict in insurer's favor was error.

APPEAL by plaintiff from *Devin, J.*, at May Term, 1934, of CURRITUCK.

Civil action to recover on a $2,000 policy of life insurance.

Upon the hearing the issuance of the policy in suit upon the life of plaintiff's husband, she being named as beneficiary therein, the payment of the first semiannual premium on 26 April, 1932, and the death of the insured on 5 February, 1933, were all admitted. Thereupon, the plaintiff offered in evidence an official receipt for the semiannual premium due 26 October, 1932, found by her after her husband's death, and rested. The genuineness of the signature on this receipt was not questioned.

In answer, the defendant offered evidence tending to show that the semiannual receipt of 26 October, 1932, was issued upon tender of a check which proved to be worthless; that said check was returned to the assured 18 January, 1933, upon written acknowledgment by him that the official semiannual receipt of 26 October, 1932, had been lost.

In rebuttal, the plaintiff testified that the purported signature of her husband to said acknowledgment was not genuine.

The court directed a verdict for the defendant, and from the judgment entered thereon the plaintiff appeals, assigning errors.

C. R. Morris and John H. Hall for plaintiff.
Worth & Horner for defendant.

STACY, C. J. The plaintiff made out a prima facie case. The defendant offered evidence tending to show that the policy in suit lapsed

for nonpayment of semiannual premium due 26 October, 1932. The credibility of defendant's defense was challenged by plaintiff's denial of assured's signature to the written acknowledgment. This made it a case for the jury.

There was error in directing the verdict.

New trial.

WHITING MANUFACTURING COMPANY v. CAROLINA ALUMINUM COMPANY.

(Filed 19 September, 1934.)

1. Eminent Domain B b—Defendant hydroelectric company held to have power of eminent domain to acquire lands for generation of electricity.

Where a corporation is authorized by its charter to generate and sell electricity, build dams and hydroelectric plants necessary to the generation of such hydroelectric power, and is therein given power of eminent domain to acquire the necessary rights of way and lands for its dams and the ponding of water if it could not agree with the owners of such lands upon a purchase price, and in pursuance of its charter powers such corporation builds hydroelectric plants and generates and sells electricity to municipalities and individuals as well as electric power to private manufacturing plants, such corporation is a public-service corporation and has the power of eminent domain, N. C. Code, 1705, 1706, and it cannot be successfully contended that its taking of lands for ponding water necessary for one of its dams is a taking of private lands for a private use, N. C. Constitution, Art. I, sec. 17, Federal Constitution, 14th Amendment, sec. 1, nor does the fact that such public-service corporation also engages in private enterprises not connected with its public service alter this result.

2. Eminent Domain D a—Defendant held estopped to complain that regular condemnation proceedings were not had by plaintiff.

Where a power company has the right of condemning lands by a certain method prescribed by statute and its charter, but title to certain land covered by its ponded water is in dispute between it and one claiming title, and such land is covered by its ponded water for a number of years and claimant repeatedly refuses to sell until other unrelated disputes between it and the power company are settled, and in an action in ejectment by the power company in which it prays that if it be determined that defendant is the owner of the land, permanent damages be assessed and it be given title to the property, the defendant fails to demand that the land be regularly condemned, but demands damages for trespass, and acquiesces in a jury trial, the defendant is estopped to complain that plaintiff did not pursue the method of condemnation prescribed by statute and its charter.

3. Eminent Domain C e—Measure and amount of damages for taking of lands under the power of eminent domain.

Where an electric power company, under the power of eminent domain, has erected a permanent dam that has ponded water back upon the lands of a private owner, the measure of damages recoverable by the owner is the fair market value of the land so taken at the time of the taking, in arriving at which the jury may consider the value of the land in connection with all the uses to which it could have been reasonably put, and not exclusively its value for the purpose for which it was used by the owner at the time of the taking, it being the object of the law to fully compensate the owner for his lands, and the charge of the trial court to the jury on the issue of damages in this case is held to be without error.

APPEAL by plaintiff from *McElroy, J.*, and a jury, at March Term, 1934, of GRAHAM. No error.

This is an action of ejectment, brought by plaintiff, a corporation, against defendant, a corporation, to recover possession of about one acre of land in Graham County, North Carolina, on Snowbird River, in the shape of a triangle. The plaintiff alleged that it was the owner of the land and defendant is in the wrongful possession of same. The defendant denied that plaintiff was the owner and set up as a defense certain statutes of limitation. The defendant, as a further defense, set up the following: "(1) The defendant, the Carolina Aluminum Company (formerly the Tallassee Power Company), is a corporation, created by the act of the General Assembly of North Carolina, chapter 122 of Private Acts of 1905, and duly organized thereunder; that among other rights, powers, and privileges conferred by said act of the Legislature this defendant was given the right to own, construct and develop and operate dams and water powers, with all the rights and privileges incident thereto, including the right of eminent domain for condemning land for the ponding of water and other purposes, which charter or act of the Legislature is referred to as fully as if written herein, and asked to be made a part of this answer. (2) This defendant says that it is informed and believes that in the event the plaintiff establishes a superior title to that portion of the lands described in the complaint, which is claimed by the defendant, or if it establishes damages thereto, that it has the right to have said land condemned in this action, and permanent damages assessed by the jury in this action for the value of that portion of the property which is claimed by the defendant if the plaintiff establishes superior title thereto; and this defendant here elects that should plaintiff establish its right to the portion of the land claimed by the defendant, that permanent damages be assessed therefor.

"Wherefore, having fully answered, defendant prays that the action be dismissed and that it go without day and recover its cost; or, in the event that plaintiff establishes superior title to the portion of the land

described in the complaint, claimed by the defendant, that the same be condemned and permanent damages assessed therefor in this action."

The defendant also, in a supplemental answer, set up a contract between the two corporations (Tallassee Power Company, predecessor in title), in which certain things were to be done by each corporation, and that in the contract it had a right to purchase the land at $10.00 an acre. The plaintiff made reply denying the material allegations of the defense of defendant corporation, and set up the following: "That it is advised, informed, and believes that the defendant was not at the time of the trespass and is not now a public-service corporation, and had not then nor has it yet complied with or brought itself within the requirements and provisions of the Constitution, and the laws of North Carolina made in pursuance thereof, to justify and invest in it the right and power of eminent domain; that the defendant is, in reality, and was at the time of the trespass, existing, acting, and doing business only as auxiliary corporation of the Aluminum Company of America, which is a corporation of some foreign state, and wholly concerned and employed in strictly private business and enterprise and not public service, and plaintiff says to allow the defendant to take plaintiff's property under the guise of a public-service corporation, as it seeks to do, would be taking private property for a private use and without due process of law, in contravention and against the provisions of section 1 of the 14th Amendment of the Constitution of the United States of America and Article I, section 17, of the Constitution of the State of North Carolina, and the laws thereof."

The plaintiff, also in reply to defendant's supplemental answer, says that the contract referred to of 5 October, 1917, expired and became inoperative after 1 May, 1920. The plaintiff further says: "However, if the court should hold that the defendant is entitled to have plaintiff's land condemned and permanent damages assessed, which right this plaintiff denies, then this plaintiff would show the court further and asks leave to amend its complaint by supplementing and adding thereto the following paragraph, to wit:

"That the plaintiff's lands described in the complaint is situated on and covers and embraces a large scope of Big Snowbird River, which river, on account of its geographic location, its large volume of water, rapid and average flow, and other attendant facilities, made it favorably adaptable and highly suitable and valuable for potential water power, and plaintiff's said land was, in addition to the other valuable and adaptable use, of great and high value as a water power proposition, etc.

"The defendant, well knowing the location, boundary, and title of plaintiff's land before and at the time it completed its lake and appro-

priated the same, made no effort whatever to purchase said land from the plaintiff, or to procure its consent for its use, and that if the defendant contends that it had the right of power of eminent domain at that time, plaintiff alleges and shows to the court that it made no attempt or effort whatever to exercise such right as prescribed by the laws of the State of North Carolina, but that it, without the knowledge or consent of plaintiff, chose to confiscate or take the same without purchase or due process of law."

After setting forth other matters, the plaintiff made the following prayer: "Wherefore, plaintiff prays judgment of the court against the defendant: (1) For relief of ejectment of defendant from its land as demanded in the complaint. (2) For $750.00 for amount due by defendant for rental value of said land. (3) If the court should hold that defendant has the right to condemn and appropriate the plaintiff's land, then plaintiff demands judgment for: (a) $4,000 permanent damages; (b) $500.00 as punitive damages; (c) for the costs of this action and such other and further relief and remedies in the premises as to the court may seem just and proper."

The defendant, in reply, among other things, says: "That the said plaintiff, as this defendant is advised and believes, has sold and conveyed to the Champion Fibre Company, under deed dated 19 December, 1926, and recorded in the office of the register of deeds of Graham County, North Carolina, in Book 36, page 1, all of the exclusive rights, privileges, and easements conveyed to it under said contract between it and the defendant, thereby creating a continual or perpetual right or easement to it or its grantees, to the use of said water in said reservoir for transportation purposes."

The defendant makes the following prayer: "Wherefore the defendant prays judgment: (1) That the court order specific performance by the plaintiff of each and every of the terms of the contract of 5 October, 1917, providing for the conveyance of any lands owned by the plaintiff which have not heretofore been conveyed to the defendant at the price of $10.00 an acre, be complied with. (2) That the court decree that the plaintiff is estopped by its contract and by its acts and conduct from demanding from the defendant a greater sum than $10.00 per acre for any lands owned by it that may be overflowed by the waters impounded by the Melton or Santeetlah Dam, and that it be required to execute deed therefor upon the payment, or tender, to it of the sum of $10.00 per acre for all such lands to which it held title at the date of the commencement of this action."

The plaintiff replies to this and sets up a letter dated 11 May, 1928, from an agent of defendant, requesting extension of the contract of 5 October, 1917, which plaintiff refused on 18 May, 1928, contending the contract expired 1 May, 1920.

The following issues were submitted to the jury by the court below, and their answers thereto: "(1) Is the plaintiff the owner of that portion of the land described in the complaint shown on the map from B to 2 and from 2 to 7, 7 to 8, and from 8 back to B, which is now in the possession of the defendant? A. 'Yes.' (2) Is the defendant in the unlawful and wrongful possession of said land? A. 'Yes.' (3) If so, is the plaintiff required under the terms of the contract to convey said land to the defendant at $10.00 per acre? A. 'No.' (4) Is the plaintiff estopped under the terms of its contract and by its acts and conduct to charge the defendant more than $10.00 per acre? A. 'No.' (5) Is the plaintiff, under its contract with the defendant and by its acts and conduct, estopped to assert its right to the possession of said land? A. 'No.' (6) What permanent damages, if any, is the plaintiff entitled to recover of the defendant for the lands in question? A. '$350.00.'"

The court below rendered judgment in accordance with the verdict and in the judgment is the following: "It is thereupon considered, ordered, adjudged, and decreed by the court that the defendant, Carolina Aluminum Company, upon the payment into court of the sum of $350.00, together with the costs of this action, be and it is hereby vested with a permanent easement, with the right of possession for the purpose of flooding that part of plaintiff's land shown on the court map and lying within the lines indicated: Beginning at the letter B and running thence to the figure 2; thence from figure 2 to figure 7; thence from figure 7 to figure 8; thence from figure 8 to the letter B, the point of beginning, so long as the said defendant, Carolina Aluminum Company, its successors or assigns, shall use said lands in connection with the development, production, and use of hydroelectric power generated by its Santeetlah hydroelectric development in Graham County."

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

T. M. Jenkins for plaintiff.

S. W. Black, Moody & Moody, and R. L. Smith & Son for defendant.

CLARKSON, J. The charter of the Tallassee Power Company, which was pleaded by defendant, is set forth in chapter 122, Private Laws of 1905. An amendment changed the name to the Carolina Aluminum Company. The charter, among other provisions, contains the following: "Sec. 4. That said company is authorized and empowered to supply to the public, including both individuals and corporations, whether private or municipal, within the State of North Carolina and elsewhere, power in the forms of electric current, hydraulic, pneumatic, and steam pressure, or any of the said forms, or any other forms for use in driving

machinery, and for light, heat and all other uses to which the power so supplied can be applied. . . . And the company may acquire, own, hold, sell or otherwise dispose of water power, water privileges in the State of North Carolina, and locate, acquire, construct, equip, maintain and operate all necessary plants for generating and developing by water, steam, or any other means, and for storing, using, transmitting, distributing, selling and developing power, including dams, gates, bridges, sluices, tunnels, stations and other buildings, and all other works, structures, machinery and appliances which may be necessary to operate said plants. . . . Sec. 5. To carry on and conduct the business of generating, making, transmitting, furnishing and selling electricity for the purpose of lighting, heat and power, and transmission of power, and to furnish and sell, and to contract for the furnishing and sale to persons, corporations, towns and cities of electricity. . . . For all uses and purposes for which electricity is now or may be hereafter used. . . . Sec. 6. And, whenever any land for the location of a dam or dams, or of a canal or canals, or for ponding of water, or any other lands or rights of way may be acquired by said company for the purpose of constructing and operating its works, or for conducting the business herein authorized, or any part of said business, and the said company cannot agree with the owner thereof for the purchase of the same, the same may be condemned and taken and appropriated by said company."

The act provides if the power company cannot agree with the owner on a price for the purchase of the land a certain method is set forth to condemn it—commissioners, etc., appointed. The Santeetlah development consists of a reinforced concrete dam about 214 feet high and 1,300 feet across the top opening, down to the width of the river at the bottom. The lake covers an area of about 3,000 acres. It took approximately two years to construct the dam. This dam backs the water over the acre of land in controversy on Snowbird River, a tributary of Cheoah River. The project was completed in 1926 and the land in controversy covered with water. The capacity of the plant is 66,000 horsepower. The testimony of defendant's witnesses was to the effect that the acre of land in 1926 was worth $10.00, $15.00, $30.00 and $100.00 for the acre. The plaintiff's witness, D. B. Burns, was to the effect: "I have an opinion as to its reasonable market value when it was covered with water in 1926, and know the capabilities of this property and the uses for which it is adapted, its reasonable market value was $1,940.00 per acre. This land was valuable as a water-power proposition and in giving my opinion I took into consideration its adaptability for water-power purposes."

It was in evidence that the defendant, since the project was completed, has been selling power to the following public-service corpora-

tions: Tennessee Power Company, Tennessee Electric Company, Carolina Power and Light Company, Nantahala Power Company, Knoxville Power Company, and Aluminum Company of America, at Alcoa.

Part of the time it would be used directly at Knoxville, and other times it would supply the area between Chattanooga, Knoxville and Alcoa. Served the territory all the way from Knoxville to Chattanooga. The Carolina Power and Light Company serves Newport, Asheville, Kingsport, and Knoxville. The Nantahala Power and Light Company serves Balsam Mountain and Murphy, and supplies the following towns: Franklin, Andrews, Tapoco, Robbinsville, and Marble. It supplies a large manufacturing plant in the vicinity of Sylva, but does not supply the town. Defendant sells about 20 per cent of the output to the Tennessee Electric Company; about 20 per cent to the Carolina Power and Light Company; between 1 and 5 per cent to Nantahala Power and Light Company; from 1 to 5 per cent to Knoxville Power Company; and the balance to the Aluminum Company of America at its plant in Alcoa.

The plaintiff's witness, D. B. Burns, further testified, in part: "I don't know how many acres of land was sold to Tallassee Power Company, now Carolina Aluminum Company, in the Santeetlah reservoir; I would guess around 50 acres. They took a deed. The land is now covered by water. We sold it at ten dollars an acre under the terms of the contract. . . . I assumed when we sold it they were to cover it with water. It was so stated in the contract."

J. E. S. Thorpe testified for defendant, in part: "I had a conversation with D. B. Burns in regard to the purchase of this acre of land. It was in 1930, after I moved to Bryson City." Witness was asked the question: "What was the conversation about this acre?" Witness answered: "I asked Mr. Burns why he was making so much to do with this small area in the Santeetlah basin, and he said he agreed," . . . "He said it did look trivial to him, too. I said, why don't you sell it to the company at a fair price. You know what land sells for in that section. He said, no, I won't sell it until we reach an agreement for all the Tennessee River with your company, that is, Nantahala Power and Light Company, and says, I am holding it over your head. I said that I thought this was an unethical position to maintain, and that I thought I could arrange an agreement. He said not only your company lands, but over on the Tennessee River. He placed it beyond the pale of anything."

The first question: Was defendant a public-service corporation and serving the public, and did the defendant have the right of eminent domain? We think so. The charter gave it all rights, privileges, and powers of a public-service corporation. The evidence was to the effect

that it was carrying out the purposes of its charter and generating and selling electricity. This power of eminent domain to such a corporation has long been the public policy of the State. N. C. Code, 1931 (Michie), sec. 1705, is as follows: "For the purposes of this chapter, unless the context clearly indicates the contrary, the word 'corporation' includes the bodies politic and natural persons, enumerated in the following section, which possess the power of eminent domain."

Section 1706: "The right of eminent domain may, under the provisions of this chapter, be exercised for the purpose of constructing their roads, canals, lines of wires, or other works, which are authorized by law and which involve a public use or benefit, by the bodies politic, corporation, or persons following: (1) Railroads, street railroads, plank road, tramroad, turnpike, canal, telegraph, telephone, electric power or lighting, public water supply, flume or incorporated bridge companies. (2) Municipalities operating water systems and sewer systems and all water companies, operating under charter from the State or license from municipalities, which may maintain public water supplies, for the purpose of acquiring and maintaining such supplies. (3) Persons operating or desiring to operate electric light plants, for the purpose of constructing and erecting wires or other necessary things," etc.

In *Land Co. v. Traction Co.*, 162 N. C., 314 (315), it is said: "The plaintiff contends that the Piedmont Traction Company cannot exercise the power of eminent domain because under its charter it is authorized to engage in private business in addition to its authority to operate a street railway, which is a *quasi*-public business. We think the law is clearly stated thus in 15 Cyc., 579: 'But the fact that the charter powers of the corporation, to which the power of eminent domain has been delegated, embrace both private purposes and public uses does not deprive it of the right of eminent domain in the promotion of the public uses.' The traction company has the power of eminent domain, not only by virtue of its charter, but by Revisal, secs. 1138 and 2575; *Street R. R. Company v. R. R.*, 142 N. C., 423."

Plaintiff in its brief states the law thus: "The law of the land, in this relation here, is that private property cannot be taken for private use, with or without compensation, without the consent of the owner, and can never be taken under the power of eminent domain, except for public use and upon payment of just compensation."

The relation here is not private use, but defendant is a public-service corporation, serving the public. See chapter 32, Electric, Telegraph, and Power Companies. Also, see *Brown v. Mobley*, 192 N. C., 470. The right of eminent domain to these public-service corporations makes them amenable to State control. The State can control a public-service corporation, and has done so. (Michie), *supra*, sec. 1035, is as follows:

"The Corporation Commission shall have such general control and supervision as is necessary to carry into effect the provisions of this chapter and the laws regulating the companies, corporations, copartnerships, and individuals specified herein, over—(1) railroads, etc., (2) telegraph and telephone companies, etc., (3) electric light, power, water and gas companies and corporations, other than such as are municipally owned or conducted, and over all persons, companies, and corporations other than municipal corporations now or hereafter engaged in furnishing electricity, electric light, current, or power and gas. (4) All water power, hydroelectric power, and water companies now doing business in this State, or which may hereafter engage in doing business in this State, whether organized under the general or private laws of this State or under the laws of any other state or country. Such companies are deemed to be public-service companies and subject to the laws of this State regulating public-service corporations," etc.

The right of the State to establish regulations for public-service corporations, and over business enterprises in which the owners, corporate or individual, have devoted their property to a public use, and to enforce these regulations by appropriate penalties, is now and has long been too firmly established to require or permit discussion. *Corporation Commission v. Mfg. Co.,* 185 N. C., 17.

The second question: Did the defendant have the right in this action to have permanent damages assessed under its power of eminent domain for its permanent trespass on the lands of the plaintiff by the impounding of its lake with a permanent structure? We think so.

The serious question presented is the position taken by plaintiff that defendant did not pursue the method set out in its charter to have this land condemned? We think on this record this position cannot be sustained by plaintiff. The land was in dispute. The defendant had the land flooded since 1926. The plaintiff knew of this, and to its agent, Burns, said: "It did look trivial to him, too. . . . No, I won't sell it until we reach an agreement for all the Tennessee River with your company. . . . I am holding it over your head." The land was originally contracted to defendant for $10.00 an acre, but the time limit to purchase had expired. This witness at the trial testified it was worth $1,940.00. This action was commenced by plaintiff 19 May, 1932. Plaintiff stood by for six years and saw this acre flooded, refused to sell it to defendant. We think that when defendant in its answer prayed that if it did not own the acre of land that the same be condemned and permanent damages assessed in the action, it was incumbent on plaintiff, if it wanted the remedy pursued under defendant's charter, it should have so requested. On the contrary, it prayed for $4,000 damages, it ac-

quiesced in the jury trial by submitting issues and doing other things which it is now estopped to complain of.

In 10 R. C. L. (Eminent Domain), p. 230, part sec. 194, is the following: "It is well settled that an owner of land who knowingly allows an expensive public improvement to be erected upon his land without proper condemnation proceedings, waives his right to object to the validity of the taking, and even when he is constitutionally entitled to compensation in advance, he is in such case estopped from asking for an injunction against the continued occupation of his land, or from attempting to require possession by writ of entry or ejectment proceedings. Furthermore, an owner who has so acted may himself be enjoined from attempting forcibly to remove or destroy the works that have been constructed upon his land. In certain cases, however, the rule has no application, as, for example, where a dam was properly constructed upon land acquired for the purpose and where as a consequence not anticipated by the owner it effected a flooding of land not taken. When the only ground for complaint is that compensation has not been paid in advance, an owner who allows the work to be constructed without objection cannot treat the taking as unlawful, even to the extent of bringing a common-law action of trespass, if there is a statutory proceeding available for the ascertainment of damages. The fact that a landowner stands by and acquiesces in or even consents to the appropriation of his land for public use does not, however, amount to a waiver on his part of his right to claim compensation for the land taken and the damage inflicted."

In *Rouse v. Kinston,* 188 N. C., 1 (11), speaking to the subject: "We think the principle in *Keener v. Asheville,* 177 N. C., 4, applicable. It is there said: 'In this view, the present case, we think, comes clearly within the recent decision of *Mason v. Durham,* 175 N. C., 638. There the county commissioners, in straightening a public road, had taken a strip of plaintiff's land. In an action to recover damages, defendants denied plaintiff's ownership of the land and, generally, his right of action, and on the hearing resisted recovery for the reason, among others, that plaintiff's remedy was in petition to the board of commissioners, as the statute provided, and it was held, among other things: 'The county board of commissioners, in acting upon a petition by the injured owner whose land had been taken for road purposes under a statute providing for the assessment of damages by this method, does so in an administrative capacity; and where the board has taken and is using the land for such purposes, *and the owner has not followed the special method provided and brings his action in the Superior Court for his damages, the defendant's denial of plaintiff's ownership and its liability for the damages waives its right to insist that the statutory method should have*

been pursued by the plaintiff.'" (Italics ours.) *Fleming v. Congleton,* 177 N. C., 186; *Efird v. City of Winston-Salem,* 199 N. C., 33. The statutory remedy against the State Highway Commission (a State agency) for taking land under the act is exclusive. *Long v. Randleman,* 199 N. C., 344.

The court below charged the jury: "In actions of this kind, our Court has laid down the following rule as to the measure of damages: The Supreme Court says that it is too well settled that when for the purposes of meeting and providing for a public necessity the citizen is compelled to sell his property, or permit it to be subjected to a temporary or permanent burden, he is entitled by way of compensation to its actual market value. The difficulty arises not so much in fixing the standard of the right as in ascertaining what elements or factors may be shown in applying the standard. Certainly where by compulsory process and for the public good the State invades and takes the property of its citizens, in the exercise of its highest prerogative in respect to property, it should pay to him full compensation. The highest authorities are to that effect. The market value of property is the price which it will bring when it is offered for sale by one who desires but is not obliged to sell it, and is bought by one who is under no necessity of having it. In estimating its value all the capabilities may be applied for which it is adapted may be considered, and not merely the condition it is in at the time and the use to which it is then applied by the owner."

This charge is fully in accord with the authorities in this jurisdiction. *Power Co. v. Power Co.,* 186 N. C., 179 (183); *Power Co. v. Hayes,* 193 N. C., 104 (107); *S. v. Lumber Co.,* 199 N. C., 199.

We see no error in the court's overruling plaintiff's demurrers. The plaintiff's exceptions and assignments of error as to the evidence introduced by defendant cannot be sustained. The issues submitted by the court below were determinative of the controversy, and we see no error in submitting them. We see no error in the charge or as to the burden of the issue. We see no prejudicial or reversible error on the record and the many exceptions and assignments of error on the part of the plaintiff cannot be sustained. From the evidence, the jury awarded plaintiff full damage for its one acre of land, which originally plaintiff contracted to sell for $10.00 an acre, but the time limit had expired and the jury fixed the damage at $350.00 for the acre.

We see in the judgment of the court below

No error.

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, A CORPORATION, v. GEO. B. LAZARUS AND WIFE, HELEN LAZARUS; JAMES L. TAYLOR, JR., TRUSTEE; THE GUARANTY TITLE AND TRUST CORPORATION; H. M. KERR, TRUSTEE IN BANKRUPTCY OF GUARANTY TITLE AND TRUST CORPORATION, A BANKRUPT; SEABOARD CITIZENS NATIONAL BANK OF NORFOLK, VIRGINIA, TRUSTEE; GREYLING REALTY CORPORATION, NATIONAL SURETY COMPANY, A CORPORATION, ETC.

(Filed 19 September, 1934.)

1. Appeal and Error J c—Where court determines issues as matter of law in case submitted to it by agreement, its findings are not conclusive.

Where the parties agree that the court should find the facts, its findings upon conflicting evidence are as conclusive as the verdict of a jury, but where under such agreement the court determines the issues as a matter of law, the judgment must be reversed if there is any sufficient evidence contrary to the findings made by the court, although there is evidence to support such findings.

2. Payment C b—

Payment by a debtor to the collecting agent of the creditor is payment to the creditor.

3. Same: Principal and Agent C a—Evidence held sufficient to raise issue of whether party to whom payment was made was collecting agent.

A mortgage company pledged notes and mortgages executed to it to a trustee bank under a trust indenture to secure the payment of the mortgage company's bonds, the trust indenture empowering the trustee bank to employ agents to collect the pledged notes, and providing that it might employ the mortgage company for this purpose, and that in the event the mortgage company should refuse or be unable to act as collecting agent, the trustee bank should receive reasonable compensation for such services. There was evidence that L.'s notes and mortgage, together with others, were pledged to the trustee bank under the trust indenture, and that thereafter L. paid the mortgage company one note and interest on the debt for three years, and that the trustee bank accepted the money from the mortgage company, surrendered L.'s note and interest coupons, which were canceled by the mortgage company and returned to L. There was also evidence that the trustee bank knew that for three years the mortgage company had been collecting principal and interest on all notes pledged, and maintained a collection office for this purpose. Thereafter L. paid the mortgage company the full balance of his mortgage debt plus an anticipation fee under an agreement that the mortgage and notes be canceled. Before payment to the trustee bank the mortgage company became insolvent, and the trustee bank contended that payment to the mortgage company did not constitute payment to it. *Held*, there was sufficient evidence to raise the issue of whether the mortgage company was a collecting agent for the trustee bank, and the court's determination as a matter of law that payment to the mortgage company did not discharge the debt *is held* for error.

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

ASSURANCE SOCIETY *v.* LAZARUS.

CIVIL ACTION, before *McElroy, J.*, at May Term, 1933, of HENDERSON.

On 1 August, 1926, the Guaranty Title and Trust Corporation entered into a collateral trust indenture with the Citizens Bank of Norfolk, Virginia, trustee. This document is voluminous, but recites that the Guaranty Company "has determined . . . to create and issue in the manner and form as provided in this indenture its certificate to be known as the Guaranteed Collateral Trust Gold Certificates of the company without limit as to amount; . . . and whereas the certificates are to be issued in series, each series to be limited to the principal amount of not to exceed $1,000,000; and whereas the payment of the principal and interest of the certificates is to be guaranteed by the National Surety Company; . . . and whereas, in order to secure the payment of the principal and interest of all the certificates at any time issued and outstanding under the indenture, . . . the company . . . has determined to execute to the Citizens Bank of Norfolk, Virginia, as trustee, . . . an indenture . . . and to pledge and assign thereunder as security for the respective series of certificates collateral of the character hereinafter referred to." Section 2, Article II, of said indenture provides that "all securities now or hereafter assigned, transferred, pledged, delivered, and set over unto the trustee shall be promissory notes and bonds duly executed by individuals, firms, or corporations, secured by first mortgages or deeds of trust upon improved real property owned in fee simple by the respective makers of the notes," etc. The Guaranty Company guaranteed to the holder the payment of all of said notes or bonds.

The trustee had the power in its discretion to foreclose the mortgages or deeds of trust or to assign or sue upon any or all of the securities in its own name as if it were the beneficial owner thereof. It was further provided that the trustee "shall at all times, upon request of the company, accept from any debtor the amount owing upon any security deposited with the trustee." It was further provided that "the company will well and truly, on or before the 20th day of each month during the continuance of this trust indenture, and so long as any of the certificates are outstanding, give notice in writing to the trustee . . . of any and all defaults in the payment of principal or interest upon any of the securities deposited with the trustee . . . which may be continued sixty days prior to the first of such month, and for such purpose the trustee will from time to time inform the company with respect to any and all collections made by it on account of principal or interest," etc. It was further provided that "the trustee may exercise its powers and perform its duties by or through and may select and employ agents, attorneys, etc., and may in all cases pay to them or any of them such reasonable compensation as it deems proper," etc. . . . The trustee may appoint the company its agent for the collection of any moneys due

to the trustee for principal or interest on the securities pledged hereunder, etc. Also, a portion of section 3, page 62, reads as follows: "Or if, for any reason, the company shall refuse, or be or become unable, to act as agent for the trustee for the collection of moneys due the trustee for principal of or interest on the securities pledged hereunder, the trustee shall be entitled to fair and reasonable compensation (over and above any and all other compensation to which it would otherwise be entitled hereunder) for any services it may render, or shall by the terms of this trust indenture be required to render in the execution of the trust hereby created, in addition to the services ordinarily required of it had such default, refusal, or inability to act not occurred."

On 16 August, 1926, George B. Lazarus negotiated a loan of $5,500 from the Guaranty Title and Trust Corporation of Norfolk, Virginia. This loan was evidenced by seven notes or bonds, all dated 16 August, 1926. The first three bonds were in the sum of $500.00 each, and the last four in the sum of $1,000.00 each. Each of said bonds was payable to bearer "at the office of the Guaranty Title and Trust Corporation of Norfolk, Virginia." The first bond for $500.00 matured 16 August, 1928, and the second bond matured 16 August, 1929. These notes were deposited in the hands of the Citizens Bank of Norfolk, Virginia, on 23 November, 1926, under and by virtue of the terms of the trust indenture hereinbefore mentioned, along with many other bonds and notes of like character, totaling a large sum. Each of the Lazarus bonds had attached to it interest coupons in the sum of $15.00.

After procuring the money Lazarus began making payments upon the indebtedness. When the first bond for $500.00 matured on 16 August, 1928, Lazarus paid the same in full to the Guaranty Title and Trust Corporation and received from said corporation the said bonds marked "canceled," and with the following words stamped thereon: "Paid Guaranty Title and Trust Corporation, Norfolk, Virginia." Lazarus also paid thirty-five interest coupons to the Guaranty Title and Trust Company, and each of said coupons was returned to him by said Guaranty Corporation marked "canceled" and stamped thereon "Guaranty Title and Trust Corporation of Norfolk, Virginia," etc. Lazarus testified as follows: "When the notes were due, or about ten days before they were due, I always got a letter from the office of the Guaranty Title and Trust Corporation of Norfolk, Virginia, . . . and I always sent the money on that date, and they would send me a receipt and coupon of what I paid. . . . After I paid the money I would later on receive coupons through the mail."

On or about 12 April, 1929, the defendant Lazarus applied to the plaintiff Insurance Company for a loan of $8,000 on his property. In order that the plaintiff should have a clear title it was necessary to pay off the loan of $5,000 to the Guaranty Title and Trust Corporation.

Thereupon, on 1 April, 1929, Lazarus wrote a letter to the Guaranty Title and Trust Corporation, as follows: "I am contemplating leaving this part of the country and liquidating all my business here and would like to straighten up that loan for $5,000 on my house. The number of the loan is 3492. Kindly let me know at once how soon I can take this off." On 3 April, 1929, the Guaranty Title and Trust Corporation, through its vice president, Virginius Butt, replied to the Lazarus letter as follows: "Answering your letter of 1 April, relative to retiring your loan at Hendersonville, we have communicated with the holders of your notes, who agree to accept retirement of the unpaid balance, aggregating $5,000, for a premium of three per cent, or $150.00 Your check in the principal amount of $5,300, with interest on $5,000 from 16 February, 1929, to date of remittance should be forwarded to us at your convenience and the notes will be returned." Thereafter, on 2 May, 1929, the attorneys for Lazarus duly sent a check for $5,365, payable to the Guaranty Title and Trust Corporation. There was a notation on the check to the effect that it was in payment for the balance of principal, interest and anticipation fee of $300.00. This check was duly deposited by the Guaranty Corporation to its credit in the Seaboard Citizens National Bank of Norfolk, and on 4 May the Guaranty Corporation acknowledged receipt of check to the attorneys of Lazarus, stating in the letter, "Instructions are going forward to our accounting department today to forward notes, deed of trust and insurance policies, which will probably be mailed on Monday."

Lazarus did not receive his papers and the Guaranty Title and Trust Corporation was placed in the hands of a receiver on 25 June, 1929, and afterwards became a bankrupt.

The Citizens Bank of Norfolk, Virginia, was duly merged with the Seaboard Citizens National Bank of Norfolk, and under and by virtue of provision in the trust indenture the said Seaboard Citizens National Bank became the successor trustee to the original trustee named in the indenture.

Lazarus made ten payments to the Equitable, and testified subsequently: "A man came in and asked me about the loan and said he represented the Guaranty Title and Trust Company, and said it hadn't been paid. . . . After I found out about it, I did not make any more payments to the Equitable. . . . No one ever sent me any notice to pay anything on this mortgage after Mr. Taylor sent this money; they haven't until this day."

On 13 April, 1931, the Equitable Life Assurance Society of the United States instituted this suit against Lazarus, the trustee in bankruptcy of the Guaranty Title and Trust Company, the Seaboard Citizens National Bank of Norfolk, and all other persons having interest in the transaction for the purpose of foreclosing its deed of trust and for re-

moving and canceling the deed of trust securing the loan to the Guaranty Title and Trust Corporation as a cloud upon the title.

When the cause came on for hearing a jury trial was waived and all parties "consented that the matter may be presented to and heard by the trial judge, and if there develops on the trial any disputed question of fact, then the parties agreed that the trial judge might find the facts and answer the issues to be submitted for that purpose." There was a certain stipulation in the record which has no bearing on the decision in this case.

The trial judge heard the evidence and submitted two issues, as follows:

1. "Have the Lazarus notes and deed of trust, being those in controversy in this action and now held by the defendant Seaboard Citizens National Bank, trustee, been legally paid and discharged, as alleged in the complaint?"

2. "If not, what amount is due said Seaboard Citizens National Bank, trustee, on account of said notes and deed of trust?"

The trial judge answered the first issue "No," and the second issue "$5,000, with interest from 16 February, 1929." The record, however, discloses the following: "After hearing the evidence and argument of counsel, the court held that, as a matter of law arising upon all the evidence, . . . the payment to the Guaranty Title and Trust Company did not operate to discharge the bonds held by the Seaboard Citizens National Bank, as trustee, and answered the issues as appears in the record."

Certain evidence with respect to dealings and transactions between the trustee bank and the Guaranty Title Corporation was offered at the trial.

A. W. Lee, assistant treasurer of the Guaranty Title and Trust Corporation, testified that "Mr. Lazarus made payments on his principal and interest to the Guaranty Title and Trust Corporation. . . . We sent out notice ten days prior to the maturity, and if they were not paid our collection department followed them up with letters. The company pursued the matter of those collections by letter. Such notices were sent to Mr. Lazarus; he responded to them. . . . The Guaranty Title and Trust Corporation always paid the coupons and bonds which had matured when the bank sent them over. . . . We sent out notices and also followed up the collection in cases where the installments were not paid when due. . . . We then once a month received a list from the Citizens Bank (now defendant Seaboard Citizens National Bank) setting forth what installments were paid. I am not quite clear that it showed what installments had not been paid. . . . The Guaranty Title and Trust Corporation never at any time had possession of this collateral until it paid the trust department of the bank for it."

Hugh G. Brown, assistant to the trust officer of the defendant Seaboard Citizens National Bank, testified: "We presented these bonds for payment as well as all other bonds that were pledged to secure Series A bonds of the Guaranty Title and Trust Corporation about every thirty, sixty or ninety days. . . . We did not make any effort to collect the collateral from the makers of various notes or bonds prior to 25 June, 1929, which is the date on which the Guaranty Title and Trust Corporation was placed in the hands of a receiver. We had not notified Mr. George B. Lazarus that the bank held his bonds in trust. We had not notified any of the borrowers whose notes we held that they were held by us in trust. The only effort we made to collect was from the Guaranty Title and Trust Corporation's guaranty up until the time it failed. I presumed that the Guaranty Title and Trust Corporation was making collections on these collaterals. Well, I do not know that we would say they were making collections. I presume the borrowers were putting their money there to meet the obligations which they had signed and made payable to the Guaranty Title and Trust Corporation. . . . I had a presumption of what was going on. . . . The trustee bank did not set up any arrangement for making collection from the borrowers individually prior to the failure of the Guaranty Title and Trust Corporation. . . . We knew that these notes had to be paid, and expected them to be paid. I did not say that we were relying on anyone in particular to make collections from the borrowers. . . . Well, it was presumed somebody had to do it. We knew that we weren't doing it, and we knew that we had not appointed an agent to do it, and I presume that we knew if anybody was doing it, it was the Guaranty Title and Trust Corporation. . . . I presume they were making them. I did not inquire to find out if the Guaranty Title and Trust Corporation was making the collection. . . . The natural presumption was in the regular course of business that the Title Company was doing it." There was other evidence that the Guaranty Title and Trust Corporation received payments of interest promptly and sometimes held the money for various periods of time, ranging from two to six months, before paying same over to the trustee.

From judgment rendered, plaintiff and Lazarus appealed.

Bourne, Parker, Arledge & DuBose for plaintiff.

Redden & Redden for George Lazarus and wife.

James L. Taylor, Jr., trustee, in propria persona.

Johnson, Smathers & Rollins for Seaboard Citizens National Bank of Norfolk, Virginia, trustee; Greyling Realty Corporation, and National Surety Company.

BROGDEN, J. Was there any competent evidence that the Guaranty Title and Trust Corporation was the agent of the Seaboard Citizens National Bank, trustee, holder, in making collections upon the Lazarus notes?

Manifestly, if the Guaranty Title and Trust Corporation was the collecting agent of the Seaboard Citizens National Bank, the holder, then the payment by Lazarus to such agent constituted payment to the holder. A jury trial was waived, and it was agreed by all parties that the judge should find the facts. Pursuant to such stipulation the judge answered certain issues appearing in the record. There was evidence to support the answers so made to such issues. Consequently, nothing else appearing, the judgment should be affirmed, because "parties can have their causes tried by jury, by reference, or by the court. They may waive the right of trial by jury by consenting that the judge may try the case without a jury, in which event he finds the facts and declares the law arising thereon. . . . His findings of fact are conclusive, unless proper exception is made in apt time that there is no evidence to support his findings or any one or more of them. . . . The findings of fact by the judge, when authorized by law or the consent of parties, are as conclusive as when found by a jury, if there is any evidence." *Buchanan v. Clark,* 164 N. C., 56, 80 S. E., 424. See, also, McIntosh's North Carolina Practice and Procedure, sec. 517. However, the record discloses that at the conclusion of all the evidence and argument of counsel "the court held that as a matter of law . . . the payment to the Guaranty Title and Trust Company did not operate to discharge the bonds held by the Seaboard Citizens National Bank as trustee." Therefore, if there is any evidence of agency in the record, the judgment was improvidently entered, and must be reversed.

This Court is of opinion that there is such evidence of agency. The trust indenture between the Guaranty Corporation and the bank is an intricate and voluminous document, disclosing in minute detail the whole scheme of lending money and the business methods and procedures involved in the multitude of transactions. By virtue of the indenture the bank received hundreds of notes, including those of Lazarus. Attached to these hundreds of notes were more hundreds of interest coupons. Indeed, the trust agreement tends to show that the Guaranty Corporation selected the bank to act as trustee and was at all times a depositor of the bank. From the volume of business involved it would not be unreasonable to infer that the bank regarded the trust indenture as a happy and profitable banking connection. The trust document expressly empowered the trustee to employ agents and to pay them such reasonable compensation as it deemed proper. Moreover, the bank, as trustee, was authorized to appoint the Guaranty Company "its agent

for the collection of any moneys due to the trustee . . . on the securities pledged hereunder." Furthermore, it was also provided that if the Guaranty Company "shall refuse . . . or become unable to act as the agent for the trustee, for the collection of moneys due to the trustee," . . . then such trustee was to receive "fair and reasonable compensation for any services it may render."

For a period of practically three years Lazarus made payments of interest to the Guaranty Corporation. The bank received this money without protest or inquiry and turned over to the Guaranty Corporation such interest coupons. In addition, Lazarus paid one principal note of $500.00. The bank received this money without protest or inquiry and turned the note over to the Guaranty Corporation. The bank knew at all times for approximately three years that the Guaranty Corporation was collecting principal and interest from Lazarus and others, and that it maintained a collection department for the express purpose of collecting principal and interest from hundreds of borrowers whose notes were in the possession of the bank. Indeed, Brown, the trust officer of the bank, said on cross-examination: "I presume that the Guaranty Title and Trust Corporation was making collections on these collaterals. . . . I had a presumption of what was going on. . . . I presumed they were making them."

While the authorities are not in agreement upon the question, this Court has spoken in several cases. The latest utterance is *General Motors Acceptance Corporation v. Fletcher,* 202 N. C., 170, 162 S. E., 234, in which it is held "that where there is evidence tending to show that an alleged agent has repeatedly collected money owed to the alleged principal, and that the alleged principal has received the money and applied it to the debts, the inference is permissible that the agreement to that effect had been made by and between them, and that the evidence is sufficient to make out a prima facie case of agency." See, also, *Buckner v. C. I. T. Corporation,* 198 N. C., 698, 153 S. E., 254; *Credit Co. v. Greenhill,* 201 N. C., 609, 161 S. E., 72.

The trustee relies upon *Baldwin v. Adkerson,* 156 Va., 447. The opinion discusses the question with great clarity and assembles the authorities upon the various aspects of law involved. The Court said: "There are many cases in which the course of dealings of the holder of a note himself with a bank or loan broker at whose office the note was payable has been held to give the bank or loan broker implied authority to receive payment of the note as the agent of the holder, even though the bank or broker did not have possession of the note. (Citing many authorities.) But these cases have no application to the case at bar. No course of dealings between Adkerson and Guaranty Title and Trust Corporation are shown, and the record discloses no transaction or inter-

course of any kind between these parties, except the bare fact that Adkerson purchased this one note, and perhaps that he presented one interest coupon at its office, where it was payable, and received payment thereof." Obviously, the decision is correct, and in accordance with the weight of authority upon the facts disclosed by the opinion.

As there is competent evidence of agency, and as the trial judge answered the issues as a matter of law, it necessarily follows that the judgment so rendered must be reversed.

Reversed.

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

THE FIDELITY BANK v. W. H. HESSEE, J. A. HESSEE, R. O. EVERETT.

(Filed 19 September, 1934.)

1. Bills and Notes F d—Definite extension of time granted maker does not relieve endorsers where note contains agreement to remain bound.

Where the face of a note contains an agreement that the parties should remain bound notwithstanding any extension of time granted the maker, and extensions of time are granted the maker for definite periods of time upon payment of interest by him, the endorsers remain liable although ignorant of such extensions and payments of interest by the maker, they being bound by their agreement in the note and the extensions being supported by the necessary elements of certainty, mutuality and consideration. C. S., 3092, 3102.

2. Limitation of Actions C a—Where parties agree to extension of note, payment of interest by maker for definite extension of time prevents running of statute in favor of endorsers.

While payment of interest on a note by the maker will not ordinarily affect the running of the statute of limitations in favor of the endorsers, where the endorsers agree upon the face of the note to remain bound notwithstanding extensions of time granted the maker, and the maker pays interest for definite periods for extensions to dates certain, the statute does not begin to run in favor of the endorsers until after the maturity date under the last extension agreement, although the endorsers were ignorant of payments of interest by the maker and extensions of time granted him, and refused to sign a renewal note upon the original maturity date of the note.

3. Bills and Notes H a—

Where certain collateral is pledged as security for a note, the holder is not required to exhaust the collateral security before suing the endorsers, especially where the collateral security is worthless.

BANK *v.* HESSEE.

CIVIL ACTION, before *Barnhill, J.*, at February Term, 1934, of DURHAM.

On 30 September, 1928, Durham Citizens Hotel Corporation executed a note for the sum of $5,000, payable to the plaintiff 120 days after date. The maker deposited with the plaintiff certain property as collateral security, to wit: Certain subscription notes and second-mortgage bonds of the Durham Citizens Hotel Corporation, filed with the Home Savings Bank as trustee, under a trust agreement dated 15 March, 1926, and supplemental agreement, dated 29 September, 1928. This trust agreement provides: "But if default be made in the payment of any of the notes this day executed by the corporation at their maturity, or any part thereof, according to the tenor of said notes, then and in any such case all of said notes shall immediately mature, fall due, and become collectible, anything herein or in any of said notes to the contrary notwithstanding," etc.

The pertinent recitals in the note are as follows:

"The subscribers and endorsers hereof agree to remain and continue bound therefor, notwithstanding any extension or extensions of time of payment of it, or any part of it, and notwithstanding any failure or omission to make presentment or demand for its payment, or to protest it for nonpayment; or to give notice of its nonpayment or dishonor or protest, and hereby expressly waive any and all presentment or demand for its payment, and protest of its nonpayment, and any and all notices of extension or extensions of time of payment of it, or any part of it, or of its nonpayment, or dishonor or protest, or any other notice whatsoever," etc.

The defendant with several others endorsed said note as accommodation endorsers, and thereafter the note so endorsed was delivered to the plaintiff. The defendant pleaded the statute of limitations in bar of recovery, alleging that "when the note matured about 1 February, 1929, or within a few days thereafter, an agent of the plaintiff and of the Durham Citizens Hotel Corporation came to this defendant and asked him to endorse a renewal of said note, whereupon this defendant told said agent that there were collaterals to the said note, and that the collaterals ought to be applied to the payment of the note, and that he would not endorse a renewal of the note. That subsequently other persons, in behalf of the maker of the note and of the plaintiff, asked this defendant to endorse a renewal of the note, and this defendant has not only persistently refused to endorse a renewal of the said note, but also to have any connection therewith; and has never made any payment thereon."

When the cause came on for hearing the parties waived a jury trial and agreed that the court might find the facts. The facts so found are as follows:

1. "That on 30 September, 1928, the Durham Citizens Hotel Corporation executed and delivered to the Fidelity Bank of Durham its note for $5,000, payable 120 days thereafter, to wit: 28 January, 1929, and that there were a number of endorsers thereon, each of whose liability was specifically limited to the amount specified upon the back of said note. That among the said endorsers was the defendant R. O. Everett, whose individual liability was limited to the sum of $1,000. This note was one of the series totaling $50,000 described in the second trust agreement offered in evidence dated 29 September, 1928."

2. "That since the execution of said note the said R. O. Everett has paid no amount on said note, either by way of interest or principal, and that so far as the evidence discloses, had no knowledge that the principal was paying interest thereon periodically, or procuring an extension thereof."

3. "That on or about 28 January, 1929, the maker of said note paid interest on said note to 28 May, 1929; that on or about 28 May, 1929, the maker of said note paid interest in advance on said note, extending the maturity date thereof to 25 September, 1929; that on or about 25 September, 1929, the maker of said note paid interest thereon in advance, extending the maturity date thereof to 23 January, 1930; that on or about 23 January, 1930, the maker of said note paid interest in advance, extending the maturity date thereof to 1 August, 1930; that on or about 1 August, 1930, the maker of said note paid interest in advance, extending the maturity date thereof to 1 January, 1931, and that on or about 1 January, 1931, the principal paid the interest thereon to 28 January, 1931, extending the maturity date thereof to said date. That the several payments of interest were not on every occasion made upon the maturity date of said note, but in a number of instances, the witness not being able to specify, the interest was paid several days after the maturity of said note, the witness having testified that it was possible that the interest was paid as much as twenty days after the maturity date, but that in his recollection the same was taken care of with reasonable promptness, and it appears affirmatively from the evidence that when the note matured on 1 August, 1931, the interest extending the maturity date of said note to 1 January, 1931, was not paid until 13 August, 1931."

4. "That on or about the maturity date of the note dated 30 September, 1928, the defendant R. O. Everett was approached by an agent of the maker of said note, T. C. Worth, who sought to get the defendant to endorse a renewal thereof; that the said defendant then and there notified the agent of the maker that he would not sign, and he then and there refused to sign any renewal of said note."

5. "That there is now due on said note the sum of $2,000, with interest from 28 January, 1931, and the liability on said note of each and every endorsement thereon other than W. H. Hessee, J. A. Hessee, and R. O. Everett has been discharged under the terms of the trust agreement dated 29 September, 1928, and that the individual liability of W. H. Hessee and J. A. Hessee was $500.00 each, which, together with the individual liability of R. O. Everett, totals $2,000."

6. "That the maker of said note is insolvent and is now in the hands of a receiver and in the process of dissolution, the order appointing a receiver being dated ..... July, 1932."

7. "That the collateral specified in said note and in the two trust agreements offered in evidence now remaining in the hands of the trustee thereunder, the Home Savings Bank, is of very little if any value."

8. "That T. C. Worth, the agent of the maker of said note, with whom the defendant R. O. Everett had a conversation in which he refused to sign the renewal, was also cashier of the Home Savings Bank, the trustee named in the two said agreements."

9. "That on 8 January, 1932, the second mortgage bonds held as additional security to said note as set out in the trust agreement dated 29 September, 1928, had a reasonable market value of $49.00 on each $100.00 thereof, and the payee in said note, through its vice president, L. D. Kirkland, wrote the defendant offering to sell said bonds at said price upon his paying the difference between the returns thereof and his liability upon said note, or to permit him to take up said bonds under the trust agreement."

10. "That H. R. Goodall was an endorser upon said note whose liability was limited to $1,000, and on 12 January, 1932, he purchased a bond in the sum of $1,000 under the terms of said trust agreement, and the same was credited on said note and his endorsement was erased from the note; that C. C. Council was an endorser on said note, whose liability was limited to $500.00, and on 13 January, 1932, he purchased one of said second mortgage bonds under the terms of said trust agreement, and the same was credited on said note and his endorsement erased therefrom; that J. L. Atkins was an endorser on said note, and on 23 January, 1932, he purchased one of said bonds in the amount of $500.00 and said sum was credited on said note and his endorsement was erased therefrom; that D. C. Mitchell was an endorser on said note and his liability was limited to the sum of $1,000.00, and on 9 February, 1932, he purchased one of said bonds in the amount of $1,000 under the terms of said trust agreement, and said sum was credited on said note and his endorsement was erased therefrom."

"Upon the foregoing facts the court finds as a fact that by reason of the language contained in the face of said note the cause of action of the

plaintiff against R. O. Everett is not barred by the three-year statute of limitations."

Thereupon judgment was entered in favor of the plaintiff and against the defendant for the sum of $1,000, with interest, and the defendant appealed.

Fuller, Reade & Fuller for plaintiff.
H. McD. Robinson for defendant.

BROGDEN, J. Does the agreement in the face of the note, "the subscribers and endorsers hereof agree to remain and continue bound, . . . notwithstanding any extension or extensions for the time of payment of it, or any part of it," deprive the defendant of the defense of the statute of limitations when it is found as a fact that the maker paid interest on the note to 28 January, 1931, and it appears that the suit was duly instituted on 9 September, 1932?

C. S., 3092, Michie's Code of 1931, provides that: "Where the waiver is embodied in the instrument itself it is binding upon all parties, but where it is written above the signature of the endorser it binds him only." C. S., 3102, provides that a person secondarily liable on negotiable instruments is discharged "by any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable," etc.

There are several cases in this jurisdiction which discuss the effect of extension agreements embodied in the face of negotiable instruments, notably: *Bank v. Johnston*, 169 N. C., 526, 86 S. E., 360; *Gillam v. Walker*, 189 N. C., 189, 126 S. E., 424; *McInturff v. Gahagan*, 193 N. C., 147, 136 S. E., 339; *Wrenn v. Cotton Mills*, 198 N. C., 89, 150 S. E., 676; *Corporation Commission v. Wilkinson*, 201 N. C., 344; *Trust Co. v. Clifton*, 203 N. C., 483, 166 S. E., 334; *Franklin v. Franks*, 205 N. C., 96, 170 S. E., 113; *Rasberry v. West*, 205 N. C., 406, 171 S. E., 350. Referring to such extension agreements in the *Wilkinson case, supra*, this Court said: "In order to bind the endorsers two things are essential to such an agreement: (1) waiver of the defense that the time of payment has been extended; (2) mutual assent to a definite time when payment is to be made." Also, in *Wrenn v. Cotton Mills, supra*, the principle is thus stated: "An endorser is, of course, entitled to notice of dishonor; and it may be conceded that by the terms of this contract the defendants waived such notice; also that they waived defenses based upon an extension of the time of payment. The latter waiver, however, imports a legal extension of time which would be effective against the defendants. Granting that the time of payment may be extended by a definite and binding oral agreement, . . . we are confronted by the

general rule that such an agreement must fix a definite time when payment is to be made. The time thus agreed on should be as definite as that which is required when the note is originally executed, the elements of the agreement being certainty, mutuality, and consideration." The last utterance of the Court is found in *Rasberry v. West, supra,* which held that the assent of the parties to an extension of time was binding. The Court remarked that "the plaintiff cannot disregard the express provision of a contract and thereby procure the discharge of a note and the cancellation of her mortgage."

In the case at bar the judge found that the maker paid interest on the note for definite periods of time, to wit, four months, as will appear by reference to said findings, "and that on or about 1 January, 1931, the principal paid the interest thereon to 28 January, 1931, extending the maturity date thereof to said date."

Ordinarily payments made by a principal will not deprive an endorser of the benefit of the defense of the bar of the statute of limitations. *Houser v. Fayssoux,* 168 N. C., 1, 83 S. E., 692; *Franklin v. Franks,* 205 N. C., 96. This principle, however, does not apply when the endorser has consented in the body of the instrument itself to such extensions: *Provided,* of course, that such extensions are for definite periods of time. *Revell v. Thrash,* 132 N. C., 803, 44 S. E., 596. It is contended by the defendant that the *Thrash case, supra,* is overruled by *Trust Co. v. Clifton, supra,* and *Franklin v. Franks, supra.* This contention, however, cannot be sustained for the reason that in the *Franks case, supra,* there was no express waiver in the body of the instrument itself, and in the *Clifton case, supra,* the waiver of extension was not in the body of the instrument, but was contained in an independent contract of guaranty upon the back of the instrument; nor was there "evidence that said note was extended or renewed from time to time."

The plaintiff was not required to exhaust the collateral security before instituting suit against the defendant. In the first place, the judge has found, without exception, that the collateral was worthless, and in the second place the holder of a note has the right to pursue his remedy to collect his debt, nothing else appearing, because "the debt is the primary obligation between the parties, and the note is primary evidence of the debt." *Brown v. Turner,* 202 N. C., 227, 162 S. E., 608.

Upon careful consideration of the entire record the Court is of the opinion that the trial judge ruled correctly.

Affirmed.

BRENEMAN COMPANY AND THE BRENEMAN COMPANY v. C. D. CUNNINGHAM AND MRS. W. H. OSBORNE.

(Filed 19 September, 1934.)

Evidence I b—In action for accounting, books of account are competent when properly identified and verified.

Defendant sold plaintiff the capital stock of a corporation under the terms of a written contract, which provided, among other things, that plaintiff should liquidate the assets of the corporation, and that if the liquidated value of its assets should prove less than their book or fixed value, defendant should pay plaintiff such difference. Plaintiff's action on the contract to recover the alleged difference between the liquidated value of the assets and their book value was referred to a referee, and plaintiff offered in evidence certain books of account purporting to show the transactions involved in the liquidation of the corporation's assets, which books of account were identified by plaintiff's witness, who testified that he had complete charge of the liquidation of the assets of the corporation, that all entries therein had been made under his supervision and control, and that he had personally verified the books and found them correct. It further appeared that the books were kept in the ordinary course of business, that they came from a proper custody, and that the entries were material and relevant, and there was no evidence of erasures, irregularities, or omissions. *Held*, the books of account were properly admitted in evidence, and defendant's contention that they were incompetent as self-serving declarations cannot be sustained.

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

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

On 2 March, 1927, the plaintiff Breneman Company, a corporation, the Cunningham Springless Shade Company, a corporation, and the defendant Cunningham entered into a contract, reciting that the Shade Company was a corporation, with principal place of business in Greensboro, and having a capital stock of $50,000, divided into five hundred shares of the par value of $100.00 each, and that Cunningham was the owner of the entire capital stock of said corporation. It was further provided that Breneman Company was desirous of purchasing from Cunningham the entire capital stock of the Shade Corporation. It was further recited "that the annexed report of the Cunningham Springless Shade Company of Greensboro, N. C., dated 26 February, 1927, made by Vestal & Company, certified public accountants, of Greensboro, N. C., and made a part hereof, is a full and true schedule of the true assets and liabilities of the said third party (Cunningham Springless Shade Company) as of the close of business on 26 February, 1927, and it is accepted by all parties hereto as a basis of this agreement." It was further provided that Cunningham "hereby sells to Breneman Company

five hundred shares of the capital stock of said third party (Shade Corporation), and Breneman Company agrees to pay Cunningham the sum of $10,000—on or before 12 March, 1927, upon delivery of said certificate of stock duly endorsed on the back thereof." It was further provided in the contract "that the fixed valuation of the assets of the party of the third part at the close of business . . . on 26 February, 1927, over and above all liabilities, was $9,059.03." Said contract provides as follows: "That the party of the third part shall and will, to the best of its ability and judgment, within the period of one year from date hereof, collect all notes and accounts receivable, sell and dispose of all merchandise now on hand, and pay off and discharge all outstanding liabilities, as shown by the aforesaid report of examination. . . . The party of the first part (Cunningham) shall, in the event the actual liquidated value of said assets of the third party (Shade Corporation) shall be less than the agreed fixed value, paid to said second party (Breneman Company) the difference between the actual liquidated value and the said fixed value. The party of the second part shall, in the event the actual liquidated value of said assets of the third party shall be greater than the said fixed value, pay to the first party any and all sums realized over and above the said agreed fixed value thereof." In order to guarantee performance of the contract the defendant Cunningham and the defendant Mrs. W. H. Osborne executed and delivered a bond of indemnity payable to the plaintiff Breneman Company.

Thereupon the plaintiff undertook to liquidate the said corporation in accordance with the contract, and after the same had been liquidated, the plaintiff asserted that the defendant Cunningham was indebted to it in the sum of $10,846.24. It was alleged that this indebtedness accrued from loss on inventory, unsold articles of merchandise, losses on notes, and accounts receivable, etc. The defendants alleged that the liquidation of said corporation was carelessly and negligently done, and that they were not liable. The account consisted of a multitude of various items, and the cause was referred to Hon. Thomas C. Hoyle as referee. At the hearing the plaintiff offered in evidence certain books of accounts, purporting to show the transactions involved in the liquidation of Cunningham Springless Shade Corporation. W. A. Anderson, witness for plaintiff, testified: "I was in the employ of the Cunningham Springless Shade Company about nine or ten months prior to March, 1927. At first I was sales manager in charge of selling and merchandising. Following that I was manager of the company and continued as such until the capital stock was purchased by The Breneman Company of Ohio. . . . After that I continued in the capacity of manager for a year or so. . . . I had charge of the office, books and records, papers and documents and the business of the company,

everything. Book entries were made under my direction and supervision. Other records and documents were kept under my supervision and direction. Following the making of the contract between Mr. Cunningham and the Cunningham Springless Shade Company, and The Breneman Company on 2 March, 1927, I was in complete charge of the operation of the entire business from that time until December, 1929. I had charge of the books, records, documents, and the papers of the company. The book entries were made under my direction. I employed help and they followed my instructions in keeping the records." Thereupon plaintiff offered in evidence the collection register of the Shade Corporation, the collection of the register of the plaintiff after the contract of liquidation, ledger sheets "covering the accounts that remained uncollected 1 March, 1928, copies of the original invoices, covering the loss, shrinkage of the Cunningham Springless Shade Company inventory up to 1 March, 1929." The witness then proceeded to testify as to the entries from the foregoing books and records. The witness said: "I have verified all of the items that made up the statement of losses." The general ledger of the plaintiff at Greensboro in connection with the liquidation of said corporation was then offered in evidence. The witness was cross-examined by the defendants with reference to the various items of account as shown by the books and, among other things, said: "The ledger sheets introduced were statements of account prepared by me and taken from the invoices we had to pay. I know the records were accurate because they have been verified. We verified them with the records we had with the manufacturer. . . . We kept books in the usual way."

The referee found "that the plaintiff, The Breneman Company, is the same corporation as the Cunningham Springless Shade Company, the name of the corporation having been changed by law." He then proceeded to find various facts and stated the accounts between the parties, and found "that the excess of the loss arising from liquidation and the sums properly paid for undisclosed liabilities, exceeds the credits admitted by the plaintiff to be due on the account as aforesaid by $7,707.90." Whereupon he found as a conclusion of law that the defendants, by virtue of said contract and bond, are indebted to the plaintiff in the sum of $7,707.90.

The defendant filed various exceptions to the report of the referee. These exceptions are based principally upon the admission of the books and records of the plaintiff company, and to the fact that the referee based his findings upon an examination of such books and records.

The trial judge overruled the exceptions and adjudged that the plaintiff was entitled to recover of the defendants the sum of $7,707.90.

From judgment upon the verdict defendants appealed.

Shuping & Hampton for plaintiffs.
Sapp & Sapp and King & King for defendants.

BROGDEN, J. In actions for an accounting, are books of account admissible in evidence?

The defendant Cunningham owned the capital stock of the Cunningham Springless Shade Corporation, a North Carolina corporation. He made a contract with the plaintiff Breneman Company, an Ohio corporation, to sell said stock for the sum of $10,000. Thereupon the Ohio corporation contracted to liquidate the Springless Shade Corporation. The parties agreed that the fixed value of the assets of the Shade Corporation at the close of business on 26 February, 1927, over and above all liabilities, was $9,059.03, and the defendant Cunningham agreed to pay to the plaintiff, Ohio corporation, the difference between the said fixed value of said assets and "the actual liquidated value," in the event the latter was less than the former. The name of the Cunningham Springless Shade Company was then duly changed by law to "The Breneman Company."

Pursuant to the terms of the agreement, the referee finds: "That the Cunningham Springless Shade Company sold the greater part of the merchandise on hand at the date of the contract and collected the collectible notes and accounts due at the date aforesaid and paid or caused to be paid all the obligations it agreed to pay; that on or about 1 March, 1928, the Cunningham Springless Shade Company caused to be made to the defendant C. D. Cunningham a report of what had been done under the contract on its behalf; that the defendant C. D. Cunningham performed the contract on his part, except that he failed to pay to the plaintiff Breneman Company the difference between the net amount realized from the liquidation provided by the contract and the fixed assets."

At the hearing before the referee the plaintiff offered W. A. Anderson as a witness. This witness had been manager of the Springless Shade Corporation prior to the date of the contract, and after said date "was in complete charge of the operation of the entire business from that time up until December, 1929." The witness said: "I had charge of the books, records, documents, and the papers of the company. The book entries were made under my direction. . . . A general record was kept in Cincinnati, but it was kept only from information and records that we sent them from Greensboro. I checked the general ledger with our Greensboro records and they reconciled exactly." The defendants objected to the introduction of such books and records, but the referee overruled the objection, admitted the books in evidence, and considered them in making his report. In said report the referee, an eminent

lawyer, stated: "The plaintiffs, over the objection of defendants, offered in evidence the books of the Breneman Company, one of said plaintiffs, and a number of papers which were compiled from said books and other records of said plaintiffs. The referee had grave doubts of the competency of this evidence, and considered very carefully the decisions of our Supreme Court before admitting said evidence. There is a line of cases in North Carolina, beginning at a very early date and coming down to 1923, holding that a person's books are self-serving declarations, and therefore inadmissible. See *Branch v. Ayscue,* 186 N. C., 219, 119 S. E., 201, and *Bland v. Warren,* 65 N. C., 372, and cases cited therein. In recent years our courts seem to have relaxed the rule somewhat and admitted this kind of evidence in some cases and for some purposes. See *Railroad v. Hegwood,* 198 N. C., 309, 151 S. E., 641, and cases cited therein. In the case at bar, the defendants examined their own witnesses and cross-examined the witnesses of the plaintiffs in regard to the documentary evidence aforesaid, and referee has admitted same and considered it carefully in making this report."

The common law would not permit a party to testify in his own behalf, and this philosophy, wrought out at a time when the individual counted for little or nothing and when business transactions consisted largely of barter and exchange, doubtless colored judicial thinking even after such disability was removed by statute; and this may explain the interpretation of the law found in *Bland v. Warren,* 65 N. C., 372, and *Morgan v. Hubbard,* 66 N. C., 394. The onset of modern interpretation first appeared in *Insurance Company v. R. R.,* 138 N. C., 43, 50 S. E., 452. This opinion examined and sifted the various aspects of the question with great learning and accuracy of both thought and expression. Moreover, it has not only been cited frequently in this jurisdiction, but in many others. Indeed, Dean Wigmore, in his work on Evidence, Volume 3, page 283, refers to the opinion as "one of the best modern opinions by Connor, J."

The principle announced in the railroad case, *supra,* has been cited and extended by subsequent decisions. For instance, in *Storey v. Stokes,* 178 N. C., 409, 100 S. E., 689, this Court said: "The book of sales, the entries in which were made under his supervision, was competent to refresh the memory of the witness, and to corroborate him, . . . and, besides, he testified that he had an independent knowledge of the facts and items recorded in it." Also, in *Flowers v. Spears,* 190 N. C., 747, 130 S. E., 710, it is said: "The fact that the cashier did not make the entries in the account shown on the sheet did not render his testimony incompetent. The entries were made by a bookkeeper, employed by the bank, who was under the supervision of the cashier. The fact that the cashier did not personally handle the check and that he had no

personal knowledge of the transactions recorded in the account, as shown by the sheet, did not render his testimony incompetent as based upon hearsay." The same general idea was the basis of the competency of evidence of a bill of lading, record of unloading and of delivery to a drayman of certain material. These records were produced by a clerk of the railroad company "who had charge and control of its records as to matters of this kind." See *Supply Co. v. McCurry,* 199 N. C., 799, 156 S. E., 91. See, also, *R. R. v. Hegwood,* 198 N. C., 309, 151 S. E., 641.

The case of *Branch v. Ayscue,* 186 N. C., 219, is not contrary to the other decisions above mentioned. In the first place, there was no evidence of the nature of the book offered in evidence, or that the entries therein were made by the direction or under the supervision of the deceased. Indeed, the court treated the entries as "an unverified account."

In the case at bar the witness Anderson was in complete charge of the liquidation of the business. The books of account and all entries therein were made under his supervision and control. Moreover, he testified that he had personally verified these records. Furthermore, it appears that the books were kept in the ordinary course of business; that they came from a proper custody; that the entries were material and relevant, and there was no evidence of erasures, irregularities or omissions which tended to cast suspicion upon the accuracy of the records or to challenge their correctness.

Under these circumstances the Court is of the opinion that the records were admissible for the purposes for which they were used at the hearing before the referee.

Affirmed.

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

GURNEY P. HOOD, COMMISSIONER OF BANKS OF THE STATE OF NORTH CAROLINA; S. G. OWENS, ASSISTANT LIQUIDATING AGENT OF THE BANK OF MURPHY, ON RELATION OF THE BANK OF MURPHY, OF MURPHY, NORTH CAROLINA; AND THE BANK OF MURPHY v. L. E. BAYLESS.

(Filed 19 September, 1934.)

1. Banks and Banking B c—Director held not liable on note to bank where condition upon which it was to be used did not transpire.

Where all the evidence tends to show that the directors of a bank executed their promissory notes to the bank under a contract stipulating that at the end of two years the notes were to be used if by their use the bank could pay depositors in full, reorganize and continue in business,

and that otherwise the notes were to be returned to the makers, and that at the expiration of the two-year period the use of the notes would not enable the bank to pay depositors, reorganize and continue in business, and there is no evidence in contradiction, a judgment as of nonsuit in an action thereon by the liquidating agent of the bank will not be held for error.

2. Trial D a—Nonsuit will not be held for error where evidence warrants directed verdict in defendant's favor.

A nonsuit and dismissal under the Hinsdale Act has the same legal effect as a directed verdict, and where, in an action on a note, there is no evidence in contradiction of defendant's evidence constituting a complete defense to the action, a judgment as of nonsuit will not be held for error, since the evidence would support a directed verdict in defendant's favor, the court not weighing the evidence, but taking it to be true.

APPEAL by plaintiffs from *McElroy, J.*, at June Term, 1934, of CHEROKEE. Affirmed.

Gray & Christopher for appellants.
Moody & Moody and D. Witherspoon for appellee.

PER CURIAM. This is an action instituted by the plaintiffs against the defendant upon a paper-writing purporting to be a note signed by the defendant, which the defendant admits he signed but alleges that it was understood and agreed by him and the plaintiffs' representative at the time of the delivery thereof that it was to be used and to become a binding obligation only if the use thereof at the end of two years, when a "freezing" agreement with certain depositors had expired, all the depositors of the bank then closed could be paid in full and the bank reorganized and continued in business, and if it appeared that at said time that the depositors could not be paid in full and the bank reorganized and continued in business there were to be no liabilities thereunder, and the paper was to be surrendered and canceled.

The plaintiffs' witness, S. G. Owen, in charge of the liquidation of the bank, on cross-examination testified that there is a record of the bank relative to this note, and four similar ones, in the following words: "Being secured notes given by officers and directors to be held as security against loss to general deposits to be used at the end of the contract period, if found necessary." Albert H. Blake, who reopened the Bank of Murphy under direction of the Banking Department, as a witness for the plaintiffs, explained the entry above quoted as follows: "I will explain what I mean by that entry. It was necessary to make an entry of this $5,000, so I charged loans and discounts, and credited deposits, the explanation being 'Secured notes given by officers and directors to be held as security against loss to general depositors, to be used at the end of the contract period, if found necessary,' though this

bank was supposed to be left alone for a period of two years. In the event that this additional sum of $5,000 was not sufficient to pay off the depositors and keep the bank open at the expiration of two years, the notes under the agreement would be given back to the makers. If at the end of two years, if the bank could remain open by the payment of this $5,000, then it was to become an actual asset of the bank."

There was other evidence corroborating and none contradicting the evidence quoted. All of the evidence tended to show that at the end of the two years referred to in the agreement the depositors could not be paid in full, and that the bank could not be reorganized nor continued in business, even with the payment of the five notes for $1,000 each.

"The legal effect of a directed verdict is the same as that of a nonsuit or dismissal under the statute (Hinsdale Act), the court does not weigh the evidence, but assumes it to be true in favor of the defeated party." *In re Will of Deyton,* 177 N. C., 494 (503). If the "legal effect of a directed verdict is the same as that of a nonsuit or dismissal under the statute," it follows that a nonsuit and such dismissal has the same legal effect as a directed verdict. Not weighing the evidence in this case, but assuming it to be true in favor of the plaintiffs, we think his Honor was warranted in directing a verdict for the defendant, and, therefore, committed no reversible error in granting his motion for judgment as of nonsuit.

Affirmed.

GUTHRIE FRANCIS, ADOLPH B. FRANCIS, AND R. C. FRANCIS v. J. S. MANN, J. H. HEATH, AGENT OF ROANOKE RAILROAD AND LUMBER COMPANY, AND ROANOKE RAILROAD AND LUMBER COMPANY.

(Filed 19 September, 1934.)

Estoppel C b—Owners held estopped to claim title to land as against purchaser by their written authorization of grantee to sell.

Where the owners of land subject to the dower right of their mother authorize their mother to sell the land by letters written her to this effect, and in reliance on the letters she sells the land, and the purchaser, also relying upon the letters, purchases same and pays the purchase price to her in good faith, the owners of the land are estopped to claim title to the land as against the purchaser, although their letters were insufficient in law to convey title to their mother.

APPEAL by Guthrie and Adolph B. Francis, from *Devin, J.,* at May Term, 1934, of HYDE. No error.

The controversy is indicated by the issues submitted to the jury and their answers thereto, which are as follows: "(1) Are the plaintiffs,

Guthrie Francis and Adolph Francis, entitled to any part of the fund derived from the sale of timber on the lands described in the complaint, said funds so derived being now in hands of the clerk? A. 'No.' (2) Is the plaintiff, Rudolph C. Francis, entitled to one-third of the funds derived from sale of said timber? A. 'Yes.' "

The court below rendered judgment in accordance with the verdict. The plaintiffs, Guthrie and Adolph B. Francis, made numerous exceptions and assignments of error and appealed to the Supreme Court.

George T. Davis for plaintiffs.
No counsel for defendants.

PER CURIAM. Guthrie, Adolph B. and Rudolph C. Francis owned a one-third interest in a certain tract of land in Hyde County, North Carolina, containing about 50 acres, and known as Tract No. 507 on the Mattamuskeet map, subject to the dower interest of their mother, Mrs. Affie Francis. The controversy is over the sale of certain timber cut off the land and the one-third sum, $124.00, was placed in the hands of the clerk of the Superior Court of Hyde County, North Carolina, to abide the result of who was the owner of the land. The defendant J. S. Mann introduced two letters from Guthrie and Adolph B. Francis to their mother, Mrs. Affie Francis, and a paper-writing from her, contracting and conveying to said defendant Mann and another the land, also reciting the receipt of the consideration of $100.00, and the further recital that she was the "authorized agent" of her sons. The defendant Mann testified that when Mrs. Francis signed the paper-writing he paid her $100.00. At the time of the trial Mrs. Francis was dead. The letters introduced and purported to be written by Guthrie and Adolph B. Francis to their mother, under which defendant Mann claimed she was their "authorized agent," were admitted by Guthrie and Adolph B. Francis to have been written by them. It was contended by the plaintiffs, appellants, that the letters did not give their mother authority to sell the land. We think that the language in the letters which were in answer to ones written by her to them in regard to the land, is sufficiently clear to give the authority to their mother to sell the land. She and the defendant Mann so understood it and the defendant Mann paid the money and she received it under the authority contained in the letters.

The court below charged the jury, in part, as follows: "While this paper of Mrs. Francis would not convey the legal title of these plaintiffs, and while her authority to convey it was not under seal, where a person by his actions and conduct in writing induces another party to rely upon it, he would thereafter be estopped in equity the claim upon it.

"Mr. Mann testifies that Mrs. Francis signed that paper voluntarily and attached the letters from her sons, giving her authority to convey. Induced thereby, he paid her the sum of $100.00.

"Therefore, the court charges you, if you find facts to be as testified that these plaintiffs who wrote these letters expressing willingness for her to sell it and Mr. Mann relied upon that and was induced thereby to pay money received, these plaintiffs cannot go back now and claim land and money too.

"That while it would not have the effect of passing title in equity, they would be estopped."

We think under the facts and circumstances of this case, the charge of the court below was correct. We have examined with care the numerous exceptions and assignments of error made by the appealing plaintiffs. We do not think any of them can be sustained. We see on the whole record no prejudicial or reversible error.

No error.

MRS. EMMA GARREN v. B. H. YOUNGBLOOD.

(Filed 10 October, 1934.)

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

On a motion as of nonsuit, all the evidence, whether offered by 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. Frauds, Statute of, A a — Promise to answer for debt held original promise not coming within statute of frauds.

Plaintiff, a depositor in a bank, went to the bank with the intention of withdrawing her deposit, and was persuaded from withdrawing her funds by representations of the bank's soundness made by the vice-president, director and stockholder of the bank, and by his personal guaranty against loss of her deposit by the bank's insolvency: *Held*, the guaranty of payment made by the vice-president, director and stockholder of the bank was an original promise to answer for the debt, upon sufficient consideration, and does not come within the provisions of the statute of frauds, C. S., 987, and upon the insolvency of the bank and loss to the depositor the plea of the statute is not a valid defense.

3. Estoppel C d—Plaintiff held not estopped by filing claim with bank for deposit from suing on individual's guaranty against loss.

Plaintiff was persuaded from withdrawing her deposit in a bank by the personal guaranty of her deposit by the vice-president, director and stockholder of the bank. Upon the failure of the bank she filed a claim with the liquidating agent for the amount of her deposit: *Held*, plaintiff was

not estopped by filing her claim with the bank from bringing suit on the guaranty, her action in filing the claim and obtaining what dividends she could on the deposit being to the interest of the guarantor.

4. Guaranty B a—Guaranty in this case held guaranty of payment and not guaranty of collection.

Allegation and evidence that defendant guaranteed plaintiff's deposit in a bank are held sufficient to constitute a guaranty of payment, and not merely a guaranty of collection, and plaintiff's right of action is held to have accrued upon the insolvency of the bank and its inability to pay the deposit on demand, and plaintiff was not required to wait until the liquidation of the bank and the payment of all dividends on her deposit before instituting action.

5. Trial E c—Charge to jury in this case held sufficiently full.

Where the charge of the court fully sets forth all substantive, material and essential questions of law arising upon the facts necessary to a determination of the controversy, the charge will not be held for error upon appellant's exception to its sufficiency, it being incumbent on appellant to have requested special instructions if he desired a fuller and more specific instruction on any aspect of the case.

APPEAL by defendant from *Finley, J.*, and a jury, at April-May Civil Term, 1934, of HENDERSON. No error.

This is an action brought by plaintiff against the defendant to recover $1,520.59, with interest from 18 December, 1932. The plaintiff, an old woman 72 years of age, lived in Fletcher, Henderson County, North Carolina. She had lived there about 35 years and had known the defendant since he was a little boy. In the village was the Bank of Fletcher. The defendant lived in Fletcher all his life. He was vice-president, director and stockholder of the Bank of Fletcher. He had a pretty good deposit in the bank, some $1,800, and owed the bank some money. He ran a grocery store in Fletcher, had some trucks and a lot of land. On 20 November, 1930, he was in Asheville when the Central Bank and Trust Company closed its doors and returned to Fletcher in the afternoon.

The plaintiff testified in part: "I went to the Bank of Fletcher for the purpose of withdrawing this money. As a result of what I was told I went to get the money. I went to the door of the bank and it was shut, and I went to the window and Mr. Sumner says, 'Let her in,' and Mr. Youngblood came to the door and took me through the door and into the office of the bank, and Mr. Youngblood says, 'I will insure your money. It is safe here.' And after some argument he repeated, 'I will insure you. It is safe.' And Mr. Youngblood said, 'This is a sound bank.' I went there to withdraw my money and when Mr. Youngblood said it was safe I went off satisfied. Mr. Youngblood told me my money was all right and I trusted him. . . . The 20th of November, according to my recollection, is the date I went to the bank to withdraw my money.

(It is admitted that the bank closed on 18 December, 1930.) The book which is shown me is my bank book. I thought I had it at home. After the bank closed, I proved my claim against the bank. I went down to the bank and filed a claim for the amount of my money against the bank. . . . The Bank of Fletcher reopened shortly after it closed and I went to the bank several times thereafter and saw it open and in operation. I signed a contract permitting the bank to reopen. . . . Since I brought this suit, the bank has paid me a dividend of twenty per cent of my deposit."

It was in evidence that the bank would pay 50c. on the dollar. It closed on 18 December, 1930, and reopened 26 January, 1931. Those who did not sign the contract had the privilege of withdrawing their funds immediately upon the bank's reopening. The records do not disclose any refusal on the part of the bank to permit withdrawing of funds at any time by persons who refused to sign the contract. There was nothing to prohibit the withdrawal of funds unless the depositor entered into a similar contract as Mrs. Garren. The bank remained open the second time for about 18 months and did a general depositing and checking business. The Corporation Commission ruled that unless a contract was signed to the contrary, a depositor had the right to withdraw funds upon the subsequent opening of the bank, and this course was followed. On 17 December, 1930, at a meeting of the directors, the defendant being present, an order was made to close the bank.

Defendant agreed to guarantee the deposit account of Miss Redden and paid her and had some of the depositors to sign the agreement to reopen. The defendant testified, in part, speaking of plaintiff's conversation with him: "I think it was on the outside of the bank. I am not certain as to the day. She asked me if I thought the bank was all right. I told her I thought it was, that I had my money there and the kids had their money there. I did not tell her that I would insure her money in the bank. And did not tell her I would pay any loss that she might sustain in the bank if the bank closed. All I said was that I thought the bank was all right; that I had my money there and that my children had their money there."

The issues submitted to the jury and their answers thereto were as follows: "(1) Did the plaintiff have on deposit in the Bank of Fletcher the sum of $1,520.59 on 20 November, 1930? A. (Yes, by consent.) (2) Did the defendant B. H. Youngblood enter into an agreement with the plaintiff guaranteeing to the plaintiff that he would be personally responsible for any loss she might sustain if said funds were permitted to remain on deposit in said bank, as alleged in the complaint? A. Yes. (3) If so, did the defendant breach said guarantee agreement? A. Yes. (4) Was the Bank of Fletcher insolvent on 20 November, 1930, and/or

18 December, 1930? A. Yes. (5) What amount of damages, if any, is the plaintiff entitled to recover of the defendant by reason of said alleged breach? A. $760.00, without interest."

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

L. B. Prince and Ewbank & Weeks for plaintiff.
Redden & Redden and Shipman & Arledge for defendant.

CLARKSON, J. At the close of plaintiff's evidence and at the close of all the evidence the defendant made motions in the 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.

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

The main question presented for our determination: Was the promise an original one upon sufficient consideration, which made defendant liable to plaintiff, or was it such that under the statute of frauds, C. S., 987, it had to be in writing? We think the promise an original one and upon sufficient consideration.

In *Handle Co. v. Plumbing Co.*, 171 N. C., 495 (501-502), speaking to the subject: "This being so, the promise, if made as alleged, was not within the statute of frauds, but it was an original promise founded upon a distinct consideration moving to the plaintiff at the time, and was not simply collateral and superadded to that of Wooten & Renigar to pay the debt. Our case falls within the principle stated in *Dale v. Lumber Co.*, 152 N. C., 651, where the matter is clearly stated by *Justice Hoke*, who, quoting from the well-considered case of *Emerson v. Slater*, 63 U. S., 28, at p. 43, said: 'Whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability.'" This position has been sustained and applied in other cases of the same Court, notably in *Davis v. Patrick*, 141 U. S., 479, in which it was held: "In determining whether an alleged promise is or is not a promise to answer for the debt of another, the following rules may be applied: (1) If the promisor is a stranger to the

transaction, without interest in it, the obligations of the statute are to be strictly upheld; (2) but if he has a personal, immediate, and pecuniary interest in a transaction in which a third party is the original obligor, the courts will give effect to the promise. *The real character of a promise does not depend altogether upon form of expression, but largely upon the situation of the parties, and upon whether they understood it to be a collateral or direct promise.*" (Italics ours.) *Mercantile Co. v. Bryant,* 186 N. C., 551; *Jennings v. Keel,* 196 N. C., 675; *Dillard v. Walker,* 204 N. C., 16 (20).

We do not think that the agreement of the plaintiff that the bank could continue to operate was inconsistent with her right of action on defendant's promise to her, so as to estop her. When she went to withdraw her money she had the direct promise of defendant to insure her money, that it was safe, the bank sound, the money was all right, and she trusted him. We see no reason why filing her claim on the bank would have the effect to release defendant. It was to his interest that she reduce her claim on him by obtaining what dividends she could from the bank, and acting as a prudent person would do under the circumstances.

The plaintiff alleged in her complaint, in part: "That on or about 20 November, 1930, the defendant B. H. Youngblood, whom this plaintiff had known for a long period of time, and in whom she had the utmost confidence, and who she knew to be a director and officer in said bank, having ascertained that plaintiff intended to withdraw her funds from said bank, urged the plaintiff that she allow her funds to remain in said bank, and then and there assured the said plaintiff that the said bank was solvent and guaranteed to the said plaintiff that the said bank was solvent and that he would see that she suffered no loss, and that plaintiff, although she had definitely decided to withdraw her funds from said bank, relying solely upon the assurances, promises, representations and guarantees of the said bank, decided to allow her funds to remain in said bank and did allow them to remain in said bank, said funds being in the amount of $1,520.59, as the proximate result of which the plaintiff has suffered a total loss of the said sum of $1,520.59," etc.

It is contended by the defendant, in part: "That he did not owe plaintiff anything, but, according to the plaintiff's evidence, insured her against loss. In other words, if he were a guarantor he became liable upon default of the bank, but not until after the plaintiff had exhausted her remedy against the bank."

We think that the language in the complaint and the evidence sufficient to support the verdict. In *Jenkins v. Wilkinson,* 107 N. C., 707 (709), it is said: "There is a plain distinction between a guaranty of payment and a guaranty of collection. 'The former is an absolute prom-

ise to pay the debt at maturity, if not paid by the principal debtor, and the guarantee may begin an action against the guarantor. The latter is a promise to pay the debt upon the condition that the guarantee shall diligently prosecute the principal debtor without success.' *Jones v. Ashford,* 79 N. C., 173; Baylie's Sureties and Guarantors, 113." *Trust Co. v. Godwin,* 190 N. C., 512; *Trust Co. v. Clifton,* 203 N. C., 483 (485).

We think, on plaintiff's evidence, that this is a guarantee of payment, and under the facts and circumstances of this case plaintiff's right of action had accrued when she instituted the suit.

The charge of the court below gave the contentions of both parties fairly. In fact, gave four long contentions and fifth, a requested charge, as a matter of law, in the language prepared by defendant. There is no exception by defendant in the record to the charge as given. The exceptions and assignments of error to this Court are to the effect that the court below in its charge failed to define guaranty and what was necessary to constitute insolvency. We think, taking the charge as a whole, the defendant's alleged contract with plaintiff was fully set forth and explained by the court below and the question of insolvency fully considered, if that issue was material to the determination of the case. The defendant, if it desired more full and specific instructions, should have asked for them. *Davis v. Long,* 189 N. C., 129 (137).

We think in the charge, all the substantive, material and essential questions of law arising on the facts to determine the controversy were fully set forth by the court below. *Moss v. Brown,* 199 N. C., 189.

The question was one mainly of fact, for the jury. It has found with plaintiff; in law we find

No error.

SECURITY NATIONAL BANK (TARBORO UNIT), ADMINISTRATOR D. B. N. OF W. R. TOLSTON, SUCCESSOR TO NORTH CAROLINA BANK AND TRUST COMPANY (TARBORO UNIT), ADMINISTRATOR D. B. N. OF W. R. TOLSTON, DECEASED, *v.* H. C. BRIDGERS, W. E. COBB, J. V. COBB, W. L. LANE, W. E. PHILLIPS, W. H. PHILLIPS, A. J. WALSTON, J. R. WALSTON, AND G. H. WEBB, DIRECTORS OF THE PINETOPS BANKING COMPANY.

(Filed 10 October, 1934.)

1. Executors and Administrators A b—

The appointment of a bank as administrator cannot be attacked in an action against the directors of the bank to recover losses sustained to the estate by alleged gross neglect and mismanagement of the bank by the directors.

2. Banks and Banking C c: H c—

The relation of debtor and creditor exists between a depositor and the bank of deposit, which relation, upon the death of the depositor, exists between the bank and the depositor's estate, and this relation is not changed by the appointment of the bank as administrator where the deposit is co-mingled with other funds of the bank.

3. Executors and Administrators F a—Administrator may refuse to distribute estate prior to expiration of one year from appointment.

A bank, acting as administrator, has a legal right to hold the funds of the estate and to refuse to settle the estate and distribute it to the heirs upon their demand prior to the expiration of one year from the appointment of the bank as administrator, C. S., 101, 109, 147. In this case demand was made shortly before the bank was placed in liquidation, but it appeared that the bank was solvent on the date it was appointed administrator, and there was evidence that it was solvent a few months before being placed in liquidation, and that it was placed in liquidation in less than a year after its appointment as administrator.

4. Executors and Administrators A a—There is presumption of compliance with statutes in licensing bank to act as administrator.

There is a presumption that the Insurance Commissioner has complied with the statutes in licensing a bank to act as administrator, and where there is evidence that a bank, on the date it was appointed administrator, was solvent in an amount in excess of $100,000, the contention of an administrator *d. b. n.* appointed upon the bank's insolvency that the bank had not complied with the provisions of C. S., 6376, 6377, 6378, 6379, cannot be sustained.

5. Corporations C c—

The directors of a corporation may be held personally liable for gross neglect of their duties, mismanagement, fraud and deceit resulting in loss to a third person, but not for errors of judgment made in good faith.

6. Banks and Banking H b—Evidence held insufficient to hold directors liable to administrator d. b. n. for loss alleged to have resulted from directors' gross neglect and mismanagement of bank.

This action was instituted by an administrator *d. b. n.*, appointed upon the insolvency of a bank which had been appointed, and had acted as administrator of the estate prior to its insolvency, and was instituted against the directors of the bank upon allegations of gross neglect of their duties and mismanagement of the bank in that they knew or should have known that the funds of the estate had been co-mingled with the general assets of the bank without being properly secured with bonds or collateral, and in that they refused to close up the estate because they knew the bank was in imminent danger of insolvency and the withdrawal of the funds would force it to close its doors. The evidence was to the effect that the bank had been licensed to act as administrator and at the time of its appointment was solvent in excess of $100,000, and that the bank was solvent a few months prior to being placed in liquidation, and that it was placed in liquidation prior to the expiration of one year from its appointment as administrator: *Held*, the evidence was insufficient to bring the directors to an accountability under the law, and their motion as of nonsuit was properly granted.

BANK *v.* BRIDGERS.

APPEAL by plaintiff from *Moore, J.*, at June Term, 1934, of EDGECOMBE. Affirmed.

This action was originally instituted by the North Carolina Bank and Trust Company, Tarboro Unit, administrator *d. b. n.* of W. R. Tolston, but during the pendency of the action the North Carolina Bank and Trust Company was placed in the hands of a liquidating agent and dismissed as such administrator, and the Security National Bank was appointed and qualified in its place and stead. The said Security National Bank was made party plaintiff by consent of all parties and was permitted to adopt the pleadings theretofore filed by the said North Carolina Bank and Trust Company.

This is an action brought by plaintiff against the defendants, directors of the Pinetops Banking Company, to recover a certain sum of money, on account of gross neglect of their duties and the mismanagement of the bank in reference to the administration of the estate of W. R. Tolston.

The material parts of the complaint allege: "That as this plaintiff is informed and believes and it so alleges upon information and belief, said officers refused and declined to close up said estate for that they realized that said bank was then and there insolvent, or in imminent danger of insolvency, and that if said sum of $13,650.26 should be paid out, that said bank could no longer function as a banking institution and must necessarily close its doors. . . . That said loss was proximately caused, brought about, and produced by the aforesaid negligent, careless, wrongful, and tortious acts of said defendants in refusing to wind up, discharge, and liquidate said estate after demand upon them so to do had been made, and after they well knew that said estate was in perfect condition to be settled up, all of which negligent refusal on the part of said defendants was, as hereinbefore alleged, induced, brought about, and caused by the wrongful desire on the part of said defendants to utilize the funds of said estate for purposes tending to serve the ends of said Pinetops Banking Company, to wit, to tide over and carry on said bank in the hope that it could continue in the function of a banking institution. . . . That the defendants in this action breached their duty to the estate this plaintiff represents in that said directors and executive officers and directors, approved, permitted and sanctioned the aforesaid acts on the part of said bank in the co-mingling of said funds, in the failure to set same up as a separate and distinct trust fund, and in the failure to have same properly secured by bonds or collateral as required by law, or legal banking regulations, or in the event same was not expressly sanctioned and approved by said defendants, that it was the duty of said defendants to have knowledge of said conditions complained of and to have prevented the aforesaid failure of duty on the part of the

bank that they represented. . . . That this plaintiff, prior to the institution of this action, made claim upon the liquidating agent of the Pinetops Banking Company and upon the Commissioner of Banks that this plaintiff's claim be allowed as a preferred claim, which demand and request has been declined. That prior to the institution of this action the plaintiff herein has made demand upon the liquidating agent of the Pinetops Banking Company that such liquidating agent institute this action against the defendants herein, which said demand was made in writing and which demand has been declined."

In answer, the defendants denied the material allegations of the complaint, and say: "That in the entire administration of its affairs the Pinetops Banking Company, as administrator of the estate of W. R. Tolston, has exercised due and proper care and caution, has honestly and faithfully executed the duties of its trusts, and has done all things required of it by law and equity in the performance of its said duties. That as these defendants are advised, believe and allege, the Pinetops Banking Company is now and was at the time of the appointment of its liquidating agent fully and amply solvent, and upon final settlement will pay the plaintiff, together with all other creditors, the full amount which is due them."

A judgment of nonsuit was rendered in the court below. The plaintiff excepted, assigned error, and appealed to the Supreme Court. The necessary facts will be set forth in the opinion.

C. H. Leggett and George M. Fountain for plaintiff.
Henry C. Bourne, Gilliam & Bond, and H. H. Phillips for defendants.

CLARKSON, J. At the close of plaintiff's evidence the defendants, in the court below, made a motion as in case of nonsuit. C. S., 567. The court below sustained the motion and in this we can see no error.

The evidence was to the effect that on 10 June, 1930, the Pinetops Banking Company was appointed administrator of the estate of W. R. Tolston. The following are the heirs at law and distributees: Thomas L. Tolston, Mrs. W. D. Wooten, and Mrs. J. E. Brown. The estimated value of the estate was $20,000. Renunciation of the heirs at law and request that the Pinetops Banking Company be appointed in their stead is as follows: "We, the undersigned, do hereby renounce our right to qualify upon the estate of W. R. Tolston, deceased, and respectfully ask that you appoint the Pinetops Banking Company in our place and stead. This 10 June, 1930. Thos. L. Tolston, Mrs. W. D. Wooten, Mrs. J. E. Brown."

The clerk of the Superior Court for Edgecombe County, North Carolina, plaintiff's witness, testified in part: "The Pinetops Banking Company qualified as administrator of W. R. Tolston's estate before me."

The question of "purported administrator" is not borne out by the record—if it were, it would be immaterial. The plaintiff in this action in the Superior Court cannot attack the appointment of the bank as administrator, under the facts herein disclosed. *Holmes v. Wharton,* 194 N. C., 470; *In re Estate of Styers,* 202 N. C., 715. The clerk can recall letters of administration when they have been improvidently granted. *In re Meadows,* 185 N. C., 99.

The Pinetops Banking Company had been in process of liquidation since 21 April, 1931. The bank went into liquidation in less than one year from its qualification as administrator. It was in evidence that W. R. Tolston died on or about 21 May, 1930, and had in the savings account of the bank $13,650.26 when the bank went into liquidation. In the checking account of the Pinetops Banking Company, administrator of W. R. Tolston, there was $1,254.78. The total balance of both accounts in favor of the Tolston estate was $14,905.04.

With respect to this money in the Pinetops Banking Company, if it had not been appointed administrator, the relation of W. R. Tolston and the bank was that of debtor and creditor. If it was appointed administrator and deposited the money in its bank, the same relation would apply. *Roebuck v. Surety Co.,* 200 N. C., 196; *In re Trust Co.,* 204 N. C., 791.

The Pinetops Banking Company, being the administrator, had certain rights and duties. C. S., 101, provides if claim not presented in twelve months, representatives discharged as to assets paid. C. S., 109, provides that the final account can be compelled to be filed "at any time after two years from his qualification." C. S., 147, provides that legacy or distributive share may be recovered from executor, administrator or collector "at any time after the lapse of two years from his qualifications."

The defendants were in their legal rights under the above statutes, in holding the money—under the facts and circumstances of this case.

S. B. Kittrell, plaintiff's witness, testified as to the solvency of the bank on 10 June, 1930, when the bank was appointed administrator: "The total assets of the Pinetops Banking Company on 10 June, 1930, was $423,765.40. The total liabilities, exclusive of capital, surplus and undivided profits, as I figure it, was $318,068.34. On 2 January, 1931, working out the same figures, the total liabilities, exclusive of capital, surplus and undivided profits was $296,953.50, and the assets on that date was $340,371.44. This book does not include liabilities and assets and surplus carried on the branch at Hookerton." Of course, the stockholders were liable to be assessed if the bank became insolvent. This was an additional asset.

The further contention is made by plaintiff that C. S., 6376, 6377, 6378, and 6379, were not complied with. The Pinetops Banking Com-

pany, when complying with these provisions, had a right to act in certain fiduciary capacities, such as administrator, etc. C. S., 6379, reads as follows: "After any such corporation has been licensed by the commissioner, the certificate of the commissioner that it has been admitted to do business in the State and is licensed by the Insurance Commissioner and is solvent to an amount not less than one hundred thousand dollars, shall be, until revoked by him, equivalent to the justification of sureties, and full evidence of its authority to give such bonds or undertakings. There shall be no charge for the seal of this certificate." C. S., 6378, provides that the commissioner shall examine into the solvency of the corporation applying for license to do business.

It will be noted that the above act (6379) says "is solvent to an amount not less than $100,000." The evidence is that on 10 June, 1930, the total assets were $423,765.40 and the total liabilities, exclusive of capital, surplus and undivided profits, was $318,068.34. This shows that the assets over liabilities were over $100,000. It is further noted that the capital stock was $50,000, its surplus $40,000, the Hookerton Branch had a surplus of $10,000. This would make total capital and surplus of $100,000. The presumption is that the commissioner, who had the authority, complied with the law when the bank was licensed to act as administrator.

It was said in *Caldwell v. Bates,* 118 N. C., 323 (325): "That the directors are liable for gross neglect of their duties, and mismanagement—though not for errors of judgment made in good faith—as well as for fraud and deceit." *Minnis v. Sharpe,* 198 N. C., 364; *S. c.,* 202 N. C., 300.

The principle of law as above written is safe, sane, and salutary, and we adhere to same in the present action. The plaintiff's evidence is not sufficient to bring defendants to an accountability under the law and the nonsuit was properly granted in the court below.

The judgment of the court below is

Affirmed.

LESTER PIANO COMPANY v. MRS. MARY LOVEN.

(Filed 10 October, 1934.)

Limitation of Actions A c—Three-year statute applies to claim and delivery for chattel covered by conditional sale contract not under seal.

Defendant had possession of a chattel purchased by her under a promissory note and conditional sale contract not under seal. Plaintiff, the owner of the conditional sale contract, instituted claim and delivery proceedings for the possession of the chattel for sale under the terms of the contract. Defendant pleaded the three-year statute of limitations, and

plaintiff admitted that there had been no new promise or payment on the purchase price for over three years prior to the institution of the action: *Held*, the three-year statute of limitations, C. S., 441 (1), (4), barred the ancillary remedy of claim and delivery, C. S., 830, action on the note being also barred by the statute.

APPEAL by plaintiff from *Warlick, J.*, at April Term, 1934, of AVERY. Affirmed.

The judgment of the court below is as follows: "It is agreed that the plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, and that the defendant is a resident of Avery County. It is agreed that the plaintiff is the owner and holder of the conditional sales and retention title contract to the piano described in the complaint, which is in words and figures as follows:

"$295.00. Hickory, N. C., 4-2-1926. For value received, I, the undersigned, of No..... Street, town of Newland, county of Avery, State of North Carolina, promise to pay to the order of Jno. F. Warren Music Company, of Hickory, N. C., two hundred and ninety-five dollars at its office in Hickory, N. C., as follows: Ten dollars this date and ten dollars per mo, until paid, with interest on each of said sums at the rate of six per centum from date hereof until paid, with exchange. The consideration for the payment of the above named amounts is the delivery by said Jno. F. Warren Music Company to the undersigned of one piano made by Lester Company, No. 87317, Style Mah 40. It is expressly agreed by and between the said Jno. F. Warren Music Company and the undersigned that the title to said instrument shall remain in the Jno. F. Warren Music Company until the entire purchase price, with interest, is fully paid; but the undersigned hereby assumes all liability for said instrument in the event of its being destroyed or damaged, reasonable use and wear thereof excepted; and if the undersigned shall fail to make any of the aforesaid payments within thirty days after such payments respectively fall due, said Jno. F. Warren Music Company may at its option, with or without notice to the undersigned, declare all unpaid installments immediately due and payable and shall have the right to retake said instrument. In case Jno. F. Warren Music Company shall retake possession of said instrument, all moneys paid on the purchase price thereof shall belong to Jno. F. Warren Music Company as liquidated damages for the nonfulfillment of this contract, loss in value of said instrument, and for the use or rental of said instrument while remaining in possession of the undersigned. In case of legal proceedings, the undersigned agrees to pay such costs as may accrue.

"The undersigned agrees not to move the instrument herein described without the consent of Jno. F. Warren Music Company, also to have it

insured and pay the loss, if any, to Jno. F. Warren Music Company, as its interest may appear; also to pay any taxes levied against the same while in his possession. Mrs. Mary Loven (Signed). Witness: W. H. Yoder.

"It is agreed that under said conditional sale agreement or contract the plaintiff made demand for possession of the piano, and the demand was refused, and claim and delivery issued with proper bond on the part of the plaintiff was issued, and that a proper replevy bond was given by the defendant. The value of the property is admitted to be $150.00.

"It is agreed by the plaintiff that no payment has been made by the defendant to the plaintiff within the past three years, and that for three years or more prior to the institution of the action the defendant paid no amount of said contract.

"Upon the agreement of the facts above stated, the court is asked to pass upon only the question of whether or not the plea of the statute of limitations made by the defendant in her answer, and admitted by the plaintiff in the findings of fact, is good as a bar, it being admitted that it is properly pleaded, to the maintenance of this suit or action at law by the plaintiff, and that the said statute of limitations is the sole question to be passed on by the court, the parties waiving a jury trial, and agreeing that in the event the court is of the opinion that the plea of the statute of limitations is good, that the court would then, if there had been a jury trial, or if the jury had been impaneled, peremptorily instructed the jury that as a matter of law that they would answer any issue submitted to the jury as to the plea of the statute of limitations in favor of the defendant.

"The court thereupon holds, on the admission being made that no payment has been made within three years or more by the defendant to the plaintiff or anyone for the plaintiff, within three years or more prior to the institution of the action, that the plea of the statute of limitations would prevail, and so stating to the parties authorizes the drafting of a judgment to the effect that the defendant is not indebted to the plaintiff under her plea of the statute of limitations, and not being indebted to the plaintiff, that the plaintiff would not be entitled to the property for the purpose of exposing it to sale under the statute applicable to the sale of the property under conditional sales contract for the purpose of satisfying the amount due thereon. And from the foregoing judgment and signing thereof the plaintiff in open court gives notice of appeal to the Supreme Court. Further notice waived.

"By consent, the plaintiff appellant is allowed forty days to make up and serve statement of case on appeal, and the defendant appellee is allowed thirty days thereafter to serve countercase or file exceptions. Appeal bond in the sum of $50.00 adjudged sufficient. (Signed) Wilson Warlick, Judge Presiding."

The exceptions and assignments of error made by plaintiff are as follows: "First. To the action of the court in holding that the statute of limitations pleaded by the defendant in her answer is applicable to this action and bars the plaintiff from recovering the possession of the property in question.

"Second. To the action of the court in signing and entering the judgment appearing in the record."

J. V. Bowers for plaintiff.
Charles Hughes for defendant.

CLARKSON, J. Is the plaintiff, under the above facts in this claim and delivery proceeding, barred by the three-year statute of limitation? We think so.

N. C. Code, 1931 (Michie), sec. 441 (1) and (4), are as follows: "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. . . . (4) For taking, detaining, converting or injuring any goods or chattels, including action for their specific recovery."

In *Battle v. Battle,* 116 N. C., 161 (163-164), it is said: "The Code, sec. 172 (C. S., 416), requires an acknowledgment or new promise to be in writing left the effect of a partial payment in removing the bar of the statute of limitations as it was before the Code of Civil Procedure. *Bank v. Harris,* 96 N. C., 118. The effect of partial payment in stopping the running of the statute is not by virtue of any statutory provision. It was not in the statute of James I, but was an exception allowed by the courts, and its application depends upon the reasoning in such decisions. The Act of 9 George IV, C 14, in a similar way to our statute, merely recognizes the exception as existing. Partial payment is allowed this effect only when it is made under such circumstances as will warrant the clear inference that the debtor recognizes the debt as then existing and his willingness, or at least his obligation, to pay the balance." *Nance v. Hulin,* 192 N. C., 665. C. S., 416. N. C. Practice and Procedure in Civil Cases (McIntosh), sec. 131.

The contract sued on is not under seal and there is no new promise or partial payment on the note. The plaintiff alleges in its complaint of claim and delivery the following: "That the plaintiff is the owner of that certain upright piano made by Lester Piano Company, No. 87317, Style Mah 40, by virtue of a conditional sale and retention title contract executed by the defendant to the title to said piano, of which contract the plaintiff is the owner thereof."

N. C. Code, 1931 (Michie), sec. 830, is as follows: "The plaintiff in an action to recover the possession of personal property may, at the time

of issuing the summons or at any time before, answer, claim the immediate delivery of the property as provided in this article."

In *Wilson v. Hughes,* 94 N. C., 182 (185-186), citing numerous authorities, is the following: "We observe that this is called an 'action of claim and delivery.' Properly and strictly speaking there is no such action. The action commonly so-called is an action to recover the possession of personal property—some specific chattel—and is of the nature of the action of detinue under the common-law method of procedure. 'Claim and delivery of personal property' is a provisional remedy, incident and ancillary, but not essential to the action. The object of such incidental provision is to enable the plaintiff, upon giving an undertaking in double the value of the property in question, with approved security, as required by the statute, to obtain the immediate possession of the same, unless the defendant shall give a similar undertaking and security for its delivery to the plaintiff, if it shall be so adjudged, and for the payment of such costs as may be adjudged against him in the action. Thus, the property, or the value of it, is made secure pending the action, in such way as to answer the purpose of the final judgment. This provisional remedy is peculiar to the Code method of procedure, and gives the action something of the nature of the action of replevin at the common law.

" 'Claim and delivery' of the property may be omitted, and the action may be simply to recover the possession of the specific chattel, as in detinue, or to recover the value of the property as in trover or trespass. In any case, it is incident to an action and provisional only." See Foreclosure of Conditional Sales, sec. 2587. *House v. Parker,* 181 N. C., 40.

The defendant in her answer pleaded the three-year statute of limitations: "That if the defendant is due the plaintiff any amount whatsoever, which she now denies, it has been a number of years since any demand was made upon her by plaintiff for payment, until at the time of or immediately before the institution of this action, and it has been more than three years since any payment has been made to the plaintiff on its alleged account against her, and the defendant now pleads the three-year statute of limitations as a bar to plaintiff's right to recover in this action."

We think that section 441 (1) and (4), *supra,* bars the plaintiff's ancillary claim and delivery proceeding. The present proceeding concerns personal property. N. C. Code, 1931 (Michie), sec. 437: "Within ten years an action—(2) Upon a sealed instrument against the principal thereto. (3) For the foreclosure of a mortgage, or deed in trust for creditors with a power of sale, of real property, where the mortgagor or grantor has been in possession of the property, within ten years after the

forfeiture of the mortgage, or after the power of sale became absolute, or within ten years after the last payment on the same."

N. C. Code, 1931 (Michie), sec. 2589, is as follows: "The power of sale of real property contained in any mortgage or deed of trust for the benefit of creditors shall become inoperative, and no person shall execute any such power, when an action to foreclose such mortgage or deed of trust for the benefit of creditors would be barred by the statute of limitations."

The holding in *Menzel v. Hinton,* 132 N. C., 660, and in *Cone v. Hyatt,* 132 N. C., 810, that the power of sale in a deed of trust or mortgage is not barred by the statute of limitations, though an action for foreclosure thereon is barred, is changed by this section, *supra. Humphrey v. Stephens,* 191 N. C., 101.

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

Affirmed.

MILDRED MERRIMON v. THE POSTAL TELEGRAPH-CABLE COMPANY.

(Filed 10 October, 1934.)

1. Torts C e—General release of all claims existing at time of execution of the release is binding in absence of fraud or mistake.

Plaintiff, having asserted a claim against defendant, signed a release for the claim asserted, and for "all claims of every nature, kind and description, which I have . . . up to and including the date of this release." Thereafter plaintiff instituted this action upon a claim existing, to her knowledge, at the time of the execution of the release, but based upon an unrelated cause of action: *Held,* in the absence of fraud or mistake, plaintiff is bound by the terms of the release, which are sufficiently broad to include the cause of action sued on, the plaintiff having signed the release after full consideration of its contents at a time when she knew all the facts, and the release being supported by consideration.

2. Appeal and Error J g—

Where the rights of the parties are determined by the decision of the court upon one of the assignments of error, questions presented by other assignments of error need not be considered.

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

APPEAL by defendant from *Schenck, J.,* at March Term, 1934, of BUNCOMBE. Reversed.

This action was begun in the general county court of Buncombe County on 2 December, 1932, and was tried at September Term, 1933, of said court.

In her complaint the plaintiff alleges:

"2. That during the month of December, 1930, and prior thereto, the plaintiff was employed in the office of the defendant in the city of Ocala, Florida, to do general office work, including stenography, typewriting, and other general work.

"3. That the defendant carries on a general telegraph business, receiving and sending messages for hire, with offices distributed throughout the country, and has a general office and place of business with agents and representatives located at Asheville, N. C.

"4. That it is and was at the time of the matters and things herein complained of the duty of the defendant to furnish to its employees a reasonably safe and suitable place in which to work, and particularly to furnish this plaintiff and her co-employees an adequately heated room or place in which to perform her duties, but notwithstanding said duty, which defendant owed to the plaintiff, the defendant carelessly, negligently and wantonly failed and refused to provide necessary heat for the offices and rooms in which this plaintiff was required to work, although this plaintiff repeatedly, from time to time, complained to defendant through its agents and representatives, and demanded that her said office be properly heated.

"5. That notwithstanding the repeated requests and demands of this plaintiff to the defendant for proper heating facilities, and notwithstanding the fact that the winter of 1930 was excessively cold, all of which facts were repeatedly brought to the attention of the defendant, the defendant persisted in its refusal to furnish sufficient appliances and accommodations to properly heat the offices, and this plaintiff was required to work in an excessively cold room, wherein the atmosphere was in a cold, damp and chilly condition, and was likely to cause the occupants thereof to suffer intensely from the cold and to expose this plaintiff to the ills incident to the cold and damp condition in said room, and by reason of the conditions as herein set forth, and by reason of the defendant's negligent, careless and wanton failure to provide adequate heating facilities, although repeatedly requested to do so, this plaintiff was exposed to the extreme cold as herein set forth, and her health was greatly impaired as hereinafter set forth.

"6. That this plaintiff was so persistent in her demands on the defendant to furnish adequate heating appliances that the defendant eventually, after this plaintiff had suffered intensely from her exposure as herein set forth, installed a gas heater in this plaintiff's room, but when this plaintiff would ignite the gas in order to provide sufficient heat, the manager and agent of the defendant under whom this plaintiff was required to work repeatedly and continuously turned off said heater, and refused to allow this plaintiff to use said heater a sufficient length of

time to heat the room, although repeatedly requested by this plaintiff to allow the plaintiff to use said heater, and by reason of the matters and things herein complained of this plaintiff was required to work under such hazardous conditions that her health became impaired, she developing a severe cold which settled in her back, side and neck, and greatly injured her nervous system, causing her to suffer great pain and mental anguish, causing a condition of neuritis to set up in her neck, side and shoulder; that her condition became so run-down, her nerves upset, that she was compelled to discontinue her services, resign her position with the defendant, and seek medical treatment, all of which cost her large sums of money for doctors' bills and medical expenses, and since said time, due solely and proximately to the negligence as herein set forth, this plaintiff's earning capacity has been greatly reduced, and she is now wholly unable to perform any duties pertaining to her livelihood, and as she is advised and believes she is permanently disabled, all by reason of the careless, negligent and wanton manner in which the defendant failed and refused to furnish the plaintiff with an adequately heated room, and wantonly and maliciously turned off the heater eventually furnished in said room, although repeated demands were made on the defendant, the condition of the room having been repeatedly brought to the attention of the defendant.

"7. That prior to the exposure to which this plaintiff was subjected by reason of the negligence of the defendant as herein set forth, the plaintiff was a strong, healthy, able-bodied person, but now by reason of the wanton, wilful and negligent failure and refusal of the defendant to furnish this plaintiff with a reasonably and adequately heated room in which to work, her health has been impaired as herein set forth, and as she is advised, believes, and so avers, she is permanently injured and damaged; that she has been caused to suffer bodily pain and mental anguish, and still is suffering, and has been made sore, sick, and lame, and been made to suffer, all to her great damage in the sum of $2,500."

Defendant's demurrer to the complaint on the ground that the facts alleged therein are not sufficient to constitute a cause of action, was overruled.

In its answer, the defendant denies all the material allegations of the complaint, and pleads, among other defenses, a release, in writing, executed by the plaintiff on 4 December, 1931, which is as follows:

"NORTH CAROLINA—BUNCOMBE COUNTY.

"Know all men by these presents: That I, Mildred Merrimon, of the aforesaid county and State, for and in consideration of the sum of $150.00 to me in hand paid by the Postal Telegraph and Cable Company of Kentucky, and the Postal Telegraph and Cable Company of

Delaware, have released and do hereby release and discharge the said Postal Telegraph and Cable Company of Kentucky, and the Postal Telegraph and Cable Company of Delaware, and the Postal Telegraph and Cable Company operating in the State of Florida, and any other Postal Telegraph and Cable Company operating anywhere else in the United States of America, from any and all liability on account of a claim which I have against said corporations arising out of an injury received by me at about nine o'clock a.m., on a certain day during the early part of January, 1930, as a result of an alleged assault made upon me by one Arthur Keel, an employee of one of the defendant corporations at Bowling Green, Ky., which said injury is fully set out and described in a complaint filed by me in the general county court of Buncombe County, N. C., on or about the 8th day of October, 1931.

"I do further release and discharge the said Postal Telegraph and Cable Company of Kentucky, the Postal Telegraph and Cable Company of Delaware, and every Postal Telegraph Cable Company operating anywhere in any of the states of the American Union, from all claims of every nature, kind and description, which I have or claim to have against them, up to and including the date of this release.

"This 4th day of December, 1931.

MILDRED MERRIMON. (Seal)"

At the trial the issues which arise on the pleadings were submitted to the jury and answered as follows:

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

"2. Did the plaintiff by accepting employment with the defendant assume the risks incident to heat and cold, as set forth in the defendant's answer? Answer: 'No.'

"3. Did the plaintiff by her own negligence contribute to her injury? Answer: 'No.'

"4. Is the release set up by the defendant in its second and further answer and defense a bar to the action of the plaintiff? Answer: 'No.'

"5. What damages, if any, is the plaintiff entitled to recover? Answer: '$1,050.'"

From the judgment of the general county court that plaintiff recover of the defendant the sum of $1,050, and the costs of the action, the defendant appealed to the Superior Court of Buncombe County, assigning errors in the trial. All the assignments of error were overruled by the judge of the Superior Court. The judgment of the general county court was affirmed and the defendant appealed to the Supreme Court.

Thomas O. Pangle and J. Scroop Styles for plaintiff.

Joseph W. Little and Alfred S. Barnard for defendant.

CONNOR, J. In apt time, the defendant requested the judge of the general county court, in writing, to instruct the jury as follows:

"I charge you, gentlemen of the jury, that the release offered by the defendant is a bar to the action of the plaintiff, and it will be your duty to answer the fourth issue 'Yes.' "

This prayer was refused, and on defendant's appeal to the Superior Court, its assignments of error based on such refusal was overruled. In this there was error, and for this error the judgment of the Superior Court affirming the judgment of the general county court must be reversed.

At the trial in the general county court, the plaintiff admitted the execution by her of the release as alleged in the answer of the defendant. She did not allege in her reply or offer evidence at the trial tending to show that the execution of the release was procured by fraud, or that there was any mistake with respect to its contents. The validity of the release was not challenged by the plaintiff. The release is therefore binding and conclusive on the plaintiff. Its language is plain and unequivocal, and clearly shows the intention of the parties.

The cause of action, if any, alleged in the complaint in this action existed to the knowledge of the plaintiff at the time she signed the release. For a consideration which was satisfactory to her the plaintiff released and discharged the defendant from any and all liability to her not only on the cause of action alleged in the complaint in the action then pending in the general county court of Buncombe County, but also on any claim or claims which she then had against the defendant. She executed the release, which was drawn by her attorney, after consultation with him, and after full consideration of its contents. When she executed the release, and delivered it to the defendant, she knew all the facts which she alleges as her cause of action in the complaint in this action. She is and ought to be bound by the terms and provisions of her contract, which are sufficiently broad and comprehensive to include the claim against the defendant on which her cause of action alleged in the complaint in this action is founded.

Jeffreys v. R. R., 127 N. C., 377, 37 S. E., 515, is readily distinguishable from the instant case. The decision in that case does not sustain the contention of the plaintiff that the release in the instant case is not effective to bar a recovery by her on the cause of action alleged in the complaint in this action. This will appear from a comparison of the release in that case with the release in the instant case. The distinction is apparent, and recognizes the principle stated in *Houston v. Trower*, 297 Fed., 558, as follows:

"The language in a release may be broad enough to cover all demands and rights to demand or possible causes of action, a complete discharge

of liability from one to another, whether or not the various demands or claims have been discussed or mentioned, and whether or not the possible claims are all known. One seeking a settlement and release has the right to buy peace from all future contention on then existing claims of every character."

As the release executed by the plaintiff is a bar to her recovery in this action, we do not decide or discuss the many interesting questions presented by other assignments of error relied on by defendant in this appeal.

The action is remanded to the Superior Court of Buncombe County with direction that judgment be entered in accordance with this opinion.

Reversed.

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

W. D. PEAL, ADMINISTRATOR OF THE ESTATE OF MRS. L. C. SPRUILL, DECEASED, *v.* MRS. ESTELLE MARTIN, ADMINISTRATRIX OF VAN B. MARTIN, DECEASED.

(Filed 10 October, 1934.)

1. Judicial Sales A a—Commissioner appointed to conduct judicial sale is not attorney for either party litigant.

A commissioner appointed by the court to sell lands and distribute the proceeds in accordance with the order of the court is in a certain sense an officer of the court to perform the specific acts specified in the order, and he is not an attorney for either party to the suit, and the relationship of attorney and client existing between him and one of the parties prior to his appointment is terminated by the appointment since he must then act in accordance with the orders of the court, and can no longer act in accordance with private contract.

2. Limitations of Actions B a—

A cause of action accrues and the statute of limitations begins to run whenever a party becomes liable to an action, if at such time the demanding party is under no disability.

3. Judicial Sales A e: Limitation of Actions B b—Cause of action accrues to distributees upon commissioner's failure to distribute funds in accordance with order of court.

Where a commissioner appointed in a civil action is ordered to sell land and distribute the proceeds as specifically directed, and after sale by the commissioner an order is entered directing him to forthwith execute a deed to the highest bidder at the sale upon the payment of the purchase price, and to distribute the funds as specified, a cause of action accrues in favor of the persons entitled to receive the funds against the commissioner for money had and received, and the commissioner not being in

a fiduciary relationship with such persons, and they being under no disability, their right of action against the commissioner is barred after the lapse of three years, and plaintiff's contention that upon the commissioner's failure to file a report and final account with the clerk the cause of action did not accrue until demand upon the commissioner or his administrator is untenable, since the order did not direct the commissioner to file such report, and if the statutes, C. S., 765, 3243, applied, the law made demand for the disbursement of the funds, and plaintiff had notice of such failure upon the expiration of the ten days therein prescribed for the filing of a report, or the sixty days therein prescribed for the filing of the account.

CIVIL ACTION, before *Small, J.*, at April Term, 1934, of WASHINGTON.

Prior to April, 1923, a suit was pending in Washington County entitled "Dr. W. H. Hardison and W. D. Peal, Administrators of Mrs. L. C. Spruill, Deceased, *v.* C. W. Overton, Sarah E. Overton, T. N. Gray and H. G. Walker, Trustee." At the April Term, 1923, certain issues were submitted and answered by the jury and a final judgment entered. This judgment decreed that Dr. W. H. Hardison recover of the defendants the sum of $1,024, "and that W. D. Peal, administrator *c. t. a.* of Mrs. L. C. Spruill, recover of the defendants . . . the sum of $3,250, and that Van B. Martin be and he is hereby appointed commissioner of the court to sell the property described in the mortgage, . . . and apply the proceeds of sale on the deed of trust to Dr. W. H. Hardison and the remainder, if there be any, to the mortgage and interest of Mrs. L. C. Spruill." Thereafter, at the October Term, 1923, an order was entered allowing the defendants to answer, and the cause came on for hearing at the October Term, 1924, before Devin, J., who entered the judgment containing the following provision: "It further appearing to the court and the court finding the facts to be that the property described in the instrument aforesaid has, by orders heretofore entered in this action, been sold and bid in by W. T. Phelps at the sum of $4,450, and all parties to this action having ratified the said sale in open court, it is ordered by the court that Van B. Martin, as commissioner of the court, proceed forthwith to execute deed of conveyance for the said property to the said W. T. Phelps at the price aforesaid upon payment of the purchase money and out of the said money to pay first the amount herein adjudged to be due Dr. W. H. Hardison and to pay the remainder of the said amount over to the said Peal, administrator, to be applied upon the said purchase money indebtedness herein adjudged to be due him as administrator." It was further provided that in the event Phelps did not pay the purchase money that the commissioner proceed to readvertise and resell the property "and make report of his proceedings to the clerk of this court," etc.

The evidence disclosed that Martin, commissioner, had duly sold the land on 28 May, 1923, pursuant to the judgment entered at the April

Term, 1923, and collected the entire purchase price, amounting to $4,480, and deed for the premises had been duly delivered to the purchaser. The deed by Martin, commissioner, to Phelps, made pursuant to the judgment, recited a report of the sale and confirmation thereof. However, the clerk of the Superior Court testified that there was no record in his office of any report made by the commissioner or of any final account. Van B. Martin, commissioner, died on 25 June, 1930, and the plaintiff filed a claim with his administratrix for the sum of $2,339.76, being the balance claimed by the plaintiff upon the purchase price of the land. The administratrix denied liability upon the claim, and thereupon, on 7 June, 1932, this action was instituted by the plaintiff to recover said sum from the estate of the deceased commissioner. The plaintiff, as a witness in his own behalf, undertook to testify that Van B. Martin, deceased, was his attorney, and that he actually saw the commissioner receive the money from Phelps, the purchaser, and that he had made demand upon Martin to pay from time to time.

At the conclusion of the evidence the trial judge sustained a motion of nonsuit, and the plaintiff appealed.

W. L. Whitley for plaintiff.
Zeb Vance Norman for defendant.

BROGDEN, J. A commissioner is appointed in a civil action tried in the Superior Court to sell land and to pay a specified portion of the proceeds to the plaintiff in this action. The land is duly sold in May, 1923, and the commissioner received the money. The commissioner died on 25 June, 1930, and thereafter, in June, 1932, the plaintiff institutes this action against the administratrix of the commissioner to recover said sum of money, alleging that the commissioner had not paid the money as directed in the judgment, and that no report and account had been filed prior to the death of the commissioner. Upon such showing the trial judge nonsuited the case.

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

1. What is the legal relationship between a commissioner appointed by a court of equity to sell land and the parties to the suit?

2. Is the cause of action alleged by the plaintiff barred by the three-year statute of limitations?

A commissioner appointed by a court of equity to sell land is empowered to do one specific act, viz., to sell the land and distribute the proceeds to the parties entitled thereto. He has no authority and can exercise no powers except such as may be necessary to execute the decree of the court. Immediately upon his appointment he ceases to be an attorney or agent for either party, but becomes in a certain sense an officer of the court for the specific purposes designated in the judgment.

The plaintiff asserts that Martin, deceased commissioner, was his attorney when the original suit was instituted, and that although he was appointed commissioner of the court to sell the land, this did not terminate the fiduciary relationship. This contention, however, cannot be maintained for the obvious reason that a commissioner must act in accordance with the orders of the court and not in accordance with the contract between the parties. The relationship of a commissioner to the parties was first considered by this Court in *Smith v. Moore,* 79 N. C., 82. The third headnote of that case is as follows: "It seems that there is no means known to our practice of holding a commissioner appointed to make a judicial sale pecuniarily responsible for the money collected by him, except by an action instituted by the parties entitled to such money." The language of the decision upon which this headnote is based is: "He might be discharged from his office at any time by the court, without affecting the rights or the status of the parties in court. It is true he is liable to an attachment for disobedience or failure to do his duty, but this is a remedy *in personam* merely. The court has no power to award judgment and execution against his property," etc. The *Smith case, supra,* was cited with approval in *Gilbert v. James,* 86 N. C., 244, which holds that a party entitled to money in the hands of a commissioner can maintain a suit for the recovery thereof. Consequently, it is manifest that a commissioner is not a trustee within the general meaning of that term.

The answer to the second question of law must be determined with reference to the time when the cause of action accrued. The plaintiff insists that as the evidence tended to show that the commissioner made no report and filed no account with the clerk that the cause of action did not accrue until demand made after the death of the commissioner, upon his administratrix. It is to be observed that the judgment at the April Term, 1923, appointing the commissioner did not require him to file either a report or an account with the clerk. It directed him specifically upon collection of the purchase money to pay the amount due to Dr. Hardison and "the remainder of said amount . . . to the said Peal, administrator, to be applied upon said purchase-money indebtedness herein adjudged to be due him as administrator." C. S., 765, requires a commissioner in certain instances to file within sixty days "a final account of his receipts and disbursements on account of the sale," etc. C. S., 3243, requires a commissioner in partition proceedings to file a report within ten days after the sale," etc. Even if it be conceded that C. S., 765, or C. S., 3243, is applicable to the facts of this case, the plaintiff knew at the end of either ten or sixty days that the money had not been paid. If these statutes were applicable, the law made the demand upon the failure to act and disburse the proceeds of the sale.

All the authorities agree that the cause of action accrues and the statute of limitations begins to run whenever a party becomes liable to an action, if at such time the demanding party is under no disability. *Eller v. Church,* 121 N. C., 270; *Brown v. Wilson,* 174 N. C., 668, 94 S. E., 619; *Washington v. Bonner,* 203 N. C., 250, 165 S. E., 683.

The original judgment at the April Term, 1923, directed the commissioner to pay the money to the plaintiff. Thereupon the plaintiff was entitled to receive the same. The commissioner, as the plaintiff contends, failed to turn over the proceeds of the sale as directed, and therefore a cause of action for money had and received accrued to the plaintiff. He was under no disability. Notwithstanding, he neglected to assert his right for a period of approximately nine years. In the meantime the three-year statute of limitations had barred his right and it necessarily follows that the trial judge ruled correctly.

Affirmed.

D. W. WINSTEAD v. ACME MANUFACTURING COMPANY.

(Filed 10 October, 1934.)

1. Evidence J a—Parol evidence in contradiction of stipulation of written order signed by plaintiff held inadmissible.

An order for fertilizer for cotton and corn was signed by the purchaser. Thereafter the fertilizer was shipped, and most of it used before the purchaser signed notes for the purchase price. The purchaser brought suit to cancel the notes given for the purchase price on the ground that he ordered fertilizer for tobacco, that the seller knew the facts, and that the fertilizer was worthless for the only purpose for which the purchaser could and did use it, and that there was a total failure of consideration: *Held,* in the absence of allegations of fraud, mistake, or mistake of one party induced by the fraud of the other, parol evidence in contradiction of the stipulation in the order that the fertilizer was for cotton and corn is not admissible, and such evidence was properly excluded by the lower court.

2. Pleadings E a—

The trial court has the discretionary power to refuse to allow a motion by a party litigant upon the trial to amend his pleadings.

APPEAL by plaintiff from *Barnhill, J.,* and a jury, at January-February Term, 1934, of LEE. No error.

This is an action brought by plaintiff against the defendant to cancel certain notes for failure of consideration. The plaintiff in the complaint alleges, in part: "That on or about 8 May, 1931, plaintiff executed and delivered to defendant two promissory notes, aggregating the

sum of $514.10, bearing interest on said sum from 8 May, 1931, which defendant had in its possession at the time this action was brought.

"Theretofore and on or about 11 April, 1931, the defendant had offered and agreed to sell to plaintiff a quantity of commercial fertilizers, which defendant represented to be and warranted to be first-class tobacco fertilizers, the equal of any other fertilizer of its purported character and analysis for the purpose of raising and growing tobacco; the defendant, knowing it was then being purchased for the said purpose of growing tobacco, defendant sold the same to plaintiff for the said purpose of being used to grow tobacco; and plaintiff had no other use therefor except for said purpose, and except therefor was useless and of no value to the plaintiff, and said note hereinbefore referred to was given to close said account for said fertilizers and said grade and description so offered and agreed to be sold to plaintiff by defendant," etc.

The prayer is as follows: "Wherefore, plaintiff prays judgment against defendant that: (1) Defendant deliver up for cancellation the note hereinbefore referred to; that there has been a total failure of consideration for said note, and that the same be canceled, and that plaintiff is due and owes the defendant nothing by reason thereof.

"(2) Defendant pay the costs, and plaintiff receive such other and further relief as plaintiff may be entitled."

The defendant denied the material allegations of the complaint and for a further defense alleges, in part: "That on 8 May, 1931, the plaintiff D. W. Winstead executed his two certain promissory notes, each in the sum of $257.05 ($514.10), copy of which notes are attached hereto and by reference incorporated in this paragraph of the further defense and marked Exhibits A and B. That the said notes were executed as evidence of indebtedness for certain fertilizer delivered to the said D. W. Winstead, pursuant to certain written orders, copies of which are attached to this answer and made a part of this paragraph of the further defense and marked Exhibits C and D. That of the fertilizer consigned to Elva Bryan under Exhibit D, the said plaintiff, who has at all times acted as the agent of the said Elva Bryan, received for his own use two and nine-tenths (2.9) tons. That no part of said notes have been paid, although frequent demand for the payment of same has been made and the whole amount is now due and owing.

"That the plaintiff received the goods ordered by him and is liable to the defendant for the said goods in the sum of $514.10, with interest on said principal sum from 1 May, 1931, until paid.

"That there was no warranty, express or implied, on the part of the defendant as to the quality of the goods shipped except such as is contained in the notes signed by the plaintiff and made a part hereof. . . . That the fertilizer purchased was for corn and cotton, as shown

on the orders, copies of which are hereto attached and made a part of this further defense, and were not for tobacco, as alleged by the plaintiff.

"That the goods delivered by the defendant to the plaintiff have been retained and used by the plaintiff in the cultivation of his crop, and that the reasonable market value of the said fertilizers at the time and place when and where delivered to the plaintiff was the sum represented by the notes hereinabove set out, copies of which have been attached to this answer."

The issues submitted to the jury and their answers thereto were as follows: "(1) Was there a failure of consideration, in whole or in part, for the execution of the two notes signed by D. W. Winstead payable to Acme Manufacturing Company, dated 8 May, 1931, in the sum of $257.05 each, as alleged? A. 'No.' (2) If not, in what amount, if any, is the plaintiff indebted to the defendant thereon? A. '$514.10, with interest from 1 May, 1931.'"

The other indebtedness due by plaintiff to defendant we do not set forth, as we think it immaterial, as the controversy was only over the two notes aggregating $514.10. Judgment was rendered on the verdict. The plaintiff made numerous exceptions and assignments of error, and appealed to the Supreme Court. The material ones and necessary facts will be considered in the opinion.

K. R. Hoyle for plaintiff.
Williams & Williams and C. D. Hogue for defendant.

CLARKSON, J. The order was dated 11 April, 1931, and called for 200 sacks brand Acme Wizard Fertilizer, c. (cotton) and c. (corn) 8-3-3. Can this order be contradicted in the absence of fraud or mutual mistake, or mistake of one party induced by false representations of the other? We think not.

Defendant contended that the goods were not ordered for tobacco and were not shipped for that purpose. That if the fertilizer was used for tobacco that it was plaintiff's responsibility, as the signed order was for cotton and corn goods, and that the fertilizer was shipped on 15 April, 1931—after the order was signed. The plaintiff testified: "That is my signature on the paper-writing, dated 11 April, 1931. When I last saw it, there was nothing on it but my name."

The plaintiff was then asked the question: "Was there any C (cotton) and C (corn) on this paper? A. 'No, sir.'" Objection by defendant; objection sustained; motion to strike by defendant; motion allowed; the plaintiff excepts. "Q. Did you order from the Acme Fertilizer Company, during the year 1931, any corn or cotton fertilizer?" Objection by defendant; objection sustained; plaintiff excepts. Plaintiff

moves to amend his complaint to allege that the contract of 11 April was fraudulently filled in. The court in its discretion overrules the motion. Plaintiff excepts.

In *Carlton v. Oil Co.*, 206 N. C., 117 (117-118), it is said: "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 intend 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."

The learned and able attorney representing plaintiff did not reply to defendant's further defense, and set up fraud, mutual mistake, or mistake of one party induced by false representations of the other in signing the paper-writing of 11 April, 1931, although the pleading by defendant had been filed for over two years before the case came for trial. To do this on the trial, the court below, in its discretion, refused plaintiff's request. The court had this discretion. *Sams v. Cochran*, 188 N. C., 731 (733); *Lee v. Martin*, 191 N. C., 401; *Fleishman v. Burrowes*, 198 N. C., 514; *Lipe v. Trust Co.*, 206 N. C., 24 (29). The notes in controversy were given on 8 May, 1931, to cover the order of 11 April, 1931, after seventy-five per cent of the fertilizer had been used. The fertilizer was shipped after the order was made. In excluding plaintiff's evidence on the present record we see no error, or in the charge of the court below.

We do not think it necessary to discuss the case of *Swift & Co. v. Aydlett*, 192 N. C., 330, the principle in that case we adhere to, but is not applicable to this record. If defendant attempted to perpetrate a fraud on the plaintiff, he should have made a reply to defendant's pleading and set it up, and then he would have been heard.

In the present action the lack of consideration is bottomed on the allegation that plaintiff had purchased tobacco fertilizer and was sent cotton and corn fertilizer. This was the theory the case was tried on. There is no contention that the fertilizer was worthless so far as the purposes set forth in the order was concerned. The truth or falsity of the order of 11 April, 1931, was the bone of contention. The fertilizer was shipped under this order and the two notes of 8 May, 1931, were

thereafter given in conformity with the order. This order was valid unless set aside by fraud or mutual mistake, or mistake of one party induced by false representation of the other. This action is distinguishable from the opinion in *Galloway v. Thrash, post,* 165.

For the reasons given, in the judgment of the court below in law we find

No error.

JAMES ALSTON AND THE PULLMAN COMPANY v. SOUTHERN RAILWAY COMPANY.

(Filed 10 October, 1934.)

1. Judgments K a: K b: Appeal and Error J c—Finding that attorney signing consent judgment was duly authorized held binding upon appeal.

Where, upon a motion to set aside a judgment for surprise and excusable neglect, C. S., 600, on the ground that the judgment was a consent judgment and was signed by movant's attorney without authority, and a motion to set aside the consent judgment for such want of authority by movant's attorney, the court finds, upon evidence by affidavits, that the attorney was duly authorized to sign the judgment for movant, the finding is conclusive on the Supreme Court upon appeal, Art. IV, sec. 8, and the order refusing the motions will be upheld.

2. Judgments K b—

After appeal from an order of the clerk refusing to set aside a judgment for surprise and excusable neglect it is too late for movant to request the clerk to find the facts upon which he bases his order.

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

APPEAL by plaintiff from *Schenck, J.,* at May Term, 1934, of BUNCOMBE. Affirmed.

This action was for actionable negligence alleging damage. James Alston was a Pullman Company porter and the gravamen of his action is that while in performance of his duties in the Pullman car, a freight train of the defendant company negligently ran into the Pullman car and injured him.

A judgment by consent was rendered in the action before the clerk of the Superior Court of Buncombe County, North Carolina, on 28 December, 1933: "The plaintiff, James Alston, have and recover of the defendant Southern Railway Company the sum of $150.00 and the cost of this action, to be taxed by the clerk."

The plaintiff, through another attorney, made a motion on 31 March, 1934, under C. S., 600, to set aside said judgment. There is no question made that the attorney who signed the consent judgment for James

Alston was not employed by him, but the contention was that he had no authority to do so. On 14 April, 1934, the clerk made the following order: "It appearing to the court, after reading the affidavits and hearing argument of counsel, that attorney for plaintiff had full authority to consent to the judgment heretofore entered, and that said judgment was entered into by consent of the plaintiff, and for that reason the plaintiff is not entitled to have the judgment set aside.

"It is therefore ordered and adjudged by the court that the motion of the plaintiff be and the same is hereby overruled; and

"It is further ordered that the judgment heretofore entered remain a binding judgment in this cause."

The plaintiff appealed from this judgment to the Superior Court, and the following judgment was rendered in the court below by Schenck, J., at May Term, 1934, of Buncombe Superior Court:

"This cause coming on to be heard before the undersigned judge presiding, upon appeal by plaintiff James Alston from an order of the clerk of this court denying the motion of the plaintiff to set aside the consent judgment entered by the clerk of this court on 28 December, 1933, and being heard, and it appearing to the court and the court finds the facts to be that:

"On and for some time prior to 28 December, 1933, Charles A. McCrea, attorney of Asheville, N. C., was the legal and duly constituted attorney for the plaintiff, representing him in the above-entitled cause; that on 28 December, 1933, the clerk of this court entered a consent judgment in favor of the plaintiff James Alston and against the defendant Southern Railway Company in the sum of one hundred fifty dollars ($150.00) and costs, said consent judgment being signed by the said Charles A. McCrea, attorney for said plaintiff, and by Jones & Ward as attorneys for the defendant, and at said time the said Charles A. McCrea had full authority from his client, the plaintiff James Alston, to compromise said cause for the sum of one hundred fifty dollars ($150.00) and costs, and to sign the consent judgment on behalf of the plaintiff; and that before signing said judgment the said Charles A. McCrea had discussed said settlement with the plaintiff, his client, the said James Alston, and the said James Alston had specifically authorized and directed the said Charles A. McCrea to settle said cause for said sum of one hundred fifty dollars ($150.00) and costs, and said judgment for that reason constitutes a consent judgment which is in all respects binding upon the plaintiff and the defendant.

"It is therefore ordered and adjudged by the court, that the order heretofore entered by the clerk of this court refusing the motion of the plaintiff to set aside the judgment is affirmed and approved; and

"It is further ordered that the motion of plaintiff to set said judgment aside be and the same is disallowed, and the judgment heretofore entered

for said sum of one hundred fifty dollars ($150.00) and costs, on 28 December, 1933, is adjudged to be a solemn and binding judgment of this court, and binding in all respects on both plaintiff and defendant."

The record disclosed an agreement for compensation for disability between James A. Alston and the Pullman Company, self-insurer approved by the North Carolina Industrial Commission. The following is in the record:

"RELEASE OF ALL CLAIMS.

"THE PULLMAN COMPANY.

"Whereas I, James A. Alston, of the city of Asheville, State of North Carolina, while employed by The Pullman Company as porter, Asheville, was injured in an accident on or about 8 March, 1931, at or near Powell (*City*), Tenn. (*State*), by sustaining lacerations of scalp, right third finger, right ankle, left leg, in rear-end collision of freight train and Southern Train No. 7, when thrown to floor.

"Now, therefore, in consideration of the sum of sixty-five 58/100 dollars ($65.58) to me in hand paid by The Pullman Company, I hereby release The Pullman Company and all other companies, partnerships and persons, including Southern Railway System, from and on account of all claims or causes of action that exist or may hereafter exist for damages for any and all personal injuries, including possible unknown injuries and other complications arising from such injuries or treatment thereof, for loss of services, for medical or other expenses, and for loss or damage to property, if any, growing out of or on account of said accident.

"The above amount is the full consideration for this settlement, and no promise or contract of employment, either present or future, has been made me.

"I have read the foregoing receipt and release and fully understand the same.

"Witness my hand and seal, this 11 May, A.D. 1931.

"Witness: W. W. PARKER. JAMES A. ALSTON. (Seal.)"

From the judgment rendered by Schenck, J., the plaintiff James Alston excepted, assigned error, and appealed to the Supreme Court.

Welch Galloway and Paul J. Smith for plaintiff.
R. C. Kelly and Jones & Ward for defendant.

CLARKSON, J. The plaintiff James Alston contends: (1) Said judgment of 28 December, 1933, should have been set aside because of mistake, surprise and excusable neglect, as provided for under C. S., 600.

(2) Said judgment of 28 December, 1933, should have been set aside because the attorney who was representing appellant at the time undertook to compromise the action of appellant and enter into a consent judgment and waive substantial rights of appellant without plaintiff's knowledge or consent, and without having any specific power or authority to do so.

From the record in this Court, we cannot sustain the contentions of the plaintiff. Article IV, section 8, of the Constitution of North Carolina is as follows: "The Supreme Court shall have jurisdiction to review, upon appeal, any decision of the courts below, upon any matter of law or legal inference. And the jurisdiction of said Court over 'issues of fact' and 'questions of fact' shall be the same exercised by it before the adoption of the Constitution of one thousand eight hundred and sixty-eight, and the Court shall have the power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts."

Evidence, by affidavits, was submitted on both sides of the controversy to both the clerk and on appeal to the Superior Court.

The clerk and the judge on appeal held against the contention of plaintiff James Alston that his attorney who signed the consent judgment did not have the authority. The law is well settled.

In *Lumber Company v. Cottingham,* 173 N. C., 323 (327), citing a wealth of authorities: "We are concluded by the judge's finding of facts, where there is some supporting evidence."

In *Bank v. Duke,* 187 N. C., 386 (390), it is written: "It is the duty of the court below to find the facts, and his finding is ordinarily conclusive. Upon the facts found, the conclusion of law only is reviewable." *Abbitt v. Gregory,* 195 N. C., 203 (209).

The request made by plaintiff James Alston for the clerk to find the material facts on which to base his order came too late. The order was signed by the clerk on 14 April, 1934, and appeal taken. The request was made before the clerk on 24 April, 1934. We think the material facts found by the court below sufficient to support the judgment appealed from.

We see no right that plaintiff James Alston has to have a jury pass on the facts from the record in this case. The court below having found the facts, and there was sufficient evidence to support same, this, on appeal, is binding on us.

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.

STATE v. RUFUS SATTERFIELD.

(Filed 10 October, 1934.)

1. Homicide G e—Evidence held sufficient to be submitted to jury on charge of murder in the first degree.

Evidence that deceased was shot and killed while he was standing in the doorway of his home as he came out of his home to investigate the barking of his dog, that the fatal shot was fired from a point in a cotton patch a short distance away, and that at such point were fresh wadding for a 12-gauge gun and matches broken and splintered in a manner characteristic of defendant, and that there were tracks leading to and away from such point, indicating a "pin-toed" person in rapid flight, and that defendant was "pin-toed," and that defendant had borrowed a 12-gauge gun shortly before the homicide, with testimony of witnesses that they had seen a man who looked like defendant get out of a car and walk toward the point from which the shot was fired, and that he carried a gun, together with evidence of motive and other incriminating circumstantial evidence, *is held* sufficient to be submitted to the jury on a charge of murder in the first degree.

2. Criminal Law I j—Only incriminating evidence need be considered upon a motion as of nonsuit.

Only incriminating evidence need be considered upon defendant's motion as of nonsuit under C. S., 4643, and contradictions in the inculpatory testimony and equivocations of some of the State's witnesses, which affects the weight or credibility of the evidence but not its competency, need not be taken into account in determining whether there is any competent evidence to sustain the allegations of the indictment.

3. Criminal Law I l: Homicide H c—

Where all the evidence tends to show that deceased was killed by a person lying in wait, with evidence that defendant committed the crime, it is not error for the court to limit the jury to a verdict of guilty of murder in the first degree or not guilty. C. S., 4200.

4. Witnesses A a—

The competency of a 7-year-old child to testify as a witness is a matter resting in the sound discretion of the trial court.

5. Criminal Law I e—Court has discretionary power to allow solicitor to offer additional evidence after argument is begun.

It is within the sound discretion of the trial court to allow the solicitor to offer additional evidence after the argument has begun, and in this case there was no suggestion of abuse of discretion, it appearing that the evidence was not discovered until the night before, and that the court stated it would allow defendant any reasonable time to investigate the additional evidence.

6. Criminal Law J a—

A motion in arrest of judgment is proper when, and only when, some error or fatal defect appears upon the face of the record.

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

STATE *v.* SATTERFIELD.

APPEAL by defendant from *Parker, J.*, at January Term, 1934, of WAYNE.

Criminal prosecution, tried upon indictment charging the defendant with the murder of one Herbert Grice.

The evidence for the State tends to show that about 9 p.m., Sunday, 22 October, 1933, Herbert Grice was shot and killed at his home in Goldsboro. He had been sitting with his wife and three children in their sitting room, when he heard his dog bark, and in going out to investigate the cause of the barking, was greeted with a load of buckshot and felled either in the doorway or on the front porch. He died immediately. The shot was fired from a point in a cotton patch a distance of about forty feet from the Grice house. Here, there was a "trampled-up place" on the ground, and, in the line of fire, fresh wadding from a 12-gauge gun was found. There was also on or near the trampled ground matches broken and splintered in a manner characteristic of a habit of the defendant. There were tracks leading to this point, and others away from it, indicating a "pin-toed" person in rapid flight, the toes of the shoes only making impressions upon the ground. The defendant is "pin-toed."

Lonie Fields testified that shortly before the shooting she and her 7-year-old daughter saw a man get out of an automobile near the Grice home and go in the direction of the cotton patch. He had a shotgun in his hands. "He looked like that man over there" (pointing to the defendant).

Dorothy Fields, the little child, positively identified the defendant as the man she saw get out of the automobile with a shotgun "folded up in his arms" and go in the direction of the cotton field.

On cross-examination, this witness said the defendant had been pointed out to her in the courtroom that morning by her mother as the man they saw on the night of the homicide; that it was a dark night and she had never seen the defendant before. Upon this admission, the defendant moved to strike out the testimony of the witness. Overruled; exception.

There was other evidence to the effect that, for quite awhile, the defendant had been paying undue attentions to the wife of the deceased—this as furnishing a motive for wanting to get rid of him—also that he had borrowed a gun from Redmond Dortch and sent him word, on the day after the homicide, not to say anything about it, as he forgot to mention the fact to the sheriff when being questioned about the case.

The sheriff testified that he saw the defendant on the night of the homicide. "He appeared to be nervous, . . . told me he did not have a shotgun, but he thought there was one around home, an old one around home somewhere, but he did not know where it was and had not seen it for years."

The sheriff also testified that Lonie and Dorothy Fields had stated to him practically the same things as detailed in their testimony.

Redmond Dortch testified that the defendant returned his gun on the day after the homicide, with the statement: "I am sorry I did not get a chance to clean it. I meant to clean it for you." Both barrels had been shot and there was new rust on it. "He did not say anything to me when he returned the gun about having been doing any hunting of any kind."

The defendant offered evidence tending to establish an alibi. He denied the testimony of the State.

After the argument had begun, the solicitor was allowed to offer additional evidence, discovered only the night before, "and bearing upon the presence of the defendant in the neighborhood where the crime was committed and the car he was operating at the time." Objection; overruled; exception. The court stated he would allow the defendant any reasonable time to investigate this additional evidence. Exception.

Motion in arrest of judgment. Overruled; exception.

Verdict: Guilty of the felony and murder in the first degree whereof he stands charged.

Judgment: Death by electrocution.

Defendant appeals, assigning error.

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

Dickinson & Bland, Scott B. Berkeley, and Paul B. Edmundson for defendant.

STACY, C. J., after stating the case: Only the inculpatory evidence has been stated, as the principal exception relied upon by the defendant is the refusal of the court to sustain his demurrer to the evidence or to dismiss the action as in case of nonsuit under C. S., 4643. *S. v. Fulcher,* 184 N. C., 663, 113 S. E., 769; *S. v. Cohoon,* 206 N. C., 388. With respect to the defendant's alibi, it is sufficient to say he was given the full benefit of all exculpatory matters before a jury of the vicinage. *S. v. Steen,* 185 N. C., 768, 117 S. E., 793. The evidence was such as to require its submission to the twelve. *S. v. Beal,* 199 N. C., 278, 154 S. E., 604; *S. v. Lawrence,* 196 N. C., 562, 146 S. E., 395; *S. v. McLeod,* 198 N. C., 649, 152 S. E., 895.

Counsel for the defendant assailed the State's case with force and vigor, pointing out the apparent contradictions in the testimony and the equivocation of some of the witnesses, but these were matters bearing upon the weight of the evidence or its credibility, and not upon its competency. The jurors alone are the triers of the facts. *S. v. Beal, supra.* In passing upon the sufficiency of the evidence, raised by demurrer or

motion to nonsuit, the court is required merely to ascertain whether there is any competent evidence to sustain the allegations of the indictment. *S. v. Marion,* 200 N. C., 715, 158 S. E., 406; *S. v. Carlson,* 171 N. C., 818, 89 S. E., 30; *S. v. Rountree,* 181 N. C., 535, 106 S. E., 669.

Nor was there error in limiting the jury to one of two verdicts—murder in the first degree or not guilty. *S. v. Spivey,* 151 N. C., 676, 65 S. E., 995; *S. v. Ferrell,* 205 N. C., 640, 172 S. E., 186; *S. v. Myers,* 202 N. C., 351, 162 S. E., 764; *S. v. Sterling,* 200 N. C., 18, 156 S. E., 96; *S. v. Jackson,* 199 N. C., 321, 154 S. E., 402. It is provided by C. S., 4200, that a murder which shall be perpetrated by means, *inter alia,* of lying in wait, as was the case here, shall be deemed to be murder in the first degree. *S. v. Keaton,* 206 N. C., 682; *S. v. Newsome,* 195 N. C., 552, 143 S. E., 187; *S. v. Smith,* 201 N. C., 494, 160 S. E., 577; *S. v. Wiseman,* 178 N. C., 784, 101 S. E., 629.

The competency of the little girl to testify as a witness in the case was a matter resting in the sound discretion of the trial court. *S. v. Merrick,* 172 N. C., 870, 90 S. E., 259.

Speaking to the identical question in *S. v. Edwards,* 79 N. C., 648, *Reade, J.,* delivering the opinion of the Court, said: "Formerly the age at which infants might be examined as witnesses was almost arbitrary. They were not regularly admissible under fourteen, subject to exceptions. At one time it was a general rule that none could be admitted under nine years, very few under ten. Gilb. Ev., 144; 1 Hale P. C., 302; 2 *Ib.,* 278; 1 Phil. Ev. But of late years, since the means and opportunities for the early cultivation of the intellect have multiplied, a more reasonable rule has been adopted, and age is not to (the) test, but the degree of understanding which they possess, including their moral and religious culture. 1 Phil. Ev.; 1 East P. C., 448; 1 Leach, 190; Roscoe Cr. Ev., 106 n. . . .

"In the case of infants where there was sufficient capacity to understand the transaction and to communicate it, but not sufficient moral and religious impression to comprehend the obligation of an oath, time has been allowed to make the impression and to cultivate the conscience. 1 Leach, 199, 430.

"There being now no arbitrary rule as to age, and it being a question of capacity, and of moral and religious sensibility in any given case whether the witness is competent, it must of necessity be left mainly if not entirely to the discretion of the presiding judge. *S. v. Manuel,* 64 N. C., 601. It may be stated, however, that a child of tender years ought to be admitted with great caution; and where there is doubt it ought to be excluded."

Likewise, allowing the solicitor to offer additional evidence after the argument had begun, was a matter addressed to the sound discretion of the trial court, and there is nothing on the record to suggest any abuse

of discretion in this respect. *S. v. King,* 84 N. C., 737; *S. v. Haynes,* 71 N. C., 79; *S. v. Rash,* 34 N. C., 382.

It is not perceived upon what ground the motion in arrest of judgment could have been allowed. Such a motion is proper when—and only when—some error or fatal defect appears on the face of the record. *S. v. Bittings,* 206 N. C., 798; *S. v. Grace,* 196 N. C., 280, 145 S. E., 399; *S. v. McKnight,* 196 N. C., 259, 145 S. E., 281; *S. v. Mitchem,* 188 N. C., 608, 125 S. E., 190.

A searching investigation of the record leaves us with the impression that the case 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.

HERSHEY CORPORATION v. ATLANTIC COAST LINE RAILROAD COMPANY, ATLANTIC AND YADKIN RAILWAY COMPANY, NORFOLK SOUTHERN RAILROAD COMPANY, AND (ASHEBORO GROCERY COMPANY, ADDITIONAL PARTY DEFENDANT).

(Filed 10 October, 1934.)

1. Parties A a—Question of whether plaintiff was real party in interest held not determinable by motion before introduction of evidence.

Plaintiff, a shipper of goods by rail, instituted this action against the carrier to recover damages sustained by the loss of the goods, alleging negligence of the carrier. Before a jury was impaneled, defendant carrier, upon depositions taken by plaintiff, moved to dismiss the action, for that the depositions showed that the loss had been paid to plaintiff by insurance companies, and that therefore plaintiff was not the real party in interest. C. S., 446. Over plaintiff's objection, the court granted the motion, stating that the same question would be presented by a motion of nonsuit after the evidence, C. S., 567, and that by this procedure the same result would be reached with less cost: *Held,* the court had no jurisdiction to anticipate what the evidence would be on the issue raised by the pleadings or whether plaintiff was the real party in interest, plaintiff not being bound to introduce the depositions in evidence, or if they were introduced, plaintiff having the right to controvert the facts therein shown, thus raising an issue for the determination of the jury. C. S., 556.

2. Jury C a—

Right to a jury trial is guaranteed by our Constitution, Art. I, sec. 19, and where the parties do not consent to trial by the court, the court may not determine, prior to the introduction of evidence, an issue of fact joined by the pleadings.

STACY, C. J., concurs in result.

APPEAL by plaintiff from *Barnhill, J.*, at January-February Term, 1934, of LEE. Reversed.

This is an action instituted by the plaintiff to recover of the defendants $1,227.90 damages for negligently allowing the destruction by water of a carload of sugar, shipped by the plaintiff to the Asheboro Grocery Company, over the lines of the carrier defendants from Wilmington, N. C., to Asheboro, N. C.

The action was dismissed as to the Atlantic Coast Line Railroad Company, upon demurrer, from which no appeal was prosecuted.

The defendant Asheboro Grocery Company filed answer and admitted the allegations of the plaintiff, including the allegation in the amended complaint that it, the consignee, had refused to receive the shipment and to complete the contract of sale, and that said contract had been rescinded by mutual consent, and the plaintiff was the party injured and aggrieved by the negligence of the carrier defendants. The grocery company, therefore, was not affected by the order of his Honor and is not involved in this appeal.

From the action of the court, taken upon the motion of defendants, in finding certain facts and thereupon entering judgment dismissing the action from the docket and adjudging that the defendants Atlantic and Yadkin Railroad Company and the Norfolk Southern Railroad Company go hence without day and recover their costs, the plaintiff appealed, assigning errors.

T. J. McPherson and K. R. Hoyle for appellant.

H. McD. Robinson, D. B. Teague, and C. M. Bain for Norfolk Southern Railroad Company.

Frank P. Hobgood for Atlantic and Yadkin Railway Company.

SCHENCK, J. From the record it appears that the judgment in this case was entered upon the motion of the carrier defendants that this case be dismissed for that the real parties in interest were the insurance companies, which, according to testimony of witnesses appearing by depositions taken by the plaintiff, had heretofore paid to the plaintiff in full the amount of the damage herein sought to be recovered; and it further appears that, upon consideration of said motion, said depositions were offered in evidence and the court reached the opinion that the payment by the insurance companies to the plaintiff constituted a settlement of the claim herein sued upon, and that the agreement accompanying the depositions, which was also introduced by the defendants, had the effect of constituting the plaintiff a collecting agent for the insurance companies as against these defendants, and that, therefore, the plaintiff was not the real party in interest as contemplated by the pertinent statute.

The judgment reads in part: "It further appears to the court that upon a trial of this cause before a jury that this question would necessarily be presented upon a motion of nonsuit, and that the action would have to be dismissed for the reason assigned, and that for the court to dispose of the cause upon motion arrives at the same effect without the necessity of consuming time and expense in impaneling a jury and offering evidence so that the same question may be presented upon a question of nonsuit; the only difference involved being the question of procedure." Whereupon the court dismissed the action and taxed the plaintiff with the costs.

The action of his Honor presents the question as to whether the court had jurisdiction, upon motion of the defendants and without consent of the plaintiff, when issue had been joined upon the pleadings, to anticipate what the evidence of the plaintiff would be upon such issue, and to find the facts upon such anticipated evidence, and upon such findings to dismiss the action, without impaneling a jury. This question must be answered in the negative.

His Honor could not have foreseen and known what evidence would have been introduced had a jury been impaneled. In the first place, while the plaintiff may have taken the depositions, it was not required to introduce them in evidence, and if it had so introduced them it would not of necessity have been bound by them and precluded from introducing other evidence. In the second place, if the defendants had introduced the depositions in evidence, the plaintiff would have had a right to controvert the facts therein shown, although the depositions were taken by it. Therefore, if the depositions, upon which his Honor based his findings of fact to support his order dismissing the action, had been introduced by either party, issuable facts might have arisen, which the plaintiff would have been entitled to have had passed upon by a jury.

C. S., 567, provides that a motion for judgment as in case of nonsuit may be made when the plaintiff "has introduced his evidence and rested his case," and may be renewed "after all the evidence on both sides is in." C. S., 556, provides that "an issue of fact must be tried by a jury." What the evidence would have been in this case had a jury been impaneled could not be anticipated by the court, and the court was without jurisdiction to try the issues of fact which arose upon the pleadings.

The ancient mode of trial by jury is derived from the common law, is guaranteed by the Constitution, and is provided for by statute. It "is one of the best securities of the rights of the people, and ought to remain sacred and inviolable." N. C. Const., Art. I, sec. 19.

One of the issues joined on the pleadings in this case, which might be determinative of the rights of litigants therein, is whether the plaintiff is the real party in interest. C. S., 446. On this issue the plaintiff

was entitled to a trial by jury. *Andrews v. Pritchett,* 66 N. C., 387; *Wilson v. Bynum,* 92 N. C., 717; *Crews v. Crews,* 175 N. C., 168; *Grantham v. Nunn,* 188 N. C., 239.

In the case of *Cozad v. Johnson,* 171 N. C., 637, *Hoke, J.,* says: "We find nowhere in the record as now presented any consent of parties that the court should try the cause, and unless this is made to appear, and in the way prescribed by statute, the issues raised by the pleadings, under our Constitution and system of procedure, must be decided by a jury." The record does not disclose any consent of the parties that the court should try this cause, but, on the contrary, reveals that the plaintiff was at all times objecting to the court's so doing.

Reversed.

STACY, C. J., concurs in result.

CARL V. CLINE AND J. F. CLICK, ON BEHALF OF THEMSELVES AND ANY OTHER TAXPAYERS OR CITIZENS OF THE CITY OF HICKORY WHO DESIRE TO MAKE THEMSELVES PARTIES PLAINTIFF, v. CITY OF HICKORY, M. H. YOUNT, MAYOR; W. W. BURNS, NORMAN HUTTON, W. M. REESE, GEORGE BAILEY, EULIN SHOOK, AND CHARLES E. HEFNER, COMPRISING THE CITY COUNCIL; AND R. L. HEFNER, CITY MANAGER.

(Filed 10 October, 1934.)

Municipal Corporations B d—City held authorized to lease auditorium built by it in its general municipal building.

The charter of defendant city authorized it to acquire and hold real and personal property and to invest, sell or dispose of same, and provided that all questions of administration not provided for by the charter should be governed by the general laws of the State: *Held,* the city had authority to lease an auditorium in its municipal building which it had equipped at the time the building was erected with a ticket booth and moving-picture projecting equipment, C. S., 2688, 2787 (2), it appearing that the lease did not involve property held in trust for the use of the city, or property devoted to governmental purposes, although administrative offices of the city were located elsewhere in the building.

CIVIL ACTION, before *Warlick, J.,* at Chambers at Newton, N. C., 19 June, 1934. From CATAWBA.

The plaintiffs instituted this action against the city of Hickory, the members of the city council and the mayor for the purpose of restraining a lease of the auditorium belonging to the city.

The trial judge found the following facts:

1. That the plaintiffs are citizens and taxpayers of the city of Hickory.

2. That the city of Hickory is a municipal corporation, duly chartered under the laws of the State of North Carolina.

3. In the year 1920 the city of Hickory voted a bond issue of $125,000 for the purpose of erecting a municipal building on a lot to which it held title in fee simple, and that on said lot was erected the present municipal building, in which is the office of the city manager, the municipal courtroom, the jail, fire department, and the office of the city council; that the other rooms or offices not now used for city or governmental purposes are rented or let, one to the welfare department and one to the Federal Employment Agency; that the central portion of said building is a large and commodious auditorium, which was built at the time of the erection of the said building; that at the time the building and auditorium were erected, the auditorium was equipped with a stage, a picture machine booth, a ticket stand at which to sell tickets for shows that might be held therein, and a moving-picture machine was installed, and from time to time the said auditorium has been rented by the day and night, and for successive days and nights when asked for, and the rental paid; that the rental acquired in this way has never equaled the upkeep and interest on the investment. That the building is rented on the average of about four nights a month.

4. That the mayor and board of aldermen were approached on the proposition to lease said auditorium for a period of five years for moving-picture shows, and . . . on 10 June, 1934, when the matter again came up for hearing, three bids were received, and the bid of the Criterion Amusement Company, Inc., of Charlotte, N. C., being the highest and most liberal bid, and the price bid being, in the opinion of the mayor and board of aldermen, a fair price, the same was accepted, provided a lease embodying the terms and conditions agreed upon was drawn and signed in such form as to be acceptable to the governing board of the city.

5. That the purpose of renting the auditorium, at this time, is to raise additional revenue with which to help pay its bonded indebtedness and other obligations, and to make the auditorium carry its part of the cost of its investment and upkeep.

6. That the proposed rent for the first year is $200.00 per month; for the next two years $275.00 per month, and for the next two years $325.00 per month, in addition to certain expensive improvements to be made to the building to approximate $8,500.00.

7. The revenue now derived from said auditorium is approximately $360.00 per year.

8. That in any lease that is made of the auditorium by the city of Hickory, by its board of aldermen, it will reserve the use of the building

for four days a month, so as to rent it to any other party desiring it for other entertainment.

9. The court further finds that the charter of the city of Hickory does not provide for the leasing of the said auditorium, nor is there any special act of the General Assembly providing for same.

10. That the municipal building is the only building of its kind in Hickory and is still being used for the purposes hereinbefore named.

Upon the foregoing facts the trial judge was of the opinion that the city had no power to lease the auditorium, and restrained the defendants from proceeding further with negotiations for said lease, and thereupon the defendants appealed.

T. Manly Whitener and A. A. Whitener for plaintiffs.
W. B. Councill and Eddy S. Merritt for defendants.

BROGDEN, J. The following question of law is presented: Does the city of Hickory have power to make the lease described in the findings of fact?

The charter of the city of Hickory is chapter 68 of the Public Laws of 1913. It is provided "that this charter shall be deemed a public act and judicial notice shall be taken thereof in all courts and places whether or not the same has been pleaded or read in evidence." Section 1 of the charter empowers the city of Hickory to "acquire and hold such property, real and personal, as may be devised, bequeathed, sold, or in any manner conveyed to it, and may invest, sell or dispose of same," etc. Section 3 of Article 18 provides that "all questions arising in the administration of government of the city of Hickory and not provided for in this act shall be governed by the laws of the State in such cases made and provided." The general laws of the State authorizing and regulating the sale of property owned by municipal corporations are contained in C. S., 2688, and C. S., 2787 (2). Both of said statutes authorize the sale of municipal property in proper cases, and C. S., 2787 (2) authorizes a municipal corporation to lease property. Construing C. S., 2688, in *Asheville v. Herbert,* 190 N. C., 732, 130 S. E., 861, this Court said: "Of course, this section is held not to apply to such lands as are held in trust for the use of such town (*Southport v. Stanly,* 125 N. C., 26), or such real estate as is devoted to governmental purposes (*Turner v. Comrs.,* 127 N. C., 154; *Carstarphen v. Plymouth,* 180 N. C., 26), or to streets in reference to which adjoining property owners have acquired rights on account of the dedication thereof, and resulting improvements. . . . The record in *Carstarphen v. Plymouth, supra,* shows that the trial court put his decision on the double basis that C. S., 2688, did not give the authority to sell land held for governmental purposes, and that

it had not been complied with." Manifestly the philosophy of the *Southport* and *Carstarphen cases* is that a municipal corporation cannot sell itself out of its exclusively governmental home, or cannot sell property held by it in trust without special authority.

In the case at bar, when the auditorium was originally constructed, it "was equipped with a stage, a picture machine booth, a ticket stand at which to sell tickets for shows that might be held therein, and a moving-picture machine was installed, and from time to time the said auditorium has been rented by the day and night, and for successive days and nights when asked for," etc. Obviously this auditorium was neither dedicated to a governmental purpose in its original construction nor used for governmental purposes thereafter. The mere fact that it is under the same roof as the city police court, city jail and office of the mayor does not in itself impress it with governmental quality or function. Indeed, the cases of *Asheville v. Herbert,* 190 N. C., 732, and *Harris v. Durham,* 185 N. C., 572, 117 S. E., 801, in principle, answer the question of law involved in the affirmative.

Reversed.

GURNEY P. HOOD, COMMISSIONER OF BANKS, EX REL. PINETOPS BANKING COMPANY, v. JAMES L. COBB AND EMMA D. COBB.

(Filed 10 October, 1934.)

1. Fraudulent Conveyances A d—Failure to retain property sufficient to pay existing debts is prerequisite to presumption of fraud.

In an action to set aside a voluntary deed as being fraudulent as to creditors of the grantor, the failure of the debtor to retain property sufficient and available to satisfy his then existing creditors is necessary to raise the presumption of fraud, since the statute, C. S., 1007, destroyed the presumption of fraud theretofore arising from the fact of the grantor's indebtedness, and made such indebtedness merely evidence tending to show an intent to delay, hinder and defraud creditors.

2. Fraudulent Conveyances C d—

The burden is on plaintiff in an action to set aside a deed as being fraudulent as to creditors to prove that the grantor failed to retain property sufficient and available to pay his then existing creditors.

3. Fraudulent Conveyances C e—Tax valuation of debtor's lands held competent on issue of his intent to defraud creditors.

In an action to set aside a deed as being fraudulent as to creditors evidence of the tax valuation of the other lands of the debtor at the time of the conveyance is competent on the issue of intent to hinder, delay and defraud creditors as tending to show the debtor had reason to believe he was retaining property sufficient and available to pay his then existing creditors.

4. Same—Commissioner's deed to part of debtor's lands, executed three years after voluntary conveyance attacked, held incompetent.

A commissioner's deed of sale of part of the lands of the debtor, executed three years after the execution of the deed sought to be set aside as being fraudulent as to creditors, *is held* incompetent, the issue being the value of all the debtor's lands at the time of the voluntary deed attacked in the action.

5. Trial E f—

An objection to the statement of the contentions of a party by the trial court must be made in time to afford the court opportunity to make correction in order to be available on appeal.

APPEAL by plaintiff from *Small, J.*, at April Term, 1934, of EDGECOMBE. No error.

This was an action instituted by the plaintiff as the liquidating agent of the Pinetops Banking Company, one of the creditors of the male defendant, against James L. Cobb and Emma D. Cobb to have declared void a deed executed by the male defendant to the *feme* defendant, his wife, for that such conveyance was a voluntary gift or settlement of property by one indebted, without retaining property fully sufficient and available to satisfy his then existing creditors, and made with intent to hinder, delay and defraud the creditors of the grantor.

The material allegations of the complaint were denied by the defendants, and the case was submitted to the jury upon the following issues:

1. Is the deed from James L. Cobb to his wife, Emma D. Cobb, dated 22 November, 1930, a voluntary conveyance, as alleged in the complaint?

2. Did James L. Cobb at the time of executing said deed retain property in his own name fully sufficient and available to pay his then existing creditors, as alleged in the answer?

3. Did James L. Cobb execute said deed with the intent to hinder and delay or defraud his creditors, as alleged in the complaint?

The jury, under the direction of the court, answered the first issue "Yes," in favor of the plaintiff; and, under the evidence and charge, answered the second issue "Yes," and the third issue "No," in favor of the defendants. Whereupon the court entered judgment adjudging that the conveyance executed by the defendant James L. Cobb to his co-defendant, Emma D. Cobb, his wife, on 22 November, 1930, was a legal and valid instrument, and that the plaintiff recover nothing by his action and be taxed with the costs. To this judgment the plaintiff objected and excepted, and appealed to this Court.

Henry C. Bourne for appellant.
Gilliam & Bond for appellees.

SCHENCK, J. There are ten assignments of error in the record, six of which, Nos. 3, 4, 6, 7, 8, and 9, are to the action of the court in placing

the burden of proof upon the plaintiff on the second issue, that is, placing upon the plaintiff the burden of showing by a preponderance of the evidence that the defendant James L. Cobb, at the time of the conveyance, 22 November, 1930, did not retain property fully sufficient and available to pay his then existing creditors. We think his Honor was correct in so placing the burden of proof. The plaintiff's alleged cause of action is governed by the provisions of C. S., 1007. This section, in part, reads: "No voluntary gift or settlement of property by one indebted shall be deemed or taken to be paid in law, as to creditors of the donor or settler prior to such gift or settlement, by reason merely of such indebtedness, if property, at the time of making such gift or settlement, fully sufficient and available for the satisfaction of his then creditors, be retained by such donor or settler; . . ." The effect of this statute is to destroy any presumption of vitiating fraud in the making of a voluntary gift or settlement solely from the indebtedness of the donor or settler, and to make the failure to retain property fully sufficient and available for the satisfaction of creditors a requisite of such presumption. Hence it was necessary for the plaintiff to allege, as he did allege, not only that the male defendant was indebted, but also that said defendant, the grantor in the deed attacked, failed to retain such sufficient and available property. The *allegata* being a requisite, it follows that the *probata* was also a requisite.

The fifth syllabus of the case of *Shuford v. Cook,* 169 N. C., 52, which correctly interprets the opinion, reads as follows: "In an action to set aside a husband's deed to his wife for fraud as to his creditors, the presumption formerly arising from a voluntary conveyance is removed and the indebtedness of the husband is evidence only from which the intent may be inferred, and a requested instruction is properly refused which requires the defendant to satisfy the jury by the greater weight of the evidence that he retain property fully sufficient and available. Revisal, sec. 962" (C. S., 1007). See, also, *Finch v. Cecil,* 170 N. C., 114.

Clarkson, J., in *Wallace v. Phillips,* 195 N. C., 665 (672), cited in both briefs in this case, says: "The defendants demur on the ground that the complaint 'does not allege the insolvency of the defendant Phillips (whose deed to his wife was under attack by creditors), and that he did not retain sufficient property to pay his debts.' We think the complaint to be good should have alleged that at the time of making such gift or settlement property fully sufficient and available for the satisfaction of his then creditors was not retained. This was a material ingredient of the cause of action and should have been alleged."

"Whenever, whether in plea or replication or rejoinder or surrejoinder, an issue of fact is reached (says 2 Wharton Ev., sec. 354), then, whether the party claiming the judgment of the court asserts an affirma-

tive or negative proposition, he must make good his assertion. On him lies the burden of proof." *Cook v. Guirkin,* 119 N. C., 13.

"Whenever the establishment of an affirmative case requires proof of a material negative allegation, the party who makes such allegation has the burden of proving it." 22 C. J., par. 15.

We think his Honor's charge was logical and in accord with the rules of pleading and practice, and with the decisions of this Court.

C. S., 1007, continues: ". . . but the indebtedness of the donor or settler at such time shall be held and taken, as well with respect to creditors prior as creditors subsequent to such gift or settlement, to be evidence only from which an intent to delay, hinder or defraud creditors may be inferred; and in any trial shall, as such, be submitted by the court to the jury, with such observations as may be right and proper." Pursuant to this latter provision of the statute, under the third issue, the court submitted, with proper observations, to the jury the admitted indebtedness of the male defendant as evidence tending to show an intent to delay, hinder, and defraud creditors. There was no exception taken to the charge as it related to this issue.

The objection in the first assignment of error to the introduction of the tax valuation of defendants' lands for 1930 cannot be sustained for that, while such tax valuation may not be competent evidence of values, it was at least competent upon the third issue as tending to show that the male defendant had grounds to think he had sufficient land value to pay his indebtedness in 1930, and therefore did not execute the deed with intent to defraud his creditors. The plaintiff's objection in the second assignment to the court's declining to admit in evidence a commissioner's deed of sale of a part of the land of the defendants in November, 1933, is untenable, as the deed tended to prove, if it tended to prove anything, only the value of a part of the land in 1933, when the issue was the value of all of the land in 1930. This deed was also *res inter alios acta.* The objection in the fifth assignment is likewise untenable, as any error in the portion of the charge to which objection was made was in the statement of the contentions of the parties, and to have availed the plaintiff must have been made at the time, so as to afford opportunity to make correction. *Green v. Lumber Co.,* 182 N. C., 681. The objection in the tenth assignment to the refusal of the court to set aside the verdict and to the signing of the judgment is formal and is disposed of by the rulings of the court upon the other exceptions.

We conclude that in the trial below there was

No error.

REBECCA L. BROWN v. COURTNEY MITCHELL, TRUSTEE, ET AL.

(Filed 10 October, 1934.)

1. Judicial Sales A b—In absence of agreement court has no authority to confirm sale by order entered out of the county.

A judgment confirming a sale of land by a commissioner appointed by the court which is entered out of the county under a misapprehension of the agreement of the parties is properly set aside upon motion in the cause made before another judge of the Superior Court, since a judge has no authority to hear a cause or make an order substantially affecting the rights of the parties outside the county in which the action is pending, unless authorized by statute or agreement of the parties.

2. Wills E c—Rule in Shelley's case held not to apply to devise in this case.

A devise to W. "for the term of her natural life," remainder "to her legitimate children" should she die leaving lawful issue of her body her surviving, otherwise to her brother, T., with an ulterior limitation that in the event either W. or T. should die without lawful issue, then to the survivor for life, remainder to his or her heirs in fee simple forever, but if both should die leaving no lawful "issue of his or her body, him or her surviving," then to the devisee's "nearest blood kindred as regulated by the laws of descent," *is held* to create less than an indefeasible fee in W., the rule in *Shelley's case* not applying, since the expressions in the will indicate that the word "heirs" in the ulterior clause was intended to be taken in the sense of issue or children, and not in its technical sense.

3. Same—Rule for ascertaining whether word "heirs" is used in its technical sense.

Where the limitation over to the heirs of the first taker is restricted to some but not all of his heirs general, it is a circumstance indicating the testator's intention, and with other indicia, may be sufficient to show that the word "heirs" was not used in its technical sense.

4. Appeal and Error C d—

Portions of a judgment not challenged by exception or appeal will be deemed correct.

APPEAL by plaintiff and defendants from *Frizzelle, J.*, at February Term, 1934, of LENOIR.

Civil action for the appointment of a receiver to operate farm during crop seasons and to foreclose deed of trust.

By consent of all the parties, judgment was entered 7 December, 1931, making the temporary receivership permanent, and the plaintiff was given the right, upon relinquishing claim to deficiency judgment, at any time, upon motion, to have the lands sold by commissioner, under oath of court, to satisfy the mortgage indebtedness of $15,000.

Thereafter, a commissioner was duly appointed and the property offered for sale in November, 1933, when the plaintiff became the pur-

chaser at a bid of $17,000. It is alleged that the property is worth considerably more than this sum.

The sale was not confirmed at the next succeeding December Term, 1933, it appearing that application had been made to the Federal Land Bank of Columbia to secure a loan with which to redeem said property, and that the same was then pending approval.

The loan was refused by the Land Bank because it was not thought that Laura E. McDaniels was seized in fee of said lands. Whereupon judgment was signed by Hon. Henry A. Grady at Chambers in Clinton on 6 January, 1934, confirming the sale of the commissioner and directing that conveyance be made to the purchaser.

This order of confirmation was set aside at the February Term, 1934, Hon. Paul Frizzelle, judge presiding, it appearing that the same had been entered upon a misapprehension as to what was embraced in the consent agreement of the parties. Plaintiff excepted to this order of vacation, and appeals, assigning the same as error.

Upon the hearing it was made to appear that Laura E. McDaniels (nee Laura E. Waters) acquired the *locus in quo* under the will of her father, James Waters, "for the term of her natural life," remainder "to her legitimate children" should she die leaving lawful issue of her body her surviving; otherwise, to go to her brother, Thomas F. Waters, and then the following ulterior limitation:

"In the event of either of my above-named children dying without leaving lawful issue of his or her body, all the lands hereinbefore mentioned shall go to his or her survivor for life, remainder to his or her heirs in fee simple forever; but if the said Thomas Waters and Laura E. Waters shall both die leaving no lawful issue of his or her body him or her surviving, then and in that event all of said lands shall go to my nearest blood kindred, as regulated by the laws of descent in North Carolina."

It was further made to appear that Thomas F. Waters died in 1875 without issue; that Laura E. McDaniels is now a widow with two grown sons and a minor daughter.

It was also made to appear that all persons *in esse,* and all other persons unknown or not in being, having any interest in said property, had been duly made parties defendant herein.

Whereupon, it was decreed (1) that Laura E. McDaniels holds only a base or qualified fee in said lands, but (2) that under C. S., 1724, the terms of which have been complied with in this proceeding, a good and sufficient deed in trust conveying the fee can be executed to the Federal Land Bank of Columbia to secure the loan sought by the defendants.

The defendants except and appeal from the holding that Laura E. McDaniels is seized of only a base or qualified fee in said premises.

Sutton & Greene for plaintiff.
Rouse & Rouse for defendants, other than Mitchell, Trustee.

STACY, C. J. With respect to plaintiff's appeal, it is sufficient to say that as the judgment of confirmation was entered out of the county and under a misapprehension of the agreement of the parties, it was properly vacated on motion. *Bisanar v. Suttlemyre,* 193 N. C., 711, 138 S. E., 1.

Unless authorized by statute, or by consent of the parties, a judge of the Superior Court has no authority to hear a cause, or to make an order substantially affecting the rights of the parties, outside of the county in which the action is pending. *Gaster v. Thomas,* 188 N. C., 346, 124 S. E., 609; *Cahoon v. Brinkley,* 176 N. C., 5, 96 S. E., 650.

It is likewise sufficient to say in regard to defendants' appeal, the holding that Laura E. McDaniels is seized of less than an indefeasible fee in said lands accords with the decisions on the subject. *Nobles v. Nobles,* 177 N. C., 243, 98 S. E., 715. The limitations in the will are not so framed as to attract the rule in *Shelley's case,* which obtains in this jurisdiction not only as a rule of law but also as a rule of property. *Whitehurst v. Bowers,* 205 N. C., 541, 172 S. E., 180; *Martin v. Knowles,* 195 N. C., 427, 142 S. E., 313; *Welch v. Gibson,* 193 N. C., 684, 138 S. E., 25. "Nearest blood kindred" excludes the idea of representation or affinity, *Fields v. Rollins,* 186 N. C., 221, 119 S. E., 207; and, "as regulated by the laws of descent," has reference to the nearest blood kindred of the testator, who would potentially be a part at least of the next of kin of the first taker. *Wallace v. Wallace,* 181 N. C., 158, 106 S. E., 501. These expressions, taken in connection with the original limitation of the remainder "to her legitimate children," would seem to indicate that the use of the word "heirs" in the ulterior clause was intended to be taken in the sense of issue or children. The case, therefore, is controlled by the decisions in *Puckett v. Morgan,* 158 N. C., 344, 74 S. E., 15; *Jones v. Whichard,* 163 N. C., 241, 79 S. E., 503; *Pugh v. Allen,* 179 N. C., 307, 102 S. E., 394; *Blackledge v. Simmons,* 180 N. C., 535, 105 S. E., 202; *Hampton v. Griggs,* 184 N. C., 13, 113 S. E., 501; *Reid v. Neal,* 182 N. C., 192, 108 S. E., 769; *Doggett v. Vaughan,* 199 N. C., 424, 154 S. E., 660.

The distinction between this line of cases, in which the rule has been held not to be applicable to the limitations appearing therein, and the long line of decisions in which it has been held to be applicable and firmly established as the law of this jurisdiction, was first pointed out in *Pugh v. Allen, supra,* and repeated in *Hampton v. Griggs, supra, Welch v. Gibson, supra, Doggett v. Vaughan, supra,* substantially as follows: When there is an ulterior limitation which provides that upon the happening of a given contingency, the estate is to be taken out of

the first line of descent and then put back into the same line, in a restricted manner, by giving it to some, but not to all, of those who presumptively would have shared in the estate as being potentially among the heirs general of the first taker, this circumstance may be used as one of the guides in ascertaining the paramount intention of the testator, and, with other indicia, it has been held sufficient to show that the words "heirs" or "heirs of the body" were not used in their technical sense. See, also, and compare *Clark v. Clark,* 194 N. C., 288, 139 S. E., 437, *Yelverton v. Yelverton,* 192 N. C., 614, 135 S. E., 632.

The remaining portions of the judgment are not challenged by exception or appeal, hence they are deemed to be correct.

On plaintiff's appeal
Affirmed.

On defendants' appeal
Affirmed.

DIXIE MERCERIZING COMPANY v. GURNEY P. HOOD, COMMISSIONER OF BANKS, EX REL.; THE MERCHANTS BANK OF DURHAM, N. C., AND THE LOUISE KNITTING MILLS COMPANY.

(Filed 10 October, 1934.)

Banks and Banking H e—In absence of issue of conspiracy in obtaining certification of checks, holder for value of checks certified by bank prior to its closing is entitled to preference.

Plaintiff was under contract to ship a manufacturing company a certain quantity of cotton within a period of six months, payment for cotton shipped during each month to be made the first of the following month with a cash discount for payment by the tenth of the month. The purchaser paid for the cotton for two months in accordance with the contract. Thereafter plaintiff agreed with the purchaser to allow a three per cent discount if the purchaser paid for the balance of the cotton due under the contract before delivery, and the purchaser had defendant bank certify its checks for the balance of the purchase price of the cotton, and sent same to plaintiff. Plaintiff thereafter delivered the balance of the cotton due under the contract. Later on the day the bank certified the checks it restricted withdrawals, and the next business day thereafter it was taken over for liquidation by the Commissioner of Banks. The checks were returned to plaintiff, but were retained by it in payment of the cotton. Plaintiff brought suit to have its certified checks declared a preferred claim, and the Commissioner of Banks alleged in his answer that the checks were certified by the bank in pursuance of an unlawful conspiracy between plaintiff and the manufacturing company, but no issue involving the alleged conspiracy was submitted to the jury: *Held,* all the evidence showed that plaintiff was a holder for value of the checks certified by the

bank prior to its closing, constituting a preference under the statute, N. C. Code, 218 (c), and an instruction directing the jury to answer the issue of whether plaintiff was a holder for value of the checks in the negative if they believed the evidence *is held* for error.

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

APPEAL by plaintiff from *Shaw, Emergency Judge,* at March Term, 1934, of DURHAM. New trial.

This is an action to have two certain checks drawn by the defendant, the Louise Knitting Mills Company, on the Merchants Bank of Durham, N. C., now in the possession of the defendant Gurney P. Hood, Commissioner of Banks, for liquidation, because of its insolvency, adjudged a preferred claim on the assets of said bank, on the ground that said checks were certified by the cashier of said bank, prior to its closing, and that plaintiff is now the holder for value of said certified checks.

The defendant Gurney P. Hood, Commissioner of Banks, in his answer denied that plaintiff is the holder for value of said checks. He alleged that said checks were certified by the cashier of the bank, pursuant to a wrongful and unlawful conspiracy to defraud the depositors of said bank entered into by and between the plaintiff and the defendant, the Louise Knitting Mills Company. This allegation was denied by both the plaintiff and the defendant, the Louise Knitting Mills Company.

The only issue submitted to the jury was answered as follows:

"Is the plaintiff the holder for value of the two checks of the Louise Knitting Mills Company drawn on the Merchants Bank of Durham, N. C., as alleged in the complaint?" Answer: "No."

From judgment that plaintiff is not entitled to a preferred claim on the assets of the Merchants Bank of Durham, N. C., on account of the certified checks described in the complaint, the plaintiff appealed to the Supreme Court, assigning as error the instruction of the court that if the jury should find the facts to be as all the witnesses had testified, they should answer the issue "No."

Bryant & Jones for plaintiff.

Brawley & Gant for defendant Gurney P. Hood, Commissioner of Banks.

CONNOR, J. All the evidence at the trial of this action pertinent to the issue submitted to the jury showed that on 10 November, 1931, the plaintiff Dixie Mercerizing Company, a corporation engaged in the business of manufacturing mercerized cotton at Chattanooga, in the State of Tennessee, sold to the defendant, the Louise Knitting Mills Company, a corporation engaged in the business of manufacturing

hosiery at Durham, in the State of North Carolina, 50,000 pounds of mercerized cotton, at prices appearing in the contract, which is in writing. It was agreed that said mercerized cotton should be delivered by the plaintiff to said defendant within six months from the date of the contract. It was further agreed that settlement should be made on the first day of each month for all cotton delivered during the preceding month, and that a discount of 2 per cent should be allowed if settlement was made in cash prior to the 10th day of the month. During the months of November and December, 1931, the plaintiff delivered 10,000 pounds of said cotton in accordance with its contract, and the defendant, the Louise Knitting Mills Company, had paid for said cotton prior to 29 December, 1931, in accordance with the terms of its contract, leaving a balance of 40,000 pounds to be delivered and settled for after said date. The contract price of the cotton not delivered at said date was $15,464. This sum was to be paid in accordance with the terms of the contract, as the cotton was delivered.

On 29 December, 1931, pursuant to a conversation over the telephone, the plaintiff agreed with the defendant, the Louise Knitting Mills Company, that it would allow the said defendant a discount of 3 per cent on the amount due under the contract, when the cotton had been delivered, if the said defendant would pay said amount in cash and in advance of deliveries. On 31 December, 1931, the defendant, the Louise Knitting Mills Company, at its office in Durham, N. C., drew two checks, each for the sum of $7,500, both payable to its order, on the Merchants Bank of Durham, N. C. These checks were presented to the bank by the drawer, during banking hours, on 31 December, 1931, with the request that both checks be certified. At this time the Louise Knitting Mills Company had on deposit with said bank, subject to its check, a sum largely in excess of the aggregate amount of said checks. Under the instruction of the cashier of said bank, both said checks were duly certified by the assistant cashier, and delivered to the Louise Knitting Mills Company. The checks were then endorsed by the said company as payee and sent by mail to the plaintiff at Chattanooga, Tenn., in payment of the amount due by the said Louise Knitting Mills Company to the plaintiff on its contract for the purchase of 40,000 pounds of mercerized cotton, which had not then been delivered. Upon its receipt of said checks, the plaintiff credited the account of the Louise Knitting Mills Company with the sum of $15,000, and with the amount of the discount at 3 per cent. The plaintiff has delivered to the defendant Louise Knitting Mills Company the 40,000 pounds of cotton in full performance of its contract.

After the checks were credited to the account of the Louise Knitting Mills Company by the plaintiff, they were endorsed by the plaintiff and

deposited in a bank at Chattanooga, Tenn., for collection. They were subsequently returned by the bank to the plaintiff, with a notation on each check to the effect that said check had not been presented to the drawee bank for payment for the reason that said bank was closed and in the hands of the Commissioner of Banks of the State of North Carolina. The plaintiff thereupon charged the said checks to the account of the defendant Louise Knitting Mills Company, and notified the said company that the checks had not been paid. The Louise Knitting Mills Company thereupon agreed in writing to indemnify the plaintiff against loss on account of said checks. Plaintiff delivered the 40,000 pounds of cotton to the defendant Louise Knitting Mills Company and retained the checks as payment for the same. The said checks are now in the possession of the plaintiff.

After the checks were certified, on 31 December, 1931, by the assistant cashier of the Merchants Bank of Durham, N. C., a "run" on said bank, which had begun on the previous day, continued, and during said day, because of said "run," the bank restricted the amounts which its depositors were permitted to withdraw. The bank remained open for business until the usual hour for closing. On 4 January, 1932, which was the first business day after 31 December, 1931, the defendant Gurney P. Hood, Commissioner of Banks, ordered the bank closed, and took possession of its assets. He is now engaged in the liquidation of said bank, because of its insolvency. He has declined to allow plaintiff's claim on account of said checks as a preferred claim.

There was evidence at the trial with respect to the allegations in the answer of the defendant Gurney P. Hood, Commissioner of Banks, to the effect that the checks described in the complaint were certified by the bank, pursuant to a wrongful and unlawful conspiracy between the plaintiff and the defendant, the Louise Knitting Mills Company, to defraud the depositors of said bank. No issue involving these allegations was submitted to the jury, and for that reason plaintiff's exceptions to the introduction of this evidence are not presented by this appeal. The only assignment of error presented by this appeal is founded on plaintiff's exception to the instruction of the court that if the jury should find the facts to be as testified by all the witnesses, they should answer the issue "No." This assignment of error must be sustained. All the evidence showed that plaintiff is the holder for value of the checks certified by the Merchants Bank of Durham, N. C., prior to its closing. Under the provisions of the statute, plaintiff's claim, founded on certified checks, is entitled to preferential payment. The statute provides that "the following shall be the order and preference in the distribution of the assets of any bank liquidated hereunder: (1) Taxes and fees due the Commissioner of Banks for examination or other

services; (2) wages and salaries due officers and employees of the bank, for a period of not more than four months; (3) expenses of liquidation; (4) certified checks and cashier's checks in the hands of a third party as a holder for value, and amounts due on collections made and unremitted for or for which final actual payment has not been made by the bank; and (5) amounts due creditors other than stockholders." N. C. Code of 1931 (Michie), sec. 218 (c), subsec. 14.

For the error in the charge of the court to the jury, plaintiff is entitled to a new trial. It is so ordered.

New trial.

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

STATE v. ALLEN MOSES.

(Filed 10 October, 1934.)

1. Arson C c—Evidence held sufficient to be submitted to jury in this prosecution for arson.

Evidence that fire in defendant's house started in a closet in which was hanging a quilt soaked in kerosene, that kindling wood was on the floor of the closet, that the closet had no ceiling, but opened at the top into the attic where were found several articles of clothing smelling of kerosene, and a bucket containing kerosene and a bucket containing paper, rags, and cloth smelling of kerosene, that defendant did not phone the fire department from the house, but first gave the alarm to his children, and that one of them summoned the fire department through the city alarm system, and that defendant was being pressed to pay installments on the mortgage on the house, and was threatened with foreclosure, with other incriminating circumstantial evidence, establishes motive and an opportunity for the defendant to commit the crime, and that the fire was of incendiary origin, and *is held* sufficient to be submitted to the jury in a prosecution under C. S., 4245.

2. Criminal Law I j—

Upon defendant's motion as of nonsuit only the incriminating evidence need be considered. C. S., 4643.

3. Criminal Law G n—

An accumulation of independent incriminating circumstances may be sufficient when taken together to warrant the submission of the case to the jury, although each single circumstance, when standing alone, is insufficient.

APPEAL by defendant from *Parker, J.*, at May Term, 1934, of WAYNE. No error.

Langston, Allen & Taylor for appellant.

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

SCHENCK, J. The bill of indictment charges that the defendant "did unlawfully, wilfully, wantonly and feloniously, being the occupant of a building used as a dwelling-house, for a fraudulent purpose, set fire to, burn, caused to be burned, aid, procure the burning of the aforesaid building," in breach of C. S., 4245.

The assignments of error present the single question as to whether his Honor erred in overruling the motion of the defendant to dismiss the action and for judgment of nonsuit, properly made and renewed under C. S., 4643.

The State's evidence tends to show:

That about 5:30 o'clock on the evening of 28 January, 1934, the dwelling-house owned and occupied by the defendant was partially burned, that when the city firemen arrived at the house in response to an alarm given over the city system, they found the fire burning in a closet in which was a step-ladder six or eight feet high, on which a quilt was hanging, which quilt was soaked with kerosene, and on the floor of the closet kindling wood; that the closet had no ceiling and opened at the top into the attic; and that in the attic was a pair of overalls, a jumper, and part of a quilt, all of which smelled of kerosene, and also a bucket containing kerosene and a charred keg contained paper, rags, and cloth which had the odor of kerosene.

That the defendant first gave the alarm of fire to his two children, a daughter and son, who were the only other members of his family in the house at the time, and that the son ran to a nearby fire alarm box and summoned the fire department, which responded immediately and came to the house and extinguished the fire; and that later the defendant stated he did not use the telephone in the house to give the alarm because he did not think of it; that the defendant some several days after the fire made the remark to an investigating officer of the State "that it would have been a God's blessing to him if it had burned up."

That the defendant at the time of the fire had $5,500 fire insurance on the building and furniture; that he owed a balance of $1,500 due on a mortgage on the house, and had been urged to catch up with the payments due thereon, and warned that he would have to vacate the house unless the payments were made.

The defendant testified himself and offered other evidence in his own behalf to the effect that he was innocent of the crime charged, and knew nothing of how the kerosene got into the house, or of the origin of the fire; and, to the further effect that the chimney, which was contiguous

to the closet where the fire was found, had holes in it between the brick where the mortar was faulty, through which sparks could have come and set fire to the closet.

We think the State's evidence, when given a liberal and reasonable construction, was legally sufficient to sustain a conviction, and that therefore the court should not have withdrawn it from the jury. The defendant's brief, in support of his motion to dismiss the action, seems to be based somewhat upon the conception that the evidence taken as a whole did not warrant a conviction, but in passing upon this motion we need consider only such evidence as was favorable to the State, without regard to that upon which the defendant relied. *S. v. Martin,* 182 N. C., 846.

The State's evidence in this case is sufficient to establish a motive and an opportunity for the defendant to commit the crime, that the fire was of an incendiary origin, and many other damaging circumstances tending to show defendant's guilt. However, it is not the fact of motive, or of opportunity, or of incendiary origin of fire, or of any other single circumstance taken by itself, but it was all of these circumstances, considered as a whole and in their relation to each other, that made it incumbent upon the court to submit this case to the jury. These related circumstances likewise warranted the jury in deciding the issue against the defendant. *S. v. Clark,* 173 N. C., 739.

When each circumstance going to make up the evidence relied upon depends upon the truth of the preceding circumstance, circumstantial evidence may be likened unto a chain, which is no stronger than its weakest link; but, as in this case, when there is an accumulation of circumstances which do not depend upon each other, circumstantial evidence is more aptly likened to the bundle of twigs in the fable, or to several strands twisted into a rope, becoming, when united, of much strength. *S. v. Shines,* 125 N. C., 730.

No error.

PAUL H. MITCHELL v. V. D. STRICKLAND AND TALMAGE BAKER.

(Filed 10 October, 1934.)

1. Bills and Notes H a: Fraud A a—Answer held to allege fraud rendering payee not a holder in due course and judgment on pleadings was error.

In an action by the payee of a negotiable note against the maker thereof and the endorser thereon before delivery, the endorser alleged in his answer that he signed the note upon representations made by the maker that the payee was lending the money to the maker to finance the

equipment of a law office, that in fact the note was given to cover funds of the payee on deposit in a bank which had been wrongfully converted by the maker, who was cashier of the bank and in complete control of its affairs, and that the payee had full knowledge of, agreed to, and participated in the fraudulent scheme to procure the endorser to sign the note by such false representations: *Held*, the allegations in the answer were sufficiently broad to allege fraud on the part of both the maker and the payee inuring to the benefit of both, and upon the allegations of the answer the payee did not take the note "for good faith" and did not take it with "no notice of any infirmity" in the instrument, and therefore was not a holder in due course, C. S., 3033, and judgment on the pleadings against the endorser was error.

2. Pleadings I c—

A motion by plaintiff for judgment on the pleadings is in effect a demurrer to the answer, and the motion should be overruled if the answer, liberally construed, alleges facts sufficient to constitute a defense.

THIS is an appeal by the defendant Talmage Baker from a judgment upon the pleadings for the plaintiff against both defendants entered by *Barnhill, J.*, at April Term, 1934, of HERTFORD. Reversed.

J. H. Matthews and E. L. Travis for appellant Baker.
Tyler & Cherry and A. T. Castelloe for appellee.

SCHENCK, J. The plaintiff in his complaint alleges: (1) The residence of the parties; (2) that the defendant Strickland executed and delivered to the plaintiff for valuable consideration a note for $500.00, payable in 12 months after date; (3) that prior to the delivery and before maturity of said note the defendant Baker endorsed the same by signing his name across the back thereof, and that the plaintiff thereupon became the owner and holder in due course of said note; and (4) that said note is past due and unpaid, and demand for payment has been made and refused.

The defendant Talmage Baker in his answer (1) admits the residences as alleged; (2) admits that he endorsed a note for $500.00, but denies, for lack of information, that it was the note described in the complaint; (3) denies that the plaintiff is the owner and holder of the note in due course; and (4) admits demand for and refusal of payment of the note; and for a further answer avers that his codefendant Strickland was cashier and had the entire management and control of a bank in which the plaintiff had a deposit of some $7,500, and that the defendant Strickland had converted to his own use a large part of this deposit, and that the plaintiff had made demand upon the defendant Strickland to make such conversion good; and that in order to save the plaintiff from loss the defendant Strickland and the plaintiff entered into collusion to procure the defendant Baker to endorse the note of his co-

defendant Strickland to the plaintiff by falsely representing that the plaintiff had agreed to lend Strickland the amount of the note for the purpose of furnishing and equipping a law office, provided he could obtain the endorsement of the defendant Baker, and that both the plaintiff and Strickland knew at the time that the plaintiff had not promised to lend Strickland any money at all, and was not going to do so, and that the proceeds of the note were to be used, not to equip a law office, but were to reimburse the plaintiff for his losses due to the defalcation of Strickland; and that the defendant Baker's endorsement on said note was obtained by the wrongful, false, and fraudulent representations made to him by the defendant Strickland, and further avers that the plaintiff had full knowledge of, agreed to, and participated in said fraudulent scheme to procure the endorsement of the defendant Baker.

We are of the opinion that these averments constitute an allegation of fraud against the defendant Strickland, and that they also constitute an allegation of fraud against the plaintiff by reason of his collusive participation therein; and, further, that said averments show that the purpose of procuring the note by the fraudulent scheme alleged was to benefit the plaintiff as well as the defendant Strickland.

This Court, in *McNair v. Finance Company,* 191 N. C., 710 (715), quoted with approval the following: "Fraud may be defined as any trick or artifice where a person by means of false statements, concealments of material facts, or deceptive conduct which is intended to and does create in the mind of another an erroneous impression concerning the subject-matter of a transaction whereby the latter is induced to take action or forbears from acting with reference to a property or legal right he has which results to his disadvantage and which he would not have consented to had the impression in his mind not been created and in accordance with the real facts." We think that the averments in the answer clearly come within this exposition of fraud.

C. S., 3033, reads as follows: "A holder in due course is a holder who has taken the instrument under the following conditions: (1) That the instrument is complete and regular upon its face; (2) that he became the holder of it before it was overdue and without notice that it has been previously dishonored, if such was the fact; (3) that he took it for good faith and value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

If the plaintiff took the note in suit with knowledge of the fraudulent and false representations made by the defendant Strickland to his co-defendant Baker as averred in the answer, he could not have taken the instrument "for good faith," and could not have taken it with "no notice of any infirmity in the instrument," and therefore was not a holder in due course of said note, as alleged in his complaint.

"'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." *Bessire v. Ward,* 206 N. C., 858.

The plaintiff having been awarded judgment upon the pleadings in this action, the averments of the defendant Baker will be taken to be true on this appeal, and taking them as true, we are of the opinion that said defendant was entitled to have his averments of fraud, agreed to and participated in by the plaintiff for his own recoupment, submitted to the jury under a proper issue and charge.

Reversed.

MRS. LAURA BLEVENS v. KITCHIN LUMBER COMPANY, INC.

(Filed 10 October, 1934.)

1. Venue A a—Form of action stated in complaint determines whether action is local or transitory.

The form of action alleged in the complaint determines whether the action is local or transitory, and upon defendant's motion for removal under C. S., 463 (1), the allegations in defendant's petition that the question of title would be put in issue by defendant's answer denying that portion of the complaint alleging title in plaintiff, must be disregarded in passing upon defendant's motion.

2. Same—Action to recover worth of timber wrongfully cut and removed by defendant held transitory.

A complaint alleging that defendant wrongfully cut and removed timber growing upon lands in which plaintiff had an interest, and which seeks to recover the reasonable worth of plaintiff's interest in the timber so cut, states an action of trover and conversion or of trespass *de bonis asportatis* which is transitory, and defendant's motion for removal from the county of plaintiff's residence where the action was instituted to the county in which the land is situate, upon allegations that the plaintiff's title would be put in issue, was properly refused.

APPEAL by defendant from *Finley, J.,* at January-February Term, 1934, of YANCEY. Affirmed.

This was a civil action brought by the plaintiff in the Superior Court of Yancey County, wherein the defendant filed a petition and motion

before the clerk demanding that the action be removed from Yancey County to Graham County for trial, under the provisions of C. S., 463 (1). The clerk denied the motion and retained the case, and the defendant excepted and appealed, and the judge at term time affirmed the order of the clerk. Whereupon the defendant again excepted and appealed to the Supreme Court, assigning error.

Watson & Fouts and Moody & Moody for appellant.
Charles Hutchins and Ernest L. Briggs for appellee.

SCHENCK, J. The defendant contends that the action as alleged in the complaint is a local action, and that Graham County, in which the land referred to in the complaint is situated, is the proper venue. The plaintiff contends that the action as alleged in the complaint is a transitory action, and that Yancey County, where it was instituted, is a proper venue. The defendant in its brief says, and correctly so, that "the form of action stated in the complaint determines this appeal"; and, since the "complaint determines this appeal," we are precluded from considering the allegation in the petition for removal that "that portion of said paragraph (of the complaint) alleging title, or an interest in said land, will be denied in the answer of this defendant, which raises the question of title to the land, or any interest therein claimed by the plaintiffs, and it becomes, or will become, necessary to try the title to said tract of land."

The sole question before us is whether the action as alleged in the complaint is transitory or local. If it is local it should have been removed to Graham County. If it is transitory it should have been retained in Yancey County.

The complaint alleges that the plaintiff is the owner of an undivided one-sixth interest in a tract of land in Graham County, and that the defendant, after obtaining certain interests in said tract of land, entered thereupon and cut and removed therefrom virgin timber, and wrongfully and wilfully cut and removed her timber therefrom, "which interest of this plaintiff was reasonably *worth* the sum of $7,500"; and that at the time the defendant "entered in and upon and wrongfully trespassed upon this plaintiff's interest in said property and wrongfully cut, removed and converted the same to its own use," it "knew that this plaintiff had an outstanding interest in said lands, and in the timber thereon, . . . and in direct violation of the law cut and removed the same from the premises."

It will be noted that the plaintiff nowhere seeks to recover real property, or an estate or interest therein, or to recover for injuries to real property, but simply seeks to recover the "reasonable worth" of the timber cut, removed and converted by the defendant.

The third syllabus, which is a proper interpretation of the opinion in the case of *Cedar Works v. Lumber Co.*, 161 N. C., 604, cited in the brief of both parties, reads as follows: "The character of trees severed by a trespasser from the lands is changed from realty to personalty, and when the trees have been carried away, the owner of the lands and trees may sue in trover and conversion, or in trespass *de bonis asportatis*, for the value of the trees, both of which actions are transitory, or for trespass *quare clausum fregit*, which is local, and should be brought in the county wherein the land is situated. Revisal, sec. 419." (C. S., 463.)

"It is necessary to distinguish in each case what the particular cause of action is, as alleged. If the timber is cut and removed from the land, it becomes personalty, and the owner has the choice of several remedies. He may sue for the injury to the land by cutting the timber, in the nature of the old action of trespass *quare clausum fregit*, and this is local; he may sue to recover possession of the specific articles of personalty, and the venue is determined by where this particular article is located; he may sue for the value of timber, as in trover and conversion, or for the wrongful taking, as in trespass *de bonis asportatis*, and these are transitory; or, if the article has been sold, he may sue, as in *assumpsit*, for the money received, and this is transitory." McIntosh N. C. Prac. and Proc., sec. 275, p. 260.

"Actions are transitory when the transactions on which they are based *might* take place anywhere, and are local when they could not occur except in some particular place. The distinction exists in the nature of the subject of the injury, and not in the means used or the place at which the cause of action arises. *Mason v. Warner*, 31 Mo., 510; *McLeod v. R. R.*, 58 Vt., 732; *Perry v. R. R.*, 153 N. C., 118." *Brady v. Brady*, 161 N. C., 325.

We think that the action as alleged in the complaint is to recover the value, or "worth," of the plaintiff's interest in timber cut, removed and converted to its own use by the defendant, which is an action of trover and conversion, or of trespass *de bonis asportatis*, and is therefore transitory. We further think the transaction upon which the action as alleged in the complaint is based, namely, the removal and conversion of timber after it had been cut from the land might have taken place anywhere, and could have occurred either in or out of Graham County, and is therefore transitory.

Being of the opinion that the action as alleged in the complaint is transitory, we conclude that his Honor was correct in declining to remove the case to Graham County for trial, and in retaining it in Yancey County.

Affirmed.

W. M. HOLT AND R. H. MANN, TRADING AS HOLT & MANN, v. B. W. MADDOX.

(Filed 10 October, 1934.)

1. Sales H e—Execution of notes for purchase price with full knowledge of defects waives right to set up breach of warranty on such defects.

The purchaser of a tractor suffered judgment to be taken against him for part of the purchase price and executed a mortgage on his lands for the balance thereof. Thereafter, to free his lands of the liens in order to obtain a Federal loan, he executed notes to the seller. In the seller's action on the notes, *it is held*, the purchaser waived his right to set up a counterclaim for breach of warranty in the sale of the tractor for defects in the tractor existing to his knowledge at the time he executed the notes, and upon his testimony to this effect the trial court was warranted in charging the jury to answer the issue against him, if they believed the evidence.

2. Same—

Where, upon his own testimony, the purchaser waives his right to set up a breach of warranty, the trial court properly excludes evidence of damage resulting from such breach of warranty.

APPEAL by defendant from *Barnhill, J.*, at January-February Term, 1934, of LEE. No error.

Two civil actions were instituted by the plaintiffs against the defendant in a court of a justice of the peace, the first being upon a note in the sum of $59.37, and the other being upon two notes in similar amounts aggregating $118.74, which were appealed to the Superior Court. The two cases came on for trial at term time and by consent were consolidated for the purposes of trial.

Upon the trial of the consolidated cases the plaintiffs pleaded orally and declared upon the three notes in the sum of $59.37 each, with interest from the date thereof, 14 July, 1931. The defendants likewise pleaded orally and admitted execution of the notes, but denied liability and set up the defense of a breach of warranty in the sale of a tractor, alleging that the damage from such breach was equal to or exceeded the amount of the notes.

From the defendant's evidence it appears that he and one Dalrymple in 1929 purchased a tractor from the plaintiffs, for which they contracted to pay $550.00, and at that time the plaintiffs guaranteed that the tractor was in good condition and would give entire satisfaction, whereas the tractor turned out to be in bad condition, and it failed utterly to give satisfaction. It further appears from the defendant's evidence that in 1930 Dalrymple, owing to the worthlessness of the tractor and his desire to be rid of further worry from it, gave his interest

therein to the defendant, and that the defendant subsequently suffered judgment in favor of the plaintiffs for the sum of $59.37, and also executed to them a mortgage on his land for $437.50; and that this judgment and mortgage represented the balance due on the original purchase price of $550.00; and that subsequent to the recording of the aforesaid judgment and mortgage the defendant paid to the plaintiffs the sum of $250.00 and executed the notes sued on in order to obtain the removal of the liens thereof from the lands of the defendant, so as to enable him to procure a Federal loan thereon.

The defendant in his own testimony states that the three notes sued on were for the balance claimed on the tractor, and that at the time he signed them he knew that the tractor was worthless, and says: "I knew as much about it then as I do now," and further states that the plaintiffs did not cancel their judgment and mortgage on his land until he paid the $250.00 and gave the notes sued on, and that he paid the amount and gave the notes "to renew the balance due on the tractor." The defendant further testifies: "When I signed these notes I knew about the condition of the tractor. When I made the payments to the plaintiff from time to time I knew about the tractor as claimed by me."

From a verdict and judgment adverse to him, the defendant appealed to the Supreme Court.

K. R. Hoyle for appellant.
Gavin & Jackson for appellees.

SCHENCK, J. This case is governed by *Sales Company v. Meyer,* 206 N. C., 198, where the following from 8 C. J., 444, was quoted 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." See, also, *Barco v. Forbes,* 194 N. C., 204, 139 S. E., 227, and *Bank v. Howard,* 188 N. C., 543, 125 S. E., 126.

Construing the evidence most favorably to the defendant and applying thereto the principle of law above enunciated, we think his Honor was warranted in charging the jury, in effect, that if they found the facts to be as shown by all the evidence they should answer the issues in favor of the plaintiffs.

Since the defendant's own testimony was a waiver of such defense, we think his Honor was correct in excluding evidence tending to show damage by reason of breach of warranty. This case is distinguishable from the case of *Manufacturing Co. v. Gray,* 124 N. C., 322, relied upon by the appellant.

No error.

C. W. BUCHANAN ET AL. v. JOHN M. OGLESBY ET AL.

(Filed 10 October, 1934.)

Judgments L f—

The refusal of a motion to dismiss an action on the plea of *res judicata* will be affirmed on appeal where no facts as to the identity of the actions are found by the trial court and none appear from an inspection of the record.

APPEAL by defendants from *Finley, J.,* at June Term, 1934, of McDOWELL. Affirmed.

The following judgment was rendered in the court below: "This cause coming on to be heard before his Honor, T. B. Finley, judge holding the courts of the Eighteenth Judicial District, and being heard at the June Term, 1934, of the Superior Court of McDowell County, North Carolina, and after a jury had been sworn and impaneled, the pleadings read, the defendants, through their attorneys, move for judgment to dismiss the action for that it was *res judicata,* and from the records and admissions of counsel, the court finds the following facts:

"(1) That on 10 December, 1931, the First National Bank of Marion, North Carolina, and other creditors of the D. E. Hudgins estate instituted a proceeding against the defendants, John M. Oglesby, Carter Hudgins, and D. E. Hudgins, Jr., co-executors of the estate of D. E. Hudgins, deceased, under section 110 of the Consolidated Statutes of North Carolina, asking for a final settlement of said estate, in which proceeding a notice was duly given to all creditors of said estate to file evidence of any claim that they might have against the defendants, who were co-executors of the said estate, and that the claim of Chesley W. Buchanan and wife, Attie A. Buchanan, was presented to the defendants as co-executors of said estate for the return of a certain life insurance policy on the life of the said Chesley W. Buchanan, and that said executors disputed said claim on 20 January, 1932, in a written statement filed by said co-executors with the clerk of Superior Court of McDowell County, North Carolina, and that the plaintiff, pursuant to notice issued to them by the clerk of Superior Court of said county on 22 January, 1932, filed a complaint in said proceeding under section 119 of the Consolidated Statutes, 29 January, 1932, after they had caused summons to be issued for the defendants on 29 January, 1932, which, with the complaint of the plaintiffs therein, was duly served on the defendants Carter Hudgins, co-executor of the D. E. Hudgins estate, on 29 January, 1932, and on the defendant D. E. Hudgins, Jr., co-executor of said estate, on 5 February, 1932, and on the defendant John M. Oglesby, co-executor of said estate, on 20 February, 1932, to which complaint the defendants filed their answer on 25 February, 1932.

"(2) That said cause came on for trial at the June Term, 1932, of said court, before his Honor, W. F. Harding, judge presiding, and after the jury had been sworn and impaneled, and the pleadings read, the defendants offered the court summons in said action for the purpose of showing when the action was commenced, and moved for judgment of nonsuit upon the pleadings for that the plaintiffs' cause of action was barred by the three-year statute of limitation, upon the allegations of the complaint and the inspection of the record, to wit, the summons, the court rendered a judgment of nonsuit against the plaintiffs, from which the plaintiffs appealed, but no appeal was perfected by the plaintiffs.

"(3) That on 21 July, 1932, the plaintiffs, Chesley W. Buchanan and wife, Attie A. Buchanan, who are admitted to be the same Chesley W. Buchanan and Attie A. Buchanan who were plaintiffs in the former suit, sent out another summons against the same defendants, which summons, with the complaint of the plaintiffs therein, was duly served on the defendants Carter Hudgins and D. E. Hudgins, Jr., co-executors of the D. E. Hudgins estate, on 23 July, 1932, and that alias summons in said action was duly served on John M. Oglesby, co-executor of said estate, on 28 July, 1932, to which complaint the defendants, on 15 August, 1932, duly filed their answer, and upon plaintiffs' said complaint and answer of the defendants the cause came on to be tried at the June Term, 1932, of said court.

"(4) That after a jury had been chosen, sworn and impaneled, the pleadings read, including former pleadings, the defendants, through their counsel, move on the pleadings, and on the judgment in the former action, to dismiss the action for that it is *res judicata;* the court being of the opinion that the motion of the defendants, through their counsel, to dismiss this action upon the plea of *res judicata* is prematurely and inadvertently made.

"Whereupon, the motion of the defendants, through their counsel, to dismiss the action is overruled, and it is considered, adjudged and decreed by the court that the plaintiffs are not estopped to prosecute this action by the former judgment.

T. B. FINLEY, *Judge Presiding.*"

Defendants filed but one exception, and that was to the judgment of the court denying defendants' motion of nonsuit, and assigned as error the court's failure to dismiss the action on the grounds that it is *res judicata,* and appealed to the Supreme Court.

W. R. Chambers for plaintiff.

Watson & Fouts and Carter Hudgins for defendants.

PER CURIAM. No facts were found by the trial judge and none appear from an inspection of the record, taking this case outside of the

ruling in *Batson v. Laundry Co.*, 206 N. C., 371, at p. 372, where it is said: "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." *Dix-Downing v. White*, 206 N. C., 567.

The judgment of the court below is

Affirmed.

KATHERINE BYERS, BY HER NEXT FRIEND, KATHERINE L. RINK, v. J. W. BRAWLEY.

(Filed 10 October, 1934.)

Automobiles D c—"Family purpose doctrine" does not apply in absence of evidence that car was kept by defendant for use of his family.

The evidence in this action was to the effect that defendant kept a Chandler automobile for the use of his family and a Chrysler automobile for his own personal use, and that in his absence his nephew, who lived with the family, asked defendant's wife for permission to use the Chrysler for a pleasure trip, and that plaintiff was injured in an accident while riding in the Chrysler as a guest of the nephew: *Held*, even conceding that the nephew was a member of the family within the meaning of the "family purpose doctrine," in the absence of evidence that the car in which plaintiff was riding at the time of the accident was kept by defendant for the use of his family, defendant'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 *Sink, J.*, at October Term, 1933, of GUILFORD. Reversed.

This is an action to recover of the defendant J. W. Brawley damages for personal injuries which the plaintiff suffered while she was riding in an automobile which was owned by the defendant.

It is alleged in the complaint that the automobile in which the plaintiff was riding at the time she was injured was owned, kept and maintained by the defendant for use by members of his family for their business or pleasure, and that at the time the plaintiff was injured, as alleged in the complaint, she was riding in said automobile as a guest of a member of defendant's family, who was using the automobile for his pleasure.

It is further alleged in the complaint that the plaintiff was injured by the negligence of the driver of the automobile, who was driving the

same at the direction and under the control of the member of defendant's family, who was then using the automobile for his pleasure.

In his answer, the defendant admits that he was the owner of the automobile in which the plaintiff was riding when she was injured, and that her injuries were caused by the negligence of the driver. He denies that he kept and maintained the automobile for use by members of his family, and that the person at whose direction and under whose control the automobile was being driven when the plaintiff was injured was a member of his family. He expressly denies that the driver of the automobile was his agent.

The issues submitted to the jury were answered as follows:

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

"2. What damage, if any, is the plaintiff entitled to recover? Answer: '$3,500.'"

From judgment that plaintiff recover of the defendant J. W. Brawley the sum of $3,500, and the costs of the action, the defendant appealed to the Supreme Court, assigning as error the refusal of the court below to allow his motion for judgment as of nonsuit at the close of all the evidence.

Smith, Wharton & Hudgins and Brooks, McLendon & Holderness for plaintiff.

Sapp & Sapp for defendant.

CONNOR, J. At the trial of this action all the evidence showed that on 31 December, 1931, the defendant J. W. Brawley owned two automobiles, one a Chandler sedan and the other a Chrysler sedan; that the Chandler sedan was kept and maintained by the defendant for use by his wife, for her business or pleasure, and that the Chrysler sedan was kept and maintained by the defendant for his own use. The defendant lives in the city of Greensboro, N. C., where he maintains a home for himself and his wife. They have no children. The defendant is employed by the Pilot Life Insurance Company of Greensboro, N. C. On 31 December, 1931, the defendant was in Havana, Cuba.

All the evidence at the trial further showed that on 31 December, 1931, W. R. Lovill, Jr., a nephew of defendant's wife, was living in defendant's home in Greensboro. The mother of W. R. Lovill, Jr., died when he was about 8 years of age, and since her death he has lived in the home of the defendant. On 31 December, 1931, he was about 26 years of age. There was evidence tending to show that both before and after W. R. Lovill, Jr., arrived at the age of 21 years the relationship

between him and the defendant and his wife was that of a son and father and mother, and that such relationship existed on 31 December, 1931.

All the evidence further showed that on the night of 31 December, 1931, in the absence of the defendant from his home in Greensboro, the said W. R. Lovill, Jr., asked his aunt, the wife of the defendant, for permission to use the defendant's Chrysler sedan to take his friends, the plaintiff and Harry J. Byrd, to Mount Airy, N. C., to visit their friend, Miss Edna Ellis. Mrs. Brawley granted the request, and the said W. R. Lovill, Jr., the plaintiff, and Harry J. Byrd left Greensboro at about 7:30 p.m. in the Chrysler sedan. They arrived at Miss Ellis' home in Mount Airy, N. C., at about 10 o'clock. Some time thereafter the party left Miss Ellis' home in the Chrysler sedan to go to a moving-picture show. At the request of W. R. Lovill, Jr., Harry J. Byrd drove the sedan, with the plaintiff sitting by his side on the front seat, and with W. R. Lovill, Jr., and Miss Ellis sitting on the rear seat. By his careless and negligent driving, Harry J. Byrd caused the automobile to swerve to the left side of the highway, to strike a telephone pole, and to turn over. The plaintiff was thereby seriously, painfully, and permanently injured, with the result that she has sustained damages.

There was error in the refusal of the trial court to allow defendant's motion for judgment as of nonsuit, at the close of all the evidence, unless, as contended by the plaintiff, the "Family Purpose Doctrine" is applicable to this case. This doctrine has been recognized and applied in this jurisdiction. See *Grier v. Woodside,* 200 N. C., 759, 158 S. E., 491.

Conceding that there was evidence at the trial of this case tending to show that W. R. Lovill, Jr., was a member of defendant's family (see *McGee v. Crawford,* 205 N. C., 318, 171 S. E., 326), in the absence of any evidence tending to show that the automobile in which the plaintiff was riding at the time she was injured by the negligence of the driver was kept and maintained by the defendant for use by members of his family for their business or pleasure, the "Family Purpose Doctrine" is not applicable to this case, for the purpose of imposing liability on the defendant for the damages which the plaintiff sustained as the result of her injuries. *Eaves v. Coxe,* 203 N. C., 173, 165 S. E., 345.

There was error in the refusal of the court to allow defendant's motion for judgment as of nonsuit. For this error the judgment is

Reversed.

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

ATLANTIC COAST LINE RAILROAD COMPANY v. TOWN OF AHOSKIE.

(Filed 10 October, 1934.)

Municipal Corporations G d: Courts A c—Jurisdiction of Superior Court on appeal from street assessments is derivative, and it has no jurisdiction on appeal to condemn land for street purposes.

The jurisdiction of the Superior Court upon appeal from a levy of assessments for street improvements by the governing body of a town is entirely derivative, and as the governing body of the town has no jurisdiction in the statutory proceeding, C. S., 2712, 2713, to condemn land for street purposes, under the power of eminent domain, the Superior Court on appeal likewise has no jurisdiction to do so, and the petition of the town, filed in the Superior Court upon appeal, asking that the land in question be condemned, is properly dismissed.

APPEAL by the town of Ahoskie from *Barnhill, J.*, at April Term, 1934, of HERTFORD. Affirmed.

This proceeding was begun on 8 September, 1925, and has since been prosecuted under the provisions of C. S., 2703, *et seq.*, for the purpose of determining the validity of an assessment made by the governing body of the town of Ahoskie on the Atlantic Coast Line Railroad Company for the cost of paving a parcel of land for street purposes.

The Atlantic Coast Line Railroad Company contested the validity of the assessment on the ground that the parcel of land which had been paved by the town of Ahoskie is not included within or a part of a public street of said town, but is owned by said railroad company, for depot purposes. The assessment was confirmed by the governing body of the town of Ahoskie, and the railroad company appealed to the Superior Court of Hertford County. This appeal was heard at April Term, 1926, of said court and dismissed, on the ground that the title to the land which had been paved could not be litigated in this proceeding. The order dismissing the appeal was reversed by the Supreme Court. See *R. R. v. Ahoskie,* 192 N. C., 258, 134 S. E., 653.

Issues involved in the proceeding were tried by a jury at October Term, 1931, of the court, and answered favorably to the contentions of the town of Ahoskie. The judgment, in accordance with the verdict confirming the assessment, was reversed by the Supreme Court. See *R. R. v. Ahoskie,* 202 N. C., 585, 163 S. E., 565. The proceeding was remanded to the Superior Court of Hertford County.

On 25 October, 1932, while the proceeding was pending in the Superior Court of Hertford County, the town of Ahoskie filed a petition therein admitting that the Atlantic Coast Line Railroad Company is the owner of the parcel of land which it had caused to be paved, and praying that the said parcel of land be condemned for street purposes.

The Atlantic Coast Line Railroad Company entered a special appearance, and moved that the petition and the proceeding be dismissed. This motion was allowed, and the town of Ahoskie appealed to the Supreme Court.

Thomas W. Davis, F. S. Spruill, and MacLean & Rodman for Atlantic Coast Line Railroad Company.

E. L. Travis and W. W. Rogers for town of Ahoskie.

CONNOR, J. This is a statutory proceeding. It was begun before the governing body of the town of Ahoskie, by a notice served by said body on the Atlantic Coast Line Railroad Company, as required by statute (C. S., 2712), to show cause why an assessment for a street improvement made by the town of Ahoskie against the said railroad company should not be confirmed. The Atlantic Coast Line Railroad Company appeared before said governing body and filed its objections in writing to said assessment. These objections were overruled by the governing body of the town of Ahoskie. The assessment was confirmed (C. S., 2713), and the railroad company appealed to the Superior Court of Hertford County. C. S., 2714.

The jurisdiction of the Superior Court was acquired by appeal. It was altogether derivative, and was restricted to matters involved in the proceeding, of which the governing body of the town of Ahoskie had original jurisdiction. Neither the said governing body nor the Superior Court had jurisdiction in this proceeding to condemn land for street purposes. As the lower court had no jurisdiction to order a condemnation of the land under the power of eminent domain, the appellate Court was likewise without jurisdiction to do so. See McIntosh N. C. Prac. and Proc., p. 64.

The suggestion in the opinion of this Court in *R. R. v. Ahoskie,* 202 N. C., 585, 163 S. E., 565, that the land assessed for the payment of a street improvement could and should be condemned in this proceeding was an inadvertence on the part of the court as to the nature of this proceeding. It is not an action begun in the Superior Court, as was the case in *Efird v. Winston-Salem,* 199 N. C., 33, 153 S. E., 632, cited to support the suggestion, but a statutory proceeding of which the governing body of the town of Ahoskie had original jurisdiction.

The order dismissing the petition for condemnation, and also dismissing the proceeding, is

Affirmed.

STATE v. LORANCE BROWN.

(Filed 10 October, 1934.)

1. Criminal Law L d—

The record on appeal imports verity and the Supreme Court is bound thereby.

2. Homicide G b—Charge that defendant had burden of rebutting presumptions from use of deadly weapon held erroneous under the facts.

Defendant, charged with murder, tendered a plea of second-degree murder, and the State contended for a verdict of murder in the first degree. The court charged the jury that if the State had satisfied them that defendant killed deceased with a deadly weapon, the burden shifted to defendant to rebut the presumptions arising therefrom that the killing was unlawful and was done with malice: *Held*, defendant's assignment of error to the charge must be sustained, since there was no question of acquittal or of manslaughter in the case, and defendant at no time had the burden of proof.

3. Criminal Law L e—Error in charge held not cured by verdict in this case.

Error in the charge of the court as to the burden of proof on the lesser degree of the crime charged *is held* not cured by a verdict of guilty of the highest degree of the crime charged, since it cannot be known whether the jury would have rendered the lesser verdict had the two degrees of the crime arising upon the evidence been submitted to them under correct instructions.

APPEAL by defendant from *Finley, J.*, at June Term, 1934, of McDOWELL.

Criminal prosecution, tried upon indictment charging the defendant with the murder of one Emma Carroll.

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.

Hugh F. Beam and D. F. Giles for defendant.

STACY, C. J. As a result of suspicion and jealousy, or a lovers' quarrel, or because he "loved her too much," the defendant shot and killed Emma Carroll at her father's house in McDowell County on the night of 3 April, 1934. The defendant tendered a plea of second-degree murder. The State contended for a verdict of murder in the first degree. There was no question of manslaughter.

The following excerpt taken from the charge forms the basis of one of the defendant's exceptive assignments of error:

"On the question of second degree, the burden shifts to the defendant if the State has satisfied you that the defendant killed with a deadly weapon, then the defendant has to satisfy you that it was done in self-defense or without malice; and if the defendant does satisfy you it was done without malice, the killing with deadly weapon raises two presumptions: one—that it was done with malice, and second, that it was an unlawful killing, and the presumption still stays with the defendant, and if you are satisfied it was without malice, the burden is still on the defendant to satisfy you it was not unlawful, but was done in self-defense, or in some way that keeps it from being an unlawful killing."

We are reasonably certain the charge of the learned judge has been erroneously reported. But it is here in a case duly settled by agreement of counsel. C. S., 643; *McMahan v. R. R.,* 203 N. C., 805, 167 S. E., 225; *Cogdill v. Hardwood Co.,* 194 N. C., 745, 140 S. E., 732; *S. v. Humphrey,* 186 N. C., 533, 120 S. E., 85. We are bound by the record; it imports verity. *S. v. Griggs,* 197 N. C., 352, 148 S. E., 547; *Brown v. Sheets,* 197 N. C., 268, 148 S. E., 233; *S. v. Palmore,* 189 N. C., 538, 127 S. E., 599; *S. v. Wheeler,* 185 N. C., 670, 116 S. E., 413.

As we understand the challenged instruction, it would seem to be erroneous. *S. v. Keaton,* 206 N. C., 682; *S. v. Banks,* 204 N. C., 233, 167 S. E., 851. At least, we are not able to say it carried the correct impression to the jury. The defendant at no time had the burden of proof, as there was no question of acquittal or of manslaughter in the case. *S. v. Keaton, supra.*

Nor was the error cured by the verdict. The defendant was entitled to have the two issues arising on the evidence—murder in the first degree and murder in the second degree—submitted to the jury under proper instructions. It cannot be known whether the lesser verdict would have been rendered had the different views, arising on the evidence, been correctly presented in the court's charge. *S. v. Keaton, supra; S. v. Lee,* 206 N. C., 472, 174 S. E., 288.

New trial.

FIRST NATIONAL BANK OF HENDERSON ET AL. v. B. H. HICKS, TRUSTEE, ET AL.

(Filed 10 October, 1934.)

Injunctions H a—Interest on value of property at time of issuance of order for time order is in force may be recovered where value of property is insufficient to pay debt secured thereby.

Where a temporary order restraining the sale of lands under a mortgage thereon is dissolved and the value of the land does not appreciate or depreciate during the time the injunction is in force, and the value of

the land at the time of the issuance of the order and at the time of its dissolution is insufficient to pay the debt, the mortgagee is entitled to recover against the injunction bond, within the penal sum thereof, interest on the value of the property at the time of the issuance of the order for the time the order is in force.

APPEAL by respondents from *Devin, J.*, at March Term, 1934, of VANCE. No error.

This was an action to restrain the defendant B. H. Hicks, trustee, from selling the land described in the complaint in accordance with his advertisement under the powers of sale contained in deeds of trust executed to him by S. M. Blacknall, deceased.

A temporary restraining order entered in the action on 26 May, 1931, on motion of the plaintiffs, was dissolved by Grady, J., on 18 March, 1932, pursuant to the decision of the Supreme Court in *Bank v. Purvis,* 201 N. C., 753, 161 S. E., 386. In the order of dissolution it was adjudged that defendants recover of the plaintiff and the surety on the injunction bond filed in the action the damages which defendants had suffered by reason of the issuance of the temporary restraining order, such damages to be assessed by a jury.

The action was heard by Devin, J., and a jury, at March Term, 1934, of the Superior Court of Vance County on the petition of the defendants that their damages be assessed in accordance with the judgment of Grady, J., and that defendants recover such damages of the plaintiff and the surety on the injunction bond. The penal sum of said bond was $500.00. In their answer, the respondents denied that petitioners had suffered any damages, except the cost of readvertisement of the sale, to wit, $25.00.

The issue submitted to the jury was answered as follows:

"What damages, if any, are the petitioners entitled to recover on account of the issuance of the restraining order in this action, as alleged in the petition? Answer: '$500.00.'"

From judgment that the petitioners recover of the respondents the sum of $500.00, with interest and costs, the respondents appealed to the Supreme Court, assigning as error, chiefly, an instruction of the court to the jury.

T. G. Stem for petitioners.

A. A. Bunn, J. B. Hicks, and J. H. Bridgers for respondents.

CONNOR, J. At the trial of the issue submitted to the jury in this action there was evidence tending to show that the value of the land described in the deeds of trust did not depreciate from the date of the issuance of the restraining order to the date of its dissolution, and that said value was not sufficient to pay the debts secured by the deeds of

trust, at the date of the issuance of the order, or at the date of its dissolution. The interest on the value of the land from the date of the order to the date of its dissolution exceeded the penal sum of the bond, to wit, $500.00. The amount of the indebtedness secured by the deeds of trust was about $33,000. The market value of the land was $17,500.

The court instructed the jury as follows:

"If you find from the evidence, by its greater weight, that there was no depreciation in the market value of the property between the dates of the issuance and of the dissolution of the injunction, and that the market value of the property both at the date of the issuance of the injunction and at the date of its dissolution, was insufficient to pay the debt, principal and interest, then the petitioners have sustained damages in the loss of interest accrued after the injunction was issued, and up to the date of its dissolution, and if you find that these are the facts, by the greater weight of the evidence, you should answer the issue such amount as you shall find, by calculation, is the interest on the value of the property at the date of the issuance of the injunction, for the time the injunction was in force, plus the cost of readvertisement of the sale, in all, however, not to exceed the sum of $500.00; otherwise, you should answer the issue, $25."

This instruction is correct. The respondents' exception to the instruction is not sustained. See *Gruber v. Ewbanks,* 199 N. C., 335, 154 S. E., 318.

There was no error in the trial of the issue. The judgment is affirmed.

No error.

B. STANLEY v. T. V. PARKER.

(Filed 10 October, 1934.)

1. Judgments M b—Judgment against several defendants is not ordinarily conclusive as to their liabilities among themselves.

A judgment in plaintiff's favor against several defendants, and the recitals therein of the liability of each of the defendants to plaintiff, is conclusive as between the plaintiff and the defendants, but is not conclusive as to the respective liability of the several defendants among themselves, unless the liability among themselves is drawn in issue and determined in the action.

2. Same: Evidence J a—Under a consent judgment jointly against endorsers on a note parol evidence is admissible to show agreement among endorsers that their respective liabilities should not be equal.

The payee of a negotiable note obtained a consent judgment against the endorsers thereon reciting that the endorsers had agreed to pay and had paid the payee jointly the sum of $1,500 in full discharge of their

joint liability. One of the endorsers thereafter brought action against the other endorser alleging that plaintiff had paid $900 on the judgment and defendant had paid $600 thereon, and that plaintiff was entitled to recover the amount by which defendant had failed to pay one-half the judgment. Defendant alleged that the respective amounts paid by plaintiff and defendant were made pursuant to an agreement among themselves that plaintiff should pay $900 and defendant should pay $600: *Held,* the consent judgment was not conclusive as to the respective liabilities of the endorsers as between themselves, and parol evidence is admissible to establish the agreement as alleged by defendant, on the principle that as among themselves parol evidence is admissible to show that the liability of the parties to a negotiable instrument is otherwise than as appears *prima facie,* and judgment on the pleadings in plaintiff's favor is held for error.

APPEAL by defendant from *Parker, J.,* at April Term, 1934, of JOHNSTON. Reversed.

It is alleged in the complaint in this action that on 22 July, 1930, the plaintiff and the defendant endorsed a note, which was executed by B. T. Barbour & Company as maker, and was payable to the order of the Tennessee Chemical Company, for the sum of $4,037.49, and thereby became jointly liable to the holder of said note, in the event the maker failed to pay the same at its maturity; that B. T. Barbour & Company, the maker of said note, failed to pay the same at its maturity, and have since been duly adjudged bankrupt; that actions were begun by the holder of said note in the Superior Court of Johnston County to recover of the plaintiff and the defendant the amount due thereon, to wit, the sum of $3,037.79; that the plaintiff and the defendant agreed to pay and did pay to the plaintiff in said actions, as the holder of said note, the sum of $1,500, in full settlement and discharge of their joint liability on said note; and that upon the payment of said sum of $1,500 by the plaintiff and defendant to the holder of said note, the said actions were dismissed by a consent judgment entered in each action.

It is further alleged in the complaint that the plaintiff paid the sum of $900.00, and the defendant the sum of $600.00, in settlement of said note, although each was liable under the terms of the settlement for the sum of $750.00; and that defendant has failed and refused to pay to the plaintiff the sum of $150.00, which the plaintiff paid in excess of his share of said sum of $1,500, and for that reason the plaintiff is now entitled to recover of the defendant the sum of $150.00.

The allegations in the complaint which constitute the cause of action set out therein are not denied in the answer filed by the defendant. He alleges, however, that it was expressly agreed by and between the plaintiff and defendant that the plaintiff would pay the sum of $900.00, and the defendant the sum of $600.00, in settlement of their liability as

endorsers of the note sued on in said actions, and that payments were made to the holder of said note in accordance with said agreement.

When the action was called for trial, the plaintiff moved for judgment on the pleadings. The motion was allowed.

From judgment that plaintiff recover of the defendant the sum of $150.00, with interest and costs, the defendant appealed to the Supreme Court.

Leon G. Stevens and C. G. Grady for plaintiff.
Parker & Lee for defendant.

CONNOR, J. The judgments entered by consent in the actions brought by the holder of the note which was endorsed by the plaintiff and defendant in this action, to recover on said note, together with the recital in said judgments to the effect that the defendants in said actions, who are the plaintiff and defendant in this action, had agreed to pay and had paid to the holder of the note sued on, jointly, the sum of $1,500, in settlement and full discharge of their joint liability on said note, are conclusive upon the plaintiff and the defendants in said actions. Neither the judgments nor the recitals are conclusive, however, upon the plaintiff and defendant in this action. A judgment against several defendants does not as a rule determine their rights as among themselves, unless their rights have been drawn in issue and determined in the action in which the judgment was rendered. McIntosh N. C. Prac. and Proc., p. 749.

The defendant in this action is entitled to a trial by the jury of the issue raised by his answer. At such trial parol evidence will be admissible to support his allegation as to the agreement between himself and the plaintiff with respect to the proportionate parts of the $1,500 each was to pay. It is well settled that as between or among themselves parol evidence is admissible to show that the liability of parties to a negotiable instrument is otherwise than as appears prima facie. *Lancaster v. Stanfield,* 191 N. C., 340, 132 S. E., 21. On this principle parol evidence will be admissible at the trial to show the agreement between plaintiff and defendant, as alleged in the answer.

There is error in the judgment in this action. The judgment is reversed and the action remanded to the Superior Court for further proceedings in accordance with this opinion.

Reversed.

VIRGINIA TRUST COMPANY v. CITY OF ASHEVILLE ET AL.

(Filed 10 October, 1934.)

Municipal Corporations J b—Notice of claim of damages given by trustor does not inure to benefit of trustee in deed of trust on the lands.

Notice to a city of a claim against it for damages for injury to lands, given the city by the owner of the equity of redemption in the lands, will not inure to the benefit of the trustee in a deed of trust thereon in the absence of a showing that such notice was given on behalf of the trustee or was intended to include the trustee's claim, since knowledge of the claimant is as necessary as knowledge of the injury in affording the city an opportunity to discharge its liability without suit, and where no proper notice is given the city by the trustee within the time prescribed by the city charter, the trustee's action against the city on such claim is properly nonsuited.

APPEAL by plaintiff from *Pless, J.*, at June Term, 1934, of BUNCOMBE.

Civil action, instituted in the general county court of Buncombe County to recover damages to lands held by plaintiff as trustee in deed of trust, alleged to have been caused by defective storm sewer constructed and maintained by defendant.

Judgment for the plaintiff in the general county court, from which the defendant appealed to the Superior Court, where the action was dismissed as in case of nonsuit, principally upon the ground that no notice of claim had been given the defendant within ninety days of the injury as required by the charter of the city of Asheville. It was also contended that the plaintiff had no right to maintain the action; and that the evidence of negligence was insufficient to carry the case to the jury.

The injury is alleged to have occurred 28 October, 1928. The charter of the defendant city provides that "no action for damages against said city of any character whatever to either person or property shall be instituted against said city unless within ninety days after the happening or infliction of the injury complained of, the complainant, his executors or administrators, shall have given notice to the board of commissioners of said city of such injury in writing," etc.

It is not contended that plaintiff gave the defendant written notice of its claim within the time required by the city charter, but plaintiff seeks to avail itself of the notice given by the owner of the equity of redemption in said lands. Notice by the owner was given 17 December, 1929, within ninety days after the injury.

From the judgment of nonsuit entered in the Superior Court, the plaintiff appeals, assigning errors.

Bourne, Parker, Bernard & DuBose for plaintiff.
C. E. Blackstock for defendant city of Asheville.

STACY, C. J. When real estate is damaged through the negligence of a municipality, will notice of such damage given by the owner of the land in accordance with the city charter inure to the benefit of the trustee in the first lien created by a deed of trust thereon?

Defendant had no notice of plaintiff's claim, or that plaintiff would make claim for damages, until nearly two years after the alleged injury. Nothing else appearing, failure to give notice as required by the city charter defeats the action under the decisions dealing with this and similar charter provisions. *Dayton v. Asheville,* 185 N. C., 12, 115 S. E., 827; *Cresler v. Asheville,* 134 N. C., 311, 46 S. E., 738; *Pender v. Salisbury,* 160 N. C., 363, 76 S. E., 228; *Dockery v. Hamlet,* 162 N. C., 118, 78 S. E., 13; *Terrell v. Washington,* 158 N. C., 281, 73 S. E., 888; *Kirby v. Comrs. of Person,* 198 N. C., 440, 152 S. E., 165. Compare *Stephens Co. v. Charlotte,* 201 N. C., 258, 159 S. E., 414.

Nor do we think the notice given by the owner of the equity of redemption can avail the plaintiff in the absence of a showing that such notice was given on behalf of the plaintiff, or was intended to include plaintiff's claim. *City of Birmingham v. Chestnutt,* 161 Ala., 253; 43 C. J., 1191.

Knowledge of the claimant is as necessary as knowledge of the injury, if the city is to be afforded an opportunity to discharge its liability without suit. See *McDougall v. Birmingham,* 219 Ala., 686, 123 So., 83, as reported in 63 A. L. R., with full annotation.

Affirmed.

MARY B. BOHANNON v. VIRGINIA TRUST COMPANY ET AL.

(Filed 10 October, 1934.)

Assistance, Writ of, A a—Only party deriving title immediately from commissioner's deed is entitled to writ of assistance.

A party purchasing land at a judicial sale is entitled to a writ of assistance to put him in possession, but a purchaser at such sale who transfers his title to a third person before applying for the writ, or who so transfers his title and takes a reconveyance back from his grantee, is not entitled to such writ.

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

APPEAL by Sussex Corporation, movant, from *Schenck, J.,* at May Term, 1934, of BUNCOMBE.

Motion by Sussex Corporation to vacate order entered at the May Term, 1933, a year previous, and for writ of assistance.

This was an action to restrain foreclosure under power of sale contained in a deed of trust. Foreclosure was later had under order of court in equity. The Sussex Corporation became the purchaser at the commissioner's sale. Writ of assistance was issued 16 January, 1933. Thereafter, at the May Term, 1933, upon motion of plaintiff, the execution of said writ was enjoined or recalled, it appearing that the Sussex Corporation, prior to the issuance of said writ, had conveyed all its interest in the lands by full warranty deed, without reservation of any kind, to Carl V. Reynolds. No appeal was prosecuted from this injunction or vacation of the writ of assistance. Carl V. Reynolds then reconveyed the property to his grantor. Upon this change in title, the Sussex Corporation again applied in this same cause for another writ of assistance.

This second application was denied upon the ground that the prior order vacating or recalling the original writ was *res judicata,* and that movant's present title is immediately derived from the deed of Carl V. Reynolds and not from the deed of the commissioner.

Movant appeals, assigning error.

Louis A. Whitener and Jones & Ward for plaintiff.
Bourne, Parker, Bernard & DuBose for movant.

STACY, C. J. It is not perceived upon what theory valid objection to the ruling of the trial court may be predicated. Having lost its right to a summary writ of assistance by conveying the premises to another and allowing the matter to be so adjudicated without appeal, movant is in no position to ask for further assistance in the present proceeding. Its remedy now is by suit in ejectment.

That one who buys at a judicial sale is entitled to a writ of assistance is not questioned (*Bank v. Leverette,* 187 N. C., 743, 123 S. E., 68; *Knight v. Houghtalling,* 94 N. C., 408), but movant parted with the title which it acquired under the commissioner's deed before applying for such writ. At any rate, it allowed the matter to be so adjudged without appeal.

Affirmed.

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

M. W. GALLOWAY, ADMINISTRATOR, v. P. H. THRASH ET AL.

(Filed 10 October, 1934.)

Evidence J a—Parol evidence that note was to be paid by crediting it against maker's anticipated share in payee's estate held competent.

In an action on a note by an administrator against the intestate's son, the maker of the note, it is competent for the son to show by parol evidence that the note represented an advancement and was to be paid by crediting it against the son's anticipated share in the estate.

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

APPEAL by plaintiff from *Schenck, J.*, at March Term, 1934, of BUNCOMBE.

Civil action, instituted in the general county court of Buncombe County to recover on $32,518.83 note, executed by defendants 1 September, 1925, payable to order of J. M. Thrash, due two years after date, and secured by deed of trust on real estate.

Defendants pleaded (1) partial failure of consideration, and (2) that said note represented an advancement from J. M. Thrash to his son and daughter-in-law, defendants herein, which was to be taken into account in the settlement of his estate. The said J. M. Thrash died intestate in August, 1930.

It was held in the general county court that the first defense was available *pro tanto,* but that the evidence offered to support the second defense was inadmissible under the rule which prohibits the introduction of parol evidence to contradict, add to, or vary the terms of a written instrument. *Carlton v. Oil Co.,* 206 N. C., 117, 172 S. E., 883; *Overall Co. v. Hollister,* 186 N. C., 208, 119 S. E., 1; *Bank v. Andrews,* 179 N. C., 341, 102 S. E., 500; *Cherokee County v. Meroney,* 173 N. C., 653, 92 S. E., 616; *Walker v. Venters,* 148 N. C., 388, 62 S. E., 510; *Moffitt v. Maness,* 102 N. C., 457, 9 S. E., 399; *Ray v. Blackwell,* 94 N. C., 10.

On appeal to the Superior Court, the evidence offered in support of the second defense was held to be competent; whereupon the ruling of the county court in this respect was reversed and the cause remanded for a new trial. From this ruling the plaintiff appeals.

T. Coleman Galloway and George H. Wright for plaintiff.
Robert M. Wells for defendants.

STACY, C. J. Is it competent, as between the parties, to show that a note given by a son to his father represented an advancement and was to be paid by crediting it against the son's anticipated share of the father's estate? The answer is, Yes.

It is established by the decisions in this jurisdiction that the rule which prohibits the introduction of parol evidence to vary, modify or contradict the terms of a written instrument, is not violated:

First, by showing a conditional delivery of said instrument. *Thomas v. Carteret Co.*, 182 N. C., 374, 109 S. E., 384; *Garrison v. Machine Co.*, 159 N. C., 285, 74 S. E., 821; *Kernodle v. Williams*, 153 N. C., 475, 69 S. E., 431.

Second, by showing failure of consideration. *Chemical Co. v. Griffin*, 202 N. C., 812, 164 S. E., 577; *Swift & Co. v. Aydlett*, 192 N. C., 330, 135 S. E., 141; *Pate v. Gaitley*, 183 N. C., 262, 111 S. E., 339; C. S., 3008.

Third, by showing mode of payment and discharge as contemplated by the parties, other than that specified in the instrument. *Kindler v. Trust Co.*, 204 N. C., 198, 167 S. E., 811; *Wilson v. Allsbrook*, 203 N. C., 498, 166 S. E., 313; *Stockton v. Lenoir*, 198 N. C., 148, 150 S. E., 886; *Bank v. Winslow*, 193 N. C., 470, 137 S. E., 320.

Viewed in the light of the foregoing authorities, and the principles they illustrate, it would seem that the ruling of the Superior Court is well supported, in tendency at least, if not directly, by the decisions on the subject.

It is observed that no effort was made by the father during his lifetime to collect said note; and it is not alleged that its collection is needed to pay the debts of the estate.

Affirmed.

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

KITTIE P. HILL, INDIVIDUALLY AND AS ADMINISTRATRIX OF DAVID H. HILL, DECEASED, v. THE CONNECTICUT GENERAL LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT.

(Filed 10 October, 1934.)

Insurance R c—Evidence held insufficient to show total disability and action on disability clause was properly nonsuited.

In this action on a disability clause in a policy of life insurance which provided for benefits to insured if he should become permanently and totally disabled to pursue any occupation for wages or profit, all the evidence tended to show that insured, although his health was greatly impaired by a progressive disease subsequently causing his death, continued to work regularly and continuously while the policy was in force and after its termination, and was paid wages by his employer regularly during this period: *Held*, the evidence failed to show total disability of insured while the policy was in force, and insurer's motion as of nonsuit was properly allowed.

APPEAL by plaintiff from *Parker, J.*, at February Term, 1934, of JOHNSTON. Affirmed.

This is an action to recover on a policy of insurance issued by the defendant on 25 October, 1930, by which the defendant agreed to pay to plaintiff's intestate as the insured in said policy the sum of one thousand dollars, provided the insured should become permanently and totally disabled, while the policy was in force, and before the insured had attained the age of 60 years, to pursue any occupation for wages or profit.

The policy was in full force and effect from the date of its issue until 30 April, 1932, when, according to its terms, it terminated. The insured died on 26 September, 1932, at the age of 39 years.

It is alleged in the complaint that prior to the termination of the policy, and before the insured had attained the age of 60 years, he became permanently and totally disabled to pursue any occupation for wages or profit, and that for that reason, under the terms of the policy, the defendant became indebted to the insured in the sum of one thousand dollars. This allegation is denied in the answer.

All the evidence at the trial showed that from the date of the policy until it terminated, according to its terms, the insured was regularly and continuously employed by the Sanders Motor Company as an automobile salesman; that during said time the insured was regularly and continuously at work for his employer, receiving pay for his work in accordance with the terms of his employment; and that after he left the employment of the Sanders Motor Company until the day of his death he was regularly and continuously employed. He performed the duties of his employment and received wages for his work.

There was evidence tending to show that for several months prior to the termination of the policy, and while the same was in force, the health of the insured was greatly impaired by a disease which was progressive in its nature, and ultimately resulted in his death, but that notwithstanding his impaired health the insured continued at work, and earned wages, which were paid by his employer.

At the close of all the evidence, the motion of the defendant for judgment as of nonsuit was allowed.

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

E. G. Hobbs and E. J. Wellons for plaintiff.

J. M. Broughton for defendant.

CONNOR, J. The judgment of nonsuit, dismissing this action, is affirmed on the authority of *Boozer v. Assurance Society,* 206 N. C., 848,

175 S. E., 175, and *Thigpen v. Insurance Co.*, 204 N. C., 551, 168 S. E., 845.

These cases are easily distinguished from *Carter v. U. S.*, 49 Fed. (2d), 221. In the latter case there was evidence tending to show that while the policy was in force the insured accepted employment, and attempted to perform the duties of his employment, but was forced, because of his disability, to abandon his work. In the instant case, as well as in the cited cases, all the evidence showed that the insured not only accepted employment, but performed the duties of his employment regularly and continuously while the policy was in force.

The evidence in the instant case failed to sustain the allegations of the complaint, which were sufficient to constitute a cause of action. By the terms of the policy defendant was liable to plaintiff's intestate only if he became both totally and permanently disabled to pursue any occupation for wages or profit. The evidence failed to show that he became totally disabled, and for that reason the action was properly dismissed by judgment of nonsuit.

Affirmed.

EULAS MAYZE v. TOWN OF FOREST CITY, EMPLOYER, AND U. S. CASUALTY COMPANY, INSURANCE CARRIER.

(Filed 10 October, 1934.)

1. Master and Servant F i—

The finding of the Industrial Commission that claimant is an employee of defendant employer is conclusive on appeal when supported by evidence.

2. Master and Servant F a—Fact that city's employee is paid from funds obtained from Reconstruction Finance Corporation does not affect contract of employment.

A worker employed by a city under a contract stipulating the wages to be received by the worker is an employee of the city within the meaning of the Compensation Act, and the fact that the city obtains the money to pay the wages from the Reconstruction Finance Corporation is immaterial on the question of the relationship between the worker and the city. N. C. Code, 8081 (i).

STACY, C. J., dissents.

APPEAL by plaintiff from *Finley, J.*, at April Term, 1934, of RUTHERFORD. Reversed.

This proceeding was begun before the North Carolina Industrial Commission for compensation under the provisions of the North Carolina Workmen's Compensation Act. Ch. 120, Public Laws of N. C., 1929; ch. 133 (a), N. C. Code of 1931.

On the facts found by the hearing commissioner, and approved on defendants' appeal by the full Commission, an award of compensation to be paid to plaintiff by the defendants was made. On defendants' appeal to the judge of the Superior Court, this award was reversed.

From the judgment reversing the award of the Industrial Commission, and dismissing the proceeding, the plaintiff appealed to the Supreme Court.

Tom J. Moss and W. B. Matheny for plaintiff.
Ralph V. Kidd for defendants.

CONNOR, J. The defendants excepted to the finding by the Industrial Commission that plaintiff was an employee of the town of Forest City at the time he suffered an injury by accident, which arose out of and in the course of his employment, and contended that all the evidence showed that plaintiff was a relief worker, and not an employee of the town of Forest City at the time he was injured. This exception was sustained by the judge of the Superior Court. In this there was error. There was evidence at least in support of the finding by the Industrial Commission, and for that reason the finding is conclusive. *Bryson v. Lumber Co.*, 204 N. C., 665, 169 S. E., 276.

In *Jackson v. Relief Administration*, 206 N. C., 274, 173 S. E., 580, and in *Bell v. Raleigh*, 206 N. C., 275, 173 S. E., 581, all the evidence showed that at the time plaintiff in each case was injured he was working under an assignment by the Welfare Department of Wake County and not under a contract with the defendants, or with either of them. In the instant case the plaintiff was employed by the Superintendent of Water and Lights of the town of Forest City, at wages agreed upon by plaintiff and said superintendent. The fact that plaintiff's wages were paid out of funds procured by the town from the Reconstruction Finance Corporation was immaterial on the question involving the relationship between the plaintiff and the town of Forest City. Such relationship was established by contract between the plaintiff and the defendant town of Forest City, and for that reason was a relationship of employee and employer.

There was error in the judgment reversing the award of the Industrial Commission, and dismissing the proceeding. The judgment is

Reversed.

STACY, C. J., dissents.

EMILY C. BOURNE AND FRANCIS C. BOURNE, ADMINISTRATORS OF THE ESTATE OF LOUIS M. BOURNE, DECEASED, v. BOARD OF FINANCIAL CONTROL FOR BUNCOMBE COUNTY, AND THE COUNTY OF BUNCOMBE.

(Filed 10 October, 1934.)

1. Municipal Corporations J a—Board of Financial Control of Buncombe County may sue and be sued in its own name.

The Board of Financial Control of Buncombe County, created by chapter 253, Public Laws of 1931, is given power to sue and be sued in its own name, and an action may be maintained against it by a person liable to the county on a chose in action held by the Board of Financial Control to compel the board to allow an offset against the chose in action. C. S., 1291.

2. Set-offs and Counterclaims A a—Scope of counterclaims in general.

Our statute relative to counterclaims, C. S., 521, goes beyond the common-law pleading and practice, and under its provisions a defendant in an action on contract may file a counterclaim arising on a contract unrelated to the cause of action sued on when the required mutuality exists, so that two independent disputes between the parties may be settled in one action.

3. Set-offs and Counterclaims A b—Held: Set-off was properly allowed under facts of this case.

Plaintiffs' intestate executed a note to a bank with collateral security. The bank pledged the note with its security to the county to secure county deposits. Upon the bank's insolvency and its inability to pay the county deposit, the county, through its Board of Financial Control, took the security pledged by the bank, including the intestate's note, and sold intestate's note at public auction, and purchased the note at the sale. Some time after the sale plaintiffs tendered past-due bonds of the county owned by intestate's estate in payment of the note, and the Board of Financial Control refused to accept the bonds in payment. It appeared that the county had an outstanding bonded indebtedness amounting to a large per cent of the tax valuation of property within the county, and that the county was in default in a large sum on principal and interest on its bonds. *Held*, judgment in plaintiffs' favor that the Board of Financial Control should accept the county bonds tendered by plaintiffs at their face value in payment of the note, which bonds belonged to the estate and were tendered in payment prior to the institution of the action, is without error. The distinction between taxes owed the county, which may not be offset by tender of past-due bonds of the county, and a debt due the county on a note or contract is pointed out by CLARKSON, J.

APPEAL by defendants from *Finley, J.*, 18 August, 1934. From BUNCOMBE. Affirmed.

This is a controversy without action, C. S., 626 to 628, inclusive. The facts agreed upon are as follows: "(1) That the plaintiffs are the duly qualified and acting administrators of the estate of Louis M. Bourne,

deceased, late of Buncombe County, N. C. (2) That the defendant county of Buncombe is a subdivision of the State of North Carolina. (3) That the defendant Board of Financial Control for Buncombe County is a corporation, duly organized and existing under and by virtue of chapter 253 of the Public-Local Laws of the State of North Carolina for the year 1931, as amended by chapter 189, Public-Local Laws of 1933, and is vested with all the powers and required to perform all the duties prescribed by said statutes which are specially pleaded and asked to be considered in all respects as if the said acts were herein incorporated and set out in this paragraph. (4) That on or about 31 October, 1930, the said Louis M. Bourne, deceased, executed and delivered to the Central Bank and Trust Company of Asheville, N. C., in renewal of a note theretofore given to said Central Bank and Trust Company for money borrowed, his promissory note in words and figures as follows, to wit:

"$18,000.00. Asheville, N. C., October 31, 1930. Ninety days after date, I promise to pay to the Central Bank and Trust Company, or its order, at the office of the said Company, at Asheville, N. C., the sum of Eighteen Thousand and No/100 Dollars, with interest thereon after maturity at the rate of six per cent (6%) per annum, for value received. I herewith deposit with the said Company the following securities and properties, described on back of the note, and agree that the above-named properties and securities, and any other added to or substituted therefor, shall be held as collateral security for the above obligation, and for any other obligation or liability of the undersigned to the Company now existing or which may hereafter be contracted, and due or to become due.

"In case the securities at any time pledged for any of the above liabilities should for any reason become unsatisfactory to the said Company, the undersigned agrees to deposit with the said Trust Company additional securities to the satisfaction of the said Company, and in case of failure to do so, forthwith this note shall become due and payable without demand for payment therefor.

"The said Company is hereby authorized: (a) Upon the failure to give additional security as above agreed upon, or (b) Upon failure to pay the above obligations or liability when due, to sell without notice to the undersigned the above-named securities and properties at public sale for cash, at the front door of the office of said Trust Company, after advertising same for five days in three public places in Buncombe County, and with the proceeds of said sale, pay: (c) All expenses and costs of sale, (d) All or any of the obligations herein secured, (e) The surplus to the undersigned, who agrees to be and remain liable to the holder hereof for any deficiency.

"I agree that the holder thereof may purchase the whole or any part of the said securities or properties at any sale thereof discharged from any right or equity of redemption; and that upon any assignment of this note, said Trust Company may deliver said securities and properties, or any part thereof, to the assignee, who shall thereupon become vested in respect thereto with all the powers and rights herein given to the said Company; and said Company shall be thereafter released and discharged from any further liability in connection therewith. No. F-242155. Due 1/29/31. Louis M. Bourne (Seal). Address: Wachovia Bldg. Tel. No. .... (Seal).'

"(5) That at the time of the execution and delivery of said promissory note, the said Louis M. Bourne, deceased, delivered to said Central Bank and Trust Company, as collateral security for the payment of said promissory note, a note payable to Louis M. Bourne, executed by Grove Park Inn *et al.*, in the principal sum of $25,000.

"(6) That there are the following endorsements on the back of the note executed by Louis M. Bourne, and delivered to the Central Bank and Trust Company, to wit: 'Central Bank and Trust Co., Asheville, N. C., J. E. Reister, Assistant Cashier. 2/17/33. Paid on collateral note $500.00.'

"(7) That the Central Bank and Trust Company of Asheville, N. C., was a banking corporation of said State, and on or about 19 November, 1930, closed its doors on account of insolvency, and since said date has been in process of liquidation under the laws of the State of North Carolina, and is now in the hands of Gurney P. Hood, Commissioner of Banks of said State, and his representatives.

"(8) That after the execution and delivery of the note of Louis M. Bourne, deceased, to the Central Bank and Trust Company, and on the same day said note was executed, said promissory note, together with the collateral attached thereto, was transferred and delivered to the county of Buncombe and its authorized representatives and pledged as security for certain funds of said county deposited with said Central Bank and Trust Company.

"(9) That the Board of Financial Control for Buncombe County was duly organized, as provided in chapter 253, Public-Local Laws, 1931, and is engaged in the performance of the duties prescribed by said statute.

"(10) That upon the organization of said Board of Financial Control for Buncombe County, acting pursuant to and under the authority of said statute, it duly appointed one W. E. Shuford, liquidating agent, and thereupon the said Board of Financial Control received from the county of Buncombe and city of Asheville all the securities, properties, choses in action, rights, claims and demands of every kind held by

said county and city as security for deposits of public funds in various closed banks, including the note of the said Louis M. Bourne, fully described in paragraph 4 hereof, together with the collateral note attached to the same as security, described in paragraph 5 hereof.

"(11) That W. E. Shuford acted in the capacity of liquidating agent for said Board of Financial Control from the date of his appointment until on or about .... day of ....., 193.., when W. H. Hipps was duly elected and appointed liquidating agent in the place and stead of the said W. E. Shuford, since which time the said W. H. Hipps has been the duly elected, qualified and acting liquidating agent of said Board of Financial Control.

"(12) That owing to the insolvency of said Central Bank and Trust Company, of Asheville, N. C., neither the said banking institution nor the liquidating agent in charge thereof was able to redeem the note of Louis M. Bourne, pledged to said county to secure deposits, as aforesaid, nor to repay to the county of Buncombe or the Board of Financial Control the deposit of public funds for which said note was given to secure, which amount was approximately four million dollars, and on or about 30 October, 1933, W. E. Shuford, liquidating agent for the Board of Financial Control, acting under the authority from said board, and after due notice given as provided by law, sold at public sale, as provided in a collateral agreement and as provided by law, the said note of the said Louis M. Bourne hereinbefore described, and at said sale the said note was knocked off to W. E. Shuford, liquidating agent for the Board of Financial Control, upon his bid of $15,000, and a credit of said amount was duly entered upon the obligations of the Central Bank and Trust Company to the county of Buncombe and the Board of Financial Control, against the amount due for deposit of public funds of Buncombe County in said Central Bank and Trust Company, for which said note was held as security, and the said Board of Financial Control now owns and holds said note, as purchaser at said sale, the payment of which is secured by the collateral mentioned in paragraph 5 hereof.

"(13) That there is now due and owing on said note the principal sum of $17,500, with interest thereon from 29 January, 1931.

"(14) That on or about 9 April, 1934, the estate of the said Louis M. Bourne, deceased, being the owner and holder of certain past-due bonds with coupons attached, issued by said county of Buncombe, which said bonds were acquired by Louis M. Bourne, deceased, some time after the execution and delivery of the aforesaid note, and after said bonds became due and payable, all of which were and are valid and legal obligations of said county tendered and offered to said county of Buncombe, and the Board of Financial Control, said past-due bonds with coupons attached and cost in an amount equal to the principal and interest due on said

note of Louis M. Bourne, deceased, to wit, $20,915.09, in full settlement and discharge of said note and interest.

"(15) That said county of Buncombe and said Board of Financial Control for Buncombe County declined and refused to accept said bonds, coupons and cash in settlement and discharge of said note.

"(16) That the plaintiffs have at all times since the tender aforesaid been able, ready and willing to make good said tender, and herewith tender said bonds, coupons and cash to defendants, and plaintiffs will at all times hold themselves in readiness to deliver the same to the defendants upon the delivery to them of said note of Louis M. Bourne and the collateral thereto attached.

"(17) That the value of all real and personal property within the county of Buncombe, as valued for purposes of taxation for the current year, amounts to $79,889,458. That the county of Buncombe is indebted as follows:

Outstanding Bonds, General	$14,715,000.00
Outstanding Bonds, Special W. & S.	3,882,400.00
Outstanding Bonds, School	2,186,000.00
Outstanding Notes, General	2,8[illegible]5,000.00
Outstanding Notes, School	8[illegible]0,706.91
Outstanding Int., General	1,436,291.17
Outstanding Int., W. & S.	428,085.00
	$26,273,483.08

"That said county is in default in the payment of said indebtedness, as follows:

Bonds, General	$1,147,000.00
Bonds, Special W. & S.	181,100.00
Bonds, School	199,000.00
Notes, School	200,000.00
Int., General	1,436,291.17
Int., Special W. & S.	428,085.00
	$3,591,476.17

"That on 9 April, 1934, the county of Buncombe did not have, nor has it at any time since said date had sufficient funds on hand, other assets available for the payment of debts and such assets as might be converted for the purpose with which to pay its outstanding indebtedness, nor even its debts past due and then owing, nor has said county now sufficient funds and assets with which to meet its financial obligations as they become due and payable.

"(18) It is further stipulated and agreed that if, upon the foregoing facts, the court shall be of opinion that the plaintiffs are entitled to offset against the indebtedness evidenced by the said promissory note of Louis M. Bourne, deceased, past-due bonds of the county of Buncombe, with interest coupons thereto attached, judgment shall be entered to that effect in favor of the plaintiffs. Otherwise, judgment shall be entered that they are not so entitled to offset said indebtedness with such bonds and interest coupons. This 17 August, 1934. Emily C. Bourne, Francis C. Bourne, administrators Louis M. Bourne, deceased. County of Buncombe, By: H. C. Reagan, Chairman Board of Commissioners. Board of Financial Control for Buncombe County. By: Tench C. Coxe, Jr., Chairman."

The judgment of the court below is as follows: "The above entitled cause coming on to be heard before his Honor, T. B. Finley, judge of the Superior Court, holding, according to law, a Superior Court in and for Buncombe County, North Carolina, upon an agreed statement of facts, and being heard, the court finds the following facts: (1) That on or about 31 October, 1930, Louis M. Bourne, a resident of Buncombe County, N. C., executed and delivered to the Central Bank and Trust Company his promissory note, whereby he promised to pay said bank the sum of $18,000, with interest thereon after maturity, ninety days after date.

"(2) That as collateral security for the payment of said note, the said Louis M. Bourne delivered to said Central Bank and Trust Company a promissory note, payable to Louis M. Bourne, and executed by Grove Park Inn *et al.*, in the principal sum of $25,000.

"(3) That on or about 17 February, 1933, there was paid on the note executed by Louis M. Bourne aforesaid the sum of $500.00 on account of principal.

"(4) That immediately upon the execution and delivery of said note, as aforesaid, the Central Bank and Trust Company transferred and delivered the same, together with the collateral attached thereto, to the county of Buncombe, and pledged the same as security for certain funds of said county on deposit with said Central Bank and Trust Company.

"(5) That under and by virtue of the provisions of chapter 253 of the Public-Local Laws of 1931, the county of Buncombe has transferred and delivered said note of Louis M. Bourne, with collateral attached thereto, to the Board of Financial Control for Buncombe County, for the purposes as provided in said statute.

"(6) That owing to the insolvency of the Central Bank and Trust Company, neither said banking institution nor the liquidating agent in charge thereof were able to redeem the note of Louis M. Bourne, nor repay to the county of Buncombe the deposit of public funds for which

said note was given as security, and on or about 30 October, 1933, the Board of Financial Control for Buncombe County purchased the note of Louis M. Bourne aforesaid at a public sale thereof, conducted in accordance with the terms by which said note was pledged to the county of Buncombe, and the said Board of Financial Control now holds said note, with the collateral thereto attached.

"(7) That on or about 9 April, 1934, there was due on said note, principal and interest, the sum of $20,915.09, and on said date the estate of the said Louis M. Bourne, deceased, was the owner of past-due bonds of the county of Buncombe in the principal sum of $20,000, with $895.00 accrued interest, represented by coupons attached to said bonds, and the plaintiffs tendered to the county of Buncombe and the Board of Financial Control said bonds, together with the sum of $20.09 in currency, in payment of the note of Louis M. Bourne aforesaid, with interest thereon.

"(8) That said county of Buncombe and Board of Financial Control for Buncombe County declined to accept said bonds, coupons and cash in settlement and discharge of said note.

"(9) That the plaintiffs have been, at all times since said tender, and now are ready, willing, and able to make good the same by the delivery of said bonds, coupons, and cash.

"(10) That the valuation of all property within the county of Buncombe for purposes of taxation is $79,889,458; that the outstanding indebtedness of the said county of Buncombe is $26,273,483.08, of which said county of Buncombe is in default in the payment of the sum of $3,591,476.17, and said county of Buncombe does not have sufficient funds and assets with which to meet its financial obligations, as they become due and payable.

"From the foregoing facts, the court is of the opinion that the plaintiffs are entitled to use the past-due bonds of the county of Buncombe, with accrued interest coupons thereto attached, in settlement of the note of Louis M. Bourne, deceased, to the extent of the face value of said bonds and coupons.

"It is therefore ordered and adjudged that upon the presentation of said past-due bonds of the county of Buncombe, with accrued interest coupons thereto attached, and cash in the sum of $20.09, to the county of Buncombe, or the Board of Financial Control for Buncombe County, that said county or board accept the same and deliver up to the plaintiffs the said note of Louis M. Bourne, deceased, with the collateral thereto attached. This 18 August, 1934. T. B. Finley, Judge Superior Court."

The only exception and assignment of error made by defendants was to the judgment as signed.

Bourne, Parker, Bernard & DuBose for plaintiffs.
Zeb F. Curtis for defendant.

CLARKSON, J. The question presented: Can the plaintiffs use past-due bonds of the county of Buncombe, owned at the commencement of the action, belonging to the estate of decedent, as a counterclaim against a promissory note executed by plaintiffs' intestate and belonging to said county, or Board of Financial Control for Buncombe County? We think so, under the facts and circumstances of this case.

The defendant Board of Financial Control for Buncombe County is created a corporation and, among other powers, is given the power "to sue and be sued" (sec. 1, ch. 253, Public-Local Laws 1931), and "to institute and maintain actions and proceedings of every kind and nature permitted by law to be brought and maintained in any court of competent jurisdiction brought for the purpose of aiding in the liquidation of any of such property, securities, choses in action, claims and demands, and in any and all such actions to resort to any supplemental proceedings permitted by law." (Sec. 36, ch. 253, Public-Local Laws 1931.) A county is authorized: (1) To sue and be sued in the name of the county. C. S., 1291. For the purpose of liquidating the securities held by the county of Buncombe, which the county acquired by reason of the insolvency of the Central Bank and Trust Company, the Board of Financial Control for Buncombe County is nothing more nor less than a liquidating agent designated by law for that purpose. These securities, property, choses in action, rights, claims and demands delivered by the county of Buncombe to the Board of Financial Control for Buncombe County, remain the property of the county of Buncombe, under the express provisions of chapter 253, Public-Local Laws 1931: "All moneys collected by the Board of Financial Control in the liquidation of securities under the provisions of this act, shall . . . on the business day following the day on which such money is collected be deposited in a depositary designated by the Board of Financial Control. All amounts so deposited shall be secured in the manner now or hereafter required by law for securing deposits of public funds in such depositaries. The funds secured on the liquidation of property, securities, choses in action, claims and demands received from the county of Buncombe and the funds received on liquidation of such property, securities, choses in action, claims and demands received from the city of Asheville, shall be deposited in separate accounts and thereafter kept separately." Section 39, chapter 253, Public-Local Laws 1931. After the payment of expenses of liquidation, such funds are to be used for the benefit of the county of Buncombe or the city of Asheville, as set forth in section 40, chapter 253, Public-Local Laws 1931.

N. C. Code, 1931 (Michie), sec. 519, is as follows: "The answer of the defendant must contain—(1) A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. (2) A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition."

Section 521 is as follows: "Counterclaim—The counterclaim mentioned in this article must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the following causes of action: (1) A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. (2) In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action."

The above statute goes beyond the common-law system of pleading and practice and gives the power to settle two independent disputes between the same parties in the action.

McIntosh, in North Carolina Practice and Procedure in Civil Cases, part of sec. 463, pp. 491 and 492, says: "The statute authorizes the defendant to plead by way of denial, or new matter constituting a defense in confession and avoidance, or new matter constituting a counterclaim. The counterclaim is a creature of the Code; it did not exist at common law, except in the limited sense of set-off or recoupment, and it was recognized in equity in the cross-bill, by which the defendant might demand affirmative equitable relief. The Court says: 'Our statute on counterclaim is very broad in its scope and terms, is designed to enable parties litigant to settle well-nigh any and every phase of a given controversy in one and the same action, and should be liberally construed by the Court in furtherance of this most desirable and beneficial purpose.' It is said to be 'broader in meaning than set-off, recoupment, or cross-action, and includes them all, and secures to defendant the full relief which a separate action at law, or a bill in chancery, or a cross-bill would have secured to him on the same state of facts.' It includes set-off and recoupment, but is different from them, and it is broader than the cross-bill, since it includes both legal and equitable claims. It is a cross-action by the defendant against the plaintiff; sufficient facts should be stated to constitute a cause of action, and they should be stated with the same degree of clearness and certainty as in a complaint, and show the relief to which the defendant considers himself entitled."

Part of section 466, at p. 496: "If the plaintiff sues the defendant upon a contract, the defendant may set up as a counterclaim any other

cause of action arising out of contract, and existing at the commencement of the action. This does not arise out of the contract or transaction set forth in the complaint, but is an independent cause of action which the defendant might assert against the plaintiff."

The value of all real and personal property within the county of Buncombe as valued for purposes of taxation for the current year amounts to $79,889,458. The county of Buncombe is indebted to the amount of $26,273,483.08. It is in default to the amount of $3,591,476.17. Plaintiffs' intestate owed the county (which it acquired from the Central Bank and Trust Company) a note of $17,500, with interest from 29 January, 1931, totalling, on 9 April, 1934, $20,915.09. The county of Buncombe, at the commencement of this action, owed the estate of plaintiffs' intestate past-due bonds, with the coupons attached, legal obligations of the county, $20,895.

The court rendered judgment as follows: "It is therefore ordered and adjudged that upon the presentation of said past-due bonds of the county of Buncombe, with accrued interest coupons thereto attached, and cash in the sum of $20.09, to the county of Buncombe or the Board of Financial Control for Buncombe County, that said county or board accept the same and deliver up to the plaintiffs the said note of Louis M. Bourne, deceased, with the collateral thereto attached."

We can see no error in this judgment. The question of what the bonds of the county of Buncombe were selling on the market is not material to this controversy. The plaintiffs' intestate owed the county and the county owed the estate of plaintiffs' intestate. We think that "honors are easy" and justice prevails.

This principle here declared does not apply to taxes. A tax is levied by the sovereign in support of the Government. It is not founded on contract or a debt in the ordinary sense, therefore the tax levied by a municipal corporation cannot be allowed as a set-off or counterclaim. *Gatling v. Commissioners of Carteret,* 92 N. C., 536; *Piscataway v. First National Bank,* 90 A. L. R., 423.

For discussion of different aspects of matters of this kind growing out of insolvent banks, see *In re Bank,* 204 N. C., 472; *In re Bank,* 205 N. C., 333; *Lumberton v. Hood, Commissioner,* 204 N. C., 171; *Edgerton v. Hood, Commissioner of Banks,* 205 N. C., 816.

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

Affirmed.

TOWN OF SALUDA v. COUNTY OF POLK.

(Filed 10 October, 1934.)

1. Municipal Corporations G i—Lien for public improvements is inferior to lien for taxes for general revenue.

The lien against property for street improvements is a lien *in rem* against the land itself, but it is not strictly a tax lien and is based upon the theory of special benefit to the property itself, and therefore does not come within the provisions of Art. VII, sec. 9, requiring all taxes on real and personal property to be levied by uniform rule and ad valorem, and a lien for street assessments, while superior to the liens of mortgages or deeds of trust, C. S., 2713, is subject to the lien of the city and county for taxes for general revenue, and where the property is sold under the tax sale certificates of the city and county, the taxes due the city and county should first be paid before applying the proceeds of sale to the payment of street assessments levied against the property.

2. Taxation D a—Tax liens due a city are on a parity and are equal with tax liens due the county.

Counties and cities and towns are governmental agencies of the State, created by the Legislature for administrative purposes, and the Legislature retains control and supervision over both classes of municipal corporations, limited only by the organic law, Art. VIII, sec. 4, and construing ch. 389, Public Laws of 1931, with C. S., 7987, *it is held*, the liens for taxes due a city and the liens for taxes due the county against property situated in the city within the county are on a parity and are equal, and the proceeds of sale of the property in a tax foreclosure suit instituted by the city and county should be applied equally to the payment of city and county tax liens against the property, and the remainder, if any, should then be applied to the payment of a lien for street assessments levied by the city against the property.

APPEAL by both parties from *Finley, J.*, at February-March Term, 1934, of POLK. Affirmed as to both parties.

This is a controversy without action, C. S., 626 to 628, inclusive. The agreed statement of facts is as follows: "(1) That the town of Saluda is a municipal corporation organized and existing under and by virtue of the laws of the State of North Carolina, and has been such a municipal corporation since the year 1880. That the boundaries of said municipal corporation are situated and located within the territorial limits and boundaries of the county of Polk and the State of North Carolina; that the said town has operated as a municipal corporation, being governed by a board of aldermen consisting of four members, duly and regularly elected by the citizens of the town of Saluda, and a mayor, who is also elected by the citizens of said town, and has been so governed since the organization of the said town and the issuing of its charter in the year 1880.

"(2) The county of Polk is a municipal corporation, organized and existing under and by virtue of the laws of the State of North Carolina, and is one of the 100 counties in said State; that the said county of Polk has been such a corporation since its organization in the year 1847.

"(3) That as such municipal corporation the town of Saluda, at various times since its organization, has borrowed money and issued its bonds for various municipal improvements in said town, and the said town now has outstanding against it an indebtedness on account of various bond issues, amounting in principal to approximately $265,000, and interest in the sum of $277,000, which sums consist of bonded indebtedness and obligations of the town of Saluda; that the said bonded indebtedness of the town of Saluda hereinafter referred to is payable in annual installments from the present time to the year 1966.

"(4) That Polk County, in pursuance of the laws, from time to time has duly and legally issued its bonds for county-wide purposes in the principal amount of $711,945, and interest in the sum of $573,271; that the above indebtedness represents principal and interest to be paid in annual installments extending from the present to the year 1961.

"(5) That both of the said municipalities, in order to operate in accordance with the laws of the State of North Carolina, have annually levied taxes for the purpose of operation and for meeting the principal and interest of their bonded indebtedness.

"(6) That there is a certain real property situated on Greenville Street, in the town of Saluda and in the county of Polk, on which taxes at the rate fixed in accordance with the provisions of law were levied and assessed for the year 1929 in the name of J. S. Smith, on a valuation of $3,000 by both the town of Saluda and Polk County, in the following amounts (inclusive of the penalties provided by law), that is to say: Town of Saluda, $81.00, and Polk County, $117.82.

"(7) That the said taxes on said property were delinquent and unpaid, and after the said town of Saluda had become the owner of the tax certificate representing the said delinquent taxes due said town and the said Polk County had become the owner of the tax certificate representing the said delinquent taxes due said county, a joint action was started by said town and said county in accordance with the provisions of section 1 of chapter 389, Public Laws of 1931, for the foreclosure of said certificates; that in addition to the taxes for the year 1929, as above set forth, the following unpaid and delinquent taxes were established as having been lawfully levied and assessed against the said property for the years subsequent to 1929, that is to say: Taxes due Polk County, 1930, $72.00; 1931, $63.60; 1932, $55.50; 1933, $59.40. Taxes due town of Saluda, 1930, $76.20; 1931, $71.40; 1932, $65.40; 1933, $37.50.

"(8) That in said action there was further established the fact that the town of Saluda had lawfully levied against said property a street assessment in the sum of $547.13, and that the said assessment was owing, unpaid, and delinquent.

"(9) That the said action proceeded to judgment whereby the said tax certificates were ordered foreclosed, and M. R. McCown was appointed the commissioner of the court to make the sale of the property. At the said sale the town of Saluda became the last and highest bidder for the said property in the sum of $414.84.

"(10) This controversy is for the purpose of determining how the said amount shall be distributed by the said commissioner. Polk County contends that the distribution should be made as follows: 1st. That the costs of the action as taxed should be paid. 2d. That the amount remaining should be applied to the payment of the taxes due Polk County for the years 1929 to 1933, inclusive; and 3d. That the excess, if any, should then be applied to the payment of the taxes and street assessments due the town of Saluda.

"The town of Saluda contends that the distribution should be made as follows: 1st. That the cost of the action as taxed should be paid. 2d. That the amount remaining should be applied equally and ratably to the payment of the taxes and street assessments due the town of Saluda and Polk County for the years 1929 to 1933, inclusive, as established in said action, and as herein agreed upon. In other words, Polk County contends that the lien of the county for the said taxes is superior and paramount to the lien of the town of Saluda, while the town of Saluda contends that the respective liens of the town and county are on a parity and of equal dignity."

The judgment rendered in the court below is as follows: "This case coming on to be heard before the undersigned judge now holding the courts of the 18th Judicial District upon agreed case in controversy without action, as appears of record, after hearing the argument and reading the briefs of plaintiff and defendant on the question involved, to wit: (1) Does the street assessment established by the town of Saluda constitute a lien on a parity and of equal dignity with the tax liens due Polk County and the town of Saluda? (2) Are the tax liens due the town of Saluda on a parity and equal with the tax liens due Polk County?

"The court answers the first question 'No,' and the second question 'Yes'; and judgment is hereby rendered accordingly, so that the fund in hand may be divided in accordance with this judgment. T. B. Finley, judge holding the courts of the 18th Judicial District."

The plaintiff excepts to the judgment and assigns error in that the court erred in holding that the street assessment levied by the town of

Saluda did not constitute a lien on a parity and of equal dignity with the tax liens due Polk County and the town of Saluda.

The defendant excepts to the judgment and assigns error in that the court erred in holding the tax liens due town of Saluda are on a parity and equal with the tax liens due Polk County.

Upon the above exceptions and assignments of error, both parties appealed to the Supreme Court.

Quinn, Hamrick & Hamrick for plaintiff.
Massenburg & McCown for defendant.

CLARKSON, J. The first question presented for our consideration: Is the judgment of the court below correct, which holds that the street assessment levied by plaintiff, the town of Saluda, does not constitute a lien on a parity and of equal dignity with the tax liens due Polk County and the town of Saluda? We think so.

In *Gunter v. Sanford,* 186 N. C., 452 (460), citing many authorities, is the following: "As we have heretofore indicated, the statutes prescribing the method of improving the streets of the town and regulating assessments against property are referred to the right of taxation, and the exercise of such right is not judicial, but entirely legislative. The legislative authority is vested in the General Assembly (Const., Art. II, sec. 1), and counties and municipal corporations, as was said in *Jones v. Comrs.,* 137 N. C., 579, are regarded merely as 'agencies of the State for the convenience of local administration in certain portions of the State's territory, and in the exercise of ordinary governmental functions they are subject to almost unlimited legislative control, except when restricted by constitutional provision'—a principle which has been consistently maintained in the decisions of the Court."

Code of North Carolina, 1931 (Michie), sec. 2713, in part, is as follows: "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."

In *Kinston v. R. R.,* 183 N. C., 14 (23-24), it is said: "And further, in section 2717, the law provides, if the 'lien is not paid when due, it shall be subject to the penalties now provided as in case of unpaid taxes.' Thus showing a clear purpose of the Legislature to make the lien effective and superior to any and all other liens or encumbrances. It would be an idle thing to confer such a lien and then withdraw any and all means for its effective enforcement, and in our opinion the lien in question here, when properly established, amounts to a statutory mortgage, having preference, as stated, over any and all liens and encum-

brances existent or other, and to be enforced by decree of sale of the property and franchise, as in other cases provided, C. S., 3462-3463." *Hahn v. Fletcher,* 189 N. C., 729 (731); *Farrow v. Insurance Co.,* 192 N. C., 148; *Coble v. Dick,* 194 N. C., 732.

In *Carawan v. Barnett,* 197 N. C., 511, it is held 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. *Statesville v. Jenkins,* 199 N. C., 159.

Article V, section 3, of the Constitution of North Carolina, in part, is as follows: "Laws shall be passed taxing, by a uniform rule, all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise; and, also, all real and personal property, according to its true value in money," etc.

Article VII, section 9: "All taxes levied by any county, city, town, or township shall be uniform and ad valorem upon all property in the same, except property exempted by this Constitution."

This section imperatively requires that all real and personal property in county, city, town or township be taxed by a uniform rule, according to its true value in money. *Pocomoke Guano Co. v. Biddle,* 158 N. C., 212.

In *Cain v. Commissioners,* 86 N. C., 8 (15 and 16), speaking to the subject: "These restraints are referable to taxation of objects in which all have a common interest, and when disregarded, render the levy invalid. *Young v. Henderson,* 76 N. C., 420, and cases cited. But there is a class of taxes, or as they are often designated, local assessments, which are imposed only upon those owners of property who, in respect to such ownership, are to derive a special benefit in the local improvements for which they are to be expended, and not within the restraints put upon general taxation."

At page 16: " 'A constitutional provision that taxation shall be equal and uniform throughout the State,' observes *Mr. Justice Dillon,* 'does not apply to local assessments upon private property to pay for local improvements.' 2 Dill. Mun. Corp., p. 617. To like effect, Burroughs Tax., p. 39."

Taxes for governmental purposes on real estate in accordance with our Constitution must be by a uniform rule and ad valorem. Although the General Assembly has the power to give municipalities the right to make

local improvements, these assessments are in their very nature confined to and benefit particular places, and could not be uniform to meet the requirements of the Constitution. Then, again, they are not for governmental purposes in contemplation of the Constitution. It is a lien *in rem* and resting upon the particular land in which levied.

In *Bosworth v. Anderson* (Idaho), 280 Pac., 227, 65 A. L. R., p. 1372, it is held: "Special assessments for public improvements are not taxes in the strict sense, since they are not assessed for governmental purposes, and are based on the theory of special benefit to the property against which they are levied."

At page 1379: "In *Missouri Real Estate and Loan Co. v. Burri* (1919), 202 Mo. App., 242, 216 S. W., 570, the Court held, without reference to any statute, that the general city tax lien was superior to a special improvement lien, though subsequent in point of time. In passing on the point, the Court said: 'It must be conceded that a general tax which has primarily for its object the support of the government, whereby the government may exist, and lives and property may be protected and the pursuit of happiness guaranteed, is of greater dignity and more importance than a tax bill issued for public improvements. It is true that a general tax is frequently levied for public improvements. But it is not feasible to levy special tax, of the nature here involved, for what we understand to be meant by the expression "support of the government." We can subsist without the special tax, but no civilized government could be organized and maintained without the general tax. So we conclude that the general tax, being first in vital importance, should be allowed first place in the means of payment.' "

25 R. C. L. (Special or local assessments), pp. 82, 83 and 84, in part, is as follows: "The word 'taxes' in a broad sense includes special or local assessments on specific property benefited by a local improvement for the purpose of paying therefor. . . . There are, however, well recognized distinctions between special assessments and taxes levied for general revenue purposes, and the terms 'assessments' and 'tax' or 'taxation' as used in constitutions and statutes are not synonymous, but have been given entirely distinct meanings by the courts. Special assessments are governed by principles that do not apply universally to taxation, and differ from general taxes in the theory on which they are based, the time and manner of their imposition, and the property on which they are levied."

The statute, *supra,* making the assessment "a lien on the real property against which the same are assessed superior to all other liens and encumbrances" is subject to our constitutional provision that "taxation shall be by uniform rule and ad valorem." Thus limited, it is prior to mortgages, deeds of trust, etc., on the property, but subject to the governmental taxes.

The second question for our consideration: Are the tax liens due the town of Saluda on a parity and equal with the tax liens due Polk County? We think so.

In *McCormac v. Commissioners,* 90 N. C., 441 (444-445), citing numerous authorities, it is said: "That it is within the power and is the province of the Legislature to subdivide the territory of the State and invest the inhabitants of such subdivisions with corporate functions, more or less extensive and varied in their character, for the purposes of government, is too well settled to admit of any serious question. Indeed, it seems to be a fundamental feature of our system of free government, that such a power is inherent in the legislative branch of the government, limited and regulated, as it may be, only by the organic law. The Constitution of the State was formed in view of this and like fundamental principles. They permeate its provisions, and all statutory enactments should be interpreted in the light of them, when they apply.

"It is in the exercise of such power that the Legislature alone can create, directly or indirectly, counties, townships, school districts, road districts, and the like subdivisions, and invest them, and agencies in them, with powers, corporate or otherwise in their nature, to effectuate the purposes of the government, whether these be local or general, or both. Such organizations are intended to be instrumentalities and agencies employed to aid in the administration of the government, and are always under the control of the power that created them, unless the same shall be restricted by some constitutional limitation. Hence, the Legislature may, from time to time, in its discretion, abolish them, or enlarge or diminish their boundaries, or increase, modify or abrogate their powers. . . . Such power in the Legislature is general and comprehensive, and may be exercised in a great variety of ways to accomplish the ends of the government." *Board of Trustees v. Webb,* 155 N. C., 379.

A county is subject to control of State Legislature, unless restrained by Constitution. *O'Neal v. Jennette,* 190 N. C., 96. A county is subject to almost unlimited legislative control in exercise of ordinary governmental functions, it being but an agency of the State. *Day v. Commissioners,* 191 N. C., 780; *Hearne v. Stanly County,* 188 N. C., 45.

Article VIII, section 4, of the Constitution of North Carolina, is as follows: "It shall be the duty of the Legislature to provide for the organization of cities, towns and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessment and in contracting debts by such municipal corporations."

N. C. Code of 1931 (Michie), sec. 7987, in part, is the following: "The lien of the State, county and municipal taxes levied for any and

all purposes in each year shall attach to all real estate of the taxpayer situated within the county or other municipality in which the tax list is made and placed in the hands of the duly authorized officer for collection, which lien shall attach on the first day of June, annually, and shall continue until such taxes, with any and all penalties and cost which shall accrue thereon, shall be paid, and which lien shall be preferred to any other lien upon the real estate of the taxpayer within the county, whether the same shall have attached prior or subsequent to the said first day of June," etc.

Public Laws 1931, ch. 389, is as follows: "When a certificate of sale is held by a county and also by a city or town for the same tract or parcel of real property, both of such governmental units may be joined as parties plaintiff in the same foreclosure action, and in such event the proceeds derived from a foreclosure sale of such real property, or so much thereof as may be necessary to satisfy the claims, shall be apportioned by the court to the parties according to their respective liens."

It will be seen by the Constitution of this State that almost unlimited power is given the General Assembly in reference to the creation and abolishing of counties, cities and towns of the State. The provision in Public Laws of 1931, ch. 389, joining the county and city or town in a foreclosure suit for the tax "shall be apportioned by the court to the parties according to their respective liens" must be construed *in pari materia* with 7987, *supra*. The liens attach at the same time, and we think the legislative intent is that the tax lien for the town of Saluda is on a parity and equal with the tax lien due Polk County.

In 26 R. C. L., part sec. 361 (Taxation), p. 404, is the following: "As between taxes assessed by a state and by counties, cities and towns, there is no precedence granted to the taxes of the larger and more important governmental subdivision, but the liens for all of such taxes are equal. It is generally held, however, that a lien for general taxes takes precedence over a lien for a special assessment."

The principle involved in this case largely depends on the Constitution and statute law of the particular state. The case of *Orange County v. Jenkins*, 200 N. C., 202, was decided before the Act of 1931, ch. 389, was passed, although we think it distinguishable from the present case—also the case of *Drainage Commissioners v. Farm Association*, 165 N. C., 697.

The county of Polk and town of Saluda are both children, as it were, of the State. The State, the mother, should treat both alike, though one is bigger than the other.

From the Constitution and statute laws of this State, we think there is no error in the judgment of the court below.

Affirmed.

S. K. YOUNG, T. R. YOUNG, AND W. H. HIPPS, TRUSTEE, v. NEW YORK UNDERWRITERS INSURANCE COMPANY.

(Filed 10 October, 1934.)

1. Insurance L d—

An award of fire loss made in accordance with the terms of the policy providing for arbitration is presumed valid and must stand, in the absence of fraud, mistake, duress, or other impeaching circumstances.

2. Same—Definition of "an interested appraiser."

"An interested appraiser," who is not qualified to act under an arbitration clause in a policy of fire insurance, is one who is partial, unfair, arbitrary and dominated by bias and prejudice for or against the parties or the property in question, or both, or who has some pecuniary interest in the result of the performance of the duties of appraiser.

3. Same—Evidence that insurer's appraiser had previously acted as appraiser for insurance companies is insufficient to show interest.

Evidence that an appraiser appointed by insurer under an arbitration agreement in a policy of fire insurance had previously acted as appraiser for insurance companies and individuals, and that insured protested his appointment on this ground, but later agreed and consented to his appointment, without evidence that the appraiser had any pecuniary interest in the result of the appraisal or evidence of any other disqualifying circumstance *is held* insufficient to be submitted to the jury on the question of whether insurer's appraiser was "an interested appraiser."

4. Same—Evidence held insufficient to show interest on part of third appraiser or undue influence on him by insurer's appraiser.

The appraiser for insured and the appraiser for insurer appointed a third person to settle items of difference between them in estimating a fire loss in accordance with the terms of the arbitration agreement of the policy. The only matter in difference between the appraisers was whether the part of the house remaining after the fire was of any value. Insured, in an action attacking the validity of the award made by the appraisers, introduced evidence that the third appraiser, before his appointment, told insured's appraiser that he considered the property a total loss, and that thereafter, after further investigation, he changed his mind and agreed with insurer's appraiser, and that in reaching his decision he used the figures made out by insurer's appraiser, which were practically identical with the figures made out by insured's appraiser, except for the item as to the value of the house remaining standing, *is held* insufficient to constitute any evidence of either fraud or vitiating interest on the part of such third appraiser, or that he was fraudulently influenced in signing the award by insurer's appraiser.

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

CIVIL ACTION, before *Schenck, J.*, at April Term, 1934, of BUNCOMBE.

The plaintiffs owned a dwelling about three miles from the city of Asheville, and on or about 7 December, 1930, the defendant executed and

delivered a policy of fire insurance insuring said dwelling against loss by fire in the sum of $9,500 on the building, but permitted concurrent insurance thereon in the amount of $13,500. The plaintiff Hipps is trustee in a certain deed of trust covering the property. On 30 April, 1933, the house was burned. The policy provided that "in case insured in this company shall fail to agree as to the amount of loss or damage each shall, on the written demand of either, select a competent and disinterested appraiser. The appraiser shall first select a competent and disinterested umpire. . . . The appraisers shall then appraise the loss and damage, stating separately sound value and loss or damage to each item; and, failing to agree, shall submit their differences only to the umpire. An award in writing, so itemized, of any two when filed with this company shall determine the amount of sound value and loss or damage," etc. On 21 June, 1933, the attorney for the plaintiffs wrote a letter to the adjuster of defendant, as follows: "In compliance with your request for an appraisal of the damage done by fire to the property of S. K. and T. R. Young, located at Emma, N. C., and covered by Policy No. 6130, I wish to advise you that the appraiser selected by us is O. V. Himes, living in Asheville, N. C.

"Your selection of Dion A. Roberts as the appraiser of the insurance company will not be acceptable to us, for that the policy provides that it should be a disinterested appraiser, and we do not think him disinterested in as much as he has frequently been selected by you as appraiser for various losses of different insurance companies that you represent, and for which he received compensation from such insurance companies for such work." Thereafter, on 8 July, 1933, the plaintiffs and the defendant entered into a written agreement "for submission to appraisers." This agreement provided "that O. V. Himes and Dion A. Roberts shall appraise and ascertain the sound value of and the loss upon the property damaged and destroyed by the fire of 30 April, 1933. . . . Provided, that the said appraisers shall first select a competent and disinterested umpire, who shall act with them in matters of difference only. The award of any two of them made in writing, in accordance with this agreement, shall be binding upon both parties to this agreement as to the amount of such loss." On 25 July, 1933, Himes and Roberts duly took and subscribed an oath before a proper officer "that we will act with strict impartiality in making an appraisal and estimate of sound value and the loss and damage upon the property hereinbefore mentioned." On the same day Himes and Roberts duly appointed P. L. Harwood to act as umpire, to settle matters of difference that existed between them. On the same day Harwood, the umpire, duly took and subscribed an oath "that I will act with strict impartiality in all matters of difference only that shall be submitted to me in con-

nection with this appointment." Thereafter, on 29 July, 1933, Himes, Roberts and Harwood signed an award as follows: "We have carefully examined the premises and remains of the property hereinbefore specified, in accordance with the foregoing appointment, and have determined the sound value and the loss and damage to be as follows: Sound value, $9,275; loss, $5,695.56." The policy of insurance contained the ordinary three-fourths value clause.

Thereafter, on 29 August, 1933, the plaintiffs brought a suit against the defendant to recover the face amount of the policy, to wit, $9,500, alleging that the fire resulted in a total loss. The defendant filed an answer setting up the submission and the award of the arbitrators. The plaintiffs filed a reply alleging that the submission and award were invalid for the reason that Roberts, the appraiser selected by the defendant, and Harwood, the umpire, were not disinterested appraisers, and that said award was procured by means of fraud. The defendant countered to this pleading by denying that either Harwood or Roberts were disqualified to act as arbitrators, and that even if Roberts was disqualified, the plaintiffs were fully appraised and informed as to such disqualification prior to executing the agreement "for submission."

Himes, the chief witness for plaintiffs, testified that after he was notified of the appointment of Roberts that they got together and talked over the matter and they could not agree on the amount of damage to the dwelling. Himes suggested the appointment of Harwood as umpire. Prior to his appointment as appraiser Himes had taken Harwood, the umpire, to the scene of the fire and requested his opinion as to the amount of loss, and Himes testified at the trial that Harwood had told him "he considered it a total loss." S. K. Young, one of the plaintiffs, testified that his son had employed Roberts "after the fire to make an estimate of the cost to rebuild. This was about two months before the arbitration, and Roberts made a figure and agreed to do the repair work for $5,700 and something, and that when Roberts gave him that figure and agreed to do the work for that that he refused to have it done."

Bearing upon the question of bias and interest of Roberts, Himes testified that Roberts contended that a good per cent of the house could be left standing as it was, and Roberts submitted this "chief difference to the umpire, Mr. Harwood; that Harwood asked what was the difference between them, and they talked over the differences, and Mr. Roberts told Harwood what he thought was their difference; that it was the remainder of the house that was standing at that time and that their other figures were almost exactly the same." Harwood requested a day or two in which to make his decision. Himes suggested that Harwood take no figures made by either himself or Roberts, "but that he go on the ground and make his own figures." Roberts suggested "that Harwood

take the figures or that he could do as he pleased, or . . . as he could have his figures if he wanted them." Harwood took Roberts' figures rather than those made by Himes. When Harwood was ready to make his decision he said: "Well, I am just taking Mr. Roberts' figures, adding for some trim in the two front rooms. . . . I am just going to let Roberts figure that trim, and he took Mr. Roberts' figures to show the value of the trim, and that when Roberts figured the trim and put it down, they signed the agreement." Himes said: "Well, gentlemen, I am not signing this," and Mr. Roberts said, "You had just as well sign it, because it will go in this way," and I said, "I reckon it will, because you signed it, and I guess I might just as well sign it as two of you have agreed to it, but it is not my estimate at all on the damage." Himes further testified that he and Roberts and Harwood had all agreed that the sound value of the property was $9,275, as shown by the award. He further testified that he had suggested Harwood as umpire because "Harwood had been a contractor and he had known him some time; that he had a high regard for his opinion; that he knew his character and reputation; that he was a man of high character." He further said: "That so far as he and Mr. Roberts went their figures were almost the same, and that when Mr. Harwood took Roberts' figures away from the conference he was taking figures that Roberts and himself had very closely agreed upon."

With respect to the bias of Roberts, Himes testified "that Roberts told him that he had represented some insurance companies in adjusting, and that he expected Roberts told him that he had represented individuals against insurance companies; that Roberts had acted as adjuster both for and against insurance companies in appraisals. . . . That the only thing he saw wrong about Harwood was that he just seemed to want to take Roberts' figures altogether; that he did not consider anything else, and did not do any figuring; that Roberts figured the lower story was of value and he figured it was of no value; that Harwood agreed with Roberts that he thought it was of some value."

The plaintiffs further offered evidence of competent witnesses that the house at the time of the fire was worth some twelve or fifteen thousand dollars. One witness estimated the value at $15,980.

The following issues were submitted to the jury:

1. "Has there been an appraisal and award as to the amount of damages to which the plaintiffs are entitled under the insurance policy sued on in this action?"

2. "Was the appraiser, Dion A. Roberts, at the time of the alleged appraisal and award, interested?"

3. "If so, did the plaintiffs have knowledge of such fact at the time of the agreement for submission to appraisers and at the time of the appraisal and award?"

4. "Was the umpire, P. L. Harwood, at the time of the alleged appraisal and award, incompetent or interested?"

5. "Was the said umpire, P. L. Harwood, fraudulently influenced in the interest of the defendant by said Dion A. Roberts?"

6. "What amount are the plaintiffs, S. K. Young and others, entitled to recover of the defendant New York Underwriters Insurance Company?"

The first issue was answered by consent of the parties, and the jury answered the second, third, fourth, and fifth issues "Yes," and the sixth issue, "$9,000."

From judgment upon the verdict the defendant appealed.

Don C. Young for plaintiffs.
Jones & Ward for defendant.

BROGDEN, J. Was there sufficient evidence to be submitted to the jury upon the issues involving the competency and interest of Roberts, the appraiser, and Harwood, the umpire?

The parties entered into a valid and definite written agreement for submission of the controversy to appraisers. The appraisers duly took an oath. Himes was selected by the plaintiffs and Roberts by the defendant. The appraisers so selected chose Harwood as umpire to act only in matters of difference between the appraisers. The appraisers and the umpire viewed the premises and, on 29 July, 1933, they signed and delivered an award in which the sound value of the property was determined in the sum of $9,275, and the loss in the sum of $5,695.56.

Such award so made is presumed to be valid. *Hemphill v. Gaither,* 180 N. C., 604, 105 S. E., 183. Consequently, such award must stand, unless there is evidence of fraud, mistake, duress, or other impeaching circumstance. *Farmer v. Wilson,* 202 N. C., 775, 164 S. E., 356.

The policy of insurance provided that in the event the parties could not agree there should be selected "a competent and disinterested appraiser," and "a competent and disinterested umpire."

The plaintiffs assert that Roberts, the appraiser selected by the insurance company, was "interested," and that Harwood, the umpire selected by Roberts and Himes, was "interested," and that Roberts fraudulently procured Harwood, the umpire, to sign the award. While the allegations of attack and assault upon the award are broad and sufficient, the vital question is: Was there evidence to support such allegations?

At the outset, the evidence discloses that the appraisers and the umpire were all men of good character and experienced business men. There was no evidence that either Roberts or Harwood had ever been employed by the defendant or had acted for the defendant in any trans-

action. All three appraisers agreed that the sound value of the property was $9,275. Applying the three-fourths value clause, the loss would, therefore, have been $6,956.25, but Roberts contended that the first floor of the house was of some value, and that the loss should therefore be reduced by the amount of such value. Himes maintained the contrary view. This constituted the only difference between Himes and Roberts and, consequently, under the terms of the contract and agreement, this difference was the sole matter to be determined by Harwood. Nor was it denied that before Roberts had been appointed appraiser that he had been consulted by the plaintiffs to estimate the cost of rebuilding the dwelling, and that he had agreed to replace it for the sum of $5,700.

Was Roberts "an interested appraiser?" "An interested appraiser" is one who is partial, unfair, arbitrary and dominated by bias and prejudice for or against the parties or the property in controversy, or both, or has some pecuniary interest in the result or performance of the duties of appraiser. There is no evidence that Roberts had a money stake hidden somewhere in the controversy. So that the sole disqualifying circumstance as to him rests upon the fact that, as Himes put it, Roberts had previously acted as appraiser for both insurance companies and individuals. It would doubtless be considered a novel proposition to assert that because a lawyer of good character and professional skill had, in the course of his practice, represented insurance companies and individuals in settling insurance controversies, he was thereby unfitted, after taking an oath, to act impartially and fairly in an insurance matter with which he had no professional connection. Obviously the same test, in principle, would apply to appraisers.

Moreover, the plaintiffs knew beforehand that Roberts had made appraisals for insurance companies and, through counsel, protested by letter of 21 June, 1933. Notwithstanding such protest, however, the plaintiffs executed an agreement with the defendant and consented to the appointment of Roberts by the defendant on 8 July, 1933. Consequently, the Court is of the opinion that there was no evidence that Roberts was "an interested appraiser."

Was Harwood an interested appraiser? Himes, the appraiser for the plaintiffs, took Harwood to the scene of the fire prior to the appointment of appraisers, and upon that visit Harwood, according to the testimony of Himes, declared that the fire had resulted in a total loss. Thereafter, when the question of the selection of an umpire was raised, Himes suggested Harwood. After Harwood was appointed umpire and took an oath to perform his duties fairly and impartially, he agreed with Roberts that the portion of the house remaining after the fire was of some value. Himes testified that he suggested the appointment of Harwood as umpire because "Harwood had been a contractor and he had known him

some time; that he had a high regard for his opinion; that he knew his character and reputation; that he was a man of high character. . . . That so far as he and Mr. Roberts went their figures were almost the same, and that when Mr. Harwood took Roberts' figures away from the conference he was taking figures that Roberts and himself had very closely agreed upon." Himes also testified that at the final conference Harwood said: "Well, I am just taking Mr. Roberts' figures, adding for some trim in the two front rooms. . . . I am just going to let Mr. Roberts figure that trim, and he took Mr. Roberts' figures to show the value of the trim," etc. It is manifest that the alleged interest of Harwood rests upon two items of evidence, to wit: First, the fact that Harwood, before he was qualified as appraiser, had stated to Himes that he considered the loss as total, and that after he was appointed umpire and made further investigation, he had changed his opinion. There is no evidence that any influence whatever had been brought to bear upon Harwood by any person or party. Harwood, testifying as a witness at the trial, said that when Himes first took him out to the building that he had suggested to Himes that the building should be replaced by building on to the remainder of the first floor, and that Himes had represented that "they had a contract with the company whereby they could object to any and all material that remained there in the building." Thereupon Harwood said he told Himes that, "If you have a contract like that you have a total loss here," and that Himes had replied, "You stick to me on that." Second, that Harwood had accepted figures made by Roberts, and had made no figures for himself. There is no evidence that Roberts made any effort, by word or act, to influence the judgment or opinion of Harwood. Nor is there evidence that the figures made by Roberts did not represent an honest difference between his opinion and that of Himes.

Viewing the record in the light of the cold neutrality of the printed word, it is not thought that the mere fact that Harwood changed his opinion, or that he accepted the reasoning and figures of Roberts, is sufficient to constitute any evidence of either fraud or vitiating interest in the performance of his duty.

While the jury found that the sound value of the house was $12,000, nevertheless, so far as the appraisers were concerned, there could not have been any difference between them at any time in excess of $1,260.69. Therefore, the Court is of the opinion that there was no evidence to sustain the verdict on the second, fourth, and fifth issues.

The plaintiffs rely upon *Hill v. Ins. Co.*, 200 N. C., 502, 157 S. E., 599. In the *Hill case, supra,* there was no award at all, for the reason that the appraiser, Gladding, signed the paper conditionally and delivered it conditionally, and such condition was never complied with.

Moreover, the appraiser for the defendant had been "practically in his employ to make appraisals for four to six a year, . . . this unknown to plaintiff." Manifestly, the *Hill case, supra,* does not control the case at bar. See, also, *Geiger v. Caldwell,* 184 N. C., 387, 114 S. E., 497; *Farmer v. Wilson,* 202 N. C., 775, 164 S. E., 356; *Yelton v. McKinney,* 203 N. C., 785, 167 S. E., 70.

The interpretation of the record leads the Court to the conclusion that the motion for nonsuit should have been allowed.

Reversed.

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

F. WILLIAM HALLOCK v. AMERICAN CASUALTY COMPANY.

(Filed 10 October, 1934.)

1. Insurance E b—

An ambiguous clause in a policy of insurance or in a rider attached thereto will be construed in favor of insured within a reasonable interpretation of the contract to ascertain the intent of the parties.

2. Insurance S a—Policy held to cover damage to car insured while it was driven against orders of the owner.

The policy of insurance in suit indemnified insured against loss from liability imposed by law for personal injuries inflicted while the car was being driven by the owner or by an adult with the owner's permission, and an endorsement in the policy provided insurance for damage to the car from accidental collision, with $50 deductible feature, "subject to all the terms" of the policy. *Held,* the provision in the personal-injury clause limiting liability to injuries sustained while the car was being driven by the owner or an adult authorized by him does not apply to the collision-damage endorsement, the collision-damage endorsement not containing a limitation to this effect and the phrase "subject to all terms" of the policy being too indefinite to bring the limitation within its terms, and the policy is held to cover damage to the car by accidental collision while it was being driven by the owner's chauffeur against the owner's orders for the chauffeur's personal pleasure.

3. Same—Collision with land at bottom of bank after running off road held collision with stationary object within meaning of policy.

Damage to an automobile resulting when it was being driven around a sharp curve and failed to make the turn, ran off the road, down a bank and into some bottom land at the foot of the bank, upsetting the car and turning it over on its side *is held* damage by collision within the meaning of a policy of collision-damage insurance providing insurance, with $50 deductible feature, for damage to the car by "accidental collision with another object, either moving or stationary, including upsets."

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

APPEAL by defendant from *Schenck, J.*, at March Term, 1934, of BUNCOMBE. Affirmed.

This action was originally tried in the general county court of Buncombe County, North Carolina. The findings of fact and the judgment in the general county court are as follows: "This cause coming on to be heard at this the August, 1933, Term of the general county court of Buncombe County, before his Honor, J. P. Kitchin, judge of said court, without a jury, upon the evidence submitted by the parties under their stipulation and agreement filed in this cause, of date 15 August, 1933, and being heard, the court finds the following facts: (1) That at times hereinafter referred to plaintiff was the owner of the Cadillac automobile referred to in the pleadings upon which defendant had issued to plaintiff its policy of insurance No. P-417261, containing a $50.00 Deductible Collision Damage Endorsement; that at the time of the damage to said car, said policy was in full force and effect.

"(2) That in November, 1931, plaintiff and his wife took a trip from Asheville to Lincolnton, North Carolina, remaining in Lincolnton for several days, and while visiting in Lincolnton on 28 November, 1931, after returning from a drive in said car, plaintiff instructed his chauffeur, Joe Smith, colored, to put the car in the private garage where plaintiff kept it, and bring him the keys.

"(3) That the said Joe Smith, in violation of said orders and instructions of his master, and without any right of authority, took said automobile and, with another Negro and two colored girls, started on a pleasure trip of his own to a neighboring town.

"(4) That while said automobile was being operated by the said Joe Smith, as aforesaid, it came to a sharp curve in the road and could not make the turn, and ran off the road, down a bank and into some bottom land at the foot of said bank and upset, turning over on its side.

"(5) That as a result of running off said road and down said bank into said bottom land at the foot of said bank and upsetting and turning over on its side, as aforesaid, said automobile was damaged and injured in the sum of $759.95.

"Upon the foregoing findings, the court is of the opinion that the plaintiff is entitled to recover of the defendant under the terms of the policy the amount of said damages, less the $50.00 deductible item in said policy.

"It is therefore ordered, adjudged and decreed that the plaintiff have and recover of the defendant the sum of $709.95, together with the costs of this action, to be taxed by the clerk. This 26 September, 1933. J. P. Kitchin, judge of the general county court for Buncombe County, North Carolina."

To the foregoing judgment and conclusion of law contained therein, the defendant excepted and assigned error, and appealed to the Superior Court.

The judgment of that court is as follows: "This cause coming on to be heard at this the March, 1934, Term of the Superior Court of Buncombe County, before his Honor, Michael Schenck, judge presiding and holding said term of said court according to law, and being heard upon the appeal of the defendant from the judgment rendered in this cause by the general county court of Buncombe County, of date 26 September, 1933, and upon the defendant's assignment of error, which appears in the record:

"It is now considered, ordered, and adjudged that the defendant's said assignment of error be and the same hereby is overruled, and that the said judgment of the general county court of Buncombe County be and the same hereby is affirmed. This 12 March, 1934. Michael Schenck, judge presiding," etc.

To the above judgment the defendant duly excepted, assigned error, and appealed to the Supreme Court.

Heazel, Shuford & Hartshorn for plaintiff.
Bourne, Parker, Bernard & DuBose for defendant.

CLARKSON, J. The first question involved in this appeal: Can the defendant avoid liability upon the contention that the automobile was not being operated at the time of the accident for the owners' "business or pleasure"? We think not, under the policy issued to plaintiff.

The plaintiff and his wife took a trip from Asheville, North Carolina, their home, to visit a friend in Lincolnton, N. C. After returning from a drive in the automobile, the plaintiff instructed the Negro chauffeur to put the car in the garage and bring him the keys. The chauffeur, with another Negro and two Negro girls, started on a pleasure trip. The chauffeur, on a sharp curve in the road, operating the automobile, could not make the turn and ran off the road, down a bank into some bottom land at the foot of said bank and the automobile turning over on its side. It was damaged to the extent of $759.95. The policy provided for a deduction of $50.00. Judgment was rendered for plaintiff in the court below for $709.95. There is no question as to the policy being in force and the premium paid. The policy provided for both public liability and property damage.

In *Grabbs v. Insurance Co.*, 125 N. C., 389 (399), is the following: "While we should protect the companies against all unjust claims and enforce all reasonable regulations necessary for their protection, we must not forget that the primary object of all insurance *is to insure.*"

In *Bray v. Insurance Co.*, 139 N. C., 390 (393), we find: "If the clause in question is ambiguously worded, so that there is any uncertainty as to its right interpretation, or if for any reason there is doubt in our minds concerning its true meaning, we should construe it rather against the defendant, who was its author, than against the plaintiffs, and any such doubt should be resolved in favor of the latter, giving, of course, legal effect to the intention, if it can be ascertained, although it may have been imperfectly or obscurely expressed."

In *Mitchell v. Assurance Society*, 205 N. C., 725 (728-729), speaking to the subject: "There is a natural feeling that after an insurance company has received its premiums, it ought not to be allowed to escape liability or to avoid responsibility, and the just rule is that policies will be construed strictly against the insurers and in favor of the assured. *Conyard v. Insurance Co.*, 204 N. C., 506, 168 S. E., 835. 'The policy having been prepared by the insurers, it should be construed most strongly against them.' *Bank v. Insurance Co.*, 95 U. S., 673; 14 R. C. L., 926. But it is not the province of the courts to construe contracts broader than the parties have elected to make them, or to award benefits where none was intended. *Guarantee Co. v. Mechanics' Bank*, 183 U. S., 402."

The following, in part, is in the policy: "Does Hereby Agree: (1) To insure the person, firm or corporation named in the attached Warranties (hereinafter called the named Assured), Against Loss from the Liability Imposed by Law upon the Assured, for damages on account of bodily injuries, including death resulting therefrom, accidentally suffered or alleged to have been suffered by any person or persons not hereinafter excepted, by reason of the ownership, maintenance or use, for the purpose named in the Warranties, of any Automobile insured herein." . . . Under Warranties (5): "The purposes for which the automobiles described herein are to be used are: *Business and Pleasure.*"

"Conditions. V. Exclusions. This Policy does not cover the Assured. . . . (1) While being used or operated for any other purpose than that stated in Item 5 of the attached Warranties. . . . VI. Omnibus Coverage. If Item 5 of the attached Warranties of the named Assured, is answered 'business and pleasure' or 'private pleasure' or 'commercial,' the indemnity provided by this Policy is so extended as to be available in the same manner and under the same conditions as it is available to the named Assured, to any person or persons while riding in, or legally operating any of the automobiles described in the Warranties of this Policy, and to any person, firm or corporation legally responsible for the operation thereof, provided such use or operation is with the permission of the named Assured, or, if the named Assured is an individual with the permission of an adult of the named Assured's household other than a chauffeur or a domestic servant," etc.

The defendant contends that the policy should be construed to cover loss for damages only, while being operated for business and pleasure by the owner or by some person authorized by him. This contention is correct so far as it applies to bodily injuries set forth above in the policy provision quoted. This action is for the damage to the automobile.

The aspect here presented is thus written in the policy: "Collision Damage Endorsement $50.00 Deductible. In consideration of Thirty-five Dollars ($35.00), and subject to all terms, conditions, agreements and statements forming part of the Policy to which this endorsement is attached, all of which shall be considered as incorporated in and made a part hereof and shall apply as if actually written or printed herein, the Company does hereby agree to insure the Assured against loss or damage in excess of Fifty Dollars ($50.00) (each claim hereunder shall be adjusted separately and said sum shall be deducted from the amount of each claim when determined), to the Automobile(s) described in the Declarations and the operating equipment thereof when attached thereto, if sustained within the period covered by this endorsement and if caused solely by Accidental collision with another object either moving or stationary, including upsets, excluding, however, (a) all loss or damage caused directly or indirectly by fire from any cause whatsoever, and/or (b) all loss or damage to any tire or tires if the insured Automobile is not otherwise damaged in the same accidental collision."

There is nothing in this provision that *the property damage* will apply only when the automobile is operated for business and pleasure by the owner or by some person authorized by him. These references, "subject to all terms," etc., are referable to the indemnity for bodily injuries set forth in the policy.

The defendant, in the "collision damage endorsement," does not limit the injury to the car while being used for business and pleasure by the owner or some person authorized by him. It could have written this in the collision damage endorsement, which would then be understandable. The defendant, when omitting this, or similar language, we cannot construe under such uncertain, vague and indefinite language "subject to all terms," etc., which refer to the bodily injury clause to include property damage to the automobile.

As was said in *Allgood v. Insurance Co.*, 186 N. C., 415 (420): "The language of the rider is ambiguous and not clear. The rider, on its face, indicates it was a form prepared by defendant. If the defendant intended that the automobile should be locked 'when leaving same unattended,' it could have said so in plain language. The defendant, no doubt, has men skilled to draw its insurance policies and riders. The rider could have been drawn in simple language, well understood by all; for example, 'the insured undertakes, during the currency of this policy, to always lock the automobile when unattended.' "

The next question involved on this appeal: What does "if caused solely by accidental collision with another object either moving or stationary, including upsets" mean? The facts were: The chauffeur, while operating the automobile on a sharp curve in the road, could not make the turn and ran off the road, down a bank into some bottom land at the foot of said bank and the automobile upset, turning over on its side.

We think from the facts that the policy covered the damage. In Vol. 5, Cyc. of Insurance Law (Couch), part sec. 1173, at pp. 4165 and 4166, is the following: "Applying the majority rule, a 'collision' with an object has been held to have occurred, where the car, in making a necessary detour, came into contact with a stump in the pathway, where it passed through the guard rail of a highway bridge and plunged into a stream below, where it struck the ground at the bottom of a precipice at the side of the road, after it had started, by force of gravity, when left standing on an incline, where, in turning it around, it backed down an embankment, struck a water main, and was thrown into a deep hole, where it skidded while being driven at a reasonable rate of speed, and was thrown into a ditch, where it struck a rut and was thrown into the ditch, where, to avoid an otherwise inevitable collision with another swiftly moving car, it was swerved, struck a stone and overturned in the ditch, where it came in contact with the bank of a ditch into which it dropped when the driver turned out of the road to avoid an obstruction, where it fell down an embankment as the result of being driven too near the edge of a narrow country road in an attempt to avoid an approaching car, where it was precipitated over a chasm in the highway caused by a washout and collided with the bottom or further bank thereof, where, in swerving sharply to avoid another car, it struck an embankment and overturned as the result of such striking, and where it struck a ridge of dirt outside of the beaten path, causing a wheel to collapse and the car to overturn. So, insurance of an automobile against damage resulting from collision with any object, moving or stationary, covers a collision with an embankment near the highway, where the car becomes unmanageable, leaves the road, and strikes such embankment, crushing the front wheels and overturning," etc. See 54 A. L. R., p. 1447, where the decisions pro and con are annotated.

We think the majority rule is supported by the better reasoning. The judgment of the court below is

Affirmed.

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

ANDREW GENNETT AND N. W. GENNETT, PARTNERS, TRADING AND DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF GENNETT LUMBER COMPANY, v. E. LYERLY.

(Filed 10 October, 1934.)

1. Frauds, Statute of, A a—C. S., 987, does not apply to an original promise.

Where the party sought to be charged is in fact the direct paymaster, or makes an original promise to answer for the debt of another, the statute of frauds, C. S., 987, does not apply to relieve him of liability.

2. Same—Party sought to be charged held not to be original promisor.

The president and treasurer of a corporation who owns a large amount of the corporation's stock, although interested in the successful and profitable operation of the corporation, has no personal, immediate and pecuniary benefit in the purchase of materials by the corporation for use in its manufacturing processes so as to make him an original promisor on the corporation's agreement to pay the purchase price of such materials, and where he pleads the statute of frauds, C. S., 987, he may not be held personally liable for the purchase price because of verbal promises to answer for the debt made in his behalf by the secretary of the corporation as his alleged agent.

3. Frauds, Statute of, E b—Writing held not to be continuing guaranty, and bound defendant only for order upon which it appeared.

A manufacturing corporation purchased several carloads of lumber from plaintiff, each carload purchased being an independent transaction, based upon independent orders. One of the orders signed by the secretary of the corporation contained a notation that the president of the corporation should be personally liable for the purchase price, and the corporation paid for the lumber shipped under this order. Plaintiff sought to hold the president of the corporation personally liable for the purchase price of the lumber sold under other subsequent orders upon the theory that the secretary signed the notation as agent for the president, either duly authorized or by estoppel. The president pleaded the statute of frauds, C. S., 987. The secretary testified that he had no authority to bind the president personally for materials purchased by the corporation. *Held*, plaintiff was not entitled to recover, even assuming that the president was bound by the notation, since the extent of liability thereunder was for the one carload of lumber shipped under the order which had been paid for, the notation not constituting a continuing guaranty, since each order was independent of the others and constituted a separate transaction.

4. Same—

The fact that goods are shipped to a corporation with a notation that the president of the corporation was to be responsible for the payment of the purchase price does not impose liability upon the president upon default of the corporation.

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

GENNETT *v.* LYERLY.

CIVIL ACTION, before *Schenck, J.*, at April Term, 1934, of BUNCOMBE.

The plaintiffs are lumber dealers, and at the times complained of the defendant was president and treasurer of the Yeager Manufacturing Company, a corporation organized and existing under the laws of North Carolina. On 15 June, 1932, the Yeager Manufacturing Company gave an order to the plaintiffs for one car of lumber. The order had upon it the following notation: "Either discount or accept and endorsed by E. Lyerly." The lumber was shipped and paid for. Thereafter, on 23 September, 1932, the Yeager Manufacturing Company inquired of the plaintiff if it had certain specified lumber for sale and available for shipment. On 24 September, 1932, the plaintiffs wrote the Yeager Manufacturing Company stating that they had two cars of certain lumber, and further stating, "Trusting that you will favor us with an order, we are," etc. On 27 September, 1932, the Yeager Manufacturing Company wrote the following letter to the plaintiffs: "We are in receipt of your favor of 24 September, quoting us a price of $18.00 delivered Hickory on two cars 4/4 No. 1, Common and Better, Sound, Wormy Chestnut. Please make shipment of these as soon as possible. Yours very truly, Yeager Mfg. Company, Walker Lyerly, Secretary." Thereafter, on 29 September, the plaintiffs wrote the following letter: "Yeager Mfg. Co., Hickory, N. C., Gentlemen: We are in receipt of your letter advising us that we can ship two cars of 4/4 No. 1, Common and Better, Sound Wormy Chestnut at $18.00 delivered Hickory, N. C. We wish to thank you for this business and trust this stock will be satisfactory in every way. Our terms on this order are 2%—30 days or a note for 60 days endorsed by Mr. E. Lyerly. Yours very truly, Gennett Lumber Company." On 17 October, 1932, the Yeager Manufacturing Company wrote the plaintiffs inquiring if they had certain poplar lumber. On 18 October, 1932, the Gennett Lumber Company wrote a letter to Yeager Manufacturing Company, stating that they had such a car, and further stating: "Trusting that you will favor us with an order for this car and that it will be satisfactory with you to pay for this car in thirty days less 2% or give us your note endorsed by Mr. E. Lyerly for sixty days." On 24 October, the Yeager Manufacturing Company wrote the plaintiffs the following letter: "We are in receipt of your favor of the 18th. Please enter our order for one car of the 5/8 Poplar same grade and about the same amount as shipped before. We trust you will ship this right out to us. Yours very truly, Yeager Mfg. Company, Walker Lyerly, Secretary." The Yeager Manufacturing Company went into bankruptcy in December, 1932, and thereafter, on or about 8 February, 1933, the plaintiffs instituted this action to recover of defendant E. Lyerly the purchase price of said three cars of lumber, amounting to approximately $782.54, after deducting the freight.

The defendant E. Lyerly filed an answer denying that he had assumed any personal liability for the account, and further pleaded the statute of frauds as contained in C. S., 987.

The evidence tended to show that E. Lyerly was engaged in the hosiery business and owned a large amount of stock of the Yeager Manufacturing Company, and that he was, in the fall of 1932, president and treasurer of the corporation, and that his brother, Walker Lyerly, was general manager and secretary thereof. The plaintiffs offered evidence tending to show that when the shipment of 15 June, 1932, was made that they did not accept the order until Walker Lyerly wrote or had written on said order, "Either discount or accept and endorsed by E. Lyerly." There was further evidence that the Yeager Manufacturing Company was considered a bad credit risk, and that plaintiffs would not have shipped the lumber except for the understanding that E. Lyerly was personally responsible for lumber purchased by the corporation. Plaintiff's witness said: "I never had any conversation with E. Lyerly about the purchase of lumber. I talked with him a little. No, I never asked him about guaranteeing any bills. In the 18 months that I called on the Yeager Manufacturing Company and saw him time and again I never mentioned to him one time whether he guaranteed these bills or whether he would be responsible for them, or anything like that." Plaintiffs also offered as a witness Mr. Walker Lyerly, secretary of the corporation. He said: "I bought some stuff for the Yeager Manufacturing Company through June, July, August, September, and October, 1932, before it went into bankruptcy in December. . . . E. Lyerly signed some checks as treasurer of the company to pay bills. I would not sign any as treasurer in his place. . . . He was just the president of it. He did not have anything to do with the selling or the buying or anything like that. He did sign some checks to pay the debts of the company. . . . Any orders that Mr. Lyerly guaranteed they would have to go to Mr. Lyerly and get the guarantee, and he would have to sign the order. It was not any good unless he did. . . . We handled a lot of acceptances. Those that refused, Mr. Lyerly would endorse acceptances. I could not endorse an acceptance. That is the way we handled 85 per cent of the cases we had there. Mr. Lyerly was not present when I wrote that. I do not know whether he saw it or not. . . . I mean he would have to sign the order. E. Lyerly had been doing that off and on in some cases, not in all cases, since the reorganization in 1930. (Q.) It was E. Lyerly's custom, when requested, to guarantee the account? (A.) People would go by to see him, yes. Mr. E. Lyerly did not have any active connection with the Yeager Manufacturing Company after I went there. He was president and treasurer. . . . E. Lyerly guaranteed some bills for the Yeager Manufacturing Company. His method of doing this was that salesmen

would go to see him and he would endorse or sign the order. Whenever he guaranteed a bill he would do it himself. I had no authority to guarantee for him. (Q.) If you told Mr. Potter that you did not have authority to guarantee for Mr. Lyerly, you don't remember telling him? (A.) No, I did not have authority."

J. W. Potter, a witness for plaintiffs, testified that he was engaged in selling lumber for the plaintiff and others, and that he often visited the plant of the Yeager Corporation in Hickory and saw the defendant on several occasions at the plant, looking over veneers and lumber, and everything in general. This witness also testified the credit of the corporation was bad, and that he made the sale referred to in the order of June 15, 1932. Over the objection of defendant this witness was permitted to testify, in effect, that Walker Lyerly told him that the defendant E. Lyerly "was responsible for all accounts for lumber, and he paid them all except three cars," and that E. Lyerly "had agreed to endorse all lumber accounts." The witness continued: "I took Walker Lyerly's word for his brother, E. Lyerly, being ready to endorse the accounts and being responsible. I thought he was general manager and a member of the company or he would not represent that. . . . He stated that they had arrangements that Mr. E. Lyerly would endorse all accounts for lumber that was bought by Yeager Manufacturing Company." . . .

The general issue of indebtedness was submitted to the jury and answered in favor of the plaintiffs. The verdict awarded to the plaintiffs the sum of $782.54, with interest. From judgment rendered upon the verdict, the defendant appealed.

Jones & Ward for plaintiffs.
Thomas P. Pruitt for defendant.

BROGDEN, J. The defendant was the president and treasurer of a corporation known as the Yeager Manufacturing Company. His brother, Walker Lyerly, was secretary and treasurer thereof. Walker Lyerly, as such general manager, purchased from plaintiffs for and in behalf of the corporation three carloads of lumber. The correspondence between the parties relating to said lumber discloses that the corporation ordered the lumber, and that the plaintiffs shipped the same upon such corporate orders. In the letter of 29 September, 1932, written by the plaintiffs, was a memorandum, as follows: "Our terms on this order are 2%—30 days or a note for 60 days endorsed by Mr. E. Lyerly." The corporation went into bankruptcy in December, 1932, and the plaintiffs bring this action against the defendant, alleging that he was individually responsible for the payment of said lumber. The defendant denied liability and pleaded C. S., 987, as a defense. This statute provides, in

substance, that "no action shall be brought . . . to charge any defendant upon a special promise to answer the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party charged therewith or some other person thereunto by him lawfully authorized." The record discloses that the defendant received no property as a result of the transaction, and signed no letter or memorandum. The record further discloses that the entry on the letter of plaintiffs, dated 29 September, 1932, was not signed by E. Lyerly, nor is there evidence that he ever saw the letter or knew of its existence.

The plaintiffs stake their case and assert liability against the defendant upon three theories, to wit: (1) That Walker Lyerly, the brother of defendant, and general manager of the corporation, was the agent of the defendant, with power and authority to bind him for the debts of the corporation; (2) that the course of dealing between the parties constituted Walker Lyerly an agent of defendant by operation of estoppel; (3) that notice to the corporation of the terms upon which the lumber was shipped was binding upon the defendant, who was not only president and treasurer of the company, but who also owned a large portion of stock.

The solution of the first question of law depends, in part, upon whether the defendant E. Lyerly was an original promisor. All the decided cases construing C. S., 987, are to the effect that if the party sought to be charged is in fact the direct paymaster or makes an original promise to answer for the debt of another that the statute of frauds constitutes no defense and affords no protection against liability. *Peele v. Powell,* 156 N. C., 553, 73 S. E., 234; *Handle Co. v. Plumbing Co.,* 171 N. C., 495, 88 S. E., 514; *McCall v. Institute,* 187 N. C., 757, 122 S. E., 850; *Beck v. Halliwell,* 202 N. C., 846, 163 S. E., 747. This idea was expressed in *Peele v. Powell, supra,* as follows: "Where the promise is for the benefit of the promisor, and he has a personal, immediate, and pecuniary benefit in the transaction, as in *Neal v. Bellamy,* 73 N. C., 384, and in *Dale v. Lumber Co.,* 152 N. C., 653, or where the promise to pay the debt of another is all or part of the consideration for property conveyed to the promisor, as in *Hockaday v. Parker,* 53 N. C., 17, . . . or is a promise to make good notes transferred in payment of property, as in *Adcock v. Fleming,* 19 N. C., 225, . . . the promise is valid although in parol.

"If, however, the promise does not create an original obligation, and it is collateral, and is merely superadded to the promise of another to pay the debt, he remaining liable, the promisor is not liable, unless there is a writing; and this is true whether made at the time the debt is created or not."

The evidence in this case, as we interpret it, does not disclose that the defendant had "a personal, immediate, and pecuniary benefit in the transaction." Of course, he was a stockholder and necessarily interested in the successful and profitable operation of the corporation; but such interest was no more "personal and immediate" than the interest of a landlord in a profitable crop made by a tenant, and such interest was declared in *Peele v. Powell, supra,* to be insufficient without a written memorandum, although the landlord had verbally promised to pay the debt of the tenant. Consequently, it necessarily follows that no verbal promise by the defendant to pay the debt of the corporation would impose liability upon the defendant in view of the facts and circumstances disclosed by the present record.

The next question is: Was there such a writing or written memorandum as the statute contemplates? Walker Lyerly, the brother of defendant, and general manager of the company, ordered lumber from the plaintiffs. The plaintiffs shipped the lumber and in acknowledging to the corporation the order and its thanks for the business, wrote in such letter of acknowledgment the words, "Our terms on this order are 2%—30 days or a note for 60 days endorsed by Mr. E. Lyerly." This letter was signed by the plaintiffs. There is no suggestion that even Walker Lyerly signed this memorandum either in behalf of the company or in behalf of the defendant E. Lyerly. Therefore, nothing else appearing, the plaintiffs were out of court. But the plaintiffs assert that on 15 June, 1932, the Yeager Manufacturing Company ordered lumber from them, and that Walker Lyerly, for and in behalf of the company, had signed an order containing the words "either discount or accept and endorsed by E. Lyerly." Doubtless the words "accept and" are intended for the word acceptance. No point, however, is made of that. There was further evidence that the defendant E. Lyerly had paid for that car of lumber with a check signed by him as treasurer. There was no evidence that any acceptance had been given by him for such shipment, or that he had endorsed any negotiable instrument of any character evidencing the purchase price thereof. Indeed, the witness for plaintiffs testified: "I never had any conversation with E. Lyerly about the purchase of lumber. I talked with him a little. No, I never asked him about guaranteeing any bills. In the eighteen months that I called on the Yeager Manufacturing Company and saw him time and again, I never mentioned to him one time whether he guaranteed these bills or whether he would be responsible for them, or anything like them."

Hence, as the defendant had never made an original promise or verbally agreed to become paymaster, and as there was no writing signed by him in compliance with the statute of frauds, his liability must rest

upon the notation made by Walker Lyerly on the order of 15 June, 1932. Walker Lyerly was placed upon the witness stand by the plaintiffs and testified that he had no authority to bind the defendant.

Moreover, assuming that E. Lyerly was bound by the notation, the extent of his liability was for the purchase price of that particular car of lumber, and it is admitted that the same was paid in due time by the corporation. Such notation did not constitute a continuing guaranty as disclosed in *Novelty Co. v. Andrews,* 188 N. C., 59, 123 S. E., 314. The record discloses that the shipments of lumber from the plaintiffs to the corporation were all independent transactions, and based upon independent orders. It follows, therefore, that E. Lyerly is not liable for the three cars of lumber in controversy, by virtue of the notation on the order of 15 June, 1932.

Nor does the fact that the lumber was shipped to the corporation with a notation that E. Lyerly was to be responsible for the payment of the purchase price impose liability upon him. *Asbury v. Mauney,* 173 N. C., 454, 92 S. E., 267; *Bank v. Courtway,* 200 N. C., 522, 157 S. E., 864. It was held in the *Courtway case, supra,* that a resolution of the board of directors of a corporation did not impose personal liability upon them to the payee of a note. Manifestly, a letter written by a shipper would not impose a greater obligation than a formal resolution duly adopted.

In the final analysis, the evidence discloses that E. Lyerly was not an original promisor or paymaster as contemplated by law, and that there was no writing signed by him or his agent "thereunto lawfully authorized," and, consequently, the motion for nonsuit should have been granted.

Reversed.

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

HENRY ANGELOFF v. HEWITT FREEMAN.

(Filed 10 October, 1934.)

1. Bankruptcy C b—

A trustee in bankruptcy is vested with title to the bankrupt's property by operation of law as of the date the debtor is adjudged a bankrupt. U. S. C. A. Title 11, sec. 110.

2. Bankruptcy C e—Purchaser at trustee's sale acquires title of trustee and may assert claim to property as real party in interest.

Where the trustee in bankruptcy sells a chattel belonging to the debtor the purchaser obtains the title of the trustee which vested in the trustee

by operation of law as of the date of the adjudication of the debtor as a bankrupt, and the title of the purchaser at the trustee's sale is superior to the title of a purchaser at a sheriff's sale held subsequent to the adjudication in bankruptcy under execution on a judgment docketed prior to such adjudication, and the purchaser at the trustee's sale is the real party in interest and may assert in the courts of this State all rights which could have been asserted by the trustee.

CIVIL ACTION, before *Devin, J.,* at March Term, 1934, of GATES.

In an action in Gates County, entitled "Corporation Commission *v.* Mrs. Fred T. Carrier," a judgment for bank stock assessment was duly docketed against her on 8 March, 1930. Mrs. Carrier was a resident of Tennessee and owned a Packard automobile. On or about 1 February, 1933, she left said automobile in the hands of the defendant in Gates County, North Carolina. Thereafter, and prior to 14 April, 1933, Mrs. Carrier filed a voluntary petition in bankruptcy in the District Court of the United States for the North Division of the Eastern District of Tennessee, and on said date was duly adjudicated a bankrupt. On 11 May, 1933, Dayton Hunter, of Elizabethton, Tennessee, was duly appointed and qualified as trustee of said bankrupt estate. The automobile was not listed in the schedule and this fact was discovered in the examination of the bankrupt before the referee, and thereupon the bankrupt duly listed said automobile. Thereafter the trustee in bankruptcy, pursuant to an order duly made by the referee, sold the automobile at the postoffice building in Elizabethton, Tennessee, on 4 October, 1933, and the plaintiff became the purchaser thereof for the sum of $10.00, subject to any and all valid liens. Said sale was duly confirmed by the referee in bankruptcy on 18 October, 1933, and a bill of sale was executed and delivered by the trustee to the plaintiff. The plaintiff came to North Carolina and made demand on the defendant for the car, and was informed that on 3 October, 1933, the sheriff of Gates County, under an execution duly issued on the bank assessment judgment, hereinbefore referred to, had duly sold said car at the courthouse door in Gatesville on 14 October, 1933, "when and where the defendant Hewitt Freeman became the purchaser thereof for the sum of $256.00," and that the sheriff of Gates County had executed and delivered to said defendant a bill of sale for the automobile.

There was evidence that the trustee in bankruptcy had called upon the defendant several weeks prior to the sheriff's sale and made an effort to obtain possession of the car, and that there had been considerable correspondence between the trustee in bankruptcy and the defendant.

At the conclusion of the evidence the judge instructed the jury to answer the issue of ownership in favor of the plaintiff, and the issue of

value in the sum of $256.00, as said amount was the only evidence upon that issue. It appeared from the evidence that the defendant was entitled to a storage lien in the sum of $44.90 upon said car, and thereupon judgment was entered that the plaintiff was the owner of said car and entitled to the possession thereof upon payment to the defendant of the sum of $44.90 storage charges.

From the foregoing judgment the defendant appealed.

A. Pilston Godwin, C. Lee Richardson, and Thompson & Wilson for plaintiff.

Costen & Costen and John H. Hall for defendant.

PER CURIAM. The Bankruptcy Act provides that upon the appointment of a trustee that such trustee is "vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt," etc. See U. S. C. A. Title 11, sec. 110. It also provides that the title to the property of a bankrupt which has been sold "shall be conveyed to the purchaser by the trustee."

The adjudication of bankruptcy in Tennessee was made on 14 April, 1933, and thereupon the title to the automobile passed to the trustee by operation of the bankruptcy statute. Moreover, the trustee in bankruptcy conveyed such title as the bankrupt had to the plaintiff, and said sale was duly confirmed. Consequently, the plaintiff could assert in the courts of North Carolina all rights to the property which could be asserted by the trustee in bankruptcy, and was under the circumstances the real party in interest as contemplated by the laws of this State. Hence, the judge ruled correctly. See *Ward v. Hargett,* 151 N. C., 365, 66 S. E., 340; *Straton v. New,* 283, 318, 75 Law Ed., 1060; *Ex Parte Baldin,* 78 Law Ed., 674.

Affirmed.

W. SCOTT RADEKER v. ROYAL PINES PARK, INC., AND MARGUERITTE JACKSON.

(Filed 10 October, 1934.)

Judgments K b—It will be presumed on appeal that findings upon which judgment is set aside under C. S., 600, are supported by evidence.

Where no evidence appears in the case on appeal from an order setting aside a judgment for surprise and excusable neglect under C. S., 600, it will be presumed that the findings of fact are based upon sufficient evidence in the absence of exceptions to the findings, and the order will be affirmed where the findings sustain the court's holding that movants have

shown excusable neglect and meritorious defense. As to whether the pleadings, judgment sought to be set aside, and the record incident thereto, and the motion and affidavit of movants may be treated as evidence, *quære?*

MOTION to set aside a judgment, heard before *Pless, J.*, at June Term, 1934, of BUNCOMBE. Affirmed.

This was a motion made before the general county court of Buncombe by the defendant Royal Pines Park, Inc., and intervenors Louis M. Bourne, Haywood Parker and John DuBose, under C. S., 600, to set aside a judgment by default final rendered in said court in the above entitled cause on 19 December, 1932. From judgment granting the motion the plaintiff appealed to the Superior Court, and from judgment there affirming the court below, appealed to this Court, assigning errors.

Weaver & Miller for appellant.
Bourne, Parker, Bernard & DuBose for appellees.

PER CURIAM. The judge of the general county court of Buncombe, "after hearing evidence for plaintiff and movants, and argument of counsel," found the facts, and upon the facts so found held, "in its discretion and as a matter of law, . . . that the movants have shown excusable neglect and a meritorious defense," and adjudged that the default judgment and the proceedings pursuant thereto, be "declared null and void and set aside."

No evidence appears in the case on appeal, unless the pleadings, the judgment sought to be set aside and the record incident thereto, and the motion and affidavit of the movants be treated as evidence. If these be so treated, they furnish sufficient basis for the findings of fact. If they be not so treated, then, in the absence of the evidence from the case on appeal, the findings of fact are presumed to be based upon sufficient evidence. And withal there are no exceptions to the findings of facts. These findings are final and binding upon this Court.

The findings of fact fully sustain his Honor's holding that the movants have shown excusable neglect and meritorious defense. In no view of the case, therefore, should the judgment be reversed. *Abbitt v. Gregory,* 195 N. C., 203; *Bank v. Duke,* 187 N. C., 386; *Weil v. Woodard,* 104 N. C., 94.

Affirmed.

BEAUFORT COUNTY v. JOHN A. MAYO.

(Filed 31 October, 1934.)

Taxation H b—Holders of prior registered mortgage liens should be made parties in tax certificate foreclosure.

It is necessary that the holders of liens under prior registered mortgages be made parties and be duly served with summons in proceedings to foreclose a tax sale certificate in order for the purchaser at the sale to obtain title free from the lien of the encumbrances, the holders of such liens being entitled to notice and an opportunity to be heard under the fundamental law of the land as a part of due process, and the provisions of ch. 260, sec. 5, Public Laws of 1931, cannot affect this fundamental right of notice and hearing.

STACY, C. J., dissents.

APPEAL by defendant from *Small, J.*, 20 August, 1934. From BEAUFORT. Error.

This was a submission of controversy without action, under the provisions of C. S., 626 to 628, inclusive, and the provisions of chapter 102, Public Laws of 1931, N. C. Code of 1931 (Michie), sections 628 (d) to 628 (o), inclusive, generally designated as the Uniform Declaratory Judgment Act. The gist of the controversy is to determine the validity of tax foreclosure actions where holders of registered encumbrances were not made parties.

The judgment of the court below is as follows: "This cause coming on to be heard by consent, before the undersigned judge, resident in the First Judicial District, upon a submission of controversy without action, the plaintiff being represented by Junius D. Grimes, county attorney, and the defendant John A. Mayo being present in person representing himself: The court being of the opinion, after a careful review of the facts set forth in the submission of controversy without action, that the plaintiff is the owner in fee simple of the lands described in said submission of controversy without action.

"It is, therefore, ordered, adjudged and decreed that the contract between the plaintiff and defendant for the sale of said lands is binding upon the defendant and the defendant is ordered, upon the tender to him of a good and sufficient deed conveying said lands in fee simple in proper form, properly executed, to pay the purchase price for said lands as set out in said submission of controversy without action: It is further ordered that the plaintiff recover the costs of this action, to be taxed by the clerk."

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

Junius D. Grimes for plaintiff.
John A. Mayo, in propria persona.

CLARKSON, J. The defendant made a contract to purchase a fee-simple title, free of encumbrances, from plaintiff, certain tracts of land in Beaufort County, N. C., containing approximately 26,149 acres, for the sum of $12,959.80. The plaintiff claimed title to same under four tax foreclosure suits instituted by plaintiff against the J. & W. Land Company (abbreviation for Jamesville and Washington). The defendant refused to carry out his contract, contending that plaintiff did not have a fee-simple title to the land, free of encumbrances. The plaintiff in its contract agreed to execute and deliver "a good and sufficient deed for the said lands above described with special covenants of warranty." We think the contention of defendant is correct.

The facts agreed to, in part, are as follows: "That the J. & W. Land Company was created and organized as a corporation under the laws of North Carolina on 18 November, 1919, and on and prior to the first day of May, 1928, was the owner in fee simple of the lands which are the subject of this controversy, including both those lying in Washington Township and those lying in Long Acre Township; but the ownership of the said J. & W. Land Company was subject to a timber contract with the Interstate Cooperage Company, dated 1 May, 1923, and registered 28 May, 1923, in Book 245, page 149, of the Beaufort County records; and said ownership was also subject to a deed of trust to A. D. MacLean, trustee for Interstate Cooperage Company to secure certain indebtedness therein recited as owing to the Interstate Cooperage Company, which deed of trust is dated 1 June, 1923, and registered 2 June, 1923, in Book 246, page 7, of the Beaufort County records:

"And said title of the said J. & W. Land Company was also subject to a deed of trust to the Trust Company of Washington, dated 1 July, 1923, and registered 25 July, 1923, in Book 246, page 21, of the Beaufort County records, to secure the indebtedness referred to in said deed of trust.

"That the time to exercise the rights given under said timber deed has not expired by the terms of said timber deed; and neither said timber deed nor the deed of trust to A. D. MacLean nor the deed of trust to the Trust Company of Washington have been canceled upon the public records of Beaufort County; and the Interstate Cooperage Company is a corporation organized under the laws of New York, but having its principal place of business at Belhaven, Beaufort County, N. C., where it has a large sawmill and lumber manufacturing plant, and A. D. MacLean is a citizen of Beaufort County, North Carolina, and was a resident of Beaufort County until some time in the month of

....., 1933, and the Trust Company of Washington is a corporation organized and existing under the laws of North Carolina, with its principal place of business at Washington, North Carolina."

Twenty-two thousand nine hundred ninety-nine acres of the land assessed for tax on 1 May, 1928, of the J. & W. Land Company, was valued at $129,695. In the foreclosure suits, action is brought by plaintiff against the J. & W. Land Company, but those who have encumbrances or other interest in the land are not made parties.

In the foreclosure suits no summons was issued: (1) Against the Interstate Cooperage Company that had an unexpired timber deed duly recorded on the land; (2) A. D. MacLean, trustee for Interstate Cooperage Company to secure certain indebtedness therein recited—the deed of trust being duly recorded; (3) Trust Company of Washington, trustee, to secure certain indebtedness therein recited—the deed of trust being duly recorded.

The instruments were registered in the above-named order or priority and are not canceled of record and not barred by the statute of limitation.

In the statement of facts agreed on in this aspect is the following: "That neither the Interstate Cooperage Company nor A. D. MacLean, trustee, nor the Trust Company of Washington, trustee, have been made parties defendant in their own names to the foreclosure suits above referred to, nor has service of process been had on them except as they are embraced within the designation of 'all other persons claiming an interest in the subject-matter of this action,' and except as advertisement has been made in the newspapers and at the courthouse door as provided by law and as shown on Exhibits 7, 11, 17, and 21 hereto attached.

"That neither the Interstate Cooperage Company nor A. D. MacLean, trustee, nor the Trust Company of Washington, as trustee, filed with the register of deeds of Beaufort County any paper or list containing the names of taxpayers on whose property a lien or interest is held, as provided by chapter 260, Public Laws of 1931."

We think that the only exception and assignment of error made by defendant, necessary to determine this controversy, is as follows: "To the invalidity of the judgments because of the failure to make as parties in the tax foreclosure suits Interstate Cooperage Company, A. D. MacLean, trustee, and the Trust Company of Washington, trustee, each of whom is a necessary party to each of said suits."

We think this exception and assignment of error must be sustained. The principle is well stated in 21 R. C. L. (Process), sec. 3, page 1262: "It is a principle that lies at the foundation of all jurisprudence in civilized countries that a person must have an opportunity of being

heard before a court can deprive him of his rights. Any other doctrine would be antagonistic to our form of government and to the provisions of our Constitution. No court, in the ordinary administration of justice, in common-law proceedings, can exercise jurisdiction over a person unless he shall voluntarily appear, or is found within the jurisdiction of the court, so as to be served with process. Therefore, in order to authorize a court to determine the adverse claims of parties touching their rights in things, judicial process is indispensable. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter. Judgment without notice wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is justly administered. The mere fact that a defendant has knowledge of a suit, pending against him, is not sufficient to give the court jurisdiction. Even in proceedings *in rem* notice, either actual or constructive, is required, in order that the judgment may have any validity. But notice is for the sole benefit of the defendant to afford him an opportunity of being heard on the claim or the charges made against him. It is not required for the protection of the plaintiff. Moreover, a party may waive his right to have a suit begun against him by process, and he does so by making a voluntary appearance, or by authorizing another to appear for him. If jurisdiction is once lost, it can be regained only by a second service of process."

Notice and an opportunity to be heard is a fundamental principle of our jurisprudence. It is of vital importance and constitutes due process of law. *Markham v. Carver,* 188 N. C., 615. The Constitution of North Carolina, Art. I, sec. 29, says: "A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." The great lawgiver, Moses, said, Deut., ch. 19, part of verse 14: "Thou shalt not remove thy neighbor's landmark which they of old time have set in thine inheritance."

As far as the human can make it so, law should be an exact science—orderly procedure and orderly government are necessary for the law of life. Law is not a "feather on the water" and it should not be "quicksand" to trap the unwary.

In *Gammon v. Johnson,* 126 N. C., 64 (65), is the following: "In general all encumbrancers, whether prior or subsequent encumbrancers, as well as the mortgagor, should be parties to a proceeding for foreclosure, and judgment creditors as well as mortgagees. *Hinson v. Adrian,* 86 N. C., 61; *LeDuc v. Brandt,* 110 N. C., 289."

In *Jones v. Williams,* 155 N. C., 179 (185), citing Wiltsie Mortgage Foreclosures, sec. 61, is the following: "All authorities in all countries where mortgages are foreclosed by equitable actions are agreed that sub-

sequent and junior mortgagees are necessary parties to the foreclosure of a prior mortgage in order to extinguish and cut off their liens. The action can be sustained without them, but a defective title would be offered at the sale which no court would compel a bidder to accept. The rule has long been settled that in a bill to foreclose a mortgage, the rights of encumbrancers not made parties to the suit are not barred or affected by the decree. If a junior mortgagee is omitted, as a party, his remedy is to redeem from the sale under foreclosure." . . . At p. 190: "The rule rests upon the reasonable assumption that the junior encumbrancer has an interest which should be protected by the courts, and which cannot be taken from him or impaired without notice and an opportunity to be heard. 'It has long been the received rule (expressed in the maxim *audi alteram partem*), that no one is to be condemned, punished or deprived of his property in any judicial proceeding, unless he has had an opportunity of being heard.' Broome Legal Maxims (8 Ed.), p. 112."

N. C. Practice and Procedure in Civil Cases (McIntosh), p. 217, speaking to the subject: "As to prior and subsequent encumbrancers, 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."

In *Madison County v. Coxe,* 204 N. C., 58 (66), it is said: "Plaintiff cites *Orange County v. Wilson,* 202 N. C., 424, at page 427, it is clearly stated: 'Besides, the trustees of the petitioners were parties defendant and were served with process.' *Gammon v. Johnson,* 126 N. C., 64; *Jones v. Williams,* 155 N. C., 179." *Guy v. Harmon,* 204 N. C., 226 (227); *Wilkes County v. Forester,* 204 N. C., 163; *Bank v. Thomas,* 204 N. C., 599 (601-2); *Buncombe County v. Arbogast,* 205 N. C., 745; *Buncombe County v. Penland,* 206 N. C., 299 (303). The case of *Street v. Hildebrand,* 205 N. C., 208, is easily distinguishable—the question here was not considered in that case.

N. C. Code, 1931 (Michie), sec. 8037, page 2269, in part is as follows: "Every holder of a sheriff's certificate of sale of real estate for taxes shall have the right of lien against all real estate described in the certificate as in case of mortgage. . . . Such relief shall be afforded only in an action in the nature of an action to foreclose a mortgage," etc.

The General Assembly, by chapter 260, Public Laws 1931, sec. 5, provides for a "mass publication." In part, it is as follows: "The person in whose name said real estate has been listed for taxation, together with the wife or husband, if married, shall be made defendants in said action and shall be served with process as in civil actions. Notice, by posting at the courthouse door, shall be given to all other persons claiming any interest in the subject-matter of the action to appear, present and defend their claims," etc. This was adverted to in *Orange County v. Jenkins,* 200 N. C., 202, and *Orange County v. Wilson,* 202 N. C., 424.

We do not think chapter 260, Public Laws of 1931, sec. 8037-b, page 322, can affect the fundamental law requiring notice and an opportunity to be heard. It is, in part, as follows: "Between the first day of December and the first day of May after taxes are due, any lienholder or interested party may file a list with the register of deeds, containing the names of taxpayers on whose property a lien or interest is held showing such information with respect to each of such taxpayers as is hereinafter required to be recorded, by said register of deeds." . . . "And if such list contains the name of the defendant in the action, shall be made parties to said action and the cost of the service of the summons shall be taxed against the lienholder. The rights of such lienholders shall not be affected unless made parties to the action."

For the reasons given, in the judgment of the court below there is Error.

STACY, C. J., dissents.

THE BANK OF BEAUFORT, BEAUFORT, N. C. (AND W. A. ALLEN, LIQUIDATING AGENT OF THE BANK OF BEAUFORT, AND MRS. D. M. DENOYER, ADDITIONAL PARTIES PLAINTIFF), v. THE COMMERCIAL NATIONAL BANK OF RALEIGH, N. C. (AND L. A. LENTZ, RECEIVER OF COMMERCIAL NATIONAL BANK OF RALEIGH, N. C., ADDITIONAL PARTIES DEFENDANT).

(Filed 31 October, 1934.)

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

Upon a motion 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, and the motion should be denied if there is any sufficient evidence on the whole record to warrant a recovery by plaintiff. C. S., 567.

2. Evidence N b—

An essential fact may be proven by circumstantial evidence.

3. Brokers C d—Evidence that bonds given to broker were the same that broker deposited with bank with draft for collection held sufficient.

In this case there was evidence that a customer of a bank, in accordance with an agreement negotiated through the bank, sent two North Carolina bonds to a brokerage firm for sale at a fixed price, and that on that day the brokerage firm deposited in a local bank two North Carolina bonds with draft attached drawn on a New York bank in the sum agreed upon for the sale of the bonds: *Held*, the evidence was sufficient to be submitted to the jury in the customer's action to recover the proceeds of the draft as to the identity of the customer's bonds and the bonds deposited by the brokers.

4. Same: Banks and Banking C c — Evidence that bank received draft from broker as collecting agent held sufficient to be submitted to jury.

Evidence that a brokerage firm deposited in a local bank a draft drawn on a bank in another state, using the local bank's regular deposit slip, which gave it the right to charge the item back to the firm's account if not collected, *is held* sufficient to sustain the jury's finding that the local bank was an agent for collection of the draft and not a purchaser thereof in an action by customer of the brokerage firm to recover the proceeds of the draft.

5. Banks and Banking H c—Evidence that bank was trustee of proceeds of draft, entitling owner to preference held sufficient for jury.

Evidence that a bank received a draft from a brokerage firm for collection, and that prior to the collection of the draft, plaintiff's agent, upon the insolvency of the brokerage firm, notified the bank that the draft represented the purchase price of plaintiff's bonds sold by plaintiff through the brokerage firm, and that the proceeds of the draft belonged to plaintiff, *is held* sufficient to sustain the jury's finding that upon the collection of the draft the bank held the proceeds thereof as trustee for the plaintiff, the plaintiff being the owner thereof and not the brokers, and the bank had no right to credit the draft before it had been collected to a note due the bank by the brokerage firm, and upon the bank's later insolvency plaintiff was entitled to a preference in its assets for the amount collected on the draft by the bank.

APPEAL by defendant from *Daniels, J.*, and a jury, at June Term, 1934, of CARTERET. No error.

This is a civil action, originally brought by the Bank of Beaufort against the Commercial National Bank of Raleigh, to recover the sum of $2,080, the proceeds from the sale of two North Carolina State Highway Serial Bonds, No. 55480 and No. 55496. After the action was commenced, both the plaintiff bank and defendant bank went into liquidation and the receiver of each made parties.

During the trial of the action before his Honor, F. A. Daniels, judge presiding, and a jury, at the June Term, 1934, of the Carteret County

Superior Court, it developed that Mrs. D. M. DeNoyer was the owner of the two bonds in question prior to their sale, and she was, by consent of parties plaintiff and defendant, made a party plaintiff.

The following issues were submitted to the jury and their answers thereto: "(1) Were the bonds attached to the draft deposited with the Commercial National Bank, the identical bonds sent by the Bank of Beaufort to Durfey & Marr for sale for the benefit of Mrs. D. M. DeNoyer? A. 'Yes.' (2) Did the Commercial National Bank receive said draft as purchaser or for collection? A. 'For collection.' (3) Was the Commercial National Bank trustee for Mrs. DeNoyer for the proceeds of said bond? A. 'Yes.'"

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.

Julius F. Duncan for plaintiff.
Jones & Brassfield and C. R. Wheatley 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 for judgment as in case of nonsuit, the evidence is to be taken in the light most favorable to the 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 for judgment as in case of nonsuit taken at the close of the 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 under the second exception, if there is any evidence on the whole record that plaintiff is entitled to recover.

The defendants contend: "(a) There was no evidence to submit to the jury that the two North Carolina bonds attached to the draft drawn by Durfey & Marr on 9 September, 1930, and deposited in the Commercial National Bank of Raleigh were the same bonds forwarded by mail to Durfey & Marr by the Bank of Beaufort on the same day.

"(b) The evidence does not disclose that the Commercial National Bank of Raleigh accepted the draft drawn by Durfey & Marr on 9 September, 1930, and to which was attached two North Carolina State Bonds for collection, but on the other hand became the owner of the draft."

It is too well settled to need cite authorities that a fact can be proved by circumstantial as well as direct evidence. J. A. Hornaday, former cashier of the Bank of Beaufort, testified to the effect: That a client or customer of the bank, D. M. DeNoyer, on 6 September, 1930, came to the bank with two North Carolina Bonds of $1,000 each, to sell same. He inquired of Durfey & Marr, who were brokers in Raleigh, North Carolina, to see what he could get for the bonds. They gave a price of $1,040 and accrued interest—or $2,080 for the two bonds. This information Hornaday gave his customer, who expressed his willingness to sell the bonds at that price.

On 9 September, Hornaday sent the bonds by mail to Durfey & Marr. He learned that the brokers had gone into receivership. He went to Raleigh and, after going to the office of the brokers, he then went to see E. B. Crow, vice-president and cashier of the Commercial National Bank, of Raleigh, North Carolina. This was on or about 11 September, 1930. Hornaday told him that these bonds had been sent to Durfey & Marr by the Bank of Beaufort and they belonged to their client or customer. "Mr. Crow told me that Durfey & Marr had brought two North Carolina Bonds to the bank, together with other security, and had drawn a draft on some bank in New York, with the securities attached."

E. B. Crow testified that Durfey & Marr "made a deposit on the 9th, of $2,184.12, and deposited $2,000 worth of bonds. . . . On the bottom of the deposit slip is the following printed matter: 'Depositor agrees that all items for credit or for collection are received by this bank subject to the conditions printed on the back of this slip.' There is nothing on the back of this slip. . . . I would not now say that this deposit slip covers these bonds. When an item is accepted for collection there is print on the reverse side of the deposit slip. The carbon copy would have printing on it. It was the form that was in use by all the banks, giving them the right to charge back an item."

We think that the evidence is sufficient to have been submitted to the jury that the draft deposited with the Commercial National Bank with bonds attached were the identical bonds sent by Hornaday to Durfey & Marr, for sale for the benefit of the plaintiff, Mrs. D. M. DeNoyer.

Did the Commercial National Bank receive said draft as purchaser or for collection? The jury answered "For collection," and we think the evidence ample to sustain this issue.

The "depositor's slip," on its face, stated "Depositor agrees that all items for credit or for collection are received by this bank subject to the conditions printed on the back of this slip." Nothing was on the back of the slip, but E. B. Crow testified: "It was the form that was in use by all the banks, giving them the right to charge back an item."

In *Textile Corp. v. Hood, Comr. of Banks,* 206 N. C., 782 (788), speaking to the subject: "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 endorser, 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 endorsement, the bank is an agent for collection and not a purchaser.' *Temple v. LaBerge*, 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."

Was the Commercial National Bank trustee for Mrs. DeNoyer for the proceeds of said bonds? The jury answered "Yes" and we think the evidence ample to sustain this issue.

Hornaday testified in regard to the bonds: "I learned that Durfey & Marr had failed. . . . They belonged to us until sold. . . . I went after them and went in the office of Durfey & Marr and called for them. I then went to the Commercial National Bank and got an audience with Mr. Crow, who was vice-president and cashier of that institution. He told me that the bonds had been accepted for collection, but later he had credited them to the account of Durfey & Marr and applied the proceeds to the indebtedness of that firm. I asked him if he had received the proceeds from New York and he said 'No.' . . . I asked where the bonds had been sent and he said to the Hanover National Bank. In consequence of that information, I wired the Hanover National Bank advising the conditions under which the bonds were sent. . . . At that time I made inquiry of Mr. Crow as to any return on the draft from the bank to which he said he had sent it. He said there were no returns on it. . . . At the time I talked with Mr. Crow, he told me that the bonds were transmitted with the draft attached, and that the draft was drawn by Durfey & Marr. . . . He said that it was taken for collection, but later credited on the indebtedness of Durfey & Marr, Mr. Crow told me that the draft was deposited in the bank either late in the evening or the next morning, and the following afternoon they gave credit for it. I do not recall whether it was the afternoon of the 9th, or the morning of the 10th. I do not recall that I saw Mr. Crow but one time. He told me that he had later transferred the item from a collection to a credit."

The bonds were sent to Durfey & Marr as brokers, or agents, to sell. Black's Law Dictionary (3d Ed.), at p. 252, defines Broker as follows: "An agent employed to make bargains and contracts between other persons, in matters of trade, commerce, or navigation, for a compensation commonly called 'brokerage.' Story Ag., sec. 28."

The evidence was to the effect that as agents for Mrs. DeNoyer, through the Bank of Beaufort and the brokers, the bonds were sold by the brokers and draft drawn, with the bonds attached, on the Hanover National Bank. The draft, with the bonds attached, was deposited for collection in the Commercial National Bank of Raleigh, North Carolina, and before the proceeds of this draft was collected for Durfey & Marr, agents, the Commercial National Bank, on 10 September, 1930, credited same on a note of Durfey & Marr, which was at that time due or past due. The Commercial National Bank knew Durfey & Marr were insolvent and on 11 September it had notice before the draft, with the bonds attached, was paid, that the proceeds of the bonds belonged to Mrs. DeNoyer. In fact, Hornaday testified: "I asked him if he had received the proceeds from New York and he said 'No.' . . . There were no returns on it."

Hornaday further testified: "In sending the bonds, I was acting under instructions of the bank's customer and the bank never acquired the bonds except as agent. As I understood, the Bank of Beaufort was acting as agent of Mr. DeNoyer in selling the bonds and never paid one dollar for them."

According to the evidence on the part of plaintiff, the draft, with the bonds attached, had not been paid when notice was given to the Commercial National Bank by Hornaday. The bank was an agent for collection and the draft, with the bonds attached, was not the property of the bank when the notice was given. The bank, by appropriating the proceeds of the draft to its own use, became a trustee *ex maleficio*.

In 1 Mechem on Agency (2d Ed.), part of sec. 1350 (pages 988-989-990), is the following: "It may be stated as a general principle that, wherever property or funds have come into the hands of the agent impressed with a trust in favor of the principal, such property or funds may be followed by the principal as long as they can be identified until they come into the possession of a *bona fide* purchaser for value without notice of the trust. So, if the property or funds have been disposed of or reinvested by the agent, the trust will in equity adhere to the proceeds in his hands in the same manner and to the same extent as to the original estate; that is, as long as they can be traced and until they are acquired by a *bona fide* purchaser without notice. It does not matter that the legal title to the fund may have changed. Equity will follow it through any number of transmutations and preserve it for the owner so long as it can be identified. And if it cannot be identified by reason of being

mingled with the funds or property of the agent, then the principal, though he may not be able to identify his fund specifically, will be entitled to a charge upon the whole mass to the extent that the trust fund is traceable into it, and has operated to enhance it. . . . In case of the bankruptcy of the agent, neither the property nor the money would pass to his assignees for general administration, but would be subject to the paramount claim of the principal." *Bank v. Crowder,* 194 N. C., 312; *Wood v. Bank,* 199 N. C., 371.

We see no error in the court below in refusing to give defendant's prayer for instruction or in the charge as given.

In the judgment of the court below we find

No error.

L. M. SAVAGE, INDIVIDUALLY, AND AS A MEMBER OF PARTNERSHIP OF SAVAGE SEED COMPANY, AND AS ADMINISTRATOR OF J. E. SAVAGE, DECEASED, v. R. E. CURRIN, LIZZIE CURRIN, AND GEORGE PEED.

(Filed 31 October, 1934.)

1. Pleadings F a—

The granting of a bill of particulars pursuant to C. S., 534, lies in the sound discretion of the trial judge.

2. Pleadings F c—

Where a motion for a bill of particulars is allowed the evidence offered at the trial must be confined to the specific items set forth in such bill.

3. Same—

Where plaintiff's failure to comply with an order of the court to file an itemized statement of the account sued on is due to the fact that his records had been destroyed by fire, plaintiff is not precluded by his failure to comply with the order from establishing the debt by competent evidence. C. S., 534.

4. Account Stated A a—

The acceptance of an account rendered or the failure to object to its correctness within a reasonable time creates a new contract to pay the amount due, and the creditor may maintain an action on such new promise.

5. Limitation of Actions E c—

Upon the plea of the statute of limitations the burden is on plaintiff to show that his claim is not barred.

6. Same—Where plaintiff offers no evidence that claim is not barred, defendant's motion of nonsuit on plea of statute is properly granted.

Where plaintiff resists defendant's plea of the statute of limitations solely on the ground that defendant left the State prior to three years

from the accrual of the cause of action, and defendant denies the allegation of nonresidence, in the absence of evidence by plaintiff in support of the allegation of nonresidence, defendant's motion as of nonsuit is properly allowed.

CIVIL ACTION, before *Cowper, Special J.*, at May Term, 1934, of PITT.

A partnership, known as the Savage Seed Company, operated a mercantile establishment in the town of Greenville, North Carolina, and it was alleged that the defendant R. E. Currin bought from time to time goods, wares and merchandise consisting of flour, meat, hay, beans, etc., from said partnership during the year 1922, and that there was a balance of $245.00 due on the account. The books and records of the partnership were destroyed by fire in 1924. On 23 November, 1933, the plaintiff filed an affidavit in the Superior Court of Pitt County, alleging that the defendants R. E. Currin and Lizzie Currin, his wife, were residents of the State of Georgia and had removed from this State with intent to defraud their creditors. Upon such affidavit the plaintiff applied for a warrant of attachment against a certain lot of tobacco in the possession of defendant George Peed, which it was alleged belonged to the defendants R. E. Currin and Lizzie Currin. It was further alleged in the complaint that the tobacco then in Pitt County, North Carolina, in possession of said Peed was worth approximately $1,000. A warrant of attachment was duly issued and served. The defendant R. E. Currin filed an answer alleging that he had resided in Pitt County, North Carolina, continuously "from prior to 1922 until during the year 1926, and if he had incurred any indebtedness with the plaintiff, which he denies, during the year 1922, same is barred by the three-year statute of limitations, and that he hereby pleads same to the bar of any recovery in this action." Thereafter the defendant R. E. Currin, Jr., was granted permission to interplead by reason of the fact that he claimed the tobacco attached in Pitt County as his property and not the property of his father and mother, R. E. Currin and Lizzie Currin. He alleged that he planted and cultivated the tobacco in controversy in the State of Georgia and sent it to North Carolina for sale. Other appropriate pleadings were filed, and thereafter the defendant served notice upon the plaintiff "to produce an itemized statement showing the indebtedness sued upon." The plaintiff answered the notice, declaring that their books and records had been lost or misplaced as a result of a fire, "which burned and destroyed their original entry book and ledger, and the plaintiff has only a summary statement of said account set up in a book showing the accounts and amounts thereof due the plaintiff, and for that reason is unable to furnish an itemized statement of the account sued on, which was made with the plaintiff during the years 1921 and 1922." It was further alleged by the plaintiff in answer to said notice

that the defendant R. E. Currin had admitted the correctness of the account and had promised to pay same.

At the trial the plaintiff offered evidence tending to show a balance on the account for the year 1922 of $245.00, and that same was due by the defendant. A witness for plaintiff said: "I talked the matter over with Mr. Currin as to the amount. He looked over the account. He never disputed it. I think we agreed about it." This conversation took place in the fall of 1923. Witness further testified: "Mr. Currin said just as soon as he sold his property he would pay me. I was talking about getting judgment. . . . I saw Mr. Currin; he was selling his crop; he said, 'Yes, I am going to sell out what I have and am going to Georgia.' . . . It was right in the store. When he walked in I spoke about this account. He said he could not pay it, but was fixing to sell his property, and as soon as he got the money he would pay up. I don't know about what time it was. Could not say whether it was December or January. We were standing at the desk. He was close by, the account was present. . . . It was itemized. We had a fire in 1924. I don't know what became of my books, most of them were destroyed. . . . I think the account of Mr. Currin was burned. I have made a thorough search. . . . When I called Mr. Currin into the office and asked him about the account I think I had the account before me. . . . He did examine the account. He never said anything at all, but did say as soon as he disposed of the land he was going to pay it, and that the account was before him at the time he made the statement. . . . The item referred to here on account of R. E. Currin is the balance due on the ledger account shown him at the time. . . . I have no book in court which I have said Mr. Currin had before him when any conversation took place between us, that is, the book opened up before him when he made the statement which I have testified about. I have no such book and no such book has been opened in court. I made an effort to find it. I think it was burned. I haven't seen it since the fire."

At the conclusion of plaintiff's evidence the trial judge was of the opinion that there was "no evidence in the record in any way showing any such account, either for the year 1922 or for the year 1923, and that upon the whole of the evidence the motion of defendants for judgment of nonsuit should be allowed."

From the foregoing judgment plaintiff appealed.

S. J. Everett for plaintiff.
J. H. Harrell for defendants.

BROGDEN, J. (1) What is the effect of a request for a bill of particulars, as provided by C. S., 534?

(2) Is the claim of plaintiff barred by the statute of limitations?

At the outset it must be noted that the granting of a bill of particulars pursuant to C. S., 534, lies in the sound discretion of the trial judge. *Temple v. Telegraph Co.*, 205 N. C., 441, 171 S. E., 630. When such bill of particulars is required or allowed the evidence offered at the trial must be confined to the specific items set forth in such bill. *Gruber v. Ewbanks*, 199 N. C., 335, 154 S. E., 318; *Pemberton v. Greensboro, N. C.*, 205 N. C., 599, 172 S. E., 196.

In the case at bar the plaintiff could not furnish the items constituting the account for the alleged reason that his books had been destroyed by fire. Manifestly under such circumstances the failure to file a list of the items constituting the claim did not preclude the plaintiff from establishing his debt by competent evidence. Otherwise, a fire would discharge a valid debt. Moreover, there was evidence that the defendant R. E. Currin had examined the account in the store of plaintiff, had observed the balance due and had promised to pay it. Consequently, the plaintiff was entitled to maintain his cause of action upon such promise. It is accepted law in this jurisdiction that when an account is rendered and accepted, or when so rendered there is no protest or objection to its correctness within a reasonable time, such acceptance or failure to so object creates a new contract to pay the amount due. *Gooch v. Vaughan*, 92 N. C., 610; *Copeland v. Telegraph Co.*, 136 N. C., 11, 48 S. E., 501; *Davis v. Stephenson*, 149 N. C., 113, 62 S. E., 900; *Richardson v. Satterwhite*, 203 N. C., 113, 164 S. E., 825.

Therefore the plaintiff offered competent evidence tending to establish the liability of defendant R. E. Currin upon the account in controversy.

However, the plea of the statute of limitations is a lion in the path of recovery. The account was made in 1922. The promise to pay was made in 1923. The suit was instituted in November, 1933. Upon the plea of the statute of limitations the burden is upon the plaintiff to show or to offer evidence tending to show that he has brought a live claim to court. *Rankin v. Oates*, 183 N. C., 517, 112 S. E., 32; *Phillips v. Penland*, 196 N. C., 425, 147 S. E., 731; *Drinkwater v. Telegraph Co.*, 204 N. C., 224, 168 S. E., 410.

While the plaintiff alleged that the defendants R. E. Currin and Lizzie Currin left the State in January, 1924, and since said time have been residents of the State of Georgia, such allegation was specifically denied in the answer, and there was no evidence offered at the trial of the nonresidence of defendants. See C. S., 411; *Lee v. McKoy*, 118 N. C., 518, 24 S. E., 210.

Hence the ruling of the trial judge was correct.

Affirmed.

MISSOURIA WELLS, DUFFY HARRIS, BESSIE MOYE, AND ALONZA HARRIS AND CHRISTANNA HARRIS, BY THEIR NEXT FRIEND, SULA HARRIS, v. WILLIAM E. ODUM, MAMIE E. CASTET, A. D. HARRIS, EXECUTOR, AND INDIVIDUALLY.

(Filed 31 October, 1934.)

Wills D m—Where duty of propounding will devolves upon beneficiaries court may allow fees to their attorneys to be paid out of estate.

Where an executor named in a will advises the chief beneficiaries named therein that a caveat had been filed and that his interest was identical with the caveators', but that the beneficiaries could use his name as executor in joining the propounders in the caveat proceedings, and it appears that the will would not be proven in solemn form unless the beneficiaries propounded same: *Held*, upon the determination of the proceedings in favor of the propounders, the trial court has the discretionary power to allow reasonable fees out of the estate to the attorneys employed by the propounders, the employment of the attorneys being necessary to the successful prosecution of the proceedings.

CIVIL ACTION, before *Daniels, J.*, at April Term, 1934, of CRAVEN.

On 4 June, 1928, Minnie L. Odum executed a last will and testament. The testatrix had no issue and died on 23 February, 1932. The propounders, William E. Odum and Mamie E. Castet, are the children of the deceased husband of Minnie L. Odum by a former marriage. The caveators are the brothers and sisters of testatrix, and Bessie Moye, Alonza Harris and Christanna Harris, minors, are the children of a deceased brother of Minnie L. Odum.

The will gave to her brothers, A. D. Harris and Duffy Harris, and to her sister, Missouria Wells, one-fourth each "of my personal property and mixed of what nature and kind soever," etc. The will also devised to Mamie E. Castet and William E. Odum certain real property. Referring to these devises, the will stated: "I give this property back because it was my husband's will and wish, and I cannot take and give to others that which was intended for his children." A. D. Harris was named executor in the will and duly qualified. Thereafter Missouria Wells, Duffy Harris, Bessie Moye and the infant children of J. H. Harris, deceased, by their next friend, Sula Harris, filed a caveat to said will, in which it was alleged that the paper-writing purporting to be a will was not the last will and testament of testatrix. It was further alleged in the caveat that A. D. Harris qualified as executor on 24 March, 1932. After the caveat was filed, A. D. Harris, executor, wrote a letter to William E. Odum and Mrs. Mamie Castet, advising them of the caveat and stating, "I am not expressing any opinion as to the merits of the proceeding, but my interest is adverse to yours and with

the caveators, and for this reason I agree that you may use my name as the executor named in the paper-writing as propounder, to be joined with yours and at your cost and expense," etc.

The cause was transferred to the civil-issue docket and at the November Term, 1933, of the Superior Court of Craven County a judgment was entered upon the verdict of the jury, declaring that the will and every part thereof was the last will and testament of Minnie L. Odum. Thereafter, Mamie E. Castet and William E. Odum filed a petition before the clerk of the Superior Court of Craven County, alleging that as the interest of the executor was adverse, the burden of propounding the will had fallen upon them, and that in upholding the validity of the will, they had employed counsel, and they requested that counsel be paid out of the assets of the estate the sum of $1,000 for services rendered the estate. The clerk allowed the petition and awarded the sum of $600.00. From such order the caveators appealed to the judge of the Superior Court. The cause was heard by Daniels, J., at the June Term, 1934, of Craven Superior Court. The judge found certain facts, and among such findings are the following: "That responsibility of securing probate of said will in solemn form devolved upon petitioners, in their discretion, who employed lawyers to counsel and represent them in the proceedings, and it was necessary for prosecution of said probate for said petitioners to employ some lawyer to advise them, and necessary for said petitioners and their lawyers to give a great deal of time and attention to the business; that trial of the matter required a full week of November Term, 1932, and following a verdict in favor of said will caveators appealed to the Supreme Court, wherein a new trial was ordered, and another whole week was taken up with the matter at November Term, 1933, when said will was established by verdict of the jury. . . . That petitioners were justified in propounding said will and by their efforts alone same was established, and if they had failed to employ lawyers and prosecute the matter the will of testatrix would have been defeated by the executor and his brothers and sister, who in said proceedings were represented by three attorneys. That said letter constituted notice to said petitioners of the intention of said A. D. Harris not to attempt to prove said will in solemn form, nor to resist the caveat filed by his brothers and sister and others, and that it was to his interest and advantage that said will should not be proved. . . . That if said petitioners had not propounded said will, it would not have been proven in solemn form, and the wishes of the testatrix would have been defeated; that it was necessary for said petitioners to employ lawyers, . . . and that a reasonable attorneys' fee is properly an item of expense to the probate of the will in solemn form."

Upon the facts so found the judge allowed counsel fees in the sum of $600.00, and directed the executor to pay said sum out of the assets of the estate.

From such order the caveators appealed.

H. P. Whitehurst and R. A. Nunn for propounders.

D. H. Willis and Ward & Ward for caveators and A. D. Harris, executor.

BROGDEN, J. Is reasonable compensation for attorney for successful propounders in a caveat proceeding allowable and payable out of the assets of the estate?

The allowance of compensation to attorneys for caveators was discussed and decided by this Court *In re Will of Howell,* 204 N. C., 437, 168 S. E., 671. The Court said: "There seems to be no precedent in this jurisdiction for ordering an executor bringing the proceedings to pay out of the estate counsel fees for the attorneys for caveators. Nor is the authority supported in tendency by our decisions. They point in the other direction." Therefore, the vital inquiry is whether propounders stand upon a different footing.

It is a crime in this State to fraudulently suppress or conceal a will. C. S., 4256. Obviously the basis for making such suppression a crime is the fact that it is the policy of the law that wills should be probated, and that the rights of the parties in cases of dispute should be openly arrived at according to the orderly processes of law. Moreover, C. S., 4139, and C. S., 4141, by implication at least, require the probate of a will. Furthermore, C. S., 4140, provides that if the executor fail to prove the will according to law, any devisee or legatee named in the will, "or any other person interested in the estate, may make such application upon ten days notice thereof to the executor."

In the case at bar the interest of the executor was identical with that of the caveators. He did not conceal this interest, but openly advised the propounders by letter of his position. In view of such circumstances, it was the duty of the propounders to establish the validity of the will. The trial judge found as a fact that the "responsibility of securing probate of said will in solemn form devolved upon the petitioners," and that if they "had not propounded said will it would not have been proven in solemn form and the wishes of the testatrix would have been defeated."

The question of law presented by this appeal has not been decided in this State, but it would seem to be clear that if the law imposes a duty upon a person, or group of persons, with respect to probating and establishing the validity of a will, in the performance of such duty, in good

faith, reasonable expenses thereby incurred should be allowed and paid out of the fund or property which is the subject of the litigation.

Manifestly, if the executor had been in a position to probate and establish the validity of the will, reasonable attorneys' fees could have been allowed in the discretion of the court. This idea was expressed in *Parsons v. Leak,* 204 N. C., 86, 167 S. E., 563, as follows: "It has been the policy of the law to permit and allow reasonable commissions to executors and administrators, together with reasonable attorney's fees and such other assistance as might be reasonably necessary to proper and efficient administration." See, also, *Overman v. Lanier,* 157 N. C., 544, 73 S. E., 192; *Shepard v. Bryan,* 195 N. C., 822, 143 S. E., 835. See, also, *Butt v. Murden,* 69 A. L. R., 1048, and annotation.

Upon the particular facts disclosed by the record, the Court is of the opinion that the trial judge did not transcend his power or abuse his discretion in awarding compensation to the attorneys of the propounders. He found the compensation so awarded to be reasonable, and there is nothing in the record warranting a contrary view.

Affirmed.

D. W. WHITFORD AND WIFE, KATIE MAY WHITFORD, v. THE NORTH CAROLINA JOINT-STOCK LAND BANK OF DURHAM AND THE INTERSTATE TRUSTEE CORPORATION, TRUSTEE.

(Filed 31 October, 1934.)

1. Appeal and Error J f—

While the Supreme Court has the power on appeal in injunction proceedings to find and review the findings of fact, where the findings are in accord with the greater weight of the evidence the Supreme Court will not be disposed to disturb the findings.

2. Mortgages H o—Agreement to defer execution of deed is revocable at will of cestui in absence of agreement as to time of forbearance.

A parol agreement to defer the execution of the deed from the trustee to the *cestui que trust,* the purchaser at the foreclosure sale, in order to give the trustor time to raise funds to redeem the lands, is revocable at the will of the *cestui que trust* where there is no agreement as to the length of time the execution of the deed should be deferred.

3. Mortgages H p: Appeal and Error J c—Inadequacy of purchase price alone is insufficient to set aside foreclosure.

Inadequacy of purchase price, standing alone, is not sufficient to set aside a deed to the purchaser at a foreclosure sale where the sale is made in conformity with the power of sale in the instrument, and, upon the return of a temporary restraining order in a suit attacking the validity

of the foreclosure, the court's refusal to find the value of the lands at the time of the sale will not be held for error, since such finding, in the absence of allegations of fraud, is immaterial.

4. Mortgages C b: Appeal and Error J c—Refusal to find immaterial fact will not be held for error.

Where both the husband and wife sign and deliver a note and deed of trust securing same it is immaterial which of them holds title to the lands, and upon the return of a temporary restraining order in a suit to set aside foreclosure of the deed of trust, an exception to the court's refusal to find which held title will not be sustained.

5. Mortgages H p—In suit attacking foreclosure, remedy against transfer of property is by notice of lis pendens and not by injunction.

In a suit attacking the validity of a foreclosure sale under a deed of trust, a temporary order enjoining further transfer of the property by the *cestui que trust*, the purchaser at the sale, is properly dissolved, since plaintiff trustor has an adequate remedy at law by filing notice of *lis pendens* in accordance with the statute. C. S., 500, *et seq.*

6. Injunctions B b—

Where there is a full, complete, and adequate remedy at law, the equitable remedy of injunction will not lie.

7. Mortgages H o—

Ch. 275, Public Laws of 1933, has no application after a foreclosure sale under power contained in the instrument has been confirmed.

APPEAL by plaintiffs from an order of *Parker, J.*, at September Term, 1934, of JONES, dissolving a restraining order. Affirmed.

This is a civil action, instituted on 8 August, 1934, by the plaintiffs to restrain the defendants from making further assignment or sale of certain real estate; and to cancel and set aside, "on the ground that the consideration is inadequate," a deed for said real estate from the defendant Interstate Trustee Corporation, trustee, to the codefendant North Carolina Joint-Stock Land Bank of Durham, dated 5 April, 1934, and recorded .... May, 1934, in the registry of Jones County; and for an accounting between the plaintiffs and the defendant bank.

The court found, in substance, that the plaintiffs borrowed from the defendant bank on 27 March, 1923, the sum of $6,000, and to secure the loan delivered to said bank a note payable on an amortization plan in semiannual installments on the first of April and first of October of each year till paid, and executed to a trustee a deed of trust on the land described in the complaint, and that the defendant Interstate Trustee Corporation has been duly made substitute trustee for said deed of trust; that on 3 March, 1934, there were defaults in the terms of the amortization plan of the note and of the deed of trust in that no semiannual installments had been paid since October, 1931, and in that the taxes on the land for the years 1929, 1930, 1931, 1932, and 1933 were unpaid;

and that on said 3 March, 1934, the substitute trustee, at the request of the defendant bank, the holder of the note, advertised said lands for sale, and that pursuant to such advertisement and the terms of the deed of trust said land was sold on 5 April, 1934, at public auction, when and where the defendant bank became the last and highest bidder at the sum of $4,900, and no increase or upset bid was filed; and that in the month of May, 1934, the substitute trustee, upon payment of said purchase price, conveyed said lands to the defendant bank by deed dated 5 April, 1934, and recorded on .... May, 1934, in the public registry of Jones County; and that the defendants had indulged the plaintiffs from time to time, prior to the aforesaid sale, to enable them to make payment of the semiannual installments due and in arrears under the terms of the amortization plan of the note and the deed of trust, and that said installments and arrears have not been paid; and that at the time of said sale the plaintiffs contended that there was an unpaid balance on said note of $3,737.94, and the defendants contended that there was an unpaid balance of approximately $4,700; and that there were subsequent to said deed of trust two past-due mortgages on said land for the sums of $4,000 and $435.00, respectively, with accumulated interest.

Upon the foregoing findings of fact the court reached the conclusion that any rights to which the plaintiffs are entitled under their complaint and replication could be fully, completely and adequately preserved by filing notice of *lis pendens* as by law provided, and dissolved the temporary restraining order. The plaintiffs excepted and appealed to the Supreme Court, assigning errors.

Warren & Warren for appellants.
J. S. Patterson and R. E. Whitehurst for appellees.

SCHENCK, J. The ten assignments of error in the record may be discussed in four groups, namely, (1) those based upon exceptions to the court's finding that the plaintiffs were in default, (2) those based upon exceptions to the court's refusal to find a breach by the defendant bank of a parol agreement, made after the foreclosure sale, to hold up delivery of deed in order to give the plaintiffs more time to raise money to redeem their land, and (3) those based upon exceptions to the court's failure to find the value of the plaintiffs' land at the time of the foreclosure sale, and (4) those based upon the failure of the court to find that the title of the land was in the *feme* plaintiff.

As to the first group: It is true that in one aspect of the pleadings and evidence it was a controverted fact as to whether the plaintiffs were in default at the time of the institution of this action, and although there may have been evidence tending to support the allegation of the com-

plaint "that the plaintiffs have paid all of said installments, or arranged for all of said installments to be paid," there was ample evidence to justify the court's finding that the plaintiffs had failed to pay certain past-due installments, and were therefore in default. While on appeal in injunction proceedings the Supreme Court has the power to find and to review the findings of fact, *Teeter v. Teeter,* 205 N. C., 438, we are not disposed to change his Honor's findings, since we are of the opinion that they are not only supported by the evidence, but are in accord with the greater weight thereof.

As to the second group: It was likewise a controverted fact as to whether the delivery of the deed from the substitute trustee to the co-defendant bank was in breach of a parol agreement between the plaintiffs and defendant bank to hold the matter up and give the plaintiffs further time to raise the money to save their property, and there was competent evidence offered on both sides of this controversy. His Honor found for the defendants, and we are of the opinion that such finding was in accord with the weight of the evidence. There is no evidence in the record tending to show how long the defendants agreed "to hold the matter up" or how much "further time to raise the money" they agreed to give. If such a parol agreement was made, with the element of time entirely absent, it would have been revocable at the will of the defendant bank.

As to the third group: In the absence of any allegation or proof of fraud, the value of the land sold at the time of the foreclosure was immaterial, since mere inadequacy of purchase price standing alone is not sufficient to entitle the plaintiffs to have set aside a deed given by a trustee where a deed of trust has been foreclosed in conformity to the power of sale therein contained. *Roberson v. Matthews,* 200 N. C., 241.

As to the fourth group: In view of the fact that the *feme* plaintiff, as well as the male plaintiff, executed and delivered both the note and the deed of trust, it is obviously immaterial which of the plaintiffs held title to the land.

His Honor concluded his order with the following language: "The court further finds that any rights or remedies to which plaintiffs may be entitled by reason of their complaint and replication can and may be preserved by filing notice of *lis pendens,* as provided by statute, and that for any rights or remedies that they may have by reason of their pleadings, they have a full, complete and adequate remedy at law."

We think his Honor's conclusion is a correct one. Article 2, ch. 12, of Consolidated Statutes, provides that "In an action affecting the title to real property, the plaintiff, at or any time after the time of filing a complaint, . . . may file with the clerk of each county in which the property is situated a notice of the pendency of the action, . . ." (sec. 500), and that "any party to an action desiring to claim the benefit

of a notice of *lis pendens* . . . shall cause such notice to be cross-indexed, ..." (sec. 501), and that "from the cross-indexing of the notice of *lis pendens* only is the pendency of the action constructive notice to a purchaser or encumbrancer of the property affected thereby; and every person whose conveyance or encumbrance is subsequently executed or subsequently registered is a subsequent purchaser or encumbrancer, and is bound by all proceedings taken after the cross-indexing of the notice to the same extent as if he were made a party to the action. . . ." (Sec. 502.)

By complying with these plain statutory provisions the plaintiffs can preserve every right they may have under their pleadings; and it is too well settled in this jurisdiction to require citations of authority that where there is a full, complete and adequate remedy at law the equitable remedy of injunction will not lie.

Chapter 275, Public Laws of 1933, has no application to this case, since the sale had been made and confirmed and the deed from the trustee to the purchaser had been of record for approximately three months before the institution of this action, and the act provides that any person having a legal or equitable interest in real estate "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 confirmation thereof, upon the ground that the amount bid or price offered therefor is inadequate and inequitable and will result in irreparable damage" to such interested person.

Affirmed.

STATE v. SHERIDAN H. MANSFIELD.

(Filed 31 October, 1934.)

1. Constitutional Law F c—

A person cannot be tried twice for the same offense. N. C. Constitution, Art. I, sec. 17; Federal Constitution, Amendment 5.

2. Criminal Law F d—

Bastardy proceedings against defendant under C. S., 265, *et seq.* (repealed by sec. 9, ch. 228, Public Laws of 1933), being civil, will not support a plea of former jeopardy in a prosecution under ch. 228, Public Laws of 1933, for wilful failure to support his illegitimate child.

3. Constitutional Law F f—Held: Offense was committed after effective date of statute, and plea of ex post facto cannot be sustained.

A defendant may be prosecuted under ch. 228, Public Laws of 1933, for wilful failure to support his illegitimate child born after the passage of the act although the child was begotten before the effective date of the

statute, and defendant's contention that in regard to such prosecution the statute is *ex post facto* cannot be sustained, since the offense is the wilful failure to support the child, and the time it was begotten is immaterial. N. C. Constitution, Art. I, sec. 32.

APPEAL by defendant from *Daniels, J.,* and a jury, at March Term, 1934, of CARTERET. No error.

This is a criminal action, tried before Judge F. A. Daniels and a jury at the March Term, 1934, of the Superior Court of Carteret County, on appeal from the recorder's court of Carteret County.

On 25 October, 1933, Leah Willis took out a warrant for the defendant Sheridan H. Mansfield, charging that he unlawfully and wilfully neglected and refused to support his illegitimate child, begotten on the person of Leah Willis. The said child being about six weeks of age. The defendant Sheridan H. Mansfield, in the recorder's court, pleaded not guilty. He was convicted and sentenced and appealed to the Superior Court. He was convicted in the Superior Court.

The judgment in the Superior Court is as follows: "Defendant charged with abandonment, appealed from recorder's court to Superior Court, 7 November, 1933. Trial by jury, verdict guilty. Judgment, let the defendant be imprisoned in the county jail for a term of six months and assigned to work on the public highways and Public Works Commission. Judgment of imprisonment suspended on condition that the defendant pay to Dr. S. W. Thompson the sum of $45.00 for attending Leah Willis in her confinement and on condition that the defendant pay the cost of the action, and a further condition that he pay to Leah Willis, on the first of each month, beginning with the month of April, 1934, four dollars a week until the arrival of her infant at the age of ten years, and on further condition that the defendant remain of good behavior."

The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court.

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

A. B. Morris for defendant.

CLARKSON, J. The defendant introduced no evidence, and at the close of the State's evidence made a motion for judgment of nonsuit. C. S., 4643. The court below overruled this motion, and in this we can see no error.

Public Laws of North Carolina, 1933, ch. 228, sec. 1, is as follows: "Any parent who wilfully neglects or who refuses to support and maintain his or her illegitimate child shall be guilty of a misdemeanor and subject to such penalties as are hereinafter provided. A child, within

the meaning of this act, shall be any person less than ten years of age, and any person whom either parent might be required, under the laws of North Carolina, to support and maintain if such child were the legitimate child of such parent."

The following is section 7: "Upon the determination of the issues set out in the foregoing section, and for the purpose of enforcing the payment of the sum fixed, the court is hereby given discretion, having regard for the circumstances of the case and the financial ability and earning capacity of the defendant and his or her willingness to coöperate, to make an order or orders upon the defendant, and to modify such order or orders from time to time as the circumstances of the case may in the judgment of the court require. The order or orders made in this regard may include any or all of the following alternatives: (a) Commit the defendant to prison for a term not to exceed six months; (b) suspend sentence and continue the case from term to term; (c) release the defendant from custody on probation, conditioned upon the defendant's compliance with the terms of the probation and the payment of the sum fixed for the support and maintenance of the child; (d) apprentice the defendant to the superintendent of the county home, to be employed there at a salary to be fixed by the board of county commissioners, or to some other person who will give bond for compliance with this act, at a salary to be fixed by the board of county commissioners, the proceeds of his earnings to be paid to such person as the court may direct for the support, maintenance and education of the said child; and (e) order the defendant to pay to the mother of the said child the necessary expenses of birth of the child and suitable medical attention for her; (f) require the defendant to sign a recognizance, with good and sufficient security, for compliance with any order which the court may make in proceedings under this act."

The defendant excepted and assigned error as follows: "The court erred in denying defendant's motion to dismiss at beginning of trial on former jeopardy plea and nonapplication of the statute." This exception and assignment of error cannot be sustained.

It was in evidence on the part of the State that an action was brought by the mother before a justice of the peace, on 4 October, 1933, under chapter 6, Bastardy, C. S., 265, etc.

Section 9, chapter 228, of Public Laws of 1933, is as follows: "All acts or parts thereof inconsistent with the provisions of this act are hereby repealed. In particular, the following sections of Consolidated Statutes of North Carolina are hereby repealed: Sections 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 1632, subsection 1."

The judgment in the action before the justice of the peace, in part, was: "That the said defendant Sheridan H. Mansfield pay to the said

plaintiff Leah Willis the sum of $100 and the cost of this action," etc. It is a fundamental principle that a person cannot be tried twice for the same offense, and a plea of former acquittal or conviction is a good plea. *S. v. Clemmons, post,* 276. Const. of N. C., Art. I, sec. 17; Const. of U. S., Amendment V.

In *Richardson v. Egerton,* 186 N. C., 291 (292), is the following: "This Court has decided that bastardy proceedings are civil and not criminal in their nature, and are intended merely for the enforcement of a police regulation. *S. v. Addington,* 143 N. C., 685; *S. v. Liles,* 134 N. C., 735; *S. v. Edwards,* 110 N. C., 511. In the *Liles case, supra,* the matter is fully discussed and authorities cited."

The former bastardy proceedings have been repealed by the Laws of 1933, *supra.* The action was a civil one. We see no error in the charge of the court below.

Leah Willis testified as follows: "My name is Leah Willis; live at Morehead City. Am eighteen years old. Baby in my arms is mine, six months old. Sheridan H. Mansfield, the defendant, is the father of the child. Has contributed nothing to support. Has not paid me a penny; paid nothing towards the doctor's bill.

"Child born 5 September, 1933; have asked Mansfield several times to support her. Have never talked to him since the child was born. Made my demand through the court. Asked him before the child was born and he refused. Asked him February, 1933, before the child was born.

"Had case tried before the justice of the peace in a bastardy proceeding. Mansfield was ordered to pay me and declared the father of the child. He did not appeal from it and he has not paid me a cent."

The act under which defendant is indicted was ratified 6 April, 1933. The child was born 5 September, 1933, after the passage of the act.

The Constitution of North Carolina, Art. I, sec. 32, is as follows: "Retrospective laws, punishing acts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust and incompatible with liberty; wherefore no *ex post facto* law ought to be made. No law taxing, retrospectively, sales, purchases, or other acts previously done ought to be passed." It is well settled and the Constitution provides that no *ex post facto* law can be passed.

It is immaterial when the child was begotten. It was born after the passage of the act and the offense is the wilful neglect or refusal to support and maintain his or her illegitimate child. See *S. v. Cook, post,* 261; *S. v. Henderson, post,* 258.

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

No error.

MILLARD J. REVIS v. THE CITY OF ASHEVILLE.

(Filed 31 October, 1934.)

1. Pleadings I a—Allegation held to be one of probative fact and not of ultimate fact, and was properly stricken out on motion.

Plaintiff brought suit against defendant city to recover for personal injuries sustained by plaintiff by reason of the alleged negligence of the city in the construction, operation, and maintenance of a municipal swimming pool. Issue was joined in the pleadings as to whether the city, in the construction, operation, and maintenance of the pool, was engaged in a business enterprise for profit or in the performance of a governmental function. Plaintiff's allegation in his reply to the effect that the city carried accident and liability insurance on the pool and other recreational features of the municipal park was stricken out upon motion under C. S., 537, and plaintiff appealed: *Held*, the allegation as to the city carrying accident and liability insurance was an allegation of an evidential and probative fact and not of a material, essential, or ultimate fact, and there was no error in the trial court's ordering it stricken out.

2. Same—

Whether evidence in support of an allegation would be competent upon the trial does not determine plaintiff's right to have it stricken out upon motion under C. S., 537, the test being whether the allegation is of a probative or of an ultimate fact.

3. Appeal and Error J g—

Upon an appeal from an order striking out an allegation in the reply, affirmed upon the ground that the allegation was of a probative and not an ultimate fact, the Supreme Court will not decide the competency of evidence upon the trial in support of such allegation.

APPEAL by plaintiff from an order of *Finley, J.*, at July Term, 1934, of BUNCOMBE, allowing motion of the defendant, made in apt time, to have stricken out certain allegations in the reply of the plaintiff, under the provisions of C. S., 537. Affirmed.

This is a civil action for damages instituted in the general county court of Buncombe, wherein the plaintiff in his complaint alleges that he was injured by the negligence of the defendant in the construction, operation and maintenance of a swimming pool in a recreation park, and further alleges that the city operated said pool in said park "as a business enterprise for the purpose of deriving to itself revenue and profits, and in competition with and in the same manner as the owners of other privately owned and operated parks and swimming pools in the vicinity, . . . and has at all times charged an admission fee for entrance to and use of said swimming pool, . . . and did so derive a profit in the sum of $2,788.21 in the year commencing July, 1932. . . ."

The defendant in its answer denies the allegation of negligence; and also denies that it has ever operated and maintained a swimming pool in

a recreation park as a business enterprise for the purpose of deriving revenue and profits for itself, or for the purpose of competing with other swimming pools in the vicinity; and in its further defense alleges that "the city of Asheville, through its lawful authorities and in the exercise of its governmental functions as a municipal corporation, acquired, established and constructed a recreation park near its corporate limits, and in the exercise of its governmental functions and prerogatives operated and is now operating said recreation park for the amusement, entertainment and recreation of its citizens and residents, and to promote the health and welfare of its people; that in connection with said park the city maintains, as a section or one of the principal features thereof, where it has on display, free of any charge, a large number of rare animals, fowls and reptiles, as well as many other interesting features which are free to the public, and in connection with which there is no service charge to individual members of the public; . . . that in addition to the many other amusement features of said park the defendants, in its capacity as a municipal corporation and in the exercise of its governmental functions and prerogatives, constructed and maintains a swimming pool in said recreation park; that said swimming pool was constructed and has been maintained and is being operated in season for the use and benefit of the public of the city of Asheville, and for the recreation, entertainment and health of the public of said city; . . . that the construction of said pool, and the operation of the same, was not for profit, and the charge made for the use of the same was intended to cover only the actual expenses to the city for the operation of said pool, and for providing the incidental privileges connected therewith, such as locker and locker-room, shower bath and facilities of this kind, . . . and that the city of Asheville, in the construction, maintenance and operation of said pool, was engaged in the performance of a governmental function having for its purpose the promotion of the health and welfare of its people; that in so doing it was exercising its lawful governmental rights and duties as a municipal corporation, and the defendant is advised and believes that it is in no way responsible for any injury the plaintiff may have sustained, and is in no way liable to the plaintiff for any damage resulting therefrom."

The plaintiff, in his reply, alleges that the defendant "at the time and times hereinbefore mentioned operated the same (the swimming pool) as a business or commercial enterprise and not as a governmental function of said city of Asheville; that in connection with said park and in the operation of the same at the time and times hereinbefore mentioned, the said city of Asheville as a business enterprise operated for profits various and sundry amusement facilities and enterprises, includ-

ing ferris wheels, merry-go-rounds, skating rinks, swimming pool, dance pavilion, a lake for boats and boating, and refreshment stands, for the use and enjoyment of each and every of said aforementioned amusement facilities or enterprises the said city of Asheville demanded and received from the public cash payment for the use and enjoyment thereof by the public, and in the entire confines of said park the only portions, facilities or devices thereof for which no charge was made to the public was a zoo, picnic grounds and walks and driveways"; and that the defendant "was not engaged in a governmental function, but was engaged in a business enterprise, in that, in addition to the fees charged for use of said pool and the fees charged for participating in the enjoyment of the other amusement facilities in said park, as alleged in the complaint, the said city of Asheville procured, kept and maintained in full force and effect accident liability insurance upon the various amusement devices and facilities maintained and operated in said park, and particularly carried in full force and effect accident liability insurance upon the said swimming pool, which said accident liability insurance was such insurance that is commonly and generally known as public liability insurance and is a matter of public record in the office of the city clerk of the city of Asheville."

In the general county court the defendant moved to have stricken from the reply the allegation to the effect that the city carried accident and liability insurance upon the various amusement devices and facilities, particularly the swimming pool, and the motion was there denied and the defendant appealed to the Superior Court. The judge at term time reversed the ruling of the county court and, in the exercise of his discretion, ordered stricken from the reply the allegation to the effect that the city carried accident and liability insurance, and remanded the case to the county court for trial. To the order of the judge of the Superior Court the plaintiff excepted and appealed to this Court, assigning errors.

Lucile McInturff, Vonno L. Gudger, and J. Y. Jordan, Jr., for appellant.

Clarence E. Blackstock and Harkins, Van Winkle & Walton for appellee.

SCHENCK, J. The issuable fact arising upon the pleadings in this case, pertinent to this appeal, is whether the defendant, the city of Asheville, in its construction, operation, and maintenance of a swimming pool in a recreation park, was engaged in a business enterprise for profit or in the performance of a governmental function. Whether the defendant carried accident and liability insurance upon its amusement devices

and facilities, particularly the swimming pool, was no more than a probative fact, the allegation of which the judge, in the exercise of his discretion, could order stricken from the pleadings.

Judge Walker, in *Winders v. Hill,* 141 N. C., 694 (702), says: "The function of a complaint is not the narration of the evidence, but a statement of the substantive and constituent facts upon which the plaintiff's claim to relief is founded. The bare statement of the ultimate facts is all that is required, and they are always such as are directly put in issue. Probative facts are those which may be in controversy, but they are not issuable. Facts from which the ultimate and decisive facts may be inferred are but evidence, and therefore probative. Those from which a legal conclusion may be drawn and upon which the right of action depends are the issuable facts which are proper to be stated in a pleading. The distinction is well marked in the following passage: 'The ultimate facts are those which the evidence upon the trial will prove, and not the evidence which will be required to prove the existence of those facts.' *Wooden v. Strew,* 10 How. Pr., 48; 4 Enc. of Pl. and Pr., p. 612."

"If irrelevant or redundant matter is inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby . . ." C. S., sec. 537. Under this statute the Superior Court is authorized in the exercise of its discretion to strike from a pleading any allegations of purely evidential and probative facts. *Commissioners v. Piercy,* 72 N. C., 181. In McIntosh, N. C. Prac. and Proc., we find the following: "Allegations which set forth evidential . . . matters . . . would be considered irrelevant, . . . and excessive fullness of detail . . . would be redundant." Sec. 371, p. 378; and further: "The material, essential, or ultimate facts upon which the right of action is based should be stated, and not collateral or evidential facts, which are only to be used to establish the ultimate facts. The plaintiff is to obtain relief only according to the allegations in his complaint, and therefore he should allege all of the material facts, and not the evidence to prove them. . . ." Sec. 379, p. 388.

We conclude that the allegation in the reply that the defendant carried accident and liability insurance upon its amusement devices and facilities, particularly the swimming pool, was an allegation of an evidential and probative fact and was in no wise an allegation of a material, essential, or ultimate fact upon which the plaintiff's cause of action was based, and that there was no error in his Honor's ordering it stricken out.

The plaintiff in his brief takes the position that since it may be competent to introduce evidence of the fact that the defendant carried accident and liability insurance on its amusement devices and facilities, par-

ticularly the swimming pool, as tending to show that said pool was not operated as a governmental function, it follows that it would be proper pleading to allege such fact. We do not understand this to be the rule. However, we do not here pass upon the competency of any evidence that may be introduced at the trial of this cause tending to show that the defendant carried accident and liability insurance. It is easily conceivable that upon an issue involving the question as to whether the city was operating the swimming pool in a recreation park as a business enterprise for profit or in the performance of a governmental function such evidence may be competent. If and when the question of the competency of such evidence arises it will be passed upon and determined in the light of such other evidence as may be introduced. The competency of such evidence does not depend upon the allegation which has been stricken from the reply, since the fact as to whether the city carried accident and liability insurance would be only a probative fact and not an issuable fact.

Affirmed.

STATE-PLANTERS BANK AND TRUST COMPANY, TRUSTEE, v. E. J. RANDOLPH AND HIS WIFE, ANNA C. RANDOLPH, R. R. WILLIAMS AND HIS WIFE, MARGARET M. WILLIAMS, WACHOVIA BANK AND TRUST COMPANY, EXECUTOR OF DR. H. H. BRIGGS, DECEASED, AND A. LILLIAN BRIGGS.

(Filed 31 October, 1934.)

Mortgages F b—After acceptance or reliance on debt assumption contract by mortgagee, grantee is not released by release of grantor.

Where the grantee in a deed, by valid contract therein, personally assumes the payment of a prior mortgage debt against the lands, which contract is accepted or relied upon by the mortgagee, as between themselves and the makers of the mortgage note, the grantee becomes the principal debtor, and a discharge of the makers of the mortgage notes by the mortgagee will not release the grantee of liability to the mortgagee on the debt assumption contract.

APPEAL by defendant Wachovia Bank and Trust Company, executor of Dr. H. H. Briggs, deceased, from *Pless, J.*, at June Term, 1934, of BUNCOMBE. Affirmed.

This is an action to recover of the defendants the sum of $2,490.52, with interest on said sum from 12 January, 1932.

This sum is the amount now due on certain notes aggregating the sum of $25,000, which were executed on 1 May, 1928, by the defendants E. J. Randolph and his wife, Anna C. Randolph, and R. R. Williams and his wife, Margaret M. Williams, and which are secured by a deed of trust executed by the said defendants to E. B. Thomason and L. O. Lohman, trustees.

On 16 November, 1928, the defendants E. J. Randolph and his wife, Anna C. Randolph, and R. R. Williams and his wife, Margaret M. Williams, conveyed the land described in the said deed of trust to Dr. H. H. Briggs and his wife, A. Lillian Briggs, by a deed which contains a clause in words as follows:

"Subject to an indebtedness of $25,000, secured by a deed of trust from the parties of the first part hereto to E. B. Thomason and L. O. Lohman, trustees, dated 1 May, 1928, and recorded in the office of the register of deeds of Buncombe County, North Carolina, in Book 294, page 101, which indebtedness the parties of the second part expressly assume and agree to pay."

The plaintiff is now the holder of the notes which were executed by the defendants E. J. Randolph and his wife, Anna C. Randolph, and R. R. Williams and his wife, Margaret M. Williams, and secured by the deed of trust executed by the said defendants to E. B. Thomason and L. O. Lohman, trustees.

After this action was begun, and while the same was pending, the holder of the notes executed by the defendants E. J. Randolph and his wife, Anna C. Randolph, and R. R. Williams and his wife, Margaret M. Williams, caused an endorsement to be made on each of said notes in words as follows:

"Without prejudice to the rights of the holder hereof to foreclose on the property pledged as security for the payment of this note and/or the collection of said indebtedness out of any and all other persons legally liable for the payment thereof, the undersigned holder does hereby release, for a valuable consideration, the makers of this note from any personal liability on account of its nonpayment."

This action was begun on 6 February, 1932, in the general county court of Buncombe County, and was tried at the February Term, 1934, of said court. The issues submitted to the jury at said trial were answered as follows:

"1. Did the plaintiff, or the holder of the indebtedness secured by the deed of trust mentioned in the complaint, enter into an agreement with E. J. Randolph and his wife, Anna C. Randolph, and R. R. Williams and his wife, Margaret M. Williams, whereby said parties, and each of them, were released from any and all personal liability for the payment of said indebtedness? Answer: 'Yes.'

"2. Is the Wachovia Bank and Trust Company, executor of Dr. H. H. Briggs, deceased, indebted to the plaintiff in this action, as alleged in the complaint, and if so, in what amount? Answer: '$2,490.52, with interest from 12 January, 1932.'"

From the judgment of the general county court that plaintiff recover of the defendant Wachovia Bank and Trust Company, executor of

Dr. H. H. Briggs, deceased, the sum of $2,490.52, with interest from 12 January, 1932, until paid, and the costs of the action, the said defendant appealed to the Superior Court of Buncombe County, assigning error in the instruction of the court to the jury with respect to the second issue.

At the hearing of defendant's appeal in the Superior Court its assignment of error was not sustained, and the judgment of the general county court was affirmed. The defendant appealed to the Supreme Court.

Harkins, Van Winkle & Walton for plaintiff.
Bourne, Parker, Bernard & DuBose for defendant.

CONNOR, J. At the trial of this action in the general county court it was agreed that the first issue should be answered in the affirmative. The issue was accordingly answered, "Yes."

With respect to the second issue, the court instructed the jury as follows:

"The burden of this issue is on the plaintiff. It contends that the amount which the plaintiff is entitled to recover in this action is $2,490.52, with interest from 12 January, 1932, until paid.

"If you find the facts to be as testified to by the witnesses, and as shown by all the evidence in the case, you will answer the second issue, $2,490.52, with interest from 12 January, 1932, until paid."

Under this instruction the jury answered the second issue as appears in the record.

The defendant Wachovia Bank and Trust Company, executor of Dr. H. H. Briggs, deceased, excepted to this instruction, and on its appeal to the Superior Court assigned same as error. The assignment of error was not sustained. In this there was no error.

Whatever conflict there may appear to be in the decisions of this Court with respect to the liability of the grantee of land who has assumed the payment of an indebtedness of his grantor which was secured by a prior mortgage or deed of trust executed by the grantor, as said in *Bank v. Page,* 206 N. C., 18, 173 S. E., 312, "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 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 an action at law, as upon a contract for the benefit of a third person. *Rector v. Lyda,* 180 N. C., 577, 105 S. E., 170."

It follows from this statement of the law that the release by the holder of the notes of the makers from all personal liability did not affect the liability of the defendants, who had expressly assumed the payment of the notes, and had thereby, as between themselves and the makers, become liable as principals.

The rule that a release by a creditor of his debtor, who is liable as a principal for the debt, discharges a surety manifestly has no application in the instant case.

There was no error in the refusal of the judge of the Superior Court to sustain defendant's assignment of error in its appeal from the judgment of the general county court. The judgment of the Superior Court is

Affirmed.

IOLA EXUM v. W. L. POOLE AND ROANOKE CITY MILLS, INC.

(Filed 31 October, 1934.)

1. Pleadings G a—Admission of evidence in this case held not to violate rule that proof must conform to allegation.

The admission of evidence tending to show the extent of injuries sustained by plaintiff in an auto accident will not be held for error on the contention that such evidence tended to show special damage not alleged in the complaint.

2. Automobiles C d—Turning car to left across highway without warning in violation of statute is negligence.

Evidence that the driver of the car in which plaintiffs were riding sounded his horn in warning of his purpose to pass defendant's car traveling in the same direction in front of him on the highway, and that the driver of defendant's car, in attempting to turn into a dirt road intersecting the highway to the left, suddenly and without warning turned his car to the left across the highway in front of the car in which plaintiffs were riding, in violation of statute of the state in which the accident occurred, resulting in the accident in suit, *is held* sufficient to be submitted to the jury on the issue of actionable negligence.

3. Automobiles C j—Where driver is not guilty of contributory negligence there can be no negligence imputed to passengers riding with him.

Plaintiffs were the driver of an automobile and persons riding with him at the time of the accident in suit. The jury found, from competent evidence under correct instructions, that the driver was not guilty of contributory negligence: *Held*, the defense of imputed negligence and joint enterprise relied on as against the other plaintiffs was not sustained.

APPEAL by defendants from *Daniels, J.*, at June Term, 1934, of GREENE. No error.

EXUM *v.* POOLE.

This is an action to recover damages for injuries sustained by the plaintiff, both to her person and to her automobile, which resulted from a collision on a highway in the State of Virginia between an automobile which was owned by the plaintiff, and in which she was riding, and an automobile which was owned by the defendant Roanoke City Mills, Inc., and driven at the time of the collision by its employee, the defendant W. L. Poole.

On 3 March, 1933, the plaintiff, Miss Iola Exum, accompanied by her sisters, Mrs. Carrie Exum Brown and Miss Mary Exum, and her friends, Mrs. Mary P. Holden and Miss Winnifred Harper, left her home in Greene County, North Carolina, in an automobile which was owned by the plaintiff and driven by her nephew, J. G. Exum, for Washington, D. C., via Richmond, Va. After they had crossed the line between the State of North Carolina and the State of Virginia, north of Weldon, N. C., and while they were traveling on a highway in the State of Virginia, in the direction of Richmond, Va., the automobile in which the plaintiff and her sisters and friends were riding, and which was driven by her nephew, J. G. Exum, collided on the highway with an automobile which was owned by the defendant Roanoke City Mills, Inc., and was driven at the time of the collision by its employee, the defendant W. L. Poole. As the result of the collision, the plaintiff and the other occupants of her automobile sustained serious and painful personal injuries. The plaintiff's automobile was also badly damaged.

On 5 July, 1933, the plaintiffs, Miss Iola Exum, Mrs. Carrie Exum Brown, Mrs. Mary P. Holden, Miss Winnifred Harper, and J. G. Exum, each brought an action against the defendants in the Superior Court of Greene County to recover damages for their respective injuries.

In the complaint in each of said actions it is alleged that the collision between the automobile in which the plaintiff was riding and the automobile which was owned by the defendant Roanoke City Mills, Inc., and driven by its employee, the defendant W. L. Poole, was caused by the negligence of the defendant W. L. Poole, in that the said defendant negligently turned the automobile which he was driving across the highway in front of the automobile in which the plaintiff was riding, just as the driver of the latter automobile was passing his automobile on the highway, and after the said driver had given the said defendant timely warning, by sounding his horn, of his purpose to pass him on the highway.

The defendants, in their answer to the complaint in each of said actions, denied that the collision was caused by the negligence of the defendant W. L. Poole, as alleged in the complaint. They alleged that the driver of the automobile in which the plaintiff was riding negligently undertook to pass the automobile which was driven by the defendant

W. L. Poole, at an intersection of the highway by a side road, at a speed in excess of 45 miles per hour, without first giving the said defendant any signal or warning of his purpose so to do. They alleged that the negligence of the said driver was the sole proximate cause of the collision and of the injuries resulting therefrom to the plaintiff. The defendants further alleged in their answer that the negligence of the driver of the automobile in which the plaintiff was riding at the time of the collision contributed to the injuries sustained by the plaintiff; that the plaintiff and the other occupants of said automobile were engaged in a joint enterprise; and that for that reason the plaintiff is barred of recovery in said action.

At June Term, 1934, of the Superior Court of Greene County the five actions brought in said court against the defendants were consolidated, by consent, for trial. Issues arising on the pleadings in each action were submitted to the jury, and answered in accordance with the allegations and contentions of the plaintiff in said action.

The jury found that the plaintiff in each action was injured by the negligence of the defendants, as alleged in the complaint therein; that the plaintiff in said action did not contribute to his injuries as alleged in the answer of the defendants; and assessed the damages which each plaintiff is entitled to recover of the defendants.

From the judgment, in each action, that the plaintiff therein recover of the defendants the amount assessed by the jury as the damages which the plaintiff was entitled to recover, the defendants appealed to the Supreme Court.

T. O. Moore and L. I. Moore for plaintiff.
Dickinson & Bland and W. G. Sheppard for defendants.

CONNOR, J. The defendants appealed from the judgment in each of the five actions which were tried together, by consent, in the Superior Court. These actions all arose out of the same accident, and involved the same issues with respect to the liability of the defendants to the several plaintiffs in said actions. Only one statement of the case on appeal has been certified to this Court. There were no objections by the defendants to evidence offered at the trial with respect to the issues involving liability. The only evidence admitted by the court over the objections and subject to the exceptions of the defendants was evidence with respect to the amount of damages which Mrs. Mary P. Holden was entitled to recover of the defendants in the action brought by her.

Assignments of error based on these exceptions cannot be sustained. The evidence admitted by the court was not offered or submitted to the jury as tending to show that Mrs. Holden was entitled to recover special

damages which she had not alleged in her complaint. It was competent as tending to show the extent of her injuries, and was submitted to the jury for that purpose only.

There was evidence tending to show that the defendant W. L. Poole, in violation of the statute law of Virginia, after he had notice that the automobile in which the plaintiffs in the several actions were riding was approaching him from his rear, and after the driver of the said automobile had warned him by the sounding of his horn of his purpose to pass the said defendant on the highway, suddenly, without warning, turned his automobile across the highway in front of the automobile in which said plaintiffs were riding. This evidence was submitted to the jury under instructions which are free from error. It was sufficient to support the finding by the jury that the plaintiff in each of the actions was injured by the negligence of the defendants.

There was evidence tending to show that the plaintiffs in the several actions were engaged in a joint enterprise, as alleged by the defendants in their answers. The jury, however, found that the driver of the automobile in which the plaintiffs were riding did not by his own negligence contribute to his injuries. This finding was supported by evidence which was properly submitted to the jury. If the driver of the automobile was not barred of recovery by his own negligence, then it follows that the defense relied on by the defendants in the actions brought by the other plaintiffs was not sustained.

We have carefully considered each of the assignments of error relied on by the defendants. None of them can be sustained. The judgment in each action is affirmed.

No error.

STATE v. EDDIE MOZINGO.

(Filed 31 October, 1934.)

1. Homicide B a—

Evidence that deceased was killed by a person lying in wait for the purpose is sufficient to sustain the State's contention that the murder was murder in the first degree. C. S., 4200.

2. Homicide A c—Evidence held sufficient to be submitted to jury on charge of being accessory before the fact to crime of murder.

Evidence that defendant, for the purpose of freeing himself of competition in the illegal sale of intoxicating liquors, procured another to kill deceased by shooting him from ambush while lying in wait, *is held* sufficient to be submitted to the jury in a prosecution as an accessory before the fact to the crime of murder, C. S., 4175, and sufficient to deny defendant's prayers for special instructions.

3. Homicide G d—

Evidence of the relations between defendant and deceased for some time before the homicide *is held* competent in a prosecution of defendant as an accessory before the fact of the crime of murder.

4. Homicide H f—Sentence of defendant held in accord with statute, and objection thereto is not sustained.

Defendant was convicted as an accessory before the fact to the crime of murder and sentenced to life imprisonment. Thereafter the actual murderer was sentenced to thirty years imprisonment upon acceptance of his plea of guilty of murder in the second degree: *Held*, defendant's objection that his sentence was greater than that of the actual perpetrator of the crime cannot be sustained, since both sentences were authorized by statute. C. S., 4176, 4200.

APPEAL by defendant from *Frizzelle, J.*, at June Term, 1934, of LENOIR. No error.

The defendant in this action was convicted as an accessory before the fact to the murder of Bennie Mozingo, by Fred Wade, on 6 December, 1933, in Lenoir County, North Carolina.

From judgment that he be confined in the State's Prison, at Raleigh, N. C., at hard labor, for the term of his natural life, the defendant appealed to the Supreme Court.

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

Wallace & White, J. Faison Thomson, Sutton & Greene, and Paul Edmundson for defendant.

CONNOR, J. The defendant's assignments of error on his appeal to this Court cannot be sustained.

All the evidence at the trial showed that the deceased, Bennie Mozingo, was shot from ambush and killed on the night of 6 December, 1933, while he was getting into his automobile, which he had parked in the woods near a highway in Lenoir County, and that the gun from which the fatal shots were fired was fired by a person who was lying in wait for the deceased in a clay hole, about 8 or 10 feet from his automobile. The deceased, who was a bootlegger, had just loaded his automobile with kegs of whiskey which had been stored in the woods by a confederate.

This evidence, which was admitted without objection by the defendant, was sufficient to sustain the contention of the State that the homicide was murder in the first degree. C. S., 4200. *S. v. Wiggins*, 171 N. C., 813, 89 S. E., 58.

There was evidence tending to show that Fred Wade was the man who lay in wait for the deceased, and who shot and killed him from the clay hole. Fred Wade, as a witness for the State, testified that he

went to the clay hole near which the automobile of the deceased was parked with a gun which he found at the foot of an oak tree. It is true that he did not testify that he shot the gun, but the inference from all the facts shown by his testimony that he did shoot and kill the deceased with the gun, as contended by the State, was almost irresistible.

There was also evidence offered by the State tending to show that the defendant Eddie Mozingo, prior to the shooting of the deceased, had urged, counseled and procured Fred Wade to shoot and kill the deceased when he drove his automobile from the highway into the woods to get the kegs of whiskey, which the defendant knew his confederate had placed there for the deceased. There was also evidence tending to show that the defendant Eddie Mozingo was engaged in the business of manufacturing and selling intoxicating liquor in Lenoir and Wayne counties, and that he wished to conduct his illegal business free from competition by the deceased, and for that reason had procured Fred Wade to shoot and kill him when he went into the woods to get a supply of whiskey for sale in the territory in which the defendant was selling whiskey.

All the evidence, both that offered by the State in support of its contentions and that offered by the defendant in support of his contentions, was submitted to the jury, and properly so. There was no error in the refusal of the court to allow defendant's motion for judgment as of nonsuit under the statute. C. S., 4643. *S. v. Jenkins,* 182 N. C., 818, 108 S. E., 767.

The objections of the defendant to the admission of evidence tending to show the relations between the defendant and the deceased for some time before the homicide, and also tending to corroborate testimony of witnesses for the State, to which there were no objections by the defendant, were properly overruled. This evidence was so manifestly competent that defendant's exceptions to its admission require no discussion.

The exception of the defendant to the refusal of the court to instruct the jury as requested by the defendant cannot be sustained for the reason that there was evidence tending to show that Fred Wade shot and killed the deceased as contended by the State, and that he did so upon the counsel and procurement of the defendant.

The instructions of the court to the jury to which the defendant excepted involved propositions of law which are well settled, and which were applicable to the facts as shown by the evidence offered by the State. There was certainly no reversible error in these instructions. Defendant's exceptions are without merit, and need not be discussed.

It is stated in the brief filed for the defendant in this Court that after the defendant had been convicted in this action by the jury and sentenced by the court to imprisonment for life, Fred Wade was arraigned on an indictment charging him with the murder of Bennie Mozingo,

and that upon such arraignment he tendered to the solicitor for the State a plea of guilty of murder in the second degree, which plea was accepted by the solicitor, and that thereupon it was adjudged by the court that said Fred Wade be confined in the State's Prison for a term of 30 years.

The defendant complains that his sentence as an accessory before the fact is for his life, while the sentence for Fred Wade, the principal felon, is for only thirty years.

Without conceding that upon the facts shown by the record in this case there is just ground for this complaint, it is sufficient to say that both the judgment against the defendant and the judgment against Fred Wade are authorized by statute. C. S., 4176, and C. S., 4200. The statute prescribing imprisonment for life upon a conviction as an accessory before the fact to the crime of murder was in force at the time the statute defining murder in the first degree and murder in the second degree, respectively, and prescribing the punishment upon a conviction of murder in the first degree as death, and the punishment upon a conviction of murder in the second degree as imprisonment for not less than two nor more than thirty years, was enacted. The former statute has not been amended or repealed. It is now in full force and effect.

The judgment in this action is affirmed.

No error.

D. C. WADDELL, JR., v. GURNEY P. HOOD, COMMISSIONER OF BANKS, EX REL. PEOPLES BANK OF BURNSVILLE, C. L. THOMPSON, AND J. W. WHEELER, ET AL.

(Filed 31 October, 1934.)

1. Bills and Notes C a—Person signing note as endorser will be deemed liable as endorser unless he shows contrary intention in writing.

A person signing a note otherwise than as maker, drawer, or acceptor is deemed to be an endorser unless he clearly indicates, by appropriate words, his intention to be bound in some other capacity, C. S., 3044, and such "appropriate words" must appear upon the instrument itself or in some sufficient writing attached thereto and becoming an essential and integral part thereof, and in an action on the note by the payee parol evidence is not admissible to show that one signing as endorser is primarily liable on the note.

2. Same—Resolution of directors held insufficient to show their intention to be bound as sureties on note.

Defendants, directors of a bank, signed the note in question as endorsers pursuant to a resolution of the board of directors of the bank in which the bank assumed payment of the note and in which resolution it was stipulated that as between the maker "and endorsers" the endorsers

should be all jointly and severally liable: *Held*, the resolution of the board of directors of the bank, in which defendants were described as "endorsers," is insufficient to constitute defendants sureties on the note, and they will be deemed endorsers. C. S., 3044.

3. Limitation of Actions C a—Payments by maker will not prevent bar as to endorsers given no notice of nonpayment.

Where more than three years elapse after the maturity of a note, and no notice of nonpayment is given the endorsers, and all payments on the note are made by the maker thereof, and there is no waiver of notice on the face of the note, the endorsers' plea of the statute of limitations is a complete defense to their liability thereon.

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

CIVIL ACTION, before *Schenck, J.*, at Regular March Term, 1934, of BUNCOMBE.

The plaintiff brought suit upon a promissory note, dated 10 July, 1929, payable thirty days after date to the plaintiff. The note in the sum of $10,000 was signed by Peoples Bank of Burnsville, N. C. The note recited the following securities: "One note of A. G. Wilson in the sum of $10,000, dated 10 July, 1929," etc. The said collateral note, or Wilson note, was executed on 10 July, 1929, in the sum of $10,000, payable to G. D. Bailey or order. This collateral note purported to be endorsed by G. D. Bailey, C. L. Thompson, W. O. Griffith, I. B. Bailey, S. H. Banks, J. A. Goodin, William I. Parnell, Sallie Parnell, W. Z. Robertson, J. L. Hyatt, and J. W. Wheeler; said endorsers being officers and directors of the Peoples Bank of Burnsville. The Peoples Bank of Burnsville was closed on 2 October, 1933, and the defendant Gurney P. Hood took possession of its assets according to law. The Peoples Bank of Burnsville had made payments from time to time on the original note, and at the time it closed it was alleged that there was a balance due plaintiff on said note in the sum of $2,984.16. This suit was brought by the plaintiff against the endorsers of the collateral note, or Wilson note, on 16 November, 1933. The defendants J. W. Wheeler and C. L. Thompson filed answers alleging that they were endorsers on the collateral note, or Wilson note, and that said note became due on 10 August, 1929, and that no notice of dishonor or nonpayment had ever been given them, and consequently they pleaded the three-year statute of limitations as a bar to the right of plaintiff to recover upon the collateral or Wilson note. There was testimony of the plaintiff to the effect that the plaintiff would not accept the note of the Peoples Bank of Burnsville and loan $10,000 to it until the officers and directors of the bank passed a resolution, the pertinent part of which is as follows: "Whereas the cashier and board of directors of the Peoples Bank of Burnsville, N. C., deem it necessary to borrow the sum of $10,000 to meet the obligations of the bank and keep a proper reserve; and whereas

A. G. Wilson had this day executed a note for the sum of $10,000, endorsed by W. L. Thompson, W. O. Griffith, S. H. Banks, J. A. Goodin, William I. Parnell, Sallie Parnell, W. Z. Robertson, J. L. Hyatt, and J. W. Wheeler, to G. D. Bailey, and it is understood and agreed between the maker and endorsers that they are all jointly and severally liable for the payment of said note.

"It is therefore ordered by the board that the payment of said note be and the same is hereby assumed by the bank."

There was evidence tending to show that Wheeler was present at the meeting of the directors when the resolution was adopted, and other evidence tending to show that he was not present. At the conclusion of plaintiff's evidence the defendants Thompson and Wheeler moved for judgment of nonsuit, which was granted, and the plaintiff appealed.

Ford, Coxe & Carter for plaintiff.
Watson & Fouts for C. L. Thompson.
Charles Hutchins for J. W. Wheeler.

BROGDEN, J. Were the defendants Wheeler and Thompson endorsers or sureties on the note held by plaintiff?

It is to be noted that this suit is brought on a $10,000 promissory note, executed by the Peoples Bank of Burnsville and payable to the plaintiff. A collateral note of A. G. Wilson in the sum of $10,000, payable to G. D. Bailey, was recited in the original note. The plaintiff alleged that this collateral note, or Wilson note, was endorsed by the officers and directors of the bank, including the defendants Thompson and Wheeler. The evidence tended to show that these defendants endorsed the note pursuant to a resolution adopted by the officers and directors, reciting the execution of the note, and that "it is understood and agreed between the maker and endorsers that they are all jointly and severally liable for the payment of said note." Consequently, it appears that the plaintiff alleged that the defendants are endorsers, and the resolution by which the relationship of surety is sought to be established described the defendants as endorsers.

C. S., 3044, provides that "a person placing his signature upon an instrument otherwise than as maker, drawer or acceptor, is deemed to be an endorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity." The question then occurs: How shall such "intention to be bound in some other capacity" be established? The statute expressly prescribes that such intention must be clearly indicated "by appropriate words."

This Court has held that the "appropriate words" clearly indicating the "intention to be bound in some other capacity" must appear in the

note itself or by some sufficient writing attached to the note and becoming an essential and integral part thereof. This idea was expressed in *Busbee v. Creech,* 192 N. C., 499, 135 S. E., 326, as follows: "Parol evidence is not competent to show that the liability of one whose name is written on the back of a note as an endorser is primary, and not secondary, for the purpose of sustaining the contention that notice of dishonor by nonpayment is dispensed with. The liability of one who has endorsed a note, where it is contended that such liability is other than that of an endorser, must be determined by appropriate words contained in the note." This utterance is fully supported by *Dillard v. Mercantile Co.,* 190 N. C., 225, 129 S. E., 598; *Wrenn v. Cotton Mills,* 198 N. C., 89, 150 S. E., 676; *Hyde v. Tatham,* 204 N. C., 160, 167 S. E., 626. See, also, *Commercial Security Co. v. Main Street Pharmacy,* 174 N. C., 655, 94 S. E., 298.

Applying the law to the facts, as disclosed by the record, it would seem manifest that the defendants must be deemed to be endorsers. The record discloses that all payments on the original note were made by the bank and that more than three years have elapsed since the maturity of the note, and that no notice was given the defendants. Therefore, as the defendants are endorsers and not sureties, the statute of limitations constitutes a defense in the absence of a waiver in the face of the note, and the ruling of the trial judge was correct. *Barber v. Absher Co.,* 175 N. C., 602, 96 S. E., 43; *Dillard v. Mercantile Co., supra; Bank v. Hesse, ante,* 71.

Affirmed.

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

J. N. BYRD, EMPLOYEE, v. GLOUCESTER LUMBER COMPANY, EMPLOYER, AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, INSURANCE CARRIER.

(Filed 31 October, 1934.)

1. Master and Servant F i—Jurisdiction of Superior Court upon appeal from award of Commission is limited to questions of law.

The award of the Industrial Commission is conclusive on appeal as to all questions of fact involved in the proceeding and determined by the Commission, and the jurisdiction of the Superior Court is limited to questions of law only. N. C. Code, 8081 (ppp).

2. Same—Superior Court has jurisdiction to remand case to Commission for rehearing on ground of newly discovered evidence.

While the Compensation Act contains no express provision authorizing the Superior Court, upon appeal from an award of the Industrial Com-

mission, to remand the case to the Commission for a rehearing on the ground of newly discovered evidence, the Superior Court has the discretionary power to do so in proper instances.

3. Appeal and Error J a—

On appeal from an award of the Industrial Commission, a motion to remand the case to the Commission on the ground of newly discovered evidence is addressed to the discretion of the Superior Court, and its determination thereof is not ordinarily reviewable by the Supreme Court.

APPEAL by defendants from *Finley, J.*, at April Term, 1934, of TRANSYLVANIA. Affirmed.

This is a proceeding for compensation under the provisions of the North Carolina Workmen's Compensation Act for an injury which the plaintiff suffered on 2 March, 1929, while he was at work as an employee of the defendant Gloucester Lumber Company.

The proceeding was begun before the North Carolina Industrial Commission, and was first heard by Commissioner Dorsett. From the evidence offered at the hearing before him Commissioner Dorsett found that the plaintiff's disability was not the result of an injury by accident which arose out of and in the course of his employment by the defendant Gloucester Lumber Company. On this finding compensation was denied. The full Commission, on its review of the hearing before Commissioner Dorsett, approved and adopted the findings of fact and conclusions of law made by him, and denied compensation. The plaintiff appealed from the award of the Industrial Commission to the Superior Court of Transylvania County. The appeal was duly docketed in said court. It has not been heard on its merits.

On 9 October, 1933, the plaintiff moved in the Superior Court for a rehearing of the proceeding by the Industrial Commission on the ground that since his appeal was docketed in said court he had discovered new evidence in support of his claim for compensation. The defendants moved that the motion of the plaintiff be dismissed on the ground that the court was without jurisdiction to hear plaintiff's motion for a rehearing of the proceeding by the Industrial Commission on the ground of newly discovered evidence.

The proceeding was heard at February Term, 1934, of the Superior Court of Transylvania County, on the motions of the defendants and the plaintiff, respectively.

The motion of the defendants that the motion of the plainitff be dismissed was denied.

The motion of the plaintiff for a rehearing of the proceeding on the ground of newly discovered evidence was allowed.

From the order of the Superior Court remanding the proceeding to the Industrial Commission, in accordance with the motion of the plaintiff, the defendants appealed to the Supreme Court.

Ralph H. Ramsey, Jr., for plaintiff.
Smathers & Smathers for defendants.

CONNOR, J. The award of the Industrial Commission in this proceeding, made 11 February, 1930, and, on the facts found by the Commission, denying compensation to the plaintiff, was conclusive as to all questions of fact involved in the proceeding and determined by the Commission. It is so expressly provided by statute. N. C. Code of 1931, sec. 8081 (ppp).

On plaintiff's appeal from the award to the Superior Court, only questions of law involved in the proceeding and decided by the Industrial Commission could be considered. This is also expressly so provided by statute. N. C. Code of 1931, sec. 8081 (ppp). The jurisdiction of the Superior Court is limited to a consideration of questions of law only.

There is no provision in the North Carolina Workmen's Compensation Act authorizing the Superior Court to consider a motion for a rehearing by the Industrial Commission of a proceeding for compensation, on the ground that since the docketing of an appeal from an award of the Commission, a party to the proceeding has discovered new evidence which supports his contention as to the facts found by the Commission adversely to him, and to remand the proceeding to the Commission for a rehearing.

For this reason the appellants in the instant case contend that there was error in the refusal of the judge of the Superior Court to dismiss the motion of the plaintiff, and in the order remanding the proceeding to the Industrial Commission for a rehearing. This contention is not sustained. The judge had the power to consider plaintiff's motion and, on the facts found by him, in his discretion to grant the motion.

It is well settled that this Court, although its jurisdiction is limited by the Constitution of North Carolina to the review, upon appeal, of decisions of the Superior Court upon matters of law or legal inference, has the power to consider a motion for a new trial of an action pending here on appeal, on the ground of newly discovered evidence, and in a proper case to grant the motion. *Moore v. Tidwell,* 194 N. C., 186, 138 S. E., 541; *Johnston v. R. R.,* 163 N. C., 431, 79 S. E., 690.

On this principle we are of opinion, and so hold, that when a proceeding for compensation under the provisions of the North Carolina Workmen's Compensation Act has been duly docketed in the Superior Court, upon an appeal from an award of the Industrial Commission, the Superior Court has the power in a proper case to order a rehearing of the proceeding by the Industrial Commission on the ground of newly discovered evidence, and to that end to remand the proceeding to the Commission.

Whether the judge of the Superior Court shall exercise this power in any proceeding pending in said court rests upon his discretion. His action, therefore, is ordinarily not subject to review by this Court.

We find no error in the order in the instant case. It is

Affirmed.

L. J. CHESTNUT v. ALBERT SUTTON.

(Filed 31 October, 1934.)

1. Husband and Wife F a—

Consent of the wife is not a defense to an action for alienation of her affections or for criminal conversation with her.

2. Same—Misconduct of husband and his ill-treatment of wife is subordinate feature on issue of damages requiring request for instructions.

In an action for alienation and criminal conversation it is not error for the trial court, in the absence of prayers for special instructions, to fail to charge the jury on the issue of damages that if they believe defendant's evidence with respect to plaintiff's misconduct and his ill-treatment of his wife, they should consider such facts in diminution of actual damages.

3. Trial E e—

A party desiring the judge to present a particular theory of the case, or a particular phase of the law applicable to his evidence, should offer a prayer for special instructions.

4. Husband and Wife F a—

In this action for alienation and criminal conversation the charge to the jury on the issue of actual damages is held to cover every phase of the law relied upon by defendant in minimizing damages, and to be without error on defendant's exception.

APPEAL by defendant from *Daniels, J.*, at April Term, 1934, of SAMPSON. No error.

This is an action to recover damages, both actual and punitive, for the alienation of the affections of plaintiff's wife by the defendant, and for his criminal conversation with her.

The issues submitted to the jury were answered as follows:

"1. Did the defendant Albert Sutton alienate the affections of the plaintiff's wife, as alleged in the complaint? Answer: 'Yes.'

"2. Did the defendant Albert Sutton have immoral relations with the plaintiff's wife, as alleged in the complaint? Answer: 'Yes.'

"3. What amount of actual damages, if any, is the plaintiff entitled to recover? Answer: '$1,200.'

"4. What amount of punitive damages, if any, is the plaintiff entitled to recover? Answer: '$400.00.' "

From judgment that plaintiff recover of the defendant the sum of $1,600, with interest and costs, the defendant appealed to the Supreme Court.

J. D. Johnson, Jr., for plaintiff.
Butler & Butler for defendant.

CONNOR, J. The facts alleged in the complaint are sufficient to constitute two causes of action, on either of which the plaintiff is entitled to recover of the defendant damages, both actual and punitive. *Cottle v. Johnson,* 179 N. C., 426, 102 S. E., 769. In that case it is said that the gravamen of the cause of action for the alienation of the affections of plaintiff's wife is the deprivation of the plaintiff of his conjugal rights to the society, affection and assistance of his wife, and that the gravamen of the cause of action for criminal conversation is the defilement of plaintiff's wife by the defendant. In neither case is the consent of the wife a defense to a recovery by the plaintiff of the damages which he has sustained as the result of the wrongful conduct of the defendant. On each of these causes of action the plaintiff is entitled to recover of the defendant his actual damages, and in a proper case the jury may award plaintiff, in addition to his actual damages, punitive damages. *Powell v. Strickland,* 163 N. C., 393, 79 S. E., 872.

The evidence offered by the plaintiff, and admitted without objection by the defendant, was sufficient to sustain the allegations of the complaint. This evidence, together with the evidence offered by the defendant, was submitted to the jury under a charge which is free from error. For this reason the judgment is affirmed.

The defendant contends that there was error in the failure of the judge to instruct the jury that if they should find certain facts with respect to the conduct of the plaintiff and his treatment of his wife, as the defendant's evidence tended to show, they should consider these facts in determining the amount of actual damages which the plaintiff is entitled to recover in this action. In the absence of requests by the defendant for such instructions, this contention cannot be sustained.

It is well settled as the practice in this State that if a party desires the judge to present a particular theory of the case, or a particular phase of the law applicable to the facts as the jury shall find them from the evidence, he should request the judge to do so by prayers for instruction tendered in apt time, and that unless this is done, he cannot raise the objection that the judge failed in his charge to instruct the jury with respect to such theory, or such phase of the law. McIntosh N. C. Prac. and Proc., p. 634, and cases cited.

This rule is applicable to the assignments of error in the instant case.

The instructions of the judge on the third issue presented to the jury every phase of the law relied upon by the defendant with respect to the minimizing of the damages which the plaintiff is entitled to recover in this action.

The defendant has had a fair and impartial trial of the issues raised by the pleadings, and must be content with the verdict of the jury and the judgment of the court. We find

No error.

STATE v. J. L. HENDERSON.

(Filed 31 October, 1934.)

1. Criminal Law K b: Husband and Wife G d—Right to suspend judgment is established by decisions, and is authorized by statute for abandonment.

The practice of suspending judgments or staying executions in criminal prosecutions upon reasonable and just terms, with the consent of defendant, is established by custom and judicial decision, and in prosecutions for abandonment has received express legislative sanction. C. S., 4449.

2. Same—Defendant may not challenge terms upon which judgment was suspended upon State's motion that judgment be executed for his failure to comply therewith.

Where a defendant in a prosecution for abandonment accepts the terms upon which judgment is suspended, and does not object or appeal on the ground that terms are indefinite, he may not thereafter challenge the validity of the terms upon motion of the solicitor that the judgment be executed for his failure to comply with the conditions upon which the execution of the judgment was suspended.

3. Criminal Law K b—

If the conditions upon which the execution of a judgment in a criminal prosecution is suspended are void, the judgment is at all times enforceable, if they are valid defendant cannot resist enforcement of the judgment upon his failure to comply with the conditions.

4. Husband and Wife G d—

A subsequent decree of divorce does not affect a prior judgment against the husband for abandonment of his wife, or the conditions upon which such judgment is suspended.

APPEAL by defendant from *Harding, J.*, at April Term, 1934, of RANDOLPH. Affirmed.

At September Term, 1931, of the Superior Court of Randolph County the defendant J. L. Henderson was tried on an indictment in which he was charged with the wilful and unlawful abandonment of his wife,

without making provision for her adequate support. C. S., 4447. On his conviction, judgment was rendered as follows:

"It is adjudged by the court that the defendant be confined in the common jail of Randolph County for a period of 12 months, and assigned to work upon the public roads of the State under the control of the State Highway Commission, pursuant to the provisions of chapter 145, Public Laws of 1931.

"This judgment is suspended on condition that the defendant pay into the office of the clerk of the Superior Court of Randolph County the amount of $15.00 per month for the use and benefit of Mrs. J. L. Henderson, on or before the 12th day of each month, and further, that he pay the costs of the action."

The defendant accepted the conditions on which the judgment was suspended. He paid the costs of the action, and paid the sum of $15.00 into the office of the clerk of the Superior Court, for the use and benefit of Mrs. J. L. Henderson, each month until December, 1933. He did not pay said sum for the month of December, 1933, and has not paid said sum for any month since December, 1933.

At April Term, 1934, the defendant was arrested under a *capias* issued on the motion of the solicitor for the State that he be confined in the common jail of Randolph County under the judgment rendered in the action at September Term, 1931.

At the hearing of the motion of the solicitor, the court found that, at November Term, 1933, of the Superior Court of Alamance County, in an action brought by the defendant in said court against his wife, the bonds of matrimony theretofore existing between them were dissolved by a judgment of divorce on the ground that the defendant and his wife had lived separate and apart from each other for more than two years immediately preceding the commencement of the action. Chapter 163, Public Laws of N. C., 1933. The motion of the solicitor was allowed.

From the order of the court that the defendant be committed to the common jail of Randolph County, under and pursuant to the judgment in this action at September Term, 1931, the defendant appealed to the Supreme Court.

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

Long & Long for defendant.

CONNOR, J. In *Myers v. Barnhardt,* 202 N. C., 49, 161 S. E., 715, it is said:

"The practice of suspending judgments in criminal prosecutions, upon terms that are reasonable and just, or staying executions therein for a

time, with the consent of the defendant, has so long prevailed in our courts of general jurisdiction that it may now be considered established, both by custom and judicial decision, as a part of the permissible procedure in such cases. *S. v. Edwards,* 192 N. C., 321, 133 S. E., 37; *S. v. Everitt,* 164 N. C., 399, 79 S. E., 274; *S. v. Hilton,* 151 N. C., 687, 65 S. E., 1011."

This practice has not only been established by custom and judicial decision, it has received express legislative sanction with respect to judgments in criminal actions in which defendants have been convicted of abandonment. C. S., 4447. It is provided by statute that "upon any conviction for abandonment, any judge, or any recorder having jurisdiction thereof, may in his discretion make such order as in his judgment will best provide for the support, as far as may be necessary, of the deserted wife or children, or both, from the property or labor of the defendant." C. S., 4449.

In the instant case the effect of the order contained in the second paragraph of the judgment was merely to suspend the execution of the judgment so long as the defendant complied with the conditions therein imposed by the court and accepted by the defendant. *S. v. Vickers,* 196 N. C., 239, 145 S. E., 175. The defendant did not object to the order on the ground that the conditions were indefinite, or appeal from the order to this Court, as did the defendant in *S. v. Vickers, supra.* Having accepted the conditions, and undertaken to comply with them, he cannot, after his failure to comply with the terms on which the execution of the judgment was suspended, challenge their validity. *S. v. Burnette,* 173 N. C., 734, 91 S. E., 364. Indeed, if the conditions are void, as now contended by the defendant, the judgment has at all times been enforceable; on the other hand, if the conditions are valid, the defendant having failed to comply with them, cannot resist the enforcement by the court of the judgment that he be confined in the common jail of Randolph County for a period of twelve months. In either event there was no error in the order of Judge Harding, unless, as contended by the defendant, he was relieved of both the conditions and the judgment at September Term, 1931, by the judgment of divorce at November Term, 1933, of the Superior Court of Alamance County. Neither the judgment rendered in this action nor the conditions on which the execution of the judgment was suspended are affected by the judgment of divorce. See *Howell v. Howell,* 206 N. C., 672, 174 S. E., 921.

Whether the judge, at April Term, 1934, had the power in his discretion to modify the conditions on which the execution of the judgment rendered at September Term, 1931, was suspended, on the facts found by him, is not presented on this appeal. Having found that the defendant had failed to comply with these conditions, the judge had the power

to order that the judgment be enforced. *S. v. Strange,* 183 N. C., 775, 111 S. E., 350. The divorce of the defendant from his wife, subsequent to the judgment in this action, did not relieve the defendant from the judgment as a matter of law.

The order of Judge Harding is

Affirmed.

STATE v. J. B. COOK, JR.

(Filed 31 October, 1934.)

1. Bastards B c—Wilfulness is essential element of offense of neglecting to support illegitimate child.

Wilfulness of defendant in his neglect or refusal to support his illegitimate child is an essential ingredient necessary for a conviction under ch. 228, Public Laws of 1933, and "wilful" as used in the statute means without just cause, excuse, or justification.

2. Same—Wilfulness of defendant in failing to support illegitimate child is not presumed from such failure, but must be proven by State.

In a prosecution under ch. 228, Public Laws of 1933, the presumption of innocence attaching to a defendant in a criminal prosecution, includes the presumption that defendant's neglect to support his illegitimate child was not wilful, and while failure to support may be an evidential fact tending to show wilfulness, such failure does not raise the presumption of wilfulness, and the burden is on the State to prove the element of wilfulness or criminal intent beyond a reasonable doubt.

APPEAL from *Stack, J.,* at August Term, 1934, of CABARRUS. New trial.

The defendant was tried, convicted and sentenced upon a bill of indictment charging a violation of chapter 228, Public Laws 1933, being "An act concerning the support of children of parents not married"; and appealed to this Court, assigning error.

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

W. S. Bogle and Armfield, Sherrin & Barnhardt for appellant.

SCHENCK, J. "Any parent who wilfully neglects or refuses to support and maintain his or her illegitimate child shall be guilty of a misdemeanor and subject to such penalties as are hereinafter provided. . . ." Sec. 1, ch. 228, Public Laws 1933.

The defendant duly assigned as error the following portion of his Honor's charge: "A man is presumed to intend to, if he has failed to

do so, the presumption is he wilfully did so," and we think this statement of the law was erroneous, and entitles the defendant to a new trial.

The entire paragraph of the charge, of which the foregoing is a part, is as follows: "The State is required to satisfy you beyond a reasonable doubt that he has failed to support his bastard child; wilfully failed. Wilfully means intentionally, purposely. A man is presumed to intend to, if he has failed to do so, the presumption is he wilfully did so."

The father of an illegitimate child may be convicted of neglecting to support such child only when it is established that such neglect was wilful, that is, without just cause, excuse or justification. The wilfulness of the neglect is an essential ingredient of the offense, and as such must not only be charged in the bill, but must be proven beyond a reasonable doubt. The presumption of innocence with which the defendant enters the trial includes the presumption of innocence of wilfullness in any failure on his part to support his illegitimate child. The failure to support may be an evidential fact tending to show a wilful neglect, but it does not raise a presumption of wilfulness.

The word "wilfully" as used in the statute under which the defendant was charged is used with the same import as in the act relating to wilful abandonment of wife by husband, C. S., 4447, and what is said in the case of *S. v. Falkner,* 182 N. C., 793, as to the effect of the use of the word "wilful" in a criminal statute is here applicable. In that case the present *Chief Justice* says: "Wilfulness is an essential element of the crime, and this must be found by the jury. The issue, upon an indictment for a violation of the present law, is the alleged guilt of the defendant. He enters on the trial with the common-law presumption of innocence in his favor. When the State has shown an abandonment and the defendant's failure to provide adequate support, the jury may infer from these facts, together with the attendant circumstances, and they would be warranted in finding, if they are so satisfied beyond a reasonable doubt, that it had been done intentionally, without just cause or legal excuse, *i.e.,* wilfully. *S. v. Taylor,* 175 N. C., 833." To the same effect are the more recent cases of *S. v. Johnson,* 194 N. C., 378; *S. v. Yelverton,* 196 N. C., 64; *S. v. Roberts,* 197 N. C., 662.

In an earlier case, *Mr. Justice Ashe,* in construing the word "wilful" in criminal statutes, says: "The word wilful, used in a statute creating a criminal offense, means something more than an intention to do a thing. It implies the doing the act purposely and deliberately, indicating a purpose to do it, without authority—careless whether he has the right or not—in violation of law, and it is this which makes the criminal intent, without which one cannot be brought within the meaning of a criminal statute." *S. v. Whitener,* 93 N. C., 590 (592).

Construing the word "wilful" in the light of the foregoing cases, it is clear that one cannot be brought within the meaning of the statute under which the defendant was charged without proving the criminal intent, and that it was error for the court to have charged the jury that if the defendant failed to support his illegitimate child "the presumption is he wilfully did so."

New trial.

J. R. WILSON AND GENERAL MOTORS ACCEPTANCE CORPORATION v. HORTON MOTOR LINES, INC.

(Filed 31 October, 1934.)

1. Pleadings D b—Demurrer for misjoinder of parties and causes held properly overruled in this case.

Action was brought by the holder of a lien upon a truck to recover for loss of his security and by the owner of the truck to recover damage to the truck, and to recover loss of profits to the owner by reason of his forced abandonment of a contract to deliver merchandise, it being alleged that all items of damage were the result of damage to the truck by the negligent act of defendant's agent: *Held*, both plaintiffs had an interest in the subject-matter of the action, and in obtaining the relief demanded, C. S., 455, and their respective causes of actions arose out of the same transaction or transactions connected with the same subject of action, C. S., 507 (1), and defendant's demurrer for misjoinder of parties and causes of action was properly overruled.

2. Parties A a—

It is not necessary that the interest of parties plaintiff should be identical, but only that each have an interest in the subject-matter of the action and in obtaining the relief demanded. C. S., 455.

3. Pleadings A a—

It is not necessary that the causes of action of several plaintiffs be identical, but only that the causes of action arise out of the same transaction or transactions connected with the same subject of action. C. S., 507 (1).

4. Pleadings D a—

A complaint will be liberally construed in favor of the pleader upon a demurrer for failure to state a cause of action.

5. Negligence D a—

A complaint alleging that plaintiff was forced to abandon a contract for the delivery of merchandise because of defendant's negligent damage to plaintiff's truck, and demanding the recovery of the loss of profits from such contract *is held* not demurrable for failure to state a cause of action.

6. Pleadings D a—

A demurrer on the grounds that the complaint fails to state a cause of action must specify wherein the complaint is deficient, or the demurrer is defective and cannot be sustained.

APPEAL by defendant from *Moore, Special Judge,* at August Term, 1934, of SAMPSON. Affirmed.

The individual plaintiff and the corporate plaintiff filed a joint complaint, wherein it is alleged that the agent and servant of the defendant corporation, by negligently parking a large truck on a State Highway, in the nighttime and without lights, caused the agent of the individual plaintiff to drive his truck into the defendant's truck, so negligently parked, with resultant damage to the truck of the individual plaintiff, as well as to the trailer attached thereto, and with further resultant damage to the plaintiff in the loss of profits from a contract for delivering cotton, which the plaintiff was compelled to abandon by reason of the loss of his truck; it is further alleged in the joint complaint that the corporate plaintiff held a lien by way of a conditional sales contract on said truck of its coplaintiff.

The defendant interposed a demurrer to the complaint upon the ground of misjoinder of parties and of causes of action; and to that portion of the complaint relating to damage sustained by the individual plaintiff by reason of the loss of contract for delivery of cotton upon the ground that the complaint does not state facts sufficient to constitute such cause of action. The court overruled the demurrer, and the defendant appealed to the Supreme Court.

Dye & Clark for appellant.

J. Abner Barker for appellee J. R. Wilson.

J. D. Johnson, Jr., and F. H. Kennedy for appellee General Motors Acceptance Corporation.

SCHENCK, J. "All persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs, either jointly, severally, or in the alternative. . . ." C. S., 455. The individual plaintiff had "an interest in the subject of the action" for that he owned the truck and the trailer alleged to have been damaged; and the corporate plaintiff had "an interest in the subject of the action" by reason of its lien upon said damaged truck.

"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 the same transaction, or transaction connected with the same subject of action." C. S., 507 (1).

The cause of action of the individual plaintiff for damage to his truck, as well as the cause of action of the corporate plaintiff for the loss of his security by reason of the damage to said truck, both arose out of the same transaction or transaction connected with the same subject of action, namely, the damage to the same truck proximately caused by the same negligent act of the same agent of the defendant. Clearly both

parties plaintiff had an interest in the subject of this action and in obtaining the relief demanded. Neither of these statutes requires, by word or by implication, that the causes of action of the parties plaintiff shall be identical. The first only requires that the respective parties plaintiff have "an interest in the subject of the action and in obtaining the relief demanded"; and the second only requires that the several causes of action shall "arise out of the same transaction, or transaction connected with the same subject of action."

". . . . The fact that the interests of plaintiffs are legally severable, or not common or identical, is no bar to their joinder where they have a common interest in the subject of the action and the relief sought." 47 C. J., 59.

We conclude that his Honor properly overruled the demurrer to the complaint.

We are also of the opinion that the demurrer to that portion of the complaint relating to damages sustained by the individual plaintiff by reason of loss of his contract for the delivery of cotton upon the ground that it did not state facts sufficient to constitute such cause of action was properly overruled. In the first place, the complaint, when construed, as we are required to construe it liberally in behalf of the plaintiff, presents facts sufficient to constitute a cause of action, *Scott v. Ins. Co.*, 205 N. C., 38; and, in the second place, the ground of the demurrer is defective and cannot be sustained for that it does not specify wherein the complaint fails to state facts sufficient to constitute the cause of action, *Elam v. Barnes*, 110 N. C., 73; *Griffin v. Bank*, 205 N. C., 253.

Judgment overruling the demurrer is

Affirmed.

FEDERAL LAND BANK OF COLUMBIA v. W. H. GRIFFIN, ADMINISTRATOR OF THE ESTATE OF W. D. WELCH, DECEASED; R. A. WELCH, DORA WELCH, DEE WELCH, ADA MOORE AND HUSBAND, J. DORSIE MOORE, HATTIE ALSTON AND HUSBAND, BILL ALSTON, W. C. WELCH AND WIFE, MRS. W. C. WELCH, C. L. WELCH AND WIFE, MRS. C. L. WELCH.

(Filed 31 October, 1934.)

Deeds and Conveyances A e—Presumption of delivery from registration of deed is rebuttable by evidence that registration was inadvertent or fraudulent.

The owner of lands executed deed to same to his wife and two sons, and the deed was duly registered. Thereafter the grantor and his wife executed a mortgage on the same lands to plaintiff. The grantor remained in possession of the lands until his death, and the recorded deed was found among his papers: *Held*, the fact that the grantor remained in

possession and that the recorded deed was found among his papers before or after his death is not sufficient to rebut the presumption of delivery of the deed arising from the registration thereof, there being no evidence that the registration was inadvertent or fraudulent, and each of the grantor's sons is entitled to a one-third undivided interest in the lands free from the lien of plaintiff's mortgage.

CIVIL ACTION, before *Barnhill, J.*, at July-August Term, 1934, of CHATHAM.

On 1 October, 1901, Levy B. Welch conveyed fifty acres of land in Chatham County to William D. Welch. This deed was duly registered on 29 October, 1914. William D. Welch went into possession of said tract of land and remained in possession until his death in April, 1931. On 1 August, 1920, W. D. Welch executed a deed for said fifty acres of land to Kittie A. Welch, his wife, and his two sons, William Corbett Welch and Carl (C. L.) Welch. This deed was recorded in the office of the register of deeds for Chatham County on 2 May, 1921.

Thereafter, on 4 June, 1926, W. D. Welch and wife, K. A. Welch, executed and delivered to the plaintiff Federal Land Bank of Columbia a mortgage upon said land, securing an indebtedness of $1,300. This mortgage was duly recorded on 9 June, 1926.

On or about 21 November, 1932, the plaintiff instituted a suit against the defendants to foreclose said mortgage by reason of the failure of the mortgagors to pay off the indebtedness. The defendants W. C. Welch and C. L. Welch filed an answer, asserting that they were the owners in fee of a two-thirds undivided interest in said property by virtue of deed from their father, heretofore referred to.

There was evidence that W. D. Welch, the grantor in said deed to his wife and sons, lived upon the land and cultivated the same until his death, and that the property was known as the "W. D. Welch place." Neither W. C. Welch nor C. L. Welch lived with their father. Carl Welch, one of the grantees in said deed, said "that the deed from W. D. Welch to his mother and to him and his brother was found in his father's papers." There was evidence that W. D. Welch, the father, built a house on the land in 1924.

The jury found that W. C. Welch and C. L. Welch were the owners and entitled to the possession of a two-thirds undivided interest in said tract of land, free and clear of the lien of plaintiff's mortgage.

From judgment upon the verdict plaintiff appealed.

Daniel L. Bell and Victor R. Johnson for plaintiff.
L. P. Dixon and Siler & Barber for defendants.

BROGDEN, J. What is the legal effect of the due and proper registration of a conveyance of land?

The plaintiff asserts that there was no delivery of the deed from W. D. Welch to his wife and sons, and hence the mortgage deed to the plaintiff constituted a prior lien upon the premises. "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. . . . 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." *Burton v. Peace,* 206 N. C., 99.

"The presumption of delivery arising from the registration of the deed may be rebutted by evidence showing that the registration was inadvertent or fraudulent." *Gulley v. Smith,* 203 N. C., 274, 165 S. E., 710.

In the case at bar there was no evidence that the registration of the deed in controversy was "inadvertent or fraudulent." The bare fact that the grantor, the father and husband of the grantees, remained in possession of the land, cultivating the same until his death, and that the recorded deed was found among his papers either before or after his death, is not sufficient in probative value, to overthrow the presumption arising from registration. See *McMahan v. Hensley,* 178 N. C., 587, 101 S. E., 210.

No error.

FEDERAL RESERVE BANK OF RICHMOND, VA., v. G. W. WHITFORD, MAMIE WHITFORD, STEPHEN WHITFORD, JOHN WHITFORD, AND N. T. WHITFORD.

(Filed 31 October, 1934.)

1. Bills and Notes C a—

The presumption that the possessor of a negotiable note is the holder thereof is a presumption of fact and not of law, and may be rebutted by either plaintiff's or defendant's evidence.

2. Bills and Notes H a: Parties A a—Bank holding note as agent for collection may not maintain action on the note.

Plaintiff Federal Reserve Bank brought suit on a note endorsed to it by the Federal Reserve Agent: "Pay to order of the Federal Reserve Bank for collection for the account of the Federal Reserve Agent." Defendant maker moved for nonsuit: *Held,* the presumption arising from possession of the note that plaintiff was the holder thereof was rebutted by plaintiff's own evidence, and as it appeared that plaintiff was not the real party in interest, C. S., 446, the motion of nonsuit was properly granted.

3. Evidence D f—

A party introducing a note in evidence endorsed to it as collecting agent cannot be heard to attack the endorsement.

THE Federal Reserve Bank of Richmond instituted this action before a justice of the peace on a note for $150.00 made by the defendant G. W. Whitford, payable to the First National Bank of New Bern, and endorsed by the other defendants. The defendants entered a general denial and, upon judgment being awarded the plaintiff, appealed to the Superior Court, where the cause was heard *de novo* at the May Term, 1934, of CRAVEN, by *Daniels, J.* Affirmed.

The plaintiff offered evidence tending to show: (1) that the note was executed by G. W. Whitford; (2) that it was endorsed by the other defendants; (3) that it was endorsed in blank by the First National Bank of New Bern and was rediscounted by the plaintiff Federal Reserve Bank of Richmond; (4) that it was endorsed by the plaintiff Federal Reserve Bank of Richmond and rediscounted to the Federal Reserve Agent; (5) that thereafter it was endorsed by the Federal Reserve Agent, "Pay to the order of Federal Reserve Bank of Richmond for collection for the account of Federal Reserve Agent, Oct. 10, 1929"; and (6) that the note, bearing this last endorsement, was delivered to the plaintiff, the Federal Reserve Bank of Richmond. The plaintiff also introduced evidence tending to show the dealings between the Federal Reserve Bank and the Federal Reserve Agent, to some of which evidence objections by the defendants were sustained. When the plaintiff had introduced its evidence and rested its case the defendants moved to dismiss the action and for a judgment as of nonsuit. The motion was granted and the plaintiff excepted and appealed to the Supreme Court, assigning errors.

W. H. Lee and M. G. Wallace for appellant.
W. B. R. Guion and D. L. Ward for appellees.

SCHENCK, J. We are of the opinion that his Honor was correct in granting the motion of the defendants for judgment as of nonsuit.

While, under certain conditions, it may be true, as contended in the appellant's brief, that the possession of a note creates a presumption of ownership, and thereby gives the holder thereof a *prima facie* right to maintain an action thereon, this presumption is not one of law but of fact, and may be rebutted either by the plaintiff's or the defendants' evidence; and if this presumption be rebutted by the plaintiff's own evidence, the fact of the plaintiff's possession of the note, standing alone, will not be sufficient to carry the case to the jury. The note sued on bore the endorsement "Pay to the order of Federal Reserve Bank of

Richmond *for collection* for the account of Federal Reserve Agent, Oct. 10, 1929." The plaintiff introduced this note bearing this endorsement, and therefore cannot be heard to attack it. Whatever may be the relationship existing between the Federal Reserve Bank and the Federal Reserve Agent, we think it clear that they are separate and distinct entities, and that the reserve bank held the note sued on for collection for the reserve agent. Such being the case, under the authority of *Bank v. Exum et al.,* 163 N. C., 199, and *Bank v. Rochamora et al.,* 193 N. C., 1, and numerous cases there cited, his Honor was correct in holding that the plaintiff, the Federal Reserve Bank of Richmond, was not the real party in interest and, under C. S., 446, could not maintain this action.

Clarkson, J., in *Bank v. Rochamora, supra,* after calling attention to the apparent conflict between C. S., 3017, which provides that "A restrictive endorsement confers upon the endorsee the right . . . to bring any action thereon that the endorser could bring," and C. S., 446, which requires that "Every action must be prosecuted in the name of the real party in interest, . . ." says: "Construing the sections of the Negotiable Instrument Law referred to (C. S., 3017) with the section under Civil Procedure, that says every action must be prosecuted in the name of the real party in interest, we think C. S., 446, is mandatory and compelling. We think the decision of *Bank v. Exum,* 163 N. C., 199, correct in principle and founded on a just and reasonable interpretation of the statutes applicable and cognate. To say a collecting agency, because it is a bank, can sue in its own name would be to say that any attorney or any kind of collecting agent can likewise enter suit by reason of the agency. We do not think our statute allows this construction as to favoritism. The contrary construction would permit the real owner of the instrument to defeat all equities of the maker by simply turning it over to an agent for collection. 'Logic of words should yield to the logic of realities.' *Brandeis, J.,* dissenting in *Di Santo v. Penn.,* U. S. Supreme Court Opinion, 3 January, 1927."

We see no prejudicial error in his Honor's admitting the cross-examination of the plaintiff's witness referred to in the first assignment of error, or in the exclusion of certain documentary evidence set forth in the second and third assignments. If the plaintiff desired the testimony of the Federal Reserve Agent, it should have subpœnaed him as a witness or have taken his deposition.

Affirmed.

LESSIE WEATHERMAN, ADMINISTRATRIX OF C. B. WEATHERMAN, DECEASED, v. H. F. RAMSEY.

(Filed 31 October, 1934.)

1. Automobiles D a—Owner may not ordinarily be held liable for injury to guest of person who borrows the car for his own pleasure.

Where all the evidence tends to show that plaintiff's intestate was killed in an accident while riding in an automobile owned by defendant, but that at the time of the accident the car was being driven by a person to whom defendant had loaned the car and who was driving the car for his own pleasure and not as agent of defendant or for defendant's purposes, and there is no evidence that defendant knew the driver to be incompetent, defendant may not be held liable.

2. Appeal and Error J e—

Where, upon the uncontroverted facts, plaintiff is not entitled to recover, upon appeal from judgment in defendant's favor, any error in the trial of the cause is harmless and is not sufficient grounds for a new trial.

APPEAL by plaintiff from *Finley, J.*, at January Term, 1934, of YANCEY. Affirmed.

This is an action to recover of the defendant damages for the death of plaintiff's intestate.

It is alleged in the complaint that the death of plaintiff's intestate was the result of personal injuries which were caused by the negligence of the driver of an automobile in which he was riding, and which was owned by the defendant; and that said driver was transporting plaintiff's intestate at the time he was injured as a passenger for and on behalf of the defendant.

In his answer the defendant admits that he was the owner of the automobile in which plaintiff's intestate was riding at the time he was injured. He denies that plaintiff's intestate was injured by the negligence of the driver of the automobile, and that the said driver was transporting plaintiff's intestate as a passenger for or on behalf of the defendant. He alleges that he had loaned his automobile to the driver, and that said driver at the time plaintiff's intestate was injured was driving the automobile for his own and not for the defendant's purposes.

At the close of the evidence for the plaintiff the defendant moved for judgment as of nonsuit. The motion was denied.

The issues submitted to the jury were answered in accordance with the contentions of the defendant.

From judgment that plaintiff recover nothing of the defendant the plaintiff appealed to the Supreme Court, assigning errors in the charge of the court to the jury.

Charles Hutchins and Edward H. McMahan for plaintiff.
Merrimon, Adams & Adams for defendant.

CONNOR, J. All the evidence at the trial of this action showed that the defendant was the owner of the automobile in which plaintiff's intestate was riding at the time he was injured; that the defendant had loaned his automobile to the driver to go to a baseball game; and that plaintiff's intestate was riding in the automobile at the time he was injured as the guest of the driver. There was no evidence tending to show that the driver of the automobile was the agent of the defendant, or that he was transporting plaintiff's intestate as a passenger for or on behalf of the defendant. For this reason the defendant is not liable to the plaintiff in this action. *Tyson v. Frutchey,* 194 N. C., 750, 140 S. E., 718. In that case the principle is approved that when a motor car is used by one to whom it was loaned, for his own purposes, no liability attaches to the lender, unless, possibly, where the lender knew that the borrower was incompetent, and that injury might occur while he was using the car, because of his incompetency. See *Reich v. Cone,* 180 N. C., 267, 104 S. E., 330.

Conceding, therefore, without deciding, that there were errors in the instructions of the court to the jury, as contended by plaintiff on her appeal to this Court, we are of opinion that such errors do not entitle plaintiff to a new trial. The judgment is affirmed on the authority of *Rhodes v. Upholstery Co.,* 197 N. C., 673, 150 S. E., 193, and *Steel Co. v. Rose,* 197 N. C., 464, 149 S. E., 555.

Upon the uncontroverted facts, as shown by the evidence offered by the plaintiff, she is not entitled to recover in this action, and any error committed by the court in the charge to the jury was harmless. *Rankin v. Oates,* 183 N. C., 517, 112 S. E., 32.

The judgment is

Affirmed.

RICHARD COLE v. ASHEVILLE FUNERAL HOME.

(Filed 31 October, 1934.)

Automobiles D b—Evidence held insufficient to hold employer liable for negligent driving of employee.

Where, in an action seeking to hold an employer liable for the negligent driving of his employee during business hours, there is no evidence that the automobile was a business vehicle or was owned by defendant, and no competent evidence that at the time of the accident the employee was engaged in the business of the employer, the employer's motion as of nonsuit is properly granted.

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

COLE *v.* FUNERAL HOME.

CIVIL ACTION, before *Schenck, J.*, at February Term, 1934, of BUNCOMBE.

On 7 August, 1930, plaintiff was working on a public street in the city of Asheville, greasing a street-car track. A street car approached and he stepped off the track in order that the street car might pass. Thereupon an automobile, driven by L. H. Wilkins, turned into the street upon which plaintiff was standing and negligently ran him down, inflicting serious injuries. Plaintiff said: "When I was knocked down and dragged the car stopped after it got toward McDowell Street, after he drug me here from the switch. I know the man that was driving, L. H. Wilkins. He was working for the Asheville Funeral Home."

The daughter of plaintiff testified without objection: "I know a man by the name of L. H. Wilkins. . . . I saw him on the date that this happened. He worked for the Asheville Funeral Home. He drove for the Asheville Funeral Home and worked for them."

The plaintiff attempted to offer evidence of certain declarations of Wilkins, tending to show that he was, at the time of the injury, engaged in executing a mission for the defendant. Wilkins did not take the stand at the trial and testify under oath. Hence, the trial judge properly excluded such declaration.

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

Edward H. McMahan and D'Arcy S. Williams for plaintiff.
Welch Galloway for defendant.

BROGDEN, J. There was competent evidence that Wilkins, an employee of defendant, was driving some kind of car during business hours. There was competent evidence that, while so driving, he negligently struck and injured the plaintiff.

Upon such showing, has the plaintiff made out a *prima facie* case? The law answers the question in the negative.

The applicable and governing principle of law was discussed and applied in the case of *Jeffrey v. Mfg. Co.*, 197 N. C., 724, 150 S. E., 503. In that case it was declared: "Our decisions are also to the effect that a plaintiff, in order to recover for personal injury inflicted by an automobile or truck, must offer evidence tending to prove the following:

"1. That the truck or automobile inflicting the injury was at the time operated in a negligent manner, or that the driver thereof was guilty of negligence which was the proximate cause of the injury.

"2. Where the driver or operator of the conveyance at the time of the injury was other than the owner, the plaintiff must offer evidence tending to show the ownership of the vehicle, if such owner is sought to be charged with the negligence of the driver or operator.

"3. That if the injury was caused by the negligence of an agent, evidence must be offered tending to establish the agency.

"4. That the agent or employee, at the time of the injury, was acting within the scope of his employment as contemplated and defined by law."

It is further held in the *Jeffrey case, supra,* that if a vehicle, devoted exclusively to business purposes, is operated during business hours by the regular employee of the owner, and such employee is engaged in the duty of driving and operating such vehicle, such facts would warrant the inference by a jury that the vehicle was, under such circumstances, operated in the furtherance of the employer's business.

In the case at bar there is no evidence that the automobile driven by Wilkins at the time was a business vehicle. There was no evidence that the defendant owned the automobile so driven. There was no competent evidence that the driver was engaged in the business of his employer. Consequently, the ruling of the trial judge was correct.

Affirmed.

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

STATE v. TOM JOHNSON, ALIAS JOHNNY JOHNSON, PRESTON HOWARD, AND JOHNNY HART.

(Filed 31 October, 1934.)

1. Criminal Law I g—Charge in this case held not to contain expression of opinion by court inhibited by C. S., 564.

In this prosecution for murder all the evidence tended to show that deceased was killed in the perpetration of a robbery. The trial court instructed the jury "all the evidence tends to show a homicide committed in the perpetration of a robbery," and that the State has offered evidence "which, it contends, tends to show, and which should satisfy you, gentlemen, beyond a reasonable doubt," etc.: *Held,* the charge will not be held for error on defendant's exception on the ground that it contained an expression of opinion by the court in violation of C. S., 564.

2. Same—

Error of the court in stating the evidence or in stating the contentions of a party must be brought to the court's attention in apt time to afford correction or an exception based thereon is unavailing upon appeal.

APPEAL by defendants from *Frizzelle, J.,* at February Term, 1934, of SAMPSON.

Criminal prosecution, tried upon indictment charging the defendants with the murder of one Howard Jernigan.

STATE *v.* JOHNSON.

The following statement of the case is taken from defendant's brief:

"The four defendants, Tom Johnson, alias Johnny Johnson, Preston Howard, Johnny Hart and Eugene Hines, were tried upon a bill of indictment charging them with murder in the first degree in connection with the killing of Howard Jernigan, Sampson County filling station operator. At the conclusion of all of the evidence, the defendant Eugene Hines, through his counsel, tendered a plea of guilty of accessory before and after the fact, which plea was accepted by the State, and this defendant was sentenced to life imprisonment in the State's Prison. A verdict of guilty of murder in the first degree was returned against the other three defendants, Tom Johnson, alias Johnny Johnson, Preston Howard, and Johnny Hart, each of whom appealed from the judgment and sentence of death.

"At about 9:30 o'clock on the night of 21 December, 1933, the automobile in which the four defendants were riding stopped at the filling station operated by the deceased, Howard Jernigan, who was present at that time with two colored men, Odell McNeal and Raymond Snuggs. The evidence of the State tends to show that just as soon as the operator of the station finished servicing the defendant's automobile with gas and oil, he was shot and killed by one of the defendants; that thereafter the defendants robbed and pillaged the filling station, held up the two colored men who were there, and also the brother of the deceased, who came up in the meantime, and made their get-away, later being apprehended in South Carolina and Florida.

"Much of the State's evidence tends to show that the deceased was killed by one of the defendants in the perpetration of a robbery, in which the other defendants (all of whom were present) either conspired or aided and abetted. The court, being of the opinion that no reasonable inference of a lower degree of unlawful homicide could be drawn from the evidence, charged the jury only as to murder in the first degree."

The only assignments of error relate to alleged expressions of opinion by the court in charging the jury.

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

J. D. Johnson, Jr., for defendant Johnson.

A. B. Crumpler for defendant Howard.

H. P. Johnson for defendant Hart.

STACY, C. J. Two expressions used by the court in charging the jury are characterized by the defendants as violative of C. S., 564. They are: (1) "All the evidence tends to show a homicide committed in the perpetration of a robbery"; and (2) the State has offered evidence "which it contends tends to show, and which should satisfy you, gentle-

men, beyond a reasonable doubt," etc. It would be "sticking in the bark" to say that these expressions were hurtful to the defendants, or that they contravened the provisions of the statute. *S. v. Hart,* 186 N. C., 582, 120 S. E., 345.

Furthermore, an erroneous statement of the evidence (*S. v. Sinodis,* 189 N. C., 565, 127 S. E., 601), or of the contentions of the parties (*S. v. Bittings,* 206 N. C., 798), if deemed material, should be called to the attention of the court, at some appropriate time before the case is given to the jury, so that he may have an opportunity to correct it. *S. v. Lea,* 203 N. C., 13, 164 S. E., 737. Otherwise, an exception based thereon is unavailing on appeal. No such complaint was made in the instant case until after verdict.

The record is free from reversible error; hence the verdict and judgments must be upheld.

No error.

STATE v. E. A. ROOKS.

(Filed 31 October, 1934.)

1. Criminal Law L g—Defendant is entitled to appeal only from conviction or final judgment of Superior Court.

Appeals in criminal cases are controlled by statute, C. S., 4650, and a defendant is entitled to appeal only from conviction in the Superior Court or some final judgment thereof, and an appeal from an order of the Superior Court remanding the case to the recorder's court will be dismissed.

2. Statutes A a—Statute may be declared unconstitutional only in exercise of judicial power properly invoked.

An act of the General Assembly may be declared unconstitutional by the courts only in the exercise of judicial power properly invoked, and an order of the Superior Court remanding a case to the recorder's court *ex mero motu,* which cause had been transferred by the recorder's court to the Superior Court in accordance with statute (ch. 115, Public Laws of 1929) will be stricken out on appeal.

APPEAL by defendant from *Parker, J.,* at September Term, 1934, of CRAVEN.

Criminal warrant charging the defendant with carrying a concealed weapon and with an assault, sworn out before a justice of the peace, and bound over to the recorder's court of Craven County.

Upon demand by the defendant for a jury trial, the cause was transferred by the recorder to the Superior Court of Craven County pursuant to chapter 115, Public Laws 1929, which amends the law in regard to the recorder's court of Craven County and provides, *inter alia,* that upon demand being made for a jury trial in the recorder's court of said

county, the cause shall be transferred to the Superior Court of Craven County, to the end that it may there be heard before a jury.

When the case was reached at the September Term, 1934, the Superior Court, of its own motion, ordered the cause remanded to the recorder's court for trial. From this order the defendant gave notice of appeal.

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

Warren & Warren for defendant.

STACY, C. J., after stating the case: The appeal must be dismissed as unavailing to the defendant in the present state of the record. *S. v. Polk,* 91 N. C., 652.

It is provided by C. S., 4650, that the defendant shall have the right to appeal in case of "conviction in the Superior Court for any criminal offense," etc. Appeals in criminal cases are controlled by the statutes on the subject; and it was said in *S. v. Webb,* 155 N. C., 426, 70 S. E., 1064, "that an ordinary statutory appeal will not be entertained except from a judgment on conviction, or some judgment in its nature final." *S. v. Lyon,* 93 N. C., 575; *S. v. Hinson,* 82 N. C., 540; *S. v. Jefferson,* 66 N. C., 309; *S. v. Bailey,* 65 N. C., 426; *William Biggs, ex parte,* 64 N. C., 202.

We may add, however, that it is not after the practice of the courts, *ex mero motu,* to declare acts of the General Assembly void or unconstitutional. It is only in the exercise of judicial power, properly invoked, that such action is taken. *Blackmore v. Duplin County,* 201 N. C., 243, 159 S. E., 354; *McPherson v. Motor Sales Corp., Ib.,* 303, 160 S. E., 283; *Poore v. Poore, Ib.,* 791, 161 S. E., 532; *Wood v. Braswell,* 192 N. C., 588, 135 S. E., 529; *Person v. Doughton,* 186 N. C., 723, 120 S. E., 481.

The order of remand, therefore, should be stricken out.

Appeal dismissed.

STATE v. CLAUDE CLEMMONS.

(Filed 31 October, 1934.)

Criminal Law F d—Where evidence as to defendant's actions is the same on two prosecutions for different offenses, his plea of former acquittal in the second action should be submitted to the jury.

Defendant was tried for arson and acquitted. Thereafter he was indicted for murder. In the prosecution for murder it appeared that the deceased was fatally burned in the fire which was the basis of the former prosecution, and that the evidence as to defendant's actions in

both prosecutions was the same: *Held*, in the prosecution for murder it was error for the court to withhold from the consideration of the jury defendant's plea of former acquittal.

APPEAL by defendant from *Daniels, J.*, at April Term, 1934, of PITT.

Criminal prosecution, tried upon indictment charging the defendant with the murder of one Louise Roberson.

The defendant entered pleas of not guilty and of former jeopardy, or former acquittal.

The facts with respect to the defendant's plea of former jeopardy or former acquittal are not in dispute. On a prior day of the same term of court the defendant was tried upon an indictment charging him with feloniously setting fire to and burning a dwelling-house on the night of 24 January, 1934, the property of one M. H. Whichard, occupied at the time by Cora Roberson and her three children, including her infant daughter, Louise Roberson. The jury returned a verdict of not guilty.

In the present case, the defendant is charged with the murder of Louise Roberson on the night of 24 January, 1934. The evidence offered on the hearing was the same as that adduced at the trial of the defendant on the charge of arson, except that the evidence of the fatal burning of Louise Roberson was incidental on the charge of arson, whereas it constitutes an essential element in the indictment for murder. But the evidence as to what the defendant did was the same on both trials.

Upon this phase of the matter, the court instructed the jury as follows: "Gentlemen, the arson case in which the defendant was acquitted and the case you are now trying upon the charge of murder embrace two different offenses, and the fact the defendant was acquitted on the charge of arson has no bearing upon the guilt or innocence of the defendant in this indictment for murder which we are now trying." Exception.

Verdict: Guilty of murder in the second degree.

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

Defendant appeals, assigning errors.

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

William J. Bundy for defendant.

STACY, C. J., after stating the case: The case is controlled by the decision in *S. v. Bell,* 205 N. C., 225, 171 S. E., 50. There was error in withholding from the jury's consideration the defendant's plea of former jeopardy or former acquittal. *S. v. King,* 195 N. C., 621, 143 S. E., 140; *S. v. Ellsworth,* 131 N. C., 773, 42 S. E., 699.

The decision in *Bell's case, supra,* evidently was not called to the attention of the learned judge who presided at the trial.

It is not according to the usual course and practice of the courts that one charged with crime should be tried over and over to secure a conviction, even though in some instances the guilty may thus escape punishment, for it is better that the guilty few escape than the many innocent be annoyed and harassed by repeated prosecutions over the same matter. *S. v. Bell, supra,* and cases there cited.

New trial.

ADDISON B. GUY v. ÆTNA LIFE INSURANCE COMPANY.

(Filed 31 October, 1934.)

1. Insurance M e—Denial that proof furnished by insured showed disability within terms of policy waives further proof of disability.

Where insured sends insurer a physician's report in furnishing proof of disability within the terms of the policy, and insurer's agent writes insured that the company declined the claim on the ground that the physician's report failed to show disability within the terms of the policy, the letter constitutes a denial of liability by insurer which waives further proof of disability.

2. Same—

A provision in a policy requiring proof of loss, disability, or death is waived by the company's denial of liability upon grounds other than failure to furnish such proof.

3. Insurance R c: Evidence K a—

A physician's statement as to the condition of insured is not conclusive on the question of insured's disability within the terms of the policy.

APPEAL by plaintiff from *Parker, J.,* at June Term, 1934, of HARNETT.

Civil action to recover disability benefits under policy of insurance issued to plaintiff by defendant.

The policy in suit contains the following provisions:

"BENEFITS IN EVENT OF PERMANENT TOTAL DISABILITY.

"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, . . . the company will waive the payment of all premiums falling due thereafter, . . . pay to the insured a sum equal to the monthly installment provided on the first page hereof," etc.

On 30 January, 1932, plaintiff filed preliminary notice of disability with defendant's agent and asked for necessary proofs in order that his claim might receive immediate attention.

For the purpose of showing "denial of liability" on the part of defendant, the plaintiff offered in evidence a letter written to him by defendant's agent, as follows:

"Our home office advises they have received Dr. Dewar's report of your examination and what Dr. Dewar has to say has been duly considered in connection with the information developed on the inspection report.

"Dr. Dewar does not believe that you are totally and permanently disabled and will for life be unable to engage in any occupation for wages or profit.

"I am therefore requested by our home office to say that they cannot recognize your claim, but to assure you that this is in no sense a repudiation of your policy contract, which remains in full force and effect, subject to its terms and provisions."

The court, being of opinion that, according to this letter, no proof of disability had been received at the home office of the company as provided by the policy, entered judgment of nonsuit, from which the plaintiff appeals, assigning errors.

Neil McK. Salmon and Dupree & Strickland for plaintiff.
Murray Allen for defendant.

STACY, C. J. This is the same case that was before us at the last term, opinion filed 28 February, 1934, and reported in 206 N. C., 118, 172 S. E., 885.

Ample evidence of plaintiff's permanent total disability was adduced on the hearing, but it was thought the letter offered by the plaintiff shows that no proof thereof had been furnished the company as provided by the policy. The action, therefore, was dismissed as in case of nonsuit. *Wyche v. Ins. Co., ante,* 45. In this we think his Honor overlooked the denial of liability contained in said letter, which dispensed with the necessity of further proof. *Misskelley v. Ins. Co.,* 205 N. C., 496, 171 S. E., 862; *Gerringer v. Ins. Co.,* 133 N. C., 407, 45 S. E., 773.

It is established by the decisions in this jurisdiction that a provision in an insurance policy requiring proof of loss, disability or death is waived by the company's denial of liability, or refusal to pay, upon grounds other than failure to furnish such proof. *Misskelley v. Ins. Co., supra.*

The physician's statement, which the defendant alone interpreted as being adverse to plaintiff's claim, and which is not in evidence, was not conclusive of the plaintiff's right to recover. *Fields v. Assurance Co.,* 195 N. C., 262, 141 S. E., 743.

Reversed.

IN RE WILL OF SUDIE HARGROVE.

(Filed 31 October, 1934.)

1. Appeal and Error A f—Propounders are not "parties aggrieved" by order setting aside verdict in favor of caveators.

In this caveat proceeding the jury found against propounders, and the trial court set aside the verdict as being against the weight of the evidence and ordered a new trial. Propounders appealed, assigning as error the refusal of the court to sustain their pleas in bar: *Held*, the propounders are not the "parties aggrieved" by the order setting aside the verdict, C. S., 632, and cannot maintain the appeal.

2. Appeal and Error J a—

The Supreme Court will not interfere with the discretion of the trial judge in setting aside a verdict as being against the weight of the evidence.

APPEAL by propounders from *Frizzelle, J.*, at May Term, 1934, of SAMPSON.

Issue of *devisavit vel non,* raised by a caveat to the will of Sudie Hargrove, late of Sampson County, based upon alleged mental incapacity.

The jury found that the alleged testatrix did not have sufficient mental capacity to execute the paper-writing propounded, and that the same was not the last will and testament of Sudie Hargrove.

The court being of opinion that the verdict was contrary to the weight of the evidence, on the determinative issues, set the same aside, in his discretion, and ordered the issue of *devisavit* reinstated on the calendar for trial at a later term.

Propounders appeal, assigning as error the refusal of the court to sustain their pleas in bar.

J. Faison Thomson, Needham Outlaw, Henry E. Faison, Henry A. Grady, Jr., and Hugh Brown Campbell for the caveators.

Butler & Butler for propounders.

STACY, C. J. This is the same case that was before us on two former appeals, reported in 206 N. C., 307, 173 S. E., 577, and 205 N. C., 72, 169 S. E., 812.

The questions now sought to be presented are not properly before us for decision. In the first place, the propounders are not the "parties aggrieved" by the order setting aside the verdict within the meaning of C. S., 632—such action being favorable to them—and, in the next place, "this Court will not interfere with the discretion of the trial judge in

setting aside a verdict as being against the weight of the evidence." *Edwards v. Phifer,* 120 N. C., 405, 27 S. E., 79; *Brink v. Black,* 74 N. C., 329; *Goodman v. Goodman,* 201 N. C., 808, 161 S. E., 686.

The appeal was improvidently taken, and must be dismissed. *McCullock v. R. R.,* 146 N. C., 316, 59 S. E., 882; *Guy v. Ins. Co.,* 206 N. C., 118, 172 S. E., 885.

Appeal dismissed.

CARL LANEVE v. THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, ET AL.

(Filed 31 October, 1934.)

Appeal and Error J d—

The burden is on appellant to overcome the presumption against him and show error in the judgment or order appealed from.

APPEAL by plaintiff from *McElroy, J.,* 12 June, 1934, at Chambers. From HAYWOOD.

Civil action to recover damages for an alleged negligent injury caused by the bite of a tarantula while plaintiff was a customer in defendant's store, brought against the Atlantic and Pacific Tea Company, a corporation chartered under the laws of the State of Arizona, and Homer Owen and Sam Owen, citizens and residents of Haywood County, N. C.

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

Motion allowed, and plaintiff appeals.

Morgan, Stamey & Ward and Jones & Ward for plaintiff.
R. R. Williams for defendant A. & P. Company.

STACY, C. J. The petition for removal, besides showing the presence of the requisite jurisdictional amount, asserts a right of removal on the grounds of diverse citizenship, and alleges (1) fraudulent joinder of resident defendants, and (2) separable controversy.

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

Without "threshing over old straw," suffice it to say, appellant has not overcome the presumption against error. *Bailey v. McKay,* 198 N. C., 638, 152 S. E., 893. To prevail on appeal, he who alleges error must successfully handle the laboring oar. *Poindexter v. R. R.,* 201 N. C., 833, 160 S. E., 767; *Jackson v. Bell,* 201 N. C., 336, 159 S. E., 926.

Affirmed.

JAMES HANEY, ADMINISTRATOR, v. TOWN OF LINCOLNTON.

(Filed 31 October, 1934.)

1. Appeal and Error J g—

Where an aspect of the law in a case is not mooted on the hearing or debated in the briefs on appeal it will not be considered in determining the appeal.

2. Municipal Corporations E c—Duty of municipality in respect to its streets.

A municipality is not an insurer of the safety of its streets, but is required to use ordinary care and due diligence to see that they are safe for travel.

3. Same—Duty of municipality to place guards at dangerous and exposed places adjacent to its streets.

It is the duty of a municipality to place some guard at dangerous and exposed places adjacent to its streets where the happening of accidents to motorists exercising ordinary care for their own safety may be reasonably anticipated from the failure to place such guards, and whether the danger at a particular place is sufficiently imminent to require guards must be decided on the facts of each particular case.

4. Same—Under facts of this case place of accident was not so imminently dangerous as to require city to place guard opposite street end.

A street within the corporate limits of defendant city intersected, but did not cross, a paved highway. There was a dirt shoulder four to eight feet wide on the highway opposite the intersection, and then a gradual downward slope with a total drop of six to ten feet. The highway had been widened where the street intersected it so that the hard surface at the intersection was something over thirty feet wide. Plaintiff's intestate was killed when a car in which she was riding was driven along the street toward the intersection, and over the embankment opposite the intersection, and turned over: *Held,* the failure of the city to place a guard at the street end did not breach its duty to exercise ordinary care to keep its streets safe for travel to the injury of plaintiff's intestate.

5. Same—Active negligence of driver held to insulate failure of city to erect guard at street end even if such failure amounted to inactive negligence.

A street within the corporate limits of a city intersected, but did not cross, a paved highway. There was a dirt shoulder four to eight feet

wide on the highway opposite the intersection, and then a gradual downward slope with a total drop of six to ten feet. The highway at the intersection had been widened so that the hard surface at the intersection was something over thirty feet wide. The city had not placed a guard at the street end. The driver of the automobile in which plaintiff's intestate was riding drove the car down the street, across the highway and over the embankment, turning the car over and killing plaintiff's intestate. The accident occurred late at night after the street light at the intersection had been turned off. The night was dark and foggy, and the lights on the car were burning dim. The driver of the car testified that he was driving at a slow rate of speed, but that he did not see the embankment in time to stop the car and avoid the accident: *Held*, the driver's active negligence was the immediate cause of the accident and insulated the conduct of the city even though the failure of the city to erect a guard at the street end amounted to inactive negligence.

6. Negligence B c—

The intervening active negligence of a responsible third party will insulate the conduct of defendant, even though it amounts to inactive negligence, where the conduct of defendant would not have resulted in injury except for such intervening negligence.

CLARKSON, J., dissents.

APPEAL by defendant from *Oglesby, J.*, at January Term, 1934, of LINCOLN.

Civil action to recover damages for the death of plaintiff's intestate, Sue Gurley, which occurred in the town of Lincolnton on Christmas morning, 1932, and is alleged to have been caused by the wrongful act, neglect, or default of the defendant.

The facts are these: The deceased, a school girl 17 years of age, Guy Barringer, age 19 or 20, James Haney and Miss Hayes left Hickory between 3:00 and 3:30 o'clock in the morning and reached Lincolnton about 5:00 a.m. en route to Shelby, and thence to York, S. C., where Haney and Miss Hayes were to be married. They were riding in a five-passenger 1928 Pontiac sedan. Barringer was driving and Miss Gurley was on the front seat with him. Haney and his fiancee occupied the rear seat. The trip was the result of a prearranged plan, the automobile having been secured for the purpose from Barringer's father, and all four were up the entire night, dining, dancing and preparing for the journey. None had had any sleep. There was no drinking in the party.

The night was dark; the weather inclement, foggy and drizzling rain. The lights on the automobile were dim, did not show very far in front, shone right down on the road. Barringer was familiar with the road leading out of Lincolnton to Shelby, had spent a good part of the summer there, but had never driven a car over it. They reached Lincolnton before day, drove around the square and out Church Street to

Mill Street, the old Lincolnton-Shelby highway prior to the construction of the new Lincolnton-Shelby road. Haney remarked he thought they were on the wrong road; Barringer replied he knew that was the Shelby road when he was there: "I knew they had a new road built and I thought it had been extended straight on."

Church Street is paved with sheet asphalt and is about eighteen feet wide. It comes into Mill Street at right angles, but does not cross it. Mill Street is a paved highway going in the direction of Shelby. It is paved in the opposite direction only a short distance—about four feet. The paving at the corner of the intersection of Church and Mill streets had been widened eight or ten feet on the inside of the curve in addition to the regular eighteen feet, so as to make the turn easier. It had been in this condition for seven years. Church Street is practically level as it goes into the intersection.

Directly across from where Church Street intersects with Mill Street, and on the west side of Mill Street, there is a dirt shoulder "of possibly 6 or 8 feet beyond the west edge of the hard surface, which had been grassed—the usual six-foot shoulder that you find on roads." There was other evidence that the dirt shoulder was only four feet in width. Beyond this, there is a declivity, fill, or embankment, which slopes gradually from the shoulder of the road to a depth of from 6 to 10 or 12 feet.

Barringer failed to turn into Mill Street, ran directly across it, over the shoulder, down the embankment, into the fill, which was wet and soggy, turned the car over, and Miss Gurley was killed.

Barringer testified that he was traveling westward along Church Street at a rate of from fifteen to twenty miles an hour; that he did not observe the road turned to the left until he crossed the hard-surfaced part of Mill Street, too late to avoid going down the embankment; that while the lights on Main Street were burning, there was no light at this intersection; nor were there any guard rails, barriers, posts, or signs to warn travelers of the unguarded ravine; and further, on cross-examination: "There was not anything to keep a man from following this pavement, and there wasn't anything there to tell us to turn. . . . There wasn't anything to keep me from following it if I was watching the road. I was driving this car no faster than 15 or 20 miles, and I just drove down that embankment. I did not tell Mr. Nicholson that I was perfectly familiar with that road, but that I got to the turning-place quicker than I thought."

There was also evidence introduced to show that four or five other cars, within the last several years, had failed to follow the paved road and had gone over this embankment, some in the daytime, some in the nighttime, but no injuries of any consequence had hitherto occurred.

The city electrician testified that there was one street light in the neighborhood of this intersection. "It was not burning at 5 o'clock Christmas morning, 1932. . . . We cut off the lights in the residential sections at 12:30 or 1:00 o'clock, but on the main street they burn all night."

Motion to nonsuit under Hinsdale Act, C. S., 567; overruled; exception.

The defendant offered no evidence.

The case was submitted to the jury on the issues of negligence and damages, and resulted in a verdict of $10,000 for the plaintiff.

From the judgment entered thereon the defendant appeals, assigning errors, the principal one being directed to the refusal of the court to grant the defendant's motion for judgment as of nonsuit.

Jonas & Jonas, L. E. Rudisill, R. H. Shuford, and R. L. Huffman for plaintiff.

W. H. Childs, S. M. Roper, and Ryburn & Hoey for defendant.

STACY, C. J., after stating the case: It is not debated on brief, nor was it mooted on the hearing, whether plaintiff's intestate and her companions had embarked upon a joint enterprise, or joint venture, so as to render the contributory negligence of the driver imputable to the other occupants of the car, hence we omit any consideration of this view of the matter. For history, philosophy, definition, and application of the doctrine of joint enterprise, see: *Potter v. Florida Motor Lines,* 57 Fed. (2d), 313 (which contains a clear exposition of the principles underlying the doctrine); *Carlson v. Erie R. Co.,* 305 Pa., 431, 158 Atl., 163, 80 A. L. R., 308 (with annotation); *Campbell v. Campbell,* 104 Vt., 468, 162 Atl., 379, 85 A. L. R., 626 (with annotation); *Keiswetter v. Rubenstein,* 235 Mich., 36, 209 N. W., 154, 48 A. L. R., 1049 (with annotation); *Charnock v. Refrigerating Co.,* 202 N. C., 105, 161 S. E., 707; *Butner v. Whitlow,* 201 N. C., 749, 161 S. E., 389; *Albritton v. Hill,* 190 N. C., 429, 130 S. E., 5; *Williams v. R. R.,* 187 N. C., 348, 121 S. E., 608 (concurring opinion); *Pusey v. R. R.,* 181 N. C., 137, 106 S. E., 452; *Eubanks v. Kielsmeier,* 171 Wash., 484, 18 P. (2d), 48, as reported in 34 N. C. C. A., 388, with full annotation upon the subject.

And further, by way of elimination, it is not alleged that there was any defect, excavation, or obstruction, in the street itself, which had been permitted to remain there for an unreasonable length of time, without signals or lights to warn the traveling public, as was the case in *Pickett v. Railroad and the Town of Newton,* 200 N. C., 750, 158 S. E., 398; nor that the street abruptly terminated in a river without barricade or lights, as was the case in *Willis v. New Bern,* 191 N. C., 507, 132 S. E., 286.

The gravamen of the complaint is, that the elbow or sharp turn in the highway created by the intersection of Church and Mill streets is immediately adjacent to a dangerous declivity which calls for lights, signs, railing, or barrier to make it safe for travel in the exercise of ordinary care, and that the failure on the part of the municipality to guard or to warn the public of such danger is negligence, rendering it liable in damages for injuries to travelers which proximately result from a breach of its duty in this respect. *Speas v. Greensboro,* 204 N. C., 239, 167 S. E., 807.

The rule applicable is stated in 13 R. C. L., 421, as follows: "It is well settled that it is the duty of a municipal or *quasi*-municipal corporation to erect railings or barriers along the highway at places where they are necessary to make the same safe and convenient for travelers in the use of ordinary care, and that it is liable for injuries to travelers resulting from a breach of its duty in this regard. This is true though the danger arises from structures or excavations outside of the highway, and on the land of adjoining owners, when they are in the general direction of travel upon the highway. Whether or not a railing or barrier is necessary in a given case depends largely upon the circumstances of the particular locality in reference to which the question arises. Among the facts material to be considered are the character and amount of travel, the character and extent of the slope or descent of the bank, the direction of the road at the place, the length of the portion claimed to require a railing, whether the danger is concealed or obvious, and the extent of the injury likely to occur therefrom. A number of courts have laid down the rule that the danger must be of an unusual character and one that exposes travelers to unusual hazards, such as bridges, declivities, excavations, steep banks, or deep water."

Our own decisions are accordant with this statement. *Willis v. New Bern, supra,* and cases there assembled.

It is further established by the decisions in this jurisdiction that a municipality is not held to the liability of an insurer of the safety of its streets, but only to the exercise of ordinary care and due diligence to see that they are safe for travel. *Alexander v. Statesville,* 165 N. C., 527, 81 S. E., 763; *Seagraves v. Winston,* 170 N. C., 618, 87 S. E., 507; *Fitzgerald v. Concord,* 140 N. C., 110, 52 S. E., 309.

With respect to the duty of notification or fortification against danger which a municipality owes to those using its streets, it has often been said that such duty is to use ordinary care to warn and to protect persons against injury who are themselves exercising ordinary care for their own safety. It is the duty of a municipality to place some guard at dangerous and exposed places, where the happening of accidents from the failure to place guards may be reasonably anticipated. In relation to defects or obstructions in the streets themselves a responsibility may

arise somewhat different from a case involving danger outside of the traveled way. In the latter case, the question of negligence becomes one of reasonably anticipated consequences, and the duty is to use such means as may be necessary to prevent those consequences. *Watkins' Admr. v. City of Catlettsburg,* 243 Ky., 197, 47 S. W. (2d), 1032. The chief difficulty arises in determining whether, in a particular case, the danger is sufficiently imminent to require guards, signs, or barriers, and naturally each case must be decided upon its own state of facts. No hard and fast rule can be laid down that will apply alike to all conditions. *Shea v. Town of Whitman,* 197 Mass., 374, 83 N. E., 1096.

It was the judgment of those having this particular highway in charge that the situation was not such as to call for signs or guards, as the intersection had been widened 8 or 10 feet opposite the gulch side of Mill Street, making the width of the hard surface at the point of injury something over 30 feet. In addition to this, there was the dirt shoulder of from 4 to 6 or 8 feet, and then the gradual descent of the embankment. The duty required of the defendant was that of ordinary care. A searching investigation of the record leaves us with the impression that the evidence is wanting in sufficiency to warrant the inference that this duty was breached to the injury of plaintiff's intestate. *Blackwelder v. Concord,* 205 N. C., 792, 172 S. E., 392; *Briglia v. City of St. Paul,* 134 Minn., 97.

It further appears that the immediate cause of plaintiff's intestate's unfortunate death was the negligence of Guy Barringer, the driver of the car, and not that of the defendant. This doctrine of insulating the conduct of one, even when it amounts to inactive negligence, by the intervention of the active negligence of a responsible third party, has been applied in a number of cases. *Baker v. R. R.,* 205 N. C., 329, 171 S. E., 342; *Hinnant v. R. R.,* 202 N. C., 489, 163 S. E., 555; *Herman v. R. R.,* 197 N. C., 718, 150 S. E., 361.

Speaking to the subject in his valuable work on Negligence (sec. 134), Mr. Wharton very pertinently says: "Supposing that if it had not been for the intervention of a responsible third party the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that causal connection between negligence and damage is broken by the interposition of independent responsible human action. I am negligent on a particular subject-matter. Another person, moving independently, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a nonconductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured."

The same rule announced by *Mr. Justice Strong* in *R. R. v. Kellogg,* 94 U. S., 469, regarded as sound in principle and workable in practice, has been quoted with approval in a number of our decisions. He says: "The question always is, Was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act amounting to a wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence, or wrongful act, and that it ought to have been foreseen in the light of attending circumstances."

It follows, therefore, that the demurrer to the evidence should have been sustained.

Reversed.

CLARKSON, J., dissenting: I think there was plenary evidence in this action for actionable negligence, to be submitted to the jury, as was done by the court below. The defendant introduced no evidence and at the close of plaintiff's evidence made a motion for judgment as in case of nonsuit. C. S., 567. The court below overruled this motion, in which I can see no error.

The issues submitted to the jury, and their answers thereto, were as follows: "(1) Was the death of Sue Gurley, plaintiff's intestate, caused by the negligence of the defendant town of Lincolnton, as alleged in the complaint? A. 'Yes.' (2) What damage, if any, is the plaintiff entitled to recover? A. '$10,000.'"

The court below rendered judgment on the verdict.

In *Speas v. Greensboro,* 204 N. C., 239 (241), the principle is laid down: "The exercise of due care to keep its streets in a reasonably safe and suitable condition is one of the positive obligations imposed upon a municipal corporation. The discharge of this obligation cannot be evaded on the theory that in the construction and maintenance of its streets the municipality acts in a governmental capacity, *Graham v. Charlotte,* 186 N. C., 649; *Willis v. New Bern,* 191 N. C., 507; *Michaux v. Rocky Mount,* 193 N. C., 550; *Hamilton v. Rocky Mount,* 199 N. C., 504.

"The court instructed the jury that the erection of the 'silent policeman' at the intersection of the streets was not enough to constitute negligence (*Valley v. Gastonia,* 203 N. C., 664), and left to the determination of the jury the question whether the city had used due care in providing adequate lights. If the city failed to exercise such care, it was negli-

gent. *Bunch v. Edenton*, 90 N. C., 431; *Bailey v. Winston-Salem*, 157 N. C., 253; *Pickett v. R. R.*, 200 N. C., 750."

The old case of *Bunch v. Edenton, supra,* is applicable to this case. At page 433 is the following: "It appears in the record that one Lee owned a lot situate along and immediately adjoining Main Street in that town, and on the side of the lot next to, adjoining and bordering on the outer side of that street there was an excavation for the purpose of a cellar, eight feet deep, running immediately along the street the distance of forty feet, and extending back from it about sixty feet.

"The defendants had knowledge of this excavation. It was permitted to remain open and unenclosed for a month without any railing, fence, or other sufficient barrier to prevent persons passing that way from falling into it, and no light was placed at night on the street near this opening.

"The plaintiff, passing along that street on the sidewalk on a very dark night, was unable to see the pit, missed the sidewalk, fell into it and broke his thigh, doing him serious damage. The jury found that he did not by his negligence contribute to the injury to himself.

"The defendants contend generally that the plaintiff has no cause of action against them, and that if in any case they could be liable for injuries happening on the streets in said town, they could not be held liable in this case, *because the pit that occasioned the injury to the plaintiff was outside of the street and sidewalk.*" (Italics mine.)

At page 434: "It was the positive duty of the corporate authorities of the town of Edenton to keep the streets, including the sidewalks, in 'proper repair'—that is, in such condition as that the people passing and repassing over them might at all times do so with reasonable ease, speed and safety. And proper repair implies also that all bridges, dangerous pits, embankments, dangerous walls and the like perilous places and *things very near and adjoining the streets,* shall be guarded against by proper railings and barriers. Positive nuisances on or near the streets should be forbidden under proper penalties, and, when they exist, should be abated." (Italics mine.)

This "death trap" had been there for years, and by the exercise of reasonable care should have been known to the defendant. Four or five automobiles had run off of it at the same place. Perhaps a cost of less than $25.00 expended by the defendant in guarding and putting warning signs would have saved this young girl's life, or a light placed there by defendant, to show the declivity. Guy Barringer was at the wheel and beside him was Sue Gurley, who was killed when the car went down into the ravine. Guy Barringer testified: "Miss Sue Gurley did not have any interest in the car. I was driving that night. She did not own any part of the car." This made her a passenger, and the law is

well settled in this State that Barringer's negligence must be the sole and only proximate cause to prevent recovery.

James Haney and Miss Hayes (now Mrs. Haney) were going from Hickory by way of Lincolnton, Shelby, and then to York, S. C., to be married. It was Christmas morning, about 5 o'clock. Guy Barringer testified further: "I stayed down here a few summers before that, and that was the highway then. I knew they had a new road built, and I thought it had been extended straight on. *It was foggy and a fine mist of rain and we had to kinder creep along and we got up to this fill and went right over the end of it. I did not see any sign or anything and had our lights on dim and they shone right down on the road and they did not show very far in front. I was operating the car from 15 to 20 an hour between the Lutheran Church and the place we went over. I was driving on the right-hand side of the street. Main Street was lit up there, there was not any light down there. I did not see a thing, no kind of warning, no barrier or anything to indicate warning. The ravine was around eight or ten feet deep.* My front wheels were just off of the hard-surface road when I realized we were going over. I gave a caution, I forget the exact words I used, but something to the effect to grab yourselves, everybody look out, or something to that effect. I applied brakes, the pavement was slick, and they did not do much good. I tried to hold it straight, because I thought maybe it would not be deep and would not turn over, but it was wet and soggy. It is elevated to the north. The front wheels stuck in the mud and kindly twisted over on the right side. Miss Sue Gurley was on the right-hand front seat. She was sitting with her left knee up in the seat, sitting on her left foot, with her back kindly toward the door.

"As soon as it was over I asked if anybody was hurt. Miss Hayes and Jim in the back seat said they were not hurt and Sue did not answer. I tried to lift her up, I thought she had fainted; I could lift her up, but I could not get her head out. . . . *There were no lights on the street as we proceeded to the point where we went off, there were not any lights at all anywhere. My car was equipped with brakes and they were in good working order, and also equipped with lights, two headlights and dash light and tail light, and they were burning.* It was a model 1928 Pontiac. . . . I knew that was the Shelby road, but I did not tell him I knew that road. I was driving about fifteen to twenty miles an hour and my lights were burning. I drove right on to the point where this road turns around and just drove right on down the embankment. *I did not turn around the road at all. I did not know I was supposed to turn. I thought it went straight.* Yes, I looked. I had my lights on dim and I could see fifteen to twenty feet ahead of the front of my car. If I had turned them on full I could not have seen at all. I was driving at the rate of fifteen to twenty miles and my brakes were in good order.

Running at fifteen miles an hour, if I applied my brakes I could stop in five or six feet when the roads are not wet. I didn't apply my brakes until my front wheels were off of the pavement. I could have seen a distance of fifteen feet and could have stopped my car, if it had been dry, within six or seven feet. I did not apply my brakes until the front wheels were off the pavement, ready to start down. The ground was level—even with the road—*and we were going down a little grade and naturally that would make the light shine a little closer and nobody would know when something just dropped straight off.* You could see out there, but you couldn't see exactly (a black road) if there was one there, you could not tell whether there was one there or not. We were straining our eyes to see where we were. Yes, I could see fifteen feet in front of me. I could see fifteen feet of the road before I ran off. *I was looking. I was really watching the road that night.* I could see an ordinary road fifteen feet. I could see that night with my lights dim fifteen feet. What was the matter with me that I didn't see it until I left the pavement is that it takes a little time to do anything. It takes you longer to act than it does to look. I have driven enough to know that if I am driving in a fog that I have to keep a lookout. *There wasn't anything to keep a man from following this pavement, and there wasn't anything there to tell us to turn. That paving ran around here, but you couldn't see around the side.*" (Italics mine.)

J. O. Shuford testified: "Christmas, 1932, where Church Street comes into the intersection, the embankment went straight into the ravine. I had never noticed any barrier or sign there. I have noticed the place recently. There was one city street light in the neighborhood of that point—one on the corner. That light was not burning at 5 o'clock Christmas morning, 1932."

J. C. Blanton testified: "I had occasion to pass by this place often, most every day. There were no barriers at the end of the street at all, and no signs, and there has never been any that I know of."

Chief of Police Farris: "I know the point at which the wreck occurred. On 25 December, 1932, that was one of the streets of the town of Lincolnton. There was no fence or barrier of any kind up at this curve that I ever saw. That ravine at the end of this street, at that time, must have been four or five feet drop and kept getting deeper—six or seven feet deep—maybe more."

S. R. Warlick: "The ravine at the end of the curve has existed ever since the road was hardsurfaced, possibly twelve or fifteen years before the wreck. I have never observed any sign or warning on the road along toward this ravine, and never noticed any fence or barrier along there."

Hilliard Hoyle: "There were no signs or barricades at this intersection whatever. As I approached the scene of the wreck I could not see the car off down in there."

Grady Sisk testified: "No, there were not any street lights burning, and there were no signs or barricades. To my knowledge that place had been in that same condition ever since we lived there, right around five years; it was that way all that time. Q. State whether you ever saw any automobile wrecks at this point prior to that time where this car went over the embankment and wrecked? A. I have seen four or five cars run off that fill. Q. Off that same fill? A. Yes. Q. At the time you saw those cars go over that embankment, tell his Honor whether the road was in the same condition as it was on Christmas, 1932? A. Yes. Q. Now, tell of those wrecks that you remember and who they were that had the wrecks. A. Mr. Mull went off there." He also told of the others.

The court below charged the well-settled principle laid down in *White v. Realty Co.*, 182 N. C., 536 (538): "His Honor correctly charged the jury that if the negligence of McQuay, the owner and driver of the Ford car, was the sole and only proximate cause of plaintiff's injury, the defendant would not be liable; for, in that event, the defendant's negligence would not have been one of the proximate causes of the plaintiff's injury. *Bagwell v. R. R.*, 167 N. C., 615. But if any degree, however small, of the causal negligence, or that without which the injury would not have occurred, be attributable to the defendant, then the plaintiff, in the absence of any contributory negligence on his part, would be entitled to recover; because the defendant cannot be excused from liability unless the total causal negligence, or proximate cause, be attributable to another or others. 'When two efficient proximate causes contribute to an injury, if defendant's negligent act brought about one of such causes, he is liable.' *Wood v. Public Service Corp., supra,* and cases there cited." The evidence was to the effect that the plaintiff's intestate, Sue Gurley, was a passenger in the car. The negligence, if any, of Guy Barringer could not have been the sole and only proximate cause of Sue Gurley's death.

It is a matter of common knowledge that every place in North Carolina similar to that in the present controversy has, by the efficient State Highway Commission, placed barriers painted white, reflectors and white cross-bars to warn motorists of the danger of this semi-dead end on the State highway system. Those who ride the roads know this to be a fact. The learned, able and painstaking judge gave the contentions fairly on both sides of the controversy and the charge covered every aspect of the law applicable to the facts. A jury of twelve men "of good moral character and of sufficient intelligence" (C. S., 2312) heard the evidence and rendered the verdict against defendant—men living in the vicinity. If we are ever to lessen the appalling death toll, in North Carolina and elsewhere, of automobile accidents, the courts

must hold municipalities and others to due care in guarding these "death traps." A leading North Carolina daily has carefully gotten up facts under *"Deadly Roads,"* which are as follows: "During the 18 months the United States was in the World War, 684 North Carolinians were killed in battle, 238 died of wounds, 601 died of disease, 87 were killed in different ways, making the total of North Carolina men who gave their lives for their country 1,610.

"During that same period, 4,128 North Carolinians were wounded. During the period from 1928 through 1933, a total of 4,429 persons were killed in automobile accidents on North Carolina highways. During that period there were 20,624 accidents in which persons were killed or injured and 29,144 persons were injured.

"The highway death toll this year through July has been 450 and highway patrol officials have estimated that the death toll for the year will exceed 1,000. The deaths by years are: 673 in 1928; 690 in 1929; 777 in 1930; 762 in 1931; 674 in 1932; 853 in 1933. The toll of injuries by year is: 4,801 in 1928; 5,084 in 1929; 4,426 in 1930; 5,075 in 1931; 4,783 in 1932; and 4,975 in 1933."

I think beyond question that the judgment of the court below should be affirmed. It may mean from the majority decisions that municipalities will be penurious, negligent, and careless with its streets at the expense of human life and limb. This young girl's life was snuffed out, as the jury in the court below found, by the defendant not using due care to provide barriers and warnings; when it knew, or, in the exercise of ordinary care, should have known, of the danger. Five other drivers of automobiles had run down this bank and had wrecks at the same place. It was night and the place was dark when the wreck occurred, and defendant had no light there, so that the traveler on the highway could see the pitfall, and death was the result.

STATE OF NORTH CAROLINA, EX REL. T. W. GRIMES, JR., v. HADEN C. HOLMES.

(Filed 31 October, 1934.)

1. Public Officers A a—Legislature may place additional duties upon municipal officer with provision that he receive compensation of only one office.

The Legislature of this State may abolish, subject to some specific constitutional restrictions, an existing public office, and therefore it has power to place additional duties upon the officers of a municipal corporation, and a statute (ch. 175, Private Laws of 1933) which places the

affairs of a municipal corporation in the hands of a city council and a city manager and provides that in the event of a vacancy in the office of city manager, by sickness or otherwise, the council may delegate the duties of this office to one of its members, to be performed *ex officio* as mere auxiliary duties with such compensation as the council may determine, but shall receive no salary as a member of the council, *is held* not to contravene Art. XIV, sec. 7, of the State Constitution prohibiting the holding of more than one office of trust or profit by any one person, since the statute merely places additional duties upon the municipal officer and provides that the incumbent of the office shall receive compensation for that one office. C. S., 2896, 2897.

2. Statutes A a—It will be presumed that act has been passed in conformity with constitutional requirements.

The courts will not go behind the ratification of an act of the Legislature to inquire as to whether notice required by Art. II, sec. 12, of the Constitution of North Carolina, and C. S., 6106, and will conclusively presume that this requirement binding upon the conscience of the Legislature has been observed.

APPEAL by plaintiff from *Harding, J.*, at March Term, 1934, of ROWAN. Affirmed.

This is an action in the nature of a *quo warranto*, brought by the Attorney-General of the State of North Carolina on the complaint of the relator, a citizen of this State, and a resident, taxpayer, and qualified voter of the city of Salisbury, to oust the defendant from the office of city councilman of the city of Salisbury, on the ground that defendant now unlawfully and wrongfully holds and exercises said office. C. S., 870 (1)-871.

The agreed statement of facts is as follows: "(1) That the relator, T. W. Grimes, Jr., is a citizen, taxpayer, and qualified voter of the city of Salisbury, North Carolina.

"(2) That leave was obtained from the Attorney-General to institute this *quo warranto* proceeding, and relator gave the proper undertaking within the time required by law, and said proceeding was instituted by the issuance of summons and copy of the complaint being served on the defendant on 28 September, 1933, all within the time required by law.

"(3) That the said Haden C. Holmes gave the proper undertaking within the time required by law and before filing his answer in this cause, and that defendant's answer was duly filed within the time allowed by law.

"(4) That Haden C. Holmes was duly elected a member of the city council of the city of Salisbury, North Carolina, in the municipal election held in May, 1933; pursuant to said election, on 1 July, 1933, the defendant was duly inducted into said office of city councilman, began the performance of his duties as such, and since said date has held and exercised said office, and continues so to do.

"(5) That on 1 July, 1933, while the defendant was holding and exercising the office of city councilman, there being a vacancy in the office of city manager, the said Haden C. Holmes was appointed by the city council to do and perform the duties of city manager, and began the performance of his duties as such and continues so to do.

"(6) That the said Haden C. Holmes is now acting and performing the duties of the office of city councilman and city manager, and is receiving as compensation the sum of $250.00, with an additional $15.00 per month for the use of his automobile while engaged in the performance of his duties, but that he is not receiving any salary as city councilman.

"(7) That the 1933 session of the General Assembly of North Carolina ratified an act entitled 'An Act to Amend Chapter Two Hundred and Thirty-one of the Private Laws of One Thousand Nine Hundred and Twenty-seven of North Carolina, Relating to the Office of City Manager of the City of Salisbury,' said act being fully set forth in defendant's further answer; that no notice by publication was given before the introduction and passage of said act.

"(8) That the city charter and all supplementary acts, whether public or private, amendatory thereof are hereby made a part of this agreed statement of facts.

"(9) That a former member of the city council, during the last term of office of the city council, performed the duties of councilman, mayor and city manager at one and the same time.

"(10) That prior to 1 July, 1933, the said Haden C. Holmes was a member of the city council of the city of Salisbury, North Carolina, and received as compensation for his services as city councilman the sum of $50.00 per month up to and including the month of April, 1933, but that he did not receive any compensation as city councilman after the ratification of chapter 175, Private Laws of 1933; that on 15 November, 1932, while the said Haden C. Holmes was a member of the city council, he was appointed to perform the duties of city manager at a salary of $200.00 per month, in addition to the salary received as city councilman up to May, 1933, but that for the months of May and June, 1933, he did not receive any salary as city councilman, and has not since that date received any salary as city councilman.

"Dated 17 February, 1934. George R. Uzzell, Attorney for Plaintiff. Hayden Clement, Attorney for Defendant."

The judgment of the court below is as follows: "This action having been called for trial, and it appearing to the court that plaintiff and defendant have waived a trial by jury and agreed upon an agreed statement of facts; and the court finding as a fact that the defendant Haden C. Holmes was duly and lawfully elected a member of the city council

at the last municipal election, and duly qualified as a member of said council on 1 July, 1933, and since said date has been lawfully performing the duties of his office as a member of said city council, together with such additional duties as have been imposed upon him by the council; and the court being of the opinion that the said Haden C. Holmes is lawfully entitled to continue to exercise and perform the duties of his office as a member of the city council, together with the additional duties of city manager delegated to him by the city council.

"It is now, on motion of Hayden Clement, counsel for the defendant, adjudged that the said Haden C. Holmes is lawfully entitled to continue to hold the office of a member of the city council and to do and perform the additional duties of city manager imposed upon him by said council, together with such franchises, privileges, and emoluments connected therewith; and that the plaintiff be denied the relief prayed for in the complaint, and that the plaintiff pay the costs of this action, to be taxed by the clerk. Wm. F. Harding, Judge Presiding."

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

George R. Uzzell for plaintiff.
Hayden Clement for defendant.

CLARKSON, J. The question involved: Is it a valid exercise of legislative power for the Legislature to enact that: In the event the city manager of a municipal corporation shall be sick, absent, or otherwise unable to perform the duties of his office, or should the position be vacant, the city council may delegate the duties of city manager to one of its members, to be performed *ex officio* as mere auxiliary duties? We think so, under the facts and circumstances of this case.

Article XIV, section 7, of the Constitution of North Carolina, is as follows: "No person who shall hold any office or place of trust or profit under the United States, or any department thereof, or under this State, or under any other state or government, shall hold or exercise any other office or place of trust or profit under the authority of this State, or be eligible to a seat in either house of the General Assembly: *Provided*, that nothing herein contained shall extend to officers in the militia, justices of the peace, commissioners of public charities, or commissioners for special purposes."

In *Groves v. Barden*, 169 N. C., 8 (9), speaking to the subject is the following: "The line between 'offices' and 'places of trust or profit' within the meaning of the Constitution has not been clearly marked, principally because they approach each other so closely, and are in all essential features identical.

"In *Doyle v. Raleigh,* 89 N. C., 133, the Court, speaking of this question, says: 'It is apparent from the association that "places of trust or profit" are intended which approximate to but are not offices, and yet occupy the same general level in dignity and importance. The manifest intent is to prevent double office-holding—that offices and places of public trust should not accumulate in any single person—and the superadded words of "places of trust or profit" were put there to avoid evasions in giving too technical a meaning to the preceding words,' and this was affirmed in *State ex rel. Wooten v. Smith,* 145 N. C., 476, the Court adding in the latter case: 'The most important characteristic which distinguishes an office from a public agency is that conferring of the office carries with it a delegation to the individual of some of the sovereign functions of the Government. In this respect, the terms "office" and "places of trust" as used in our Constitution are synonymous. *Doyle v. Raleigh,* 89 N. C., 136; *Barnhill v. Thompson,* 122 N. C., 495.' "

In the above-cited case it was held that a rural mail carrier was an officer. Under the doctrine announced in *Hoke v. Henderson,* 15 N. C., 1, a public office was property and, although the General Assembly could regulate the fees and emoluments thereof, it could not take away the entire or major part of the salary of a public officer.

Hoke v. Henderson, supra, was overruled in *Mial v. Ellington,* 134 N. C., 131, so that now the fees, salaries and emoluments of all officers, except the salaries of the judges and certain other officers, set forth in the Constitution, are absolutely subject to legislative control. Under that decision, an officer appointed for a definite time to a legislative office has no vested property therein or contract right thereto of which the Legislature cannot deprive him.

The people of the city of Salisbury adopted Part 4, Plan D, Mayor, City Council and City Manager, chapter 56, "Municipal Corporations." C. S., 2896, is as follows: "The city council shall appoint a city manager, who shall be the administrative head of the city government, and shall be responsible for the administration of all departments. He shall be appointed with regard to merit only, and he need not be a resident of the city when appointed. He shall hold office during the pleasure of the city council, and shall receive such compensation as it shall fix by ordinance."

C. S., 2897, is as follows: "The city manager shall (1) be the administrative head of the city government; (2) see that within the city the laws of the State and the ordinances, resolutions and regulations of the council are faithfully executed; (3) attend all meetings of the council, and recommend for adoption such measures as he shall deem expedient; (4) make reports to the council from time to time upon the affairs of the

city, keep the council fully advised of the city's financial condition and its future financial needs; (5) appoint and remove all heads of departments, superintendents, and other employees of the city."

In *Town of Saluda v. County of Polk, ante,* 180 (187), we find: "It will be seen by the Constitution of the State that almost unlimited power is given the General Assembly in reference to the creation and abolishing of counties, cities, and towns of the State."

The General Assembly, Private Laws 1933, ch. 175, passed an act relative to the position of the city manager of the city of Salisbury. A copy of the same is made a part of the agreed statement of facts. The material part is as follows: "In the event the city manager shall be sick, absent from the city, or otherwise unable to perform the duties of his office, or should the position of city manager be vacant, the council may delegate the duties of the city manager to one of its members, to be performed *ex officio* as mere auxiliary duties, and designate one of its members to perform such duties, and the person so designated shall have all of the powers and authority of the city manager while he shall serve in that capacity, and shall receive such compensation as the council shall determine, but shall receive no salary as a member of the city council."

Conceding that the city manager is an officer in the meaning of the Constitution, yet we think the duties of his office in the cases set forth in the act for the time being can be performed *ex officio* by one of the council "as mere auxiliary duties."

If the General Assembly can abolish, they can subject to the limitations of the Constitution, place additional duties on officers of a municipality. *Chief Justice Ruffin* says, in *Troy v. Wooten,* 32 N. C., 377 (379-380): "The only provision in that instrument which has any bearing on the question is that in the 25th section, that no person shall hold more than one lucrative office at any one time. But that does not restrain the Legislature from abolishing an office and transferring its duties, so as to attach them to another office, when it shall seem to the General Assembly to promote the public weal, and when the several duties are not in their nature incompatible. . . . It therefore answers an important purpose in the public economy, by uniting the duties and fees in one office, to induce fit men to take the place. . . . For, while it is not to be presumed, on the one hand, that the Legislature will create needless offices, so, on the other, it cannot be presumed that it will, with the intent to evade a constitutional provision, impose on one officer more duties than by reasonable diligence he can discharge."

In the *Mial case, supra,* at page 154, is the following: "When the State employs officers or creates municipal corporations as the mere agencies of government, it must have the power to discontinue the agency whenever it comes to be regarded as no longer important. 'The framers

of the Constitution did not intend to restrain the State in the regulation of their civil institutions adopted for internal government.' They may, therefore, discontinue offices, or change the salary or other compensations, or abolish or change the organization of municipal corporations at any time, according to the existing legislative view of State policy, unless forbidden by their own Constitution from doing so." Cooley's Const. Lim. (7th Ed.), 387.

At pages 161-162: "If the people have not authorized the legislative department to parcel out their sovereignty by grants of public offices as private property, we dare not do so. The Legislature having been entrusted with the power of either electing or providing for the election of officers of legislative creation, must, as the representatives of the people, be entrusted to make such changes in the tenure, duties and emoluments of such offices as in its judgment the public interest demands. This power having been vested in that department of the Government, it is our duty to obey and enforce the law as the 'State's collected will.'" *Lawrence v. Hodges,* 92 N. C., 672; *State ex rel. McNeil v. Somers,* 96 N. C., 467; *McCullers v. Commissioners,* 158 N. C., 75; *Borden v. Goldsboro,* 173 N. C., 661; *State v. Wood,* 175 N. C., 819. The plaintiff cites *Harris v. Watson,* 201 N. C., 661, which is distinguishable from the present case.

Citing a long list of authorities in *Hinton v. State Treasurer,* 193 N. C., 496 (499), we find: "In *Sutton v. Phillips,* 116 N. C., at p. 504, speaking to the question, this Court said: 'While the courts have the power, and it is their duty in proper cases, to declare an act of the Legislature unconstitutional, it is a well-recognized principle that the courts will not declare that this coördinate branch of the Government has exceeded the powers vested in it unless it is plainly and clearly the case. *If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people.* (Italics ours.) . . . At p. 505: It cannot be said that this act is plainly and clearly unconstitutional. The doubt, if any, must be resolved in favor of the General Assembly.'"

Plaintiff contends that the act in controversy was not passed in compliance with Article II, section 12, of the Constitution and as provided in C. S., 6106. This contention cannot be sustained.

In *Cox v. Commissioners,* 146 N. C., 584 (585), is the following: "The courts will not go behind the ratification of the act to ascertain whether notice has been given in accordance with section 12, Article II, of the Constitution of the State. While that section is binding upon the conscience of the General Assembly, and doubtless is intended to be observed by that body, the courts will not undertake to review the action in that respect of a coördinate department of the State Govern-

ment, and will conclusively presume, from ratification, that the notice has been given. *Gatlin v. Tarboro,* 78 N. C., 119; *Brodnax v. Groom,* 64 N. C., 244; *Worth v. Railroad,* 89 N. C., 291; *Puitt v. Commissioners,* 94 N. C., 709; *S. v. Powell,* 100 N. C., 525."

The able brief of plaintiff is gripping and persuasive, but not convincing. It is a serious matter for a court to declare an act of the General Assembly unconstitutional. This has been done when the act is plainly and clearly so. The General Assembly is the law-making body, subject to constitutional limitations. The judicial forum would soon be an autocracy if it would attempt to legislate or overrule acts of the General Assembly, passed contrary to its views, when not unconstitutional. The policy as to the passage of the act in controversy here is for the General Assembly and not for us to determine.

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

Affirmed.

S. A. PARAMORE v. THE FARMERS MUTUAL FIRE INSURANCE ASSOCIATION OF NORTH CAROLINA.

(Filed 31 October, 1934.)

1. Insurance G c—Evidence of waiver of forfeiture for nonpayment of assessments held sufficient to be submitted to jury.

Evidence that defendant Mutual Fire Insurance Association sent plaintiff a notice of assessment on his policy which provided, under its charter and by-laws, that the policy would be forfeited unless the assessment were paid within sixty days, and that about six months thereafter defendant sent plaintiff notice of an additional assessment and included in such notice the past-due assessment, the second notice stating that if the total assessment were not paid within sixty days the policy would be forfeited, together with evidence that it was defendant's custom to mail notices of past-due assessments with current assessments and reinstate policies upon payment of the past-due and current assessments, and that within sixty days from receipt of the second notice plaintiff tendered payment of both his past-due assessment and his current assessment, and that he had suffered loss by fire within the sixty days after receipt of the second notice, *is held sufficient to be submitted to the jury on the question* of defendant's waiver of the forfeiture of the policy for nonpayment of the first assessment within the time prescribed, and as to whether the policy was in effect at the time of the fire.

2. Customs and Usages A a—Testimony of plaintiff as to transaction with defendant held competent with other evidence of custom.

In this action on a fire insurance policy in a mutual insurance association, plaintiff introduced evidence of the custom of defendant to mail notices of past-due assessments with notices of current assessments and to

reinstate policies upon payment of past-due and current assessments. Plaintiff testified to the effect that after the assessment against him was past due he went to defendant's secretary-treasurer to pay same and was told not to do so at that time, that the matter of reinstatement would be taken up at a meeting of defendant's directors, and that thereafter plaintiff sent him notice of the past-due assessment with notice of a current assessment, which notice stated that the policy would be forfeited if the total assessment were not paid within sixty days: *Held*, plaintiff's testimony was competent with the other evidence of custom.

3. Insurance G c—

C. S., 6351 and 6352, held not applicable to facts in this case, in which plaintiff seeks to establish a waiver of the forfeiture of his policy of fire insurance for nonpayment of an assessment within the time limit prescribed.

APPEAL by defendant from *Daniels, J.*, and a jury, at May Term, 1934, of PITT. No error.

This is an action brought by plaintiff against defendant to recover the sum of $1,500 for the loss of his residence by fire, under the terms of a policy issued to him by defendant. The defendant denied liability and contended that the policy of insurance lapsed and became void on 15 March, 1933, by reason of the failure of the plaintiff to pay his assessment on 16 January, 1933, or within sixty days thereafter, as provided by the charter and by-laws of the defendant corporation.

The plaintiff replied to the defendant's contention as follows: "That the policy of fire insurance sued on herein, on the date of the fire, to wit, 10 October, 1933, was in full force and effect and fully subsisting, and the validity thereof was fully recognized by the defendant, for that, on 20 September, 1933, the defendant mailed to the plaintiff at his post-office address in Grimesland, North Carolina, a postal card in the following words and figures, to wit: 'S. A. Paramore, Grimesland, N. C., Office of The Hood System Industrial Bank, Greenville, N. C., September 15, 1933. Dear Sir: Your pro-rata part of an assessment to cover Reserve Fund and losses sustained by J. H. and F. L. Blount ($100), J. G. Moye ($100), Calvin Dunn ($250), J. E. Sutton ($150), Mrs. Lizzie Dail ($350), J. C. Galloway ($125), Mrs. Pearl Roberson ($750), J. F. Cox ($300), M. O. Gardner ($75), Heber F. Cox ($375), Mrs. G. L. Moore ($300), and A. M. Wooten, Jr. ($500), amount to $9.50 (Previous Assessment $9.50), Total $19.00.

" 'The above assessment is due within sixty days from date, and if not paid at maturity your policy will be forfeited. Farmers Mutual Fire Insurance Association, James L. Little, Secretary-Treasurer. Present this card at Hood Bank.'

"That the above-mentioned postal card, advising the plaintiff of assessment due and owing by him, was mailed by the defendant at

Greenville, North Carolina, at 3 p.m. on 20 September, 1933, and thereafter, in due course, was received by the plaintiff.

"That the aforesaid notice of assessments due and owing by the plaintiff included all assessments theretofore made by the defendant against the plaintiff, then unpaid, and in addition thereto included a further assessment of $9.50, and according to said notice, as appears above, the plaintiff had sixty days from 15 September, 1933, in which to pay the total assessment of $19.00.

"That thereafter, to wit, on 11 October, 1933, and within the sixty days provided for in said notice, the plaintiff tendered to the defendant, in cash, lawful money of the United States, the sum of $19.00, for the purpose of paying said assessment, which tender the defendant wrongfully and unlawfully refused.

"That, as aforesaid, the defendant, in its notice of assessment made on 15 September, 1933, included the assessment theretofore due and owing by the plaintiff, in addition to an assessment then being made and by reason of the inclusion of said old assessment in said notice and the levying of another assessment against the plaintiff, the defendant waived its right to declare the policy sued on herein lapsed, and recognized that said policy was then in full force and effect.

"That the defendant, prior to the levying of the assessment, notice of which is contained on the postal card fully above set cut, usually and habitually followed and practiced the custom, habit and usage not to declare one of its policies lapsed for the nonpayment of assessments, which said custom had been so habitually practiced that the provision for payment within sixty days, or a consequent lapsing of the policy by reason of such nonpayment, had fallen into disuse and was not enforced by the defendant, which said custom and practice and usage were well known to the plaintiff and numerous others of the defendant's policyholders.

"That being so advised, the plaintiff alleges and says that both by reason of defendant's custom with respect to the levying and collection of assessments as above set forth, and by reason of the particular notice of assessment made by the defendant on 15 September, 1933, the defendant waived its right to declare a forfeiture of plaintiff's policy, and on account thereof, at the time of the fire complained of in the complaint, plaintiff's policy was in full force and effect and fully subsisting and on account thereof the plaintiff is entitled to recover the amount demanded in the complaint."

The following issue was submitted to the jury, and their answer thereto: "Was the policy of fire insurance in controversy herein in full force and effect on 10 October, 1933, the date of the fire complained of, as alleged in the complaint? A. 'Yes.'"

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.

W. L. Whedbee and Albion Dunn for plaintiff.
Harding & Lee 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. The court below overruled these motions, and in this we can see no error.

The question involved: Did the defendant, under the facts appearing of record, waive the forfeiture of the policy for nonpayment of the January, 1933, assessment, and was the policy of fire insurance in full force and effect on the date of the fire on 10 October, 1933? We think so, under the facts and circumstances of this case.

In Vol. 2, Couch Cyc. of Insurance Law, part of section 533, page 1631, is the following: "It has been intimated that, in order to revive a policy which is absolutely forfeited, there must be a new contract, founded upon a valuable consideration, or such conduct by the company or its authorized agent as misleads the insurer to his prejudice, and operates as an estoppel; but the better rule seems to be that, if an agent's authority is such that he may issue policies and make contracts of insurance, or if he has apparent authority to act in the premises, and the insured has no knowledge, actual or constructive, of any conflicting limitations of authority, the agent necessarily has, as such, the right to revive lapsed or voided policies, provided the original contract at its inception was neither illegal nor against public policy. And in so far as an insurance agent has power to waive a forfeiture of the policy, he has authority to revive it, inasmuch as a waiver of forfeiture operates as a revival. This, it is held, may arise from the agent giving a renewal receipt with knowledge of the facts from which a forfeiture may arise, or by receipt of the premium, or by some other unequivocal act sufficient to effect a waiver of forfeiture."

In *Moore v. Accident Assurance Corp.*, 173 N. C., 532 (536-537), citing numerous authorities, we find: "It was not merely a courtesy or favor extended to the insured, as in *Hay v. Assn.*, 143 N. C., 257. A casual indulgence would not be sufficient to show a waiver, as decided in that case, and so the judge charged the jury, but he left it to them to find whether there had been such 'a long-continued course of dealings' on the part of the defendant as showed that it did not intend to rely upon the delay in payment, but that it extended credit to the insured for

the brief space of time. It was said in *Painter v. Industrial Life Assn.*, 131 Ind., 68, approving and quoting from *Sweetser v. Odd Fellows Assn.*, 117 Ind., 97: 'It is abundantly settled that an insurance company will be estopped to insist upon a forfeiture if by any agreement, either express or implied by the course of its conduct, it leads the insured honestly to believe that the premiums or assessment will be received after the appointed day. The decisions which hold and enforce this view are very numerous.'" *Grubbs v. Insurance Co.*, 108 N. C., 472; *Perry v. Ins. Co.*, 132 N. C., 283; *Murphy v. Ins. Co.*, 167 N. C., 334; *Sellers v. Insurance Co.*, 205 N. C., 355.

In *Penland v. Ingle*, 138 N. C., 456 (457), to establish a custom, the law is thus stated: "The character and description of evidence admissible for establishing the custom is the fact of a general usage and practice prevailing in the particular trade or business, and not the opinions of witnesses as to the fairness or reasonableness of it." *Crown Co. v. Jones*, 196 N. C., 208.

The evidence on the part of the plaintiff fully sustained plaintiff's allegations of waiver in his reply. There was abundant evidence of a custom by numerous witnesses. In fact, the testimony of J. L. Little, which is in part as follows, tends to sustain plaintiff's contentions: "I have been secretary and treasurer for thirty-eight years, and during that time have collected assessments levied from time to time, and assessments have been paid to me as treasurer. The help referred to that I thought I might be able to give Mr. Paramore was that I could let him be reinstated by paying the lapsed assessments and waiving the September assessment. *It has been a custom with me for a long time to mail notices of a second assessment when a former assessment had not been paid and I have collected a good many and reinstated a good many members by sending them notices of new assessments calling their attention to their failure to pay the old assessment.*" (Italics ours.)

The plaintiff testified: "I went to see Mr. Little because I got to studying about my insurance on my house, and I didn't really know whether I owed for it or not. I know they usually send out assessments the first of the year, but I didn't remember whether I got a card or not. I went in to talk it over with Mr. Little, and when I did he told me he was going to call a meeting within a few days, the first of September, and he was going to make a motion to cancel out the premiums that was not over one behind and let them start with the new assessment of September, and he asked me didn't I think that would give the members some encouragement. The motion to cancel out the assessment was for everybody who was not more than one premium behind.

"Q. In going to see Mr. Little at that time, was it your purpose to pay up your assessment, if you owed any?

"A. Yes, sir. I did not receive any notice of any meeting that was had after this conversation. I received this card through the mail (card exhibited to him). I received it on or about 21 September. The fire that destroyed my house occurred on 10 October, 1933. After I received this notice I went to see Mr. Little. I went to see him the next day after the fire.

"Q. What was your conversation with Mr. Little at that time?

"A. I went in and told him I wanted to straighten out my insurance and he said all right. He was at the front part and he got up and we went on in the back, and as we were going on back there together I told him that I was sorry to tell him, but I had a fire last night, so he went on and got his books like everything was all right and he looked on there, and I took the money out of my pocket and counted it. I took out $19.00 and laid it out there and he acted like he was going to take it, then he told me he couldn't take it. I asked him why, and he said if he took the money the company would have to pay out money. I said let me pay and then you pay me, and he said no, I can't do that. He said that if I had not had the fire they would be glad to take it, and that he always wants to take in money, so he handed me the $19.00 back.

"Q. Mr. Paramore, in your experience as a policyholder in this company, what, if anything, do you know of the practice and custom of the company to take assessments from its policyholders after sixty days from the notice of the assessment?

"A. Well, as far as my knowledge, they took the money. As far as I have ever had the experience they always took the money when they can get it. I know of an instance when they took money or assessments after the sixty days had expired. My brother, Tom, paid one assessment after the sixty days had expired after the notice." . . . "Mr. Little told me not to pay the January assessment and to wait until September."

The letter of 15 September, 1933, recites: "Previous assessment $9.50. Total $19.00. The above assessment is due within sixty days from date and if not paid at maturity your policy will be forfeited."

The fire occurred within the sixty days, on 10 October, 1933. Within the sixty days the plaintiff tendered the $19.00. The testimony of plaintiff as above set forth was excepted to, and assignments of error duly made. We think the evidence competent with the other evidence of custom.

We think the court below, in its charge, taking the evidence of all the witnesses as to custom, more liberal to defendant than it was entitled to. *Crown Company v. Jones, supra.* The court below charged the jury: "And then you heard the defendant explain about the other losses, there were two others, I believe, I think that is not sufficient, that evidence is not sufficient to establish a custom or a general course of action, taking only three instances, and with the explanation that had been

made. But the course of dealing that they received assessments by more than sixty days after they were due may be considered by the jury in connection with the testimony of the plaintiff. That in August, before the fire, he went to the office of Mr. Little, the secretary and treasurer, to see how his insurance stood and got information that he had not paid the assessment of January preceding, and that he offered to pay that, and thereupon Mr. Little told him if he was in his place he would not pay it then, and stated that he, Mr. Little, would have a meeting about the first of September of the directors and make a suggestion to them to refinance policyholders on past-due assessments, if only one was past due, and considered together with the mailing of the postal card, which the plaintiff received about 20 September, and which I have just read you from the replication, consider all this upon the question as to whether its association waived the forfeiture for failure to pay assessment January, 1933."

We do not think that C. S., 6351 and 6352, cited by defendant, applicable to the facts in the case. The exceptions and assignments of error made by defendants cannot be sustained.

On the whole record, we find no prejudicial or reversible error.

No error.

STATE v. J. E. WAGGONER.

(Filed 31 October, 1934.)

1. Disorderly House B c—

Evidence of the reputation of the upstairs of a building owned by defendant, and of the persons frequenting it, *is held* competent in a prosecution under C. S., 4358.

2. Criminal Law I j—

Where defendant does not renew his motion of nonsuit at the close of his evidence he waives his right to have the sufficiency of the evidence to warrant a conviction considered upon appeal.

CRIMINAL ACTION, before *Harding, J.*, at July Term, 1934, of CATAWBA.

On 26 February, 1934, a warrant was issued by the municipal court of the city of Hickory, charging that the defendant "did unlawfully and wilfully maintain a place, building or structure in the city of Hickory for the purpose of prostitution and assignation; (2) did permit persons to occupy a place in the city of Hickory, N. C., for the purpose of prostitution and assignation; (3) did aid and abet in prostitution and assignation, against the statute in such case made and provided, and against the peace and dignity of the State." Upon the trial in the

recorder's court the defendant was adjudged guilty, and he appealed to the Superior Court. There was evidence offered on behalf of the State that the defendant was engaged in the mercantile business. The upstairs or second floor of the store consisted of apartments, which the defendant leased to various parties or persons. There was also evidence that a short time before the indictment a police officer had found two men and two women in bed, and that these parties were arrested and put in jail. Waggoner was not present and his store was closed at the time. On another occasion a police officer testified that he had seen one or two girls come down from the apartments and get in cars with men. The chief of police testified that after one of the girls had been arrested and released that he went to Waggoner "and told him not to rent rooms to her again. . . . Waggoner told me if the women were bad to get them away from there, that he would coöperate with me. After that I saw her in there." There was also evidence that women who lived in the apartments were of bad character, and that this upstairs had a bad reputation. There was also evidence that there was noise at night, and that at various times men and women had been seen going up and down the stairway to the apartments. The evidence further tended to show that Waggoner closed his store about eight o'clock at night and went home. There was no evidence that Waggoner had any actual knowledge of what was going on or that he participated in any way in any violation of law by the occupants of these apartments.

There was a verdict of guilty on the second and third counts in the warrant, and of not guilty on the first count.

From judgment pronounced, defendant appealed.

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

R. L. Huffman for defendant.

PER CURIAM. The warrant was drafted in accordance with the provisions of C. S., 4358. There were exceptions to the competency of evidence as to the reputation of the place and of those who frequented it. The competency of such evidence has been established in *S. v. Sinodis,* 189 N. C., 565, 127 S. E., 601.

The defendant made a motion of nonsuit at the close of State's evidence. This motion was overruled and the defendant offered evidence in his own behalf tending to establish his innocence. The motion for nonsuit was not renewed at the conclusion of all the evidence, and therefore the insufficiency of evidence to warrant conviction was waived and cannot now be considered by this Court on appeal. *S. v. Hayes,* 187 N. C., 490, 122 S. E., 13.

No error.

FARMVILLE OIL AND FERTILIZER COMPANY v. FANNIE V. BOWEN.

(Filed 31 October, 1934.)

Pleadings A a—

A cause of action in the nature of abuse of process for wrongful and unlawful dispossession in summary ejectment and for false imprisonment is improperly joined with actions for breach of contract to purchase the land at foreclosure for the mortgagor and to set aside the foreclosure for fraud.

CIVIL ACTION, before *Cowper, Special J.*, at May Term, 1934, of PITT.

Plaintiff brought suit against the defendant to recover possession of land. The defendant filed an answer alleging that she had given certain mortgages to secure indebtedness therein specified, and that both mortgages had been purchased by the plaintiff, and that subsequent thereto she and the plaintiff had entered into an agreement to the effect the plaintiff should foreclose the mortgage on the one-hundred-and-fifty-acre tract and to purchase same at the sale and "hold the title for the defendant, and make same to defendant upon defendant's executing notes and security in an amount spread out through several years to cover the indebtedness of defendant to plaintiff. . . . And this indebtedness was to be the purchase price of the property," etc. Plaintiff further alleged that the land was sold, but that she did not attend the sale, relying upon said agreement, and that thereafter, on 5 February, 1932, the plaintiff, in violation of the agreement, proceeded to obtain possession of both of said tracts of land in a summary ejectment before a justice of the peace, and also by virtue of said judgment and proceeding, took certain teams, farm equipment and other personal property belonging to the defendant.

For a second cause of action the defendant alleged that the foreclosure was fraudulent, and that the defendant was entitled to have the same vacated and set aside.

For a third cause of action the defendant alleged in the answer "that the plaintiff, in an effort to unlawfully, inequitably and wrongfully damage this defendant, instituted the said summary ejectment before a justice of the peace, in disregard of this defendant's rights, . . . and did wrongfully remove this defendant from the possession of her own lands, and . . . put her, the defendant, in jail and the property of the defendant in the road, in pursuance of and in carrying out their unlawful and wrongful, unlawful and inequitable effort to dispossess this defendant and take charge of her property." Thereupon, defendant prayed that the deeds made to the plaintiff as a result of foreclosure be declared void, and that the plaintiff be adjudged to hold title to said property for the defendant. Furthermore, that defendant recover of

plaintiff "the items of team, fertilizer, damage and rents as set forth herein in the sum of $4,100," and that the defendant recover under the third cause of action "damage by reason of the wrongful dispossession, throwing of personal property in the road and defendant in jail, and the humiliation and disgrace thereof, in the sum of $10,000."

Plaintiff filed a reply to the first and second causes of action contained in defendant's counterclaim, and demurred to the third cause of action upon the ground that said third cause of action is "for an alleged tort which did not grow out of the cause of action alleged in the complaint," etc.

The trial judge was of the opinion that the demurrer to the third cause of action was valid, and so adjudged, and from such ruling the defendant appealed.

F. M. Wooten and Albion Dunn for plaintiff.
S. J. Everett for defendant.

PER CURIAM. The third cause of action is based upon a separate and distinct tort in the nature of abuse of process, and hence could not be properly joined with the other causes of action constituting a counterclaim. *R. R. v. Nichols,* 187 N. C., 153, 120 S. E., 819; *Sasser v. Bullard,* 199 N. C., 562, 155 S. E., 248; *Williams v. Gooch,* 206 N. C., 330; *Lucas and Lewis v. North Carolina Bank and Trust Co.,* 206 N. C., 909.

Affirmed.

E. H. WILLIAMS v. FOWLER AUTOMOBILE COMPANY, REXFORD WILLIS, EXECUTOR OF A. R. WILLIS, HARRIET L. HYMAN, EXECUTRIX OF T. G. HYMAN, AND J. V. BLADES.

(Filed 31 October, 1934.)

Bills and Notes F b—

The burden is on the holder of a negotiable note to show that notice of nonpayment was given the endorsers, and in the absence of evidence of such notice to an endorser, or to his personal representative after his death, the holder is not entitled to recover on the endorsement. C. S., 3084.

APPEAL by plaintiff from *Daniels, J.,* at January Term, 1934, of CRAVEN. No error.

This is an action to recover on six notes described in the complaint. The action was begun on 28 December, 1932.

The notes sued on were executed by the defendant Fowler Automobile Company as maker. They were endorsed before delivery to the plaintiff

by A. R. Willis, T. G. Hyman and J. V. Blades. Each of said notes was due prior to the commencement of this action.

Both A. R. Willis and T. G. Hyman are dead. The defendant Rexford Willis is the executor of A. R. Willis, deceased, and the defendant Harriet L. Hyman is the executrix of T. G. Hyman, deceased. The defendant J. V. Blades has been duly adjudged a bankrupt, and has been duly discharged of his liability as an endorser of the notes sued on. Neither the defendant Fowler Automobile Company nor the defendant Rexford Willis, executor of A. R. Willis, filed an answer to the verified complaint.

Issues raised by the answer of the defendant Harriet L. Hyman, executrix of T. G. Hyman, were answered by the jury as follows:

"6. Was due notice of the nonpayment of the notes maturing on 24 March and 24 September, 1930, given to T. G. Hyman? Answer: 'No.'

"7. Was due notice of the nonpayment of the notes maturing on 24 March and 24 September, 1931, and 24 March and 24 September, 1932, given to defendant Harriet L. Hyman, executrix? Answer: 'No.'

"8. What amount, if any, is plaintiff entitled to recover of the defendant Harriet L. Hyman, executrix? Answer: 'Nothing.'"

From judgment that plaintiff recover nothing of the defendant Harriet L. Hyman, executrix of T. G. Hyman, deceased, and that said defendant recover of the plaintiff her costs in the action, the plaintiff appealed to the Supreme Court, assigning errors in the trial.

Dunn & Dunn, L. I. Moore, and T. O. Moore for plaintiff.
R. A. Nunn for defendant.

PER CURIAM. In the absence of any evidence at the trial of this action tending to show that plaintiff gave due notice to T. G. Hyman of the nonpayment of the notes which matured prior to his death, and also of any evidence tending to show that plaintiff gave due notice to his executrix of the nonpayment of the notes which matured after his death, there was no error in the instructions of the court to the jury with respect to the 6th, 7th, and 8th issues. The burden of showing such notice was on the plaintiff. *Davis v. Royall,* 204 N. C., 147, 167 S. E., 559; *Exchange Co. v. Bonner,* 180 N. C., 20, 103 S. E., 907. The failure of the holder of a negotiable instrument to give an endorser notice of its nonpayment, as required by statute (C. S., 3084 *et seq.*), discharges the endorser. *Barber v. Absher Co.,* 175 N. C., 602, 96 S. E., 43; *Perry v. Taylor,* 148 N. C., 362, 63 S. E., 423.

We find no error in the trial of this action. The judgment is affirmed.

No error.

J. N. MOORE v. CALDWELL COUNTY, NORTH CAROLINA; HUGH A. DOBBINS, CHAIRMAN, C. G. MOORE AND R. S. WEBB, BEING AND CONSTITUTING THE BOARD OF COUNTY COMMISSIONERS THEREOF.

(Filed 31 October, 1934.)

Controversy Without Action A a—Proceeding in this case held not to come within provisions of C. S., 626, and proceeding is dismissed.

Where it appears that an action is instituted solely to obtain the advice and opinion of the Court as to the validity of a proposed county bond issue upon facts agreed, and that the interest of both parties is the same and there is no "question of difference" between them, the proceeding will be dismissed in the Supreme Court for want of jurisdiction of the Superior Court to enter the judgment appealed from. C. S., 626.

APPEAL by the plaintiff from *Harding, J.*, at August Term, 1934, of CALDWELL. Proceeding dismissed.

The purpose of this proceeding is to ascertain whether certain bonds proposed to be issued by Caldwell County would be valid under the facts stated. The cause is submitted on an agreed statement of facts, under C. S., 626. There was a judgment of the Superior Court declaring "that the bonds described will be, when executed and issued, a valid and binding obligation of Caldwell County," from which the plaintiff appealed.

Hunter Martin for appellant.
Newland & Townsend and Siler & Barber for appellees.

PER CURIAM. On the agreed statement of facts it appears that the plaintiff holds a note duly issued by the defendant county for the sum of $35,000, representing funds procured by said county from the plaintiff, a portion of which at least was used for paying the ordinary expenses of the county, and not used for a special purpose within the meaning of Art. V, sec. 6, of the Constitution, and that the plaintiff has agreed to accept in settlement of said note bonds to be issued pursuant to a resolution passed by the board of commissioners, "provided the same be a valid obligation of the county and one for which the defendant has a legal right to levy and impose sufficient taxes for the payment of the interest provided, and the final liquidation and payment of said bonds," and "If the bonds issued under the provisions of said resolution be a valid and binding obligation of the county of Caldwell, North Carolina, the plaintiff agrees to accept the same in settlement of his claim; otherwise, he declines to accept the same."

It is apparent that there is no "question in difference" (C. S., 626) between the parties to this proceeding. Both sides are asking for the

same thing and everybody is interested in the same kind of judgment. The proceeding in reality is one to obtain the advice and opinion of this Court and no more. We are only asked to say whether the bonds proposed to be issued would be, when issued, good or bad upon the facts agreed. While we do not declare that bonds issued in accordance with the resolution set forth in the agreed facts would not be a binding obligation upon the county, we must dismiss the proceeding for want of a real controversy. *Burton v. Realty Co.*, 188 N. C., 473, and cases there cited.

We dismiss the proceeding, rather than the appeal, because of the judgment below, which we think is void for the want of jurisdiction in the Superior Court to enter it.

Proceeding dismissed.

MRS. L. E. KAYLOR v. B. E. SAIN.

(Filed 31 October, 1934.)

Trespass B c—Evidence of forcible trespass held insufficient.

Evidence tending to show rudeness of language or a slight demonstration of force against which ordinary firmness is sufficient protection is insufficient to sustain an action for trespass against the person or possession of plaintiff.

APPEAL by the plaintiff from *Oglesby, J.*, at February Term, 1934, of BURKE. Affirmed.

This was an action for an alleged assault and forcible trespass committed by the defendant against the plaintiff. The plaintiff's evidence tended to show that the defendant went to a house owned by him and in which the plaintiff was living and asked her when she and her husband were going to vacate the house, stating he would give her seven days to move, and accompanied such inquiry and statement with rude and, by innuendo, threatening language, and with "popping his fists"; that all the while the defendant was on the outside and the plaintiff was on the inside of a wire screen door; and that the defendant, when asked to leave the premises, did so immediately. When the plaintiff had introduced her evidence and rested her case, the court, upon motion of the defendant, dismissed the action and entered judgment as of nonsuit.

Isaac T. Avery and Hatcher & Berry for appellant.
Mull & Patton for appellee.

PER CURIAM. "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." *Anthony v. Protective Union*, 206 N. C., 7 (11), and cases there cited.

We are of the opinion that the evidence was insufficient to sustain an action for trespass against the person or possession of the plaintiff and, therefore, his Honor was correct in granting the motion for judgment as in case of nonsuit.

Affirmed.

N. W. WARREN v. LITTLETON ORANGE CRUSH BOTTLING COMPANY, INC.

(Filed 31 October, 1934.)

Appeal and Error F a—

Where defendant's sole exception is to the judgment, and the judgment is supported by the findings of fact to which no exception is taken, the judgment must be affirmed on appeal.

CIVIL ACTION, before *Moore, Special J.*, at Chambers, 15 February, 1934. From HALIFAX.

This action was instituted to recover the sum of $720.00, which the plaintiff alleges was due the plaintiff by virtue of the terms of a written contract, dated 31 October, 1931. The defendant denied the indebtedness and alleged that the claim of plaintiff constituted usury.

All parties agreed that the trial judge should find the facts. Accordingly, it was found that the said sum of $720.00 demanded by plaintiff represented interest on a $12,000 note due the plaintiff by C. E. Carter, W. A. Carter, and Mrs. Verbena Carter, and that said note was part of the original purchase price of certain property purchased by the defendant from the plaintiff, and that the $720.00 "agreed to be paid by the defendant and involved in this suit represented the interest due on the $12,000 balance of the purchase price of said corporate property," etc. It was further agreed "that the court shall enter judgment for the plaintiff if he shall find from the foregoing facts that the charge of $720.00 is not an usurious one," etc. In the judgment entered, the court declared that "the contract executed by defendant to plaintiff for the sum of $720.00 is not an usurious one, and that the plaintiff is entitled to recover of defendant the sum of $720.00," etc.

From the foregoing judgment the defendant appealed. The only exception is as follows: "To the action of the court in signing the judgment as set out in the record, and to the judgment."

Julian R. Allsbrook and Cromwell Daniel for plaintiff.

Geo. C. Green for defendant.

PER CURIAM. In *Wilson v. Charlotte,* 206 N. C., 856, it was said: "The only assignment of error in the case at bar is 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.' "

So, in the present case there is no exception to the finding of fact that the claim was not usurious, and consequently the judgment must be affirmed.

Affirmed.

J. L. RICHARDSON v. THOMAS PEARL RICHARDSON.

(Filed 31 October, 1934.)

1. Deeds and Conveyances C f—Plaintiff held not a party to contract in deed for support of grantor and could not maintain action against grantee.

A husband and wife divided their lands between their two sons by separate deeds, each providing that the grantee therein should pay one-half the costs of maintenance of the grantors for life and one-half the costs of their funeral expenses. After the death of the grantors one of the grantees brought action against the other, alleging that defendant had failed to pay one-half the costs of maintenance and care of the grantors, and had failed to pay one-half their funeral expenses, and that plaintiff had paid more than one-half the costs thereof, and sought to recover the amount by which plaintiff had contributed beyond his share: *Held,* plaintiff could not maintain the action, and defendant's demurrer was properly sustained.

2. Pleadings D c—

A demurrer admits the truth of facts properly alleged in the complaint, but not inferences or conclusions of law therein.

APPEAL by plaintiff from *Warlick, J.,* at May Term, 1934, of DAVIE. Affirmed.

This is a civil action, instituted by the plaintiff against the defendant for the recovery of $651.00 alleged to be due by the defendant to the plaintiff for defendant's part of maintenance, care, support, and upkeep of his father, on the ground of an implied contract by reason of the acceptance of a deed by the defendant from his mother in which he, the defendant, was charged jointly with the plaintiff for the support of his aged father.

Mary Richardson had a husband, J. W. Richardson, and two sons, the plaintiff and the defendant in this action. She also had about one

hundred and fifty acres of land in Davie County, North Carolina. On 3 April, 1926, Mary Richardson and her husband, J. W. Richardson, joining in the deeds, divided the land between their two sons, the plaintiff and defendant in this action, and conveyed to them by separate deeds the land in fee simple. The deeds were duly recorded. (1) Fifty acres was conveyed to J. L. Richardson, the plaintiff, with this provision: "*Provided,* that J. L. Richardson is to pay one-half of expenses of support and funeral expenses of J. W. Richardson and wife, Mary Richardson." (2) One hundred acres was conveyed to Thomas Pearl Richardson, the defendant, with this provision: "*Provided,* that Thomas Pearl Richardson is to pay one-half of expenses of support and funeral expenses of J. W. Richardson and wife, Mary Richardson." Mary Richardson died on 6 May, 1928, and J. W. Richardson on 17 June, 1933.

The complaint alleges, in part: "That after the death of Mary Richardson, the plaintiff and the defendant, in compliance with the provision made in said deeds of conveyance, began the joint support and maintenance of their father, J. W. Richardson, then in his 80th year, and feeble in mind and body. That the joint support of their father continued for approximately two years, until the defendant Thomas Pearl Richardson became intoxicated and ran his father away from home and refused to further contribute to his support, care, and maintenance, and for a period of two and one-half years immediately preceding the death of J. W. Richardson the plaintiff J. L. Richardson had the sole support, maintenance, and care of his father for the said two-and-one-half-year period until his death on 17 June, 1933, at the age of eighty-four years; and for the past two and one-half years prior to the death of J. W. Richardson the defendant Thomas Pearl Richardson has failed, neglected, and refused to contribute anything for the maintenance, care, upkeep, and support of his father. That during the last two and one-half years the said J. W. Richardson was very feeble, requiring constant care and attention, and that on 30 May, 1933, he fell and broke his pelvis bone, and from then until his death on 17 June, 1933, was totally helpless and unable to care for himself at all. . . . That plaintiff's services for the maintenance, care, upkeep, and attention to J. W. Richardson during the last two and one-half years of his illness was reasonably worth the sum of twelve hundred dollars ($1,200), and that plaintiff is entitled to recover one-half of the sum of $1,200.00, to wit, six hundred dollars ($600.00) from the defendant for the maintenance, care, upkeep, support, and attention for the said J. W. Richardson, and that the funeral expenses amounted to the sum of $90.00, and the doctor's bill amounted to the sum of $12.00, making a total of $102.00, which the plaintiff has paid, and of which sum the plaintiff is entitled to recover of the defendant the sum of $51.00.

"That the defendant is justly due the plaintiff for his part of the maintenance, care, support, and upkeep of his father, together with the funeral expenses, in the sum of six hundred and fifty-one dollars ($651.00), and that demand has been made upon the defendant for the payment of said sum, and that defendant has refused to pay the same.

"Wherefore, plaintiff demands judgment that he recover of the defendant the sum of six hundred and fifty-one dollars ($651.00) and the costs of this action, and for such other and further relief as plaintiff is entitled to receive."

The defendant demurred to the complaint, as follows: "First. For that as appears from the complaint and the proviso or condition of the deed referred to therein, paragraph 5, wherein it is alleged that this defendant was to 'provide or pay one-half of the expense of support and funeral expenses of the said J. W. Richardson and wife, Mary Richardson,' the same being sued for by the plaintiff herein, is and was an obligation due the said J. W. Richardson and wife, Mary Richardson, or their personal representative, and as this defendant is advised, informed, and believes, the plaintiff has no right to maintain this action for the recovery of any sum alleged to be due thereon, or any part of the same.

"Second. For that as appears from said complaint, the said J. W. Richardson and wife, Mary Richardson, are both dead, and that no administration upon the estate of either of them has been granted, and as defendant is advised and believes, and he so alleges, the plaintiff has no right, in his individual capacity, to maintain this action or sue this defendant upon an alleged claim, which, if due at all, would be due J. W. Richardson and Mary Richardson, or their personal representatives.

"Third. For that, as will appear from said complaint, the same does not state a cause of action against this defendant. Wherefore, defendant prays that this action be dismissed, and for such other relief to which defendant may be entitled."

The judgment of the court below is as follows: "This cause coming on to be heard before his Honor, Wilson Warlick, judge presiding, upon demurrer filed by the defendant, and being heard:

"It is adjudged by the court that the demurrer be and the same is hereby sustained upon the ground that the complaint does not state a cause of action against the defendant, and that the plaintiff has no legal capacity to sue in this action."

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

Hayden Clement for plaintiff.
A. T. Grant for defendant.

PER CURIAM. A demurrer admits for the purpose thereof the truth of facts set out in the complaint, and reasonable inferences to be drawn therefrom, but not inferences or conclusions of law therein. The judge of the court below sustained the demurrer on the ground "that the complaint does not state a cause of action against the defendant, and that the plaintiff has no legal capacity to sue in this action." The remedy of plaintiff cannot be granted in the present action.

The judgment of the court below is

Affirmed.

MRS. THOMAS P. MORGAN, WIDOW, MRS. MARGARET WEBB, T. J. MORGAN, MRS. MATTIE BOLIN, VANCE MORGAN, CHILDREN OF THOMAS P. MORGAN, v. CLEVELAND CLOTH MILLS AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY.

(Filed 21 November, 1934.)

1. Master and Servant F b—Evidence held sufficient to support finding that injury resulted from accident arising out of employment.

In this hearing before the Industrial Commission there was evidence that the deceased employee was a piece worker in the employer's cotton mill, and was required to report for work at the mill at six o'clock in the morning, at which time he was given work if any was available, or told when to report back for work later in the day; that on the morning of the accident the employee reported for work at the usual time, and was told to return at eleven or twelve o'clock; that he said he would go home and come back; and that shortly thereafter he was found unconscious near a platform at an entrance of the mill with indications that he had slipped on some ice or stumbled over some lumber or a hand truck on the unlighted platform and had fallen to the frozen ground, fracturing his skull, which injury caused his death: *Held*, the evidence was sufficient to sustain the finding of the Industrial Commission that the employee's death resulted from an accident arising out of and in the course of his employment.

2. Master and Servant F i—

The findings of fact of the Industrial Commission are conclusive on the courts when supported by any sufficient evidence.

3. Same—

On appeal from an award of the Industrial Commission, the Superior Court may review all the evidence to determine whether any evidence tends to support the Commission's findings.

4. Master and Servant F a—

A workman in a cotton mill paid by the piece or quantity of the work performed by him is an employee of the mill within the intent of the North Carolina Workmen's Compensation Act.

APPEAL by employer and carrier, from *Oglesby, J.*, at March Term, 1934, of CLEVELAND. Affirmed.

The following are the findings of fact and conclusions of law of Commissioner J. Dewey Dorsett: "The defendants admit employment on a piece basis at seventeen fifty-three ($17.53) per week. The defendants further admit that Thomas P. Morgan is dead, and they admit that he died as the result of a fractured skull. The defendants are denying liability on the sole ground that the deceased suffered no injury by accident arising out of the claimant's employment by the Cleveland Cloth Mills, causing the death, which they admit. From the evidence in the record the Commissioner makes the following findings of fact:

"(1) Parties to this cause are bound by the provisions of the North Carolina Workmen's Compensation Law. The American Mutual Liability Insurance Company is the carrier.

"(2) The deceased, Thomas P. Morgan, before his death, was a regular employee of the Cleveland Cloth Mills as a piece worker at an average weekly wage of $17.53.

"(3) The deceased leaves, wholly dependent upon him for support, his wife, Mrs. Margaret Webb Morgan. There were not any other dependents upon the deceased at the time of his death.

"(4) That Thomas P. Morgan died on 13 February, 1933.

"(5) That Thomas P. Morgan suffered an injury by accident on 13 February, 1933. The injury by accident arose out of and in the course of his employment with the Cleveland Cloth Mills.

"(6) Thomas P. Morgan was found in a dying condition by a fellow employee at 6:15 a.m., on the morning of 13 February, 1933. He made no statement after being found other than to say, 'Don't carry me to the hospital.'

"(7) Thomas P. Morgan, the deceased, was found a few steps from one of the entrances to the Cleveland Cloth Mills, where he was employed. He was found about one and a half feet from the platform leading into the mill proper. When the deceased was found at 6:15 a.m., on the morning of 13 February, 1933, it was yet dark, before light.

"(8) The deceased, as well as all of the other employees of the defendant Cleveland Cloth Mills, was directed to report to work each morning on or before six o'clock.

"(9) The deceased was a piece worker; he reported to work every morning at six o'clock or before, as per the instructions from the employer, and if there was any work for him to do he was assigned this work. If there was no work available he was told when work would be available. On the morning of his death he reported to the mill along with all of the other employees and was told that there was no work available at that particular hour, but to return at about eleven or twelve o'clock

and some work would be available. The next time he was seen he was found by a fellow employee in a dying condition as above found.

"(10) The ground, on 13 February, 1933, was in a frozen condition. There was ice at places where water was standing.

"(11) On the platform entering the mill there was a hand truck and some lumber. On this particular morning there was no light on this platform and it was dark on the same. At other times there was a light on the platform.

"(12) The claimant fell from the platform to the frozen ground, fracturing his skull, causing his death.

"Upon the foregoing findings are based the following conclusions of law: All of the circumstances in this case point to the fact that the plaintiff, in all likelihood, because of the truck and lumber on the platform entering the mill, and because there was no light on the said platform stumbled on the platform and fell off of same onto the frozen ground, fracturing his skull. He was found by a fellow employee lying on his face. His head was away from the platform and his feet were pointed toward the platform about one and one-half feet from the same.

"Deceased was a piece worker, like thousands of other employees in this State. The fact that he was a piece worker does not alter the circumstances as far as being an employee is concerned, however. This man was simply paid according to the amount of work that he did. The evidence discloses the fact that all of the piece workers, and this deceased in particular, were requested by the employer to report each and every morning at six o'clock when the mill began operating for the day in order to find out if there was any work available. The custom was, if there was work available for these piece workers, they were assigned to the job. If there was no work available, they were told to come back at an hour when work would be available. The deceased in this case, on the morning of 13 February, 1933, reported for work. He was told that there was no work at that particular hour in the morning. He was told there would be work about 11 or 12 o'clock. The deceased is dead. We do not know what he did after being told that there was no work available at the particular hour. We do know that he was found in a dying condition on the premises of the employer a foot and a half from the mill door or from the platform three or four feet wide that led into the middle door. He was found on the premises of the employer before daylight after reporting for work, and we believe that under all the circumstances his widow is entitled to recovery on the theory that the deceased sustained an injury by accident arising out of and in the course of his employment resulting in the death, and we hold as a matter of law, from all the evidence in this record, that the defendants are liable. Let an award issue as follows:

"The defendants are directed to pay to Margaret Webb Morgan, wife of the deceased, compensation at the rate of sixty per cent of $17.53 per week for a period of 350 weeks; pay any hospital bills incurred; pay funeral expenses not to exceed $200.00, and to pay the costs. The defendants in open hearing gave notice of appeal. J. Dewey Dorsett, Commissioner."

On the foregoing appeal the defendants asked for a review of the findings of fact and conclusions of law of hearing Commissioner for that, "That the claimant has failed to show that the deceased met his death through an injury by accident arising out of and in the course of his employment." Said appeal was heard before the full Commission at Raleigh, North Carolina, 20 September, 1933.

Opinion of the full Commission is as follows: "Upon consideration of all the evidence and arguments, the full Commission affirms and adopts as its own the findings of fact, conclusions of law, and award of Commissioner Dorsett. Matt H. Allen, chairman for the full Commission."

Award by full Commission: "You, and each of you, are hereby notified that a hearing was had before the full Commission on 20 September, 1933, in the above-entitled case in Raleigh, North Carolina, and a decision thereupon was rendered by Chairman Matt H. Allen, for the full Commission, on 20 October, 1933, in which an award was ordered and adjudged as follows: That the findings of fact and conclusions of law set out in the opinion of Commissioner J. Dewey Dorsett are proper and justified from all the evidence, and they are hereby adopted as findings of fact and conclusions of law of the full Commission, and that the award heretofore issued under date of 31 July, 1933, reading as follows: 'Upon the finding that the death of the deceased was the result of an injury by accident arising out of and in the course of the employment on 13 February, 1933, and that the deceased left wholly dependent Mrs. Thomas P. Morgan, widow, the defendants will pay to the widow compensation at the rate of $10.52 per week for 350 weeks. Defendants to pay funeral expenses not to exceed $200.00. Defendants to pay costs of medical and hospital treatment. Defendants to pay costs of hearing. Defendants give notice of appeal in open court,' be in all respects affirmed. North Carolina Industrial Commission, by Matt H. Allen, Chairman. Attest: E. W. Price, Secretary."

Notice of appeal: "The defendants in the above-entitled matter except to the findings of fact and conclusions of law set out in the opinion of the Commission and appeal to the Superior Court of Cleveland County. J. Laurence Jones, Attorney for Defendants."

The judgment in the Superior Court was as follows: "This cause coming on to be heard before his Honor, Jno. M. Oglesby, judge presiding and holding the March Term, 1934, Superior Court for Cleveland

County, on appeal by employer and its carrier from findings of fact and conclusions of law of the Industrial Commission; it is ordered, adjudged, and decreed that the findings of facts and conclusions of law as set out in the opinion of the Industrial Commission be and the same are hereby in all respects affirmed. This 2 April, 1934. Jno. M. Oglesby, Judge Presiding, March Term Superior Court, Cleveland County."

From the signing of the foregoing judgment the employer and carrier except, assign error, and appeal to the Supreme Court.

M. R. Weathers and D. Z. Newton for appellee, widow.
J. Laurence Jones for appellants, employer and carrier.

CLARKSON, J. The following is the only exception and assignment of error made by the employer and carrier: "The signing of the judgment sustaining findings of fact and conclusions of law of the North Carolina Industrial Commission."

We do not think this exception and assignment of error can be sustained. The evidence is to the effect that the plaintiffs are the widow and children of Thomas P. Morgan, who was employed by the Cleveland Cloth Mills as a piece worker. This breadwinner, as it was his duty to do, went to the mill to report for work at 6 o'clock on the winter morning of 13 February, 1933. These piece workers were required to report to work at 6 o'clock every morning just the same as the employees who were working by the hour.

W. F. Mull testified, in part: "Mr. Morgan came to the mill early in the morning and had a conversation with me. He was at the window as we were going back inside the mill and he called to me to the window and asked as to whether he would get a warp that morning or not, so Mr. Blanton was the man that was in charge and I went to Mr. Blanton and asked Mr. Blanton about it. Mr. Blanton said he wouldn't get a warp until about eleven or twelve o'clock and I went back to the window and told him what Mr. Blanton said, and Mr. Morgan said it was cold out there and he believed he would go back home and wait."

H. H. Smith, an employee of the mill, testified, in part: "I found him. It was not daylight at the time I found him. I heard someone moaning out there and I walked out to the edge of the platform and found him lying there. He was about a foot and a half or two feet from the edge of the platform. He was lying with his head from the platform and his feet towards the platform. His feet were just off the edge of the platform. It was dark out there that morning. There was no light on the platform. It was customary for a light to be out there. . . . The path where he was lying come up side of the mill and you

walked from this path onto the platform. The path came up the end and this railing run out to the platform and you had to make a turn from this path to go onto the platform. He was found out at the end of the platform."

It was in evidence that Morgan was a cripple. It was a cold, freezing morning and around the edge of the platform were frozen places. The body was found inside of the mill property. It was admitted by the defendants "that the plaintiff died from a fractured skull on the same day he was found."

The question involved: Under all evidence, is there any evidence to sustain a finding of fact that deceased met his death by reason of an injury by accident arising out of and in the course of his employment? We think so.

It is contended by defendants that under this record the question is one of law, as there is no evidence in the record from which any inference can be logically drawn that deceased met his death by accident growing out of and in the course of his employment. In fact, there is no evidence that he had an accident.

The Commission has found contrary to defendants' contention, and we think there was some evidence, direct and circumstantial, to sustain its finding. It is settled by a wealth of authorities that the Industrial Commission's findings of fact on competent evidence are conclusive.

Findings of fact by member of Industrial Commission, approved by full Commission on appeal, are conclusive upon courts, when supported by any sufficient evidence. *West v. East Coast Fertilizer Company,* 201 N. C., 556.

Superior Court may review all evidence on appeal from Industrial Commission to determine whether any evidence tends to support Commission's findings. *Wimbish v. Home Detective Co.,* 202 N. C., 800.

In *Hunt v. State,* 201 N. C., 707 (709), is the following: "The words 'out of' as used in the act refer to the origin or cause of the accident. Whether the accident arose out of the employment is usually a mixed question of fact and law; but if the facts are found or are not in dispute and the case does not depend upon inferences of fact to be drawn from the facts admitted, the question is not one of fact, but of law. *Conrad v. Foundry Co.,* 198 N. C., 723; *Harden v. Furniture Co.,* 199 N. C., 733; Willis' Workmen's Compensation, 16."

We think the present case is similar to *Gordon v. Chair Co.,* 205 N. C., 739 (741-2): "The plaintiff was an employee of the defendant, but was not certain the plant would run on the Monday morning he went to work. He lived some distance from the plant and rode to work with a fellow employee. There had been a big snow and he had his son to come with his automobile so that he could ride back home if the plant

would not run that day. He went to his place of work and found that the plant would run that day and put his lunch up. This was about the time the five-minutes-to-seven whistle blew. He then went to the outside platform at the front of the plant to tell his son that the plant would run and his feet slipped on ice and he fell and was injured. We think the facts of this case come within the decision of *Bellamy v. Mfg. Co.*, 200 N. C., 676."

In *McKinstry v. Guy* (116 Kan., 192), 38 A. L. R., 837, it is held that "A workman who is paid wages by the piece or quantity comes within the Workmen's Compensation Act, the same as one who is paid by the day." The annotation on page 839, citing numerous authorities, is as follows: "It seems to be well settled in the various jurisdictions that a piece worker is an employee rather than an independent contractor, and so is entitled to the protection of a Workmen's Compensation Act."

For the reasons given, we find no error in the judgment of the court below.

Affirmed.

STATE v. FRANK NEWTON AND ROMIE WEST.

(Filed 21 November, 1934.)

1. Automobiles C n—Evidence that defendants operated car while intoxicated and failed to stop after inflicting injury held for jury.

All the evidence in this case tended to show that an automobile, driven in a careless and reckless manner from one side of the highway to the other, struck and injured two pedestrians who were standing on the shoulders of the highway, or in the ditch on the side of the highway to the left of the driver of the car, and that after inflicting the injury the driver did not stop the car. There was testimony that the car which struck the pedestrians was a dark blue Ford roadster with yellow wheels and tan top, and that two men were riding in it at the time of the accident. About twenty minutes after the accident, defendants' dark blue Ford roadster, with yellow wheels and tan top, going in the same direction as the car which struck the pedestrians, was found wrecked on the highway a short distance from where the pedestrians were injured, and defendants were found at the scene of the second accident in an intoxicated condition. There was testimony that no other car passed that part of the highway between the time of the injury to the pedestrians and the finding of defendants' car: *Held*, the evidence, together with other incriminating circumstantial evidence, was sufficient to be submitted to the jury as to the identity of the defendants as the occupants of the car which injured the pedestrians, and their motions as of nonsuit in prosecutions for operating a car while under the influence of intoxicants, N. C. Code, 2621 (44), (45), and failing to stop after inflicting the injury, N. C. Code, 2621 (71) (a), were properly denied.

2. Criminal Law G n—Sufficiency of circumstantial evidence.

While circumstantial evidence is a recognized and accepted instrumentality in ascertaining the truth, when relied upon in a criminal prosecution it should tend to establish guilt to a moral certainty, and exclude any other reasonable hypothesis, but it should be submitted to the jury if it reasonably conduces to the conclusion of guilt as a fairly logical and legitimate deduction, it being for the jury to decide whether it establishes guilt beyond a reasonable doubt.

3. Criminal Law L e—Error on one count may be cured by verdict of guilty on another count of equal dignity.

Where the jury renders a verdict of guilty on both counts in a bill of indictment, error in the trial or charge of the court upon one count is cured by the verdict on the other count where the counts are of the same grade and punishable alike, and only one sentence is imposed, and the error in respect to one count could not affect the verdict on the other.

4. Criminal Law L d—

Defendants' briefs in this case held not to comply with Rule 28 in that they do not contain the exceptions and assignments of error, properly numbered, with reference to the printed record.

APPEAL by defendants from *Daniels, J.*, and a jury, at February Term, 1934, of GREENE. No error.

The defendants were put on trial under the following bill of indictment: "The grand jurors for the State, upon their oath, present: That Frank Newton and Romie West, late of the county of Greene, on 30 April, 1933, with force and arms at and in the county aforesaid, unlawfully, wilfully, and feloniously did drive and operate an automobile on the public highway while they, the said Frank Newton and Romie West, were under the influence of intoxicating liquor, opiates or drugs, and in a reckless and careless manner, and while so doing unlawfully, wilfully and maliciously did in and upon two children, Inez Turner and Helen Beaman, with a certain deadly weapon, to wit, an automobile, make an assault, and them, the said Inez Turner and Helen Beaman, unlawfully, wilfully, feloniously, and maliciously did wound and seriously injure, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

"And the grand jurors for the State, upon their oaths aforesaid, do further present: That on said day and year aforesaid, at and in the county and State aforesaid, Frank Newton and Romie West, late of said county, with force and arms, unlawfully, wilfully, and feloniously did fail to stop their automobile and give their names, addresses, license number, and registration number and render assistance or offer to render assistance to the said Inez Turner and Helen Beaman, after having run into and injured said Inez Turner and Helen Beaman, while operating their said automobile on the public highway, contrary to the form of the

statute in such case made and provided, and against the peace and dignity of the State. D. M. Clark, Solicitor."

The defendants plead not guilty. The jury rendered a verdict of guilty on both counts, and judgment was rendered by the court below. The defendants made numerous exceptions and assignments of error and appealed to the Supreme Court. The necessary ones and material facts will be set forth in the opinion.

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

Shaw & Jones for defendants.

CLARKSON, J. There are two counts in the bill of indictment against the defendants, under the following statutes: North Carolina Code, 1931 (Michie), sec. 2621 (44) and (45), 2621 (71) (a).

Section 2621 (44) is as follows: "It shall be unlawful and punishable as provided in section 2621 (101) of this act for any person, whether licensed or not, who is an habitual user of narcotic drugs or any person who is under the influence of intoxicating liquor or narcotic drugs to drive any vehicle upon the highway within this State."

Section 2621 (45) 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 (71) (a) is as follows: "The driver of any vehicle involved in an accident resulting in injury or death to any person shall immediately stop such vehicle at the scene of such accident, and any person violating this provision shall upon conviction be punished as provided in section 2621 (103)," etc.

Section 2621 (51) is as follows: "Upon all highways of sufficient width, except upon one-way streets, the driver of a vehicle shall drive the same upon the right half of the highway, and shall drive a slow-moving vehicle as closely as possible to the right-hand edge or curb of such highway, unless it is impracticable to travel on such side of the highway, and except when overtaking and passing another vehicle, subject to the limitation applicable in overtaking and passing set forth in sections 2621 (54) and 2621 (55)." Public Laws of North Carolina, 1927, ch. 148, sec. 9.

The defendants introduced no evidence and at the close of the State's evidence the defendants made a motion for judgment of nonsuit. Code of 1931 (Michie), sec. 4643. The court below overruled this motion, and in this we can see no error.

The evidence on the part of the State was circumstantial as to the identity of the defendants who injured Inez Turner and Helen Beaman, but we think sufficient to be submitted to a jury.

As to the injury there can be no dispute. Two little children, Inez Turner and Helen Beaman, on Sunday, 30 April, 1933, between one and two o'clock, were with Helen Jones, thirteen years of age, on the highway on the left side, coming from Wilson towards Farmville. The car that struck the children was coming towards Farmville. The children were going in the same direction as the car was traveling. The children were on the left side, on the dirt shoulders of the main traveled concrete highway. The older girl, when she saw the car coming, told the children "the car was coming . . . and we better get off the highway. . . . We got in the drain ditch and when I jumped up in the field." It can be inferred that the children were in the drain ditch when hit—at least, they were off the concrete, on the dirt shoulders, a place they had a right to be. Both legs of one of the children were broken and one leg of the other, by the car that struck them.

Mr. Beaman testified, in part: "When it passed by my place it was going around 20 or 25 miles and it was hitting the dirt, zigzagging across the road."

The car that struck the children was off the concrete and on the wrong side of the road.

Was there sufficient evidence to be submitted to the jury that the car that struck the children was under the control of the two defendants? We think so.

Margaret Jones testified, in part: "In approaching the road I saw they were coming and they were off the highway. I saw the automobile that struck them, immediately afterwards, when it passed my house. It was a dark-colored car with yellow wheels and don't know what color of the top. I didn't notice that. It was a dark car, with yellow wheels. . . . The time the children were struck by the car with yellow wheels, and the time Mr. Pierce got there, no other cars passed there."

Cedric Pierce testified, in part: "Saw these children lying in the edge of the field. Before I saw them I met a Ford roadster, a 1930 or 1932 model, and it was painted blue with yellow wheels and tan top. After passing them, and before getting to the children, I went about a quarter of a mile, my speed was 30 or 35 miles." When the witness got where the children were he passed them and turned and went back.

Chief Taylor testified, in part: "In consequence to a call, I went out on the Farmville and Wilson highway, about a quarter of a mile from Farmville on the Farmville-Wilson highway. I found a Ford roadster wrecked, with a dark body, yellow wheels and yellow top. Wasn't anybody on the car when I got to it. Mr. Newton and Mr. West were there.

Mr. Newton was sitting across the road by a tobacco barn and Mr. West was out in the road. Both of them were drinking some, I think, not right drunk, had the odor on their breath. The car was headed towards Farmville. Q. What side of the road at the time you were there? A. Almost in the middle of the road and ran into another car, two cars ran together. I don't know who was to blame. . . . I had just eaten dinner, which was about 1 o'clock. It was soon after dinner, the best of my recollection. After I received the call, I went right on. I wasn't over ten minutes, I don't think. . . . Q. Chief Taylor, what description did you receive of the car, when you received this message? A. Sam, . . . ; Court: Go ahead. A. The description I got of the roadster, a car of dark body with yellow wheels and tan top."

Mrs. Beaman testified, in part: "I saw the automobile that has been described; I saw it pass Mr. Jenkins'; I don't remember, it was a dark car with yellow wheels. That was about 15 minutes before these children were returned to my house. No other car passed after that car passed and before the children were brought back to the house. Between 1 and 2 o'clock on Sunday. All I heard, that it was a dark car with yellow wheels; I didn't hear whether it was a coach or sedan. I didn't notice that."

Kirby Cobb testified, in part: "I went over to Farmville after the prisoners. I reached there around 3 o'clock, 2 or 3 o'clock. They were in jail in Farmville. At that time they were drunk."

Circumstantial evidence is not only recognized and accepted instrumentality in ascertainment of truth, but in many cases is quite essential to its establishment.

In cases where State relies upon circumstantial evidence for conviction, circumstances and evidence must be such as to produce in minds of jurors moral certainty of defendant's guilt and to exclude any other reasonable hypothesis, but evidence should be submitted to them if there is any evidence tending to prove fact in issue, or which reasonably conduces to its conclusion as fairly logical and legitimate deduction, and not merely such as raises only suspicion or conjecture, and it is for the jury to say whether they are convinced from evidence of defendant's guilt beyond reasonable doubt. *S. v. McLeod,* 198 N. C., 649.

What are the circumstances? First: Two drunken men in a "dark-colored car with yellow wheels, a Ford roadster." . . . "It was painted blue with yellow wheels and tan top."

Second: "It was going around 20 or 25 miles and it was hitting the dirt—zigzagging across the road."

Third: It was on the wrong side of the road and going the direction and behind the two little girls, who got off the dirt highway and got in the drain ditch. The car left the concrete and struck the two children

and broke two legs of one and one leg of the other and never stopped. No other car passed. This was between 1 and 2 o'clock.

Fourth: Chief Taylor was called immediately and a description given him, and he found a Ford roadster wrecked, with a dark body, yellow wheels and yellow top, the car was headed towards Farmville, almost in the middle of the road—both of defendants indicated they were drinking and had had another wreck. The chief had just eaten dinner about 1 o'clock and it was soon after his dinner and after he received the call, he went right on and it wasn't over ten minutes. Both defendants were there—West out in the road and Newton sitting across the road by a tobacco barn. There was no evidence that any others but these two defendants were at the wrecked car. The two men in the Ford roadster were intoxicated when the children were hit and intoxicated also when arrested shortly afterward.

Fifth: All the witnesses testified it was a Ford roadster with yellow wheels, and two men in it, that struck the children, and their conduct indicated drinking, and shortly afterwards a Ford roadster was found with yellow wheels and the defendants at or near the car semi-intoxicated. Kirby Cobb, shortly afterwards, went to the jail in Farmville to get them and at that time they were both drunk.

We think the evidence sufficient for the jury to pass on. We can see no error in the charge of the court below, taking it as a whole. *S. v. Parker,* 198 N. C., 629 (633).

The court below fully charged criminal negligence, as different from civil negligence, and what constituted criminal negligence, and followed the law as set forth in *S. v. Agnew,* 202 N. C., 755 (758). There was a verdict of guilty on both counts.

In *S. v. Sheppard,* 142 N. C., 586 (589), it is said: "It is well established that such a verdict on an indictment containing several counts charging offenses of the same grade and punishable alike, is a verdict of guilty on each and every count; and if the verdict on either count is free from valid objection, there being evidence tending to support it, the conviction and sentence for that offense will be upheld. It was accordingly held for law in this State that: 'When there is a general verdict of guilty on an indictment containing several counts, and only one sentence is imposed, if some of the counts are defective, the judgment will be supported by the good count; and in like manner, if the verdict as to any of the counts is subject to objection for admission of improper testimony or erroneous instruction, the sentence will be supported by the verdict on the other count, unless the error was such as might or could have affected the verdict on them.' *S. v. Toole,* 106 N. C., 736." *S. v. Switzer,* 187 N. C., 88 (96); *S. v. Jarrett,* 189 N. C., 516 (519).

An examination of the defendant's brief discloses that it does not comply with Rule 28, in that it does not contain, properly numbered, the several grounds of exception and assignments of error with reference to printed pages of transcript and the authorities relied on classified under each assignment. It is impossible to determine from reading the first two paragraphs of the argument in defendant's brief just what exceptions or assignments of error he has reference to. *S. v. Bryant,* 178 N. C., 702 (708).

We see no prejudicial or reversible error on the record.

No error.

GURNEY P. HOOD, COMMISSIONER OF BANKS, ET AL., v. E. A. DAVIDSON AND FIDELITY AND CASUALTY COMPANY OF NEW YORK.

(Filed 21 November, 1934.)

1. Principal and Surety B c—

Ambiguous language in a surety bond will be construed most strongly against the surety who chose the words to suit itself.

2. Contracts B a—

In determining the meaning of an indefinite contract, the construction placed upon the contract by the parties themselves will usually be adopted by the Court.

3. Principal and Surety B d—Bank official's bond and renewal thereof held to constitute but one contract under facts of this case.

Defendant surety executed a bond for a bank officer which provided that it should continue in force until terminated or canceled by written notice to the employer stating when such cancellation should be effective, which notice should be given at least thirty days prior to such cancellation. Three years thereafter the same surety executed a bond on the same officer to the same employer, which bond stated that it was issued as a continuation of the old bond, that the old bond and the renewal should be deemed one bond, and that the surety's aggregate liability should not exceed the greatest amount for which the surety was liable under one of the bonds: *Held*, the two papers, executed for a common intent, will be construed together, and in view of the language of the bonds and the construction placed thereon by the parties, together with the pertinent principles of law, the two bonds constituted but one contract of indemnity.

4. Same—Claim against surety held filed within time prescribed under bank official's bond and renewal thereof which constituted one bond.

The bond of a bank official provided, among other conditions relating to notice, filing claim and suit, that no claim should be filed thereunder after fifteen months from the expiration or cancellation of the bond. Thereafter a renewal bond was executed by the surety, which renewal bond and original bond constituted but one contract, and there was no

evidence that the old bond had been canceled in accordance with its terms. Loss covered by the contract was sustained during the period covered by the original bond, but was not discovered until more than fifteen months after the execution of the renewal bond: *Held*, the right to file claim and sue on the bond to recover such loss was not precluded by the limitation in the original bond, since the original bond had not expired and had not been canceled in accordance with its terms, and the provisions in the second bond requiring notice in thirty days after discovery of loss, itemized proof of loss within three months after such discovery, and suit within twelve months from such discovery, amended and modified like provisions in the first bond, and governed the rights of the parties.

5. Appeal and Error J c—Findings of fact by referee, approved by trial court, and supported by evidence, are conclusive on appeal.

In this action against the surety on the bond of a bank officer, the referee found that notice of loss under the contract and an itemized statement thereof was given the surety as required by the contract, which findings were supported by evidence and approved by the trial court upon appeal: *Held*, the surety's contentions that notice and an itemized statement were not given as required by the contract cannot be sustained.

6. Appeal and Error B b—

Where an aspect of the law involved in a case is not presented in the trial court it will not be considered in determining the rights of the parties upon appeal to the Supreme Court.

CIVIL ACTION, before *Small, J.*, at July Special Term, 1934, of CHEROKEE.

The record discloses that the Cherokee Bank was duly chartered as a North Carolina bank in the year 1920, and that upon organization of the bank E. A. Davidson became president thereof until the bank was closed on account of insolvency on 3 October, 1931.

On 21 May, 1926, the Fidelity and Casualty Company of New York executed and delivered to the Cherokee Bank Fidelity Bond No. 1096651, indemnifying said bank in the sum of $10,000 against loss through the fraud, dishonesty, embezzlement, or wrongful abstraction of E. A. Davidson. Certain pertinent clauses of this bond are noted, as follows: (a) "The term of this bond begins on 21 May, 1926, . . . and shall continue in force until terminated or canceled as hereinbefore provided." (b) "Without prejudice . . . the company may cancel this bond at any time by a written notice, stating when the cancellation takes effect, served on the employer or sent by registered letter to the employer . . . at least thirty days prior to the date that the cancellation takes effect," etc. (c) "Upon discovery of employer of any dishonesty . . . the employer shall give immediate written notice thereof to the company. . . . Affirmative proof of loss under oath, together with full particulars of such loss, shall be filed with the company at its home office within three months after such discovery. . . . The right to make

claim hereunder shall cease at the end of fifteen months after the termination, expiration, or cancellation of this bond."

Thereafter, on 21 May, 1929, the defendant Casualty Company "executed and delivered to said bank another Fidelity bond, known as No. 1267548, indemnifying said bank against the same acts of E. A. Davidson as specified in the former bond . . . while in any position in the continuous employ of the employer, after twelve o'clock noon of 21 May, 1929, and 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." This second bond, as aforesaid, contains certain pertinent clauses, to wit: (a) "The employer shall, within a reasonable time and at all events not later than thirty days after discovery of loss hereunder, notify the surety thereof," etc. (b) "Claim for loss hereunder shall be itemized with full particulars, including the amount and date of each item, subscribed and sworn to by the employer, and presented to the surety within three months after the discovery of such loss." (c) "Any suit or action to recover against the surety . . . shall be brought before the expiration of twelve months from the discovery of such loss," etc.

To the foregoing bond was attached a rider constituting a part of said bond, as follows: "This individual bond is issued as a continuation of the individual bond . . . numbered 1096651 and dated 21 May, 1926.

"It is hereby understood and agreed that the continuance of the said old bond in this manner shall not bar a recovery under the said old bond for loss in all other respects covered thereunder, and the said old bond and this renewal bond shall be deemed one bond.

"It is further understood and agreed that the company's liability (1) for any loss occurring within the term of the old bond shall not exceed the limit of the company's liability specified under the said old bond; (2) for any loss occurring within the terms of this renewal bond shall not exceed the limit of the company's liability specified in this renewal bond, . . . the company's aggregate liability under both bonds for all loss or losses shall not exceed the greatest amount for which the company is liable under one of the said bonds."

On 3 October, 1931, the Bank of Cherokee was closed by proper authority. On 6 November, 1931, the liquidating agent of the bank notified the defendant surety that there was an apparent shortage in the books of the Cherokee Bank "which the auditors have just begun to discover," and further notified the defendant surety that it held surety bonds issued by it on behalf of E. A. Davidson and Charles William Carringer, who were active officers of the bank. This letter was re-

ceived by the defendant surety on 9 November, 1931. On 19 December, 1931, the plaintiff filed a proof of loss with the surety, stating that E. A. Davidson, president of the bank, had violated various banking statutes in abstracting and misapplying the funds of the bank, showing a direct and indirect liability of Davidson amounting to $24,910.05. In addition, certain other notes were listed, bringing the total amount of proof of loss to the sum of $36,624.73. The proof of loss declared: "The Fidelity and Casualty Company of New York is further notified that an accurate and complete examination of the affairs of said Cherokee Bank has not yet been consummated and claimants expressly reserve the right to include in their claim on said bonds other and additional items that may in the future come to light. Notice is further given that the grounds set out above on which liability may be predicated shall not be exclusive, but the right is expressly reserved to include other and additional grounds of liability."

The present suits were instituted on 23 February, 1932, and on 19 September, 1932. The suits were consolidated. A complaint and amended complaint were filed and answer and amended answer filed by the surety company. The case on appeal shows the following: "The defendant Fidelity and Casualty Company of New York denied liability on the ground that there had been no breach of the bond by Davidson, or losses to the bank, and on the further ground that the Cherokee Bank and the plaintiff Commissioner of Banks had failed to comply with the terms of the bond in regard to notifying it of the losses claimed within the time required by the bond, and had also failed to file proof of loss in accordance with the terms of the bond."

Thereafter, Hon. G. L. Jones was appointed referee. Hearings were had at various times and on 23 October, 1933, the referee filed a comprehensive report setting out in detail his findings of fact and conclusions of law. There are ninety-three findings of fact and thirty-three conclusions of law.

The referee concluded that the endorsement on Bond No. 1267548 constituted Bond No. 1267548 a continuation of Bond No. 1096651. He found as a fact that notice and proof of loss furnished the surety were in compliance with the terms of the bond (findings 82 and 83). Upon the findings and conclusions of law the referee declared that the plaintiff was entitled to judgment against E. A. Davidson for the sum of $38,144.57, and that the plaintiff was entitled to a judgment against the defendant surety company for the sum of $25,596.71, said judgment to be discharged "upon the payment of $10,000, and interest thereon, from 19 March, 1932."

Both parties filed exceptions to the referee's report, and thereafter such exceptions were heard by the trial judge, who made certain findings

and certain amendments to the report of the referee, and adjudged that the plaintiff was entitled to recover of the defendant surety the sum of $20,853.44, "said judgment . . . to be discharged upon the payment by said defendant of the sum of $10,000, with interest . . . from 19 March, 1932," etc.

From the foregoing judgment the defendant surety appealed.

Gray & Christopher for plaintiff.

S. W. Black and Edwin B. Whitaker for Fidelity and Casualty Company of New York.

BROGDEN, J. (1) Do Fidelity Bonds Nos. 1096651, dated 21 May, 1926, and 1267548, with endorsement thereon, constitute one bond or contract of indemnity, or are they separate and independent contracts of indemnity?

(2) Was notice given by the plaintiff as required?

(3) Was claim for loss given in accordance with the terms of the contract?

The first bond, or No. 1096651, provided that "the right to make a claim hereunder shall cease at the end of fifteen months after the termination, expiration, or cancellation of this bond." According to finding of fact No. 80 invalid loans made between 21 May, 1926, and 21 May, 1929, aggregate $21,698.90. Obviously no claim was made for these loans within a period of fifteen months from 21 May, 1929, and hence there could be no recovery for losses sustained from 21 May, 1926, to 21 May, 1929, when Bond No. 1267548 was given, unless the two bonds are to be deemed and construed as one contract. The first bond, or Bond No. 1096651, provided that it should "continue in force until terminated or canceled as hereinafter provided." The method specified in said bond for such termination or cancellation rested upon "a written notice stating when the cancellation takes effect served on employer or sent by registered letter . . . at least thirty days prior to the date that the cancellation takes effect." There is no evidence and no finding of fact that such notice was ever given. Consequently, it must be determined whether Bond No. 1267548, given on 21 May, 1929, is in itself a termination and cancellation of the former bond. Bond No. 1267548 carried a rider constituting a part of the bond itself, and this rider contained the following clause, to wit: "(a) This individual bond is issued as a continuation of the individual bond . . . numbered 1096651, dated 21 May, 1926. (b) And the said old bond and this renewal bond shall be deemed one bond. (c) The company's aggregate liability under both bonds for all loss or losses shall not exceed the greatest amount for which the company is liable under one of the said bonds."

The foregoing language is plain and unequivocal, and it would seem manifest that the defendant surety company has chosen apt words to weld the two instruments together and make them one. It has been held that "when two or more papers are executed by the same parties at the same time, or at different times, and show on their face that each was executed to carry out the common intent, they should be construed together." *Perry v. Surety Co.*, 190 N. C., 284, 129 S. E., 721. Moreover, if the language of the instrument or instruments is ambiguous, they must be construed most strongly against the defendant, who chose words to suit itself and sold them to the bank for compensation for the purpose of indemnifying against loss occasioned by unfaithful officers. In addition, it has been generally held that in determining the meaning of an indefinite contract, the construction placed upon the contract by the parties themselves will usually be adopted by the Court. *Wearn v. R. R.*, 191 N. C., 575, 132 S. E., 576; *Cole v. Fibre Co.*, 200 N. C., 484, 157 S. E., 857; *Loan Association v. Davis*, 192 N. C., 108, 135 S. E., 463.

In view of the language of Bond No. 1267548, the construction thereof by the parties, and the pertinent principles of law, it is concluded that the two bonds constitute one contract of indemnity, and therefore Bond No. 1096651, as amended and modified by Bond No. 1267548 bases liability upon certain express conditions specified therein, to wit: (a) "That the employer shall, within a reasonable time and at all events not later than thirty days after discovery of loss hereunder, notify the surety thereof," etc. (b) "That claim for loss hereunder shall be itemized with full particulars, including the amount and date of each item, . . . and presented to the surety within three months after the discovery of such loss." (c) "That any suit . . . to recover against the surety on account of loss hereunder shall be brought before the expiration of twelve months from the discovery of such loss," etc. In other words, liability rests upon notice in thirty days after discovery of loss, itemized proof of loss within three months after such discovery and suit within twelve months from such discovery.

The bank was closed on 3 October, 1931, and on 6 November, 1931, the liquidating agent wrote a letter to the surety declaring the intention of plaintiff "to put you on notice as to shortage which has become apparent."

The referee concluded that the notice of loss given by the liquidating agent complied with the contract. This conclusion was approved by the trial judge and there was competent evidence to support it. The liquidating agent testified that he mailed a letter giving the notice "within three or four days after I discovered the certificates of deposit outstanding, which were marked paid upon the register."

On 19 December, 1931, an itemized proof of loss was submitted to the defendant specifying in detail certain claims arising from the unlawful and wrongful acts of the principal in the bond. This proof of loss was furnished "within three months after discovery of such loss." There are certain discrepancies between the proof of loss so furnished and the proof produced at the trial, but the referee concluded that the proof of loss was in compliance with the contract and this conclusion was approved by the trial judge, and there was evidence to support such conclusion.

The record discloses that the suit was brought within twelve months from the discovery of the loss and a careful study of the findings of fact, the exceptions thereto, and the rulings of the trial judge do not convince the Court of reversible error.

The question of liability of the surety upon both bonds was not presented in the trial court, and for that reason has not been considered in determining the rights of the parties in the case.

Affirmed.

R. P. SCRUGGS, J. A. SMITH, L. L. LONG, AND R. M. TWITTY, ON BEHALF OF THEMSELVES AND ALL OTHER CITIZENS AND TAXPAYERS OF RUTHERFORD COUNTY SIMILARLY SITUATED, V. D. V. ROLLINS, F. D. KOON, E. E. HARRILL, J. H. HILL, AND W. A. JOLLY, CONSTITUTING AND BEING MEMBERS OF THE BOARD OF COUNTY COMMISSIONERS OF RUTHERFORD COUNTY.

(Filed 21 November, 1934.)

1. Taxation A a—Issuance of bonds held properly restrained to hearing upon complaint alleging filing of petition for vote in accordance with statute.

Plaintiffs, taxpayers of a county, filed suit to restrain the issuance of bonds by the county for necessary county expenses until the issuance of such bonds should be authorized by the qualified voters of the county, and plaintiffs alleged in their complaint that the levying of taxes for the proposed bond issue would work irreparable injury to plaintiffs and other taxpayers, and that a petition signed by more than twenty per cent of the qualified voters of the county had been filed with the defendant county commissioners, which petition asked that the proposed bond issue be submitted to the voters. N. C. Code, ch. 24, Art. VII-A. Defendants filed answer alleging that the petition did not contain names of the required fifteen per cent of the qualified voters of the county: *Held*, the temporary order restraining the issuance of the bonds was properly continued to the hearing on the merits of the case when the sufficiency of the petition could be determined.

2. Injunctions D b—

Where plaintiff has shown probable cause, or a *prima facie* case, or it can reasonably be seen that he will be able to make out his case at the final hearing, continuance of the temporary order is proper.

3. Appeal and Error J f—

While the Supreme Court, on appeal in injunction proceedings, can find and review the findings of fact, the burden is on appellant to show error.

APPEAL by defendants from *Warlick, J.*, 20 August, 1934. From RUTHERFORD. Affirmed.

The following are orders signed by Warlick, J.: First. "It appearing from the verified complaint filed in this cause, which is asked to be taken as an affidavit, that the plaintiffs allege that more than twenty per cent of the qualified voters of Rutherford County cast at the last gubernatorial election have signed a petition asking that said bond issue referred to in the complaint be submitted to a vote of the people of Rutherford County, at a special election to be held for the county of Rutherford, or at the next general election, and have asked in the meantime that the defendants be restrained and enjoined from issuing said bonds or doing anything further in connection with the issuance of said bonds; and it further appearing to the court that the defendant and its clerk to said board, upon an examination of said petitions, have not indicated on said petitions or filed as a public record of said board of commissioners the voters whose names appear upon said petition whom they allege are not qualified voters in said county:

"It is therefore ordered, adjudged, and decreed that the defendants appear before the undersigned judge holding the courts of the Eighteenth Judicial District at Columbus, North Carolina, on 3 September, 1934, and show cause if any it has why the said bond issue should not be submitted to a vote of the people of Rutherford County;

"And it further appearing that said defendant and the clerk to its board, W. O. Geer, have not indicated on said petition, or filed as a public record of its said board, the names of the said petitioners whom it alleges are not qualified voters in said county;

"It is further ordered that the defendant and W. O. Geer, clerk to its board, be and they are hereby ordered and directed to indicate upon the said petition the names of said petitioners whom they allege are not qualified voters in the county of Rutherford, or that in lieu thereof that the said defendant and W. O. Geer, clerk to its board, file as a public record a list of the names and postoffice addresses as appearing upon said petition whom the said board alleges are not qualified voters in Rutherford County, whose names they failed to count within five days from the service of this order upon said board; and

"It is further ordered, adjudged, and decreed that in the meantime the said defendant be and it is hereby enjoined and restrained from taking

any further proceedings in connection with said bond issue until the same is heard by the undersigned resident judge of the Eighteenth Judicial District, upon plaintiffs giving a bond in the sum of $100.00 to indemnify defendants against loss by virtue of this order.

"It is further ordered, adjudged, and decreed that a copy of this order be served on each member of the board of county commissioners and upon W. O. Geer, clerk to said board, by the sheriff of Rutherford County. This 13 August, 1934. Wilson Warlick, Judge Holding the Courts of the Eighteenth Judicial District of North Carolina."

Second. "This cause coming on to be heard before his Honor, Wilson Warlick, judge holding the courts of the Eighteenth Judicial District, at Burnsville, North Carolina, upon motion made by said defendants to vacate the order of injunction heretofore signed by his Honor, Wilson Warlick, on 13 August, 1934, and being heard. And it appearing to the court from the verified complaint that the bonds proposed to be issued by the defendants should be enjoined and restrained pending the hearing in this cause upon its merits:

"It is therefore ordered, adjudged, and decreed that the defendant board of county commissioners of Rutherford County be and they are hereby enjoined from issuing and delivering the bonds referred to in the complaint filed in this action in the sum of $163,000, pending the hearing of this cause.

"It is further ordered, adjudged, and decreed that the order of *mandamus* heretofore issued against W. O. Geer and the defendants, requiring them to submit to the plaintiffs the names of the petitioners filed with the register of deeds of Rutherford County, calling for an election on said bond issue, be and the same is hereby vacated.

"It is further ordered, adjudged, and decreed that the plaintiffs be required to give a bond in the sum of $1,000 to indemnify these defendants against any loss or damage which they might suffer on account of this order, pending the hearing, and upon its execution this order is effective. This 20 August, 1934. Wilson Warlick, Judge Holding the Courts of the Eighteenth Judicial District."

The assignments of error are as follows: "(1) The court erred in overruling defendants' motion to vacate and dissolve the restraining order. (2) The court erred in signing an order continuing the restraining order until the final hearing in this cause."

Paul Boucher and Quinn, Hamrick & Hamrick for plaintiffs.

Dunagan & McRorie, McRorie & McRorie, and Edwards & Edwards for defendants.

CLARKSON, J. The question involved: Did the court below err in refusing to vacate the restraining order against the county commis-

sioners of Rutherford County, North Carolina, from issuing and delivering $163,000 in bonds and in continuing same until the final hearing? We think not.

In *Hermic v. Commissioners of Yadkin,* 206 N. C., 845 (847), it is said: "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, ch. 81, N. C. Code of 1931, ch. 24, Art. VII-A), 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, 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."

Where no petition is filed according to the provisions of the above act, the bond order is valid and effective without the approval of the voters of the county, *Hermic case, supra.* It is contended by plaintiff that in accordance with the provision of the act, the plaintiffs filed, in time, with the register of deeds and clerk to the board of county commissioners of Rutherford County, North Carolina, a petition containing the names of 2,697 voters of Rutherford County, North Carolina. That this was more than twenty per cent of the votes cast at the general election in 1932 for the office of Governor, requesting an election to determine the issuance of $163,000 in bonds for the erection of additions to school buildings in Rutherford County, North Carolina.

The plaintiff alleges that the clerk "reported that he investigated the sufficiency of said petitions and presented it to the county commission-

ers on Tuesday, 7 August, 1934, in which report he stated that there were only 1,550 qualified voters on said petitions, but failed, neglected, and refused to indicate the names appearing on said petition which he contended and alleged were not qualified voters."

The plaintiff further alleges: "That within the past two or three years over 2,000 homes and farms in Rutherford County, North Carolina, have been sold for taxes on account of the inability of the taxpayers and citizens to meet the demand for taxes and, as plaintiffs are informed, believe, and so allege, the issuing of said bonds over the protest and in defiance of the request of the plaintiffs and other taxpayers that said order be submitted to a vote of the voters of Rutherford County, North Carolina, *would work irreparable damage and harm to the plaintiffs and all other persons similarly situated, and is arbitrary, wrongful, and unlawful.*" (Italics ours.)

The petitioners prayed that the defendants be enjoined and restrained from issuing and delivering the proposed bonds.

The defendants in their answer say, in part: "It is admitted that a petition purporting to contain the names of approximately 2,700 citizens of Rutherford County, North Carolina, was filed within the thirty-day period, but it is specifically denied that said petition contained the names of the required fifteen per cent of the qualified voters of Rutherford County, North Carolina, as provided by law. That these defendants aver the truth to be that after a careful investigation they find the said petition does not contain the names of more than 1,550 qualified voters, if in fact it contains that number. That, as defendants are advised and believe, it is incumbent upon them to determine the sufficiency or insufficiency of the petition. The method of determining this fact not being specifically outlined by the law, the defendants conscientiously and after long and hard work reached the conclusion, after giving petitioners the benefit of every doubt."

The court below restrained the issuing and delivering of the bonds to the final hearing of the case on its merits; in this we can see no error.

In *Castle v. Threadgill,* 203 N. C., 441 (442), speaking to the subject: "It has long been the settled rule in this jurisdiction that this Court, on appeal in injunction suits, has the power to find and review the findings of fact in controversies of this kind. On the record it appears that as to material facts there is a serious conflict. The rule is to the effect that if plaintiff has shown probable cause of a *prima facie* case, or it can reasonably be seen that he will be able to make out his case at the final hearing, the injunction will be continued. It is also settled that the burden is on appellant to show error. *Wentz v. Land Co.,* 193 N. C., 32; *Realty Co. v. Barnes,* 197 N. C., 6."

The judgment or order of the court below is

Affirmed.

LOUISBURG GROCERY COMPANY v. BOWERSOCK MILLS AND POWER COMPANY AND BOWERSOCK MILLS AND POWER COMPANY v. W. H. ALLEN, RECEIVER OF LOUISBURG GROCERY COMPANY, AND McM. FERGUSON.

(Filed 21 November, 1934.)

Contracts F c—Evidence held sufficient to be submitted to jury on issue of existence of contract alleged.

Plaintiff brought suit for breach of alleged contract under which plaintiff was constituted defendant's exclusive agent for the distribution of defendant's products in certain counties of the State. The president of plaintiff company testified that he had received a letter from defendant stating that K. was defendant's agent, and K. testified that he was defendant's sole agent in this State, with power to make the contract in question, and the president of plaintiff company testified that he made the alleged contract with K. for exclusive distribution of defendant's products in certain counties and in certain towns and cities of this State, and that he accepted the agency for distribution in reliance thereon, and gave up a like contract with another firm, and advertised defendant's products in the territory assigned. There was also evidence of ratification of the contract by defendant by shipment of products to plaintiff: *Held*, the evidence was sufficient to be submitted to the jury on the issue of the existence of the alleged contract between the parties, and an instruction to the jury that if they believed all the evidence they should answer the issue in the negative constitutes reversible error.

APPEAL by Louisburg Grocery Company, W. H. Allen, receiver, and McM. Ferguson, from *Grady, J.*, at February Term, 1934, of FRANKLIN. New trial.

The above-entitled actions were consolidated for trial and tried at February Term, 1934, of the Superior Court of Franklin County.

The Louisburg Grocery Company is a corporation, organized under the laws of the State of North Carolina, with its principal office and place of business at Louisburg, in Franklin County, N. C. Prior to the appointment of W. H. Allen as its receiver in 1932, the said corporation was engaged in the wholesale grocery business, dealing principally in flour, which it sold and distributed to retail merchants doing business in Franklin, Warren, Vance, Nash, and Wake counties.

The Bowersock Mills and Power Company is a corporation, organized under the laws of the State of Kansas, with its principal office and place of business at Lawrence, in said state. During the year 1928 the said corporation was and it is now engaged in the business of manufacturing and selling flour.

The action entitled "Louisburg Grocery Company *v.* Bowersock Mills and Power Company" was begun in the Superior Court of Franklin County on 13 December, 1932. In the complaint in said action it is alleged:

"4. That during the year 1928 the plaintiff and the defendant entered into a contract whereby the defendant contracted and agreed that it would constitute the plaintiff its sole agent for the sale of its flour in the territory above set forth (to wit, Franklin, Warren, Vance, Nash, and Wake counties, North Carolina), and that it would not sell or permit anyone else to sell by its authority its flour to any other dealer within said territory, but that the plaintiff should be its sole and exclusive agent. Said defendant further contracted and agreed that it would furnish to the plaintiff all of its several grades and brands of flour, and in such proportions as the plaintiff might order out the same.

"5. That after the making of the contract above set forth, and in consequence of the same, and in reliance upon the good faith of the defendant, this plaintiff proceeded at once to thoroughly advertise the flour of the defendant throughout the counties above mentioned; that said advertising was done through the newspapers, by the distribution of printed handbills, by letters, postal cards and other advertising matter sent through the mails, as well as by personal solicitations; that plaintiff had great confidence in the merits of flour manufactured from hard wheat and its suitability for the making of bread; and in order to better advertise said flour and further the sale thereof, the plaintiff gave public demonstrations of its suitability for that purpose and carried and exhibited samples of bread made from it; that said advertising campaign was carried on at great pains and expense to the plaintiff, and resulted in the creation of a very large demand for said flour in this section, whereas prior to that which the plaintiff did to advertise said flour, it was practically unknown here.

"6. That after the plaintiff, at great pains and expense, had widely and extensively advertised the flour of defendant and created a demand for it, the said defendant failed and refused to abide by and perform its contract with the plaintiff, whereby the defendant had agreed to give the plaintiff the exclusive right to sell defendant's flour in this territory; that in violation of its contract and agreement, and of the rights of this plaintiff, it sold its flour under various brands to other wholesalers and jobbers within plaintiff's territory; that not only did said defendant breach its contract with plaintiff by selling to other wholesalers and jobbers in plaintiff's territory, but it also failed and refused to ship to the plaintiff the grades and brands of flour which were ordered by the plaintiff, endeavoring to compel plaintiff to use only the highest grade of flour. That the plaintiff suffered much loss on this account by reason of the fact that during the period of financial depression which has overtaken the nation there is a much greater demand for the cheaper grades of flour than there is for the higher-priced grades.

"7. That by reason of the defendant's breach of contract as hereinbefore set forth, plaintiff lost the sale of large quantities of flour and the

profits therefrom; that plaintiff did not realize the benefits to which it was entitled from the extensive and expensive advertising campaign which it carried on in behalf of defendant's flour; and plaintiff has in many and various ways suffered inconveniences and loss—all to the damage of the plaintiff in the sum of $3,000."

These allegations of the complaint are denied in the answer filed by the defendant.

The action entitled "Bowersock Mills and Power Company *v.* W. H. Allen, Receiver of Louisburg Grocery Company and McM. Ferguson" was begun in the Superior Court of Franklin County on 28 June, 1933. In the complaint in said action it is alleged:

"3. That on or about 5 November, 1932, the plaintiff, at the request of the defendant Louisburg Grocery Company, sold and delivered to the said Louisburg Grocery Company at Louisburg, N. C., a shipment of flour, aggregating 210 barrels, for the net sum of $604.69, a copy of invoice of said shipment being hereto attached, marked 'Exhibit A,' and made a part of this complaint.

"4. That at the time of the shipment of said flour, to wit, 5 November, 1932, the plaintiff forwarded, through the regular banking channels, an acceptance draft in the sum of $604.69, covering the said shipment of flour, which draft was duly presented to the Louisburg Grocery Company, through the First Citizens Bank and Trust Company, Franklinton, N. C., and was accepted by McM. Ferguson for the Louisburg Grocery Company as of 14 December, 1932, the said draft to be paid thirty days after the arrival of the car containing said shipment of flour."

It is further alleged in said complaint that prior to the shipment of said flour, the defendant McM. Ferguson, the president of the Louisburg Grocery Company, had in writing personally guaranteed the payment of said draft, and that although more than thirty days had elapsed since the arrival of the car containing the said shipment of flour, the said draft has not been paid by the defendants or either of them.

In their answer the defendants admit the allegations of the complaint. They plead, however, in defense of plaintiff's recovery in said action, damages for the breach of the contract between the plaintiff and the Louisburg Grocery Company, as alleged in the action entitled "Louisburg Grocery Company *v.* Bowersock Mills and Power Company."

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

"1. Was there an agreement between the Louisburg Grocery Company and the defendant Bowersock Mills and Power Company that the said grocery company was to act as the sole and exclusive agent of the defendant for the sale of flour in the territory and towns and under the terms and conditions as alleged in the complaint? Answer: 'No.'

"2. If so, did the said defendant breach said contract and agreement, as alleged in the complaint? Answer: .....

"3. If so, in what amount has the plaintiff been damaged by reason of said breach of contract? Answer: .....

"4. What amount is the plaintiff Bowersock Mills and Power Company entitled to recover of the defendants Louisburg Grocery Company and McM. Ferguson? Answer: '$604.69, with interest from date of acceptance of the draft.' "

From judgment that the Louisburg Grocery Company recover nothing of the Bowersock Mills and Power Company, and that said Bowersock Mills and Power Company recover of W. H. Allen, receiver of the Louisburg Grocery Company, and McM. Ferguson the sum of $604.69, with interest from 14 December, 1932, and the costs of the action, the Louisburg Grocery Company, W. H. Allen, receiver, and McM. Ferguson appealed to the Supreme Court.

G. M. Beam and Yarborough & Yarborough for appellants.
Edward F. Griffin and White & Malone for appellees.

CONNOR, J. At the trial of this action there was evidence tending to show that J. B. Kittrell, of Greenville, N. C., was during the year 1928 and is now the agent of the Bowersock Mills and Power Company in and for the State of North Carolina, and that as such agent he was authorized to make and enter into the contract with the Louisburg Grocery Company on behalf of the Bowersock Mills and Power Company, as alleged in the complaint in the action entitled "Louisburg Grocery Company *v.* Bowersock Mills and Power Company."

As a witness for the Bowersock Mills and Power Company, J. B. Kittrell testified as follows:

"I live in Greenville, Pitt County, North Carolina. In 1928 I represented the Bowersock Mills and Power Company as its flour salesman. My territory was and is now the State of North Carolina. I was authorized to contact prospective customers, on a specific contract on which I was paid commissions. I had the whole State of North Carolina, and was the sole representative of the company in this State. I reported all contracts to the company for its approval. When we entered into a contract with a prospective customer we came to a common understanding as to a division of territory."

There was also evidence tending to show that some time during the year 1928, or 1929, J. B. Kittrell, as agent of the Bowersock Mills and Power Company, made and entered into the contract with the Louisburg Grocery Company, as alleged in the complaint, and that the Bowersock Mills and Power Company thereafter ratified the said contract.

McM. Ferguson, as a witness for the Louisburg Grocery Company, testified as follows:

"From 1925 to 1933 I was the president of the Louisburg Grocery Company. On 8 December, 1925, I received a letter from the Bowersock Mills and Power Company advising me that the said company had sent me a sample of the flour which it was manufacturing, and soliciting business with me. In this letter I was advised that Messrs. Kittrell and Parrish were the company's brokers, and was requested to favor them with a trial order for a carload of flour.

"I made the contract on which we are suing with Mr. Kittrell during 1928 or 1929. He agreed to give me exclusive right to sell flour manufactured by the company in Franklin County, and also in the following towns: Oxford, Henderson, Warrenton, Nashville, Spring Hope, Zebulon, and Wake Forest. It was agreed that my contract should cover all brands of flour manufactured by the company, and that the company should not sell such flour to jobbers who sold flour in my territory. In consequence of the agreement, I agreed to take the agency of the Bowersock Mills and Power Company in the territory agreed upon, and to give up the contract that I had with another mill. I knew I would have a hard time to establish the trade in this part of the country. I went to work and advertised the flour manufactured by the company at my own expense. I paid out for newspaper advertising during the years 1928, 1929, and 1930, $548.75."

In view of this evidence it was error for the court to instruct the jury that if they believed all the evidence they should answer the first issue "No," and in that event should not consider the second and third issues.

For the error in such instruction the appellants are entitled to a new trial. It is so ordered.

New trial.

NOVELLA WILSON v. BOYD & GOFORTH, INC., AND LUMBER MUTUAL CASUALTY INSURANCE COMPANY.

(Filed 21 November, 1934.)

1. Master and Servant F b—Evidence held sufficient to support finding that injury arose out of employment.

There was evidence in this case tending to show that claimant, while performing the duties of his employment, was corrected by his foreman, and that another employee, not on duty at the time and whose place of work was some distance away, and who was intoxicated at the time, thereupon abused claimant and hit claimant with a hammer, that claimant ran away, but returned later to work, and that after his return to work the intoxicated fellow employee again got after him, and claimant, in attempting to get away, fell and broke his leg, and that not until then

did the foreman grab the intoxicated employee and force him to desist: *Held*, the evidence was sufficient to support the finding of the Industrial Commission that there was a causal connection between claimant's employment and the injury and its finding that the injury resulted from accident arising out of and in the course of claimant's employment.

2. Master and Servant F i—

The findings of fact of the Industrial Commission are conclusive upon the courts when they are supported by any competent evidence.

APPEAL by defendants, employer and carrier, from *Oglesby, J.*, at March Term, 1934, of BURKE. Affirmed.

An opinion in this case was rendered by Commissioner T. A. Wilson against the employer and carrier. Application for review was made by the employer and carrier to the full Commission.

The opinion of the full Commission, by J. Dewey Dorsett, Commissioner, 5 February, 1934, is as follows: "The only issue in this case hinges around the question dealing with whether or not the plaintiff sustained an injury by accident arising out of and in the course of his regular employment. The circumstances in the case are a little peculiar inasmuch as the plaintiff, while on the job doing his regular work as requested by his foreman, was injured when another employee of the same company, a man by the name of Gilbert, who was not working on this particular day and who was employed to work at a different location about a mile distant, being present and intoxicated, hit the plaintiff with a hammer when the plaintiff's foreman gave orders to him to do the work in a certain manner. The evidence shows that after being struck with the hammer the plaintiff ran and was followed by this man Gilbert. The evidence shows that later the plaintiff returned to the place he was working, and that Gilbert returned, and when the plaintiff saw this man Gilbert return he began running, fell and fractured his left leg, upper third fibula and middle third tibia. The defendants say that the accident did not arise out of and in the course of his regular employment.

"Upon all the evidence in the case, the Commission makes the following findings of fact: (1) That the plaintiff and defendant employer have accepted the provisions of the Compensation Law and the Lumber Mutual Casualty Insurance Company is the carrier.

"(2) That the plaintiff's average weekly wage was $6.00.

"(3) That the plaintiff sustained an injury by accident which arose out of and in the course of his regular employment on 4 August, 1933, and has been totally disabled since that date, and at the time of the hearing by the trial Commissioner was totally disabled.

"Conclusions of law: The evidence is clear that this man Gilbert, one of the employees of the defendant, the man who injured the plaintiff

with a hammer and later caused the plaintiff to injure himself in getting away from this man Gilbert, was a bad actor while drinking. The evidence shows that this man Gilbert first attacked the plaintiff at the time when the foreman of the plaintiff, the injured employee, was giving instructions to the employee as to how to do the work. At that particular time, the evidence shows that this man Gilbert said he'd make this Negro boy do this work in the right manner, and it was then he hit the Negro boy and injured him. We believe there is a causal connection between the plaintiff's employment in this case and the injury he sustained, and we believe, under all the circumstances, compensation ought to be awarded and that Commissioner Wilson should be affirmed and it is so ordered.

"Award: The plaintiff is awarded compensation at the rate of $7.00 per week for the period of his total disability, beginning with 4 August, 1933. The defendants will pay to the proper parties the necessary medical, surgical and hospital costs in this case after bills have been submitted to and approved by the Industrial Commission. The defendants will pay the costs of the two hearings."

The employer and carrier appealed to the Superior Court. The judgment of the Superior Court is as follows: "The above-entitled cause coming on for hearing and being heard by the undersigned judge of the Superior Court assigned to and holding the courts of the Sixteenth Judicial District at the regular March, 1934, Term, upon the appeal of the defendants from an award made to plaintiff by the North Carolina Industrial Commission, the court being of the opinion that the findings of fact made by the full Commission and the conclusions of law are correct:

"It is now, therefore, on motion of Mull & Patton, attorneys for the plaintiff, considered, ordered, and adjudged that the award of compensation to the plaintiff at the rate of $7.00 per week for the period of his total disability be and the same is hereby in all respects affirmed.

"Defendants pay the cost of action, to be taxed by the clerk. John M. Oglesby, Judge Presiding."

The employer and carrier excepted and assigned error and appealed to the Supreme Court. The exception and assignment of error is as follows: "Signing of the judgment sustaining findings of facts and conclusions of law of the North Carolina Industrial Commission."

Mull & Patton and W. A. Self for plaintiff.
Walter Hoyle for employer and carrier.

CLARKSON, J. The question involved: Did the court below commit error in signing the judgment sustaining the holding of the North Carolina Industrial Commission that the injury sustained was by accident

that arose out of and in the course of the employment of the plaintiff, as an employee of the defendant employer, within the meaning of the Workmen's Compensation Act? We think not.

The evidence in this case is to the effect: That Novella Wilson, a Negro boy, was working for his employer, Boyd & Goforth, Inc. He was working on a septic tank, rubbing on the wall. T. S. Ostwalt was foreman in charge of the work. One Gilbert, also an employee in another department, a white man who was intoxicated, came and sat down beside Ostwalt. About a minute after sitting there Ostwalt said something to Wilson, the Negro boy, "about putting water on the wall, telling him not to use so much water." Gilbert got up and went over to the Negro and began to curse him. The Negro said nothing. Gilbert cursed him right on and came back to where Ostwalt, the boss, was sitting, picked up a claw-hammer and went to where the Negro was "and hit him on the hip with it." The Negro came down off the scaffold and Gilbert came after him. The Negro ran and Gilbert picked up a rock and threw it at him. The Negro picked up a stick and Gilbert made him throw it down, and then the Negro ran and Gilbert got after him and threw a stick at him about six feet long. The Negro went back to work and Gilbert kept after him after he had gone back to work, and in the end, in trying to get away from Gilbert, the Negro fell off the edge of the tank and broke his leg.

The Negro, Wilson, testified: "Q. Did the bossman say anything to Mr. Gilbert about hitting you? A. No, sir.

"Q. Was your bossman there on the job when Mr. Gilbert hit you? A. Yes, sir; right there.

"Q. And he didn't say anything to Gilbert? A. No, sir."

Ostwalt, the boss, testified that he told Gilbert, the intoxicated man and the employee of the company in another department, to leave the Negro alone, but Ostwalt never took hold of Gilbert until after the injury to the Negro—Gilbert was cursing and pursuing the Negro three or four minutes. The Negro was under the direction and control of the boss of the corporation, and on duty. It was the bossman's duty to use or exercise reasonable care, or the care of an ordinarily prudent man, to protect the Negro in his peaceful occupation.

The Commission has found that "there is a causal connection between the plaintiff's employment in this case and the injury he sustained." We think there was evidence to support the finding, and this is binding on us.

In *Conrad v. Foundry Co.*, 198 N. C., 723 (726-7), is the following: "There must be some causal relation between the employment and the injury, but if the injury is one which, after the event, may be seen to have had its origin in the employment, it need not be shown that it is

one which ought to have been foreseen or expected. *Baum v. Industrial Commission,* 288 Ill., 516, 6 A. L. R., 1242. The decisions of various courts contain practical illustrations of the principle. For example, a claimant was foreman in a shoe factory; an employee, who had been repairing machines, approached the claimant in a dark room, placed his arms around the claimant's neck and drew his head against a lead pencil which injured the claimant's eye. *Markell v. Daniel Green Felt Shoe Co.,* 221 N. Y., 493, 116 N. E., 1060. Likewise, an employee, while engaged in his work, was struck in the eye by a missile thrown by a fellow-servant. *Leonbruno v. Champlain Silk Mills,* 229 N. Y., 470, 13 A. L. R., 522. Again, a workman was injured in a quarrel with another over interference with his work. *Pekin Cooperage Co. v. Industrial Commission,* 285 Ill., 31, 120 N. E., 530. In these cases the injury was held to be by accident arising 'out of' the employment. *Socha v. Cudahy Packing Co.,* 13 A. L. R. (Neb.), 513."

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

Affirmed.

FAIRBANKS, MORSE & COMPANY, INC., v. J. A. MURDOCK COMPANY, INC.

(Filed 21 November, 1934.)

Sales H e—Allegations of answer, supported by evidence, held sufficient to state counterclaim for misrepresentation of article sold.

Under our rule that a pleading will be liberally construed in favor of the pleader upon demurrer, *it is held* that defendant's answer alleged as a counterclaim in plaintiff's action on notes given for the purchase price of machinery, that plaintiff represented not only that the machinery would furnish power sufficient to produce thirty tons of ice per day, but also that it would develop power sufficient to operate at all times, as desired by the defendant, the defendant's ice plant, the size and specifications of which plaintiff had full knowledge, and, there being evidence in support of the allegations of the counterclaim as thus interpreted, it was error for the court to dismiss the counterclaim upon plaintiff's motion.

APPEAL by defendant from *Cowper, Special Judge,* at October Term, 1933, of DURHAM. Reversed.

This is a civil action, instituted upon a note for $1,775.00, wherein it is admitted that the defendant executed the note and that the plaintiff is entitled to recover the amount sued for, less a credit of $479.09, subject to the rights of the defendant upon its counterclaim.

Both the plaintiff and the defendant introduced evidence, and at the close thereof the court intimated that, under the pleadings as drawn, the

burden was on the defendant to prove that the gasoline engine sold by the plaintiff to the defendant, for which the note in suit, with others, was given, had failed to develop power sufficient to produce 30 tons of ice per day; and, upon the defendant's admitting that it had offered and could offer no evidence tending to show how many tons of ice per day said engine would produce, the court dismissed the counterclaim of the defendant, and signed judgment for the plaintiff. Whereupon the defendant excepted and appealed to the Supreme Court, assigning errors.

Morehead & Murdock and R. P. Reade for appellant.
Manning & Manning for appellee.

SCHENCK, J. The plaintiff's contention is that, under the pleadings drawn, the allegation of the counterclaim that the representation made by the plaintiff that the engine "would do all the work of the said ice plant and was entirely sufficient in power to at all times operate said ice plant as desired by the defendant" is susceptible only to the interpretation that the engine would develop power sufficient to produce thirty tons of ice per day.

The defendant's contention is that, under the pleadings as drawn, the allegation of the counterclaim that the representation made by the plaintiff that the engine "would do all the work of the said ice plant and was entirely sufficient in power to at all times operate said ice plant as desired by the defendant" is susceptible also to the interpretation that the engine would develop power sufficient to operate at all times, as desired by the defendant, the ice plant consisting of machinery purchased from the York Manufacturing Company.

There is evidence tending to support the allegation of the counterclaim, if it be given an interpretation in accord with the defendant's contention, but no evidence tending to support it if it be given the restricted interpretation contended for by the plaintiff. The court was of the opinion that the allegation was restricted to a representation as to the number of tons per day the engine would produce, and, upon motion of the plaintiff, dismissed the counterclaim.

Paragraphs 2 and 3, and part of 4, of the counterclaim read as follows:

"2. That the defendant's officers were approached by the representative of plaintiff, who advised defendant's officers that plaintiff could deliver to defendant a Diesel-type engine burning crude oil, which engine would be able to operate said 30-ton ice plant and would effect a great saving to defendant in the cost of fuel necessary; defendant's officers explained to the representative of the plaintiff that he was not familiar with engines and did not know the size of engines required for

the operation of the said 30-ton ice plant, and directed said representative to get in touch with the representative of the York Manufacturing Company, to whom would be given the contract for the furnishing of the refrigerating and other machinery necessary in said plant; that thereafter a representative of the York Manufacturing Company, makers of the ice refrigerating machinery and the representative of plaintiff collaborated together and prepared a schedule showing the machinery necessary and proper for the construction and operation of an ice plant of the capacity desired; and thereafter the representative of the plaintiff advised the defendant that the plaintiff's 120 h.p. Fairbanks-Morse, type Y, style V. A. Diesel engine, would do all the work of the said ice plant and was entirely sufficient in power to at all times operate said ice plant as desired by the defendant.

"3. That plaintiff's representative tendered to defendant's officers a contract for the purchase of said 120 h.p. engine, and defendant's officers, relying upon the representation made by plaintiff through its representative to the effect that the said engine was fully able to and would fill all the needs of defendant, and at all times operate said plant as desired by defendant, executed said contract and the said engine was thereafter delivered and installed by plaintiff; but defendant says that the representations made by plaintiff by and through its representative were made, defendant believes and therefore alleges, recklessly, carelessly, and negligently, and with utter disregard of the desires and intentions of defendant, and solely for the purpose of selling said engine to defendant, and well knowing that defendant was relying upon said representation, and was induced thereby to enter into said contract, all of which representations were false and made for the purpose of deceiving defendant and effecting the sale of said engine.

"4. This defendant says that after it had executed said contract that such contract was forwarded to the home office of the plaintiff, together, this defendant is advised and believes and therefore alleges, with full information relative to the proposed plant, its size and capacity, together with a list of all machinery to be installed in said plant and the requirements as to size and motive power, and that the plaintiff, with all the information before it and by the full knowledge of the capacity of the plant for which said engine was purchased and the desires of the defendant that said engine should at all times be able to operate the said plant, executed said contract and returned a copy thereof to the company; . . ."

These allegations are followed by further allegations of the failure of the engine to operate the defendant's ice plant, the machinery for which was purchased from the York Manufacturing Company, and of resultant damage.

"The uniform rule prevailing under our present system is that, for the purpose of ascertaining the meaning and determining the effect of a pleading, its allegations shall be liberally construed, with a view to substantial justice between the parties. Revisal, sec. 495. (C. S., 535.) This does not mean that a pleading shall be construed to say what it does not, but that if it can be seen from its general scope that a party has a cause of action or defense, though imperfectly alleged, the fact that it has not been stated with technical accuracy or precision will not be so taken against him as to deprive him of it. *Buie v. Brown,* 104 N. C., 335. As a corollary of this rule, therefore, it may be said that a complaint cannot be overthrown by a demurrer unless it be wholly insufficient. If in any portion of it, or to any extent, it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading will stand, however inartificially it may have been drawn, or however uncertain, defective, or redundant may be its statements, for, contrary to the common-law rule, every reasonable intendment and presumption must be made in favor of the pleader. It must be fatally defective before it will be rejected as insufficient." *Blackmore v. Winders,* 144 N. C., 212 (215). This clear and concise statement of the liberal rule of construction in this jurisdiction of pleadings upon demurrer by *Mr. Justice Walker* has been often cited and approved by this Court, most recently in the case of *Insurance Company v. Dey,* 206 N. C., 368. If we apply this rule to the allegation of the counterclaim it will not be limited to the restricted construction urged by the plaintiff, but may be extended as well to the more inclusive construction sought by the defendant.

We feel constrained to hold that in dismissing the counterclaim his Honor erred.

Reversed.

CHARLES PEARSON v. W. A. SIMON AND MARYLAND CASUALTY COMPANY.

(Filed 21 November, 1934.)

1. Trial D a—

Where there is evidence in support of plaintiff's contention as to the amount of indebtedness sued on, defendant's motion as of nonsuit is properly denied, although there is evidence in contradiction.

2. Principal and Surety B b—

The bond of a contractor given in accordance with a contract for public construction and the contract itself will be construed together to determine the extent of the liability of the surety under the bond.

3. Same—Construing bond for public construction with contract, surety is held liable for salary of superintendent of construction.

The contract for municipal construction in this case provided that the contractor should file bond conditioned, among other things, for the payment of laborers, foremen, and superintendents employed in the performance of the contract. The bond filed in accordance therewith stated it was for the benefit of all persons furnishing material or performing labor in the performance of the contract: *Held*, although the surety, by strict construction of the bond itself, might not be liable for the salary of a superintendent employed in the performance of the contract, construing the bond with the contract it is manifest that it was the intention of the parties to the contract, as well as the parties to the bond, that the bond should also be liable for the salary of the superintendent, such provision being expressly incorporated in the contract.

4. Trial B b—

The trial court has discretionary power, not reviewable on appeal, to allow plaintiff, prior to the introduction of evidence by defendant, to offer additional evidence after plaintiff has rested and after denial of defendant's motion as of nonsuit.

5. Appeal and Error J c—

Where additional evidence offered by plaintiff after he has rested and after denial of defendant's motion as of nonsuit in no way affects the right of plaintiff to recover, the action of the trial court in allowing plaintiff to offer such additional evidence cannot be held for prejudicial error.

APPEAL by defendants from *Frizzelle, J.*, at May Term, 1934, of LENOIR. No error.

On or about 14 October, 1930, the defendant W. A. Simon entered into a contract with the city of Kinston, N. C., by which he agreed to do all the work, and to furnish and install, unless otherwise specified, all the materials and equipment necessary for and to complete ready for use the construction of power plant improvements for the city of Kinston. The contract is in writing and provides, among other things, that the said defendant shall execute and file with the city of Kinston a bond in the sum of $23,295, in such form and with such sureties as may be approved by the mayor and board of aldermen of the city of Kinston, conditioned, among other things, for the payment by the said defendant of the wages of laborers, foremen and superintendents employed by him in the performance of said contract.

Pursuant to the provisions of said contract, and in compliance with the terms thereof, the defendant W. A. Simon, as principal, and the defendant Maryland Casualty Company, as surety, executed and filed with the city of Kinston a bond in the sum of $23,295, containing a clause in words as follows:

"This bond is made for the use and benefit of all persons, firms, and corporations who may furnish any material or perform any labor for or

on account of said work, buildings, or improvements, and they and each of them are hereby made obligees hereunder the same as if their own proper names were written hereunder as such, and they and each of them may sue hereon."

The defendant W. A. Simon began the performance of his contract with the city of Kinston during the month of October, 1930, and completed said contract during the month of October, 1931.

On or about 10 October, 1930, the defendant W. A. Simon employed the plaintiff Charles Pearson to superintend the performance of his contract with the city of Kinston, at a salary of $350.00 per month. The plaintiff entered upon the performance of his duties under said contract of employment during the month of October, 1930, and continued to perform the same until the contract of the defendant W. A. Simon with the city of Kinston was completed during the month of October, 1931.

This action was begun on 21 January, 1932. In his complaint the plaintiff alleges that there is now due him by the defendant W. A. Simon for his services under his contract of employment with the said defendant the sum of $1,813.00, with interest from 10 October, 1931.

In their joint answer the defendants deny that there is now due the plaintiff by the defendant W. A. Simon the sum of $1,813.00; they admit that they are indebted to the plaintiff in the sum of $258.83, and offer to pay the said sum into court in full discharge of their liability to the plaintiff on the cause of action alleged in the complaint.

The issue submitted to the jury at the trial of the action was answered as follows:

"In what amount are the defendants indebted to the plaintiff? Answer: '$1,813.00, with interest.' "

From judgment that the plaintiff recover of the defendant W. A. Simon, as principal, and of the defendant Maryland Casualty Company, as surety, the sum of $1,813.00, with interest from 10 October, 1931, and the costs of the action, the defendants appealed to the Supreme Court, assigning errors in the trial.

Ely J. Perry, Kenneth C. Royall, and Allen Langston for plaintiff.
Rouse & Rouse and Carr, Poisson & James for defendants.

CONNOR, J. There was no error in the refusal of the court below to allow the motion of the defendants, at the close of all the evidence, for judgment as of nonsuit. Assignments of error based on exceptions to the rulings of the court on this motion cannot be sustained.

The evidence for the plaintiff tended to show that the defendant W. A. Simon is indebted to the plaintiff in the sum of $1,813.00, with interest from 10 October, 1931, as alleged in the complaint. This evidence,

although contradicted in some respects by the evidence for the defendants, was properly submitted to the jury.

The contention of the defendant Maryland Casualty Company that it is not liable to the plaintiff in this action under the terms of its bond cannot be sustained. Conceding that under the decision of this Court in *Moore v. Industrial Company,* 138 N. C., 304, 50 S. E., 687, the said defendant is not liable under its bond, strictly construed, for the amount due by the defendant W. A. Simon to the plaintiff for services as superintendent of the work performed by the said defendant under his contract with the city of Kinston, we think that in the instant case the bond must be construed together with the contract, which is referred to and made a part of the bond. It is expressly provided in the contract that the bond shall be conditioned for the payment of wages due not only to laborers, but also to foremen and superintendent. It is well settled as the law in this jurisdiction that a contractor's bond executed and filed pursuant to the provisions of the contract, and in compliance therewith, and the contract must be construed together, in order to determine the extent of the liability of the surety under the bond.

In *Mfg. Co. v. Blaylock,* 192 N. C., 407, 135 S. E., 136, it is said: "The principle is well established by many authoritative decisions, here and elsewhere, that in determining the surety's liability to third persons, on a bond given for their benefit and to secure the faithful performance of a building contract as it relates to them, the contract and bond are to be construed together. *Mfg. Co. v. Andrews,* 165 N. C., 285, 81 S. E., 418. The obligation of the bond is to be read in the light of the contract it is given to secure, and ordinarily the extent of the engagement, entered into by the surety, is to be measured by the terms of the principal's agreement. *Brick Co. v. Gentry,* 191 N. C., 636, 132 S. E., 800, and cases there cited."

When the contract and the bond in the instant case are read together, it is manifest that it was the intention of the parties to the contract as well as of the parties to the bond, that the bond should be liable for the wages not only of laborers, but also of foremen and superintendents employed by the contractor in the performance of his contract. Indeed, in their answer to the complaint in this action the defendants do not deny their liability to the plaintiff on the cause of action alleged in the complaint. They put in issue only the amount due by the defendant W. A. Simon to the plaintiff for his services under his contract of employment. Their contention as to such amount was not sustained by the jury.

The contention of the defendants that it was error for the trial court, after the plaintiff had rested his case, and after the motion of the defendants for judgment as of nonsuit under the statute, C. S., 567, was denied,

and before either of the defendants had offered evidence to allow the plaintiff to offer additional evidence, cannot be sustained. The action of the court was within its discretion, and for that reason is not reviewable by this Court. The rights of the defendants under the statute were not affected by the action of the court. It might have been otherwise if their motion at the close of the evidence for the plaintiff had been allowed.

Conceding, however, that the action of the court of which the defendants complain was not in accord with the practice heretofore obtaining in this State, we are of opinion that no harm resulted to the defendants in the instant case from such action. The facts shown by the additional evidence were not determinative of the right of the plaintiff to have his case submitted to the jury. The purpose and effect of the evidence was to bring plaintiff's case within the principle on which *Moore v. Industrial Company, supra,* was decided. This principle has no application in the instant case.

The judgment in this action is affirmed.

No error.

THOMAS VAN LANDINGHAM, JR., BY HIS NEXT FRIEND, THOMAS VAN LANDINGHAM, SR., v. SINGER SEWING MACHINE COMPANY AND U. R. RUSSELL.

(Filed 21 November, 1934.)

1. Appeal and Error J g—Whether nonsuit should be considered solely on evidence offered before plaintiff rested held immaterial on record.

Where a defendant's motion as of nonsuit should be allowed whether only the evidence introduced before plaintiff rested or whether all the evidence in the case is considered, the defendant's contention that it was entitled to have the motion considered solely upon the evidence introduced before the plaintiff rested, without considering the evidence introduced by its codefendant and the plaintiff's evidence in rebuttal thereof, although defendant had cross-examined the witness of its codefendant, need not be decided on appeal.

2. Automobiles D b—Evidence in this case held insufficient to be submitted to jury on issue of employer's liability for driving of employee.

Evidence that the driver of an automobile owned same but was employed by a sewing machine company and used the car for the business of his employer when occasion required, and that at the time of injury to plaintiff by the negligent driving of the car, the employee had on the rear of the automobile a sewing machine belonging to the employer, *is held* insufficient to be submitted to the jury on the issue of the employer's liability for the employee's negligent driving, and this result is not altered by further evidence that at the time of the injury the employee

was driving from the office of the employer to the employee's home for lunch, without evidence that the car owned by the employee was used exclusively for business of the employer, the evidence failing to show that the relationship of master and servant existed at the time and in respect to the very transaction out of which the injury arose.

APPEAL by the corporate defendant from *Hill, Special Judge,* at December Term, 1933, of MECKLENBURG. Reversed.

This was a civil action, instituted by the minor plaintiff, Thomas Van Landingham, Jr., by his next friend, for personal injuries alleged to have been proximately caused by the negligence of the defendant Russell while in the employment and in the furtherance of the business of his codefendant Singer Sewing Machine Company. The defendants filed separate answers.

On 15 May, 1930, the plaintiff, then a lad of about ten years of age, while on East Seventh Street, near the intersection of Alexander Street, in the city of Charlotte, was struck by an automobile driven by the defendant U. R. Russell, and injured.

There was evidence tending to show that the injury to the plaintiff was proximately caused by the negligence of the defendant Russell, as alleged in the complaint, and the jury so found. The jury also answered in the affirmative an issue reading as follows: "Was the defendant U. R. Russell, at the time alleged in the complaint, acting within the scope of his employment and in the furtherance of the business of the Singer Sewing Machine Company?"

The court signed judgment in favor of the plaintiff against both defendants, and the defendant Singer Sewing Machine Company appealed, assigning errors.

J. Laurence Jones for appellant Singer Sewing Machine Company.
Tom P. Jimison, G. T. Carswell, and Joe W. Ervin for appellee.

SCHENCK, J. Upon the plaintiff resting his case both defendants moved to dismiss the action and for a judgment as of nonsuit, which motions were denied, and the defendants excepted. Whereupon the defendant Russell offered evidence, including his own testimony, and his codefendant Singer Sewing Machine Company cross-examined Russell and the other witnesses introduced by him; and at the close of defendant Russell's evidence the plaintiff offered further evidence in rebuttal. Both defendants, when all the evidence was in, renewed their motions theretofore made to dismiss the action and for judgment as of nonsuit, and upon the motions being denied, again noted exceptions.

The defendant Singer Sewing Machine Company did not at any time introduce evidence, and now contends it has the right, upon this appeal, to have its motion for a judgment as of nonsuit considered upon the

evidence alone of the plaintiff offered prior to the evidence of its co-defendant and rebuttal evidence of the plaintiff. This raises the interesting questions as to whether the corporate defendant's position is well taken in the first instance; and if so, whether its right to have its motion so considered was waived by its cross-examination of the witnesses of its codefendant. However, we are not called upon to decide these questions, since we have reached the conclusion that the corporate defendant's motion for judgment as of nonsuit should have been granted whether the evidence taken after the plaintiff's resting his case be considered or not.

This Court, in emphasizing the essentialness of establishing the fact that the employee was acting within the scope of his employment at the time of the injury, when it is sought to hold an employer responsible for an injury inflicted by the employee, says, in the case of *Martin v. Bus Line,* 197 N. C., 720 (721-2): "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' (*S. v. Bridgers,* 172 N. C., 879, 89 S. E., 804). These are:

"1. That the plaintiff was injured by the negligence of the alleged wrongdoer. *Hurt v. Power Co.,* 194 N. C., 696, 140 S. E., 730.

"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. Linville v. Nissen,* 162 N. C., 95, 77 S. E., 1096.

"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. *Ferguson v. Spinning Co.,* 196 N. C., 614, 146 S. E., 597; *Fleming v. Knitting Mills,* 161 N. C., 436, 77 S. E., 309.

"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. *Gurley v. Power Co.,* 172 N. C., 690, 90 S. E., 943.

"It is elementary law that the master is responsible for the negligence of his servant which results in injury to a third person when the servant is acting within the scope of his employment and about the master's business. *Roberts v. R. R.,* 143 N. C., 176, 55 S. E., 509; 8 L. R. A. (N. S.), 798, 10 Ann. Cas., 375. It is equally elementary that the master is not responsible if the negligence of the servant which caused the injury occurred while the servant was engaged in some private matter of his own or outside the legitimate scope of his employment. *Bucken v. R. R.,* 157 N. C., 443, 73 S. E., 137; *Doran v. Thomsen,* 76 N. J. L., 754."

If we consider, with the admissions, only the evidence offered by the plaintiff upon the issue as to whether the defendant Russell was acting within the scope of his employment and in the furtherance of the business of the Singer Sewing Machine Company at the time and place alleged, we have, and no more, the admission that Russell was employed by his codefendant and was, at said time and place, driving an automobile which he himself owned and used when occasion required in the business of the codefendant; and evidence tending to show that at said time and place there was on the rear of said automobile a Singer sewing machine. We do not think these admissions and evidence make out a *prima facie* case upon this issue.

If we consider the evidence introduced by the defendant Russell we have added evidence tending to show, and no more, that Russell was employed by the sewing machine company upon a salary and commissions under an all-time contract, and was on his way from the office of the company to his home for lunch when his automobile struck the plaintiff, and we think, with this addition, the evidence still falls short of establishing a *prima facie* case. There is nothing in any of the evidence tending to show that the automobile which the defendant Russell owned and was driving was used exclusively for business purposes.

"The doctrine of *respondeat superior* applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged for the result of wrong, at the time and in respect to the very transaction out of which the injury arose." *Linville v. Nissen,* 162 N. C., 95 (101). This familiar principle has been repeatedly applied by this Court, most recently in the case of *Cole v. Funeral Home, ante,* 271.

We conclude that his Honor was in error in denying the motion of the Singer Sewing Machine Company for a judgment as of nonsuit.

Reversed.

LESLIE CARLISLE MORRIS, BY HIS NEXT FRIEND, S. T. MORRIS, v. D. J. SPROTT, TRADING AS SPROTT BROTHERS FURNITURE COMPANY.

(Filed 21 November, 1934.)

1. Negligence C b—

It is error for the trial court to hold as a matter of law that a seven-year-old boy cannot be guilty of contributory negligence.

2. Same—

While a child is not chargeable with the same degree of care as an adult, he is required to exercise such prudence for his own safety as one of his age may be expected to possess, which is usually a question for the jury.

MORRIS *v.* SPROTT.

APPEAL from *Harding, J.*, at April Term, 1934, of CABARRUS. New trial.

The plaintiff, a lad of seven years of age, institutes this action by his next friend and father, for personal injuries alleged to have been proximately caused by the negligence of the agent of the defendant. It is alleged in the complaint that the driver of the defendant's truck negligently backed said truck over the plaintiff and injured him, and in the answer it is alleged that "the plaintiff contributed to and proximately caused his own injury and by his own negligent acts and conduct, in that he was hanging underneath defendant's truck; in that he failed to exercise that degree of care one of his age, intelligence, and experience should have exercised under the conditions and circumstances then and there apparent to him; and that this defendant pleads such negligence on the part of said minor plaintiff in bar of his right to recover."

The court submitted issues as to the defendant's negligence and as to the measure of damage, and declined to submit an issue as to the contributory negligence of the plaintiff, tendered in proper form and in due time by the defendant. The court intimated that since it appeared that the plaintiff was seven years old at the time of the alleged injury he was of the opinion that the plaintiff could not be guilty of contributory negligence, and for that reason declined to submit the issue tendered by the defendant. To this ruling of the court the defendant excepted. The court also charged the jury "that a seven-year-old child is incapable under our law of being guilty of contributory negligence as a bar to his right of action for damages for negligence of a defendant, if any," and the defendant excepted.

The issues submitted were answered in favor of the plaintiff, and judgment in accord therewith entered, and defendant appealed, assigning errors.

Hartsell & Hartsell for appellant.
H. S. Williams, R. R. Hawfield, and H. L. Taylor for appellee.

SCHENCK, J. We think his Honor's holding, as a matter of law, that a child of seven years of age is incapable of being guilty of contributory negligence is in conflict with the decisions of this Court, which are to the effect that contributory negligence on the part of a child is to be measured by his age and his ability to discern and appreciate the circumstances of danger; and is not chargeable with the same degree of care as an experienced adult, but is only required to exercise such prudence as one of his age may be expected to possess; and this is usually, if not always, when the child is not wholly responsible, a question of fact for the jury. *Rolin v. Tobacco Co.*, 141 N. C., 300; *Alexander v. Statesville*, 165 N. C., 527; *Fry v. Utilities Co.*, 183 N. C., 281; *Ghorley v.*

R. R., 189 N. C., 634; *Hoggard v. R. R.*, 194 N. C., 256; and *Tart v. R. R.*, 202 N. C., 52.

We are not unmindful of the case of *Ashby v. R. R.*, 172 N. C., 98, relied upon by the plaintiff. In this case the plaintiff was a child of eight years of age, and the last sentence of the opinion reads: "Contributory negligence cannot be attributed to a child of the age of the plaintiff at the time of this injury." However, this Court has recently distinguished, if not overruled, the above-quoted utterance in the case of *Brown v. R. R.*, 195 N. C., 699. Certainly, if the sentence quoted is read without strict reference to the facts of the case it is in conflict with the universal holding of this Court in other cases where contributory negligence has been pleaded as a bar to recovery by infants of seven years of age and upward. *Chief Justice Clark*, who wrote the opinion in *Ashby v. R. R., supra*, in a concurring opinion in the case of *Fry v. Utilities Co., supra*, quoted with approval from *Foard v. Power Co.*, 170 N. C., 50, as follows: "We find in the books many cases where children of various ages, from seven years upward, have been denied recovery because of their own negligence." This assertion in the *Foard case, supra* (which actually reads six years instead of seven years), is followed by a citation of a long list of authorities. It is not at all improbable that the apparently inadvertent statement of the late learned *Chief Justice* in *Ashby's case, supra*, misled the court below.

To the end that the defendant may have submitted to the jury an issue as to the contributory negligence of the plaintiff, under a charge in consonance with this opinion, we award a

New trial.

TOWN OF MORGANTON, A MUNICIPAL CORPORATION, AND HUTTON & BURBONNAIS COMPANY, INC., v. CAROLINE HUDSON.

(Filed 21 November, 1934.)

1. Trespass B b—Owner of an easement upon lands and owner of fee therein may maintain joint action for trespass.

A town owning by condemnation an easement over lands for its watershed and the owner of the fee in such lands may maintain a joint action against a third party for damages for trespass and to restrain further acts of trespass, both plaintiffs having an interest in the lands.

2. Trespass B c—Complaint held to state cause of action for trespass.

A complaint alleging that defendant wrongfully and unlawfully entered upon lands over which the municipal plaintiff owned an easement for its watershed and in which the other plaintiff owned the fee, and that the defendant cut and removed from the lands valuable timber and interfered with the enjoyment of the easement, and threatened the health of the citizens of the town, and praying damage for the trespasses com-

mitted and an order restraining further acts of trespass, *is held* not demurrable on the ground that it fails to state a cause of action, it not being alleged that defendant owned or lived upon land embraced in the municipal watershed. C. S., 7116, 7123.

CIVIL ACTION, before *Harding, J.*, at August Term, 1934, of BURKE.

It was alleged that the plaintiff town of Morganton was a municipal corporation, owning, maintaining, and operating a public water system, supplying citizens and residents of the town with water necessary for domestic consumption and for the protection of the health of the citizens. It was further alleged that in order to secure a proper watershed the town had duly condemned the necessary drainage area to protect said water supply, and as a result of such condemnation was "the owner of an easement and right in and to the said lands and premises constituting its said watershed."

The plaintiff Hutton & Burbonnais Company is the owner of a large boundary of land in Burke County, including the portion of land which had been condemned by the town as a watershed.

It was alleged that the defendant, "under some spurious claim unfounded in law, has recently unlawfully entered and trespassed upon said premises, . . . cutting and removing from the boundary of plaintiff's said watershed certain valuable timber trees standing and growing thereon, and is threatening to continue to cut and remove from plaintiff's said watershed much valuable timber trees, and will, as plaintiff is advised and believes, continue to cut and remove from plaintiff's watershed the said standing and growing timber thereon, and will pollute said water supply of the plaintiff unless enjoined and restrained by the order of the court. . . . That the entry on said lands and premises by defendant constituting plaintiff's watershed is unlawful and wrongful, and constitutes a dangerous nuisance and potential infection and contamination of the water supply of said town of Morganton, and such continued entry and trespass upon plaintiff's said watershed endangers the lives and health of the citizens of the said town."

The plaintiffs alleged that they were damaged in the sum of $500.00 by reason of such unlawful and wrongful trespass, and ask that an injunction be issued restraining further trespass.

The defendant demurred to the complaint upon the ground that there was a misjoinder of both parties and causes of action, and further, that neither plaintiff had stated facts sufficient to constitute a cause of action.

The demurrer was sustained and the plaintiffs appealed.

Mull & Patton and Charles W. Bagby for plaintiffs.
I. T. Avery and O. L. Horton for defendant.

BROGDEN, J. The situation is this: The Hutton & Burbonnais Company owns a tract of land in Burke County. The town of Morganton

owns and operates a municipal water supply in said county, and has duly condemned and now owns an easement in and over a portion of said tract of land for the protection of its said water supply and of the health of its citizens. It is alleged in the complaint and admitted by the demurrer that the defendant has unlawfully and wrongfully entered upon that portion of land constituting an easement of the town, and has cut and continues to cut and remove valuable timber from the premises, and that such trespass not only interferes with the enjoyment of the easement but constitutes a menace to the health of the inhabitants of the town.

This fact status produces the following question of law: Can the owner of the easement and the owner of the land maintain a joint action for damages heretofore accrued and at the same time restrain further trespass upon the land by the defendant? The law answers the inquiry in the affirmative.

C. S., 7116, *et seq.,* prescribes certain regulations and supervision with respect to watersheds. C. S., 7123, provides certain regulations to be observed by persons residing or owning property on a watershed. It does not appear, however, that the defendant resides or owns any property on the watershed in question, but, on the contrary, it is specifically alleged that the plaintiffs own the fee and the easement superimposed thereon by a condemnation proceeding.

An easement is an interest in land, and it has been held by this Court that a tenant and an owner may be properly joined in an action for trespass or remainderman and life tenant. See *Balcum v. Johnson,* 177 N. C., 213, 98 S. E., 532; *Nobles v. Nobles,* 177 N. C., 243, 98 S. E., 715; *Tripp v. Little,* 186 N. C., 215, 119 S. E., 225; *Gruber v. Ewbanks,* 197 N. C., 280, 148 S. E., 246; *Combs v. Brickhouse,* 201 N. C., 366.

Both plaintiffs have an interest in the land and the complaint states facts sufficient to ward off a demurrer.

Reversed.

ELIZA WILLIAMS AND L. W. WILLIAMS v. BLUE RIDGE BUILDING AND LOAN ASSOCIATION, A CORPORATION, AND A. W. BURNS, JR., LIQUIDATING AGENT FOR THE CENTRAL BANK AND TRUST COMPANY.

(Filed 21 November, 1934.)

Evidence B a—

A charge that the burden of convincing the jury by "clear, strong, and convincing proof" means evidence convincing the jury to a "moral certainty" *is held* for error. The degrees of proof required in civil and criminal actions, and definitions of same, are discussed by *Mr. Justice Schenck.*

WILLIAMS *v.* BUILDING AND LOAN ASSO.

APPEAL by the plaintiffs from *Pless, J.,* at June Term, 1934, of BUNCOMBE. New trial.

This was a civil action, instituted by the plaintiffs to restrain a sale under a certain recorded deed of trust, signed, and purporting to be duly acknowledged before a notary public, by the plaintiffs, to the Central Bank and Trust Company, as trustee, to secure an indebtedness to the Blue Ridge Building and Loan Association.

It is alleged in the complaint that, while the *feme* plaintiff signed the deed of trust, she never appeared before the notary public whose name is affixed to the certificate, and never, separately and apart from her husband, assented thereto. This allegation is denied in the answer. The case was submitted to the jury upon the following issue:

"1. Did the notary public, Fenton H. Harris, take the private examination of Eliza Williams touching her voluntary execution of the deed of trust dated 11 December, 1929, securing the sum of $7,000, recorded in Deed of Trust Book 305, page 292?" Upon the issue being answered in the affirmative, judgment was entered for the defendants, and the plaintiffs appealed, assigning errors.

Harry A. Gorson for appellants.
R. M. Wells and Martin & Martin for appellees.

SCHENCK, J. The appellants assign as error the following from the charge: "You enter the jury box with the presumption that the private examination was legally taken, and if that presumption is to be rebutted it must be done by the plaintiff, the burden being upon her, Eliza Williams, to satisfy this jury by clear, strong, and convincing proof that the private examination was not legally taken. The phrase 'clear, strong, and convincing proof' means more than merely satisfying you, or satisfying you by the greater weight of the evidence; it means she must fully satisfy you, that is, satisfy you to a moral certainty that the certificate signed by the notary public, Fenton Harris, is not correct, that her private examination was not taken."

We are constrained to hold that when his Honor, in explaining the meaning of the words "clear, strong, and convincing proof," told the jury that the plaintiffs "must . . . satisfy you to a moral certainty," he required of the plaintiffs an intensity of proof not warranted or justified by the decisions of this Court, even in cases where it is sought to set aside a solemn act of a judicial officer. If the quoted words had been omitted, the charge would have been in accord with *Lumber Co. v. Leonard,* 145 N. C., 339, where it is said: "The court should instruct the jury with the greatest care in cases of this character, and explain to them that the solemn act of a judicial officer is not to be lightly set aside, and certainly not upon a mere preponderance of

evidence, but only upon very clear, strong, and cogent proof, which should fully convince the minds of the jury." But when the phrase "satisfy you to a moral certainty" was chosen his Honor adopted the language that this Court has universally used in criminal cases to define the clause "satisfy you beyond a reasonable doubt."

In this jurisdiction there are three degrees of proof required of the party upon whom the *onus probandi* rests. First, in ordinary civil actions the burden is to satisfy the jury by the greater weight of the evidence; and, second, in certain cases of an equitable nature, such as where it is sought to reform a written instrument, or prove the terms of a lost will, or to impeach the probate of a married woman's deed, the burden is to establish the contention by clear, strong, and cogent proof; and, third, in criminal actions the burden is to show the guilt of the accused beyond a reasonable doubt. *Ellett v. Ellett,* 157 N. C., 161; *Montgomery v. Lewis,* 187 N. C., 577. The first phrase, "greater weight of the evidence," has been universally explained by "the preponderance of the evidence," *Butchers Supply Co. v. Conoly,* 204 N. C., 677; the second phrase, "clear, strong, and cogent proof," by evidence which "should fully convince," *Lumber Co. v. Leonard, supra;* and the third phrase, "beyond a reasonable doubt," by "to a moral certainty," *S. v. Schoolfield,* 184 N. C., 721.

When his Honor placed upon the plaintiffs the burden of establishing their contention "to a moral certainty" he took this case out of that line of cases requiring the second degree of proof, and placed it in the category of criminal cases requiring the third degree of proof. In this we think there was error, and therefore award a

New trial.

JOSEPH B. CHESHIRE, JR., AND J. C. ALLISON, RECEIVERS OF THE PARKER-HUNTER REALTY COMPANY, v. V. O. PARKER AND AMERICAN EMPLOYERS INSURANCE COMPANY.

(Filed 21 November, 1934.)

1. Fraudulent Conveyances C e—Form of question relating to solvency of corporation at time of transfer held not prejudicial.

In an action seeking to establish fraud in the transfer of corporate property by the president of the corporation in paying a preëxisting debt due the president's wife by the corporation, a question to the president as a witness in his own behalf as to whether he had a "feeling" the corporation was solvent at the time of the transfers will not be held for reversible error where it appears from the witness' answer that he understood the question to be as to his opinion of the solvency of the company at the times in question.

2. Same—Admission of testimony in this case held not prejudicial.

In an action seeking to establish fraud in the transfer of corporate property by the president of the corporation in paying a preëxisting debt due the president's wife by the corporation, the admission of testimony by the president as a witness in his own behalf as to his present financial condition cannot be held for reversible error.

3. Fraudulent Conveyances C g—

Instructions of the court upon the issue as to the solvency of the corporation at the time of application of funds by the president thereof to a preëxisting debt due by the corporation to the president's wife *are held* to be without error in this case.

4. Fraudulent Conveyances A d—

Transfer of corporate funds by the president of the corporation to a preëxisting debt due by the corporation to the president's wife is not wrongful and does not constitute wilful misapplication of the funds by the president, if at the time of such transfers the corporation is solvent.

APPEAL by plaintiffs from *Grady, J.*, at April Term, 1934, of WAKE. No error.

This is an action to recover of the defendants the sum of $5,798.05.

The plaintiffs are the receivers of the Parker-Hunter Realty Company, a corporation organized under the laws of this State. They have been engaged in the performance of their duties as such receivers since their appointment on 20 August, 1930.

Prior to his resignation on 22 July, 1930, the defendant V. O. Parker was the president and treasurer of the Parker-Hunter Realty Company and was in the active management of its business.

Prior to 1 January, 1930, the defendant American Employers Insurance Company had executed and delivered to the Parker-Hunter Realty Company a bond, by which it agreed to reimburse the said company for any loss it might sustain, not to exceed the sum of $5,000, caused by the fraud, dishonesty, forgery, theft, embezzlement, wrongful abstraction, or wilful misapplication of its property by the said V. O. Parker, its president and treasurer. The said bond was in full force at all times between 1 January, 1930, and 22 July, 1930.

It is alleged in the complaint that at various times between 1 January, 1930, and 22 July, 1930, the defendant V. O. Parker, as president and treasurer of the Parker-Hunter Realty Company, wrongfully abstracted and wilfully misapplied the sum of $5,798.05, the property of the said company. This allegation is denied in the answers filed by the defendants.

There was evidence at the trial tending to show that at various times between 1 January, 1930, and 22 July, 1930, the defendant V. O. Parker, as president and treasurer of the Parker-Hunter Realty Company, directed the secretary of said company to issue its checks payable to him,

and that the amounts of these checks were charged to him, with the understanding that the aggregate of such amounts should be credited on a note for the sum of $14,200, executed by the Parker-Hunter Realty Company and payable to Mrs. Annie L. Parker, his wife. The consideration of said note was money which had been loaned to the company by Mrs. Parker. The aggregate amount of these checks on 22 July, 1930, was $5,798.05, and on said day the said amount was credited on the note of Mrs. Parker by the secretary of the company, pursuant to the instructions of Dr. J. Rufus Hunter, the successor of the defendant V. O. Parker, as its president and treasurer.

The issues submitted to the jury were answered as follows:

"1. Did the defendant V. O. Parker, while acting as president and treasurer of the Parker-Hunter Realty Company, between 1 January, 1930, and 22 July, 1930, withdraw from the assets of said company the sum of $5,798.05, and apply the same on a preëxisting debt due his wife by said company? Answer (by consent): 'Yes.'

"2. If so, at the time of said withdrawal was the Parker-Hunter Realty Company insolvent? Answer: 'No.'

"3. Did the withdrawal of said funds and the application to the preexisting indebtedness amount to a fraud, or to a wrongful abstraction, or to a wilful misapplication, as alleged in the complaint? Answer: 'No.'"

From judgment that they recover nothing of the defendants, or either of them, the plaintiffs appealed to the Supreme Court, assigning as errors the rulings of the court on plaintiffs' objections to the admission of evidence, and instructions of the court to the jury.

Paul F. Smith and Murray Allen for plaintiffs.

Bunn & Arendell for defendant V. O. Parker.

J. M. Broughton for defendant American Employers Insurance Company.

CONNOR, J. The contentions of the plaintiffs that there was error in the refusal of the court to sustain their objections to questions addressed to the defendant V. O. Parker while testifying as a witness for the defendants, as to whether or not he had a "feeling" that the Parker-Hunter Realty Company was solvent at the times he withdrew sums of money from its treasury and applied the same as payments on Mrs. Parker's note, and as to his present financial condition, cannot be sustained. The answer of the witness to the first question showed that he understood that he was asked his opinion as to the solvency of the company at the times he caused the checks to be issued to him by the secretary of the company. The jurors, as intelligent men, could not

have been improperly influenced by the question to or by the answer of the witness with respect to his present financial condition.

The plaintiffs did not object to the issues submitted by the court to the jury, but tried their case on the theory on which the issues were drawn. There was evidence tending to show the solvency of the company at the times of the withdrawal and application of the money. This evidence was submitted to the jury under instructions which are free from error. Assignments of error based on exceptions to these instructions are not sustained.

If the Parker-Hunter Realty Company was solvent at the time the money was withdrawn by the defendant V. O. Parker and applied by him as payments on Mrs. Parker's note, as the jury found, then such withdrawal was not wrongful, and such application was not a wilful misapplication. There was evidence tending to show that the directors of the company knew and approved of the action of the defendant V. O. Parker. There was no evidence tending to show that such action was fraudulent.

The judgment is affirmed.

No error.

W. G. SMITH AND HIS WIFE, ORA H. SMITH, v. THE FINANCE COMPANY OF AMERICA.

(Filed 21 November, 1934.)

1. Process B d—

A foreign corporation, having property and doing business in this State and not having a process agent here, may be served with summons by service on the Secretary of State, in accordance with C. S., 1137.

2. Limitation of Actions B e—

The nonresidence of a foreign corporation will not prevent the running of the statute of limitations in its favor where constantly from the accrual of the cause of action it might have been served with summons under the provisions of C. S., 1137.

3. Limitation of Actions A b—

An action to recover the statutory penalty for usury, C. S., 2306, is barred after the lapse of two years from the accrual of the cause of action in the absence of disability or nonresidence affecting the running of the statute. C. S., 442 (2).

APPEAL by plaintiffs from *Grady, J.*, at June Term, 1934, of WAKE. Affirmed.

This is an action to recover of the defendant the statutory penalty for usury. C. S., 2306.

Among other defenses relied on by it, the defendant in its answer pleads the statute of limitations, C. S., 442 (2). The facts with respect to this defense were agreed on by the parties to the action. They are as follows:

1. The plaintiffs are citizens of the State of North Carolina and residents of Wake County, in said State.

2. The defendant is a corporation, organized under the laws of the State of Delaware, with its principal office in the city of Baltimore, in the State of Maryland. It has not been domesticated in the State of North Carolina, and at the date the cause of action alleged in the complaint accrued it did not have, nor has it at any time since said date had in this State, a process agent on whom summons or other process could be served. It has, however, since said date continuously, until the commencement of this action, owned property and done business in this State.

3. The summons in this action was issued on 28 September, 1933, and was served on Stacey W. Wade, Secretary of State of North Carolina, under the provisions of C. S., 1137. The cause of action alleged in the complaint accrued more than two years prior to 28 September, 1933.

On these facts the court was of opinion, and accordingly adjudged, that the action of the plaintiff is barred by the statute of limitations, and that for that reason the plaintiffs cannot maintain this action.

The plaintiffs appealed from the judgment to the Supreme Court, assigning error in the judgment.

J. A. Thebault for plaintiff.

J. L. Emanuel and Oscar Leach for defendant.

CONNOR, J. Under the provisions of C. S., 1137, where a corporation having property or doing business in this State, whether incorporated under its laws or not, has failed to have an officer or agent in this State upon whom service of process in an action begun in a court of this State against such corporation may be served, such process may be served on the Secretary of State by leaving a copy of the process with him. In such case the Secretary of State is required by the statute to mail the copy to the president, secretary, or other officer of the corporation, upon whom, if he was a resident of this State, service could be made. A service of process under the provisions of the statute is valid. In *Lunceford v. Association,* 190 N. C., 314, 129 S. E., 805, it is said: "And in case of foreign corporations doing business in this State without complying with the provisions of said section, we have held that valid service of process may be made under this statute in the manner indi-

cated, as well as on officers and agents of such corporations under the general provisions of C. S., 483."

In the instant case such service could have been made on the defendant at the date the cause of action alleged in the complaint accrued. For that reason the statute of limitations (C. S., 442 [2]) began to run at the date the cause of action accrued, and as service could have been made under the statute at any time before the commencement of this action, the statute continued to run against the plaintiffs. The defendant, although a nonresident or foreign corporation, was at all times from the date the cause of action accrued until the commencement of this action subject to the jurisdiction of the courts of this State. *Steele v. Telegraph Co.*, 206 N. C., 220, 173 S. E., 583. For that reason, two years having elapsed from the date the cause of action accrued to the date of the commencement of the action, the action is barred. See *Anderson v. Fidelity Co.*, 174 N. C., 417, 93 S. E., 948, where it is said that "it is established with us that when a foreign corporation has complied with provisions of our statute, Rev., sec. 1243 (C. S., 1137), by maintaining an agent in the State upon whom valid service of process may be had, our statute of limitations is available for its protection as in case of citizens and residents within the State, and a perusal of this well-considered decision (*Volivar v. Cedar Works*, 152 N. C., 656, 68 S. E., 200), and others to like import, will show that the principle is not restricted to cases where there has been formal compliance with the statutory requirements for domesticating these corporations and the appointment of process agents, but extends and should apply to all cases where such corporations doing business or holding property within the State have been continuously for the statutory period subject to valid service of process, so as to confer jurisdiction on our courts to render binding judgments *in personam* against them."

There is no error in the judgment. It is

Affirmed.

STATE v. BASCOM G. GREEN AND LESTER GREEN.

(Filed 21 November, 1934.)

1. Homicide B a—

Where a conspiracy is formed to rob a bank, and murder is committed by one of the conspirators in the attempt to perpetrate the crime, each conspirator is guilty of murder in the first degree, C. S., 4200, and it is immaterial which one of them fired the fatal shot.

2. Criminal Law H a—

Where the testimony of a defendant at the trial amounts to a confession of the crime charged, and is sufficient for conviction of both defendants, the refusal of a motion for continuance cannot be held for error, since a continuance would have availed defendants naught.

3. Same—

A motion for continuance is addressed to the sound discretion of the trial court.

4. Indictment B d—

It is not error for the trial court to refuse a separate trial on each of two counts in an indictment charging defendants with conspiracy to rob and with murder committed in the attempt to perpetrate the robbery. C. S., 4622.

5. Homicide H f—

Where the jury convicts a defendant of murder in the first degree, the court must disregard the jury's recommendation of mercy.

APPEAL by defendants from *Warlick, J.*, at February Term, 1934, of ALEXANDER.

Criminal prosecution, tried upon indictment charging the defendants B. G. Green and Lester Green, 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.

The State's evidence tends to show a conspiracy on the part of Mike Stefanoff and B. G. Green, and the latter's son, Lester Green, and son-in-law, R. E. Black, to rob the Merchants and Farmers Bank of Taylorsville on Saturday, 29 July, 1933, which was attended with fatal consequences to the cashier, T. C. Barnes, and serious injury to the assistant cashier. All four entered the bank, not together, but two at the time, according to design, and "the shot fired by Lester Green hit Mr. Barnes." Barnes died the following day.

Stefanoff and Black were apprehended, tried and convicted (*S. v. Stefanoff and Black,* 206 N. C., 443), while the two Greens fled the vicinity, going first to High Point, then into a number of states, and finally into Tennessee, where they were arrested on 17 February, 1934. Both confessed while in jail.

The bill of indictment was returned at the September Term, 1933. The defendants were arraigned on 19 February, 1934, the first day of the term, and the trial set for Wednesday, 21 February.

Motions for continuance and change of venue overruled; exception. Jury ordered from adjoining county. C. S., 473.

Defendants moved for a severance of the two counts in the bill of indictment. Overruled; exception.

The defendant B. G. Green was offered as a witness on behalf of himself and Lester Green, and testified in substance as follows: We went in the bank. Black and Stefanoff went in first and I was right next to Black and my boy behind me. . . . Stefanoff walked up to the window with a quarter or half-dollar and told Mr. Barnes (the cashier) he wanted it changed. Mr. Barnes did like he was going to get some change and walked back. Stefanoff commenced shooting. He must have shot Barnes five or six times. He was shooting with an automatic. . . . Yes, I had a gun. We went in to get the money. Stefanoff was to hold up the cashier; Black was to take care of the other man (Mr. Little, the assistant cashier); I was to watch the front door; Lester was to take the money. That was agreed upon down at High Point. . . . That is right. Me and my son and Black and Stefanoff had all agreed to come up here and rob this bank. . . . Lester didn't want to come. . . . Stefanoff said fifteen or sixteen thousand dollars was coming in on Saturday and we would rob it on that day. That is what he said. He said he knew all about it. Lester did not have a gun. He was to pick up the money and put it in a sack. Black and Stefanoff and I were the ones that had the guns. . . . I shot Mr. Little because he looked like he was going to turn to shoot my boy. . . . We ran out without getting the money. . . . Yes, I came back to tell the truth.

Verdict as to B. G. Green: "Guilty of murder in the first degree."

Verdict as to Lester Green: "Guilty of murder in the first degree, and we ask the mercy of the court."

Judgment as to each defendant: "Death by electrocution."

The defendants appeal, assigning errors.

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

J. Archie Myatt for defendants.

STACY, C. J., after stating the case: In view of the defendant's own testimony, which amounts to a confession of guilt, it would seem the questions sought to be presented are academic. The evidence offered by the State tends to show that Lester Green fired the fatal shot, while the defendants say Mike Stefanoff was the actual killer. The difference is not material on the present record.

When a conspiracy is formed, as here, to rob a bank, and a murder is committed by any one of the conspirators in the attempted perpetration of the robbery, each and all of them are guilty of the murder. *S. v. Stefanoff,* 206 N. C., 443; *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. Satterfield, ante,* 118; *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. The record discloses no evidence of a lesser degree of homicide. *S. v. Spivey,* 151 N. C., 676, 65 S. E., 995; *S. v. Ferrell,* 205 N. C., 640, 172 S. E., 186; *S. v. Myers,* 202 N. C., 351, 162 S. E., 764.

In the light of the confession made on the witness stand, a continuance would have availed the defendants naught. *S. v. Keeter,* 206 N. C., 482. Furthermore, this was a matter resting in the sound discretion of the trial court. *S. v. Whitfield,* 206 N. C., 696.

Nor was it error to refuse the defendants a separate trial on each count in the bill. C. S., 4622; *S. v. Stephens,* 170 N. C., 745, 87 S. E., 131. Indeed, the attempted robbery and murder having arisen out of the same conspiracy, a separate trial on one of the counts in the bill might have precluded a subsequent prosecution on the other. *S. v. Clemmons, ante,* 276; *S. v. Bell, supra.*

The jury's recommendation of mercy for Lester Green, evidently made in recognition of his hesitancy to enter the conspiracy, was properly disregarded as surplusage. *S. v. Matthews,* 191 N. C., 378, 131 S. E., 743; *S. v. Hancock,* 151 N. C., 699, 66 S. E., 137.

No vitiating error having been made to appear, the verdict and judgment will be upheld.

No error.

JOHN B. SOWELL v. TRAVELERS INSURANCE COMPANY.

(Filed 21 November, 1934.)

Insurance F c—Employee held insured under lower group of employees and nonsuit was properly entered in action to recover under higher group.

Employees under a group policy of insurance were divided into two classes, in accordance with their position with the company, a higher premium being deducted from the salaries of the higher group and the higher group being insured for a larger amount. Plaintiff, with knowledge of the two classes and of the premiums of each, was promoted from the lower class to the higher class, and the deductions from his salary for the insurance correspondingly increased, and was thereafter demoted to the lower class, but the employer continued to deduct from his salary the premiums for the higher class, but insurer did not receive such overcharge. Plaintiff thereafter became disabled under the terms of the policy, and insurer paid him the insurance for the lower class and the employer tendered him the overcharge of premiums. Plaintiff brought

this action to recover of the insurer the amount of insurance for the higher class: *Held*, insurer's motion as of nonsuit was properly allowed. *Deese v. Ins. Co.*, 204 N. C., 214, is distinguished.

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

APPEAL by plaintiff from *Schenck, J.*, at February Term, 1934, of BUNCOMBE.

Civil action to recover on a certificate of group insurance issued by defendant to plaintiff as an employee of Rogers Store, Inc., a subsidiary of Southern Grocery Stores, Inc.

The schedule of insurance set out in the master policy issued by defendant to the employer shows $1,000 for "Managers" and $3,000 for "Superintendents." The amount deducted monthly for managers was sixty cents and for superintendents, $1.80. The policy provides: "If the employee's occupation or position shall change so as to place him in a different class, the amount of his insurance shall, on the date such change becomes effective, change to the amount provided in the above table for the class in which his new occupation or position shall place him."

The plaintiff was originally employed as manager. On 1 February, 1928, he was promoted to superintendent, which position he held until August, 1930, when he was demoted to manager. His insurance and the monthly premiums to be retained increased or decreased as the plaintiff was promoted or demoted.

After plaintiff was demoted from superintendent to manager, the employer continued to deduct the higher premium until the overcharge amounted to $8.40.

The plaintiff has been paid by the defendant $1,000, the amount due a manager under the policy, and his employer has tendered him the overcharge of $8.40. He sues for $2,000, the difference between the amount paid him by the defendant and the amount he would have been entitled to receive had he remained superintendent up to the time of his disability. The basis of his claim is that he was overcharged by his employer after his demotion from superintendent to manager. This excess or overcharge was never paid to the defendant.

The court, being of opinion that the defendant had discharged its full liability under the policy, dismissed the action as in case of nonsuit, and the plaintiff appeals.

Richard H. Moser and C. C. Jackson for plaintiff.
Johnson, Rollins & Uzzell for defendant.

STACY, C. J., after stating the case: The nonsuit is correct. The plaintiff knew the amount of his insurance, as well as the monthly pre-

miums to be deducted by the employer, changed back and forth accordingly as he was demoted or promoted from one classification to another. With this knowledge he cannot, while manager, be heard to say he was superintendent.

In the case of *Deese v. Ins. Co.*, 204 N. C., 214, 167 S. E., 797, cited and relied upon by plaintiff, the employee had no such knowledge or information. The two cases are not alike.

Affirmed.

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

STATE v. J. H. GULLEDGE.

(Filed 21 November, 1934.)

1. Criminal Law I k—

A special verdict that fails to find facts essential to an adjudication of defendant's guilt or innocence is fatally defective and a *venire de novo* will be ordered on appeal.

2. Criminal Law L e—

The State may appeal from acquittal of defendant upon a special verdict, although the verdict is fatally defective in that it fails to find facts essential to an adjudication of defendant's guilt or innocence. C. S., 4649.

APPEAL by the State from *Sink, J.*, at August Term, 1934, of MECKLENBURG.

Criminal prosecution, tried upon warrant charging the defendant with feloniously failing (1) "to comply with city ordinance by cruising from place to place in a taxicab and picking up passengers"; and (2) "also failing to have insurance covering taxicab No. 1 of the Safety Cab Company."

Judgment of guilty and fine on both counts in the Recorder's Court, from which the defendant appealed, and was tried *de novo* in Superior Court.

Upon motion, the solicitor was allowed to amend "so as to set out the ordinances referred to in the warrant."

The following special verdict was returned in the case:

"The jury finds that the defendant committed the acts prohibited by the ordinances, as set out in the amendment to the warrant, upon the date stated in the warrant. If upon said facts the defendant is guilty, the jury then finds him guilty. If upon said facts he is not guilty, the jury finds him not guilty."

The court being of opinion that the ordinances are void under authority of *S. v. Sasseen,* 206 N. C., 644, adjudged the defendant not guilty upon the special verdict. The State appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorneys-General Seawell, Bridges, and Orr for the State.
J. L. DeLaney for defendant.

STACY, C. J. The special verdict is fatally defective in that it fails to find the facts essential to an adjudication of the defendant's guilt or innocence. *S. v. Yount,* 110 N. C., 597, 15 S. E., 231; *S. v. Finlayson,* 113 N. C., 628, 18 S. E., 200; *S. v. Colonial Club,* 154 N. C., 177, 69 S. E., 771; *S. v. Hanner,* 143 N. C., 632, 57 S. E., 154, 24 L. R. A. (N. S.), 1. Hence, a *venire de novo* must be ordered. *S. v. Blue,* 84 N. C., 807. The case stands as if there had been a mistrial. *S. v. Curtis,* 71 N. C., 56.

But defective as it is, the verdict is such as to warrant an appeal by the State. C. S., 4649; *S. v. Ewing,* 108 N. C., 755, 13 S. E., 10; *S. v. Robinson,* 116 N. C., 1046, 21 S. E., 701; *S. v. Gillikin,* 114 N. C., 832, 19 S. E., 152.

Venire de novo.

IN RE WILL OF W. D. MCLELLAND.

(Filed 21 November, 1934.)

1. Executors and Administrators F e—

Family settlements of estates are commended by the law.

2. Appeal and Error K b—

In this case proceedings after the consent judgment of the parties for the distribution of the estate in question being unauthorized, or irregular, all proceedings after the entry of the consent judgment are stricken out and the case remanded for adjustment of the rights of the parties in accordance with law.

APPEAL by "heirs at law of W. D. McLelland" from *Harding, J.,* at June Special Term, 1934, of IREDELL.

Nondescript proceeding, started by a caveat to the will of W. D. McLelland, late of Iredell County, which resulted in a consent judgment, all the parties agreeing that the will should be declared valid and probated in solemn form; that three commissioners should be selected by the parties, or appointed by the clerk, to divide the real estate of the testator, etc.

Pursuant to this consent judgment, the clerk appointed three commissioners and specifically directed them how to divide the lands, including the "joint lands belonging to the estate of W. D. and H. A. McLelland." This went beyond the terms of the consent judgment.

Upon the coming in of the report of the commissioners, "the heirs at law of W. D. McLelland" filed exceptions thereto, and Carrie Elliott McLelland, widow and residuary legatee, filed answer to said exceptions. In this state of the record the matter came on for hearing at the June Special Term, 1934, of Iredell Superior Court, "and the court also being asked to construe the will of the late H. A. McLelland, which is made a part of this record, after hearing evidence, affidavits presented, and argument of counsel," a judgment was entered "on the whole record" and ordered spread on the special proceedings docket, from which the "heirs at law of W. D. McLelland" appeal, assigning errors.

John M. Robinson, John G. Lewis, and Buren Jurney for appellants.
Jack Joyner and Burke & Burke for appellee.

STACY, C. J. Neither the will of W. D. McLelland nor the caveat filed thereto is in the record. Hence, we are not advised as to what interest, if any, his "heirs at law" have in the subject-matter of the proceeding. The "case" apparently proceeded on the assumption that the rights of the parties were settled by the consent judgment, but the order of the clerk, provided for therein, went beyond the terms of the consent judgment, and thereafter the will of H. A. McLelland, brother of W. D. McLelland, was introduced into the record, together with other matters.

Family settlements are to be commended (*Tise v. Hicks,* 191 N. C., 609, 132 S. E., 560), and much is permitted to be done by consent of the parties, but it is a little unusual for an issue of *devisavit vel non,* raised by a caveat to one will, to end with the construction of another, and all without pleadings, or chart or compass, by which the court may be guided. It is not stipulated in the consent judgment that exceptions may be filed to the report of the commissioners, nor does it contain any description of the lands sought to be divided.

In the interest of a fair determination of the rights of the parties, it would seem that everything done subsequent to the entry of the consent judgment should be stricken out as unauthorized, and the parties allowed to proceed in some regular way to have their rights adjusted.

Error and remanded.

STATE v. B. V. HOUPE.

(Filed 21 November, 1934.)

1. Rape C c—

Every element of the crime of having carnal knowledge of a female child under sixteen years of age, 3 C. S., 4209, being supported by the State's evidence in this case, defendant's motion as of nonsuit was properly denied.

2. Rape C b—

In a prosecution under 3 C. S., 4209, it is not error to exclude evidence of improper relations between the prosecuting witness and another several months after the alleged crime of the defendant.

3. Criminal Law G d—

Testimony of conversations, offered to prove the facts therein alleged, is properly excluded when such testimony contains only conclusions of the witnesses of such facts.

APPEAL by defendant from *Harding, J.*, at January Term, 1934, of IREDELL.

Criminal prosecution, tried upon indictment charging the defendant with carnal knowledge of a female child between the ages of twelve and sixteen, in violation of 3 C. S., 4209.

The evidence of the State tends to show that on 8 September, 1932, the defendant first had illicit intercourse with the prosecuting witness, at that time an innocent and virtuous girl fifteen years of age, and that this was repeated from time to time until 21 January, 1933, when the last act was committed. The prosecuting witness gave birth to a child on 22 October, 1933.

Demurrer to the evidence or motion to nonsuit overruled. Exception.

The defendant offered evidence tending to impeach or question the chastity of the prosecuting witness on 8 September, 1932, Ed. Shoemaker being named as consort.

The defendant further offered to show friendly relations between the prosecuting witness and Ed. Shoemaker in April and May, 1933. This evidence was excluded. Objection; exception.

The defendant also offered evidence of conversations between the prosecuting witness and her sister, relative to alleged improper relations with Ed. Shoemaker, and similar conversations between the sister of the prosecuting witness and their father. This evidence was excluded. Objection; exception.

Verdict: Guilty as charged in the bill of indictment.

Judgment: Eighteen months on the roads.

Defendant appeals, assigning errors.

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

Robert A. Collier, John R. McLaughlin, and J. G. Lewis for defendant.

STACY, C. J. The motion to nonsuit was properly overruled. Every element of the offense charged is supported by the State's evidence. There was no error in excluding evidence of improper relations between the prosecuting witness and another several months after the alleged crime of the defendant. *S. v. Lang,* 171 N. C., 778, 87 S. E., 957; *S. v. Malonee,* 154 N. C., 200, 69 S. E., 786.

Nor was it reversible error to exclude the conversations had between the prosecuting witness and her sister and those between the sister of the prosecuting witness and their father. These conversations were offered to prove the facts therein alleged, when in reality they contained only conclusions of the witness. *S. v. McLamb,* 203 N. C., 442, 166 S. E., 507; *S. v. Melvin,* 194 N. C., 394, 139 S. E., 762.

While the appeal might well be dismissed for failure to comply with the rules, still the exceptions have been considered.

No error.

W. H. H. JONES, ADMINISTRATOR OF RUSSELL L. JONES, DECEASED, v. WALTER L. BAGWELL.

(Filed 21 November, 1934.)

1. Trial D a—

Upon 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. Same—

A mere scintilla of evidence, which raises only a suspicion, conjecture, guess, surmise, or speculation, is insufficient to resist a motion as of nonsuit.

3. Automobiles C i—

There must be a causal connection between the violation of a safety statute by the driver of an automobile and the injury in suit in order for such violation to render the driver liable in damages.

4. Evidence K a—

Nonexpert witnesses, who saw defendant's car within a second or so after the accident in suit, *are held* competent to testify as to the speed of the car at the time they saw it.

5. Automobiles C b—Evidence that driver was exceeding speed limit held sufficient to be submitted to the jury.

An automobile driven by defendant struck and killed a pedestrian as the pedestrian was crossing a street in a city at an intersection. There was testimony of witnesses to the effect that they heard the impact and immediately thereupon looked in that direction and saw defendant's car, that in their opinion it was then traveling over thirty miles an hour, that it was slowing up and came to a stop some 71 steps from the point of impact, that the thud of the impact was heard several hundred feet away, and that the force of the impact knocked a hole in the pedestrian's head, *is held* sufficient circumstantial evidence to be submitted to the jury on the question of whether the driver of the car at the time of the accident was exceeding the speed limit at the intersection in violation of N. C. Code, 2618, and in violation of an ordinance of the city, N. C. Code, 2617 (a).

6. Automobiles C i—Evidence that excessive speed was proximate cause of injury held sufficient to be submitted to the jury.

There was evidence that defendant drove his automobile across a street intersection in a city at a rate of speed in excess of that allowed by statute, C. S., 2618, and an ordinance of the city. Plaintiff's intestate was struck and killed by defendant's automobile at the intersection while intestate was attempting to cross the street. There was evidence that defendant was practically blind in one eye, but had normal vision in the other eye, that there was no traffic on the street at the time of the accident, but that defendant had a clear view of the straight street, which was lighted by arc lamps at the intersections, and that defendant stated immediately after the accident that he did not see intestate until he was in front of the car's headlights: *Held*, the evidence was sufficient to be submitted to the jury on the question of whether the unlawful speed at which defendant was driving was the direct and proximate cause of injury to plaintiff's intestate.

7. Negligence C a—

Contributory negligence is plaintiff's negligent act concurring and cooperating with defendant's negligence in producing the injury, and negligence and contributory negligence do not differ essentially.

8. Negligence D b—

The burden of proving contributory negligence is on defendant, and is ordinarily a question for the jury.

9. Automobiles C i—Evidence held not to show contributory negligence barring recovery as matter of law.

Evidence tended to show that defendant, who was practically blind in one eye, drove his car thirty to forty miles an hour across a street intersection in a city, and struck and killed plaintiff's intestate, who was walking across the street at the intersection, that there was no traffic on the street at the time of the accident, and that the street was lighted at the intersection by an electric arc lamp, and that there was nothing to obstruct defendant's view, and that defendant stated immediately after the accident that he did not see plaintiff's intestate until he was in front of the car, *is held* not to establish contributory negligence as a matter of law in intestate's failure to avoid the rapidly approaching car, the questions of contributory negligence and the last clear chance, raised by the pleadings, being for the determination of the jury.

10. Judgments L a—Evidence in this action held not substantially identical with evidence in former action nonsuited, and dismissal on plea of res judicata was error.

This action to recover for the death of plaintiff's intestate upon allegations that intestate was killed as a result of defendant's negligent driving of an automobile, was instituted within one year of nonsuit in a prior action to recover for intestate's death in accordance with statute, C. S., 160, 415. Upon the plea of *res judicata*, the trial court found that the allegations and evidence in both actions were substantially identical, and dismissed the second action. It appeared on appeal that in the second action there was new and material evidence as to the rate of speed defendant was driving his car at the time of the accident, and as to the operation of the car, in the first action the gravamen of the defense being that intestate jumped from behind another car in front of defendant's car, and in the second action there being evidence that there was no other car traveling on the street at the time of the accident, and that defendant did not see intestate until he was in front of defendant's car although defendant's view was not obstructed: *Held*, the evidence in the two actions was not substantially identical, and the judgment dismissing the second action was erroneous.

APPEAL by plaintiff from *Grady, J.*, at Second June Term, 1934, of WAKE. Reversed.

This was a civil action for actionable negligence, instituted by plaintiff W. H. H. Jones, administrator of Russell Jones, deceased, against defendant W. L. Bagwell to recover damages for alleged wrongful death of plaintiff's intestate, which occurred in the city of Raleigh, about midnight, 21 December, 1929, or the early morning of 22 December, 1929. This cause of action was first tried at Second April Term, 1931, of Wake Superior Court, before Judge G. V. Cowper, which resulted in a nonsuit. Upon appeal to the Supreme Court the judgment of nonsuit was affirmed by opinion rendered 21 October, 1931—201 N. C., 831. The present action was instituted on 12 April, 1932, and came on for trial before Judge Henry A. Grady at Second June Term, 1934.

At the close of plaintiff's evidence the court below rendered the following judgment: "This cause coming on to be heard before the court and jury, and the plaintiff having offered evidence and rested his case, and the defendant thereupon having moved the court for judgment as of nonsuit; and it appearing to the court that the cause of action declared upon in the complaint is identical with the cause of action declared in the complaint filed in Jones against Bagwell, tried at the April, 1931, Term of Wake Superior Court, in which a nonsuit was entered at the close of plaintiff's evidence, which judgment of nonsuit, affirmed upon appeal, appearing in 201 N. C. Report, page 831; and it further appearing to the court that the evidence in the instant case is substantially the same as the evidence offered upon the trial of the first case; and it

further appearing to the court, in addition thereto, and the court being of the opinion that the plaintiff ought not to recover in any event upon the evidence offered in the instant case, the motion of defendant is allowed; and it is thereupon considered, ordered, and adjudged that the plaintiff be nonsuited, and that this action be dismissed at the cost of the plaintiff, to be taxed by the clerk of the Superior Court."

The plaintiff's exceptions and assignments of error were as follows: "For that the court erred in granting defendant's motion of nonsuit at the close of plaintiff's evidence.

"For that the court erred in rendering and signing judgment dismissing the action as of nonsuit, as set out in the record."

The material and necessary facts will be set forth in the opinion.

J. L. Emanuel, Bart M. Gatling, and Sam J. Morris for plaintiff.
Douglass & Douglass and Simms & Simms 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 sustained the motion, and in this we think there was error.

Upon motion as of nonsuit all the evidence 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.

It is well settled that the evidence must be more than a scintilla to be submitted to the jury. If it only raises a suspicion, a conjecture, a guess, a surmise, a speculation, it is not sufficient. *Denny v. Snow*, 199 N. C., 773 (774).

N. C. Code of 1931 (Michie), sec. 2618, in part, is as follows: "No person shall operate a motor vehicle upon the public highways of this State recklessly, or at a rate of speed greater than is reasonable and proper, having regard to the width, traffic, and use of the highway, or so as to endanger the property or the life or limb of any person: *Provided,* that no person shall operate a motor vehicle on any public highway, road, or street of this State at a rate of speed in excess of:

"(A) Twenty miles per hour in the built-up residential section of any village, town, or city: *Provided,* that on any highway, road, or street entering any city, town, or village the built-up residential section shall be construed to begin at the first point, between which point and a point one thousand feet away on said street, road, or highway where there are as many as eight residences." . . . Part of (F) is as follows: "The governing body of every incorporated city or town shall have authority, by ordinance, to make reasonable street-crossing regulations." Public Laws of 1925, ch. 272.

Section 2617 (a), in part, is as follows: "This act shall not interfere with the regulations prescribed by towns and cities." Public Laws of 1927, ch. 120. See sec. 2621 (46).

Section 5 of the Traffic Ordinances of the city of Raleigh is as follows: "It shall be the duty of every person driving or operating any vehicle to obey instantly any directions that may be given by a traffic officer; *to slow down upon approaching each street intersection or pedestrian in the street so as to pass such intersection or pedestrian at a speed not exceeding ten miles per hour;* and in the case of a motor vehicle or street car, to sound the horn or bell of such vehicle or car, in warning upon the approaching of Hillsboro Street and Glenwood Avenue, to slow such vehicle or street car to five miles an hour, to sound horn or bell." (Italics ours.)

In *Hendrix v. R. R.*, 198 N. C., 142 (144), is the following: "It is well settled in this jurisdiction that the violation of a town or city ordinance, or State statute, is negligence *per se,* but the violation must be the proximate cause of the injury. Ordinarily this is a question for the jury, if there is any evidence, but, if there is no evidence that the violation of the ordinance or statute is the proximate cause of the injury, this is for the court to determine." There must be a causal connection between the violation of the statute and the injury inflicted. *Burke v. Coach Co.*, 198 N. C., 8 (13).

Was there any or sufficient evidence to be submitted to the jury that defendant was exceeding the speed limit contrary to the law of the road? We think so. The evidence on the part of plaintiff was not direct, but circumstantial, yet under well-settled law he was entitled to every reasonable inference to be drawn from the evidence.

The testimony of Neill Hester was to the effect that he was driving a Model-T Ford sedan on Hillsboro Street, traveling east towards the Capitol, approximately one-half block away—some 200 feet—running fifteen to twenty miles per hour.

He further testified, in part: "The first indication I had of this accident was when I noticed two headlights approaching me approximately half a block away, and there was a jerk to this side; that would be toward my left, or toward the east side. No, it would be to the south side of Hillsboro Street; but when *I noticed the lights going out* I was not impressed even with that that an accident had occurred until I had traveled almost the length of the block going east, when I noticed a form, appearing to be a human form, lying in the middle of the car track. Then I saw somebody had been hit. . . . I saw the person, when I got there, was apparently dead or unconscious. I did not examine his pulse to see if he were dead or not. There was a trickle of blood from under his head about five or six inches long. About that

time I noticed a car up the block, west from where the form lay, and I started up there to see if that was the car that figured in the accident, and got about one-third of the distance when I met a man walking towards me or towards the form, whom I later learned was Mr. Bagwell. I did not know him personally then. . . . I kept on going until I came to this car and went around to the front end of it and saw that *the right headlight was mashed in and bent back, and that satisfied me.* . . . From the time I saw the lights go out on Mr. Bagwell's car, until I parked in front of the A. & P. store, I did not see any cars pass going either in an easterly or westerly direction. . . . The car that struck this body was traveling west. To the best of my recollection, the head was lying west and the feet east. It was almost in a straight line between the car tracks. In other words, the body was lying on a north and south line in the north car tracks. . . . I presume that when the lights went out is when the body fell; that was the conclusion I arrived at, but I don't know. . . . I should say that a person with ordinary vision, driving an automobile in a westerly direction at that point, could see everything that was at that intersection. . . . I was across the bridge when the lights went out on Mr. Bagwell's car—I'd say 200 feet or more away."

M. F. Arnold testified, in part: "I just saw the spot of blood and the parked car. The spot of blood was right in this track (indicating on map), where this track goes to the barn. It was on the north side of Hillsboro. . . . I examined the place carefully. I saw Mr. Bagwell's car and stepped the distance from the place I found the blood stains to his car. *As I remember, it was 71 steps. . . . The headlights were broken on the car.* . . . The right front main headlight was bent back or around." He further testified that, on the former trial, Bagwell told him plaintiff's intestate "jumped out in front of his car and he could not avoid hitting him."

E. M. Waring testified, in part: "I was standing in front of the Manhattan Lunch Room on the corner of the intersection between, or on the corner of the intersection of Glenwood Avenue and Hillsboro Street, which is one block from the intersection of Hillsboro and West streets. I was standing on the south side of Hillsboro Street looking toward the north side, drinking a coca-cola.

"My attention was attracted by hearing a thud as though a car struck a rough place in the street or hit something. It sounded like it might have hit a bag or something. I turned and saw this car come to a stop. I turned instantly upon hearing the noise. I turned to my right; to the east of where I was standing, and saw the automobile coming to a stop. *I would say it was going between thirty and forty miles an hour when I first saw it, and coming to a stop. That was just a fraction of a second*

after it hit the object. I went up there and someone in the crowd said the car belonged to Mr. Bagwell.

"The automobile was traveling in a westerly direction on Hillsboro Street. When I first saw it it was approximately twenty-five feet from the intersection of West and Hillsboro streets. . . . *I turned my face to the right just a second from the time I heard the thud, I'll say the automobile was traveling not less than thirty miles an hour when I first saw it coming to a stop* here in the vicinity of the billboard. . . . There was no obstruction to the traffic in front of the Bagwell car until I got there; *I did not see any traffic passing either in an easterly or westerly direction, west of West Street on Hillsboro Street. From the point where I first saw the Bagwell car until where it stopped, I would say, was 175 feet.* I did not measure it or step it off. . . . There were no lights burning on the car when I first saw it. . . . It was after twelve at night and traffic had just about died down. There was practically no traffic. . . . I had a clear view from where I was standing to the point where the body lay. *I saw the Bagwell car within a split second after it struck something,* because I turned my head as I heard the noise. . . . When I first saw the Bagwell car it had no lights on it. I had no difficulty in seeing it. When I saw it it had a street light between me and the street and I had a clear vision of the car. I could see that easily. . . . I was approximately a hundred feet from the corner to the bridge. I suppose anybody in the intersection of West and Hillsboro streets, in the street, would have had a clear view of any car approaching from the east or west; I don't know about anybody else. . . . That would have put me the distance away of the bridge, 80 or 90 feet, plus the total distance from the east end of the bridge back to the intersection of West and Hillsboro streets."

Ellis Lundy testified, in part: "On the night of 21 December, 1929, I was on Hillsboro Street at the hot-dog stand. I had just gotten out of the car. I came from the west and was parked on the bridge just before you get to the hot-dog stand. *After I parked, I heard a thud sound from down towards the Standard Filling Station, which is on the northern side of Hillsboro Street on the corner of West and Hillsboro.* I turned my head and looked down there, and then I could see this fellow lying in the street. I ran down there to him.

"When I turned my head I saw the Bagwell car. That was instantly, after the thud. It was coming west. It appeared to be coming from toward the Capitol. *I would say it was moving 40 miles an hour.* Of course, I don't know. It was a right good distance from me. That is my estimate. It was coming directly towards me. I was parked on the same side of the street as the Manhattan Lunch. The Bagwell car continued up to about the billboard and stopped there.

"I did not see any car traveling either in an easterly or westerly direction from the time I heard the thud until I got to the body. . . . I rushed down there and the fellow was bleeding from his eyes, ears, and mouth, and everywhere. I helped pick him up and put him in the car. . . . I also went to the hospital. I held his head in my lap in the car. I got in the car first with my arms under his shoulders. *There was a hole in his head about as big as your two knuckles.* I think there was an arc light at the center of the intersection of West and Hillsboro streets."

Eugene Utley testified, in part: "On 21 December, 1929, I was assistant manager of the store at 415 Hillsboro Street. The store was on the southeast corner of Hillsboro and West streets. . . . On the night of 21 December, 1929, from about 11:15 to a quarter after 12 I was dressing the window of the store. I had closed for business at ten-thirty. The windows were also closed and also the doors. *I heard a very hard crash on the street.* About thirty seconds later someone drove up in front of the store and said somebody had been hurt. It was Mr. Hester of the *News & Observer,* who notified me; I found the body lying on the car track of Hillsboro Street, on the north side."

The testimony of the opinion of witnesses as to the speed of the death car was competent.

In *Hicks v. Love,* 201 N. C., 773 (775-776), is the following: "Subject to the defendant's exception, several witnesses who saw the sedan and at the time were impressed by its speed were permitted to express their estimate, some saying that in their opinion it was running at the rate of fifty miles an hour, and others at a rate not less than sixty. . . .

"In his Commentaries on Evidence, sec. 1264, Jones cited a large number of cases in support of the rule, which he states as follows: 'A person of ordinary intelligence, having opportunity for observation, is competent to testify as to the speed at which an automobile was being operated at a given time. The rate of speed of an automobile on a public highway is a matter of which people generally have some knowledge. It is not a matter exclusively of expert knowledge or skill. As above stated, where the rate of speed of such a vehicle is material in an action, any person of ordinary ability and means of observation who may have observed the vehicle may give his estimate as to the rate of speed at which it was moving. The extent of his observation goes to the weight of his testimony.' *Lewis v. Miller,* 70 A. L. R., 532, 549."

As to the reasonable inferences drawn from the evidence that defendant was exceeding the speed limit, are: (1) Two witnesses testified, in their opinion, immediately after the collision, defendant was running over 30 miles an hour. (2) The blow of the collision was heard several hundred feet away. (3) Defendant's car stopped some seventy-one steps

away from bloodstains in the street. (4) Lundy's testimony: "There was a hole in his head about as big as your two knuckles."

Was there any evidence that the speed of the car was the proximate cause of the injury? We think so. We think there was evidence to be submitted to a jury as to the causal connection between the speed of the car and the injury, and there was evidence to be submitted to the jury that the speed and operation of the car was the proximate cause of plaintiff's intestate's death. The defendant had a clear vision of the intersection of Hillsboro and West streets, which the evidence indicated plaintiff's intestate was crossing, going west at the time he was hit. There is evidence to be submitted to the jury that defendant was exceeding the speed limit. It was also in evidence that defendant left the bowling alley on West Davie Street between 11:30 and 12 o'clock the night of the injury, where he had been bowling.

H. I. Stell testified, in part: That in 1925 or 1926 "he told me one of his eyes was bad."

Dr. Louis N. West, eye, ear, nose, and throat specialist, testified, in part: "I know the condition of his eyes, in 1929, in December. *He was practically blind in his right eye* and had normal vision in his left eye. The vision of his right eye evidently was not capable of improvement."

In *Craver v. Cotton Mills,* 196 N. C., 330 (333), speaking to the subject: "Accepting the familiar definition of proximate cause as that which in natural and continuous sequence, unbroken by any new and independent cause, produces an event."

Was there such contributory negligence on the part of plaintiff's intestate, on the facts and circumstances of this case, that this Court should so declare as a matter of law? We think not. The question was one of fact for a jury to determine.

It is well settled that contributory negligence is plaintiff's negligent act concurring and coöperating with defendant's negligent act in producing injury. Negligence and contributory negligence do not essentially differ. *Liske v. Walton,* 198 N. C., 741. The burden of proving negligence is on plaintiff, that of contributory negligence is on defendant.

In *Elder v. R. R.,* 194 N. C., 617 (619), citing authorities, is the following: "Originally, under C. S., 567, in cases calling for its application, there was some question as to whether a plea of contributory negligence (the burden of such issue being on the defendant) could be taken advantage of on a motion to nonsuit, but it is now well settled that such may be done when the contributory negligence of the plaintiff is established by his or her own evidence, as he or she thus proves himself or herself out of court."

In *Hood v. Mitchell,* 204 N. C., 130 (135), it is 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. It is sufficient to say that this is not such a case."

The traffic ordinance of the city of Raleigh applicable is as follows: "To slow down upon approaching each street intersection, or pedestrian in the street, so as to pass such intersection or pedestrian at a speed not exceeding ten miles per hour."

The plaintiff's intestate, as the evidence indicates, had worked at the Commercial National Bank and was there about 11:15 or 11:30 on the night of his death, and had told Yates Parker that he was going to walk home. A direction to go to reach his father's home on Tilden Street was to cross from east to west over the street intersection, where he was killed. He was at a place he had a right to be and could presume that defendant would comply with the ordinance and not cross the intersection at more than ten miles an hour.

It was a matter of common knowledge that defendant, running his automobile at the estimated speed of from thirty to forty miles per hour, defendant was traveling a distance of from 44 to 58½ feet as each and every second tolled. Five seconds previous to the accident defendant's automobile was from 220 to 290 feet distant from the point of collision.

W. N. Perry testified that defendant: "Made the statement that he saw him *going toward the curb—moving, running; that he ran in front of the car; that he suddenly saw him in front of the car;* and that he tried to pull away like this (indicating). I had heard him say two or three years before that he was having some trouble with his eyes. . . . I don't recall that he told me he saw Russell Jones jump from in front of another car in front of his car."

The evidence indicated at the time of the collision there were no other cars going or coming on Hillsboro Street.

H. I. Stell testified that defendant: "Said the first time he saw Mr. Jones *was when he was right in front of his headlights.* I had heard about the condition of his eyes, but I did not know. He told me one of his eyes was bad. He made that statement in 1925 or 1926. . . . Q. Didn't he also say that Mr. Jones suddenly ran from his left, right immediately in front of his car? A. I don't remember his saying he ran in front. He said the first time he saw him was right in front of his headlights." The evidence was to the effect that the defendant was practically blind in his right eye.

Taking all the facts and circumstances, we think the question of contributory negligence was for the jury to determine. The plaintiff, in

his complaint, alleges: "Defendant negligently and unlawfully failed to keep a proper lookout for pedestrians rightfully in said street. Defendant negligently and wrongfully failed to stop his car after he saw, or by the exercise of ordinary care and prudence could have seen intestate in the act of crossing Hillsboro Street, at the intersection of West and Hillsboro streets."

In *Moore v. Powell,* 205 N. C., 636 (639), is the following: "In *Goss v. Williams,* 196 N. C., 213 (221-222), the following able charge of Judge Sinclair in the court below was sustained: 'You are instructed that even though the injured party through his own negligence placed himself in a position of peril, he may recover if the one who injured him discovered, or by the exercise of ordinary care could have discovered him in time to have avoided the injury. The defendant would not be relieved of liability by reason of the fact that he did not see him, but the law holds him to the responsibility of seeing what he could have seen by keeping a reasonably vigilant and proper lookout.' "

The court below had before it the court papers and the printed record in the former action. The court below found that all court costs in the former action have been paid; and that the present action was brought within the time prescribed by C. S., 160 and 415.

In the judgment of the court below is the following: "That the evidence in the instant case is substantially the same as the evidence offered upon the trial of the first case, and it further appearing to the court, in addition thereto, and the court being of the opinion that the plaintiff ought not to recover, in any event, upon the evidence offered in the instant case. The motion of defendant is allowed." And the plaintiff was nonsuited.

We cannot hold with the able and learned judge in the court below that the evidence in this case was substantially the same as the evidence offered upon the trial of the first case, and the plaintiff ought not to recover in any event upon the evidence offered in the instant case.

In *Hampton v. Spinning Co.,* 198 N. C., 235 (240), it is said: "If the Supreme Court affirms the judgment of the trial court, he may, under C. S., 415, bring a new action within the period therein specified. But, if upon the trial of the new action, upon its merits, in either event, 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 judicata,* and thus end that particular litigation." *Midkiff v. Insurance Co.,* 198 N. C., 568; *Fuquay v. R. R.,* 199 N. C., 499.

In the former case of *Jones, Admr., v. Bagwell,* 201 N. C., 831 (832), we find: "There was no direct evidence at the trial of this action tend-

ing to sustain the allegations of the complaint with respect to the rate of speed at which, or in the manner in which, defendant was driving his automobile at the time plaintiff's intestate was struck and fatally injured. Plaintiff contends on his appeal to this Court that the evidence tends to show facts and circumstances from which the jury could have reasonably inferred that defendant was negligent, as alleged in the complaint. A careful consideration of all the evidence fails to sustain this contention. All the evidence shows that the unfortunate death of plaintiff's intestate was the result of an unavoidable accident, for which defendant was not responsible. There was no error in the judgment dismissing the action. It is affirmed."

There was new and material evidence as to the rate of speed which defendant was driving the car and the manner of its operation, when plaintiff's intestate was killed.

The new evidence was to the effect that shortly after midnight, 21 December, 1929, defendant, suffering the complete lack of vision in his right eye, and while driving his automobile westerly along Hillsboro Street at a speed in excess of city ordinances and State law, and in violation thereof, struck and fatally injured plaintiff's intestate. So far as plaintiff's evidence disclosed, there were no eye-witnesses to the exact instant of the collision, nor to the point of impact in the street. The nearest approach was the testimony of certain witnesses who said, substantially, that hearing "a thud sound" of noise from the direction of the intersection, they saw defendant's car "just a fraction of a second," and "within a split second," after hearing the impact, traveling from 30 to 40 miles per hour, in a westerly direction, gradually slowing down, and stopping on the north side of Hillsboro Street a distance of about 71 steps from where intestate's body was found in the switch of the north car track. That Hillsboro Street was a straight, wide-open street, without obstructions, with an arc light burning at the intersection. At the moment of impact no traffic or cars were moving in either direction, east or west; and there were no obstructions to traffic and no cars parked on the north side of the street.

It was in evidence that defendant, the first time he saw plaintiff's intestate, "he was right in front of his headlights."

Plaintiff's evidence, on the former trial uncontradicted, was to the effect that defendant stated that intestate had *jumped from in front of a car going east to a place immediately in front of defendant's car; and such allegation was the gravamen of the defense.* On the present trial, however, while one witness, Neill Hester, testified that he heard defendant make that statement, he also testified that he was in position to see, *but did not see any east-bound car.* Two other witnesses testified not only that defendant made no such statement to them, but that he told

them rather the contrary—that the first time he saw intestate was when the latter suddenly appeared in front of the headlights of his car, running toward the curb, but so close that defendant could not avoid him.

This constituted the sharp difference between the testimony offered by the plaintiff upon both trials; and was substantially new and materially different evidence, which plaintiff contended was not available on the former trial.

For the reasons given, the judgment of the court below must be

Reversed.

R. F. BOYD, ADMINISTRATOR OF VIOLET OVERCASH, DECEASED, v. ATLANTA AND CHARLOTTE AIRLINE RAILWAY COMPANY, SOUTHERN RAILWAY COMPANY, CRAMERTON MILLS, INC., AND DUKE POWER COMPANY.

(Filed 21 November, 1934.)

Negligence A c—Doctrine of attractive nuisance held not applicable to facts alleged in complaint in this action.

Plaintiff's intestate, a child eight years old, went upon a railroad bridge, and while throwing small stones from the tracks on the bridge into the water fifty feet below, lost her balance and fell into the deep water and drowned. The railroad bridge spanned water ponded by a dam to a great depth, and the bridge was near houses in which many children lived, including plaintiff's intestate. One of defendants had constructed the dam which so ponded the water; one of defendants owned the houses and permitted and consented to the ponding of the water in the vicinity of its houses; and the other defendants were the owner and lessee of the railroad bridge, which had been constructed without guard rails. On the bridge there was a raised section of concrete thirty-six inches wide which plaintiff alleged was used as a walkway by the public generally to the knowledge of defendants. Plaintiff sought to recover for intestate's death on the theory that the condition existing at the place of the accident constituted an attractive nuisance, and that defendants knew or should have known that children, including the intestate, would be attracted to the place to their death: *Held*, defendants' demurrer to the complaint on the ground that it failed to state a cause of action was properly allowed, the doctrine of attractive nuisance not applying to the facts alleged in the complaint.

CLARKSON and SCHENCK, JJ., concur in result.

APPEAL by plaintiff from *Stack, J.*, at March Term, 1934, of MECKLENBURG. Affirmed.

This is an action to recover damages for the death of plaintiff's intestate.

The plaintiff is the duly qualified administrator of Violet Overcash, who died in Gaston County, North Carolina, on 16 June, 1929.

This action was begun in the Superior Court of Mecklenburg County within one year after the death of plaintiff's intestate.

The allegations of the complaint on which the plaintiff seeks to recover in this action are as follows:

"19. That on 16 June, 1929, Violet Overcash, a child less than eight years of age, in company with another girl of about the same age, left her home in the town of Cramerton, where her father lived, in a house belonging to the defendant Cramerton Mills, Incorporated, and wandered away to and got upon the south, or west, end of the railway bridge belonging to the Atlanta and Charlotte Airline Railway Company, as owner, and to the Southern Railway Company, as lessee, which said bridge spans the South Fork of the Catawba River, as hereinbefore mentioned, said bridge having no guard rails, fence, or other equipment along the side thereof; and said children continued to walk along and over said railway bridge until they had reached a point near the center thereof.

"20. That when Violet Overcash and her companion had reached a point near the center of said bridge they began to look at, and gaze upon, the broad expanse of water stretching away on both sides of said bridge, and Violet Overcash and her companion began throwing into the water far below, to see it splash, the small crushed stone used for ballast by the defendants Atlanta and Charlotte Airline Railway Company and the Southern Railway Company, and each of them.

"21. That while Violet Overcash and her companion were about their childish play, and while attempting to throw the small pieces of crushed stone into the water beneath the bridge, as hereinbefore described, the said Violet Overcash lost her balance, stumbled and fell from the top and over the edge of said railway bridge, a distance of 45 or 50 feet, into the waters beneath thereof, and was drowned. That for a period of many hours thereafter vain attempts were made to recover her body, so deep was the water into which she fell.

"22. That the death of plaintiff's intestate, Violet Overcash, was the direct and proximate result of the wilful, wanton, and negligent acts and gross carelessness of the defendants, and was due solely, brought about, and caused by the joint and concurrent negligent acts and omissions of the defendants, and each of them.

"(a) In that the defendant Duke Power Company built and constructed, or owns and controls, the dam across the South Fork of the Catawba River, which said dam serves no purpose whatsoever in generating electric current for said defendant, nor was it intended so to do, and dammed, backed up, and impounded the waters of the South Fork of the Catawba River, along the channel of said stream, and far out over the lands adjacent thereto, and upon, over, and across the lands

belonging to the Cramerton Mills, Incorporated, and upon, over, and across the lands and right of way of the defendants Atlanta and Charlotte Airline Railway Company, as owner, and of the Southern Railway Company, as lessee, said water so dammed, backed up, and impounded being in varying depths, and having a maximum depth of eighteen or twenty feet, and said waters are near by and in close proximity to and within a few feet of the dwelling-houses belonging to the defendant Cramerton Mills, Incorporated, and in which a great many of the operatives of said manufacturing plant live, and did live on the date hereinbefore mentioned;

"(b) That the Duke Power Company, at all times herein mentioned, maintained said dam as hereinbefore alleged, well knowing that said waters of the South Fork of the Catawba River were backed up to and near, and within a few feet of, many of the homes of the operatives of the Cramerton Mills, Incorporated, and when it knew, or by the exercise of ordinary care and observation upon its part could have known, and did know, that in a great many of said homes there were children of tender years, and who were totally lacking as to a sense of the danger connected with said waters, and well knowing at all times that to go in and play about waters of the kind and character herein mentioned was a weakness of a child's mind;

"(c) That the defendant Duke Power Company backed up and impounded the waters of the South Fork of the Catawba River upon, over, and across the lands and right of way of the Atlanta and Charlotte Airline Railway Company, as owner, and of the Southern Railway Company, as lessee, and underneath the bridge supporting the tracks of said defendant, when it knew, or by the exercise of ordinary care, caution, observation, and prudence upon its part could have known, and did know, that many of the children in the town of Cramerton, and especially those nearby, would be attracted to, play about, on, over, and upon the bridge belonging to said railway defendants herein mentioned, and when it knew that there was nothing more attractive to a child's mind than just such a scene as is viewed from the top of said bridge;

"(d) That the Duke Power Company maintained said dam and backed up and impounded the waters of the South Fork of the Catawba River to a great depth over and across the right of way, and underneath the bridge belonging to the Atlanta and Charlotte Airline Railway Company, as owner, and to the Southern Railway Company, as lessee, when it knew, or by the exercise of ordinary care, caution, observation, and prudence could have known, and did know, that there were many homes in which there were children of tender years near and in close proximity to said bridge belonging to the railway defendants herein mentioned, and that said bridge had no guard rails, fence, or other means to prevent

children that might wander upon said bridge from falling from said bridge and into the waters beneath thereof, and being drowned, in the way and manner in which plaintiff's intestate was in fact drowned, and when said defendant knew, or by the exercise of ordinary care, caution, and prudence upon its part could have known, and did know, that said railway bridge, in its unguarded condition, and the waters beneath thereof, was such an attractive place as to invite and cause small children to go upon said bridge and be and become a place of great hazard and danger;

"(e) That the defendant Cramerton Mills, Incorporated, permitted the Duke Power Company to dam, impound, back up, and overflow its said lands adjacent to and nearby its said mill village, and said waters so backed up and impounded was done with its full knowledge, consent, and approval, and more especially did said defendant permit said Duke Power Company to dam, back up, and impound said waters upon its premises, at and near the railway bridge belonging to the Atlanta and Charlotte Airline Railway Company, as owner, and to the Southern Railway Company, as lessee, and nearby and in close proximity to the homes of its operatives, wherein were many children of tender years, when it knew, or by the exercise of ordinary care, caution, and prudence upon its part could have known, and did know, that said waters so backed up and impounded were dangerous to the life and limb not only of plaintiff's intestate but to the other children of said town of Cramerton as well;

"(f) That the defendant Cramerton Mills, Incorporated, permitted the Duke Power Company to dam, back up, and impound the waters of the South Fork of the Catawba River, across and over its said premises, and near to and under the railway bridge hereinbefore mentioned, when it knew that many of its houses, occupied by its operatives and their families, were near and in close proximity to the south, or west, end of said railway bridge, and when it knew, or by the exercise of ordinary care, caution, and prudence upon its part could have known, and did know, that there were no guard rails, fence, or other means to prevent children of tender years from going upon said bridge and falling therefrom, in the way and manner in which plaintiff's intestate did go upon said bridge and fell therefrom, and when it knew, or by the exercise of ordinary care and prudence could have known, that said railway bridge so located, and the waters beneath thereof constituted such a place as would attract children of tender years;

"(g) That the defendants Atlanta and Charlotte Airline Railway Company, as owner, and the Southern Railway Company, as lessee, permitted the Duke Power Company to dam, back up, and impound the waters of the South Fork of the Catawba River, over, across, and

upon its lands and right of way, and underneath the bridge supporting their railway lines, to a great depth, in, near, and adjacent to the town of Cramerton, and near the homes of the residents thereof, when they, and each of them, knew, or by the exercise of ordinary care, caution, and prudence upon their part could have known, and did know, that in said homes there were many children of tender years;

"(h) That the defendants Atlanta and Charlotte Airline Railway Company, as owner, and the Southern Railway Company, as lessee, built and constructed, or caused to be built and constructed, said railway bridge across and over the South Fork of the Catawba River at, near, and adjacent to the town of Cramerton, and the south, or west, end of said bridge was nearby and in close proximity to the homes of many of the residents of said town, and said bridge so built and constructed was forty or fifty feet above the waters underneath thereof, and on each side of said bridge was a raised section of concrete, about thirty-six inches in width, which was used as a walkway by the public in general in passing to and from the town of Cramerton to and from the Eagle Mills, and the town of Belmont, Gaston County, North Carolina, which the defendants, and each of them, well knew, or by the exercise of ordinary care, caution, and prudence upon their part could have known, and this plaintiff is informed, believes, and alleges that said sections were so used with the full knowledge, consent, and approval of said defendants, and each of them;

"(i) That the defendants Atlanta and Charlotte Airline Railway Company, as owner, and the Southern Railway Company, as lessee, on the date hereinbefore mentioned had no guard rails, fence, or other equipment along the concrete sections, or walkways, which were located on each side of said bridge, to prevent anyone who might go upon said bridge from falling therefrom and into the waters below, when they, and each of them, knew, or by the exercise of ordinary care, caution, and prudence upon their part could have known, and did know, that owing to the closeness of said bridge to many of the homes in the town of Cramerton, and in which children of tender years lived, that said children would go upon and play about said bridge, and when they knew, or by the exercise of ordinary care, caution, and prudence upon their part could have known, that said children going upon and playing about said bridge might and would fall therefrom and be killed, in the way and manner in which plaintiff's intestate in fact was killed;

"(j) That the defendants Atlanta and Charlotte Airline Railway Company, as owner, and the Southern Railway Company, as lessee, owned and maintained said bridge hereinbefore mentioned without any guard rails, fence, or other equipment along the edges or sides thereof, when they, and each of them, knew, or by the exercise of ordinary care,

caution, and prudence upon their part could have known, and did know, that owing to the view from the top of said railway bridge, and the broad expanse of water surrounding same, that the children in the homes hereinbefore mentioned would be attracted thereto and thereon, and would throw, or attempt to throw, the small crushed stones into the waters beneath, and that said children, in attempting to throw said stones, might and would fall into said waters and be drowned, in the way and manner in which plaintiff's intestate fell from said bridge and was drowned, and when they knew that said railway bridge, in its unguarded condition, was dangerous and hazardous, and was a veritable death-trap for any child or children that might wander upon or be attracted to said bridge."

Each of the defendants filed an answer to the complaint, in which all the allegations therein relied on by the plaintiff as stating facts sufficient to constitute a cause of action against the defendants, or either of them, are denied.

After the action was called for trial but before a jury was impaneled, each of 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 against the defendants, or either of them. The demurrers were sustained, and the plaintiff duly excepted.

From judgment dismissing the action the plaintiff appealed to the Supreme Court, assigning as errors the rulings of the court upon the demurrers, and the judgment dismissing the action in accordance with such rulings.

M. L. Ritch, J. C. Newell, and H. L. Taylor for plaintiff.

John M. Robinson and Hunter M. Jones for defendants Atlanta and Charlotte Airline Railway Company and Southern Railway Company.

Cansler & Cansler for defendant Cramerton Mills, Inc.

W. S. O'B. Robinson and W. B. McGuire, Jr., for defendant Duke Power Company.

CONNOR, J. The plaintiff on his appeal to this Court contends that on the facts alleged in the complaint, and admitted by the demurrers, the defendants, and each of them, are liable to the plaintiff for the damages which he has suffered by the death of his intestate on the principle which was announced and applied by the Supreme Court of the United States in the *Turntable case* (*R. R. v. Stout,* 21 L. Ed., 745), and that for this reason the judgment dismissing the action should be reversed. This contention cannot be sustained. There was no error in the ruling of the court sustaining the demurrers, or in the judgment dismissing the action in accordance with such ruling.

The principle on which the *Turntable case, supra,* was decided was recognized by this Court as sound in *Kramer v. R. R.,* 127 N. C., 328, 37 S. E., 468. It was held, however, that the principle was not applicable to the facts shown by the evidence in that case, for that the crossties by which the plaintiff was injured were not piled on the land of the defendant, but on a street on which the land of the defendant abutted. It is said in the opinion in that case that "the principle announced in the *Turntable case, supra,* would not apply if the ties had been carelessly piled on the defendant's premises. The *Turntable* decisions are necessarily based either on the idea that such machinery has such peculiar attractiveness for children as objects of play that when left unlocked there is an implied invitation to use them, or when not properly guarded it is so obviously dangerous to children as to call for diligence in the owner to take precautions against the dangers. Those cases are exceptions to the general doctrine, and went to the very limit of the law. Mere attractiveness of premises to children will not bring a case within that exceptional doctrine. Indeed, the plaintiff's counsel, in his argument here, stated that he did not contend for the application to this case of the principle laid down in the *Turntable case, supra.*"

The soundness of the principle was conceded and its application in proper cases was approved in *Briscoe v. Lighting and Power Company,* 148 N. C., 396, 62 S. E., 600. However, it was held by this Court that the principle was not applicable in that case. It is said in the opinion that "it must be conceded that the liability for injuries to children sustained by reason of dangerous conditions on one's premises is recognized and enforced in cases in which no such liability accrues to adults. This we think sound in principle and humane in policy. We think the law is sustained upon the theory that the infant who enters upon premises, having no legal right to do so, either by permission, invitation, or license, or relation to the premises or its owner, is as essentially a trespasser as an adult; but if to gratify a childish curiosity or in obedience to a childish propensity excited by the character of the structure or other conditions he goes thereon and is injured by the failure of the owner to properly guard or cover the dangerous conditions which he has created, he is liable for such injuries, provided the facts are such as to impose the duty of anticipation or prevision; that is, whether under all the circumstances he should have contemplated that children would be attracted or allured to go upon his premises and sustain injury." It is further said in the opinion that "to allege simply that the machinery, including dynamos, engines, etc., in an attractive building in the populous portion of a city 'is calculated to attract and allure boys and others to see the machinery' does not bring the case within the exception to the general principle. There is no suggestion that any boys had been at-

tracted or allured, nor is it even averred that the plaintiff was on the premises to see the machinery." In that case it was held that the demurrer to the complaint should have been sustained.

A judgment of nonsuit was reversed in *Starling v. Cotton Mills,* 168 N. C., 229, 84 S. E., 388. In that case the plaintiff's intestate, a boy six years of age, fell into a reservoir on the defendant's premises, and was drowned. The defendant had caused a fence to be constructed around the reservoir, but had failed to keep the fence in repair. Plaintiff's intestate crawled through a hole in the fence and fell into the reservoir. There was evidence tending to show that plaintiff's intestate and other children had been accustomed to play about the reservoir, and that the defendant knew of this custom, and because of this custom had caused the fence to be erected for the protection of the children. In the opinion in that case it is said: "It does not admit of debate that the fact that such a dangerous place was unguarded by a secure fence, where children of that age were allowed to play, was culpable negligence on the part of the officers of the defendant. The very fact that a fence had been put up of itself shows that these authorities were aware of the danger. To permit it to become dilapidated was negligence."

In *Comer v. Winston-Salem,* 178 N. C., 383, 100 S. E., 619, it is said: "In this case the city was responsible for not maintaining an efficient railing, which would have prevented this child from getting through and falling twenty feet below upon the concrete bottom of the extension of the culvert. A small mesh, strong wire fence would have prevented such danger as this, and would have saved the life of the little one whose death was caused by leaning over the railing, or getting through it, to look at the gurgling, many-hued ripplings of the stream below." A judgment for the plaintiff was affirmed.

The instant case is governed by the law as stated in *Kramer v. R. R., supra,* and in *Briscoe v. Lighting and Power Company, supra.* The facts alleged in the complaint and admitted by the demurrers do not bring this case within the class of cases which is governed by *Starling v. Cotton Mills, supra,* and *Comer v. Winston-Salem, supra.*

The "attractive nuisance doctrine," which is invoked by the plaintiff in this case, has been repudiated by a majority of the courts. In those courts in which the doctrine is recognized, it is said that "it needs very careful statement not to make an unjust and impracticable requirement." See *Lucas v. Hammond,* 150 Miss., 369, 116 So., 536, 60 A. L. R., 1427.

The judgment is

Affirmed.

CLARKSON and SCHENCK, JJ., concur in result.

HANNAH BRANNON, ADMINISTRATRIX OF THE ESTATES OF EDWARD AND TOMMY BRANNON, DECEASED, v. J. H. SPRINKLE, JOHN A. SPRINKLE, ETHEL G. SPRINKLE, ELSIE S. LEAKE, AND H. H. LEAKE.

(Filed 21 November, 1934.)

1. Negligence A c—Evidence held sufficient for jury upon doctrine of attractive nuisance.

Allegation and evidence to the effect that defendants owned a certain lot of land for a number of years prior to the injury in suit, that upon the land was a deep reservoir twelve feet in diameter which was filled with water to within about two feet from the top, that the reservoir was unfenced and unprotected and had been allowed to remain in this condition for a number of years, and that the reservoir was discernible from the sidewalk on the day the property was bought by defendants, one of them being present, that there were paths across the property near the well which had been used by the public generally and that for a number of years children in the neighborhood had played around the reservoir, catching tadpoles and playing in the water, and that plaintiff's intestates, children four and seven years of age, had gone upon the property and were fishing in the reservoir for tadpoles, and fell in the reservoir and drowned, *is held* sufficient to take the case to the jury on the issue of defendants' actionable negligence, the allegation and evidence tending to show an alluring and attractive place to small children, existing upon the land to the knowledge of defendants, and that defendants had actual or constructive knowledge that the place was frequented by children of tender years, and failed to exercise due care to guard against the foreseeable dangers to children attracted to the premises, and that the deaths of plaintiff's intestates were proximately caused by such failure.

2. Trial D a—

Only the evidence favorable to plaintiff need be considered in passing upon the sufficiency of the evidence to be submitted to the jury upon defendants' motion as of nonsuit.

3. Negligence A c—Application of doctrine of attractive nuisance.

While a child who goes upon lands without legal right by permission, invitation, license, or relation to the premises or its owner is as much a trespasser as an adult, a child cannot be held to the same degree of care for its own safety, and where an owner permits a dangerous and exposed place, which is alluring and attractive to small children, to exist and remain unguarded on his lands, and has actual or constructive notice that small children habitually play at or near such place, so that their presence there and injury to them could be anticipated, the owner may be held liable for injury resulting from his failure to properly guard against such dangers.

4. Negligence D d—

Where but one inference can be drawn from the evidence as to the proximate cause of the injury in suit, a new trial will not be awarded for the court's failure to charge the jury upon the question.

5. Appeal and Error J e—

Where but one inference can be drawn from the evidence, a new trial will not be granted for error in the charge of the trial court upon appeal from a verdict in accordance with the evidence.

BROGDEN, J., concurs in result.

CONNOR, J., dissenting.

APPEAL by defendants from *Hill, Special Judge,* at February Term, 1934, of FORSYTH. No error.

There were consolidated for the purpose of trial two cases, the plaintiff in each being the same person, the mother and the administratrix of her infant child, the intestate in the respective cases being Edward Brannon, aged four years, and Tommy Brannon, aged seven years, and the defendants in each case being the same.

Upon the plaintiff resting her case, the defendants moved the court to dismiss the action and for a judgment as of nonsuit, and upon denial thereof noted objection and reserved exception, and upon the close of all the evidence the defendants renewed their motion theretofore made, which was again denied, and objection and exception again noted and reserved.

It is admitted that the plaintiff is the duly qualified administratrix of her deceased children, Edward and Tommy Brannon, and that the defendants, at the time alleged as well as before and after, were the owners of the land described in the complaint, located on Northwest Boulevard, in a populous section of the city of Winston-Salem. It is also not controverted that the intestates were drowned in a well or reservoir on said land on 30 May, 1931.

These actions are instituted for the alleged wrongful death of said infant children, the intestates.

From judgment in favor of the plaintiff the defendants appealed, assigning errors.

J. O. Wagoner, R. M. Weaver, and Richmond Rucker for appellee.
W. Reade Johnson for appellants.

SCHENCK, J. The determinative question in this case, which is raised by the exception to the denial of the motion for a judgment as of nonsuit, is whether there was sufficient evidence of actionable negligence, as alleged in the complaint, to be submitted to the jury.

The plaintiff alleges, *inter alia,* "That upon the property described, . . . the defendants did, on 30 May, 1931, and for a great while previous thereto, maintain and allow to remain in an unprotected, exposed, and unfenced condition a brick well which was some fifty feet,

more or less, deep; was of square dimensions, the opening of which was about twelve feet in diameter at the top; that stagnant water had been allowed to accumulate in said well to a depth of forty-seven or forty-eight feet, reaching to within approximately two feet of the top of said well, and vegetation had grown up from the walls and water, and trash and leaves had been allowed to accumulate on the surface of the said water in such a manner as to conceal and camouflage the true depth of said well. That for more than twenty years the public has used several footpaths which converged into one path at a point adjacent to and by the side of said well, and the use of these footpaths was permitted and acquiesced in and allowed by the defendants and their predecessors in title to said property; and the defendants knew or should have known that the said well constituted a highly dangerous condition, not only to those who were using the said path but to all who might come upon said property; that the defendants knew, or should have known, that children of immature years frequently used the said paths and had been allowed by these defendants . . . to frequent the vicinity and the property upon which the said well was situated; that children of tender years were permitted and have been accustomed to playing around said well, fishing for tadpoles and engaging in other childish sports. That on or about 30 May, 1931, the plaintiff's intestate, an infant child four years of age, while using the said path, or while present in the vicinity of said well, being attracted by the unusual and dangerous condition, and in order to satisfy his childish curiosity, was tempted to the well, fell into the stagnant water which had accumulated and was drowned. That the negligence of the defendants in permitting the maintenance of the deep well or cistern in a densely populated section of the city without guard or barrier, in close proximity to a public thoroughfare and footpaths, when they knew, or by the exercise of ordinary care should have known, that small children in the vicinity, including this intestate, would likely be attracted to the well or water pit which apparently afforded a place of recreation but in fact constituted a dangerous and hazardous condition, constituted a constituent element of the proximate cause of the injuries sustained by the plaintiff's intestate."

The foregoing excerpts are from the complaint wherein Edward Brannon is the intestate, and the complaint wherein Tommy Brannon is the intestate is identical, except it is alleged that he was seven years of age.

These allegations, with the admitted facts, clearly state a cause of action, and if they are supported by any evidence the court correctly submitted the case to the jury.

John Moore, a ten-year-old boy, told a tragic story, with childlike simplicity, in these words: "I was down there where they were the

morning that they died. We were trying to catch tadpoles. There were no other children there with us that morning except my brother, and he is dead now. I saw Tommie and Edward when they fell in the hole. The little one fell in first. He was fishing for tadpoles with a tin can. When the little one fell in the big one jumped and tried to catch him. I didn't do anything. Didn't any people come there. The fire people got them out of the hole. We could reach the water with the can. . . . There wasn't any top on the place where they fell in. . . . The brick wall was wide and had a flat top to it. It wasn't necessary to get up on the wall to fish for tadpoles, but you could reach over it. Tommie Brannon did not climb up on the wall, but Edward, the four-year-old one, did climb up on the wall and was fishing with a can, and fell in. Then Tommie jumped in. He didn't have a string on the can, but had it in his hand."

Hannah Brannon, the mother, testified that she ran to the scene and jumped in the hole in which she was told her children had fallen; that the water was deeper than she was, because she went under and could not find bottom, and that she was unable to get out until somebody pulled her out. That she couldn't do anything to help her children. That Edward was four years old and Tommy was seven.

J. L. Snyder testified, in effect, that he was a member of the fire department of Winston-Salem, and that his company reached the scene about thirty minutes after the children were drowned, and that the firemen devised means to get the children out by laying two ladders across the well. That the water in the hole was about two and a half feet from the top of the wall, and the wall was about two and a half feet high, so the water came up about to the top of the ground; that on the south side the wall was about even with the ground, and the slope of the ground tapered up the wall, the ground being a little sloping and the wall level; that the wall around the hole was about two and a half or three feet above the ground on the north side, eighteen feet square, and made of brick. It was ninety-four feet from the center of the sidewalk on Northwest Boulevard, on the south side of the property, to the center of the hole.

Peter Hogan testified substantially that he had known this property thirty-five years or longer. That when he first became acquainted with it the city had it in charge and used it for a pump-house, and later on the city sold it. That this well was used once as a help for the reservoir the city had on the far side of the creek, and that water was pumped from it through a pipe to the reservoir over there and then to the larger reservoir up town. That there was a path that came down the bank and went by on the west side of this brick structure, within some four or five feet of it. That the path led on out across the branch and on up across

the hill, and that grown people and children all came across the property on this path; that there were two paths, one led to "Pittsburgh" and the other led to the Old Town Road and then into Cherry Street. That he lived at the top of the hill on Cherry Street and could see this property from his house. That there are other houses there and a school a good piece up Cherry Street. That children going to school came through this lot where the hole is. There is a church on Cherry Street and people going to church came across that lot. That he had seen children playing ball and one thing and another down in that bottom, seen them down there often. They had a little flat on yon side of the well, between there and the branch, had a nice little place there where they would play ball; and then they played sometime down below there further in the meadow place.

Celia Harrington's testimony in chief, as set forth in the record, is as follows: "I lived down on Northwest Boulevard on 30 May, 1931, just angling across the street from the hole; I could see it from my porch. I had lived there about six years, and during that time have observed children playing around this place; that was their playground and they played there, catching tadpoles and having old tin cans, bending over the bricks, fishing along in the water and messing around in there. On the day of this accident you could see this place from the street along there, for they had plowed up all around on this side and fixed to tend there. I remember when they had the auction sale out there. At that time this property was cleaned off; that spring they cleaned off all the bank clean on down and hauled all the brush and rubbish and stuff out on the creek and burned it up. Then they put up white posts with figures on them down by the side of the street. That was all done before the sale; they had it cleaned off nice. On the day of the sale the grounds were cleaned off. There were right many people there on the day of the sale."

Clifford Conrad testified that he had known "this place for eleven years, and had seen tadpoles in the water in the hole" and had "seer children playing around the place."

R. C. Rights and W. A. Pegram testified in effect that the well or reservoir was made by constructing brick walls around a spring; and that it formerly had a cover over it "just like an ice house," and later when this was torn away a fence was built around it to keep the cattle out, but the fence, too, had disappeared before the children were drowned.

E. C. Reese testified that in October, 1928, he assisted the auction company in conducting the sale of the property on Northwest Boulevard, and that only nine or ten lots were sold at that time. That he saw Mr. Sprinkle, the defendant, on the ground that day attending the sale.

At the time of the sale the entire property had been cleaned off and the weeds and underbrush on the property had been mowed. That he saw this well or hole there on the day of the sale, and that the hole and the water in it could be seen from the street and sidewalk. That the auctioneers were on a wagon or truck in the street and the crowd was gathered on the sidewalk and around the truck. That he didn't know the exact lot Mr. Sprinkle was on, but he thought it was the second lot sold; he was either on the first or second lot, or on the sidewalk.

There was evidence in conflict with the foregoing, more particularly tending to show that the defendants had no knowledge of the existence of any well or reservoir upon the land owned by them, or that children used the land as a playground, but since only evidence favorable to the plaintiff is considered on a motion for nonsuit, we do not set forth the defendants' evidence. *Fowler v. Fibre Co.*, 191 N. C., 42.

We think there is both *allegata* and *probata* of an alluring and attractive place to small children; of knowledge by defendants of such place; of further knowledge, active or constructive, by defendants of such place being used by children of tender years as a place to play, fish, and catch tadpoles; of failure by defendants to exercise due care to guard against the foreseeable danger of such place; and of the death of the intestates being proximately caused by such failure.

The law is stated in *Briscoe v. Lighting and Power Co.*, 148 N. C., 396 (411), where *Connor, J.*, writing with much force and clarity, says: "It must be conceded that the liability for injuries to children sustained by reason of dangerous conditions on one's premises is recognized and enforced in cases in which no such liability accrues to adults. This we think sound in principle and humane in policy. We have no disposition to deny it or to place unreasonable restrictions upon it. We think that the law is sustained upon the theory that the infant who enters upon premises, having no legal right to do so, either by permission, invitation, or license, or relation to the premises or its owner, is as essentially a trespasser as an adult; but if, to gratify a childish curiosity, or in obedience to a childish propensity excited by the character of the structure or other conditions, he goes thereon and is injured by the failure of the owner to properly guard or cover the dangerous conditions which he has created, he is liable for such injuries, *provided the facts are such as to impose the duty of anticipation or prevision;* that is, whether under all of the circumstances he should have contemplated that children would be attracted or allured to go upon his premises and sustain injury. The principle is well stated in 21 A. and E., 473, and was cited with approval in *McGhee's case, supra* (147 N. C., 142). 'A party's liability to trespassers depends upon the former's contemplation of the likelihood of their presence on the premises and the probability of injuries from

contact with conditions existing thereon.' Immediately following this language the editor says: 'The doctrine that the owner of premises may be liable in negligence to trespassers whose presence on the premises was either known or might reasonably have been anticipated is well applied in the rule of numerous cases, that one who maintains dangerous implements or appliances or unenclosed premises of a nature likely to attract children in play, or permits dangerous conditions to exist thereon is liable to a child who is so injured, though a trespasser at the time when the injuries are received; and, *with stronger reason, when the presence of a child trespasser* is actually known to a party, or when such presence *would have been known had reasonable care been exercised.*'" (Italics ours.)

Mr. Justice Walker, in *Ferrell v. Dixie Cotton Mills,* 157 N. C., 528, in an able and exhaustive opinion, clearly points out the difference in the rule of liability of one who maintains or permits a dangerous instrumentality or situation on his premises to a trespasser of mature age and to a trespasser of tender years. He writes: "The negligence charged against the defendant is the maintaining by it of a highly dangerous and deadly condition and instrumentality on premises which were unenclosed, and which were in an attractive place to children, and on which defendant knew, or by the exercise of reasonable care ought to have known, that small children were accustomed to play. There was ample evidence to sustain this allegation. The contention of the appellant is that the child was a trespasser, to whom it owed no duty except to refrain from wilfully injuring it. If the injury had been to a person of such mature age that he could appreciate the nature of his acts and the dangers attached to the situation, we would agree with this contention. But when, as in this case, the injury is suffered by a six-year-old boy, under such circumstances and surrounding conditions as the evidence showed to exist, a different rule of law governs the conduct and liability of the defendant. What did this six-year-old boy know about the dangers of electricity? What could he possibly have known about the rules of property and the laws of trespass? Technically, he may have been a trespasser on defendant's land, but all he knew about it was that it was an attractive place to play, and that it was where he and the other little children of the neighborhood were accustomed to play, and had been playing for months past. The defendants knew, or ought to have known, that this pole with the loose guy wire attached to it was an instrument of death, which might become effective to anyone who came in contact with it. The defendant also knew, or ought to have known, that the children were in the habit of playing about this pole, and that they were also in the habit of swinging on the loose guy wire. Under these circumstances, the law will not permit the defendant to allege a technical trespass and thereby shield itself from the consequences

of its negligence, resulting in the death of the son of the plaintiff. The doctrine of the 'turntable cases' was first before this Court in the case of *Kramer v. R. R.*, 127 N. C., 328. There the nine-year-old son of plaintiff was killed by climbing upon a pile of crossties negligently stacked by defendant in an unused portion of one of the streets of the town of Marion. The Court held that plaintiff's son was not a trespasser; but it further says: 'If he was too young to be bound by any rule as to contributory negligence and had a habit of playing, with other boys, on the crossties with the knowledge of defendant, and without the defendant's attempting to prevent such sport or to take precaution against injury to the children, then the defendant was negligent. In such a case the defendant's negligence would not consist in piling the crossties in the street, but it would consist in its failure to guard against injury to the children, after it had learned of their habit of playing on the ties, and its failing to provide against their injury.' "

The opinion in *Ferrell v. Cotton Mills, supra,* continues: "In *Brown v. Salt Lake City,* 93 Pac., 570, an eight-year-old boy was drowned in a conduit situated near a schoolhouse. Entrance to the conduit was barred up, but one of the bars had been broken for a year or more, and children had played in and about it for several years, and its condition had been brought to the notice of the city authorities. The Court says: 'We are constrained to hold, therefore, that the doctrine of the turntable cases should be applied to all things that are uncommon and are artificially produced, and which are attractive and alluring to children of immature judgment and discretion, and are inherently dangerous, and where it is practical to guard them without serious inconvenience and without great expense to the owner.' In *Price v. Water Co.,* 50 Pac., 450, an eleven-year-old boy was drowned in defendant's reservoir. The reservoir was fenced, but there was a kind of stile over the fence, and defendant had knowledge that boys played about the reservoir, fishing and indulging in other sports. The Court says: 'To maintain upon one's property enticements to the ignorant or unwary is tantamount to an invitation to visit and to inspect and to enjoy, and in such case the obligation to endeavor to protect from dangers of the seductive instrument or place follows just as though the invitation had been express. . . . It would be a barbarous rule of law that would make the owner of land liable for setting a trap thereon, baited with meat so that his neighbor's dog attracted by his natural instincts might run into it and be killed, and which would exempt him from liability for the consequences of leaving exposed and unguarded on his land a dangerous machine, so that his neighbor's child, attracted to it and tempted to intermeddle with it by instincts equally strong might thereby be killed or maimed for life. Such is not law.' "

The original "turntable case" (*Sioux City and Pacific R. R. Co., Plff. in Err., v. Stout, by his next friend,* 17 Wall., 657), decided by the Supreme Court of the United States in 1874, has much in common with the instant case. There, as here, the case was presented on a motion for nonsuit, and the question was whether the evidence introduced was sufficient to be submitted to the jury upon the issue of the actionable negligence of the railroad company. There was evidence tending to show that the railroad company had a turntable, by which a much-used path led, and upon which children were known by the railroad company to play, and that the turntable had no lock or latch to make it stationary when not in use, and that the plaintiff, then a mere lad between six and seven years old, while playing thereon had his foot crushed when the turntable moved. The Court said: "It is well settled that the conduct of an infant of tender years is not to be judged by the same rule which governs that of an adult. While it is the general rule in regard to an adult, that to entitle him to recover damages for an injury resulting from the fault or negligence of another, he must himself have been free from fault, such is not the rule in regard to an infant of tender years. The care and caution required of a child is according to his maturity and capacity only, and this is to be determined in each case by the circumstances of that case." After disposing of the issue as to any negligence on the part of the plaintiff, the Court propounds the question: "Was there negligence on the part of the railway company in the management or condition of its turntable?" and makes answer as follows: "To express it affirmatively, if from the evidence given it might justly be inferred by the jury that the defendant, in the construction, location, management, or condition of its machine had omitted that care and attention to prevent the occurrence of accidents which prudent and careful men ordinarily bestow, the jury was at liberty to find for the plaintiff."

In view of the evidence tending to show that the defendants, by the exercise of reasonable care, could have known that there was no cover over or fence or guard around the well or reservoir, and that small children frequently used the paths in very close proximity thereto, and were in the habit of playing around and fishing and catching tadpoles therein, we are of the opinion that there is sufficient evidence "to impose the duty of anticipation or prevision" upon the defendants; and, in consonance with the legal principles by which individuals are held liable for their negligent acts, we think the jury was properly allowed to pass upon the issue as to whether these defendants had breached a duty owed to these plaintiffs to use due care under the circumstances to prevent the well or reservoir on their premises from getting and remaining in a condition which was dangerous, and such as was likely to attract children of tender years. We therefore conclude that there was no error in denying the defendants' motion for judgment as of nonsuit.

There are a number of exceptions taken to the charge of the court, the most serious of which is "that his Honor failed to charge the jury that it would be necessary for them to go further and find that the negligence outlined . . . was the proximate cause of the . . . death of the plaintiff's intestates." There could be drawn from the evidence but one inference as to the proximate cause of the intestates' deaths, namely, drowning in the well or reservoir on the defendants' land. Where, from all the evidence before the court, the jury can draw but one inference, a new trial will not be granted on account of error in the charge of the trial judge. *Credit Co. v. Teeter,* 196 N. C., 232. Since the risk of the deaths of the intestates was one of the very factors which made the defendants' conduct negligent, there was really no problem of legal causation.

We think the other exceptions taken to the charge are untenable; and, upon an examination of the objections taken to the admission and exclusion of evidence, we think they were properly overruled.

We find in the record

No error.

BROGDEN, J., concurs in result.

CONNOR, J., dissenting: I think that the refusal of the court at the trial of this action to allow the defendants' motion, at the close of all the evidence, for judgment as of nonsuit was error. For this reason I cannot concur in the decision of the Court that there was no error in the trial. I think that the judgment should be reversed, and that the action of the plaintiff to recover damages for the death of her intestates should be dismissed.

There was no evidence at the trial tending to show that the well on the land owned by the defendants, in which the plaintiff's intestates were drowned, was an "attractive nuisance or a dangerous instrumentality." For this reason the doctrine of the "turntable case," which has been recognized and approved in this jurisdiction, is not applicable to this case. *Gurley v. Power Co.,* 172 N. C., 690, 90 S. E., 943. That doctrine is founded on an exception to the general rule with respect to the liability of a landowner to trespassers, and should be restricted and not extended. *Kramer v. R. R.,* 127 N. C., 328, 37 S. E., 468. In *Briscoe v. Lighting and Power Co., supra,* it is said:

"If the exception is to be extended to this case, then the rule of nonliability as to trespassers must be abrogated as to children, and every owner of property must at his peril make his premises childproof. If the owner must guard an artificial pond on his premises, so as to prevent injury to children who may be attracted to it, he must on the same principle guard a natural pond. The courts which have adopted the

doctrine of the 'turntable case' have uniformly held that it was not to be extended to other structures and conditions. A number of highly respectable courts have rejected it as unsound."

Under the decision in this case it would seem that a landowner is liable for injuries to a child who has gone upon his land, and been injured thereby, as an insurer, and not on the principles of actionable negligence as those principles have been heretofore applied. If such be the law, ownership of land in this State carries a hazard which makes it dangerous, for it is well-nigh impossible for a landowner, at all times and under all conditions, to keep his land childproof.

CHARLESTON AND WESTERN CAROLINA RAILWAY COMPANY v. ROBERT G. LASSITER & COMPANY, A CORPORATION, AND LONDON AND LANCASHIRE INDEMNITY COMPANY OF AMERICA.

(Filed 21 November, 1934.)

1. Principal and Agent C b—Evidence that act of agent was within his apparent authority and binding on principal held for jury.

An indemnity company, by letter to its agent, authorized the agent to write a freight charge bond for a contractor only in the event the agent wrote the contract bond for the contractor on the project for which the freight was shipped. The agent, in violation of his authority contained in the letter, wrote a freight charge bond for the contractor. The railroad company accepting the bond had no knowledge of the limitation on the agent's authority. The license of the indemnity company to do business in this State stated that the agent signing the bond for the company was its duly authorized agent (N. C. Code, 6262, 6288, 6298, 6302), and the bond was written on a form furnished by the company for freight charge bonds and the company's seal was affixed thereto by the agent: *Held*, the agent had apparent authority to sign the bond for the company, and the railroad company was not chargeable with knowledge of the agent's lack of authority, and the granting of the indemnity company's motion as of nonsuit on the ground that it was not bound by its agent's unauthorized act was error.

2. Same: Estoppel C b—Person first reposing confidence in third party must suffer loss occasioned by third party's misconduct.

An agent of an indemnity company executed, in behalf of the company, a freight charge bond for a contractor in violation of a limitation upon the agent's authority to write such bond unless the agent also wrote the bond for the principal contract. The indemnity company held the agent out as its general agent, and the bond was executed on a form furnished by the company which was filled in by the agent, and the agent affixed thereto the indemnity company's corporate seal: *Held*, in an action on the bond the indemnity company's motion as of nonsuit on the ground that the agent was without authority to sign the bond was erroneously

granted, the rule applicable being that where one of two innocent parties must suffer loss by the misconduct of a third person, he who first reposes confidence in such third person, and makes it possible for the loss to occur, must bear the loss.

3. Principal and Agent C b—Principal is bound by acts of agent within his apparent authority but in violation of secret limitation thereof.

As between the principal and agent, the agent's authority is limited to the authority actually conferred, but as between the principal and a third party dealing with the agent, the principal is bound by acts of the agent within the agent's apparent authority where such third party, in the exercise of reasonable prudence, deals with the agent in reliance upon the agent's apparent authority and has no knowledge that the acts of the agent are in violation of a limitation placed upon the agent by the principal.

4. Same—Third party dealing with agent in reliance upon agent's apparent authority held not required, as matter of law, to make further inquiry as to agent's actual authority.

The agent and attorney in fact of defendant indemnity company was clothed by it with apparent authority to execute the indemnity bond in suit. In an action on the bond defendant indemnity company moved for nonsuit on the ground that the agent exceeded his authority, and contended that the obligee of the bond was charged with making inquiry, upon the presentation of the bond by the attorney in fact, which would have disclosed his lack of authority to execute the bond in suit: *Held*, the contention cannot be sustained, and the granting of the nonsuit was error, the obligee of the bond having determined that the act of the agent was within the agent's apparent authority, was not required as a matter of law to inquire further into the agent's actual authority.

APPEAL by plaintiff from *Grady, J.*, at Second June Term, 1934, of WAKE. Reversed.

This is a civil action, brought by plaintiff Charleston and Western Carolina Railway Company against the defendants Robert G. Lassiter & Company and London and Lancashire Indemnity Company of America to recover the sum of $4,407.07, together with interest thereon from 20 June, 1933, until paid, alleged to be due on account of tariff charges on and/or in connection with freight shipments delivered by plaintiff to the defendant Robert G. Lassiter & Company. The defendant Robert G. Lassiter & Company did not answer and on 6 November, 1933, judgment by default final was rendered against it. The defendant London and Lancashire Indemnity Company of America filed answer, and the cause was thereupon transferred to the civil-issue docket for trial of the issues joined. The defendant London and Lancashire Indemnity Company denied liability to plaintiff Charleston and Western Carolina Railway Company under bond executed in its behalf by its agent and attorney in fact, Stacey W. Wade, alleging that the said Stacey W. Wade did not have the power and authority to execute the same.

The action was tried before his Honor, Henry A. Grady, judge presiding, at Second June Term, 1934, of the Superior Court of Wake County, trial by jury having been waived. At the conclusion of all the evidence, the court allowed the motion of defendant London and Lancashire Indemnity Company for judgment of nonsuit, and from judgment upon this ruling the plaintiff excepted, assigned error, and appealed to the Supreme Court. The necessary facts will be set forth in the opinion. In the opinion the London and Lancashire Indemnity Company of America will be called, for short, Indemnity Company.

Murray Allen for plaintiff.
J. M. Broughton for Indemnity Company.

CLARKSON, J. At the conclusion of all the evidence the defendant Indemnity Company made a motion in the court below for judgment as in case of nonsuit. C. S., 567. The court below sustained this motion, and in this we think there was error.

The part of the bond in question necessary to be set forth in this controversy is as follows: "Know all men by these presents, that we, Robert G. Lassiter & Company, of Oxford, North Carolina, as principal, and London and Lancashire Indemnity Company of America, of Hartford, Conn., as surety, are held and firmly bound unto the Charleston and Western Carolina Railway Company, its successors and/or assigns, hereinafter called the obligee, in the sum of five thousand dollars ($5,000.00), lawful money of the United States of America, for the payment of which, without set-off or counterclaim, we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents. Signed, sealed, and dated this 13 October, A.D. 1931.

"Whereas the obligee has consented to extend to the principal credit of not exceeding ninety-six hours for the payment of tariff charges on and/or in connection with freight shipments, the period of ninety-six hours being as hereinafter construed.

"Now, therefore, the condition of this obligation is such that if the principal shall, within such period of ninety-six hours, pay or cause to be paid to the obligee all such charges, then this obligation to be void; otherwise, to remain in full force and effect, subject, however, to the following express conditions," etc.

The express conditions are not material. The bond is signed as follows: "Robert G. Lassiter & Co., Principal (Corporate Seal), by Geo. R. Goodwin, Vice-President. Attest: H. Wolff, Asst. Secty. London & Lancashire Indemnity Co. of America, Surety. (Corporate seal of said company bearing words 'London & Lancashire Indemnity Company of

America.') Stacey W. Wade & Son (Seal), by Stacey W. Wade, Attorney in Fact."

It is conceded that under the bond Robert G. Lassiter & Company owes the plaintiff Charleston and Western Carolina Railway Company $4,407.07, with interest from 20 June, 1933, until paid. The Indemnity Company contends that it nominated, constituted, and appointed "Stacey W. Wade and/or Louis M. Wade, of Raleigh, North Carolina, its true and lawful agent and attorney in fact, to make, execute, seal, and deliver for and on its behalf, as surety, and as its act and deed." That under the attorney in fact, Stacey W. Wade & Son were given power and authority to execute certain kinds of bonds therein mentioned, but not the one in controversy. In its answer the Indemnity Company said: "That the said bond is accordingly invalid and void so far as this defendant is concerned, and not in any respect binding on this defendant."

The agency and attorney-in-fact bond to Stacey W. Wade & Son is dated 18 March, 1931. On 4 May, 1931, Stacey W. Wade & Son received from the Indemnity Company, through its agent at Richmond, Va., a letter, in part as follows: "Re: R. G. Lassiter & Company. Please be advised that we are willing to execute contract bonds for this concern up to $100,000.00 without reference to this office. On larger projects we ask that you secure all possible information with reference to the project and phone or write us for authorization.

"$100,000.00 blanket authorization on this concern without reference to the company may seem to be very small to you, but in view of the fact that this concern represents an entirely new outfit so far as we are concerned, we trust that it will be satisfactory.

"With reference to Freight Charge Bonds, we find it is the usual practice for the company which executes the contract bond to execute the freight charge bonds necessary in the performance of the contract bonded by them under their contract bond. We would not care to execute any such bonds in connection with contracts bonded by some other company, though we will take care of the freight charge bonds executed on our own projects, of course."

The bond in controversy was thereafter issued on 13 October, 1931. Stacey W. Wade testified, in part: "I had no authority from the company to execute bonds other than the authority contained in the power of attorney by writing. I was under the impression I had authority to execute the bond. That is why I executed it. I did not at the time of the execution of this bond give any information whatever to the Charleston and Western Carolina Railway Company as to any limitations on my authority which would prevent the execution of that bond by me in behalf of the London and Lancashire Indemnity Company. . . . Q.

Did you hold yourself out, Mr. Wade, as having authority to write bonds generally for the London and Lancashire Indemnity Company? A. Yes, sir."

We have examined the original bond in evidence, in the possession of the plaintiff and the subject of this controversy. (1) It is a printed form with blanks to be filled in, which clearly indicates that it was furnished by defendant Indemnity Company to its agent and attorney in fact, Stacey W. Wade & Son. (2) The printed form has on it "A & B—1300—4-31—1 M." "Form 3351, Revised 10 April, 1931." (3) "Indemnity Bond for Freight Credits." (4) At the bottom of the bond is a note printed, in part as follows: "Bond must be forwarded to the Treasurer of the Railroad Company for file after being executed. Bond must be for the maximum amount of the credit." (5) The company's name indicated it was an "indemnity company." (6) The agent and attorney in fact, Stacey W. Wade & Son, had a seal of the company, and the seal impression is on the bond, with this on it: "London & Lancashire Indemnity Company of America." The bond was given to plaintiff and it relied on it, and no knowledge of the limited or restricted authority of the agent and attorney in fact of the Indemnity Company was brought to the attention of plaintiff.

In two aspects, we think the judgment of nonsuit in the court below should be overruled. First: The agent and attorney in fact, Stacey W. Wade & Son, were acting within the scope of their apparent authority, and had the form from the Indemnity Company, which was filled out, signed, and sealed by Stacey W. Wade & Son, and which, according to the printed form, permitted them to do what they did do—execute an "Indemnity Bond for Freight Charges" to plaintiff. The plaintiff had no notice of the lack of authority.

Second: Where one of two persons must suffer loss by the fraud or misconduct of a third person, he who first reposes a confidence or by his negligent conduct made it possible for the loss to occur, must bear the loss.

On the first aspect, the law is as follows, as stated in *Bank v. Hay,* 143 N. C., 326 (330-331): "The principal is held to be liable upon a contract duly made by his agent with a third person: (1) When the agent acts within the scope of his actual authority. (2) When the contract, although unauthorized, has been ratified. (3) When the agent acts within the scope of his apparent authority, unless the third person has notice that the agent is exceeding his authority, the term 'apparent authority' including the power to do whatever is usually done and necessary to be done in order to carry into effect the principal power conferred upon the agent and to transact the business or to execute the commission which has been entrusted to him; and the principal cannot restrict his own liability for acts of his agent which are within the scope

of his apparent authority by limitations thereon, of which the person dealing with his agent has not notice. The principal may also, in certain cases, be estopped to deny that a person is his agent and clothed with competent authority, or that his agent has acted within the scope of his authority which the nature of the particular transaction makes it necessary for him to have. Tiffany on Agency, 180, *et seq.; Biggs v. Ins. Co.,* 88 N. C., 141."

Speaking to the subject in *Bowers v. Lumber Co.,* 152 N. C., 604 (606): "The Guaranty and Surety Company entrusted Willard and Vines with a bond, to which its corporate seal had been affixed, and it was licensed to do business, that is, to execute an indemnity bond, in this State. When this was done, the Guaranty and Surety Company put it in the power of Willard and Vines to induce others to believe that they had the power and authority to execute a bond in its behalf as surety, even if the signatures of the said agents were necessary to make it a valid bond as against the company after it had thus affixed its corporate seal and its corporate name had been signed to the bond."

The Indemnity Company had license signed by the Insurance Commissioner, as follows: "Date: 20 April, 1931. . . . The London & Lancashire Ind. Insurance Company of New York City has been licensed for the year ending 1 April, 1932, and Stacey W. Wade of Raleigh, North Carolina, is the duly authorized and licensed agent for said company." A similar license was issued to Louis M. Wade, as agent. See North Carolina Code of 1931 (Michie), secs. 6262, 6288, 6298, and 6302.

This is not an action between a principal and agent where the scope of the agent's authority is the authority actually conferred upon him by the principal, but this is an action by a third party and a different principle is applicable. Confusion has arisen in the decisions on the subject when the distinction is not kept in mind.

The principle applicable to the facts in this action is also set forth in *R. R. v. Smitherman,* 178 N. C., 595 (598-9), as follows: "While as between the *principal and agent* the scope of the latter's authority is *that authority which is actually conferred upon him by his principal,* which may be limited by *secret instructions and restrictions,* such instructions and restrictions do not affect third persons ignorant thereof, and *as between the principal and third persons,* the mutual rights and liabilities *are governed by* the apparent scope of the agent's authority, which is that authority which the principal has held the agent out as possessing, or which he has permitted the agent to represent that he possesses, and which the principal is estopped to deny. *The apparent authority, so far as third persons are concerned, is the real authority,* and when a third person has ascertained the apparent authority with which the principal has clothed the agent, he is under no further obliga-

tion to inquire into the agent's actual authority. The authority must, however, have been actually apparent to the third person, who, in order to avail himself of rights thereunder, *must have dealt with the agent in reliance thereon, in good faith and in the exercise of reasonable prudence,* in which case the principal will be bound by the acts of the agent performed in the usual and customary mode of doing such business, *although he may have acted in violation of private instruction, for such acts are within the apparent scope of his authority.*" (Italics ours.) *Trollinger v. Fleer,* 157 N. C., 81; *Powell v. Lumber Co.,* 168 N. C., 632; *Furniture Co. v. Bussell,* 171 N. C., 474; *Cardwell v. Garrison,* 179 N. C., 476; *Bobbitt Co. v. Land Co.,* 191 N. C., 323; *Sears, Roebuck & Co. v. Banking Co.,* 191 N. C., 500; *Bank v. Sklut,* 193 N. C., 589.

Page, in his valuable work on Contracts, Vol. 3, 2d Edition, part sec. 1760, at p. 3018, states the matter thus: "Outside of the class of public agents, the actual authority conferred by a principal *upon his agent is practically inaccessible to the public at large.* Accordingly, persons who do not know what the *agent's authority really is are justified in dealing with him upon the assumption that he has the authority which the principal indicates by his conduct that the agent possesses.* Thus dealing with the agent, such persons may hold the principal on contracts *outside the real authority of the agent, but inside his apparent authority.*" (Italics ours.)

In Couch Cyc. of Ins. Law, Vol. 2 (1929), pp. 1479-80, and part of sec. 517, is in full accord with the decisions of this and other courts on the subject. We find: "It is within the power of an insurance company, as between itself and its agent, to define and limit the powers of the latter, but it is equally well settled that the rights of innocent third parties dealing with an agent, within the apparent scope of his authority, cannot be affected by private instructions to such agent, of which they have no notice or knowledge, or by secret limitations upon his authority. In fact, it is clear that insurance companies are responsible for the acts of their agents within the general scope of their business entrusted to their care, and that no limitations of their authority will be binding on parties with whom they deal, which are not brought to the knowledge of those parties, especially where such persons rely in good faith upon his apparent authority. Undoubtedly, if an officer of an insurance company assumes to possess certain powers, and the nature of his employment justifies the assumption of authority, and the party dealing with him has no notice of want of the claimed authority, and there is nothing to warrant an inference to the contrary, the company is bound, even though he had no such power as claimed. And it would seem to be especially true, as it has been held, that limitations upon the powers of, or secret instructions to, a general agent do not bind third

persons dealing with him without notice thereof; also, that it is no defense that the general agent departed from private instructions when acting within the general scope of his authority, unless such instructions be made public, or the insured has notice, or unless the party dealing with the agent is, by reason of the attendant circumstances, or something in the nature of the business, or by custom, or by a course of dealing, or otherwise, put upon inquiry as to the exact limits of the agent's authority." *Bank v. Winder,* 198 N. C., 18; 7 R. C. L., "Corporations," secs. 621-622, pp. 625-626; 2 C. J., pp. 566-567-568, secs. 208-209.

On the second aspect the law is as follows, as stated in *Railroad v. Kitchin,* 91 N. C., 39 (44): "Where one of two persons must suffer loss by the fraud or misconduct of a third person, he who first reposes the confidence, or by his negligent conduct made it possible for the loss to occur, must bear the loss." *Barnes v. Lewis,* 73 N. C., 138; *Vass v. Riddick,* 89 N. C., 6; *Bank v. Liles,* 197 N. C., 413 (418); *Bank v. Clark,* 198 N. C., 169 (173); *Lightner v. Knights of King Solomon,* 199 N. C., 525 (528).

The defendant Indemnity Company contends, "The plaintiff was clearly charged with making an inquiry upon the presentation of a bond by an attorney in fact, which would have disclosed beyond any question that the agent had no authority whatever to execute the bond involved in this suit." We cannot so hold. The authorities above cited are to the contrary. The Indemnity Company made Stacey W. Wade & Son "its true and lawful agent and attorney in fact" broader than the Indemnity Company now contends. In this kind of insurance agency, we do not think the contention of the Indemnity Company well taken. *Bowers v. Lumber Co., supra.*

There are other matters discussed by the litigants, but we do not think them material to this controversy. For the reasons given, the judgment of the court below is

Reversed.

STATE v. MARVIN BRANCH AND R. T. SIDES, SURETY.

(Filed 21 November, 1934.)

Bail B e—Judgment against surety on ground that defendant had failed to appear in court as required held erroneous upon findings of court.

Judgment against defendant in a prosecution for abandonment was suspended upon condition that he pay into court for the benefit of his children a certain sum monthly and give bond for the cost and payment of the sum stipulated. Thereafter *scire facias* was issued against the surety on the bond solely on the ground that defendant had failed to appear in court as required by his bond, but the court found upon issuance

of the *scire facias* that the defendant had never failed to appear in court at any term as required: *Held*, upon the findings of the court upon issuance of the *scire facias*, judgment absolute against the surety in the penal sum of the bond was error.

CIVIL ACTION, before *Stack, J.*, at August Term, 1934, of CABARRUS.

At the August Term, 1933, Marvin Branch was tried in the Superior Court on charges of abandonment and nonsupport. He pleaded guilty of nonsupport of his children, "which plea was accepted by the State." The prayer for judgment was continued for two years upon condition that the defendant pay the cost, and the further condition that he pay the sum of $20.00 per month for the support of his two children, payable to the clerk of the court of Cabarrus County on or before the first day of each month for a period of two years; and upon the further condition "that he pay $20.00 of the cost at this term, and give bond to secure the balance to be paid at the October Term of court, 1933." Thereupon a bond was given in the sum of $300.00, signed by R. T. Sides as surety. This bond provided that Marvin Branch "shall make his personal appearance at the next term of this court and pay the cost of the court and $20.00 per month for the support of same. . . . This bond is to insure payment of above." At the October Term, 1933, the defendant Branch was sentenced to work the roads for a period of four months. Thereafter, at the January Term, 1934, the records show the following entry: "Order restored on motion of solicitor." Subsequently, at the April Term, 1934, the following entry was made in the case, to wit: "At this term, on motion of counsel for the State, the defendant was discharged and the cause transferred to the *scire facias* docket. Motion for *scire facias* against the defendant and surety on his bond is allowed. *Scire facias* to issue.

"The court finds as a fact, from information furnished him by counsel for the State, counsel for the defendant, and the clerk, that the defendant has never been called out or failed to appear here at any term since this case has been pending in the Superior Court."

Accordingly, a *scire facias* was issued to the surety, Sides, reciting a judgment *nisi* for $300.00 at the March Term, 1934, in favor of the State and against Marvin Branch and his surety, R. T. Sides, . . . "according to the provision of the act of the General Assembly, concerning bail, for the personal appearance at said term of our court of said Marvin Branch in the matter of the State *v.* Marvin Branch then pending in said Superior Court."

From the foregoing judgment the defendant appealed.

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

Hartsell & Hartsell for defendants.

PER CURIAM. No facts were found by the trial judge and no finding was requested by the defendant when the judgment absolute was entered on the *scire facias* against the surety. However, at the April Term, 1934, when the *scire facias* was issued, the trial judge found as a fact that the defendant Branch had never failed to appear at any term of court while the case was pending and before it was finally disposed of. The *scire facias* recites that the surety, R. T. Sides, "had become bound as bail, . . . for the personal appearance at the said term of our court of said Marvin Branch." Hence, it is obvious that the *scire facias* was apparently issued on the sole ground that the defendant Branch had failed to make his appearance as required by the terms of the bond.

Interpreting the record in the light of the findings of the judge at the April Term, 1934, that the defendant had always appeared as required, it would seem that the judgment absolute rendered was not justified.

Error.

W. L. DAVIS, EXECUTOR OF J. M. DAVIS, DECEASED, v. F. B. ALEXANDER, D. E. TURNER, AND J. W. VAN HOY, ADMINISTRATOR OF C. M. ALEXANDER, DECEASED.

(Filed 12 December, 1934.)

1. Bills and Notes C a—As against payee, person signing note as maker may show he signed same as surety to knowledge of payee.

As between the payee of a negotiable note and the signers thereof, a person signing his name on the face of the note may prove by parol evidence that to the knowledge of the payee he signed the same as surety and not maker, C. S., 2977, 3041, and the answer in this case, broadly construed, *is held* sufficient to allege the indispensable allegation that plaintiff payee knew that defendant signed the note as surety.

2. Limitation of Actions A c—Action against surety on note is barred in three years.

An action on a note under seal against a surety thereon is barred after the lapse of three years from the maturity of the note, or after three years from the expiration of an extension of time for payment binding on the surety. C. S., 441 (1).

3. Limitation of Actions C a—Payment by maker after action against surety is barred will not repeal bar of statute as to surety.

After the statute of limitations has barred the right of action by the payee of a negotiable note against the surety thereon, payment on the note by the maker thereof operates as a renewal only as to the maker, and does not repeal the bar of the statute as to the surety. C. S., 417.

4. Limitation of Actions E c—

Where defendant pleads the statute of limitations, the burden is on plaintiff to show that his action is not barred.

DAVIS *v.* ALEXANDER.

APPEAL by D. E. Turner from *Harding, J.*, at May Term, 1934, of IREDELL. Reversed.

The plaintiff, executor of J. M. Davis, deceased, brought this action against the defendants to recover $1,008.00, with interest from 1 January, 1933, on the following note: "800.00. Mooresville, N. C., 1 January, 1923. Twelve months after date, without grace, for value received, we, or either of us, promise to pay to the order of C. M. Davis, Executor J. M. Davis, eight hundred and no/100 dollars, negotiable and payable at the First National Bank of Mooresville, N. C., with interest at six per cent per annum until paid. The drawers and endorsers severally waive presentment for payment, and notice of protest, and nonpayment of this note, all defenses on the ground of any extension of the time of its payment that may be given by the holder or holders to them, or either of them. F. B. Alexander (Seal), C. M. Alexander (Seal), D. E. Turner (Seal).

"No..... Due 1 January, 1924. P. O., Mooresville, N. C." The following credits appear on the back of said note: "Received from F. B. Alexander interest to date, 1 January, 1924. Received interest to date, 1 January, 1925. Received interest from F. B. Alexander. Interest on note for 1926. Received of F. B. Alexander $50.00 Fifty Dollars on interest 3-3-30. Received $30.00 on interest 2-3-31."

The issue submitted to the jury and their answer thereto was as follows: "Are the defendants indebted to the plaintiff, and if so, in what amount? A. $1,008.00, with interest from 1 January, 1933."

The court below charged the jury, in part, as follows: "The plaintiff has offered the note in evidence, together with the credits thereon. The defendant has pleaded the statute of limitations. Now counsel for the defendant tell the court in the trial of this case, at the conclusion of the evidence, that if the plaintiff's right to recover against the defendant is not barred by the three-year statute of limitations, that you may answer the issue, $1,008.00, with interest from 1 January, 1933. The defendant has offered no evidence; it is not required to do so; therefore, the court charges you, gentlemen of the jury, upon all the evidence, if you believe it to be true, it would be your duty to answer the issue, $1,008.00, with interest from 1 January, 1933."

The material exceptions and assignments of error made by defendant D. E. Turner are to the judgment as signed and overruling his demurrer to the evidence and for motion for judgment as of nonsuit at the close of plaintiff's testimony. The defendant D. E. Turner duly made exceptions and assignments of error, and appealed to the Supreme Court.

Buren Jurney for plaintiff.
Grier, Joyner & Hartness for D. E. Turner.

CLARKSON, J. The defendant D. E. Turner 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. This motion was overruled, and in this we think there was error.

The note in controversy was dated 1 January, 1923, due at twelve months, payable to plaintiff's testator, under seal and signed by F. B. Alexander, C. M. Alexander, and D. E. Turner, for $800.00.

F. B. Alexander paid the interest up to 1 January, 1927, and as to these payments being made within three years, there is no question by defendant Turner as to the statute of limitation. The defendant Turner (1) contended he was surety on the note under seal. (2) As to him, it is barred by the three-year statute of limitation. The credit of $50.00 on the note, 5 March, 1930, was over three years from the previous payment of the note on which the interest was paid to 1 January, 1927. The present suit was instituted on 12 January, 1933.

The questions involved: Was the note under seal signed by D. E. Turner, under the facts and circumstances of this case, barred by the three-year statute of limitations? We think so.

Did a payment made by the maker of a note under seal, after three years, operate as a renewal to a surety on the note? We think not, under the facts and circumstances of this case.

N. C. Code, 1931 (Michie), sec. 2977, is as follows: "The person primarily liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are secondarily liable."

C. S., 3041, is as follows: "The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to endorse."

In *Howell v. Roberson,* 197 N. C., 572 (573-574), it is written, citing numerous authorities: "Under the law in this jurisdiction, all three who signed the note were joint makers and may be so held by the payee or holder of the note. C. S., 2977, 3041. As among themselves, they may ordinarily show by parol their respective liability to each other on the note. Coprincipals and cosureties are presumed to assume equal liability, but this presumption may be rebutted by parol evidence." *Trust Co. v. York,* 199 N. C., 625; *Stanley v. Parker, ante,* 159.

In *Williams v. Glenn,* 92 N. C., 253 (255-256), is the following: "In *Robinson v. Lyle,* 10 Barb. (N. Y.), 512, it was held that 'as between the makers of a promissory note and the holders, all are alike liable, all are principals; but as between themselves, their rights depend upon other questions, which are the proper subject of parol evidence. On the trial of an action, therefore, between the signers of such a note, it is right to receive extrinsic proof to show which of the parties signed the

note as principal and which as sureties.' To the same effect is *Sisson v. Barrett,* 2 Comst., 406.

"The distinction is this: As between the makers and payee of a note, it is made for the purpose of being the proof of the contract, and is the exclusive proof of the contract, and cannot be contradicted by extrinsic proof. The only exception to this rule is in the class of cases like *Welfare v. Thompson* (83 N. C., 276), and the other cases of that character cited above. But as between the signers, it was not made or intended to be exclusive proof of the agreement or relation between them. That may be shown by parol proof. . . . The fact is not overlooked that the decisions cited are mostly upon matters arising upon promissory notes. But the same reasons apply with equal force to sealed instruments." Citing numerous authorities, 65 A. L. R., 823.

In *Welfare v. Thompson, supra,* at p. 278, citing authorities, the exception is as follows: "We believe it is conceded that whenever it is proposed to prove that a copromisor or coöbligor to a note or bond is surety only, the fact not appearing upon the face of the instrument, it is competent to show by parol that fact, and that the creditor knew at the time he received the note that he was surety." *Hunter v. Sherron,* 176 N. C., 226 (228); *Kennedy v. Trust Co.,* 180 N. C., 225 (229); *Haywood v. Russell,* 182 N. C., 711 (713); *Chappell v. Surety Co.,* 191 N. C., 703 (708); *Taft v. Covington,* 199 N. C., 51; *Barnes v. Crawford,* 201 N. C., 434; *Furr v. Trull,* 205 N. C., 417.

The periods provided for the commencement of actions relative to this controversy are as follows: C. S., 437, within ten years. (2) "Upon a sealed instrument against the principal thereto."

C. S., 441, is as follows: "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."

In an action between sureties to a note, as between themselves, this can be shown by parol. *Gillam v. Walker,* 189 N. C., 189. So as to an endorser, *Dillard v. Mercantile Co.,* 190 N. C., 225, in these cases, the three-year statute of limitation applies. See *Waddell v. Hood, Comr., ante,* 250.

The present action is brought by plaintiff against the makers of the note under seal. The contract as written must ordinarily abide between the parties, but it can be shown by parol that a maker was a surety, known to the payee.

In the answer of defendant D. E. Turner it may be broadly construed that he set up the fact that plaintiff's testator knew that he signed the note as surety, that allegation is indispensable. *Manley v. Boycott,* 75 E. C. L., Rep. 45, cited in *Barnes v. Crawford, supra,* at pp. 437-8.

In plaintiff's reply he says: "That the defendant D. E. Turner, when he signed said note as surety for F. B. Alexander, expressly waived all

defenses on the ground of any extension of the time of the payment of said note that might be given by the holder or holders to the maker, or either of the parties to said note, as fully set forth on the face of said note." The payments were made by F. B. Alexander. There is no evidence of any definite extension of time. The defendant introduced no evidence.

The plaintiff introduced the note under seal, and also the following: "That on or about 1 July, 1923, the defendant F. B. Alexander, being indebted to the estate of J. M. Davis, deceased, in the sum of $800.00, made, executed, and delivered renewal note to the said C. M. Davis, one of the executors in the estate of J. M. Davis, deceased, his promissory note under seal, and due and payable twelve months after date, drawing interest at the rate of six per centum per annum from date until paid; that said note was signed on the face of said note under the principal's name by C. M. Alexander and D. E. Turner, as sureties.

"This portion of paragraph one of the defendant's further answer and defense: 'That he signed the note set out in the fifth paragraph of the complaint as surety for the said F. B. Alexander.'"

N. C. Code, 1931 (Michie), sec. 417, is as follows: "No act, admission, or acknowledgment by partner after the dissolution of the copartnership, or by any of the makers of a promissory note or bond after the statute of limitations has barred the same is evidence to repel the statute, except against the partner or maker of the promissory note or bond doing the act or making the admission or acknowledgment."

N. C. Practice and Procedure in Civil Cases (McIntosh), sec. 134, pp. 126-127, is as follows: "Where there are several persons bound for the same obligation, as partners, surety, and principal, or joint debtors, and a new promise or payment is made by one, the rule as to its effect upon the liability of the others has not been uniform. In some cases it has been held that it would affect only the person making it; in others, that it would affect all; and in others, that it would affect all only when made while the obligation was still in force.

"In this State it was held that, in the case of partners and other joint obligors, the act of one would bind all, until the act of 1852, which is also the present law, provided that no act or acknowledgment of a partner after the dissolution of the partnership, or of any of the makers of a note or bond after the statute of limitations has barred the same, shall be evidence to repel the statute, except as against the person doing the act or making the acknowledgment. Under this statute, no new promise or a payment by a partner, after the dissolution of the partnership, will have any effect to bind the other partners.

"As to coöbligors on a note, it was held that a payment by one before the debt was barred would extend the time as to the other, but a promise

to pay would not have that effect. This rule as to payment has been applied to all coöbligors who come within the same class as original makers of the instrument, having a community of interest and a common obligation. A payment by a principal or surety, before the debt is barred, will continue the obligation as to both. But the rule would not apply to obligors in different classes, as endorsers and makers. Under a former statute, endorsers were made liable as sureties, and a payment by the principal extended the liability of the endorser; but this has been changed by the Negotiable Instrument Law, and a payment by the principal will not affect the endorser." *Houser v. Fayssoux,* 168 N. C., 1, is not contrary to the position here taken.

Where defendant pleaded the statute of limitations, plaintiff had burden to show that action was timely commenced or otherwise was not barred. *Marks v. McLeod,* 203 N. C., 257; *Moore v. Charlotte,* 204 N. C., 37; *Wilkes County v. Forester,* 204 N. C., 163; *Drinkwater v. Western Union Tel. Co.,* 204 N. C., 224; *Aldridge v. Dixon,* 205 N. C., 480.

From the statute above quoted, C. S., 417, a payment made by the maker of the note under seal, F. B. Alexander, after the bar of the statute operates as a renewal as to himself only. It was alleged by plaintiff, and admitted, that D. E. Turner was a surety on the note under seal, and known to plaintiff's testator, therefore the three-year statute was applicable. See *Bank v. Hessee, ante,* 71; *Piano Co. v. Loven, ante,* 96.

For the reasons given, the judgment of the court below must be

Reversed.

W. J. BUNDY, GUARDIAN OF J. W. SUTTON, SR. (J. W. SUTTON, SUBSTITUTED IN HIS OWN BEHALF), v. SARAH E. SUTTON, DEPOSED GUARDIAN OF J. W. SUTTON, SR., L. W. TUCKER, RECEIVER OF J. W. SUTTON PROPERTY, JOE SUTTON, GUY SUTTON, W. H. WOOLARD, TRUSTEE, GREENVILLE BANKING AND TRUST COMPANY, H. L. HODGES, F. C. HARDING, TRUSTEE, VIRGINIA-CAROLINA CHEMICAL CORPORATION, F. M. WOOTEN, TRUSTEE, AND NORA PATRICK AND J. H. WALDROP.

(Filed 12 December, 1934.)

1. Trial G e—Trial court has no power to amend the verdict of the jury.

The parties have a substantial right in the verdict of the jury, and while the trial court has the power to set aside the verdict in his discretion or as a matter of law to prevent miscarriage of justice, or to allow the jury to correct their verdict with his approval, or to dismiss the action irrespective of the verdict where the plaintiff is not entitled to

recover on any aspect of the case, the trial court does not have the power to reverse or amend the verdict of the jury by "setting it aside" as to some of the defendants as being against the weight of the evidence while rendering judgment against the other defendants upon the verdict.

2. Trial G b—

The verdict of the jury will be construed in the light of the pleadings and charge of the court.

3. Appeal and Error J e—Amendment of verdict by trial court held not harmless error under facts of this case.

In this case the jury found that nine of the defendants entered a conspiracy to suppress the bidding at the foreclosure sale of plaintiff's land in order that the two defendants to whom the last and highest bid was transferred, and to whom the property was finally conveyed, might acquire the property at a grossly inadequate price, and found in a separate issue that the two defendants to whom the land was finally conveyed conspired together to this end. The trial court amended the verdict by "setting it aside" as to the trustee in the deed of trust foreclosed, and as to certain other of the defendants, on the ground that as to them the verdict was against the weight of the evidence. Judgment was entered that the transferees of the title held title as trustees *ex maleficio* for the benefit of plaintiff: *Held*, construing the verdict in the light of the pleadings and charge, the amendment of the verdict by the court must be held for prejudicial error, since it cannot be ascertained that the jury would have found the transferees guilty of conspiracy when title to the property was outstanding in the trustee who sold same on the open market with no agreement, express or implied, that the transferees should become the purchasers.

CIVIL ACTION, before *Frizzelle, J.*, at March Term, 1934, of PITT.

Prior to 1927 the plaintiff J. W. Sutton, Sr., was the owner of certain land in Pitt County, containing approximately 350 acres, and ten teams, farming implements necessary to cultivate a twenty-horse farm, and had on hand approximately 100 bales of cotton. In addition, it was alleged that he had approximately $3,000.00 in cash on deposit in the National Bank of Greenville. In the fall of 1927 the mind of J. W. Sutton, Sr., became impaired. Thereupon his wife, the defendant Sarah E. Sutton, was duly appointed guardian for her husband, and she undertook as such to operate the farm. Mr. and Mrs. Sutton had several children, to wit, Joe Sutton, Guy Sutton, Charlie Sutton, Bessie Willoughby, Fannie Lloyd, James Sutton, Clara Todd, and Roy Sutton. In the spring of 1930 Mrs. Sarah Sutton was removed as guardian and Mr. L. W. Tucker was appointed receiver of the estate of the incompetent in May, 1930. After Tucker was appointed receiver, by virtue of an order of court he was authorized and directed to borrow the sum of $6,500.00, to be used in operating and cultivating the lands of J. W. Sutton, incompetent. Thereupon the receiver executed and delivered a deed of trust to W. H. Woolard, trustee, for the Greenville Banking and Trust Company. This deed of trust is dated 23 February, 1931, and

covered land, crops, "with all teams, including twelve mules now on said farm, and farming utensils." The deed of trust to Woolard, trustee, contained a power of sale in the event of default and was duly registered. The note for $6,500.00 was endorsed by the defendant H. L. Hodges.

The receiver paid approximately $3,000.00 of said indebtedness, but was unable to pay the remainder, amounting to $3,500. Thereafter, in January, 1932, the defendant Woolard, trustee, under the deed of trust heretofore mentioned, advertised the land and personal property for sale. At the sale the defendant Nora Patrick, through her attorney, the defendant F. M. Wooten, appeared and bid the sum of $2,597.00 for the land. Within ten days after such sale the defendant Virginia-Carolina Chemical Company raised the bid as provided by law, and the land was readvertised and sold on 10 March, 1932, at which sale the defendant J. H. Waldrop, cashier of the Greenville Bank and Trust Company, bid the sum of $2,750.00. No increased bid was placed upon the purchase price and Waldrop having assigned his bid to Joe Sutton and Guy Sutton, Woolard, trustee, executed and delivered to Joe Sutton and Guy Sutton a deed for the land. The personal property was sold on 2 February, 1932, and was purchased by W. H. Dail, Jr., for the sum of $310.00.

Thereafter, on 28 March, 1932, Joe Sutton and Guy Sutton executed and delivered to W. H. Woolard, trustee, a deed of trust upon the land to secure a note of $3,331.83, payable to H. L. Hodges, at the Greenville Banking and Trust Company. This deed of trust covered the land and personal property theretofore sold by Woolard, trustee. On the same date the said Joe Sutton and Guy Sutton executed and delivered to F. M. Wooten and F. C. Harding a mortgage securing a note of $1,750.00 to Nora Patrick, a note for $450.00 to H. L. Hodges, and a note for $2,153.70 to the Virginia-Carolina Chemical Company.

Subsequently, plaintiff W. J. Bundy was duly appointed guardian of J. W. Sutton, Sr., and instituted the present action against all the defendants, alleging in substance that all the defendants named entered into a conspiracy and "did unlawfully, illegally, and fraudulently collude and connive together to the end that the appeal from the order dissolving the restraining order should be abandoned, that the trustee, W. H. Woolard, should proceed with the sale of the lands, that the said J. H. Waldrop should place a bid on the land just a little higher than the raised bid of the Virginia-Carolina Chemical Corporation, that in time he should transfer and assign his bid to Joe and Guy Sutton, for whom in fact he was to do the bidding, and that none of the other defendants would place any bid on said lands, and that they would suppress the bidding on said lands and let the said Joe and Guy Sutton bid same in as aforesaid, that the Greenville Banking and Trust Com-

pany would immediately, upon closing of the sale, accept from the said Joe and Guy Sutton note, or notes, secured by deed of trust on said lands for the full amount of the indebtedness at the time of the sale, and carrying same for them, that the said Joe and Guy Sutton, after executing to the bank said paper for the amount of the bid, or what was due at the time of the sale on note held by the bank, would then execute to F. M. Wooten and F. C. Harding, trustees, a deed of trust on said lands to secure the payment of notes for the amount claimed to be owing to Virginia-Carolina Chemical Company and Nora Patrick by Sarah E. Sutton, guardian of J. W. Sutton, and that they would further secure the amount claimed to be owing to H. L. Hodges, or, in other words, they unlawfully and illegally connived and colluded together to change the title to said lands without the payment of one cent of money by the purchasers, and that each and every one who professed to hold a claim should be secured by a mortgage on the lands, to be executed by the purchasers, regardless of what the lands brought at the sale, and regardless of whether the purchasers were indebted to those to whom they were to give security or not. In pursuance of said unlawful, illegal, and fraudulent connivance and collusion on the part of said defendants, the said trustee did in fact readvertise said lands . . . and thereafter the said J. H. Waldrop did unlawfully, illegally, and fraudulently . . . transfer and assign said bid to Joe and Guy Sutton," etc. After suit was instituted by Bundy, J. W. Sutton was duly and legally declared to be sane, and upon his petition it was ordered that he be made a party plaintiff to the suit.

The defendants filed answers denying any conspiracy or unlawful agreement to deprive J. W. Sutton of his lands, and at the trial much evidence was offered by both sides.

When the plaintiff rested all the defendants moved for judgment of nonsuit. This motion was allowed as to the defendants F. M. Wooten and F. C. Harding, and denied as to all other defendants.

The following issues were submitted to the jury:

"1. Did the defendants Sarah E. Sutton, Joe Sutton, Guy Sutton, Greenville Banking and Trust Company, W. H. Woolard, trustee, H. L. Hodges, J. H. Waldrop, Nora Patrick, and Virginia-Carolina Chemical Corporation illegally and fraudulently collude and conspire together to suppress the bidding at the sale of the J. W. Sutton lands under the Tucker, receiver, deed of trust to W. H. Woolard, trustee, as alleged in the complaint?

"2. Did the defendants Joe Sutton and Guy Sutton illegally and fraudulently collude and conspire together to acquire title to the lands of J. W. Sutton at an unfair, inequitable, and grossly inadequate price, as alleged in the complaint?

"3. Did the defendants Sarah E. Sutton, Joe Sutton, Guy Sutton, Greenville Banking and Trust Company, W. H. Woolard, trustee, H. L. Hodges, J. H. Waldrop, Nora Patrick, and Virginia-Carolina Chemical Corporation, by means of said illegal and fraudulent conspiracy and collusion, enable Joe Sutton and Guy Sutton to acquire title to the lands of J. W. Sutton at an unfair, inequitable, and grossly inadequate price, as alleged?

"4. Did the defendants Joe Sutton and Guy Sutton, by means of said illegal and fraudulent collusion and conspiracy, acquire title to the lands of J. W. Sutton at an unfair, inequitable, and grossly inadequate price, as alleged?

"5. Did the defendants Joe Sutton and Guy Sutton illegally and fraudulently collude and conspire together to acquire title to the personal property of J. W. Sutton, sold by W. H. Woolard, trustee, at an unfair, inequitable, and grossly inadequate price, as alleged?

"6. Do the defendants Joe Sutton and Guy Sutton hold title to the lands conveyed to them by W. H. Woolard by deed dated 28 March, 1932, as trustees *ex maleficio* for the use and benefit of J. W. Sutton, as alleged?

"7. Do the defendants Joe Sutton and Guy Sutton hold title to the personal property sold by W. H. Woolard, to wit, nine mules, three wagons and three sets of harness, as trustees *ex maleficio* for the use and benefit of J. W. Sutton, as alleged?"

The jury answered the first, second, third, fourth, and fifth issues "Yes." The trial judge instructed the jury that he would answer the sixth and seventh issues after the jury had determined the proper answers to the first five issues.

After the verdict was returned the record shows the following: "The defendants W. H. Woolard, J. H. Waldrop, H. L. Hodges, and Greenville Banking and Trust Company having moved the court to set aside the verdict of the jury as to them in answer to the first and third issues on the grounds that said answers were contrary to the weight of the evidence, and the court being of the opinion that said motion should be allowed, in its discretion set aside the verdict of the jury in answers to the first and third issues as to W. H. Woolard, J. H. Waldrop, H. L. Hodges, and Greenville Banking and Trust Company."

Judgment was entered as shown in the record and the defendants Sarah E. Sutton, Joe Sutton, Guy Sutton, Nora Patrick, and Virginia-Carolina Chemical Corporation appealed.

Gaylord & Harrell for plaintiff.
Albion Dunn for Joe Sutton and Guy Sutton.
Blount & James for Virginia-Carolina Chemical Company.
F. M. Wooten for Nora Patrick.

BROGDEN, J. Has the trial judge the power to make material amendments to a verdict, as rendered by the jury and accepted, and thereupon enter judgment upon such verdict so amended?

A verdict is a substantial right. A trial judge in the due and orderly administration of justice has the power to set a verdict aside in his discretion or as a matter of law, and it is his duty to do so when a palpable miscarriage of justice would result. The ultimate objective of the law is to guarantee justice to all the parties. A trial is the process ordained and sanctioned for realizing that objective. A jury in proper cases may correct its verdict with the approval of the court in the event the verdict does not correctly express the actual agreement of the jury. *McCabe Lumber Co. v. Beaufort County Lumber Co.*, 187 N. C., 417, 121 S. E., 755; McIntosh North Carolina Practice and Procedure, p. 665, sec. 603. See, also, *Cole v. Laws*, 104 N. C., 651, 10 S. E., 172; *Willoughby v. Threadgill*, 72 N. C., 438.

In the case at bar, in answer to the first and third issues, the jury found that nine of the defendants had conspired to suppress bidding at the sale, and that by reason of such illegal conspiracy had enabled Joe Sutton and Guy Sutton to acquire title to the lands of their father at a grossly inadequate price. The trial judge amended the verdict upon these issues by eliminating four of the alleged conspirators, or as stated in the record, "set aside the verdict of the jury as to them." "While a change merely as to form is not fatal, the court cannot amend or change a verdict in any matter of substance without the consent of the jury, and cannot do so with their consent after the verdict has been finally accepted and recorded." *S. v. Snipes*, 185 N. C., 743, 117 S. E., 500. It was also held in *Rankin v. Oates*, 183 N. C., 517, 112 S. E., 32, that the "court was without authority to reverse the jury's finding on the second issue, answer it himself, and then render judgment on the verdict as amended." Also, in *Sitterson v. Sitterson*, 191 N. C., 319, 131 S. E., 641, it was held that "the court had the power to set aside the verdict, but none to reverse the answers of the jury." See, also, *Bartholomew v. Parrish*, 186 N. C., 81, 118 S. E., 899; C. S., 591. Of course, if the plaintiff is not entitled to recover upon any aspect of the case, the trial judge has the power to dismiss the action despite the verdict of the jury. *Sitterson v. Sitterson, supra.* Moreover, in cases in which a plaintiff is entitled to recover as a matter of law, irrespective of the answer of the jury to certain issues, a judgment will not be upset even though the trial judge struck out an answer of the jury to a certain issue and substituted an answer of his own. This principle was applied in *Sprinkle v. Wellborn*, 140 N. C., 163, 52 S. E., 666. *Justice Walker*, the author of the opinion, remarked: "It was error in doing so, but not reversible error. The court had the power to set aside the verdict, as

to that issue, that is *pro tanto,* but none to reverse the answer of the jury. This was an invasion of their province, but the defendant cannot complain of it, as it worked no material injury in law to him."

Consequently, it might be asserted by the plaintiff in the present action that as Joe and Guy Sutton now hold the title to their father's land, and such deed has been set aside, that they have no right to complain because other conspirators were erroneously eliminated from the verdict. A verdict must be construed in the light of the pleadings and charge of the court. When the verdict in the case at bar is so construed it is not clear that the jury would have found Joe Sutton and Guy Sutton guilty of conspiracy when the title to the property was outstanding in Woolard, trustee for the bank, and such trustee duly sold the property as required by law in the open market and with no agreement or understanding, express or implied, that the Suttons should become the purchasers.

Therefore, viewing the case in the light of the pleadings, evidence, and charge of the trial judge, it is the opinion of this Court that the amendment of the verdict was erroneously entered, and for such error a new trial is awarded. In awarding a new trial this Court does not decide any other exception appearing in the record to the end that the case may be retried wholly upon its merits, free from intimation upon all assignments of error contained in the record.

New trial.

R. L. SHUFORD, SR., AND R. L. SHUFORD, JR., v. GREENSBORO JOINT-STOCK LAND BANK, O. D. BARRS, SHERIFF, AND L. M. EPPS, JUSTICE OF THE PEACE, OF CATAWBA COUNTY.

(Filed 12 December, 1934.)

1. Mortgages H j—Purchase of property by mortgagee at foreclosure is voidable and not void.

The purchase of property by a mortgagee at the foreclosure of the mortgage, or the purchase of the property by an officer of the mortgagee and his transfer of the property to the mortgagee is not void, but is voidable at the option of the mortgagor.

2. Same: Landlord and Tenant C b—Mortgagors held estopped by their conduct from attacking title of mortgagee on ground that he purchased property at his own foreclosure sale.

Upon the foreclosure of a mortgage on plaintiff's land an officer of defendant bank, the mortgagee, bid in the property, and later conveyed the property to the bank. Thereafter the mortgagors procured the bank to lease the property to a third person for their benefit, and later procured the bank to lease the property to them and entered a consent judgment in

which they admitted that the title to the land was in the bank, and acknowledged that their only claim to the land was under their lease: *Held*, the mortgagors are estopped by their conduct from attacking the title of the bank on the ground that in effect the bank bought the property at the foreclosure sale of its own mortgage, the title of a mortgagee bidding in the property at his own sale being voidable and not void, and the mortgagors, by their conduct, having confirmed and ratified the bank's title.

3. Ejectment B a—Justice of the peace held to have had jurisdiction under provision of C. S., 2365, et seq.

A suit to restrain execution on a judgment in summary ejectment by a justice of the peace, on the ground that the justice had no jurisdiction, is properly dismissed where it appears that plaintiff, formerly the mortgagor of the property, had leased the property and was estopped from attacking the foreclosure and setting up the relation of mortgagor and mortgagee. C. S., 2365, *et seq.*

4. Appeal and Error E h—

The rights of a person not made a party to the action cannot be adjudicated on appeal.

APPEAL from judgment of *Harding, J.*, entered at Chambers in Charlotte, 3 August, 1934, dissolving a restraining order in an action pending in CATAWBA. Affirmed.

The plaintiffs seek to restrain the defendants from ejecting them from the land described in the complaint by means of an execution issuing out of the court of a justice of the peace, for that the said justice of the peace was without jurisdiction to determine the rights of the parties thereto in a suit in summary ejectment, alleging that the relationship existing between said parties was not that of landlord and tenant, but that of mortgagor and mortgagee.

The cause came on to be heard upon a notice to show cause why the temporary restraining order should not be made permanent, and judgment was entered vacating such order, and the plaintiffs appealed to this Court, assigning errors. The determinative facts are set forth in the opinion.

W. A. Self and Russell W. Whitener for appellants.
W. C. Feimster and J. C. Rudisill for appellees.

SCHENCK, J. Upon sufficient evidence his Honor found substantially the following facts:

On 17 January, 1924, R. L. Shuford, Sr., one of the plaintiffs, and his wife, Cora Shuford, executed to the defendant Land Bank a mortgage for the sum of $28,000 to secure the payment of their certain promissory note in like amount, and that later the said Shuford and wife defaulted in the payment of a portion of said indebtedness, and because of said

failure to pay, in accordance with the terms of said mortgage, all of the balance of the indebtedness became due and payable; that on 23 February, 1932, the said defendant Land Bank, pursuant to the power contained in the mortgage, sold the land in controversy at public auction, and that C. E. Fleming became the last, highest, and only bidder therefor at the sum of $28,000, which sale was reported to the court and confirmed; and thereafter, on 27 April, 1932, the defendant bank, as mortgagee, conveyed said land to said Fleming, and later, namely, on 7 May, 1932, said Fleming conveyed the said land to said Land Bank for the recited consideration of $10.00, and that the said Fleming was all the while an officer of said bank. The court further found that, on 29 March, 1932, the defendant Land Bank leased said land for a crop season to one J. W. Abernethy for the benefit of the plaintiffs, and one year later, on 29 March, 1933, the defendant Land Bank leased said land for a crop season to the plaintiffs, in which lease the plaintiffs agreed to vacate said premises upon the expiration of said lease on 31 December, 1933, and that the plaintiffs paid the rental due under their lease for only one month, failing to pay the balance due of $100.00 per month for six months; that on 29 November, 1933, the defendant bank had written notice served upon said plaintiffs to vacate said property on or before 31 December, 1933, in accordance with their written lease. That prior to the lease to said plaintiffs on 29 March, 1933, the defendant bank had instituted before its codefendant L. M. Epps, a justice of the peace, a suit in summary ejectment against said Abernethy and the plaintiffs in this action, and, upon the execution of said lease to the plaintiffs, a consent judgment was entered in said ejectment proceeding wherein the defendants in that action, the plaintiffs in this action, admitted that said Land Bank was the owner in fee of said land and acknowledged that their only claim, right, title, or interest therein was such as was given them by reason of the lease to them by said Land Bank.

That upon the failure of the plaintiffs to vacate the land in controversy the defendant Land Bank again instituted suit in summary ejectment before the said L. M. Epps, justice of the peace, against the said R. L. Shuford, Sr., and R. L. Shuford, Jr., for the possession of the premises in question, in accordance with the terms of said lease of 29 March, 1933; and on or about 16 April, 1934, judgment was entered by said justice of the peace to the effect that the defendants be removed from said premises and that the Land Bank be put into possession thereof, from which judgment the defendants, the plaintiffs in this action, while they gave notice thereof, failed to perfect an appeal to the Superior Court; and the Land Bank, at the July Term, 1934, of the Catawba County Superior Court, had said appeal docketed and dismissed in accordance with the statute.

That on 3 May, 1934, at the request of the defendant bank, the said L. M. Epps, justice of the peace, issued an execution directing O. D. Barrs, sheriff of Catawba County, to dispossess the defendants R. L. Shuford, Sr., and R. L. Shuford, Jr. (the plaintiffs in this action), and to place the Greensboro Joint-Stock Land Bank in possession thereof, which execution was held for more than sixty days and returned not executed on account of the illness of the wife of R. L. Shuford, Sr.

That in the meantime a receiver of the crops grown on the land in controversy was appointed by the resident judge of the 16th Judicial District; and that on 14 July, 1934, a temporary restraining order was signed by the said resident judge requiring the defendant L. M. Epps, justice of the peace, to appear and show cause why he should not be required by writ of *mandamus* to recall the execution and directing the said Barrs, sheriff as aforesaid, not to eject the plaintiffs from the lands in question and directing the defendant Greensboro Joint-Stock Land Bank to show cause why it should not be enjoined from ejecting or attempting to eject the plaintiffs in this action.

That at the hearing upon the notice to show cause plaintiffs filed affidavits tending to show that in said mortgage to the bank are embraced a 13-acre tract and a 42-acre tract, which were the separate estate of Cora Shuford, wife of R. L. Shuford, Sr., upon the smaller of which was situated the residence of the said wife, which affidavits were not controverted; and that the said Cora Shuford did not sign any lease of the lands in controversy or any paper-writing in respect to said land after the execution of the mortgage, and that the said Cora Shuford was not a party to this action; and that the leases and agreements hereinbefore referred to were not under seal.

And withal it appears from the record that no fraud in the sale under the power in the mortgage is alleged or any proof or suggestion of fraud made at the hearing, and that the $28,000 bid by Fleming at said sale was more than anyone else would bid at the time thereof, or at any time subsequent thereto, and is more than the land would bring if again offered at public auction.

The plaintiffs, appellants, contend that under the foregoing facts the relationship of mortgagor and mortgagee was still subsisting between the plaintiffs and the defendant Land Bank at the time the judgment ejecting them was entered by L. M. Epps, justice of the peace, and, as equitable rights and questions of title were involved, said justice of the peace was without jurisdiction to enter said judgment, and that the same, as well as the execution based thereupon, was therefore void and of no effect.

The defendants, on the contrary, contend that under the foregoing facts the relationship of landlord and tenant existed between the defendant bank and the plaintiffs at the time the judgment ejecting the plain-

tiffs was entered, and that therefore the right to institute a suit in summary ejectment before a justice of the peace was open to the said bank, and that therefore said judgment and execution are in all respects valid.

While it may be true that where a director or an officer of a corporation buys land sold under mortgage by the corporation, he is presumed to have bought for the corporation and acquires only the legal title, and that the mortgagor still holds the equity of redemption. *Craft v. Mechanics' Home Association*, 127 N. C., 163, and that if such director or officer conveys the legal title to the corporation, that the mortgagor still retains the equity of redemption; and if nothing else appeared than the sale of the land described in the mortgage, under the power therein, by the Land Bank to Fleming, one of its officers, and by Fleming to the Land Bank, the deed to Fleming and the deed by him to the Land Bank would be voidable at the option of the plaintiffs, mortgagors. However, the record in this case shows, and his Honor so finds, that after the sale was made to Fleming under the power in the mortgage, the Land Bank leased the lands in controversy to one Abernethy for the benefit of the plaintiffs; and that after the land was conveyed by Fleming to the Land Bank the Land Bank leased said lands to the plaintiffs, and that the plaintiffs contracted and agreed in said lease to pay a monthly rental and to vacate the land upon the expiration of the lease; and that at the same time this last-named lease was entered into the plaintiffs in this case consented, in a previous suit in summary ejectment, to a judgment removing them from said land and acknowledged therein that the only right or title which they had to said land was such right or title as they had by virtue of the lease to them by the defendant Land Bank, which they also admitted in said consent judgment to be the owner in fee simple of the said land; that said last-named lease and said consent judgment were entered into on 29 March, 1933, more than a year after the sale under the power on 23 February, 1932, and plaintiffs occupied said lands under said lease until the expiration thereof on 31 December, 1933.

In the case of *Joyner v. Farmer*, 78 N. C., 196, cited in the briefs of both parties to this action, it is said: "The sale of the mortgagee (*i.e.*, the sale under the power in the mortgage by the mortgagee to himself) is not void, but only voidable, and can be avoided only by the mortgagor or his heirs or assigns. . . . The estate of the mortgagee acquired by the sale, being voidable only, may be confirmed by any of the means by which an owner of a right of action in equity may part with it:

"1. By a release under seal, as to which nothing need be said.

"2. Such conduct as would make his assertion of his right fraudulent against the mortgagee, or against third persons, and which would, therefore, operate as an estoppel against its assertion.

"3. Long acquiescence after full knowledge; . . ."

The action of the plaintiffs in procuring from the defendant bank the lease to Abernethy for their benefit, and procuring the later lease to themselves from said bank, and in entering into the consent judgment in which they admitted that the title was in the Land Bank and acknowledged that their only claim was by virtue of a lease from said bank, was such conduct as makes their assertion of any right to have declared void the deed made under the power to Fleming, or the deed to the Land Bank by Fleming, fraudulent against said Land Bank, and therefore operates as an estoppel against such assertion. The estate of the Land Bank, acquired through the sale under the power in the mortgage, being, in the first instance, only voidable at the option of the plaintiffs, mortgagors, they have by their conduct and acquiescence confirmed and ratified such estate, and are now estopped to deny the title of the bank, mortgagee.

We are of the opinion that the relationship existing between the defendant Land Bank and the plaintiffs at the time the judgment of the justice of the peace was entered and at the time the execution therein was issued was not that of mortgagee and mortgagor, but was that of landlord and tenant, and that said judgment and execution were entered and issued by a court of competent jurisdiction—in fact, by the only court that has original jurisdiction of suits in summary ejectment between landlord and tenant, that of a justice of the peace, C. S., 2365, *et seq.;* and we therefore conclude that there was no error in his Honor's judgment dissolving the restraining order which sought to have the judgment and execution of the justice of the peace declared a nullity.

We do not here attempt to adjudicate any of the rights of Cora Shuford, wife of R. L. Shuford, Sr., for the reason that she has never been made a party to this action.

Affirmed.

A. T. MOORE, TREASURER OF PITT COUNTY, N. C., v. FIDELITY AND CASUALTY COMPANY OF NEW YORK, GURNEY P. HOOD, COMMISSIONER OF BANKS, ET AL.

(Filed 12 December, 1934.)

1. Limitation of Actions B g—Suit for reformation held instituted as of date of amendment of complaint to state cause of action therefor.

Defendant surety company issued its bonds securing county funds on deposit in a bank. Upon the loss of the funds through the insolvency of the bank, suit was instituted on the bonds. Part of the county funds were on general deposit and part were represented by certificates of deposit, and defendant surety company set up the defense that the bonds

contained a clause which provided that funds represented by certificates of deposit should not be covered by the bonds. Thereafter plaintiff was allowed to amend his complaint so as to allege that the clause exempting certificates of deposit was inserted through the mutual mistake of the parties and that the clause should be eliminated therefrom: *Held*, suit for reformation of the bonds was instituted as of the date of the amendment of the complaint.

2. Reformation of Instruments A a—

Equity has the power to reform instruments for mutual mistake of the parties, or for mistake of one party induced by the fraud of the other, in order to make the instruments express the true intent of the parties.

3. Limitation of Actions B b—

A cause of action for reformation of an instrument for fraud or mistake accrues when the fraud or mistake is discovered, or when it should have been discovered in the exercise of due diligence.

4. Same—Cause of action for reformation of bonds held barred by three-year statute under facts of this case.

Bonds securing county funds on deposit in a bank contained a clause stipulating in unequivocal terms that the bonds should not cover county funds represented by certificates of deposit. The county treasurer brought suit on the bonds to recover funds of the county on general deposit and funds represented by certificates of deposit, and sought to have the bonds reformed by eliminating the clause exempting certificates of deposit because of the mutual mistake of the parties. Defendant surety company pleaded the three-year statute of limitations, C. S., 441 (9), it appearing that the action was begun some five years after the delivery of the bonds. Plaintiff alleged in his reply that the clause exempting certificates of deposit was not discovered until after the failure of the bank in which the county funds were deposited: *Held*, the actual time of the discovery of the alleged mistake is not determinative, but the cause of action for reformation of the bonds accrued when the mistake should have been discovered by plaintiff in the exercise of due diligence, and plaintiff being an educated man, and there being no evidence of any effort to conceal the plain language of the bonds or to prevent plaintiff from reading them, plaintiff's cause of action was barred by the statute.

CIVIL ACTION, before *Daniels, J.*, at First May Term, 1934, of PITT.

Plaintiff alleged that he was the treasurer of Pitt County, and that on or about 5 May, 1927, the defendant Fidelity and Casualty Company, through its agent in Pitt County, North Carolina, executed and delivered its Bond No. 1159556, in the sum of $10,000, in favor of A. T. Moore, treasurer of Pitt County, and the term of said bond began 5 May, 1927. On or about 20 February, 1928, the said defendant issued to the said treasurer Bond No. 1162964 in the penal sum of $6,000, and the term of said bond began on 20 February, 1928. It was further alleged that the purpose of securing said bonds was to protect public funds of Pitt County in the hands of said Moore, treasurer, and de-

posited by said treasurer in the Citizens Bank of Farmville, North Carolina. Section 2 in each of said bonds was as follows: "The company shall not be liable hereunder for the payment of any sum due upon any certificate of deposit issued by the bank." The Citizens Bank of Farmville failed on 8 December, 1930, and at the time of such failure the plaintiff, as treasurer, had on deposit in said bank to his credit, subject to check, the sum of $4,000, and on Certificate of Deposit No. 2432, dated 19 June, 1930, and due 19 September, 1930, $15,541.50. The defendant filed an answer, pleading as a defense the provisions of said bond exempting liability for certificates of deposit. Thereafter, on or about 14 October, 1933, pursuant to an order of court, the plaintiff amended his complaint, alleging, among other things, that said bonds were intended to cover all deposits held by the plaintiff treasurer in the Bank of Farmville, and "that the execution and delivery of the bonds sued upon, with said provision therein, was a mutual mistake which was understood by the defendant company, said company knowing the requirements of the plaintiff, and that it understood that it was the intention and purpose of said bonds to protect all amounts so deposited with the Citizens Bank; . . . and that the delivery of the bonds sued upon was a mistake which was mutual, and in fairness, in law, equity, and good conscience, should be corrected to comply with the conditions established by this plaintiff before any deposits were made, and that section two should be eliminated therefrom."

The defendant interposed the plea of the statute of limitations to the cause of action for correction or reformation set up in the amended complaint. At the trial it was admitted, and the court found as a fact, that the Citizens Bank of Farmville suspended business on 8 December, 1930, and at the time of such suspension the plaintiff had on deposit therein $4,000, subject to check, and $15,833.33 evidenced by certificate or certificates of deposit. The court further found as a fact that summons in this action was issued and complaint filed on 5 December, 1931, and that the amendment to the complaint was filed on or about 14 October, 1933, pursuant to an order of court. The plaintiff offered certain oral evidence that other depository bonds had been furnished carrying full coverage and without a clause similar to the one contained in the bonds in controversy; and, further, that the agent of the surety company was told at the time the bonds were issued that the plaintiff treasurer desired full coverage upon all amounts in the bank. The trial judge excluded all such evidence, and upon the facts found by him entered judgment that the plaintiff recover of the surety company the amount of the general deposit, and that he recover of Commissioner of Banks the amount represented by the certificates of deposit.

From judgment so rendered plaintiff appealed.

J. B. James for plaintiff.
Ruark & Ruark for defendants.

BROGDEN, J. The controlling questions of law are these:

1. When was the action for the reformation and correction of the indemnity contracts begun?

2. Is such cause of action barred by the statute of limitations?

The depository bonds involved in this litigation contain a clause worded as follows: "The company shall not be liable hereunder for the payment of any sum due upon any certificate of deposit issued by the bank." It was admitted, and found as a fact by the trial judge, that $15,833.33, in the bank at the time of closing to the credit of plaintiff treasurer, was evidenced by certificate or certificates of deposit, and therefore not within the protection of the bond so long as the language above quoted constituted an essential and material part thereof.

"It is accepted doctrine that when the parties have bargained together touching a contract of insurance, and reached an agreement, and in carrying out, or in the effort to carry out, the agreement, a formal written policy is delivered and accepted, the written policy, while it remains unaltered, will constitute the contract between the parties, and all prior parol agreements will be merged in the written instrument; nor will evidence be received of prior parol inducements and assurances to contradict or vary the written policy while it so stands as embodying the contract between the parties. Like other contracts, it may be set aside or corrected for fraud or for mutual mistake; but, until this is done, the written policy is conclusively presumed to express the contract it purports to contain." *Floars v. Ins. Co.*, 144 N. C., 232, 56 S. E., 915. See, also, *Clements v. Ins. Co.*, 155 N. C., 57, 70 S. E., 1076; *Wilson v. Ins. Co.*, 155 N. C., 173, 71 S. E., 79; *Burton v. Ins. Co.*, 198 N. C., 498, 152 S. E., 396; *Welsh v. Brotherhood*, 200 N. C., 184, 156 S. E., 539.

Doubtless realizing that the foregoing principles of law blocked the path of recovery, the plaintiff amended his complaint on 14 October, 1933, and alleged that the delivery of the depository bonds with the restrictive clause therein was the result of mutual mistake, and that such bond should be reformed and said clause stricken therefrom. Therefore, the action for reformation was begun on said date. See *Jones v. Vanstory*, 200 N. C., 582, 157 S. E., 867.

The power of a court of equity to reform contracts for mistake has been recognized and applied for so long in this jurisdiction that such power may now be deemed to be thoroughly built into the structure and fabric of our law. Thus, in the *Welsh case, supra*, the Court spoke as follows: "But the reformation is subject to the same rules of law as are

applicable to all other instruments in writing. It must be alleged and proven that the instrument sought to be corrected failed to express the real agreement or transaction because of mistake common to both parties, or because of mistake of one party and fraud or inequitable conduct of the other."

The defendant pleaded the statute of limitations to the amended complaint upon the theory that the bonds were delivered to the plaintiff 29 May, 1927, and on 25 February, 1928, and that as the amended complaint filed in October, 1933, first set up a cause of action for reformation that such cause of action was barred by C. S., 441, subsec. 9, in that more than three years had elapsed from the discovery of fraud. The plaintiff asserted that he did not discover the fraud or mistake until he read the bonds after the bank failed, and then for the first time discovered the presence of the restrictive clause, and that he had assumed that the bonds in litigation were similar to other depository bonds which he had been taking for a period of years, and which provided for full coverage. However, actual discovery of the fraud or mistake is not always conclusive. The correct principle as held and pronounced by this Court was stated in *Latham v. Latham,* 184 N. C., 55, 113 S. E., 623, in the following words: "We do not hold, as appellant contends, that the statute begins to run from the actual discovery of the fraud, absolutely and regardless of any negligence or laches of the party aggrieved. A man should not be allowed to close his eyes to facts observable by ordinary attention and maintain for his own advantage the position of ignorance. Such principle would enable a careless man, and by reason of his carelessness, to extend his right to recover for an indefinite length of time, and thus defeat the very purpose the statute was designed and framed to accomplish. In such case, a man's failure to note facts must be imputed to him for knowledge, and in the absence of some actual effort to conceal a fraud or some of the essential facts embraced in the inquiry, we think the correct interpretation of the statute should be that the cause of action shall be deemed to have accrued from the time the fraud was known, or should have been discovered in the exercise of ordinary diligence."

When the bonds were delivered in 1927 and in 1928 the clause limiting liability to general deposits and excluding certificates of deposit was plainly written in the instrument in clear and unequivocal words. The plaintiff had been a student at the University of North Carolina and was an able and experienced business man, and, therefore, even a casual reading of the instruments at the time they were delivered would have disclosed the limitation of liability. There was no evidence of any effort to conceal the plain wording of the instruments or to prevent the plain-

tiff from reading them or of making such examination of the contents as he might deem desirable and advisable. The cause of action for mistake appeared in the case upon the filing of the amended complaint on 14 October, 1933, and on said date the statute of limitations had already put such cause of action to death.

Affirmed.

JOHN HENRY ALEXANDER v. SOUTHERN PUBLIC UTILITIES COMPANY AND W. O. WOODCOCK.

(Filed 12 December, 1934.)

1. Street Railroads B b—Evidence of negligence in operation of street car held sufficient to be submitted to jury.

The evidence in this case tended to show that plaintiff was driving a truck along a busy and congested street in a city, that at the place of the accident there were cars parked at angles and double parked so that there was not sufficient space between the parked cars and the street car tracks for a vehicle to pass, that plaintiff was driving behind another truck, that the first truck turned off the street and plaintiff then saw for the first time defendant's street car approaching him from the opposite direction, that plaintiff was powerless to get out of the way of the approaching street car because of the automobiles parked along the curb of the street, and that the street car was being driven 25 to 28 miles an hour, and that without slackening its speed or giving warning by bell or gong, the street car crashed into the truck plaintiff was driving, resulting in injury to plaintiff: *Held*, the evidence was sufficient to be submitted to the jury on the issue of the negligence of defendant street car company.

2. Automobiles G i—Instruction in this case on issue of contributory negligence held free from reversible error.

In this case plaintiff was driving his truck behind another truck along a busy and congested street in a city and plaintiff was injured in an accident occurring when the first truck turned off the street to the right and a street car approaching from the opposite direction crashed into plaintiff's truck, plaintiff being unable to get out of the way of the street car because of automobiles parked along the curb of the street. The trial court fully and correctly defined contributory negligence and instructed the jury that plaintiff was required to drive with due care for his own safety and keep a proper lookout: *Held*, an exception to the charge for its failure to call the jury's attention to N. C. Code, 2621 (57), which provides that one car shall not follow another more closely than is reasonable and prudent cannot be sustained in the absence of a special request for such instructions.

APPEAL from *Devin, J.*, and a jury, at August, 1934, Special Term of MECKLENBURG. No error.

This is an action for actionable negligence, brought by plaintiff against defendants. The defendants denied that they were guilty of any negligence and set up the plea of contributory negligence. The plaintiff in his replication set up "last clear chance."

The following issues were submitted to the jury and their answers thereto: "(1) Was plaintiff injured by the negligence of the defendants, as alleged in the complaint? A. Yes. (2) Did plaintiff, by his own negligence, contribute to his injury, as alleged in the answer? A. No. (3) If so, notwithstanding the contributory negligence of the plaintiff, could the defendants, by the exercise of due care, have avoided the injury to the plaintiff? A. ..... (4) What damages, if any, is the plaintiff entitled to recover of the defendants? A. $1,066.00."

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

Hiram P. Whitacre for plaintiff.
John M. Robinson and W. B. McGuire, Jr., for defendants.

CLARKSON, J. The defendants in the court below, at the close of the plaintiff's evidence and at the close of all the evidence, made motions for judgment as in case of nonsuit, C. S., 567. The court below overruled these motions, and in this we can see no error. The evidence on the part of the plaintiff was to the effect: That the defendant Utility Company, through its motorman, Woodcock, was operating a street car in the city of Charlotte, on North McDowell Street, going north. The place where the collision occurred was at or near where East 2d Street should enter South McDowell Street. There are a number of stores at this point. The total frontage of these stores on the right, going south on North McDowell Street, is eighty-eight feet. The plaintiff was going south on North McDowell Street, and to his right and in front of the stores were a number of automobiles parked, some double-parked and at angles. Between the parked automobiles and the west rail of the street car track there was not sufficient space to drive unless driving to the left and on the west rail of the street car track. Where the collision occurred was in a hollow of the street. The decline going north on McDowell Street was a little greater than the decline going south. The collision occurred in front of a meat market, a short distance from the lowest point of the decline. On 21 November, 1933, at about 12:30 o'clock p.m., the motorman, Woodcock, driving the street car, coming down the decline going north on McDowell Street, was operating the street car about 20 to 28 miles an hour, and without slowing down ran into the truck plaintiff was driving and seriously injured him. The street car motorman gave no signal or warning. The plaintiff, a colored man,

was driving a 1925 Whippet truck for the Dixie Awning Company, on business, in a southerly direction at a speed not exceeding 10 or 15 miles an hour. He was following a big van truck. He testified, in part: "I continued behind this truck down South McDowell Street until I got to those stores in the business section. The cars were double-parked or angle-parked. I had to pull over on the west rail of the street car track. This truck in front of me switched off of track. About that time I looked up and the street car was right in my face. I was helpless. A large car was parked there and I had to pull over on the street car track, and before I knew anything I was hit. I had to drive my car over the west rail of the street car track. I did not have room to get by on account of the cars parked there. I would have hit other people. . . . I came on down by them right behind the truck. I couldn't see the ones that were angled back until I got there. The big truck pulled up, and when it pulled out the street car dashed into me. When he pulled in the corner, I looked in the street car's face. When that happened, I was within 10 feet of the street car. I was running on the right-hand side of the street. When I got to all of these parked cars the truck jerked over to the left and I pulled over to the left, and about that time the truck got out of the way and I saw the street car. I was within 10 feet of the street car then."

Will Johnson testified, in part: "It looked like the street car was making 25 or 28 miles an hour. After it passed me, it kept on down to the branch and was just about at the branch when it had the collision. The street car didn't slacken in speed from the time it passed me until this collision. If it did, I couldn't tell the difference. I did not hear any bell or gong at all. . . . Five or six cars were parked angling in front of the A. & P. store. Therefore, if anyone was coming south, one wheel had to get on the street car track to pass the cars there. One coach was parked double on the south side of the A. & P. store. It was a Buick and would take up the length of the street. There would not be more than 3 or 4 feet from the automobile to the car line, and no car would have space in passing if it didn't get on the car line without hitting the rear end."

Under the facts and circumstances of this case, we think the evidence sufficient to be submitted to the jury. *Ingle v. Power Co.*, 172 N. C., 751; *Smith v. Electric R. R.*, 173 N. C., 489; *Lea v. Utilities Co.*, 178 N. C., 509. The exceptions and assignments of error to the charge of the court below cannot be sustained. The court below defined accurately negligence, contributory negligence, and proximate cause, and applied the law applicable to the facts.

The charge of contributory negligence, in part, is as follows: "The burden of proof upon the second issue is upon defendants to satisfy you

from the evidence, and by its greater weight, that plaintiff himself was negligent, and that his negligence was a proximate contributing cause to his injury. That is what we term contributory negligence. Contributory negligence means want of due care upon the part of a person who has been injured by the actionable negligence of another, combining and concurring with that negligence and contributing to the injury as a proximate cause thereof and without which it would not have occurred.

"So, remembering the definitions of negligence, due care and proximate cause, there was a duty upon the plaintiff to exercise due care and precaution for his own sake. It was his duty in the operation of the motor truck upon the street to operate the same with due care and prudence for his own safety. Not to operate it at a greater rate of speed than 15 miles per hour, or than was reasonable and proper, considering the traffic, width, surface, and other conditions then existing, which he knew, or in the exercise of due care could ascertain. It was his duty to keep a reasonable and proper lookout in the direction in which he was going, to be advertent to the traffic on the street, which in the exercise of due care he could have seen and anticipated, and if you find from this evidence, and by its greater weight, that plaintiff failed in one or more of these respects to exercise due care, and that such failure on his part combined and concurred with negligence on defendants' part, produces the injury complained of as a proximate cause thereof, then it would be your duty to answer the second issue 'Yes'; otherwise, 'No.'"

The defendants complain that the court, in its charge on contributory negligence, did not call attention to N. C. Code, 1931 (Michie), sec. 2621 (57), which is as follows: "(a) The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent with regard for the safety of others and due regard to the speed of such vehicles and the traffic upon and condition of the highway," etc.

The defendant requested no prayer for instruction on this aspect, but we think the charge full and plenary enough as given. The jury did not answer the issue as to the "last clear chance," and in the charge as a whole we see no error.

The evidence on the part of the defendants was in conflict with that of plaintiff. The jury, the triers of the facts, took plaintiff's version of the collision. This was for them to decide and not us, where the evidence, as in this case, was sufficient to be submitted to the jury.

On the whole record, we see no prejudicial or reversible error.

No error.

THE BANK OF FRANKLIN v. JOHN S. TROTTER AND WIFE, ADA BURNETT TROTTER, GUS LEACH, AND OTHERS.

(Filed 12 December, 1934.)

1. Banks and Banking K c—Order allowing bank to reopen held to authorize it to sue on past-due notes held by it at time of closing.

An order of the Commissioner of Banks allowing a bank to reopen for business upon certain terms and limitations, which order expressly provides that the bank shall proceed in the orderly liquidation of its assets existing at the time of its closing and discharge its liabilities as of that date, authorizes the bank to institute and maintain suit on past-due notes existing in its favor at the date of its closing, suit on such notes being necessary for the liquidation of same, and being necessary to the execution of the order.

2. Attorney and Client B b—Attorney employed to collect note has no authority to make agreement not to sue thereon.

An agreement by an attorney for a bank employed to collect a past-due note owing the bank, that suit would not be instituted thereon if the maker would pay a stipulated sum thereon monthly is not binding on the bank, since such agreement is beyond the scope of the attorney's authority.

3. Same: Principal and Agent C f—Acceptance by payee of payments on note held not ratification of agent's void agreement not to sue thereon.

An attorney employed to collect a note made an unauthorized agreement with the maker not to institute suit on the note if the maker paid certain stipulated sums on the note monthly: *Held*, the acceptance by the payee of the stipulated sums does not constitute a ratification by the payee of the void agreement, since the payee received no moneys or payments it was not entitled to receive under the law.

4. Bills and Notes F d—Void agreement for extension of time for payment of note will not release accommodation endorser thereon.

Where an agreement between the maker of a note and the attorney of the payee for an extension of time for payment is void for want of authority on the part of the attorney to make the agreement, and there is no valid ratification of the agreement by the payee, the void agreement for extension of time for payment will not release an accommodation endorser of liability on the note.

APPEAL from *Alley, J.*, at February Term, 1934, of MACON. Affirmed.

This was a civil action, instituted on 15 March, 1932, by the plaintiff bank upon various notes drawn by John S. Trotter, most of which were endorsed for the accommodation of said Trotter by his various co-defendants, including the defendant Leach. By consent of all parties, the case was referred to J. D. Mallonee, Esq., to hear the evidence, find the facts, and report conclusions of law. The referee filed his report under date of 5 August, 1933, to which various exceptions were filed by the parties plaintiff and defendants, and upon these exceptions the

case came on to be heard at term time. Some of these exceptions were sustained, either in the entirety or in part; and the report as thus modified was adopted and approved by the judge presiding. Judgment was entered in favor of the plaintiff against the various defendants, and the defendants John S. Trotter and Gus Leach alone perfected appeals to this Court.

Smathers & Smathers for John S. Trotter, appellant.
Moody & Moody for Gus Leach, appellant.
Jones & Ward and Jones & Jones for Bank of Franklin.

SCHENCK, J. We will first consider the appeal of the defendant John S. Trotter, which presents two questions, to wit:

1. Did the plaintiff bank, under the order of the Commissioner of Banks, have authority to institute and maintain this action?

2. Was there a valid agreement between the plaintiff bank and the defendant John S. Trotter that the bank would forbear instituting suit against defendant Trotter until 1 October, 1933, if the said defendant would pay the said bank on his indebtedness to it the sum of $150.00 per month until said date?

The answer to the first question is found in the order of the Commissioner of Banks, dated 3 June, 1931, permitting the plaintiff bank, which had been closed since 17 December, 1930, to reopen upon certain conditions therein set forth. The order reads in part: "That immediately upon reopening, said Bank of Franklin shall proceed in an orderly liquidation of the assets of the bank existing upon and prior to 17 December, 1930, and discharge all of its liabilities as of the date . . ." We think the words "proceed in an orderly liquidation of the assets of the bank existing upon and prior to 17 December, 1930," in the absence of any limitation annexed thereto, authorize the bank to maintain an action upon past-due notes held by it prior to the date named. Past-due notes are assets, and, if the makers thereof fail to pay, suit is one, if not the only, method of reducing such notes to money, that is, to liquidate them, so the proceeds therefrom may be utilized to discharge liabilities. While there are certain limitations and terms placed upon the bank by the order of the Commissioner of Banks as conditions precedent to reopening, we find none upon its right after reopening to maintain actions to bring about an orderly liquidation of its assets. In fact, to take away the right of the bank to enforce collection of its assets by suit would render the order practically nugatory.

Upon the second question presented, relative to the alleged agreement of the plaintiff bank to forbear instituting suit against the defendant Trotter until 1 October, 1933, upon the payment by said defendant to

said plaintiff on his indebtedness to it in the sum of $150.00 a month until said date, the evidence tends to show that John S. Trotter in attempting to make such an agreement had all of his negotiations with an attorney employed by the bank to collect its assets, and all that was done to consummate said agreement was done through and by said attorney; and Judge Alley so finds, and upon this finding the judge correctly held, as a matter of law, that there was no valid agreement between the plaintiff bank and the defendant Trotter.

In the case of *Bank v. McEwen,* 160 N. C., 414, *Walker, J.,* says:

"No one could reasonably suppose that it was within the scope of an attorney's authority to release a debt, or any party to a note, or to do anything which would have that effect, when his commission extended only to the collection of the debt. It is stated in the books that an attorney has no implied authority to work any discharge of a debtor but upon actual payment of the full amount of the debt, and that in money. He cannot release sureties or endorsers, nor enter a *retraxit,* when it is a final bar. . . ."

"It seems, therefore, to be the generally accepted doctrine that an attorney charged with the collection of a debt has no power, in virtue of his general authority, to do any act which will either release his client's debtor or his surety, nor can he materially jeopardize his client's interest in any way. An attorney at law is an officer in a court of justice, who is employed by a party in a cause to manage the same for him, and his client is concluded by his act done within the range of his authority. . . ."

"'Although counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it, . . . and the management and conduct of the trial, he has not by virtue of his retainer in the suit any power over matters which are collateral to it.' Pollock Ch. Baron, in *Swinfen v. Chelmsford,* 2 L. T. (N. S.), 406." See, also, *Hall v. Presnell,* 157 N. C., 290, and cases there cited.

The defendant Trotter contends that even if the attorney had no authority to make a contract to forbear instituting suit, that the plaintiff ratified such an agreement by accepting payments after the negotiations were had with said attorney. With this contention we cannot agree, since the plaintiff received from the defendant Trotter no moneys, or payments, it was not justly entitled to receive under the law. Receiving money from the defendant, which the defendant admits to be due, cannot be construed as a ratification of a void contract.

We find no error upon the appeal of the defendant John S. Trotter.

The appeal of the defendant Gus Leach presents but the single question: Did the plaintiff and defendant Trotter enter into such an agreement to extend the time of payment of the note on which the defendant

Leach was an accommodation endorser as would release and exonerate and discharge the defendant Leach from further liability; and, if not, did the plaintiff ratify an attempt of its attorney in its behalf to enter into such a contract?

Since the alleged contract relied upon by the defendant Leach is the same one attempted to be made with the plaintiff's attorney for collection, and relied upon by the defendant Trotter, it is void for the reasons above set forth; and since the facts relied upon by the defendant Leach for ratification of an otherwise void contract are the same as those relied upon by defendant Trotter for the same purpose, the contention of the defendant Leach as to ratification must fail for the reasons hereinbefore assigned.

We find no error upon the appeal of the defendant Gus Leach.

The judgment of the Superior Court is

Affirmed.

IN RE ACCUSATION AGAINST DR. J. E. OWEN.

(Filed 12 December, 1934.)

1. Physicians and Surgeons A d—Truthful advertising by dentist is not prohibited by C. S., 6649.

The grounds for revocation of the license of a dentist under C. S., 6649, as amended by ch. 270, Public Laws of 1933, are solicitation of professional business and false advertising and the circulation of false claims or fraudulent or misleading statements, and the statute does not render truthful advertising and circulation of truthful statements by a dentist unlawful.

2. Same—

Advertising in newspapers and the maintenance of a large sign on the building in which he maintains his office does not constitute solicitation of professional business by a dentist, advertising and solicitation not being synonymous terms, and where it is not alleged that such advertising was false or misleading, it is not sufficient ground for the revocation of the dentist's license.

3. Appeal and Error A e—

Where it appears on appeal that the rights of the parties do not depend upon the constitutionality of a statute invoked in the proceedings, the Supreme Court will not determine the question of constitutionality upon the appeal.

APPEAL from *Pless, J.*, at June Term, 1934, of BUNCOMBE. Reversed.

This was a proceeding instituted before the North Carolina State Board of Dental Examiners upon an accusation against Dr. J. E. Owen,

a dentist licensed by the State, duly filed under the provisions of C. S., 6649, by Drs. Bennett, Little, and Wells, dentists.

The accusation was heard and judgment entered by the Board of Dental Examiners, from which the respondent, Dr. J. E. Owen, appealed to the Superior Court. The case was transferred from Wake County to Buncombe County, where it was heard at term time upon an agreed statement of facts, and judgment was there entered revoking the license of the respondent to practice dentistry. From this judgment the respondent appealed to the Supreme Court, assigning errors.

Harry A. Gorson and Marcus Erwin for appellant.
Sale, Pennell & Pennell for appellees.

SCHENCK, J. The portion of the statute, C. S., 6649, as amended by chapter 270, Public Laws 1933, pertinent to the accusation filed, reads: "Whenever it shall appear to the Board of North Carolina Dental Examiners that any licensed dentist practicing in the State has been guilty . . . of false notice, advertisement, publication, or circulation of false claims, or fraudulent or misleading statements of his art, skill, or knowledge, or of his method of treatment or practice, . . . or has by himself or another solicited professional business, the board shall revoke the license of such person."

The accusation filed charges: (1) "That the said Dr. J. E. Owen has, since 18 June, 1933, by himself and by another, solicited professional business as a practitioner of dentistry by running paid advertisements, and/or solicitation for professional business in the *Asheville Citizen,*" and

(2) "That since 18 June, 1933, the said Dr. J. E. Owen has, by himself or another, solicited professional business by advertisements upon the buildings in the city of Asheville in which said Dr. J. E. Owen has his offices, said signs or advertisements soliciting professional business all being painted in yellow and black colors," and of large dimensions.

It will be noted that nowhere in the accusation is there any charge of false advertisement or publication, or of the circulation of any false claims or fraudulent or misleading statements. The charge is (1) that the respondent solicited professional business as a practitioner of dentistry by running paid advertisements in the newspapers, and (2) that he solicited professional business by signs in colors and of large dimensions upon the building in which he has his office.

In the agreed statement of facts upon which the case was heard in the Superior Court there is no mention of false advertisements, or of circulation of false claims or fraudulent or misleading statements. In this statement it is agreed (1) that the respondent caused to be published

in newspapers of large circulation paid advertisements of his work and prices charged, and (2) that the respondent maintained on the outside of the walls of the building in which he had his office certain signs, advertising his work and prices, painted yellow and black, and of large dimensions.

The judgment below, entered upon the agreed facts, contains, *inter alia,* the following: ". . . . The court being of the opinion that the respondent has by himself or others solicited professional business, as alleged in the accusation," and concludes by adjudging that "the judgment of the North Carolina State Board of Dental Examiners in this cause is affirmed, and the license to practice dentistry in the State of North Carolina, heretofore granted the respondent, Dr. J. E. Owen, be and is hereby revoked. . . ."

The respondent's appeal from the judgment of the Superior Court raises the question as to whether the insertion of paid advertisements of his work and prices by a licensed dentist in newspapers with a large circulation and by signs in flaring colors and of large dimensions constitutes such soliciting of professional business as is inhibited by the statute, as amended. We think not.

The offenses against which the statute inveighs are (1) that of false advertising, and the circulation of false claims or fraudulent or misleading statements, and (2) that of soliciting professional business.

Advertising, or the circulation of statements, without the taint of falsity or fraud, either by newspaper or sign, although paid for, cannot be construed as a violation of the statute. Advertising and soliciting are not synonymous terms. If such were so, every dentist who inserted a professional card in a registry, directory, or other publication, and paid for such insertion, or who placed upon the window or door of his office, or upon the wall of the building in which his office is located, his name followed by the word "dentist" would subject himself to an accusation that might lead to the revocation of his license. We apprehend that such was not the purpose of those who drafted the statute. The statute only makes the use of false advertising, or the circulation of fraudulent and misleading statements, unlawful, and the corollary follows that the use of truthful advertising and circulation of truthful statements are not unlawful. *Expressio unius est exclusio alterius.* There is no suggestion in the record of any soliciting by the respondent otherwise than by advertising in newspapers and by signs.

We do not pass upon the ethics of the advertising resorted to by the respondent in this case, but under the statute as drawn, in the absence of any allegation of falsity or fraud, we are constrained to hold that judgment below is erroneous. If the North Carolina Board of Dental Examiners desires to have further limited the nature and extent of adver-

tising to which members of their profession may lawfully resort, their remedy lies with the Legislature and not the courts. The law-making branch of the Government, if in its wisdom it saw fit, might make unlawful any kind of advertising by members of the dental profession, whether false or otherwise, but as yet it has not done so.

In view of the foregoing, it does not appear that the enforcement of C. S., 6649, will result in injury to the respondent, and we are therefore not called upon to determine the constitutionality of the statute in this proceeding.

Reversed.

STATE v. WILLIAM (BUNK) DEAL.

(Filed 12 December, 1934.)

1. Indictment C c—

Where some of the witnesses examined by the grand jury are competent but one of them is incompetent to testify, a motion to quash the bill for that the incompetent witness was allowed to testify is properly refused.

2. Homicide G c—

Testimony tending to show that deceased was found mortally wounded and in eminent danger of death, and that he fully realized his condition, lays a proper predicate for the admission of deceased's dying declaration.

3. Criminal Law G j—

An instruction that the jury should carefully scrutinize the testimony of defendant in a criminal prosecution, but that if, having done so, the jury is satisfied defendant is telling the truth, to give his testimony as much credibility as a disinterested witness, *is held* without error.

4. Criminal Law J a—

Judgment in a criminal prosecution is subject to arrest, on motion duly made, when, and only when, some fatal defect or error appears on the face of the record.

APPEAL by defendant from *Cranmer, J.*, at January Term, 1934, of ROBESON.

Criminal prosecution, tried upon indictment charging the defendant with the murder of one Lewis Chavis.

The record discloses that on the night of 23 December, 1933, the defendant shot and killed Lewis Chavis as he was approaching his home in Robeson County, having first armed himself and made preparations for the shooting.

J. H. Godfrey, rural policeman, arrived upon the scene soon after the shooting: "When I got there and found Lewis Chavis lying on the ground about four or five feet from the steps, he called to me and said could I get him a doctor. I told him that I had one coming, and he

said, 'If he don't get here pretty quick, I am going to die. I am shot to death.' He told me that Bunk Deal shot him. He said he had just started to get out of the car when Bunk Deal walked out of the door at the end of the porch and shot him. After he told me that, I asked him where Bunk was, and he said, 'I can't tell you, Chief.' "

The defendant interposed a plea of self-defense, and offered evidence tending to show a quarrel and threats on the part of the deceased.

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.

F. D. Hackett, Jr., for defendant.

STACY, C. J. The defendant's first exception is to the refusal of the court to quash the bill of indictment on the ground that his wife was examined as a witness before the grand jury. It likewise appears that five other witnesses were examined by the grand jury.

Speaking to the question in *S. v. Moore,* 204 N. C., 545, 168 S. E., 842, *Connor, J.,* delivering the opinion of the Court, epitomized the law on the subject as follows:

"It is well settled as the law of this State that when a bill of indictment has been returned by the grand jury as a true bill, upon testimony all of which was incompetent, or upon the testimony of witnesses all of whom were disqualified by statute or by some well-settled principle of law in force in this State, the indictment will be quashed on the motion of the defendant made in apt time; but when some of the testimony was competent and some incompetent, or some of the witnesses heard by the grand jury were qualified and some disqualified, the Court will not go into the barren inquiry of how far testimony which was incompetent or witnesses who were disqualified contributed to the finding of the bill of indictment as a true bill. *S. v. Levy,* 200 N. C., 586, 158 S. E., 94; *S. v. Mitchem,* 188 N. C., 608, 125 S. E., 190; *S. v. Coates,* 130 N. C., 701, 41 S. E., 706. This is the general rule in other jurisdictions. 31 C. J., 808, and cases cited."

The dying declaration of the deceased was correctly admitted in evidence, proper predicate having been laid for its introduction. *S. v. Beal,* 199 N. C., 278, 154 S. E., 604; *S. v. Layton,* 204 N. C., 704, 169 S. E., 650; *S. v. Gregory,* 203 N. C., 528, 166 S. E., 387.

With respect to the testimony of the defendant, the court instructed the jury as follows: "Now it is your duty, gentlemen, to take his testimony with a degree of allowance and to carefully and closely scrutinize it and scan it because of his interest in your verdict. If, after having

done so, you are satisfied he is telling the truth, it would then be your duty to give his testimony as much credibility as you give the testimony of a disinterested witness." Exception.

The decisions in *S. v. Beavers,* 188 N. C., 595, 125 S. E., 258, and *S. v. Fogleman,* 164 N. C., 458, 79 S. E., 879, are in support of this instruction. See, also, *S. v. Beal, supra,* and cases there cited. The cases cited and relied upon by the defendant, *S. v. Wilcox,* 206 N. C., 691, and *S. v. Ray,* 195 N. C., 619, 143 S. E., 143, are not apposite.

It is not perceived upon what theory error may be imputed for refusal to arrest the judgment. A judgment in a criminal prosecution is subject to arrest, on motion duly made, when, and only when, some fatal defect or error appears on the face of the record. *S. v. Satterfield, ante,* 118, and cases cited.

We have found no reversible error on the record. Hence, the verdict and judgment will be upheld.

No error.

J. F. MATTHEWS, IN BEHALF OF HIMSELF AND OTHER TAXPAYERS IN A GIVEN BOUNDARY, v. THE TOWN OF BLOWING ROCK AND G. C. ROBBINS, MAYOR, ET AL.

(Filed 12 December, 1934.)

1. Statutes A a—

The courts will conclusively presume from the ratification of a private act that the notice required by Art. II, sec. 12, has been given.

2. Same—

In the absence of allegation and proof that plaintiff's rights are injuriously affected by a statute, plaintiff may not maintain an action to have the statute declared unconstitutional.

3. Same—Semble: Legislature has power by private act to enlarge town limits and provide that town maintain streets in annexed territory.

Under the unlimited power of the Legislature to provide for the creation and extension of corporate limits of municipalities, it would seem that it has the power to provide by private act enlarging the boundaries of a town that it should take over the streets existing in the annexed territory and levy taxes to maintain such streets as a necessary power of its existence, and that such private act would not contravene Art. II, sec. 29, prohibiting the Legislature from authorizing the opening, maintaining, or discontinuance of streets by private act.

APPEAL from *Warlick, J.,* at Chambers in Bakersville, on 29 March, 1934. From WATAUGA. Affirmed.

This is an action to enjoin the collection of taxes levied against the property of J. F. Matthews, located without the limits of the town of Blowing Rock as fixed by chapter 199, Private Laws of 1889, and within

the limits of said town as fixed by chapter 13, Private Laws of 1927, upon the ground that the act of the Legislature enlarging the corporate limits of the municipality is unconstitutional and void.

From a judgment dissolving a temporary restraining order the plaintiff appealed, assigning errors.

R. L. Ballou for appellant.
Trivette & Houshouser for appellees.

SCHENCK, J. "There are no limitations in the Constitution of this State or of the United States upon the power of the General Assembly to provide by statute for the extension of the corporate limits of a municipal corporation organized and existing under the laws of this State, or for the repeal of a statute under which a municipal corporation in this State was organized." *Highlands v. Hickory,* 202 N. C., 167 (168), and cases there cited.

The plaintiff alleges that chapter 13, Private Laws 1927, is void, for that there was a failure to comply with Article II, section 12, of the Constitution of North Carolina in that no notice of application to pass such a law was given, as provided by law. While this section of the State Constitution may be binding upon the conscience of the General Assembly, and was doubtless intended to be observed by that body, this Court will not undertake to go behind the ratification of an act to review the action of a coördinate department of the State Government, but will conclusively presume, from the ratification, that the notice here required has been given. *Brodnax v. Groom,* 64 N. C., 244; *Cox v. Commissioners,* 146 N. C., 584.

Chapter 13, Private Laws 1927, contains the following provision: "That all streets, public driveways, and county highways within the said boundary of the said (newly made) town shall be and the same are hereby adopted as streets of the said town, to be kept up and maintained by said town," and it is urged in the plaintiff's brief that this is an infringement upon Article II, section 29, of the Constitution of North Carolina, which deleted of that portion not germane to this case reads: "The General Assembly shall not pass any local, private, or special act or resolution . . . authorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets, or alleys. . . . Any local, private, or special act or resolution passed in violation of the provisions of this section shall be void. The General Assembly shall have power to pass general laws regulating matters set out in this section."

There is no allegation in the complaint that any highways, streets, or alleys, in which the plaintiff has any interest, have been laid out, opened,

altered, maintained, or discontinued, or that there have been any taxes levied, or attempted to be levied, against the property of the plaintiff to keep up or maintain any highways or streets, and without such an allegation there could be, and was, no proof of any such tax levy or of injury resulting to the plaintiff by reason thereof. It is well settled in this jurisdiction that one who seeks to have an act of the Legislature declared unconstitutional must show that the enforcement of such act will result in injury to him. In *Yarborough v. Park Commission,* 196 N. C., 284 (288), it is said: "A party who is not personally injured by a statute is not permitted to assail its validity; if he is not injured he should not complain because another may be hurt." In the absence of both allegation and proof to the effect that the plaintiff would be injured by the adoption by the town of Blowing Rock of "all streets, public driveways, and county highways" within the new boundary "as streets of said town to be kept up and maintained by said town," the plaintiff could not maintain an action to have declared void chapter 13, Private Laws 1927, upon the theory that it is in contravention of Article II, section 29, of the Constitution of North Carolina.

We would not have it understood, however, that we intimate that if the complaint had contained sufficient allegations to the effect that taxes had been levied against his property to lay out and maintain highways and streets, that the plaintiff could maintain this action, as the unlimited power in the General Assembly to provide by statute for the creation and extension of corporate limits of municipal corporations, would seem to include the right to vest in such municipal corporations the authority to levy taxes to lay out and maintain highways and streets within such limits, since they are essential to the existence of such corporations. In *Lutterloh v. Fayetteville,* 149 N. C., 65, after holding that municipal corporations are creatures of the legislative will, it is said: "Consequently, it follows that the enlargement of the municipal boundaries by the annexation of new territory, and the consequent extension of their corporate jurisdiction, including that of levying taxes, are legitimate subjects of legislation. In the absence of constitutional restriction, the extent to which such legislation shall be enacted, both with respect to the terms and circumstances under which the annexation may be had and the manner in which it may be made, rests entirely in the discretion of the Legislature. With its wisdom, propriety, or justice we have naught to do. It has therefore been held that an act of annexation is valid which authorized the annexation of territory, without the consent of its inhabitants, to a municipal corporation, having a large unprovided-for indebtedness, for the payment of which the property included within the territory annexed became subject to taxation."

Affirmed.

TRADERS LAND COMPANY v. ABBOTT REALTY COMPANY AND JOHN SPRUNT HILL.

(Filed 12 December, 1934.)

Contracts F a: Damages F b—Transferee of equity liable for the debt held not party to contract to refinance first mortgage made by second mortgagee with holder of first mortgage notes.

Plaintiff alleged that he was liable under a debt assumption contract on notes secured by a first mortgage on property in which he had purchased and later sold the equity of redemption, that defendant, the holder of a second mortgage on the property, agreed with the holder of the first mortgage notes that if the holder of the first mortgage notes would grant extension of time for payment and would defer foreclosure, defendant would lend the holder of the equity money to refinance the first mortgage notes, that at the expiration of the extension agreement defendant refused to lend the money in accordance with his agreement, and that the holder of the first mortgage notes foreclosed the property and recovered a deficiency judgment against plaintiff on the debt assumption contract, which plaintiff was forced to pay. Plaintiff brought suit to recover of defendant the amount of the deficiency judgment, claiming that plaintiff had been injured in this sum by defendant's breach of the contract: *Held*, plaintiff was not a party to defendant's agreement to lend the money to the holder of the equity, made with the holder of the first mortgage notes, nor was the agreement made for plaintiff's benefit, and plaintiff could not maintain an action thereon, and *held further*, the measure of damages for the breach of the contract to lend the money would not be the amount of deficiency after foreclosure.

CIVIL ACTION, before *Stack, J.*, at Regular April Term, 1934, of MECKLENBURG.

The complaint alleges that on 13 June, 1927, F. D. Lethco executed and delivered two promissory notes, aggregating $16,000, payable to I. W. Stewart. The notes were secured by deed of trust upon certain property owned by the maker. Thereafter Stewart endorsed the notes to the plaintiff and the plaintiff duly endorsed said bonds and negotiated the same to the Commercial National Bank of Charlotte, N. C. Subsequently, Lethco and wife conveyed the land described in the deed of trust to the defendant Abbott Realty Company, and said grantee "assumed liability for and the payment of said bonds and interest thereon." On 10 December, 1929, Abbott Realty Company borrowed $5,000 from the defendant John Sprunt Hill and executed a second deed of trust upon the property to secure said note. Prior to 10 July, 1930, "said Commercial National Bank, being the owner and holder of the bonds herein mentioned aggregating the sum of $16,000, served notice upon said defendant John Sprunt Hill that said bonds were past due, and unless said Abbott Realty Company made prompt payment thereof, foreclosure would be had."

It was alleged that "John Sprunt Hill, defendant, for the purpose of deferring the foreclosure of said deed of trust, . . . and in consideration of extension of the foreclosure of said deed of trust, did, on or about 10 July, 1930, covenant and agree that if the said Commercial National Bank would extend the time of payment of said bonds until the period between the first and tenth of September, 1930, then and in such event said defendant John Sprunt Hill would place a new loan of $16,000 on said property and make payment of the said bonds of $16,000 owned by said Commercial National Bank, thereby relieving the estate of said F. D. Letheo of liability upon said notes." The time of payment was extended until 10 September, 1930, when the bank demanded payment of said bonds and the defendants failed and refused to pay same. Foreclosure resulted, and the property was duly sold for $11,329.50, thus creating a deficiency of $4,670.50, plus interest. Plaintiff was required by the bank to pay said deficiency, and thereupon brought suit against the defendants to recover the said sum of $4,670.50.

The defendant Abbott Realty Company filed an answer admitting that John Sprunt Hill agreed with the Commercial National Bank and the Abbott Realty Company that he would refinance the notes mentioned in the complaint provided the Realty Company could give him a mortgage on certain other property securing his $5,000 note. The Realty Company further alleged that it was unable to give such security. The defendant Hill filed an answer alleging that his negotiations were conducted with the bank and that he was never informed that the plaintiffs had anything to do with the transactions, or were in anywise interested therein. He further alleged that he had stated to the bank that he would refinance the property for Abbott Realty Company if certain additional security could be given, and that such security was not given, and he had thereupon notified his codefendant Abbott Realty Company that he could not make the loan.

At the trial the defendant Hill demurred *ore tenus* to the complaint, asserting that it did not state a cause of action against him in that no contract was alleged between him and the plaintiff which was enforceable on behalf of plaintiff. The trial judge sustained the demurrer, and the plaintiff appealed.

H. L. Taylor for plaintiff.
Whitlock, Dockery & Shaw for John Sprunt Hill.

BROGDEN, J. If the defendant John Sprunt Hill made any contract at all, it was with the Commercial National Bank, the owner and holder of the bonds or notes executed by Letheo. Obviously, if it be conceded that the negotiations between Hill and the bank amounted to a contract, it does not appear that such agreement was

made for the benefit of the plaintiff. Consequently, the principles of law permitting a beneficiary to sue into a contract made with a third party has no application to the facts alleged. Moreover, the purported contract was in all essential features an agreement to lend money to the Abbott Realty Company, and neither this corporation nor the bank is seeking to enforce the same. In addition, the measure of damages for the breach of a contract to lend money would not ordinarily be the deficiency arising from a sale of property for less than the face value of the notes. See *Coles v. Lumber Co.,* 150 N. C., 183, 63 S. E., 736; *Norwood v. Crowder,* 177 N. C., 469, 99 S. E., 345; 36 A. L. R., 1408; 41 A. L. R., 357.

Affirmed.

COMMERCIAL BANKING CORPORATION v. H. C. LINTHICUM.

(Filed 12 December, 1934.)

1. Evidence I b—

Letters purporting to have been written by a party to the suit relating to a material matter in controversy must be properly identified as genuine in order to be competent in evidence.

2. Insurance E e: Evidence J a — Parol evidence of contemporaneous agreement to insure held incompetent as against purchaser of note secured by chattel mortgage.

Plaintiff, the purchaser of notes secured by an instrument amounting in effect to a chattel mortgage on an automobile, brought suit on the notes. The instrument and notes stipulated that there was no contemporaneous oral agreement between the parties. Defendant maker set up the defense that the payee of the note, at the time of the loan, agreed to use part of the proceeds to purchase insurance on the automobile, that the payee had failed to do so, and that the car had been burned, and that the amount of the loss by fire should be subtracted from the amount of the note: *Held,* in the absence of evidence that plaintiff was not a purchaser for value, or that the payee of the note was plaintiff's agent in making the agreement, defendant was not entitled to set up the verbal agreement of the payee to purchase the insurance.

3. Trial D b—

The trial judge cannot direct a verdict in favor of the party upon whom rests the burden of proof unless the facts are admitted or established, and only one inference can be drawn therefrom.

CIVIL ACTION, before *Grady, J.,* at Second June Term, 1934, of WAKE.

On 11 March, 1932, the defendant executed and delivered to O. K. Kines a negotiable promissory note for the sum of $264.00. This note was secured by a lease agreement according to the terms of which instrument the defendant leased from said Kines a Packard automobile. The document contained a stipulation providing that "there is no guar-

antee, representation, agreement, verbal or written, or other condition whatsoever as an inducement for or contemporaneous to the execution hereof, and the entire agreement relating to the said motor vehicle is herein contained." In practical effect the defendant borrowed $264.00 from Kines and secured the payment thereof with a chattel mortgage upon his Packard automobile. Kines, the payee in the note, transferred the same to the plaintiff. On 2 June, 1932, defendant's car was partially burned and the loss was appraised at $414.00. Proof of loss payable to the plaintiff and the defendant was signed by the defendant and returned to the Stuyvesant Insurance Company of New York.

The defendant did not make the installment payments as provided in the agreement, and thereupon the plaintiff seized the car in a claim and delivery proceeding. The defendant replevined and the cause came on for trial. The plaintiff offered the note and endorsement in evidence without objection. The defendant admitted the execution of the note and mortgage and testified that he borrowed $264.00 from Kines and received as the proceeds of said loan the sum of $198.00. He further offered to testify that it was agreed between him and Kines that $46.00 of the proceeds of said loan was to be used in purchasing fire and theft insurance upon the car in the sum of $800.00. The defendant offered certain letters from Kines and the plaintiff to the defendant relating to insurance. The plaintiff finally notified the defendant that it did not have any insurance upon the car.

The following issues were submitted to the jury:

"1. Did the defendant execute the note and lease, dated 11 March, 1932, as alleged in the complaint?

"2. Is the plaintiff the owner of said note and lease, as alleged in the complaint?

"3. What amount is due and owing on said note and lease?"

The trial judge instructed the jury if they believed the evidence to answer the issues "Yes."

The defendant duly tendered an issue as to the amount due him on counterclaim for the appraised sum of damage to his car. The trial judge declined to submit such issue.

From judgment rendered the defendant appealed.

Ball & Ball for plaintiff.

S. Brown Shepherd for defendant.

BROGDEN, J. The assignments of error challenge the following rulings of the trial judge, to wit:

(a) Excluding the conversation between defendant and Kines.

(b) Refusal to submit an issue upon the counterclaim.

(c) Refusal to grant a motion of nonsuit.

(d) Refusal to grant a motion for judgment in favor of defendant.

(e) Refusal to give a peremptory instruction to the jury that the defendant was entitled to recover the amount of his loss by fire, less the amount due on the note.

(f) The peremptory instruction to answer the issues in favor of plaintiff.

Kines was not a party to the suit and there was no competent evidence that he was the agent of the plaintiff. Certain letters appear in the record purporting to have been written by the plaintiff. These letters, however, were not identified as required by law. *Bank v. Brickhouse,* 193 N. C., 231, 136 S. E., 636; *Chair Co. v. Crawford,* 193 N. C., 531, 137 S. E., 577.

The contract and note introduced in evidence, without objection, contain a stipulation to the effect that there was no contemporaneous oral agreement between the parties. The written contract contained no reference to insurance, and in the absence of evidence tending to show that Kines was the agent of plaintiff, or that the plaintiff was not the purchaser of the note for value, the trial judge ruled correctly. Undoubtedly a trial judge cannot direct a verdict in favor of the party bearing the burden of proof unless the facts are admitted or established, and only one inference can be drawn therefrom. In such event, the trial judge can draw the inference and so direct the jury. See *Bank v. McCullers,* 200 N. C., 591, 157 S. E., 869; *Reinhardt v. Ins. Co.,* 201 N. C., 785; *Somersette v. Stanaland,* 202 N. C., 685, 163 S. E., 804.

The burden of showing error is upon the appellant. An examination of the record discloses no reversible error, and hence the judgment is

Affirmed.

PEARL M. GEORGE, ADMINISTRATRIX OF JOHN J. GEORGE, DECEASED, *v.* ATLANTA AND CHARLOTTE AIRLINE RAILWAY COMPANY, SOUTHERN RAILWAY COMPANY, AND GEORGE B. SORRELLS.

(Filed 12 December, 1934.)

Railroads D b—In action against driver of car and railroad, railroad company's demurrer is properly sustained upon complainant's allegation that driver drove upon track after seeing approaching train.

The complaint in this action alleged that plaintiff's intestate was riding as a passenger in an automobile and was mortally injured in a collision between the car and a railroad train at a grade crossing, that the railroad company maintained two tracks at the crossing, and that there were certain obstructions near the crossing so that trains approaching from the south on the second track could not be seen until a person was nearly on the tracks, and then could be seen only for a distance of five hundred feet,

that plaintiff's intestate had no control over the driver of the car, and that the driver approached the crossing at a dangerous and reckless rate of speed and drove upon the first track, and that then seeing for the first time a train approaching from the south at a high and dangerous rate of speed, the driver of the car recklessly, excitedly, and wantonly accelerated the speed of the car in an attempt to drive it across the second track in front of the oncoming train, and that the train struck the car, causing intestate's death. Plaintiff brought suit against the railroad company and the driver of the car, alleging that defendants were *joint tort-feasors: Held*, defendant railroad company's demurrer to the complaint on the ground that it failed to state a cause of action against it was properly sustained under authority of *Ballinger v. Thomas*, 195 N. C., 517.

CIVIL ACTION, before *Sink, J.*, at July Term, 1934, of GASTON.

This was a civil action for wrongful death, heard upon complaint and demurrer. The complaint alleged that plaintiff's intestate, John J. George, died on 16 September, 1932, as a result of collision between the automobile in which the plaintiff's intestate was riding and a passenger train owned and operated by the defendants. The scene of the collision was approximately one mile south of the town of Kings Mountain. At this point the railroad of the defendants is double-tracked so that all southbound traffic moves on the westerly track and all northbound traffic on the easterly track. At the point of collision these tracks are intersected by a public road which turns off from Highway No. 29 and intersects the railroad at grade. The railroad tracks run approximately east and west. It was alleged that there are certain obstructions south of the crossing "rendering it difficult to see from said highway the approach of the train from the south until it gets within about 500 feet of said crossing." It was also alleged that there were certain freight cars standing on a spur track near a cotton mill situated on the south side of the crossing, and that all of these obstructions interfered with the vision of a traveler, so that, as alleged, "it was impossible to see the approach of a train from the south by anyone crossing said railroad tracks from west to east until such person was practically upon said railway tracks, and difficult to see such train in its approach from the south until said train was within 500 feet of said crossing."

At the time of the accident plaintiff's intestate was riding as a guest in an automobile owned by the defendant George B. Sorrells, and the same was under the exclusive control of said defendant. The automobile approached the crossing, headed east. It was alleged "that the said George B. Sorrells approached said railway tracks at a reckless rate of speed without taking any due caution as to the danger in approaching said railway tracks, and without giving plaintiff's intestate any opportunity whatsoever to stop, look, and listen, or to take note of any danger that might exist by reason of entering upon said railway tracks at said

crossing, . . . and that by reason of the fact that he had no control over the driving of said automobile of the defendant George B. Sorrells, plaintiff's intestate was utterly unable to protect himself at all. . . . That the defendant George B. Sorrells recklessly and wantonly drove his said automobile, in which plaintiff's intestate was riding with him, upon the first or west sidetrack of said railway, . . . and when upon said tracks they saw for the first time a fast passenger train, owned and operated by the defendants, . . . approaching from the south at a high and dangerous rate of speed, to wit, a speed of about 60 miles per hour; that at the moment plaintiff's intestate and the said George B. Sorrells observed the said train approaching said crossing, as hereinbefore described and alleged, the said George B. Sorrells, defendant, recklessly, excitedly, and wantonly undertook to accelerate his automobile and drive it across the eastern track of said railway, . . . and in so doing the engine of said railway company . . . struck the rear end of said automobile . . . and caught the body of plaintiff's intestate on the extended parts of the right side of said engine or locomotive, and carried the body of plaintiff's intestate for a distance of about 90 feet, . . . with such violence . . . that he died almost immediately."

It was further alleged that the death of plaintiff's intestate was caused "solely and proximately by the negligence of defendant George B. Sorrells and the negligence of defendant Railway Company, severally and concurrently. . . ."

The defendant Railway Company demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and that there was a misjoinder of both parties and causes of action.

The trial judge sustained the demurrer, and the plaintiff excepted and appealed.

Samuel R. McClurd and Tillett, Tillett & Kennedy for plaintiff.

Richard C. Kelly, George B. Mason, Smith, Leach & Anderson, and Oscar F. Mason for defendants.

BROGDEN, J. The narrative of facts contained in the complaint and the picture painted therein classify this case within all the essential principles heretofore announced and applied in *Ballinger v. Thomas and Southern Railway*, 195 N. C., 517, 142 S. E., 761. Of course, there are slight variations of fact between the *Ballinger case* and the case at bar, which might form the basis of nice legal distinctions and metaphysical reasoning; nevertheless, in all practical aspects the *Ballinger case* is decisive.

Affirmed.

STATE v. PAUL JORDAN.

(Filed 12 December, 1934.)

1. **Criminal Law G r—State is bound by testimony of defendant elicited on cross-examination as to matters collateral to charge and which do not tend to show motive, temper, etc., toward cause or parties.**

Defendant, on trial for receiving stolen goods knowing them to have been stolen, testified on cross-examination by the State that he had not stated he sold liquor, and that he had not been selling liquor: *Held*, the State was bound by defendant's testimony on cross-examination in response to the collateral questions relative to his selling liquor and was precluded from contradicting it by testimony of other witnesses that defendant had stated he sold liquor to everyone in the county.

2. **Criminal Law G j—**

When a defendant voluntarily becomes a witness in his own behalf he has the same privileges and position, and is equally liable to be impeached or discredited, as any other witness.

3. **Criminal Law L e—**

The admission of incompetent testimony tending to disprove a defendant's testimony in his own behalf as to a matter collateral to the charge upon which he is tried cannot be held harmless, since it would tend to discredit his testimony relative to his innocence of the charge.

4. **Criminal Law G b—**

In a prosecution for receiving stolen goods knowing them to have been stolen, testimony that defendant sold liquor is incompetent as substantive proof, even of the intent to commit the crime charged.

APPEAL by the defendant from *Clement, J.*, at July Term, 1934, of RICHMOND. New trial.

The facts pertinent to the appeal are set forth in the opinion.

J. C. Sedberry for appellant.

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

SCHENCK, J. The charge in the bill upon which the defendant was tried and convicted was that of feloniously receiving stolen goods, knowing them to have been stolen.

Upon cross-examination the defendant testified as follows:

"I am not a liquor seller; I don't say I sold liquor. I drink liquor. I have not sold liquor around up there. I don't know that I have sold any—just gone out and sold it. I have not sold it anywhere. If I said to the officers that I sold liquor to everyone in my county except the preacher, and gave him half a gallon, I was out of my head. I said if they could get anyone to say a hard word about me—all that you can get

anyone to say about me is that I sold liquor. If I said that the sheriff of Randolph County knew that I was selling liquor, or anything like that, I did not know what I was saying. I was not drunk that night. . . . I said, 'If anyone says anything about me, they might say I sold liquor.' I have not been selling liquor."

After the defendant had closed his evidence, one West, a witness for the State, over the objection of the defendant, was permitted to testify: "I did not hear it at his (defendant's) home, but heard it after he was put in jail. I was asking him about this tobacco and stuff and he said no one could say anything against him only that he sold whiskey, and everyone knew it, and he sold it to everyone but the preacher, and the preacher come over there about two weeks ago and he gave him a half a gallon, and the preacher tried to give him $2.00, and he gave him the money back." And one Finch, also a witness for the State, over objection of the defendant, was permitted to testify: "He (defendant) was down in jail that morning and one of the boys was getting a mattress for him, and he said anyone could say nothing against him except that he sold liquor, and he sold it to most everyone except the preacher, and the preacher come over there and wanted some and he gave him a jar and he offered him $2.00 for it and he gave him the money back."

The testimony of the defendant as a witness in his own behalf to the effect that he had not sold liquor or in any way dealt in liquor, and that he had not told anyone he had sold or dealt in liquor was entirely collateral to the offense with which he was charged, namely, that of feloniously receiving stolen goods, knowing them to have been stolen, and the State having elicited such testimony upon cross-examination was bound thereby and precluded from contradicting it.

The general rule is that answers made by a witness to collateral questions on cross-examination are conclusive, and that the party who draws out such answers will not be permitted to contradict them; which rule is subject to two exceptions, first, where the question put to the witness on cross-examination tends to connect him directly with the cause or the parties, and second, where the cross-examination is as to a matter tending to show motive, temper, disposition, conduct, or interest of the witness toward the cause or parties. *S. v. Patterson,* 24 N. C., 346; *S. v. Davis,* 87 N. C., 514; *Cathey v. Shoemaker,* 119 N. C., 424; *In re Craven's Will,* 169 N. C., 561. It is clear that the testimony of the defendant elicited on cross-examination is not within either of the exceptions to the general rule, since its sole purpose was to disparage and discredit the witness.

When the defendant voluntarily became a witness in his own behalf, he occupied the same position, was entitled to the same privileges and protection, and was equally liable to be impeached or discredited as any other witness. *S. v. Efler,* 85 N. C., 585.

In view of the rule enunciated by this Court, we are of the opinion that his Honor erred in admitting the testimony of the witnesses West and Finch to contradict the defendant's testimony as to facts collateral to the issue involved; and we cannot agree with the suggestion that the admission of such testimony was harmless error, since it at least laid the defendant's testimony, as a witness in his own behalf, open to the implication of *"falsum in uno, falsum in omnibus,"* and could easily have discredited his testimony in the minds of the jurors.

We are aware that in certain instances evidence of the commission of other offenses by the defendant will be heard to prove the intent of the offense with which he is charged. However, the violation of a prohibition statute, concerning which the witnesses West and Finch testified, is a distinct and independent offense from feloniously receiving stolen goods, knowing them to have been stolen, with which the defendant was charged, and the transactions were in no wise so connected or contemporaneous as to form a continuing action, and evidence of the former was therefore inadmissible to prove even the intent of the latter. *S. v. Smith,* 204 N. C., 638, and cases there cited.

Since there must be a new trial for the error assigned, it becomes unnecessary for us to discuss the other questions raised on this appeal. We do, however, hold that his Honor was correct in overruling the defendant's demurrer to the evidence and motion to dismiss the action.

New trial.

A. W. PERKINS, EMPLOYEE, v. D. J. SPROTT, TRADING AS SPROTT BROTHERS FURNITURE COMPANY, EMPLOYER, AND GREAT AMERICAN INDEMNITY COMPANY, CARRIER.

(Filed 12 December, 1934.)

1. Master and Servant F i—

Where all the facts are admitted and the Industrial Commission denies compensation on the facts as a matter of law, the Superior Court, on appeal, has jurisdiction to reverse the Industrial Commission and remand the cause.

2. Master and Servant F b—Injury in this case held to have resulted from accident arising out of employment.

Claimant was driving a truck in the course of his employment and, while passing a group of boys playing baseball, the baseball struck the windshield and a piece of glass from the windshield struck claimant in the eye, resulting in the injury: *Held,* the injury resulted from accident arising out of and in the course of the employment.

APPEAL by defendants from *Harding, J.,* at June Term, 1934, of CABARRUS. Affirmed.

A claim was filed by the plaintiff against the above defendants, employer and carrier, for compensation. A hearing before an individual Commissioner, J. Dewey Dorsett, was held in Concord, on 11 October, 1933. The individual Commissioner found that the injury arose out of and in the course of the plaintiff's employment, and entered an award approving compensation. An appeal was taken to the full Commission on 8 November, 1933; the full Commission reversed the award of the hearing Commissioner and found that the injury did not arise out of and in the course of the plaintiff's employment, and entered an order denying compensation and dismissing the case. The plaintiff appealed to the Superior Court. His Honor, Judge Wm. F. Harding, found on the facts that the accident did arise out of and in the course of the plaintiff's employment, reversed the decision of the Commission, and directed that the cause be remanded to the Industrial Commission. The defendants excepted, assigned error, and appealed to the Supreme Court.

It is admitted that on 27 June, 1933, A. W. Perkins, the plaintiff, was one of more than five employees of D. J. Sprott, trading as Sprott Brothers Furniture Company, in Concord, North Carolina; that the contract of employment was made under and was being performed subject to the provisions of the Consolidated Statutes of North Carolina, known as the "Workmen's Compensation Act," and was covered by a policy of insurance in full force and effect with the Great American Indemnity Company; that the average weekly wages of the plaintiff were twelve dollars and fifty cents ($12.50), and that as a result of the injury the plaintiff sustained a permanent loss of fifty-one per cent (51%) of the vision of his right eye.

H. S. Williams for plaintiff.
Fred B. Helms and Frank E. Exum for defendants.

CLARKSON, J. N. C. Code, 1931 (Michie), sec. 8081 (i): "When used in this chapter, unless the context otherwise requires: (f) '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."

In *Harden v. Furniture Company,* 199 N. C., 733 (735), it is said: "While the phrase 'in the course of' refers to time, place, and circumstance, the words 'out of' relate to the origin or cause of the accident." *Goodwin v. Bright,* 202 N. C., 481.

In *Byrd v. Lumber Co., ante,* 253 (255), it is said: "On plaintiff's appeal from the award to the Superior Court, only questions of law involved in the proceeding and decided by the Industrial Commission

could be considered. This is also expressly so provided by statute. N. C. Code of 1931, sec. 8081 (ppp). The jurisdiction of the Superior Court is limited to a consideration of questions of law only."

In the present case all the facts are admitted, and the full Commission decided as a matter of law that plaintiff could not recover. An appeal was taken to the Superior Court and the ruling on this question of law made by the Industrial Commission was reversed. The court below had this power, and we think the decision correct.

The testimony of plaintiff, in part, is as follows: "I was employed as a collector and deliveryman. On 27 June, 1933, I was driving my employer's truck, returning on Highway No. 15, after having made a delivery at Kannapolis, to my employer's place of business in Concord. As I was passing a group of boys playing baseball on a field near the highway a baseball hit and broke the windshield of the truck. A piece of glass from the windshield got in my eye. I did not return to work until 28 September, 1933. . . . Q. What I am getting at is this: Did anything hit you in the face except the glass in your eye? A. Nothing but the glass. The ball, to my knowledge, didn't touch me at all, only possibly fell in my lap. I don't know where the ball was found. Q. Nothing hit you solidly, nothing but the glass, a few fragments of glass went in your eye, and that's all? A. Yes, sir."

The injury was: (1) By accident. (2) In the course of the employment and, we think, "arising out of." The injury to the plaintiff employee was the glass that hit him in the eye. The baseball did not hit him.

In *Whitley v. Highway Com.*, 201 N. C., 539, the injury was a stray shot from a hunter's gun. In *Bain v. Travora Mfg. Co.*, 203 N. C., 466, the injury was the stray bullet from one shooting at a sparrow.

We do not think that it is necessary from the view we take of this case to consider "Street Hazard." The judgment of the court below is

Affirmed.

PATE HOTEL COMPANY, OWNER OF GREYSTONE INN, AND W. H. PATE, MANAGER OF GREYSTONE INN, v. H. BLAIR AND WIFE, MRS. H. BLAIR.

(Filed 12 December, 1934.)

Innkeepers B a—

Under the facts of this case, a hotel keeper's lien for charges, C. S., 2461, *is held* not to attach to an automobile belonging to a third person which was brought to the hotel by the guest.

APPEAL by plaintiffs from *Harris, J.*, at May Term, 1934, of NEW HANOVER.

Civil action to enforce innkeeper's lien on automobile brought by defendants to plaintiffs' hotel.

The defendants were guests at plaintiffs' hotel at Carolina Beach during the month of July, 1933. In addition to certain baggage, they had in their possession a Ford automobile which was kept, during their stay, on the hotel property just outside the window of the room occupied by defendants. They attempted to leave without paying board and lodging bill of $93.75. The plaintiffs attached the baggage and automobile as the property of the defendants.

The Rose Investment Company and Ike W. Wright intervened and established title to the automobile; whereupon the court released said automobile from the attachment and alleged lien of the plaintiffs. From this ruling the plaintiffs appeal.

John W. Hinsdale for plaintiffs.
Carr, Poisson & James for intervenors.

STACY, C. J. It is provided by C. S., 2461, that every hotel or innkeeper who furnishes hotel accommodations to any person shall have a lien upon "all baggage or other property of such person . . . brought to such hotel" or inn, until all reasonable charges for such accommodations have been paid. The lien, however, would not attach to an automobile, the property of a third person, brought to the inn by the guest under circumstances disclosed by the present record. *Covington v. Newberger,* 99 N. C., 523, 6 S. E., 205; *Cook v. Kane,* 13 Or., 482, 57 Am. Rep., 28, and annotation.

Affirmed.

D. L. HILTON AND L. W. BOSTIAN, PARTNERS, TRADING AND DOING BUSINESS AS CHARLOTTE BREAD COMPANY, v. B. E. HARRIS, TREASURER OF THE CITY OF CONCORD, NORTH CAROLINA.

(Filed 12 December, 1934.)

1. Municipal Corporations K b—City held authorized to levy tax on trades, professions and franchises within the city.

The charter of a city giving it certain powers in respect to the levying of franchise taxes on trades and professions, etc., and C. S., 2677, will be construed together in determining the legislative grant of power to the municipality to levy taxes of this class, and construing the charter of the city of Concord *in pari materia* with C. S., 2677, *it is held* the city is given authority by the Legislature to levy a tax upon bakeries operating or delivering in the city, the Legislature being given the power to levy such taxes by Art. V, sec. 3, of the Constitution, and having the power to delegate this authority to counties, cities, and towns as administrative agencies of the State.

2. Same—City held authorized to tax bakery located outside of city but which delivers and collects for products within the city.

The charter of the city in question authorized it to levy a tax on "every person who shall manufacture and sell any bread" in the city, and gave the city "all powers incident and usual to corporations of like character under the general laws of the State." C. S., 2677, gives municipalities power to tax trades, professions, etc., "carried on or enjoyed within the city": *Held*, construing the charter *in pari materia* with the statute, the city is given power to tax a firm whose bakery is outside the city, but which delivers bread and bakery products inside the city to customers procured by its salesman, and collects for its goods upon delivery, such trade being "carried on or enjoyed within the city."

3. Taxation A d—Municipal tax on bakeries operating or delivering bakery products within the city held not discriminatory.

The municipal ordinance in question levied a tax on bakeries operating or delivering bread and bakery products within the city. Plaintiff firm operated a bakery outside the city, but delivered bakery products inside the city to customers obtained by its salesman, and collected for its products upon delivery. Plaintiff contended that as to it the tax was discriminatory, and that while the city might have the power to tax the trade it did not have the power to tax an incident to such trade: *Held*, plaintiff's contentions cannot be sustained, the tax being equal upon all who operate or deliver bread and bakery products within the city, and tending to protect bakeries operating within the city and thus prevent monopolies, Art. I, sec. 31, and taxing without discrimination both residents and nonresidents carrying on the trade within the city.

4. Same—Classification of bakeries delivering bread and other bakery products and those delivering only pies or cakes or doughnuts held not discriminatory.

The municipal ordinance in this case levied a tax of $100.00 on bakeries operating or delivering bread and other bakery products within the city, and levied a tax of $50.00 on bakeries operating and delivering only cakes or pies or doughnuts within the city: *Held*, the classification was not unjust, arbitrary, or discriminatory, but operated equally upon all coming within the specified classifications, whether operating within the city or bringing themselves within the city for the purpose of carrying on the trades made the subjects of such classification.

APPEAL by plaintiffs from *Harding, J.* at June Term, 1934, of CABARRUS. Affirmed.

"The parties hereto expressly waive trial by jury and agree upon the following facts, and further agree that the judge presiding at the trial of this cause may try the same, without a jury, upon said agreed statement of facts, and render judgment, subject to the rights of the parties, or either of them, to appeal to the Supreme Court, or otherwise seek a review of such decision; the facts agreed upon being as follows:

"(1) The plaintiffs above named are persons residing in Mecklenburg County, North Carolina, and trading and doing business as Charlotte Bread Company; that said plaintiffs have their only bakery and place

of business in the city of Charlotte, Mecklenburg County, North Carolina, and maintain no bakery or place of business in the city of Concord; that all of said facts were true at all the times involved in this action, and that at said times the activities of the plaintiffs in the city of Concord were as follows, to wit: The plaintiffs, through a salesman, operate a truck from their plant in Charlotte to the city of Concord daily, carrying bread and other bakery products, and delivering the same to grocery stores and cafes in said city. The salesman collects for the bakery products at the time of delivery. From time to time customers of the plaintiffs discontinue buying bakery products from the plaintiffs, and also from time to time the salesman of the plaintiffs, by solicitation in the city of Concord, obtains new accounts, which are served in the same manner.

"(2) That the city of Concord is, and was at the times involved in this action, a municipal corporation, organized and existing under a charter contained in chapter 344 of the Private Laws of 1907, which chapter of the Private Laws is hereby referred to, and it is agreed that the court and parties may refer to the printed volume of the Private Laws of North Carolina for the terms and provisions of said statute, and that copy of said statute shall be included in the case on appeal in the event this case is appealed to the Supreme Court. Chapter 85, Private Laws 1903, and chapter 104, Private Laws 1925, pleaded by the defendant, are likewise hereby referred to, and the same agreement is made as to said statutes as is made with reference to chapter 344 of Private Laws of 1907; it being agreed, subject to all objections to the application of said statutes, on the issues involved in this cause, and subject to all objections as to the constitutionality of any of said statutes, as applied to the facts in this case, if they are held to be applicable, that said laws were duly and regularly enacted at the session of the Legislature referred to by the said laws, respectively.

"(3) That the city of Concord, by and through its board of aldermen, passed an ordinance on 7 April, 1932, levying privilege taxes from 1 May, 1932, to and including 30 April, 1933, and amended said ordinance by ordinance adopted 2 June, 1932; that the city of Concord, by and through its board of aldermen, passed another ordinance on 6 April, 1933, levying privilege taxes for the period from 1 May, 1933, to and including 30 April, 1934; that the original of each of the ordinances referred to in this paragraph will be produced in court by the defendant, and may be referred to by the parties and the court, and copies of said ordinances, or so much as may be agreed to be material, shall be included in the case on appeal in any appeal taken in this case.

"(4) In making this agreement, the plaintiffs do not admit the application of said ordinances to them, nor do they admit the validity of

the ordinances if held applicable, but do admit that said ordinances were duly adopted as a form.

"(5) That pursuant to the ordinance of 7 April, 1932, referred to in the preceding paragraph hereof, the city of Concord demanded of the plaintiffs, for the year beginning 1 May, 1932, a tax in the amount of $100.00, and issued a warrant against the plaintiffs on account of their failure to pay said tax; that on 18 April, 1933, the plaintiffs paid to the city of Concord the said tax of $100.00 for the year from 1 May, 1932, to 1 May, 1933, together with penalty demanded by said city for late payment thereof, in the amount of $55.00, making a total payment of $155.00; said payment was made under protest, and the tax collector of the city of Concord was expressly notified, in writing, that said payment was made under protest; that thereafter, on 18 April, 1933, plaintiffs duly demanded of the defendant treasurer of the city of Concord, in writing, that he return to the plaintiffs the sum of $155.00, paid under protest as aforesaid, and said defendant was expressly notified in said written demand that said tax had been paid under protest, and that said demand was made in order that proper action might be instituted to recover said amount in the event it was not returned.

"(6) That for the year beginning 1 May, 1933, the city of Concord, pursuant to the ordinance adopted 6 April, 1933, and hereinbefore referred to, made a demand on the plaintiffs for payment of tax of $100.00, and that thereafter, on 31 May, 1933, the plaintiffs paid said sum of $100.00 under protest, and thereafter, on the same date, demanded the return of said tax, both said payment under protest and demand for refund being made in the same manner as set out in the preceding paragraph hereof.

"(7) That the defendant has refunded neither the $155.00 paid under protest on 18 April, 1933, nor the $100.00 paid under protest on 31 May, 1933, and after the expiration of more than 90 days from the demand for the refund of each of said payments, as hereinbefore set out, this suit was instituted for the recovery of said sum of $155.00, with interest thereon from 18 April, 1933, and the sum of $100.00, with interest thereon from 31 May, 1933.

"(8) That for the years hereinbefore referred to the plaintiffs were required to and did pay to the city of Charlotte a license tax in the amount of $100.00 per annum, for the privilege of engaging in the business of operating their bakery in said city, said city of Charlotte being a municipal corporation, organized and existing under a charter, contained in chapter 342 of the Private Laws of 1907, which is hereby referred to. This 14 June, 1934. John M. Robinson, Hunter M. Jones, Attorneys for Plaintiffs. Hartsell & Hartsell, Z. A. Morris, Jr., Attorneys for Defendant."

The judgment in the court below is as follows: "This cause coming on to be heard before the undersigned judge presiding at the June Term, 1934, Cabarrus Superior Court, upon the pleadings and the agreed statement of facts appearing in the record, the parties having expressly waived trial by jury by written stipulation, and being heard; and it having been agreed upon said hearing that the plaintiffs may be deemed to have amended their complaint so as to allege that the ordinance of 7 April, 1932, and the ordinance of 2 June, 1932, referred to in paragraph 3 of the agreed statement of facts, are discriminatory in that they impose a smaller tax upon bakers delivering only cakes, or pies, or doughnuts, than is imposed on the plaintiffs; and the court being of the opinion upon said hearing that the city of Concord had the power to levy the taxes complained of:

"It is therefore ordered and adjudged that the plaintiffs recover nothing of the defendant, and that the plaintiffs be taxed with the costs of this action. Wm. F. Harding, Judge Presiding, 15th Judicial District."

To the foregoing judgment, as signed, the plaintiffs excepted, assigned error, and appealed to the Supreme Court.

John M. Robinson and Hunter M. Jones for plaintiffs.
Zeb A. Morris, Jr., and Hartsell & Hartsell for defendant.

CLARKSON, J. This is an action brought by plaintiffs against defendant to recover an alleged illegal or invalid tax paid under protest. The plaintiffs complied with the requirement of the statute, C. S., 7979. *R. R. v. Commissioners,* 188 N. C., 265 (266); *Loose-Wiles Biscuit Co. v. Sanford,* 200 N. C., 467 (469).

The questions involved are: (1) Has the city of Concord authority to levy a privilege tax on "Bakeries, operating or delivering in the city?" We think so.

(2) If so, can the tax be collected from a bakery located outside the limits of said city which delivers its products, collects money for same, and solicits new business within said city? We think so.

The material parts of the ordinance in controversy are as follows: "Levying, assessing, imposing, and defining the license and privilege taxes of the city of Concord, for the year beginning 1 May, 1932, and ending 30 April, 1933. The board of aldermen of the city of Concord, North Carolina, do ordain: Section 1. That to raise funds for general municipal purposes, the following license taxes hereinafter specified are hereby levied for the privilege of carrying on the business, trades, avocations, professions, employment, calling, or doing the act named, within the corporate limits of the city of Concord from 1 May, 1932, to 30

April, 1933, unless for some other time or period herein specified, and all such taxes shall be due and payable in advance at the office of the tax collector for the city of Concord: The payment of any particular tax herein imposed shall not relieve the party paying same from liability for any other tax specifically imposed for any other business conducted by such person. . . . Section 8. That whenever the word 'person' is used in this ordinance, the same shall be construed to include 'firms,' 'companies,' 'corporations,' and 'associations.'

"Section 9. Schedule of city privilege license taxes. Bakeries operating or delivering in the city, $100.00."

This ordinance was adopted 7 April, 1932. The above ordinance was amended 2 June, 1932: "An ordinance relating to the taxing of bakers. The board of aldermen of the city of Concord do ordain: That every person, firm, or corporation operating or delivering bread or other bakery products in the city of Concord shall pay a tax of one hundred dollars ($100.00). That every person, firm, or corporation delivering cakes only within the said city of Concord shall pay a tax of fifty dollars ($50.00). That every person, firm, or corporation delivering pies only within the city of Concord shall pay a tax of fifty dollars ($50.00). That every person, firm, or corporation delivering doughnuts only within the city of Concord shall pay a tax of fifty dollars ($50.00). That every person, firm, or corporation who or which shall violate any of the provisions of the above ordinance, or who or which shall conduct or carry on the above business without paying the above tax for same within the city of Concord, shall be guilty of a misdemeanor and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days for each offense: *Provided,* that each day any of the provisions of this ordinance are violated shall constitute a separate and distinct offense. That this ordinance shall take effect and be in force from and after its publication. Ordained by the board of aldermen of the city of Concord, this 2 June, 1932."

It was agreed by the parties that the ordinance adopted 6 April, 1933, is identical with the ordinance adopted 7 April, 1932, except that it applies to the year from 1 May, 1933, to 30 April, 1934, and that said ordinance adopted 6 April, 1933, may be omitted entirely from the case on appeal. The ordinance adopted 2 June, 1932, above set forth, shall be included in full. We think the ordinances of 7 April, 1932, and 2 June, 1932, in reference to bakeries, are practically the same.

The following is in the agreed statement of facts: "The plaintiffs above named are persons residing in Mecklenburg County, North Carolina, and trading and doing business as Charlotte Bread Company; that said plaintiffs have their only bakery and place of business in the city of Charlotte, Mecklenburg County, North Carolina, and maintain no

bakery or place of business in the city of Concord; that all of said facts were true at all the times involved in this action, and that at said times the activities of the plaintiffs in the city of Concord were as follows, to wit: The plaintiffs, through a salesman, operate a truck from their plant in Charlotte to the city of Concord daily, carrying bread and other bakery products, and delivering the same to grocery stores and cafes in said city. The salesman collects for the bakery products at the time of delivery. From time to time customers of the plaintiffs discontinue buying bakery products from the plaintiffs, and also from time to time the salesman of the plaintiffs, by solicitation in the city of Concord, obtains new accounts, which are served in the same manner."

In the charter of 1903 and in the revised charter of 1907 the power to tax the business of a baker is granted in the following language: "That the said city of Concord . . . shall have the right to levy and collect the following amounts for the privilege of doing the acts or carrying on the trades or business or exercising the privileges as follows: . . . On every baker, an annual tax not to exceed $15.00 per annum. Every person who shall manufacture and sell any bread, pies, cakes, or the like, shall be deemed a baker."

Private Laws of 1925, ch. 104, sec. 2: "That chapter three hundred and forty-four of the Private Laws of one thousand nine hundred and seven be further amended by adding after section eighty-nine a new section, to be known as 'Section eighty-nine a,' to read as follows:

" 'Section 89a. In addition to the powers and privileges hereinbefore conferred, the city of Concord shall have all the powers incident and usual to corporations of like character under the general laws of the State; and the amounts of tax named above which the city is authorized to levy and collect shall only be a guide and shall not be binding as to the amount of tax the city may levy on each trade, profession, business, or franchise, but the amount of tax which the city may levy and collect on each trade, profession, business, or franchise shall be in the discretion of the board of aldermen.' "

Section 89a gives the city of Concord broad powers to tax trades, professions, business, or franchise, and "the amount of tax which the city may levy and collect on each trade, profession, business, or franchise shall be in the discretion of the board of aldermen." The prior provisions limited the power as follows: "On every baker, an annual tax not to exceed $15.00 per annum." The further power is given: "All the powers incident and usual to corporations of like character under the general laws of the State."

N. C. Code (1931), Michie, sec. 2677, is as follows: "The board of commissioners may annually levy and cause to be collected for municipal purposes a tax not exceeding fifty cents on the hundred dollars, and one

dollar and fifty cents on each poll, on all persons and property within the corporation, which may be liable to taxation for State and county purposes; and may annually lay a tax on all trades, professions, and franchises carried on or enjoyed within the city, unless otherwise provided by law; and may lay a tax on all such shows and exhibitions for reward as are taxed by the General Assembly; and on all dogs, and on swine, horses, and cattle, running at large within the town."

The power to tax a trade is given to the General Assembly in Article V, section 3, of the Constitution of North Carolina. The plaintiffs contend that there is no legislative authority for the tax. We cannot so hold. The charter of Concord and C. S., 2677, are *in pari materia.* They relate to the same matter and are to be construed together. *Corp. v. Motor Co.,* 190 N. C., 157 (160).

The plaintiffs further contend that in the charter of 1903 and the revised charter of 1907, that the authority given to tax bakers is in this language: "Every person who shall manufacture and sell any bread," etc., and if C. S., 2677, applies, it says: "And may annually lay a tax on all trades, professions carried on or enjoyed within the city." We think that under a reasonable construction, the language broad enough to cover the trade plaintiffs are carrying on in the city of Concord, and not restricted to those who manufacture and sell it in the city. C. S., 2677, *supra,* gives additional power.

In *Drug Co. v. Lenoir,* 160 N. C., 571 (572), a part of the agreed statement of fact is as follows: "The town of Lenoir insists that it is allowed to collect taxes on all privileges and subjects within the corporate limits, and on all itinerant or resident persons plying any trade, profession, or calling which is liable for taxation for State and county purposes, unless prohibited by the general law of the State. That the collection of the tax aforesaid is not prohibited by the general law of the State, and that the imposition and collection of the tax aforesaid is permitted and permissible under the general law of the State, and the town is not restricted to the collection of license and privilege taxes which are specifically named in the Revenue Act."

The opinion says, at page 573: "It is true, as contended by the plaintiff, that the defendant derives its power to tax from legislative authority, and if it has not been conferred, it does not exist. *S. v. Bean,* 91 N. C., 554; *Winston v. Taylor,* 99 N. C., 211.

"We must look, then, to the charter of the defendant (chapter 37, Private Laws 1909), and we find there that certain powers as to taxation are specifically enumerated in section 8, and it is further provided, in section 1, that the defendant, 'in addition to the powers and privileges hereafter specially conferred, shall have all the power incident and usual to corporations of like character under the general laws of the State.'

"Chapter 73 of the Revisal is devoted to 'Cities and Towns,' and section 2924 (now C. S., 2677, *supra*), confers the power on them to 'annually levy a tax on all trades, professions, and franchises carried on or enjoyed within the city, unless otherwise provided by law,' and the word 'trade,' as used in acts to raise revenue, is defined to be 'any employment or business embarked in for gain or profit.' *S. v. Worth*, 116 N. C., 1010."

We think plaintiffs' trade is "carried on or enjoyed within the city" of Concord. To be sure its headquarters are in Charlotte, but the activities of plaintiffs are in Concord, as follows: "The plaintiffs, through a salesman, operate a truck from their plant in Charlotte to the city of Concord daily, carrying bread and other bakery products, and delivering the same to grocery stores and cafes in said city. The salesman collects for the bakery products at the time of delivery. From time to time customers of the plaintiffs discontinue buying bakery products from the plaintiffs, and also from time to time the salesman of the plaintiffs, by solicitation in the city of Concord, obtains new accounts, which are served in the same manner." Where the bread is baked is immaterial, but where it is sold and where the money is collected is where the business is done and the trade carried on.

The tax by the city of Concord is on "Bakeries operating or delivering in the city, $100.00." And further, "That every person, firm, or corporation operating or delivering bread or other bakery products in the city of Concord shall pay a tax of one hundred dollars ($100.00)."

If the plaintiffs were not required to pay this tax for the trade or business it carries on in Concord, a situation would arise that those living in Concord and carrying on this kind of trade or business, who paid the tax—it would injure their business, as they would have to pay a tax of $100.00 and the plaintiffs would not; consequently, the plaintiffs would undersell the Concord bakers. Such favoritism would tend to monopolize and, in time, destroy competition, which is sometimes called "the life of trade."

In this case it would tend to create a monopoly on bread, the staff of life. It is a well-recognized principle of law that a tax must be uniform. "A tax is uniform when it is equal upon all persons belonging to the described class upon which it is imposed." *Lacy v. Packing Co.*, 134 N. C., 567 (572); affirmed, 200 U. S., 226; 50 L. Ed., 451.

The plaintiffs contend that the tax discriminates against them, and that a municipality authorized to tax a trade or business cannot tax a mere incident to that business. These contentions cannot be sustained. The factual situation is that clearly plaintiffs are plying their trade and doing business by delivering and soliciting the sale of bread in the city of Concord. "Perpetuities and monopolies are contrary to the

genius of a free state, and ought not to be allowed." Article I, section 31, Constitution of North Carolina, 1776 Declaration of Rights, sec. 23.

In *S. v. Denson,* 189 N. C., 173 (175), citing a wealth of authorities, the following principle is stated: "Municipal Ordinances, sec. 193, *et seq.* 'The specific regulations for one kind of business, which may be necessary for the protection of the public, can never be the just ground of complaint, because like restrictions are not imposed upon other businesses of a different kind. The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws.'—*Mr. Justice Field,* in *Soon Hing v. Crowley,* 113 U. S., 703; 28 Law Ed., 1145." *Hart v. Commissioners,* 192 N. C., 161 (164-5); *S. v. Kirkpatrick,* 179 N. C., 747.

This whole matter has been recently discussed in *Tea Co. v. Maxwell, Comr. of Revenue,* 199 N. C., 433 (440): "When a classification has been made by the General Assembly, for the purpose of imposing license taxes on trades, professions, franchises, or incomes, solely for the purpose of raising revenue, this Court will not hold the classification invalid, unless it shall appear, clearly and unmistakably, that the classification is unreasonable and arbitrary, resulting in an unjust discrimination. Unless it shall so appear, the classification will be upheld and the tax imposed adjudged valid, notwithstanding the contention that its imposition violated the rule of uniformity." On an appeal to the Supreme Court of the United States this judgment was affirmed. *Great Atlantic and Pacific Tea Co. et al. v. Maxwell, Comr. of Revenue,* 284 U. S., 575; *Rosenbaum v. City of New Bern,* 118 N. C., 83; *Clark v. Maxwell,* 197 N. C., 604; *Provision Co. v. Maxwell,* 199 N. C., 661.

It is further contended by plaintiffs that they are taxed twice as much as a person delivering cakes or pies or doughnuts only, though the volume of business of such person may be greater than that of the plaintiffs. There is no discrimination in these particular classes—the subject of these taxes. There is no discrimination in the ordinance between resident and nonresident persons or corporations delivering bread or other bakery products in the city of Concord. "All who bring themselves within the limits of the corporation are, while there, citizens so as to be governed by its laws." *Whitfield v. Longest,* 28 N. C., 268 (272). "It is settled that by coming within the town and acting there, a person becomes liable as an inhabitant and member of the corporation." *Comrs. v. Roby,* 30 N. C., 250 (253-4).

From a careful review of this case we can see no error in the judgment of the court below. It is therefore

Affirmed.

W. C. McGEE v. EMANUEL FROHMAN.

(Filed 12 December, 1934.)

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

Upon a motion 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. Contracts F c — Nonsuit on plaintiff's testimony tending to show affirmance of contract by defendant with knowledge of facts held error.

Plaintiff brought suit on a contract alleging that in consideration of plaintiff's agreement to relinquish and assign all his rights under an application for letters patent, and all his rights, title, and interest in partnership property theretofore operated by the parties in the manufacture of the article for which application for letters patent had been made, and all accounts receivable by the partnership, defendant made an initial payment of money and promised to pay stipulated sums of money each year for five years, that plaintiff had complied with his part of the contract but that defendant had failed and refused to pay the balance of the sums due under the contract. Defendant filed answer alleging that the application for the patent had been rejected by the Government to plaintiff's knowledge prior to the execution of the contract, and set up a counterclaim for sums previously paid under the contract. Plaintiff filed a reply alleging that defendant knew all the facts known to plaintiff at the time of the execution of the contract, and that defendant was then engaged in the manufacture of the article, the subject of the contract, at a profit. Plaintiff testified that after all facts were known by defendant, plaintiff made demand for the sums due, and that defendant did not dispute the contract, but promised to pay the sums due as soon as there was money available: *Held,* defendant's motion as of nonsuit for the insufficiency of the evidence should have been denied.

3. Trial D a—

Where defendant in an action on contract sets up a counterclaim arising out of the same contract declared upon by plaintiff, defendant may not withdraw his counterclaim over plaintiff's objection in order to enter a motion as of nonsuit on the plaintiff's cause of action.

APPEAL by plaintiff from *Stack, J.,* at March Civil Term, 1934, of GASTON. Reversed.

The following contract was introduced in evidence on the part of plaintiff, on the trial in the court below: "North Carolina—Gaston County. This agreement made and entered into by and between Emanuel Frohman, hereinafter designated as Frohman, and W. C. McGee, hereinafter designated as McGee, this 9 June, 1928:

"Witnesseth: That, whereas, the parties hereto have been engaged in the business of installing lubricating devices having a wick oiling means and acting by capillary attraction, said devices having been applied to the front bearings of spinning, twisting, and roving frames, the said McGee having invented the said devices and having applied for letters patent thereon in the United States Patent Office, said patent application having the serial number of 172,478, and having been filed in the United States Patent Office on 3 March, 1927, and is still pending therein, and that since the application for said letters patent the said Frohman has advanced certain sums of money to the said McGee for the development, manufacture, and sale of the said device in various mills throughout the adjacent territory to Charlotte, North Carolina, and other portions of the United States; that a considerable demand has been created for the said oiling devices and a great number of the same have been installed in mills throughout the states of North Carolina and South Carolina, and other portions of the United States; and the development has reached the point where the said McGee desires to withdraw from the business and assign his entire right, title, and interest in and to the said patent application and his interest in and to the said business to the said Frohman upon the following conditions:

"(1) Frohman agrees to pay to McGee the sum of two thousand five hundred dollars ($2,500.00) upon the execution of this instrument, and to give to McGee his note for two thousand five hundred dollars ($2,500.00), payable thirty days from the date of this contract, and further agrees to pay the said McGee one thousand dollars ($1,000.00) on 9 June, 1929; one thousand dollars ($1,000.00) on 9 June, 1930; 9 June, 1931; 9 June, 1932; and 9 June, 1933; and the said latter payments to be conditioned upon the fulfillment of all the terms of this contract by the said McGee.

"(2) McGee agrees to relinquish all his rights, title, and interest in and to the said patent application, Serial Number 172,478, and to execute an assignment thereof to the said Frohman upon the execution of this contract and the payment of the initial sum of two thousand five hundred dollars ($2,500.00), and to relinquish all his rights, title, and interest in and to the business which the parties hereto have built up and operated under, and the name of the firm being known as the Textile Roller Lubricating Device Company, and the said McGee hereby sells, assigns, and transfers all his rights, title, and interest in and to all equipment, materials, and supplies now on hand; the said McGee also assigns and sells and transfers unto the said Frohman all his rights, title, and interest in and to all accounts receivable by the said Textile Roller Lubricating Device Company.

"(3) The said Frohman assumes all indebtedness of the said Textile Roller Lubricating Device Company, which has been contracted by either of the parties hereto in relation to the said business.

"(4) The said McGee hereby agrees that he will not for a period of five years from date engage in the business, either directly or indirectly, of manufacturing and/or selling, and/or installing any devices for oiling the front rollers of spinning, twisting, and roving machinery, if said devices operate by using a wick oiler acting on the principle of capillary attraction.

"(5) It is agreed that in case the said McGee fails to carry out any one of the terms of said conditions of this contract that the yearly payment of one thousand dollars ($1,000.00) shall not be payable for the current year in which the breach occurs, nor for any succeeding year.

"(6) It is further agreed by and between the parties hereto that upon the issuance of letters patent on the said patent application Serial Number 172,478 by the United States Patent Office, that the said Frohman shall pay to the said McGee within thirty days after the issuance of said patent and after the said Frohman has been notified of the said issuance by the said McGee, the sum of one thousand dollars ($1,000.00).

"(7) It is further agreed between the parties hereto that all agreements heretofore entered into between them, either written or oral, are hereby revoked and canceled.

"(8) This contract is executed in triplicate and all copies shall be considered as an original for all purposes, each of the parties hereto having been supplied with a copy of this contract, and the third copy having been deposited with Paul B. Eaton, of 406 Independence Building, Charlotte, North Carolina, the said third copy to be available at all times for the inspection of either of the parties hereto or their legal representatives.

"In witness whereof the parties hereto have set their hands and affixed their seals in triplicate, the day and year above written. Emanuel Frohman (Seal), W. C. McGee (Seal). Witnesses: Paul B. Eaton (Signed)."

In the complaint the plaintiff alleges: "That the plaintiff fully complied with said contract on his part by delivering and transferring said patent rights and said business to the defendant in strict accord with said agreement, but that the defendant has neglected and defaulted in the performance of said contract and, in particular, the payment of the consideration for the purchase of said letters patent, and that said defendant is now justly indebted to the plaintiff in the sum of five thousand dollars ($5,000.00), with interest on one thousand dollars ($1,000.00) from 9 June, 1929, to 9 June, 1930; and interest on two thousand dollars ($2,000.00) from 9 June, 1930, to 9 June, 1931; and

interest on three thousand dollars ($3,000.00) from 9 June, 1931, to 9 June, 1932; and interest on four thousand dollars ($4,000.00) from 9 June, 1932, to 9 June, 1933; and interest on five thousand dollars ($5,000.00) from 9 June, 1933, until paid, all at the rate of six per cent per annum from the dates mentioned until paid, and all due by contract made between the plaintiff and defendant as hereinbefore fully alleged and set out."

The defendant, in his answer, denied liability, and for a further answer and defense and by way of counterclaim avers and alleges: "(1) That at the time of the signing of the contract as attached to the complaint herein, and made a part of the same, the plaintiff knew that the said patent claim and the rights thereunder, and everything he purported to convey to the defendant by the same, was a nullity and was worthless, and was of no consideration, as the patent claim he was attempting to convey, and the rights thereunder, had been rejected by the patent bureau of whatever department handles claims for patents, and that the plaintiff knowingly, wilfully obtained the sum of $6,250.00 from the defendant on said contract, knowing at said time the said patent rights or claims had been rejected, and that said lubricating device for oiling machinery, as he states, evidenced by patent application, Serial No. 172,478 of the United States Patent Office, on 3 March, 1927, was rejected on 17 December, 1927, a long time before said contract was signed, and that the plaintiff secured from the said defendant the sum of $6,250.00 for nothing and without any consideration, and that the plaintiff is thereby indebted to the defendant in the sum of $6,250.00.

"(2) That the defendant denies any indebtedness in any sum to the plaintiff.

"Wherefore, having answered the complaint of the plaintiff, and having set up a counterclaim against the plaintiff, the defendant prays that he be granted judgment of and against the plaintiff in the sum of $6,250.00; that the plaintiff take nothing of the defendant; that the costs of this action be taxed against the plaintiff; and for such other and further relief as he is in law and equity entitled."

The plaintiff, in reply, avers and says: "That he entered into a contract with the defendant relating to the purchase and sale of the patent pending as set out in plaintiff's complaint, and that said contract was drawn and prepared by the patent attorney selected by the defendant, and that the defendant knew all matters relating to said application for patent in as full and ample manner as did the plaintiff, and that the defendant profited by said purchase and is today manufacturing, selling, and offering for sale the device referred to in plaintiff's complaint; and that the defendant is justly indebted to the plaintiff, as alleged in said complaint.

"Wherefore, having fully replied to defendant's further answer and defense and counterclaim, the plaintiff prays the court: That defendant shall take nothing by his counterclaim, but that the plaintiff shall have and recover the relief set forth in his said complaint."

At the close of the plaintiff's evidence defendant moved for judgment as of nonsuit; motion denied, for that the court stated that defendant's answer set up a counterclaim, and judgment as of nonsuit could not be allowed. Thereupon, the defendant moved the court to be allowed to withdraw his counterclaim, which appears in the answer filed in this cause. Motion allowed, and plaintiff excepted.

The judgment of the court below is as follows: "This cause coming on to be heard at the March Civil Term, 1934, of the Superior Court of Gaston County, before his Honor, A. M. Stack, judge present and presiding, and a jury; and being heard, at the close of the plaintiff's evidence, the defendant moved for a judgment as of nonsuit, which motion was allowed by the court.

"Hereupon, it is considered, ordered, and adjudged by the court that the plaintiff be and he is hereby nonsuited, and that the plaintiff shall pay the costs of this action, to be taxed by the clerk. A. M. Stack, Judge Present and Presiding."

The plaintiff's exceptions and assignments of error are as follows: "First, that the court erred in granting the motion of defendant for permission to withdraw the counterclaim of defendant as set out in the answer filed in this cause for that the counterclaim alleged by the defendant arises out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, and that such counterclaim is a cross-action at issue and to which a verified reply was filed in this cause, and the plaintiff has the right to have a complete adjudication and determination of all the matters in controversy without or against the consent of the defendant.

"Second, that the court erred in that it sustained the defendant's motion for a judgment as of nonsuit and did not allow the cause to go to the jury under the testimony offered.

"Third, that the court erred in signing the judgment in this cause as set out in the record."

Cherry & Hallowell for plaintiff.
No counsel for defendant.

CLARKSON, J. At the close of plaintiff's evidence the defendant made a motion in the court below for judgment as in case of nonsuit, C. S., 567. The court below sustained this motion, and in this we think there was error.

"It is the well-settled rule of practice and accepted position in this jurisdiction that, on a motion of nonsuit, the evidence which makes for the plaintiff's claim and which tends to support her cause of action, whether offered by the plaintiff or elicited from the defendant's witnesses, will be taken and considered in its most favorable light for the plaintiff, and she is 'entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.'" *Nash v. Royster,* 189 N. C., at p. 410.

We think there was sufficient evidence to be submitted to the jury. In the contract is the following: "McGee agrees to relinquish all his rights, title, and interest in and to the said patent application, Serial Number 172,478, and to execute an assignment thereof to the said Frohman upon the execution of this contract and the payment of the initial sum of two thousand five hundred dollars ($2,500.00), and to relinquish all his rights, title, and interest in and to the business which the parties hereto have built up and operated under, and the name of the firm being known as the Textile Roller Lubricating Device Company, and the said McGee hereby sells, assigns, and transfers all his rights, title, and interest in and to all equipment, materials, and supplies now on hand; the said McGee also assigns and sells and transfers unto the said Frohman all his rights, title, and interest in and to all accounts receivable by the said Textile Roller Lubricating Device Company."

The plaintiff testified, in part: "Mr. Frohman positively did not at any time deny or dispute his obligations under this contract. It was some time in September, 1929, that I went back to work for Mr. Frohman. He told me I was a valuable man, and I continued to work for him until December, 1932. During the time that I worked for him I made further demands on Mr. Frohman for payment of what was due me under my contract. On those occasions Mr. Frohman stated to me that he had not made any money yet, and as soon as he had some money that he would pay me what he owed me."

The second contention of plaintiff: If, in an action on a contract, the defendant pleads a counterclaim arising out of such contract, can the defendant withdraw his counterclaim over the objection of the plaintiff? We think not.

In *Cohoon v. Cooper,* 186 N. C., 26 (27-28), is the following: "There are two counterclaims that can be set up under C. S., 521, *i.e.,* 521 (1): 'A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.' Such counterclaim must not only exist at the commencement of the action, but as to this, when it has been pleaded a nonsuit cannot be taken. The defendant 'is not obliged to set up such counterclaim. He may omit it and bring another action. He

has his election. But when he does set up his counterclaim, it becomes a cross-action, and both opposing claims must be adjudicated. The plaintiff then has the right to the determination of the court of all matters brought in issue, and naturally the defendant has the same right, and neither has the right to go out of court before a complete determination of all the matters in controversy without or against the consent of the other.' *Francis v. Edwards,* 77 N. C., 271; *Whedbee v. Leggett,* 92 N. C., 469; *McNeill v. Lawton,* 97 N. C., 20; *Yellowday v. Perkinson,* 167 N. C., 146.

"The other ground of counterclaim, C. S., 521 (2), is 'Any other cause of action arising also on contract and existing at the commencement of the action.' As to such cause of action a nonsuit may be taken at any time before a verdict."

In *Insurance Co. v. Griffin,* 200 N. C., 251 (254): "In an action for the specific recovery of a horse, the defendant pleaded as a counterclaim that the plaintiff sold the horse to the defendant, and, at the time of the sale, warranted that it was sound, which warranty was false, and in consequence of which the defendant had been damaged: *Held,* that the counterclaim arose out of the transaction set out in the complaint, and was properly pleaded as a counterclaim. *Wilson v. Hughes,* 94 N. C., 182."

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

Reversed.

E. L. OLIVER AND WIFE, MRS. BERTHA OLIVER, v. CHARLES K. HECHT AND WIFE, MRS. SADIE B. HECHT.

(Filed 12 December, 1934.)

1. Trial D a—

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

2. Evidence F b—Introduction in evidence of warranty deed held to preclude other evidence of warranty against encumbrances.

Plaintiff, grantee in a deed to land, brought suit against his grantor to recover the amount of street assessments against the property, plaintiff claiming that defendant had warranted and represented that no assessments existed against the property. The evidence tended to show that assessments against the property had been made but not confirmed at the time of the execution of the deed. Plaintiff introduced in evidence his deed containing the usual covenants of warranty and against encumbrances: *Held,* in the absence of fraud or mistake, the covenant in the

solemn instrument precluded plaintiff from introducing in evidence a letter written by defendant to plaintiff stating that the municipal authorities had assured defendant that there were no assessments against the property, and testimony of plaintiff of statements made by defendant at the time of the delivery of the deed that the property was not subject to street assessments, and that defendant would make good any assessments against the property. If the plaintiff wished to enlarge the covenant in the deed he should have sought reformation of the covenant and proven by clear, strong, and convincing evidence that the covenant as written was inserted by mutual mistake, or mistake induced by fraud.

3. Deeds and Conveyances C f—Lien for street assessments attaching subsequent to execution of deed does not violate covenant against encumbrances.

By provision of statute the lien for street assessments does not attach to land until confirmation of the assessments, C. S., 2713, and where such assessments are not confirmed by the governing body of the town until after the execution of a deed to the property, the subsequently attaching lien for the assessments does not violate the warranty and covenant in the deed, in the usual language, against encumbrances.

APPEAL by plaintiffs from *Stack, J.*, 30 April, at Regular Term, 1934. From MECKLENBURG. Affirmed.

This is an action brought by plaintiffs against defendants to recover $291.73, street assessment on a certain lot sold by defendants to plaintiffs. The material allegations of the complaint are as follows: "That on or about 20 August, 1930, the plaintiffs purchased from the defendants Lot No. 5, Block No. 2, of the Roslyn Heights Realty Company property in the county of Mecklenburg, State of North Carolina, and the defendants delivered to the plaintiffs their deed for the said property, a copy of which is hereto attached, marked Exhibit A, and made a part of this complaint and allegation.

"That at the time the said defendants sold the plaintiffs the said property they represented that there were no street assessments on the said property which were a lien on the property which the plaintiffs purchased.

"That after the plaintiffs had purchased the said property they discovered that the defendants had breached their contract, in that the defendants had sold to the plaintiffs the said property which was subject to a lien for street assessments in the sum of $291.73, which amount the plaintiffs are now required to pay.

"That the defendants gave to the plaintiffs a title letter, a copy of which is hereto attached, marked Exhibit B, and made a part of this complaint and allegation.

"That at the time the defendants gave to the plaintiffs the said title letter the defendants assured the plaintiffs that the property was not subject to any lien for street assessments, and the plaintiffs purchased

the said property upon this understanding and subject to the representation set forth in the title letter.

"That the plaintiffs did not discover until after they had made the purchase of the said property that the defendants had breached their said contract and sold them the land which was subject to a lien of $291.73, and interest.

"That by reason of the breach of contract on the part of the defendants, the plaintiffs have been damaged in the sum of $291.73, which is a lien against their property, and which assessment has been made against their said property, and which was a lien and assessment against the said property at the time of the sale by the defendants to the plaintiffs of the said property.

"That the plaintiffs have made demand upon the defendants to pay the said $291.73, and interest, and the defendants have failed to pay same."

In the deed, Exhibit A, is the following: "And the said party of the first part, for himself, his heirs, executors, and administrators, covenants with the said parties of the second part, their heirs and assigns, that he is seized of said premises in fee, and has right to convey the same in fee simple; that the same are free and clear from all encumbrances, and that he will warrant and defend the said title to the same against the lawful claims of all persons whomsoever."

In the letter marked Exhibit B is the following: "(3) While Rozelle Ferry Road in front of this property has recently been repaved and resurfaced, the engineering department of the city of Charlotte has assured us that there is no paving or sidewalk assessment against this property." The material allegations of the complaint of plaintiffs were denied by defendants, and a further answer and defense pleaded, not necessary to be considered on this appeal.

On the trial in the court below plaintiffs offered in evidence the deed from the defendants to the plaintiffs, which is set out in full as Exhibit A in the complaint referred to. Plaintiffs offered the title letter in evidence, from Redd and Small, which is set out in full as Exhibit B in the complaint. Plaintiffs offered in evidence Exhibit C, which is as follows: "City of Charlotte, North Carolina. Mr. E. L. Oliver and wife, 1711 Fountain View. Dear Sir: Pursuant to section 11 of chapter 56 of the Public Laws of 1915, notice is hereby given that the assessments of the whole or part of the costs of the following described streets, or parts thereof, improvements have been confirmed and deposited in the office of the supervisor of street assessments of the city of Charlotte. Character of improvements streets and sidewalks. 2112 Rozelle Ferry Road, Lima Ave., to old city limits, 50 ft. frontage, total amount, $291.73.

"On 5 October, 1931, the foregoing street assessments were confirmed and from that date you will have thirty days within which to pay said installments in full without interest; otherwise said assessments will be divided in ten equal annual installments with interest. K. E. Ward, Street Assessments Supervisor."

E. L. Oliver, plaintiff, testified: "My wife is Bertha L. Oliver. On 20 August, 1930, I received a deed from the defendants Charles K. Hecht and wife, the copy being marked Exhibit A, attached to the complaint. I had a conversation with Mr. Hecht at the time we made the trade and I got the deed. Before we made the trade the question came up about street assessments. The street had been paved for about a year and the sidewalk had been graded at the time, but the sidewalks had not been laid. I asked Mr. Hecht about the street assessments; he told me there would be none against the sidewalk, and I asked him if it came up later, then what about that, and he said there would be none against the sidewalk or the street, and if anything did come up, he would take care of it, make it good, and give me a clear title. He showed me a title letter. It is the title letter attached to the complaint, marked Plaintiffs' Exhibit B. In August, 1931, I received the notice marked Plaintiffs' Exhibit C. There has been no other street laid or pavement other than the one to which I refer at the time I bought the lot. I kept the title letter. I read paragraph 3. I knew the street had been repaved. I did not go to the street assessment office at the City Hall, nor the city clerk, nor the city engineer, nor make inquiry of a single individual, or the mayor, or anybody else as to whether or not there was any likelihood of any street assessment against the property, nor have the title examined before the purchase."

The defendants, through their counsel, admit that an assessment was made against the said lot in question for street and paving.

The judgment of the court below is as follows: "This cause coming on to be heard before the Hon. A. M. Stack, and a jury, at the 30 April Regular Term of Superior Court, and after all the evidence had been introduced, on motion of the defendants, the court being of the opinion that the action should be nonsuited: It is therefore ordered, adjudged, and decreed that the plaintiffs be and are hereby nonsuited, and the plaintiffs taxed with the costs of this action. This 9 May, 1934. A. M. Stack, Judge Presiding."

John G. Newitt for plaintiffs.
John H. Small, Jr., for defendants.

CLARKSON, J. At the close of plaintiff's evidence, defendants in the court below made a motion for judgment as in case of nonsuit, C. S., 567. The motion was allowed, and in this we can see no error.

The defendants, in their brief, say: "The testimony of E. L. Oliver with reference to an alleged contract with Charles K. Hecht was objected and excepted to, but those exceptions are not before the court in view of the judgment of nonsuit. The complaint did not allege any such contract, and if it had, the testimony would have been incompetent as parol evidence in contradiction of the written contract, the deed."

"It is the well-settled rule of practice and accepted position in this jurisdiction that, on a motion of nonsuit, the evidence which makes for the plaintiffs' claim and which tends to support the cause of action, whether offered by the plaintiffs or elicited from the defendants' witnesses, will be taken and considered in its most favorable light for the plaintiffs, and they are 'entitled to the benefit of every reasonable inference to be drawn therefrom.'"

Mindful of this rule, on the pleadings and evidence in this case, we think the nonsuit was properly granted. The covenants in the deed are as follows: "And the said party of the first part, for himself, his heirs, executors, and administrators, covenants with the said parties of the second part, their heirs and assigns, that he is seized of said premises in fee, and has right to convey the same in fee simple; that the same are free and clear from all encumbrances, and that he will warrant and defend the said title to the same against the lawful claims of all persons whomsoever."

We do not think the covenant in this solemn instrument, the deed, "that the same are free and clear from all encumbrances," can be so amended by the uncertain and vague allegations in the complaint and testimony of the plaintiff E. L. Oliver. In the beginning of his testimony he said: "On 20 August, 1930, I received a deed from the defendants Charles K. Hecht and wife, the copy being marked Exhibit A, attached to the complaint," etc. This deed, with the written covenants in it, was the gravamen of this action, and made a part of the complaint and allegations.

The plaintiffs did not, in the complaint, allege fraud or seek reformation of the part of the covenant that the land was free and clear from all encumbrances, by allegation of mutual mistake, or the mistake of one induced by the fraud of the other. *Winstead v. Mfg. Co., ante*, 110.

In *Crawford v. Willoughby*, 192 N. C., 269 (271-272), it is said: "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 party asking for relief by reformation of a deed or written instrument must allege and prove, first, that a material stipulation, as alleged, was agreed upon by the parties, to be incorporated in the deed or instrument as written, and second, that such stipulation was omitted from the deed or instrument as written by mistake, either of both parties or of one party, induced by the fraud of the other, or by the mistake of the draughtsman. Equity will give relief by reformation only when a mistake has been made, and the deed or written instrument because of the mistake does not express the true intent of both parties. The mistake of one party to the deed or instrument alone, not induced by the fraud of the other, affords no ground for relief by reformation." It is said in *Oil and Grease Co. v. Averett*, 192 N. C., 465 (467-8): "On the issue of fraud the burden is on the defendant to satisfy the jury of the fraud by the greater weight of the evidence, or a preponderance of the evidence. *McNair v. Finance Co.*, 191 N. C., 715. Not so where it is proposed to correct a mistake in a deed, or similar cause—the *quantum* of proof. The evidence must be clear, strong, and convincing. *Speas v. Bank*, 188 N. C., p. 528."

In *Ray v. Blackwell*, 94 N. C., 10 (12), it is said: "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 intend to be bound, 1 Greenleaf Ev., sec. 76. *Etheridge v. Palin*, 72 N. C., 213."

We have frequently quoted the *Ray case, supra,* as it is a clear and concise expression of the law on the subject. The deed which includes the covenant is made a part of the complaint and allegations. We think that the other allegations in the pleadings and the evidence too uncertain and vague and contradictory of the covenant in the deed to constitute a cause of action. So the material question involved on this record is as follows: The defendants Charles K. Hecht and wife, the owners of a lot of land in the city of Charlotte, conveyed the same to the plaintiffs by deed dated 20 August, 1930, and containing usual covenants of warranty and against encumbrances. On 5 October, 1931, the city council of Charlotte confirmed an assessment for street and sidewalk improvements against this and other property. Does this assessment constitute a lien in violation of the covenants of the defendants in their deed? We think not.

We think this matter, on the present record, is settled in *Coble v. Dick*, 194 N. C., 732 (733), where it is there said: "C. S., 2713, in part, is as

follows: '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.' . . . In *Hahn v. Fletcher*, 189 N. C., at p. 732, it is said: 'From the facts found, the covenant in plaintiff's deed was "against encumbrances." When the defendant delivered the deed to plaintiff, this covenant was broken with the street assessment—a lien or a statutory mortgage on the land. Plaintiff could have at once sued for the breach.' "

In the present case the deed from defendants to plaintiffs was made 20 August, 1930, and the street assessments were confirmed on 5 October, 1931. Under the statute the street assessment became a lien from the confirmation. Under the covenant in the deed, plaintiffs cannot recover, as the confirmation of the street assessment was on 5 October, 1931—some 13 months after the deed was made, executed, and delivered from defendants to plaintiffs.

In 72 A. L. R., p. 320, citing authorities, is the following: "A covenant of warranty and against encumbrances is not breached by a street-paving assessment against the property to which the covenant related, where, at the time of the making of the covenant, the assessment did not constitute a lien on the land, under a statute providing that the lien for paving does not attach until the assessment order or resolution is passed by the council and the amount fixed."

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

Affirmed.

HERBERT L. HARRISON v. METROPOLITAN LIFE INSURANCE COMPANY.

(Filed 12 December, 1934.)

1. Appeal and Error B d—

Where defendant does not move for nonsuit in the lower court he waives his right to have the insufficiency of the evidence to be submitted to the jury considered on appeal. C. S., 567.

2. Trial F a—

Where the court submits the first two issues tendered by a party, which issues arise upon the pleadings and are determinative of the controversy, the court's refusal to submit other issues tendered will not be held for error.

3. Trial G e: Appeal and Error J a—

A motion to set aside the verdict as being contrary to the evidence is addressed to the sound discretion of the trial court, and his refusal of the motion is not ordinarily reviewable on appeal. C. S., 591.

4. Trial E c—

The charge of the trial court will be construed as a whole, and if, upon such construction, it fully charges the law applicable to the facts and does not impinge C. S., 564, it will not be held for error on appeal.

5. Insurance I b—Where insurer relies upon fraud in insured's application, insurer must prove all elements of such fraud.

Insurer defended this action on a policy of life insurance on the ground of fraud in that insured made misrepresentations in her application in that she stated that she had not been attended by a physician within the last five years, while in fact during such time she had gone to the office of a physician and had been told that she had goiter. There was evidence tending to show that insurer's physician examined insured prior to the issuance of the policy, and that he found no impairment of her health, and that insured died from apoplexy. Insurer did not resist recovery upon the ground of a material misrepresentation affecting the risk. The court instructed the jury that the burden was upon insurer to show that insured made the false statement with intent to deceive insurer's agent, and that insurer, by reason of such false and fraudulent misrepresentation, was induced to issue the policy to its damage: *Held*, insurer's exception and assignment of error to the charge cannot be sustained.

6. Same—Whether misrepresentations in application for insurance are fraudulent or material are ordinarily questions for jury.

Under the provisions of N. C. Code, 6289, all statements in an application for a policy of life insurance are deemed representations and not warranties, and a misrepresentation must be material or fraudulent in order to prevent recovery, and whether a misrepresentation is made with fraudulent intent by insured, or whether it is material, so that insurer would not have issued the policy had it known the truth, are ordinarily questions for the jury.

7. Appeal and Error B b—

An appeal will be determined in accordance with the theory of trial in the lower court.

APPEAL by defendant from *Stack, J.*, and a jury, at June Term, 1934, of MECKLENBURG. No error.

The complaint of plaintiff alleges, in part: "That on or about 13 February, 1931, the defendant insured the life of Viola Harrison for the sum of $1,000.00 by issuing its Policy No. 6,829,517-A to the said Viola Harrison. That the plaintiff is named beneficiary in said policy of insurance issued by the defendant upon the life of Viola Harrison, No. 6,829,517-A. That Viola Harrison died on 20 June, 1931. That the first premium of $9.35 was paid when the Policy No. 6,829,517-A

was issued upon the life of Viola Harrison, deceased, on or about 13 February, 1931. That Herbert L. Harrison, the beneficiary in said policy, made demand for payment of said policy in a reasonable time after the death of the said insured, and payment was refused. That demand has been made upon the defendant for the payment of the $1,000.00, the amount of said policy of insurance upon the life of the insured, and payment has been refused. That the defendant is justly indebted to the plaintiff in the sum of $1,000.00, with interest from 20 June, 1931, until paid."

The defendant denied liability, and for further answer and defense alleged: "That on 24 January, 1931, within two weeks prior to the date when she signed said application, she had consulted one of the leading surgeons and goiter specialists in the city of Charlotte on account of the nervousness, fast heart, tremor and loss of weight from which she had been suffering for several months, and said surgeon, after carefully examining her, had informed her that she was suffering from exophthalmic goiter, and advised her to have an operation for the removal of said goiter, and had told her that if she did not have such operation she would die from the effects of said goiter.

"That all of said facts were well known to said Viola Harrison at the time she signed Part A of said application for insurance on 7 February, 1931, and at the time she signed Part B of said application for insurance on 7 February, 1931, and at the time of the delivery of said policy to her on 16 March, 1931; and that said false and fraudulent statements and representations contained in said application, as hereinbefore set forth, were, and each of them was, made for the purpose of inducing, and did induce, the defendant to accept said application and to issue its said policy of insurance, which the defendant would not have done had it known of the disease from which said Viola Harrison was suffering, or of any of the other facts so falsely misrepresented by said Viola Harrison."

The following issues were submitted to the jury, and their answers thereto: "(1) Did the deceased, at the time of her application for insurance in the defendant company, falsely and fraudulently represent that she did not have goiter, as alleged in the answer? A. No. (2) At the time of the application by the deceased for the policy of insurance in question, did the deceased falsely and fraudulently represent that she had never been attended by a physician as alleged in the answer? A. No. (3) What amount, if any, is the plaintiff entitled to recover of the defendant? A. $1,000.00, with interest from 20 June, 1931, until paid."

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

Taliaferro & Clarkson and Carswell & Ervin for plaintiff.
Cansler & Cansler and R. M. Gray, Jr., for defendant.

CLARKSON, J. Neither at the close of plaintiff's evidence nor at the close of all the evidence did the defendant make a motion for judgment as in case of nonsuit, as is allowed in C. S., 567.

In *Harris v. Buie,* 202 N. C., 634 (636), is the following: "At the close of plaintiff's evidence the defendant Buie did not move for judgment as in case of nonsuit in the court below, nor at the close of all the evidence, as he had a right to do under C. S., 567. By the failure of defendant to follow strictly C. S., 567, *supra,* the question of the insufficiency of evidence is waived. *Nowell v. Basnight,* 185 N. C., 142; *Penland v. Hospital,* 199 N. C., 314; *Batson v. Laundry Co., ante,* 560."

In *S. v. Waggoner, ante,* 306 (307), we find: "The defendant made a motion of nonsuit at the close of State's evidence. This motion was overruled and the defendant offered evidence in his own behalf tending to establish his innocence. The motion for nonsuit was not renewed at the conclusion of all the evidence, and therefore the insufficiency of evidence to warrant conviction was waived, and cannot now be considered by this Court on appeal. *S. v. Hayes,* 187 N. C., 490."

In the present case the insufficiency of evidence is waived. The exception and assignment of error made by defendant as to the refusal of the court below to submit the third issue and fourth issue tendered by it cannot be sustained. The first two issues tendered by defendant are those submitted to the jury by the court below, and arose on the pleadings, and are determinative of the controversy. The other two we do not think were material, and in not submitting them would be prejudicial to the defendant from the pleadings in the cause. There were no exceptions to the evidence on the trial in the court below. The defendant made a motion in the court below to set aside the verdict as contrary to all the evidence. The court below refused the motion. This exception and assignment of error cannot be sustained.

N. C. Code 1931 (Michie), sec. 591, is as follows: "The judge who tries the cause may, in his discretion, entertain a motion to be made on his minutes to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages; but such motion can only be heard at the same term at which the trial is had. When the motion is heard and decided upon the minutes of the judge, and an appeal is taken from the decision, a case or exceptions must be settled in the usual form, upon which the argument of the appeal must be had."

This power is not only made discretionary by statute, but it is inherent in the trial court and ordinarily not reviewable by this Court.

Brantley v. Collie, 205 N. C., 229 (231). See *Bundy v. Sutton, ante,* 422. In fact, the defendant by not making motions of nonsuit, the insufficiency of evidence was waived. The other exceptions and assignments of error were to the charge of the court below. Taking the charge as a whole, we think the learned and able judge in the court below applied the law applicable to the facts. The charge fully defined all the elements of fraud and deceit and applied the law to the facts on this aspect clearly and accurately. It did not impinge C. S., 564.

N. C. Code 1931 (Michie), sec. 6289, is as follows: "All statements or descriptions in any application for a policy of insurance, or in the policy itself, shall be deemed representations and not warranties, and a representation, unless material or fraudulent, will not prevent a recovery on the policy."

The contention of defendant is that a short while before the policy was taken out Viola Harrison went to the office of a physician and was told that she had goiter. "Have you been attended by a physician during the last five years?" The applicant answered, "No." It will be noted that the question is susceptible of different interpretations. This whole matter, under the facts in this case, was left by the court below for the jury to say whether it was done fraudulently. The company's physician examined her and did not discover a goiter, and there was evidence that she died of apoplexy. On this aspect, the court charged, "The defendant must show, if it was false, she made the false statement for the purpose and with the intent to deceive the agent of the defendant Insurance Company, and must show that it actually, by reason of such false statement, fraudulently and knowingly made, was induced to issue the policy and was damaged thereby." *Oil and Grease Co. v. Averett,* 192 N. C., 465 (467-8). We do not think the charge prejudicial. *Anthony v. Teachers Protective Union,* 206 N. C., 7. We think this exception and assignment of error made by defendant cannot be sustained.

In *Howell v. Insurance Co.,* 189 N. C., 212 (217), is the following: "But whether a representation is material or not is not always a question of fact, or rather, like the question of negligence, or reasonable time, a mixed question of law and fact. Where there is a controversy as to the facts, or where, upon the facts admitted or found by the jury, the court cannot hold that knowledge or ignorance of them, upon all the facts in the particular case, would or would not naturally influence the judgment of the underwriter in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of premiums, an appropriate issue should be submitted to the jury, in order that they may, upon competent evidence, determine whether or not the representation was material."

The application was made on 5 February, 1931, and the policy issued about 13 February, 1931. The defendant Insurance Company had its physician to examine her. He testified, in part: "I found no abnormality physically from that examination, which was held on 7 February, 1933, and after Viola Harrison signed it, I signed my name on Part B of the application as a witness. . . . I could not tell from her physical appearance anything that might indicate any disease. She appeared in good health when I examined her, and I recommended her as a good risk. I based this recommendation on the answers and history and my findings. . . . I made the examination at the insured's home at the request of the company. . . . I generally start and read the question. I can't swear that I asked Viola Harrison every one, but I read the list of diseases and don't ask the questions from memory. . . . I examined her pulse and it was in the normal limits. I examined her heart. If her pulse rate had not been within the normal limits, they would have sent her back for reëxamination. . . . I can't swear I read the questions verbatim every time because sometimes I know the applicant. An exophthalmic goiter bulges. Viola Harrison had no abnormal enlargement, and I did not notice anything indicating a goiter, and I found no symptoms of goiter."

W. M. Moore, agent for defendant, testified, in part: "Does the appearance of applicant indicate to you that she is in sound health? Yes. Do you recommend delivery of the policy? Yes. . . . She paid me the premium after Form 074 was signed, and I delivered the policy to her. I know that the insured was examined by a doctor before the issuance of this policy. . . . I solicited her several times before she took out this policy. . . . She was not sick but some two or three days before she died. She was 24 or 25 years old. . . . I saw Viola Harrison all along during the six months I was on that route and she appeared to be in good health. She was in normal health all the time I saw her, both before and after the policy was issued. I did not see her but about once a month. There was nothing to indicate she was sick."

Her husband, the plaintiff, testified, in part: "Viola Harrison was my wife. I work at Efird's Department Store. I talked to Dr. Kennedy when he treated my wife and he said that she died with apoplexy."

In *Hines v. Casualty Co.*, 172 N. C., 225 (227), is the following: "The question is not whether the plaintiff had hernia, for this is not denied, but whether it was of such nature as to have rendered him an unsound man at the time of the application. The jury is the only tribunal which can settle the disputed facts, for this is an issue of fact and not a matter of law. The illness from which the plaintiff suffered subsequently, and for which he seeks to recover, was an attack of rheu-

matism, which had no connection with, nor was there any evidence to show that it was in any way traceable to hernia.

"Revisal, 4808 (C. S., 6289), provides that all statements in an application for insurance shall be held merely representations, and not warranties; and that no representations, unless fraudulent or materially affecting a risk, shall prevent a recovery. This matter was properly submitted to the jury, and they found that 'the plaintiff was of sound physical condition at the time he signed the application, notwithstanding such hernia; and that his representations at the time he applied for the policy were not false and were not material to the defendant in determining whether it would issue the policy.' The court instructed the jury that whether he was in sound health or not was a matter for the jury to determine upon the evidence, depending upon whether the extent of the hernia he had was such as to render him unsound or not."

In *Suggs v. N. Y. Life Insurance* (S. C.), Vol. 176, No. 3, p. 457, S. E. Reporter, in a case similar to the present, it is said: "In *Johnson v. New York Life Insurance Company*, 165 S. C., 494, 164 S. E., 175, 177, the Court said: 'Finally, the intent with which representations or misstatements of facts are made is a thing that is locked up in the heart and consciousness of the applicant. It may be shown by his express words, or it may be deduced from his acts and the facts and circumstances surrounding the making of the misrepresentations, though on this question the mere signing of the application containing the answers alleged to be false is not conclusive. *Huestess v. Insurance Co.*, 88 S. C., 31, 70 S. E., 403.'"

Ordinarily, the question whether the representation is material or fraudulent is for the jury to determine, but in some cases, where the facts are undisputed and these facts can reasonably give rise to only one inference, that the policy was procured by a material representation which was false, or by fraud and deceit, the question is one for the court to determine. The case in the court below and the issues submitted were on the theory of fraud.

In *Weil v. Herring, ante*, 6 (10), *Brogden, J.*, says: "An examination of the record discloses that the cause was not tried upon that theory, and the law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court."

Then, again, there was no request for nonsuit, as heretofore stated, and the question of the insufficiency of the evidence to be passed on by the jury was waived. We see no prejudicial or reversible error in the trial of the case.

No error.

WYLIE HUNNICUTT, ADMINISTRATOR OF THE ESTATE OF JAMES HUNNICUTT, DECEASED, v. JASPER KIMBRELL, BY HIS GUARDIAN AD LITEM, W. H. ABERNATHY, AND MRS. MYRA KIMBRELL.

(Filed 12 December, 1934.)

Appeal and Error J e: Automobiles C i—

The charge of the court on the question of defendant's contributory negligence upon evidence tending to show that defendant was walking along the highway on the right side thereof in violation of a State Highway ordinance is not held for reversible error for its failure to contain a precise definition of contributory negligence.

CIVIL ACTION, before *Shaw, Emergency J.*, at April, 1934, Special Term, of MECKLENBURG.

The evidence tended to show that the deceased, James Hunnicutt, on or about 28 January, 1933, was walking on the right-hand side of the highway, and that an automobile driven by Jasper Kimbrell and owned by his mother, Myra Kimbrell, approached the deceased, traveling in the same direction. The plaintiff alleged that the car driven by Jasper Kimbrell, who was a minor, was a family car, and that he was operating it in a reckless and negligent manner, without keeping a proper lookout and driving at an unlawful rate of speed, and that as a result he negligently struck and killed James Hunnicutt. The defendant alleged that the deceased was walking on the wrong side of the road in violation of an ordinance duly adopted by the Highway Commission requiring pedestrians to walk on the left-hand side of the highway, and that as the car approached plaintiff's intestate he suddenly stepped in front of the car, and that his injury and death was proximately caused by his own negligence.

Issues of negligence, contributory negligence, and damages were submitted to the jury. The verdict declared that the defendant was guilty of negligence, and that plaintiff's intestate also by his own negligence contributed to his injury and death. Judgment was entered upon the verdict that the plaintiff take nothing by his action, and the plaintiff appealed.

Carswell & Ervin for plaintiff.
Ralph V. Kidd for defendants.

PER CURIAM. The assignments of error are based upon the charge of the trial judge in failing to fully explain to the jury the applicable principles of law.

The judge defined negligence and proximate cause. While he did not give a formal definition of contributory negligence, he instructed the jury: "If plaintiff's intestate was walking on the right-hand side of the road, as claimed by the defendant, he was violating the law, and that would be negligence on his part, and if such negligence was the proximate cause of his injury and death, that would be contributory negligence upon his part, and his administrator would not be entitled to recover."

While the charge may be lacking in precise definition, nevertheless the case in all essential features involves a simple issue of fact. An examination of the charge in its entirety fails to produce the conclusion that there is reversible error warranting the overthrow of the judgment.

Affirmed.

COMMERCIAL NATIONAL BANK OF CHARLOTTE, N. C., AND THOMAS D. OSBORNE, EXECUTORS OF THE ESTATE OF MARY D. OSBORNE, v. J. H. CARSON AND C. M. CARSON.

(Filed 12 December, 1934.)

Mortgages F a—

The liability of the maker of a mortgage note to the payee thereof is not changed from that of principal to that of guarantor by the fact that the maker transfers his equity in the property to a third person who assumes the debt and the payee accepts from such third person partial payments on the note and extends the time of payment without the maker's knowledge.

APPEAL by defendants from *Hill, Special Judge,* at June Term, 1934, of MECKLENBURG. Affirmed.

The plaintiffs brought this action to collect a past-due bond. From the allegations contained in the complaint and answer it appears that the plaintiffs are the executors of the payee of said bond, and that the defendants are the makers thereof; that said bond was secured by a deed of trust, and that the defendant subsquently sold the land covered by said deed of trust to a third party, who assumed the payment of the bond; and that the plaintiffs, without the knowledge of the defendants, dealt with said third party by receiving partial payments on said bond and agreeing to certain extension of payments thereon. The defendants had said third party and the trustee in said deed of trust made parties to this action.

H. L. Taylor and John H. Small, Jr., for appellants.
John M. Robinson and Hunter M. Jones for appellees.

PER CURIAM. This is an appeal from a judgment awarded the plaintiffs upon the pleadings, and presents but one question, namely: Where the payee of a bond has dealt with a person, who, for valuable consideration, assumed the payment of the debt by accepting from him partial payments on the bond and extending the time of the payment thereof without knowledge of the makers, is the character of the makers, as between the payee and the makers, changed from that of principals to that of guarantors? This question is answered in the negative upon the authority of *Brown v. Turner*, 202 N. C., 227.

The present judgment does not preclude the defendants from proceeding in this action against him who is alleged to have assumed the payment of the bond, or to foreclose the deed of trust given to secure it, or to obtain any other relief to which they may be entitled against those whom they have had made parties thereto.

Affirmed.

EARL FERGUSON v. REX SPINNING COMPANY.

(Filed 1 January, 1935.)

1. Judgments L b—Judgment dismissing action upon plea of estoppel by judgment held without error in this case.

Where, upon a plea of estoppel by judgment, the trial court finds that the allegations and evidence in the second action instituted by plaintiff after his majority are substantially identical with the allegations and evidence in the former action against the same defendant brought by plaintiff through his next friend during plaintiff's minority, and the findings of the court are supported by the pleadings and evidence in the former trial introduced in evidence in the second trial, judgment dismissing the second action upon the plea of estoppel will be affirmed.

2. Appeal and Error J g—

Where it is determined on appeal that defendant's plea of estoppel by judgment was properly allowed, other assignments of error by plaintiff need not be considered.

APPEAL by plaintiff from *Sink, J.*, at July-August Term, 1934, of GASTON. Affirmed.

The plaintiff, by his next friend, instituted an action in the year 1927 against the defendant for personal injuries alleged to have been caused by an overseer in the defendant's mill, where the plaintiff was working as a "doffer boy," negligently placing a hose conducting compressed air against the body of the plaintiff in such a way as to inflate and stretch the intestines of the plaintiff. At a trial of this action in the Superior Court of Gaston County the plaintiff recovered damages of the defend-

ant, and upon an appeal to the Supreme Court the judgment of the lower court was reversed. *Ferguson v. Spinning Co.*, 196 N. C., 614.

After reaching his majority the plaintiff instituted this action for the same injuries, and the defendant denied the allegations of the complaint and pleaded estoppel by judgment, asserting that the judgment in *Ferguson v. Spinning Company, supra*, constituted *res adjudicata*. The judge below found the facts and held that the plaintiff was estopped by the judgment in the former action to maintain this action and granted the defendant's motion for a dismissal. Whereupon the plaintiff appealed, assigning errors.

J. G. Carpenter and J. L. Hamme for appellants.
J. Laurence Jones for appellee.

SCHENCK, J. The third assignment of error assails the finding of the court that "the cause of action set up in the present action is the same as that set up in the first," and the fifth assignment of error assails the finding "that the testimony as to the cause of action was the same in both" (the former and instant cases).

We think the record in the former action, which was introduced in the trial of the instant case, and the testimony taken in the trials of both cases furnish ample basis for these findings by his Honor, and that such findings support his conclusions of law that the judgment in the former case is an estoppel to the prosecution of the instant case.

In the former case it is alleged:

"11th. That the sole and proximate cause of the injuries and damages to this plaintiff as herein alleged was and is the carelessness and negligence on the part of the defendant in that the defendant failed to furnish this plaintiff a safe place in which to perform the duties of his employment as aforesaid; that it carelessly and negligently furnished an incompetent, careless, and reckless vice-principal with a dangerous instrumentality to use as a plaything; that it carelessly and negligently failed to maintain such supervision and control over said vice-principal as to prevent him from using this dangerous instrumentality to the hurt of his servants as aforesaid; that it carelessly and negligently maintained in its employ as its vice-principal one addicted to such practices, when it had notice of such practices, or would have had notice of same had it maintained the proper and necessary supervision of its plant, as aforesaid."

And in the instant case it is alleged:

"10. That it was the duty of the defendant to provide for the plaintiff Earl Ferguson a safe place in which to work, safe surroundings, a competent and thoughtful overseer, but notwithstanding the said duties owing by the defendant to the plaintiff Earl Ferguson it failed so to do,

and carelessly and negligently surrounded him with such unsafe and dangerous instrumentality and permitted and allowed such unsafe and dangerous instrumentality to be used at and around the place where it required the plaintiff Earl Ferguson to work, and such dangerous instrumentality to be used or picked up by such incompetent, thoughtless overseer and to be used by him in the manner aforesaid, to the great injury and damage of the plaintiff Earl Ferguson.

"12. That the injuries sustained by the plaintiff Earl Ferguson and the damages sustained by him, as herein alleged, were caused solely and proximately by the negligence and carelessness and brutal act of the defendant as herein alleged."

We think that substantially the same issues arise upon the complaints in the respective actions, former and instant, and, since it is well recognized that the test of an estoppel by judgment is the identity of the issues involved in suit, *Gillam v. Edmonson*, 154 N. C., 127, the plaintiff in this action is estopped by the pleadings in the former action wherein judgment adverse to him was rendered.

We have examined the evidence in the former case, and carefully compared it with the evidence in the instant case, and there is substantially no difference between the former and the latter as it relates to the manner and way the plaintiff was injured, and we think that every ground of recovery presented in the latter trial was presented in the former trial, and, therefore, that the fifth assignment of error is untenable.

In *Batson v. Laundry*, 206 N. C., 371, it is said: "'. . . 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.'" And again in *Hardison v. Everett*, 192 N. C., 371, we find the following terse statement: "The underlying reason for recognizing the principle of estoppel is that a person ought not to be vexed twice about the same matter."

The sustaining of the findings by the court that the pleadings and the evidence are substantially the same in the instant case as in the former action renders it unnecessary for us to pass upon the other assignments of error, as these findings alone are sufficient to sustain the judgment of the court.

Affirmed.

ALEXANDER BOYD ANDREWS, 3RD, v. GURNEY P. HOOD, COMMISSIONER OF BANKS, NORTH CAROLINA BANK AND TRUST COMPANY, AND THE RALEIGH SAVINGS BANK AND TRUST COMPANY.

(Filed 1 January, 1935.)

1. Banks and Banking H c—Savings deposit to be held by bank and paid to depositor's grandson upon his majority held a trust fund.

Where a deposit is made in a savings bank under an agreement, entered in a deposit pass book, that the funds should be held by the bank at interest until depositor's grandson reached the age of twenty-one, and then paid to him, or if the grandson should die before attaining his majority, the funds, upon his death, should be paid his mother, the deposit is not subject to the check of the depositor, but is held by the bank for a particular purpose, and constitutes a trust fund which, if the bank should become insolvent, would entitle the beneficiary of the deposit to a preference in its assets.

2. Banks and Banking J c—

Where a bank holds a sum of money as a trust fund, and thereafter the bank is merged with another bank, the merged bank also holds the funds as a trust fund.

APPEAL by plaintiff from *Grady, J.*, at Chambers in Raleigh, N. C., on 22 May, 1934. Reversed.

This is an action to have plaintiff's claim against the North Carolina Bank and Trust Company, which is now in process of liquidation by the defendant Gurney P. Hood, Commissioner of Banks, because of its insolvency, adjudged a preferred claim and ordered paid as such claim by the defendant out of the assets of the North Carolina Bank and Trust Company.

It is alleged in the complaint and admitted in the answer that the North Carolina Bank and Trust Company is a corporation, organized under the laws of this State, and that prior to its insolvency the said corporation was engaged in business as a commercial bank, a savings bank, and a trust company, as authorized by its certificate of incorporation.

It is also alleged in the complaint and admitted in the answer that the Raleigh Savings Bank and Trust Company was a corporation, organized under the laws of this State, and that prior to its merger with the North Carolina Bank and Trust Company the said corporation was engaged in business as a savings bank and trust company, as authorized by its charter. The said corporation was not authorized by its charter to engage in business as a commercial bank.

In their answer the defendants admit that the claim of the plaintiff against the North Carolina Bank and Trust Company is a valid claim;

they deny that said claim is a preferred claim, and as such entitled to preferential payment.

At the hearing before Judge Grady it was admitted that the facts with respect to plaintiff's claim are as follows:

"On 15 September, 1913, Col. A. B. Andrews, now deceased, deposited in the Raleigh Savings Bank and Trust Company the sum of $500.00, and took from the proper official of said company a receipt, which was written in a pass book, and is in words as follows:

" 'This $500.00 is deposited in the Raleigh Savings Bank and Trust Company to the credit of Alex Boyd Andrews, 3rd, son of Mr. John H. Andrews and Mrs. Mabel Y. Andrews, by his grandfather, A. B. Andrews, of Raleigh, N. C., to remain at interest until he arrives at the age of twenty-one (21) years (12 January, 1934), at which time the principal and interest is to be paid to the order of the said Alex Boyd Andrews, 3rd; if he should die before he arrives at the age of twenty-one (21) years, the principal and interest upon same shall upon his death be paid to his mother, Mabel Y. Andrews, or as she shall direct.'

"Said deposit remained in said Raleigh Savings Bank and Trust Company until the year 1929, when the said company was merged with the North Carolina Bank and Trust Company, and said deposit, with whatever character it originally bore, was delivered and transferred to said North Carolina Bank and Trust Company. Thereafter the North Carolina Bank and Trust Company rendered its statement to the plaintiff, as of 1 January, 1933, showing that said deposit, with accrued interest, then amounted to $1,062.06.

"On 28 December, 1933, the plaintiff, through his attorney, Hon. James S. Manning, filed with said Gurney P. Hood, Commissioner of Banks, a claim for the full amount of said deposit, with all accrued interest thereon, contending that the same was a preferred claim in law, and on 24 January, 1934, the said Commissioner declined to allow said claim as a preferred claim.

"Again, on 17 January, 1934, the plaintiff, being then of full age, presented his claim to the said Gurney P. Hood, Commissioner of Banks, and demanded that the total amount of said deposit, with accrued interest, be paid to him as a preferred claim. The claim of the plaintiff was rejected by the said Commissioner of Banks as a preferred claim."

On the foregoing facts, the court was of opinion that "the deposit in question was nothing but a savings account, and that it was not impressed with any trust or other quality which entitled the plaintiff to a preference in its payment."

It was accordingly ordered and adjudged by the court that "the plaintiff is entitled to recover of the defendants the sum of $1,062.06, with interest thereon at six per cent per annum from 1 January, 1933, as a simple

contract debt; and that the plaintiff is not entitled to any preference over and above other unsecured creditors of the defendant North Carolina Bank and Trust Company."

The plaintiff excepted to the judgment and appealed to the Supreme Court, assigning as error the holding of the court that plaintiff's claim is not a preferred claim.

Manning & Manning for plaintiff.
Brooks, McLendon & Holderness for defendants.

CONNOR, J. The sum of $500.00 was not deposited by Colonel Andrews or accepted by the Raleigh Savings Bank and Trust Company as a savings deposit, subject to the control of Colonel Andrews as a depositor. The receipt signed by an official of the company and delivered to Colonel Andrews, for the plaintiff, although written in a pass book, shows that it was the intention of both Colonel Andrews and the company that said sum should be held by the company as a trust fund, and, with interest, should be paid to the plaintiff upon his arrival at the age of twenty-one years, or if the plaintiff, who was at the date of the deposit an infant, should die before arriving at the age of twenty-one years, should be paid to his mother, Mrs. Mabel Y. Andrews. The said sum of $500.00 remained with the Raleigh Savings Bank & Trust Company as a trust fund until 1929, when the said Savings Bank and Trust Company was merged with the North Carolina Bank and Trust Company. At the date of said merger the said sum, with interest, which had been credited on said sum from time to time, was delivered to the North Carolina Bank and Trust Company, which thereafter held said sum as a trust fund for the plaintiff. For this reason the plaintiff's claim is entitled to preferential payment out of the assets of the North Carolina Bank and Trust Company, which are now in the hands of the defendant Gurney P. Hood, Commissioner of Banks, for liquidation, because of the insolvency of the North Carolina Bank and Trust Company.

In *Flack v. Hood, Comr.*, 204 N. C., 337, 168 S. E., 520, it is said: "In the liquidation of insolvent banks, the general depositors are entitled to no preference, and must share pro rata with the general creditors. *Corp. Com. v. Trust Co.*, 194 N. C., 125, 138 S. E., 530. But when the 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 entitled 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.*"

This principle is applicable to the admitted facts with respect to the plaintiff's claim in the instant case. There is error in the judgment denying the plaintiff the right to preferential payment of his claim against the North Carolina Bank and Trust Company.

The principle on which the judgment in *Underwood v. Hood,* 205 N. C., 399, 171 S. E., 364, was reversed is not applicable in the instant case. In that case the Bank of Clinton had deposited with itself funds which it held as a fiduciary. It held these funds as a general deposit, and not as trust funds. For that reason it was held that the beneficiaries of said funds were not entitled to preferential payment. As said in the opinion, that case was governed by *Bank v. Corp. Com.,* 201 N. C., 381, 160 S. E., 360, and *In re Garner Banking and Trust Company,* 204 N. C., 791, 168 S. E., 813.

The judgment in the instant case is

Reversed.

MARY SIMMONS ANDREWS, BY HER NEXT FRIEND, JOSEPH B. CHESHIRE, ALEX A. MARKS, AND LAWRENCE H. MARKS, v. GURNEY P. HOOD, COMMISSIONER OF BANKS.

(Filed 1 January, 1935.)

APPEAL by plaintiffs from *Grady, J.,* at May Term, 1934, of WAKE. Reversed.

From judgment that neither of the plaintiffs is entitled to preferential payment of his claim against the North Carolina Bank and Trust Company, each of the plaintiffs appealed to the Supreme Court.

Murray Allen for plaintiffs.

Brooks, McLendon & Holderness for defendant.

CONNOR, J. The pertinent facts in this case are identical with those in *Andrews v. Hood, Comr., ante,* 499. In accordance with the opinion on the appeal in that case, the judgment is

Reversed.

MARY J. OSBORNE v. BOARD OF EDUCATION OF GUILFORD COUNTY, EX REL. STATE OF NORTH CAROLINA, AND JOE S. PHIPPS, SHERIFF OF GUILFORD COUNTY, NORTH CAROLINA.

(Filed 1 January, 1935.)

1. Judgments G a—

A judgment for a fine, duly docketed, constitutes a lien on the real estate of defendant, C. S., 4655, which lien attaches immediately upon the docketing of the judgment, C. S., 614.

2. Same—

An action on a judgment must be brought within ten years from its rendition and docketing or the lien of the judgment against the lands of the judgment debtor is lost, C. S., 437, but transfer of the lands by the judgment debtor does not release the land of the lien.

3. Same—Nonresidence of judgment debtor does not affect running of statute against lien of judgment in favor of purchaser of the lands.

Where a judgment for a fine is rendered against a defendant residing in this State, and who remains in the State several months after the rendition and docketing of the judgment, the fact that thereafter the defendant left the State will not prevent the loss of the judgment lien by the lapse of ten years after the rendition and docketing of the judgment as against a purchaser of the land from the judgment debtor, C. S., 437, no execution on the judgment having been completed within the ten-year period, and the land having been subject to sale under execution continuously since the rendition and docketing of the judgment.

CIVIL ACTION, before *Alley, J.*, at October Criminal Term, 1934, of GUILFORD.

W. F. Lethco owned in fee simple a forty-six-acre tract of land in Guilford County. At the September Term, 1924, of the criminal court for the county of Guilford, Lethco was convicted of a misdemeanor, sentenced to the roads for a term of two years, and fined the sum of $500.00 and costs. This judgment was docketed in the office of the clerk of the Superior Court of Guilford County on 15 September, 1924.

On 15 December, 1924, Lethco conveyed said land to the plaintiff and received the purchase price thereof, amounting to $1,400.00. The trial judge found "that the plaintiff Mary J. Osborne, a citizen and resident of the State of North Carolina, bought said land without having the title examined or without actual knowledge of the judgment lien," etc. Lethco escaped from the roads of Guilford County on 25 June, 1925, and since said time "has remained away from the State of North Carolina and is now a nonresident of the State of North Carolina."

On 4 September, 1934, the clerk of the Superior Court of Guilford County issued an execution against Lethco and pursuant to such execution the sheriff advertised the land for sale on 22 October, 1934. The

plaintiff instituted this action to restrain the sale, contending that the ten-year statute of limitations protected her title.

The trial judge vacated the restraining order and taxed the plaintiff with the cost, and from such judgment the plaintiff appealed.

Robert A. Merritt for plaintiff.

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

BROGDEN, J. Does the statute of limitations bar the right to sell the land under execution?

A judgment for a fine, duly docketed, constitutes a lien on the real estate of defendant (C. S., 4655), and such a lien attaches immediately upon the docketing of the judgment. C. S., 614. It is further provided by C. S., 437, that an action upon a judgment must be brought within ten years "from the date of its rendition." Manifestly, land is not relieved of a judgment lien by the mere transfer of the debtor's title. *Moses v. Major*, 201 N. C., 613. But it has been held that "the lien upon lands of a docketed judgment is lost by the lapse of ten years from the date of the docketing, and this notwithstanding execution was begun but not completed before the expiration of ten years." *Hyman v. Jones*, 205 N. C., 266, 171 S. E., 103.

The facts in the case at bar disclose that the judgment against Letheo was duly docketed on 15 September, 1924. Execution was issued thereon and the land advertised for sale on 22 October, 1934, or more than ten years from the date of the rendition and docketing of the judgment.

The defendant, however, asserts that the ten-year statute of limitations is tolled by reason of the fact that Letheo, the judgment debtor, fled the State in 1925, and as he is now a nonresident of the State, this period of nonresidence should not constitute a part of the ten years. In support of such contention the defendant relies upon C. S., 411, and C. S., 614. It is to be noted, however, that when the judgment was rendered Letheo was in the State and remained in the State several months after the judgment was docketed. Obviously, if Letheo was contesting the sale of the land under execution, the contention of defendant would be maintainable.

The land has been subject to sale under execution continuously since the rendition and docketing of the judgment, and the defendant has at all times had the right to have the land appropriated to the payment of the fine, but it has remained inactive until all the sand has run out of the glass, and the plaintiff's feet are now upon the rock.

Reversed.

FLORA M. BARRINGER AND THE QUEEN CITY HOTEL COMPANY v. THE WILMINGTON SAVINGS AND TRUST COMPANY, TRUSTEE.

(Filed 1 January, 1935.)

1. Mortgages H o—Temporary order restraining consummation of sale is properly dissolved upon finding that bid is fair market value of lands.

Where, in proceedings to enjoin the consummation of a sale under the power contained in a deed of trust on the ground that the amount bid at the sale was inadequate, ch. 275, Public Laws of 1933, the parties expressly waive a jury trial, and the trial court finds from admissions in the pleadings and from conflicting affidavits filed by the parties that the amount bid at the sale represented the fair market value of the lands, and that there was no assurance that a larger sum would be offered if the lands were resold, the findings support his judgment dissolving the temporary order restraining the consummation of the sale.

2. Appeal and Error J c—

Where a jury trial is waived, the findings by the court upon conflicting evidence are conclusive and are not subject to review upon appeal. Art. IV, sec. 13.

APPEAL by plaintiffs from *Harris, J.*, at March Term, 1934, of NEW HANOVER. Affirmed.

This is an action to enjoin the consummation of a sale of real estate made by the defendant trustee under a power of sale contained in a deed of trust which was executed by the Hotel Cape Fear, Inc., to the defendant, and which secures the payment of the bonds described therein.

The plaintiff Flora M. Barringer is the holder and owner of certain of the bonds which are secured by the deed of trust.

The plaintiff The Queen City Hotel Company is the owner of the real estate described in the deed of trust, claiming title to the same under a deed executed by the Hotel Cape Fear, Inc., and recorded subsequent to the registration of the deed of trust.

After due advertisement and after full compliance with all the terms and provisions of the deed of trust, the defendant sold the real estate described therein, which is known as the Cape Fear Hotel, at Wilmington, N. C., on 23 October, 1933. The last and highest bid at the sale was the sum of $175,000. This bid has not been raised under the provisions of the statute, C. S., 2591. Unless restrained and enjoined from so doing, the defendant trustee will consummate the sale by executing and delivering to the purchaser a deed for the said real estate, upon his compliance with his said bid.

The only ground on which the plaintiffs pray that the defendant be enjoined from consummating the sale is that the amount bid for said real estate is not the fair value of the same, and that for that reason it

would be inequitable for the defendant to consummate the sale by executing and delivering to the purchaser a deed for the said real estate upon his paying the amount of his bid.

This action was begun in the Superior Court of New Hanover County on 31 October, 1933.

At the hearing of the action at March Term, 1934, it was agreed by the parties that the judge should find the facts from the evidence at said hearing and render judgment accordingly.

Among other things, the judge found that the sum of $175,000 is the fair, just, and reasonable market value of the real estate described in the deed of trust, and that no assurance had been given to the court by the plaintiffs that a larger sum would be offered for the said real estate if a resale should be ordered by the court.

From judgment dissolving a temporary restraining order heretofore issued in the action, and denying the relief prayed for by them, the plaintiffs appealed to the Supreme Court, assigning as error (1) the failure of the court to find as a fact that the fair market value of the real estate described in the deed of trust is $300,000, and (2) the finding by the court that the fair market value of the said real estate is $175,000.

Herbert McClammy and Rose & Lyon for plaintiffs.
Marsden Bellamy and Stevens & Burgwyn for defendant.

CONNOR, J. The only question presented by this appeal is whether there was evidence at the trial in the Superior Court sufficient in its probative force to support the findings of fact made by the judge. This question must be answered in the affirmative.

The judge found the facts from the admissions in the pleadings and from affidavits filed by the parties, who had expressly waived a trial by a jury of the issue raised by the pleadings, as to the fair, just, and reasonable value of the real estate described in the deed of trust at the date of the sale. The affidavits were conflicting, those filed by the defendant tending to show that the fair, just, and reasonable value of the real estate was at said date $175,000, the amount of the bid; those filed by the plaintiffs tending to show that such value was largely in excess of said amount. The findings of fact are conclusive and are not subject to review by this Court. Const. of N. C., Art. IV., sec. 13.

The judgment is supported by the facts found by the judge, and is therefore affirmed.

The action was brought under the provisions of chapter 275, Public Laws of N. C., 1933. This is a valid statute. *Woltz v. Deposit Co.*, 206 N. C., 239, 173 S. E., 587. In that case a judgment enjoining the consummation of a sale of land, made under a power of sale contained in

a deed of trust, was affirmed. The judgment was supported by a finding by the judge that the amount bid at the sale was not a fair price for the land. Where, as in the instant case, the amount of the bid was a fair price, and the sale was fairly conducted, there is no error in a judgment refusing to enjoin a consummation of the sale by the trustee, mortgagee, or other person authorized to make the sale.

Affirmed.

EDNA MAY LIPPARD, FRED W. LIPPARD, JR., PHYLISS ANN LIPPARD, AND WILLIE FAYE LASH, DEPENDENTS OF FRED W. LIPPARD, DECEASED, v. SOUTHEASTERN EXPRESS COMPANY.

(Filed 1 January, 1935.)

Master and Servant F g—Posthumous illegitimate child acknowledged by father is dependent of father within meaning of Compensation Act.

An illegitimate child, born after the death of its father, who before his death had acknowledged his paternity of the child, is a dependent of its deceased father within the provisions of the North Carolina Workmen's Compensation Act, and such child is entitled to share with children of its deceased father who were born of his marriage to their mother, from whom their father had been divorced prior to his death, in compensation awarded under the act to his dependents. N. C. Code, 8081 (uu), 8081 (i).

APPEAL by defendant from *Alley, J.*, at June Term, 1934, of FORSYTH. Affirmed.

This is a proceeding, begun before the North Carolina Industrial Commission, for compensation under the provisions of the North Carolina Workmen's Compensation Act.

The facts found by the Industrial Commission are as follows:

Fred W. Lippard died on 20 September, 1932. At the date of his death he was an employee of the Southeastern Express Company. Both he and the said company were subject to the provisions of the North Carolina Workmen's Compensation Act.

The death of the said Fred W. Lippard was the result of personal injuries which were caused by an accident which arose out of and in the course of his employment.

At his death Fred W. Lippard left surviving him Edna May Lippard, Fred W. Lippard, Jr., and Phyliss Ann Lippard, his children, born of his marriage to Maggie Bell Lippard. Before his death, to wit, on 15 August, 1932, Fred W. Lippard was divorced from his wife, Maggie Bell Lippard, by a decree of the Superior Court of Cabarrus County.

The custody of the said children was awarded by the court to their father, Fred W. Lippard.

Willie Faye Lash was born on 17 January, 1933. She is the child of Thelma Lash and Fred W. Lippard, who were never married to each other. Before his death, Fred W. Lippard knew that Thelma Lash was pregnant, and acknowledged that he was the father of her unborn child. Fred W. Lippard and Thelma Lash were engaged to be married on 24 September, 1932. He died on 20 September, 1932.

On these facts, the Industrial Commission awarded compensation for the death of Fred W. Lippard, to be paid by the Southeastern Express Company to the guardian of Edna May Lippard, Fred W. Lippard, and Phyliss Ann Lippard, as dependents of Fred W. Lippard, deceased. The commission denied the claim of Willie Faye Lash that she is entitled to share in said compensation as a dependent of Fred W. Lippard, deceased.

On an appeal from this award to the Superior Court of Forsyth County, the award was modified and affirmed.

The court was of opinion that on the facts found by the Industrial Commission, Willie Faye Lash is a dependent of Fred W. Lippard, deceased, and as such is entitled to share with his children born of his marriage in the compensation to be paid by the Southeastern Express Company, and adjudged that the award of the Industrial Commission be amended in accordance with its opinion. The defendant appealed from the judgment of the Superior Court to the Supreme Court, assigning as error so much of said judgment as orders the Industrial Commission to amend its award by directing that Willie Faye Lash share in the said compensation.

Walter D. Browne for Edna May Lippard, Fred W. Lippard, Jr., and Phyliss Ann Lippard.

John C. Wallace and Wm. H. Boyer for Willie Faye Lash.

CONNOR, J. The questions of law presented by this appeal are (1) whether an illegitimate child born after the death of its father, who before his death had acknowledged his paternity of the child, is a dependent of its deceased father, within the provisions of the North Carolina Workmen's Compensation Act, and (2) if so, whether such child is entitled to share with children of its deceased father who were born of his marriage to their mother, from whom their father had been divorced prior to his death, in the compensation awarded under the act to his dependents.

Both of these questions must be answered in the affirmative.

The provisions of the North Carolina Workmen's Compensation Act (chapter 120, Public Laws of N. C., 1929) which are pertinent to the questions presented by this appeal are as follows:

1. "A widow, a widower, and/or a child shall be conclusively presumed to be wholly dependent for support upon the deceased employee. . . . If there is more than one person wholly dependent, the death benefit shall be divided among them; the persons partly dependent, if any, shall receive no part thereof." Sec. 39, ch. 120, Public Laws of N. C., 1929. Sec. 8081 (uu), N. C. Code, 1931.

2. "The term 'child' shall include a posthumous child, a child legally adopted prior to the injury of the employee, and a step-child or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent upon him." Sec. 2, ch. 120, Public Laws of N. C., 1929. Sec. 8081 (i), N. C. Code of 1931.

The fact that the illegitimate child, whose paternity was acknowledged by the deceased employee prior to his death, was born after his death does not affect the relationship between the child and its father. The dependency which the statute recognizes as the basis of the right of the child to compensation grows out of the relationship, which in itself imposes upon the father the duty to support the child, and confers upon the child the right to support by its father. The status of the child, social or legal, is immaterial.

The philosophy of the common law, which denied an illegitimate child any rights, legal or social, as against its father, and imposed no duty upon the father with respect to the child, is discarded by the statute. The child is no less the child of its father because it was born after his death. The statute expressly provides that the compensation shall be divided among the dependents of the deceased employee. The judgment of the Superior Court is

Affirmed.

INDUSTRIAL LOAN AND INVESTMENT BANK v. E. F. DARDINE, MRS. AMELIA J. DARDINE, AND AGNES V. DARDINE.

(Filed 1 January, 1935.)

1. Fraud A e—

Ignorance of the contents of an instrument is no defense in an action on the instrument against a party signing same where such party is able to read and no fraud is alleged.

2. Bills and Notes G b: Evidence J a—

Evidence of a parol contemporaneous agreement that a person signing a note should not be obligated thereon in any way is incompetent, even as against the payee, the parol evidence being in contradiction of the written instrument.

3. Bills and Notes A a—

Forbearance to institute an action to set aside a conveyance from a husband to his wife as being voluntary is a valuable consideration and will support their promissory note, and the wife's contention that she received no consideration for the note is untenable.

APPEAL from *Devin, J.*, at Special Term, 1934, of MECKLENBURG. Affirmed.

This action was originally instituted by the plaintiff bank against the three defendants and voluntary nonsuits subsequently taken as to E. F. Dardine and Agnes V. Dardine.

The action was to recover a balance due upon a promissory note dated 15 December, 1930, payable to the plaintiff bank, for the sum of $6,900, upon which $498.00 has been paid.

The defendant Mrs. Amelia J. Dardine admits that she signed a certain paper-writing, but avers in her further answer that, if in fact and in truth the instrument she signed was the note sued on, she did not know the contents thereof; and that she was assured by the plaintiff that the signing of the paper by her "was purely a matter of form and that she would not be obligated in any way in connection therewith"; and that she "received no consideration in connection therewith or any part of the proceeds thereof."

His Honor charged the jury, in effect, that if they found the facts to be as shown by all the evidence they should answer the issue of indebtedness in favor of the plaintiff.

From judgment for the plaintiff, the defendant Mrs. Amelia J. Dardine appealed, assigning errors.

H. L. Taylor for defendant.
Stewart & Bobbitt for plaintiff.

SCHENCK, J. The assignments of error present but the single question: Did the court err in charging the jury as indicated?

The defense that she did not know the contents of the instrument at the time she signed it cannot avail the defendant in the face of her own testimony that "I can read. . . . He (her husband and codefendant) asked me, 'Dear, please sign that for me,' and I did it." It was the defendant's duty to have read, or to have had read to her, the contract, or note, and her failure to do so, in the absence of fraud, is negligence for which the law affords no redress. *Colt Company v. Kimball,* 190 N. C., 169, and authorities there cited.

The defense that she relied upon the representation of the bank that the signing of the paper was "purely a matter of form and she would not be obligated in any way in connection therewith" likewise cannot

avail the defendant, since any oral agreement on the part of the bank to relieve her from payment of the note was merged in the written contract, the note itself, and she cannot be heard to vary the latter by evidence of the former. In *Bank v. Moore,* 138 N. C., 529, it is written: "The only defense attempted amounts in substance to this: That though the defendant executed his note and received a valuable consideration for same, there was an understanding and agreement at the time that payment should never be enforced or demanded. All the authorities are agreed that such a defense is not open to the defendant."

The defense that she "received no consideration, . . . or any part of the proceeds" of the note must also fail, since it appears from all the evidence that the note sued upon was given to the payee bank to withhold instituting action against the defendant and her husband to have declared void an alleged voluntary conveyance to her from him in fraud of his creditors. The forbearance to institute this action was sufficient consideration for the note. "In a legal sense, a valuable consideration may consist in some right, interest, or benefit accruing to one party, or in some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." *Bank v. Harrington,* 205 N. C., 244.

We conclude that the charge below was fully sustained and warranted by the law and evidence in the case.

No error.

JOHN S. BOUSHIAR, ALSO KNOWN AS NIMER BOUSHIAR ACHKAR, ET AL. v. CAROLINE H. WILLIS, ADMINISTRATRIX, ET AL.

(Filed 1 January, 1935.)

Injunctions D b—

Equity will generally continue a temporary restraining order to the hearing upon a proper showing for injunctive relief when it appears that no harm can come to respondents from its continuance, and great injury might result to petitioners from its dissolution.

APPEAL by defendants from *Daniels, J.,* at May Term, 1934, of CRAVEN.

Civil action to restrain execution and delivery of deed under power of sale contained in deed of trust, for an accounting, and for further relief.

Temporary injunction and order to show cause issued 3 May, 1934, returnable 16 May before Hon. F. A. Daniels at New Bern, N. C.

The defendants pleaded, by answer, the pendency of another action between some of the parties to the present proceeding; and upon the

return of the show-cause order, demanded that the temporary restraining order be dissolved and the present action dismissed.

It was adjudged "that the restraining order issued herein be and the same is hereby continued until the final hearing in this cause," from which the defendants appeal "on the ground that his Honor was in error in continuing the restraining order to the final hearing."

Greer & Greer and R. A. Nunn for plaintiffs.
D. H. Willis and Ward & Ward for defendants.

STACY, C. J. The temporary restraining order was properly continued to the hearing. *Wentz v. Land Co.*, 193 N. C., 32, 135 S. E., 480.

It is the general practice of equity courts, upon proper showing for injunctive relief, to continue the temporary restraining order to the final hearing, when it appears that no harm can come to the respondents from such continuance, and great injury might result to the petitioners from a dissolution of the injunction. *Parker Co. v. Bank*, 200 N. C., 441, 157 S. E., 419; *Thomason v. Swenson*, 204 N. C., 759, 169 S. E., 620. "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"—*Walker, J.*, in *Seip v. Wright*, 173 N. C., 14, 91 S. E., 359.

This is the only point presented by the appeal.

There is no finding that the prior action is for the same cause, and that they are substantially alike. Indeed, the two are apparently dissimilar. *Buchanan v. Milling Co.*, 200 N. C., 52, 156 S. E., 140.

Affirmed.

SCALE JOHNSON v. MISSOURI STATE LIFE INSURANCE COMPANY ET AL.

(Filed 1 January, 1935.)

Insurance R c—Held: under provisions of policy, liability under disability clause attached only after such disability had existed six months.

Where a disability clause in a policy of insurance provides for benefits to insured upon proof of total and permanent disability and that such disability had continued for six months, under plain terms of the policy, disability as defined by the policy must exist for the six-months period before liability attaches to insurer, and where the insurance is not kept in force by the payment of premiums for six months after insured sustained such disability, insured's action on the disability clause is properly nonsuited.

CLARKSON, J., dissents.

JOHNSON *v.* INSURANCE CO.

APPEAL by plaintiff from *Moore, Special Judge,* at June Term, 1934, of DURHAM.

Civil action to recover on a $1,000 certificate of group insurance issued by defendant to plaintiff, an employee of the B. C. Remedy Company and/or Five Points Drug Company of Durham, N. C.

The certificate in suit contains the following provision:

"If the employee shall furnish the company with due proof that, before having attained the age of sixty years, he or she has become totally and permanently disabled by bodily injury or disease, and that he or she is then, and will be at all times thereafter, wholly prevented thereby from engaging in any gainful occupation, and that he or she has been so permanently and totally disabled for a period of six months, the company will immediately pay to the employee in full settlement of all obligations hereunder, the amount of insurance in force hereunder on the employee at the time of the approval by the company of the proofs as aforesaid."

Plaintiff's total disability began on 1 January, 1931, when he left the employ of the Five Points Drug Company. His brother continued to pay his premiums until 1 March, 1931, when the insurance coverage was canceled, as no further premiums were paid to continue it in force after that date.

Suit was instituted 1 March, 1933.

From a judgment of nonsuit the plaintiff appeals, assigning error.

A. A. McDonald and W. S. Lockhart for plaintiff.

Smith, Wharton & Hudgins for defendant.

STACY, C. J. Must the plaintiff's total and permanent disability have existed for a period of six months before liability attaches therefor under the certificate in suit? The answer is, Yes. *Kingsland v. Ins. Co.* (Mo.), 66 S. W. (2d), 959; *Baker v. Ins. Co.,* 202 N. C., 432, 163 S. E., 110.

The same question in principle was presented in the case of *Hundley v. Ins. Co.,* 205 N. C., 780, 172 S. E., 361, where *Brogden, J.,* delivering the opinion of the Court, observed: "It is not deemed relevant to discuss the meaning of the six months' clause or for what reason it was inserted in the contract. It is there in plain English." See, also, *Wyche v. Ins. Co., ante,* 45, 175 S. E., 697; *Ammons v. Assur. Society,* 205 N. C., 23, 169 S. E., 807.

The evidence rendered it proper to dismiss the action as in case of nonsuit.

Affirmed.

CLARKSON, J., dissents.

EMMA J. CASE ET AL. v. ROBERT V. BIBERSTEIN ET AL.

(Filed 1 January, 1935.)

1. Wills E b—Word "balance" in clause of will in this case held to include both realty and personalty.

The pertinent provisions of the will in this case were "I will and bequeath" certain sums of money and a chattel to named beneficiaries, "to my aunt, C., use of the entire balance during her lifetime and at her death this balance to J.": *Held*, the dispositive words "will and bequeath" are sufficient to include both realty and personalty, and the word "balance" referred to both, and under the presumption against partial intestacy, C. and J. took a life estate and remainder in such realty and their joint deed conveyed the fee-simple title thereto.

2. Wills E a—

Where a competent person undertakes to make a will, the law presumes he does not intend to die intestate as to any part of his property.

APPEAL by defendants from *Hill, Special Judge,* at October Special Term, 1934, of MECKLENBURG.

Civil action for specific performance, heard upon the pleadings and agreed statement of facts.

The defendants contracted in writing to purchase from the plaintiffs Emma J. Case, who is unmarried, and Dorothy Jackson and her husband a certain lot of land, situate in the city of Charlotte, for a valuable consideration. The plaintiffs duly executed and tendered deed therefor and demanded payment of the purchase price as agreed, but defendants decline to accept deed and refuse to make payment of the purchase price, on the ground that the title offered is defective.

Judgment for the plaintiffs, from which the defendants appeal, assigning error.

Whitlock, Dockery & Shaw for plaintiffs.
J. M. Shannonhouse for defendants.

STACY, C. J. On the hearing the sufficiency of the title offered was made to depend upon the construction of the following provision in the will of L. Alice Chambers:

"Third: I will and bequeath to my cousins, Dorothy and Walter Jackson, $2,000.00, to Cousins John and Pearl LeBarr $200.00, to Cousin Fern LaBarr my typewriting machine—to my aunt, Emma J. Case, use of the entire balance during her lifetime and at her death this balance to Cousin Dorothy Jackson."

Does the word "balance" in the above clause refer to the real estate of the testatrix as well as to her personal property? It is the contention

of the defendants that only the balance of the personal property is bequeathed by this clause, while the plaintiffs say the real estate of the testatrix is also devised thereby.

The dispositive words "will and bequeath," are sufficient to include both. *Allen v. Cameron,* 181 N. C., 120, 106 S. E., 484; *Faison v. Middleton,* 171 N. C., 170, 88 S. E., 141. And the word "balance," we apprehend, was intended to mean the remainder of the estate of the testatrix. *Arvin v. Smith's Ex'rs,* 128 S. E. (Va.), 252; 28 R. C. L., 296, *et seq.* The law presumes that when a person who is capable of doing so undertakes to make a will, he does not intend to die intestate as to any part of his property. *Gordon v. Ehringhaus,* 190 N. C., 147, 129 S. E., 187. This presumption against partial intestacy has been applied in a number of cases. *Holmes v. York,* 203 N. C., 709, 166 S. E., 889; *McCallum v. McCallum,* 167 N. C., 310, 83 S. E., 250; *Austin v. Austin,* 160 N. C., 367, 76 S. E., 272; *Powell v. Wood,* 149 N. C., 235, 62 S. E., 1071; *Blue v. Ritter,* 118 N. C., 580, 24 S. E., 356; *Reeves v. Reeves,* 16 N. C., 386.

We have concluded that the judgment is correct.

Affirmed.

HOME BUILDING AND LOAN ASSOCIATION, GASTONIA, N. C., v. MRS. O. O. MOORE AND MRS. J. E. DALE.

(Filed 1 January, 1935.)

1. Justices of the Peace D a—

In proceedings before a justice of the peace oral pleadings are permissible. C. S., 1500, Rule 6.

2. Ejectment B e — Title to property held put in issue and action in summary ejectment was properly dismissed in Superior Court upon appeal.

Where, in proceedings in summary ejectment before a justice of the peace, C. S., 2365, plaintiff claims title through a deed from defendant's father and maintains that defendants orally leased the land from plaintiff, and defendants claim that the land belonged to their mother, and that they acquired title by inheritance from her, and that they have steadfastly refused to pay rent upon demand, the adverse contentions of the parties, supported by evidence, put the title to the property in issue, and the jurisdiction of the justice of the peace is ousted, and on appeal in the Superior Court the action is properly dismissed.

APPEAL by the plaintiff from *Cowper, Special Judge,* at May Term, 1934, of GASTON. Affirmed.

This was a proceeding commenced before a justice of the peace in summary ejectment under C. S., 2365, *et seq.*, and was heard *de novo* on appeal by the plaintiff to the Superior Court at term time.

It is the position of the plaintiff that the relationship of landlord and tenants existed between it and the defendants by virtue of an oral lease, and that this proceeding could be properly maintained.

The position of the defendants, on the other hand, is that they are the owners of the house and land from which the plaintiff seeks to eject them, by inheritance from their deceased mother, and contend that a question of title is involved, and that therefore the court of a justice of the peace is without jurisdiction, in the first instance, of the controversy between them and the plaintiff, and that the Superior Court is likewise without jurisdiction upon appeal.

A. C. Jones and Geo. B. Mason for appellant.

W. H. Sanders for appellees.

SCHENCK, J. The pleadings were oral, which were permissible, since this is a proceeding before a justice of the peace. C. S., 1500, Rule 6.

Upon the trial in the Superior Court the plaintiff contended and offered evidence tending to show that it was the owner of the premises in controversy by virtue of a deed to it from the father of the defendants conveying said premises, and that when the grantor vacated said premises the defendants, his daughters, orally agreed to pay $4.00 per month rental for "a few months" until they could find another place to go, and that defendants have been upon said premises for approximately 18 months without paying any rent whatsoever, and have declined to vacate, notwithstanding they have been served with notice to quit.

The defendants contended and offered evidence tending to show that they have lived upon the land in controversy for more than fifteen years, and that their deceased mother, and not their father, was the owner of said premises, and that they are now, as heirs at law of their mother, the owners thereof; and that while they have been asked to pay rent they have at all times steadfastly refused to do so, or to agree to do so.

We think these adverse contentions and contradictory evidence clearly put the title to the property involved in issue, and made the relationship of the parties other than that of conventional landlord and tenants, and ousted the jurisdiction of the justice of the peace, and that his Honor therefore properly dismissed the action on appeal as in case of nonsuit. *Insurance Co. v. Totten,* 203 N. C., 431, and cases therein cited.

Affirmed.

STATE v. JAMES BUCHANAN CARDEN.

(Filed 1 January, 1935.)

Criminal Law G j—Law does not presume that defendant testifying in own behalf labors under temptation to testify falsely.

While it is proper in a criminal prosecution for the court to charge that the jury should scrutinize the testimony of a defendant testifying in his own behalf, it is error for the court to charge that the law presumes the defendant is laboring under a temptation to testify to whatever he thinks will clear him of the charge, whether the defendant is so tempted and whether he yields to such temptation being for the determination of the jury.

APPEAL by defendant from *Sinclair, J.,* at May Term, 1934, of DURHAM. New trial.

The defendant was tried upon a bill of indictment charging him with the murder of his wife, Vera Carden, and was convicted of murder in the first degree. From judgment of death by electrocution defendant appealed to the Supreme Court, assigning errors.

R. O. Everett and A. R. Wilson for defendant.

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

SCHENCK, J. The State contended that the defendant, with deliberation and premeditation, shot and killed the deceased. The defendant, while admitting that the deceased was shot by his pistol, contended that the shooting was accidental. The State offered evidence tending to establish its contentions; and the defendant, as a witness in his own behalf, testified to the effect that the deceased was shot in a struggle with the defendant in an effort to keep him from taking his pistol with him for the avowed purpose of "getting" certain people who had stolen his money.

The following excerpt taken from the charge forms the basis of one of the defendant's exceptive assignments of error: "Another rule of law, it is your duty to apply in this case, is, as you do in all criminal cases, it is your duty to scrutinize the evidence of a defendant and all his close relations before accepting their evidence as true. There is a reason for that, gentlemen, just as you will find a reason founded on common sense and human experience for all rules of law. The reason for that rule of law is that the law recognizes the fact that human nature is frail and weak, and the law presumes that when a man is being tried for a crime, that he is laboring under a natural temptation to testify to whatever he

thinks may clear himself of the charge, and for that reason it is your duty to scrutinize the evidence of the defendant in this case, and all his close relations, on account of the temptation they have to secure his release from this charge, before accepting the testimony as true. After scrutinizing the testimony and taking into consideration the interest they have in your verdict, the temptation under which they are laboring, if you find then that their testimony is entitled to belief, it will be your duty to give it the same weight you would that of any disinterested witness."

This charge is in practically the same words as that given in *S. v. Haynes Wilcox,* 206 N. C., 691, which we held for error, and, in conformity with that holding, we think entitles the defendant to a new trial. While the law may require the jury to scrutinize the testimony of a defendant in the light of his interest in the verdict, we cannot agree that "the law presumes" that the defendant is laboring under a temptation to testify to whatever he thinks will clear him of the charge. Whether the defendant has such temptation, and whether he yields to such temptation and thereby testifies falsely, must be determined by the jury from hearing the evidence and observing the witness, and not by legal presumption.

It should be said in justice to the learned judge who tried the case that the opinion in *S. v. Haynes Wilcox, supra,* was not rendered until after the trial of the instant case.

New trial.

MRS. M. F. GRAVES, ADMINISTRATRIX, v. J. G. PRITCHETT ET AL.

(Filed 1 January, 1935.)

1. Appeal and Error A d—

The refusal to dismiss an action for laches, or because barred by the statute of limitations, will not be disturbed on an appeal taken prior to final judgment.

2. Reference A a—

It is error for the trial court to order a compulsory reference before disposing of pleas in bar set up by defendants on the grounds of laches and the bar of the statute of limitations. C. S., 573.

APPEAL by defendants from *Cranmer, J.,* at July Term, 1934, of ALAMANCE.

Civil action by administratrix of surviving partner for partnership accounting and for alleged fraudulent misapplication of partnership assets.

There was a motion to dismiss the action for laches, or because barred by the statute of limitations, which was overruled. Exception.

A compulsory reference was ordered, to which both sides excepted, and the defendants appeal.

J. Elmer Long and Clarence Ross for plaintiff.
John S. Thomas and Sapp & Sapp for defendants.

STACY, C. J. The refusal to dismiss the action will not be disturbed on appeal (*Griffin v. Bank,* 205 N. C., 253, 171 S. E., 71), but there was error in ordering a compulsory reference without first disposing of the pleas in bar. C. S., 573; *Garland v. Arrowood,* 172 N. C., 591, 90 S. E., 766; *Jones v. Wooten,* 137 N. C., 421, 49 S. E., 915; *Royster v. Wright,* 118 N. C., 152, 24 S. E., 746. Error in this respect is confessed by appellee.

Error.

E. B. THOMASON ET AL. v. SIMEON SWENSON ET AL.

(Filed 1 January, 1935.)

Mortgages H b—Where foreclosure is enjoined for an accounting for usury, order that land be sold for debt as ascertained with legal interest is proper.

Where injunctive relief is asked against the foreclosure of a deed of trust on the ground of usury and for an ascertainment of the amount of the debt due after deducting penalties for the alleged usury, it is proper for the trial court to ascertain, with the aid of a jury, the amount of the debt with six per cent interest, and to order the land sold and the proceeds applied to the payment thereof.

APPEAL by defendants from *Pless, J.,* at June Term, 1934, of BUNCOMBE.

Civil action to foreclose deed of trust, for the appointment of a receiver to take charge of the property, and for general relief.

The plaintiffs, on trial in the General County Court, abandoned any claim to a personal deficiency judgment against the defendants.

The defendants set up, by way of counterclaim, claim for usury, demanded penalties for its alleged exaction, and asked for injunctive relief against the threatened foreclosure.

The General County Court, with the aid of a jury, fixed the principal sum due the plaintiffs, with interest at 6 per cent per annum, and ordered that the property be sold and applied to the payment thereof. From this judgment the defendants appealed to the Superior Court, where the assignments of error were all overruled, and from these rulings the defendants again appeal.

Harkins, Van Winkle & Walton and John Izard for plaintiffs.
Bourne, Parker, Bernard & DuBose for defendants.

STACY, C. J. This is the same case that was before us at the Spring Term, 1933, opinion filed 14 June, 1933, and reported in 204 N. C., 759, 169 S. E., 620.

The defendants have asked for injunctive relief; the trial court adjudged that they pay their debt with lawful interest, and no more; this accords with the decisions on the subject, and the defendants have no further grounds for complaint. *Waters v. Garris,* 188 N. C., 305, 124 S. E., 334; *Miller v. Dunn,* 188 N. C., 397, 124 S. E., 746; *Jonas v. Mortgage Co.,* 205 N. C., 89, 170 S. E., 127. The record is free from reversible error, or at least none has been made to appear.

Affirmed.

MARGARET JOHN v. H. R. ALLEN ET AL.

(Filed 1 January, 1935.)

1. Schools and School Districts G b—

Mandamus will not lie to compel a county to issue its voucher to pay a debt due by a county school district to a principal in its elementary school, chs. 88 and 361, Public-Local Laws of 1933, applying only to county vouchers and county obligations.

2. Mandamus A b—

A writ of *mandamus* can confer no new authority, but the writ lies only to compel the performance of an existing ministerial duty by a party having a clear legal right to demand its performance.

APPEAL by plaintiff from *Harris, J.,* at August Term, 1934, of BLADEN.

Civil action to recover $280.00 for services rendered as principal of Elizabethtown Elementary Public School (District No. 66), Bladen County, for the year 1930-1931, with application for writs of *mandamus* to require issuance of voucher and to compel levy of tax sufficient to pay same.

The debt of the district is not denied, but defendants say plaintiff's claim is not a county obligation, and that there is no authority for levying a county tax to pay the same. From the denial of the writs of *mandamus* the plaintiff appeals, assigning errors.

Maxcy L. John for plaintiff.
H. H. Clark for defendant Bladen County.

STACY, C. J. The statutes under which the plaintiff seeks to compel the issuance of a voucher and the levy of a tax, chs. 88 and 361, Public-Local Laws 1933, deal only with county vouchers and county obligations. The application for writs of *mandamus* was, therefore, properly denied. *Rollins v. Rogers,* 204 N. C., 308, 168 S. E., 206; *Comrs. v. Lacy,* 174 N. C., 141, 93 S. E., 482.

Mandamus is available against a board of county commissioners only to compel the board to do something which it is its duty to do without it. The writ confers no new authority. The party seeking it must have a clear legal right to demand it, and the board must be under a legal obligation to perform the act sought to be enforced. Neither of these prerequisites appears in the instant case. *Powers v. Asheville,* 203 N. C., 2, 164 S. E., 324.

Affirmed.

IN THE MATTER OF THE HOTEL RALEIGH, INC.

(Filed 1 January, 1935.)

1. Corporations C a—

The jurisdiction of a judge of the Superior Court over matters involved in the election of directors of a corporation organized under the laws of this State is statutory. C. S., 1176, 1177.

2. Same—Proceeding under C. S., 1177, is summary in its nature and is properly instituted by service of ten days notice on adverse parties.

A proceeding based upon the failure of stockholders of a corporation to elect directors thereof at the annual meeting held for that purpose because of dissension among the stockholders, and the postponement of such election because of such dissension with the result that the directors theretofore elected continued in office, is a proceeding under C. S., 1177, which is summary in its nature, and notice in writing signed by complainant served on the adverse parties by the sheriff ten days before the date designated for the hearing of the complaint confers jurisdiction upon the judge of the Superior Court over the parties and subject-matter of the proceeding, nor is the failure of the directors to hold an election within thirty days after written request therefor by holders of ten per cent of the stock of the corporation a prerequisite to the proceedings, the conditions precedent to proceedings under C. S., 1176, not being applicable.

3. Same: Corporations H a—Superior Court has no power to appoint receiver for corporation in proceedings under C. S., 1177.

In proceedings under C. S., 1177, for the failure of the stockholders of a corporation to elect directors thereof because of dissension among the stockholders at a meeting held to elect such directors, the corporation is neither a necessary nor a proper party, nor may its rights be affected, and the judge of the Superior Court has no jurisdiction to appoint a receiver for the corporation in such proceeding; although, in proper instances, in the exercise of its equitable jurisdiction, the Superior Court may appoint

a receiver for a corporation whose business is mismanaged, with resulting loss of its assets, because of dissensions among its stockholders or directors.

4. Corporations C a—

The officers of a corporation may be chosen only by its directors, and its directors, duly elected by its stockholders, hold office until their successors are duly elected.

APPEAL by A. W. Pate and W. H. Pate, respondents, from *Harris, J.*, at Chambers in Raleigh, N. C., on 15 November, 1934. Reversed.

This proceeding was instituted by M. H. Robertson against A. W. Pate and W. H. Pate under the provisions of C. S., 1177.

The proceeding was begun by notice in writing, signed by M. H. Robertson and addressed to A. W. Pate and W. H. Pate. The notice is dated and was duly served on A. W. Pate and W. H. Pate by the sheriff of Wake County, on 12 September, 1934, and was in words as follows:

"COMPLAINT OF ELECTION AND MATTERS PERTAINING THERETO.

"To A. W. Pate and W. H. Pate:

"You will please take notice that on Saturday, 22 September, 1934, at 11 o'clock a.m., application will be made to his Honor, W. C. Harris, Judge, at chambers in the Wake County courthouse, Raleigh, N. C., to hear the proofs of M. H. Robertson and otherwise enquire into the matter of his complaint of the election which should have been held by the stockholders of the Hotel Raleigh, Inc., on ..... January, 1934, and which was postponed from time to time, no election ever having been actually held, the grounds of complaint, among other things, being:

"1. That there is an equal ownership of stock in A. W. Pate and W. H. Pate, and in M. H. Robertson, and it was not possible for any matter to be heard or determined at said election due to the fact that the votes of A. W. Pate and W. H. Pate were, or would have been, cast on one side of any matter that came before said meeting, and the said stock of M. H. Robertson would have been voted on the other side, the said A. W. Pate and W. H. Pate stating that they would not vote for any person or persons, as officers or directors of the corporation, except themselves, to which the said M. H. Robertson has at all times been and is now opposed.

"2. That the said A. W. Pate and W. H. Pate, at a previous election of the stockholders held for the election of directors, had been elected such directors and by their action in blocking the election which should have been held on ..... January, 1934, they forced the continuance of themselves as directors of the company, and as such directors they had elected themselves officers of the company, to wit: A. W. Pate as Secretary-Treasurer, and W. H. Pate as Vice-President.

"3. That the management of the affairs of the corporation, which is engaged in operating the Raleigh Hotel in the city of Raleigh, N. C., by A. W. Pate and W. H. Pate has proved entirely unsatisfactory, and the business of the company has been and is being damaged thereby.

"M. H. ROBERTSON, Applicant."

Pursuant to this notice, A. W. Pate and W. H. Pate appeared before Judge Harris, at the time and place fixed in the notice, and then and there moved that the proceeding be dismissed, for that:

"(a) No summons has been issued in any matter pertaining to the subject-matter set out in the Complaint of Election and Matters Pertaining Thereto.

"(b) No action has been instituted and no complaint has been filed setting out in full the complaint of the said M. H. Robertson, if any; and said Complaint of Election and Matters Pertaining Thereto is not served upon these parties in connection with any action instituted in the courts of this State.

"(c) Said Complaint of Election and Matters Pertaining Thereto, if treated by the court as a complaint in an action instituted in the courts of this State, does not state a cause of action for that it does not state that the directors of the Hotel Raleigh, Inc., after notice, failed or refused to hold an election for the selection of directors of said corporation; and for that it does not state that the complaint of M. H. Robertson is in connection with an election held or any proceeding, act, or matter pertaining to the same.

"(d) The court is without jurisdiction to hear or determine any matter except as the directors shall have failed or refused to hold an election for thirty (30) days after receiving a written request for an election for directors, or in connection with an election or proceeding, or act, or matter pertaining to the same."

The motion was denied, and the respondents A. W. Pate and W. H. Pate duly excepted.

Without waiving their exception to the denial of their motion to dismiss the proceeding, the respondents A. W. Pate and W. H. Pate thereafter filed their Response to the Complaint of Election and Matters Pertaining Thereto filed by the applicant M. H. Robertson.

The proceeding was then heard by Judge Harris on affidavits filed by both the applicant and the respondents.

On 15 November, 1934, Judge Harris filed in the proceeding an order, as follows:

"This cause coming on to be heard upon the complaint of M. H. Robertson, one of the stockholders, directors, and officers of the Hotel Raleigh, Inc., and it appearing to the court that due notice was given

to the adverse parties, A. W. Pate and W. H. Pate, who appeared at the hearings through their counsel, I. M. Bailey, Esq., and the matter having been heard upon affidavits filed in behalf of the complainant M. H. Robertson, and in behalf of the adverse parties, A. W. Pate and W. H. Pate, the court finds the following facts:

"1. The certificate of incorporation of the Hotel Raleigh, Inc., was issued by the Secretary of State of the State of North Carolina on 9 May, 1932. After the organization of said corporation, stock was issued therein as follows:

Certificate No. 1, A. W. Pate	1 share
Certificate No. 2, M. H. Robertson	1 share
Certificate No. 3, W. H. Pate	1 share
Certificate No. 4, M. H. Robertson	1 share
Certificate No. 5, M. H. Robertson	1 share
Certificate No. 6, A. W. Pate	1 share

"2. That at the organization meeting, M. H. Robertson was elected president and A. W. Pate was elected secretary-treasurer, and M. H. Robertson, A. W. Pate, and W. H. Pate were elected directors. At the first meeting of the directors, A. W. Pate was appointed general manager of Hotel Raleigh, Inc. The by-laws of the corporation provided for an annual meeting of the stockholders on Tuesday following the third Monday in January of each and every year. The annual meeting was not held on Tuesday after the third Monday in January, 1933, as provided by the by-laws of the corporation, and an effort was made to hold a meeting of the stockholders in the month of February, 1933, for the purpose of electing directors, who would in turn elect officers and a manager of the hotel. No meeting of the stockholders or directors was held in 1933.

"During the month of February, 1934, a meeting of the stockholders of the corporation was held and an equal number of votes in said meeting being cast by M. H. Robertson and by A. W. Pate and W. H. Pate, a deadlock was reached, and nothing could be accomplished at said meeting; that as the result of this condition, A. W. Pate, who was appointed manager at the first meeting of the directors, has continued as manager of the Hotel Raleigh over the protest of the complainant M. H. Robertson; that as the result of the deadlock in the voting at the stockholders' meeting held in February, 1934, and the continuation of such deadlock in any meeting that may be held in future, there can be no change in the directors of the corporation, or in the general manager; that in meetings of the directors of the corporation, W. H. Pate and A. W. Pate consti-

tute a majority, and will not declare the term of office of A. W. Pate at an end or elect any other manager, although M. H. Robertson has protested and objected to the continuation of A. W. Pate as manager, and M. H. Robertson has been and will be deprived of any control of the management of the Hotel Raleigh, which is operated under a lease by the corporation, Hotel Raleigh, Inc.

"3. That in the hearings of this matter before the court, every effort has been made to reach an adjustment that would be satisfactory to M. H. Robertson on the one hand and to A. W. Pate and W. H. Pate on the other hand, and which would be for the best interests of the stockholders of the corporation, but such efforts have failed, and the court finds as a fact that the continuation of the conditions as they now exist places the corporation in imminent danger of insolvency, and that it is necessary for the protection of the rights of stockholders and creditors that this court exercise the power given it by section 1177 of the Consolidated Statutes of North Carolina and give such relief in the premises as right and justice may require.

"4. That in order to prevent the insolvency of the corporation, and in order to protect the rights of all the stockholders and of the creditors of said corporation, it is necessary to forthwith appoint a receiver to operate the Hotel Raleigh until the further order of this court.

"Whereupon, it is ordered and adjudged (1) that Fred A. Williams be and he is hereby appointed receiver of Hotel Raleigh, Inc., with full power and authority to forthwith take charge of and operate Hotel Raleigh immediately upon filing of this order, and to manage and control the business of the said corporation under the orders and directions of this court.

"(2) That said receiver give bond in the sum of $3,000.00 for the faithful performance of his duties.

"(3) That the compensation of said receiver be and it is hereby fixed at $150.00 per month, together with the right to occupy two rooms in said hotel, free of charge.

"(4) That the said receiver shall operate said Hotel Raleigh in accordance with the provisions of the lease entered into by Cobb Realty Company and Hotel Raleigh, Inc., and shall operate it in accordance with the Code of Fair Competition established under the National Industrial Recovery Act for the operation of hotels of a character similar to Hotel Raleigh; that said receiver shall devote his entire time to the management and business of said hotel, and if the Code permits him to do so, the said receiver shall act as clerk as well as manager, and he shall have power to employ such clerks and other help as may be necessary for the proper conduct of said hotel, and to pay to them such salaries as may meet the requirements of said Code.

"(5) That the said receiver shall operate the said hotel free from interference by any of the officers, directors, or stockholders of the corporation, and the said receiver is prohibited from extending any favors to any of said stockholders, officers, or directors in the way of free quarters, or otherwise.

"(6) That A. W. Pate and W. H. Pate deliver to the said receiver all of the books, records, office equipment, cash on hand, and property of every kind and character belonging to Hotel Raleigh, Inc., which is in their possession or under their control, individually or as manager or officer of said corporation.

"(7) The term of office of A. W. Pate as manager of said hotel shall end upon filing of this order and upon the payment of his salary for the month of November, his right to compensation as manager shall terminate, and if he, W. H. Pate, or M. H. Robertson shall continue to occupy quarters in the said hotel after 1 December, 1934, it shall be at the rates charged other guests of the hotel for similar quarters.

"(8) That in the operation of said hotel the said receiver shall not be responsible to any stockholder, officer, or director of the corporation, and each and every one of the said stockholders, directors, and officers is prohibited from interfering in any manner with the operation of said hotel by the receiver.

"(9) That the receiver shall file with the court a report of his operation of the said hotel on 15 December, 1934, and on the 15th day of each month thereafter, and shall deliver a copy of said report to M. H. Robertson, W. H. Pate, and A. W. Pate.

"(10) That I. M. Bailey, Esq., attorney for W. H. Pate and A. W. Pate, and Murray Allen, Esq., of counsel for M. H. Robertson, are appointed attorneys for the receiver.

"This matter is retained for further orders.

"W. C. HARRIS, Judge."

The respondents A. W. Pate and W. H. Pate excepted to the foregoing order and appealed to the Supreme Court, assigning as error (1) the denial by the court of their motion that the proceeding be dismissed, and (2) the signing of the order by the court.

Clyde A. Douglass and Murray Allen for M. H. Robertson appellee.
I. M. Bailey for A. W. Pate and W. H. Pate, appellants.

CONNOR, J. The jurisdiction of a judge of the Superior Court of this State of matters involved in the election of directors by stockholders of a corporation organized under the laws of this State is statutory. The statutes applicable to such elections are as follows:

"C. S., 1176. *Failure to hold election.* If the election for directors of a corporation is not held on the day designated by the charter or by-laws, the directors shall cause the election to be held as soon thereafter as is convenient. No failure to elect directors at the designated time shall work any forfeiture or dissolution of the corporation; and if the directors fail or refuse for thirty days after receiving a written request for such election from those owning one-tenth of the outstanding stock to call a meeting for the election, the judge of the district, or the judge presiding in the courts of the district in which the principal office of the corporation is located, may, upon the application of any stockholder, and on notice to the directors, order an election or make such other order as justice requires. The proceedings governing the issuance and hearing of injunctions shall, as far as applicable, govern such hearing."

"C. S., 1177. *Jurisdiction of Superior Court over elections.* The Superior Court judge, upon application of any person who may complain of any election, or any proceeding, act, or matter pertaining to the same, ten days notice having been given to the adverse party, or to those who are to be affected thereby, of such intended application, shall proceed forthwith, at chambers, in any county in the district in which the principal office of the corporation is situated, to hear the affidavits, proofs, and allegations of the parties, or otherwise inquire into the matter or causes of complaint, and thereupon establish the election complained of, or order a new election, or make any order and give any relief in the premises as right and justice requires. The proceedings shall, as far as applicable, be the same as in injunctions."

This proceeding was instituted under C. S., 1177. The notice signed by the complainant and served by the sheriff of Wake County on the adverse parties, ten days before the date designated for the hearing of the complaint, was sufficient to confer jurisdiction on the judge of the Superior Court, of the parties and of the subject-matter of the proceeding. The conditions precedent to the institution of a proceeding under C. S., 1176, are not applicable to this proceeding. It is true that it appears from the complaint that the stockholders of the corporation had failed to elect directors, but it also appears that a meeting of the stockholders had been duly held for that purpose, on the day fixed in the by-laws of the corporation. The complaint is that no directors had been elected by the stockholders for the ensuing year, and that for the reasons assigned such election had been postponed, with the result that the directors heretofore elected continue in office.

The assignment of error on the appeal to this Court based on respondents' exception to the denial of their motion that the proceeding be dismissed is not sustained.

The proceeding under C. S., 1177, is summary, and is properly begun by a notice in writing signed by the complainant and served on the re-

spondent. No conditions precedent to the commencement of the proceeding are required by the statute as in the case of a proceeding under C. S., 1176.

The question presented by respondents' second assignment of error on their appeal to this Court is whether the judge of the Superior Court, in a proceeding instituted under C. S., 1177, on his finding that the stockholders of a corporation organized and doing business under the laws of this State, at an annual meeting duly held in accordance with the by-laws of the corporation, have failed to elect directors for the ensuing year, because of their inability, due to dissensions among them, to agree on such directors, has the power to appoint a receiver of the corporation, and to authorize and direct such receiver to take into his possession all the property of the corporation, and to conduct its business under the orders of the court, thereby depriving the corporation of the possession of its property and its board of directors of the right to conduct its business, as authorized by the laws of this State.

This question is answered in the negative. The statute, which is general in its terms and which should be liberally construed, does not confer such power on the judge, expressly or by implication. If it did purport to confer such power, grave questions as to its validity would be presented. The corporation itself is neither a necessary nor a proper party to the proceeding, and for that reason its rights are not involved therein, and cannot be affected by any order or orders made in the proceeding.

In the instant case the judge has found that the corporation is in imminent danger of insolvency because of the failure of the stockholders to elect directors at their annual meeting in January, 1934. We find no evidence in the record to support this finding. On the contrary, all the evidence shows that under the management of the directors who now hold office under a valid election, the business of the corporation has prospered.

The only controversy which has arisen among the stockholders of the Hotel Raleigh, Inc., is as to who shall be chosen as officers of the corporation, and receive salaries for their services to be paid by the corporation. The statutes in this State provide a solution for this controversy. The officers can be chosen only by the directors, to whom the management of the business of the corporation is entrusted. Until their successors shall be elected by the stockholders, the present directors, now holding their offices under a valid election, will continue as directors, and as such will be liable to the stockholders and creditors for the faithful performance of their duties.

We do not hold that in a proper case the Superior Court of this State, in the exercise of its equitable jurisdiction, is without power to appoint

a receiver of a corporation, whose business has been improperly conducted, with resulting loss to its creditors or stockholders, because of irreconcilable dissensions among its stockholders or directors. That question is not presented on this appeal. We hold only that in the summary proceeding provided by C. S., 1177, the judge of the Superior Court is without such power. In accordance with this holding, the order of Judge Harris is

Reversed.

BANK OF CHAPEL HILL v. A. ROSENSTEIN, DR. N. ROSENSTEIN, DR. L. S. BOOKER, AND ERIC COPELAND.

(Filed 1 January, 1935.)

1. Appeal and Error J e—

Testimony elicited on direct examination by leading questions will not be held for prejudicial error upon objection and exception where it appears that other testimony to the same import was given by the witness and others upon proper questions without objection.

2. Bills and Notes G b: Evidence J a—Evidence of parol contemporaneous agreement for mode of payment of note held competent.

In this action by the payee against the makers and endorsers of a note secured by a deed of trust on lands one of the makers set up the defense that he held title to the lands as a naked trustee for the other makers, and that at the time the note was executed the facts were explained to the payee, and that the parties entered a parol contemporaneous agreement that his liability on the note should be limited to the value of the lands: *Held*, testimony of the parol agreement was competent under the rule that evidence of a parol contemporaneous agreement providing a mode of payment is competent as between the parties.

3. Bills and Notes G a—Substitution of endorsers by consent of all parties held not to discharge original note.

The note sued on in this case was renewed from time to time and upon one of the renewals one endorser was substituted for another endorser by consent of all the parties: *Held*, the renewals and the substitution of endorsers with the consent of the parties did not operate as a discharge of the original note, and in an action instituted by the payee, the payee is bound by a parol contemporaneous agreement made with one of the makers at the time of the execution of the original note as to the mode of payment of the liability of such maker.

APPEAL by plaintiff from *Sinclair, J.*, and a jury, at January, 1934, Civil Term, of DURHAM. No error.

This action was brought by plaintiff to recover on a certain note set forth in the complaint. The prayer of plaintiff was as follows: "(1) For judgment against the defendants Eric H. Copeland, Abraham Rosen-

stein, N. Rosenstein, and L. S. Booker, jointly and severally, for the sum of ten thousand dollars ($10,000), with interest thereon from 2 December, 1931, until paid at the rate of six per cent per annum, together with the costs, charges, and expenses of this action. (2) That the deed of trust recorded in Book 137, at page 266, registry of Durham County, referred to in this complaint be foreclosed, the equity of redemption barred and the mortgaged premises sold under the direction of this court and the proceeds of the sale be applied, first, to the costs and expenses of said sale; second, to the payment and discharge of the indebtedness evidenced by the note dated 2 December, 1931; and third, the surplus, if any, be disbursed according to law. (3) That the court appoint a commissioner to foreclose said mortgage or deed of trust and sell the property therein described under the guidance and under the direction of this court. (4) That plaintiff be permitted to bid at said sale and purchase said property for its protection. (5) For such other and further relief as may be just and proper in law or in equity for the plaintiff to have."

The defendant Abraham Rosenstein denied that he was liable on the note, that he was merely holding the land as a naked trustee, with the agreement with plaintiff that no personal liability would attach to him in the transaction. The evidence on the part of the defendant Abraham Rosenstein was to the effect: In July, 1925, Eric H. Copeland, N. Rosenstein, and E. S. Booth purchased a tract of land just outside the corporate limits of the city of Durham, and as a matter of convenience had the deed to the property made to Eric H. Copeland and Abraham Rosenstein, who, at that time were unmarried, to the end that the wives of the purchasers of the property would not have to join in the deeds if and when the property was sold. At the time of the purchase of said tract of land the said purchasers applied to the Bank of Chapel Hill for a $10,000 loan. The application was made by E. H. Copeland and N. Rosenstein, who went in person to see M. E. Hogan, cashier of the Chapel Hill Bank, at which time they explained to Mr. Hogan that they had purchased said tract of land, and that same had been conveyed to Eric H. Copeland and Abraham Rosenstein as a matter of convenience, as they expected to develop the property and sell it off in small tracts of land, and the wives of the purchasers would not have to sign the deeds; and they further advised said Hogan that Abraham Rosenstein had no interest whatever in the transaction, but was acting as trustee in the matter merely for the accommodation of the purchasers of the property. It was further explained to the said Hogan at said time that it had been agreed between the purchasers of the property and Abraham Rosenstein that in signing the deed of trust and note to secure said loan that his liability would be limited to the value of the property

described in the deed of trust; that N. Rosenstein and E. S. Booth would endorse said note, and that they, together with Eric H. Copeland, the other purchaser, and the real estate purchased would be the security for the said $10,000 loan. Thereupon Mr. Hogan advised the said N. Rosenstein and Copeland that he would take the matter up with W. J. Holloway, who was then president of the First National Bank of Durham, N. C., and with whom his bank had done considerable business, and if Mr. Holloway approved of and recommended the loan, that the Bank of Chapel Hill would make it upon the terms and conditions stated by said Copeland and N. Rosenstein. A short time thereafter, Mr. Holloway approved the loan and the same was made by the Bank of Chapel Hill, with the understanding and agreement that the defendant Abraham Rosenstein had no interest in the transaction, and that his liability on the note would be limited to the value of the property. That the note was renewed from time to time as requested by the bank, and some time in the summer of 1930 E. S. Booth disposed of his interest in said tract of land to Dr. L. S. Booker, at which time it was explained to the said Booker the status of the title to the property, and the agreement between the owners of the property, Abraham Rosenstein and the Bank of Chapel Hill, and the said Booker agreed to assume the responsibility of the said E. S. Booth and carry out and perform the provisions of said agreement that had theretofore been imposed upon the said Booth. That the said Booth was released as endorser upon said note and Dr. L. S. Booker took his place as such endorser. The deed of trust was foreclosed some time in 1933, and the net proceeds therefrom were applied on the payment of said $10,000 note. The defendant Abraham Rosenstein, at the time of his transaction, was a young man and had just returned from school and had no property. Judgment by default was obtained against all of the defendants with the exception of Abraham Rosenstein, and this action was tried as to him only.

The material aspects of this defense by Abraham Rosenstein was denied by plaintiff. The issues submitted to the jury and their answers were as follows: "(1) Did the Bank of Chapel Hill have notice at the time of taking the note and deed of trust that Abraham Rosenstein was claiming no interest in the property, but he was holding same as trustee? A. 'Yes.' (2) Is the defendant indebted to the plaintiff, and, if so, in what amount? A. ..... It was agreed that the jury should not answer the second issue, and if the jury answered the first issue 'No,' that the court could answer the second issue as follows: '$7,314.01, with interest on $10,000 from 31 March, 1932, to 19 October, 1933, and interest on $7,314.01 from 19 October, 1933, until paid.' "

The judgment of the court below is as follows: "This cause coming on to be heard before his Honor, N. A. Sinclair, judge presiding, and a

jury, and the jury having answered the issue submitted to them in favor of the defendant Abraham Rosenstein, as set out in the record; it is therefore ordered, adjudged, and decreed by the court that the plaintiff take nothing against the defendant Abraham Rosenstein, and that the plaintiff pay such costs in this action as has been incurred by the defendant Abraham Rosenstein."

The plaintiff 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.

Graham & Sawyer and Bryant & Jones for plaintiff.
Oscar G. Barker and Brawley & Gantt for defendant.

CLARKSON, J. The first issue submitted to the jury is as follows: "Did the Bank of Chapel Hill have notice at the time of taking the note and deed of trust that Abraham Rosenstein was claiming no interest in the property, but he was holding same as trustee?" On conflicting evidence, the jury answered this issue "Yes," in favor of Abraham Rosenstein. From the record, none of the evidence introduced on the part of Abraham Rosenstein bearing on this issue was objected to by the plaintiff except the following: "Q. Mr. Copeland, that was the understanding at the time the loan was made that Dr. Abraham Rosenstein was to sign the deed of trust, the note, and the notes to the bank? A. Yes, sir. Motion to strike out answer; motion overruled. Q. And was to be responsible of course to the extent of the land secured by the deed of trust, and to that extent only? A. That was my understanding, yes, sir. Motion to strike out answer; motion overruled." The question was leading, but from the evidence that had theretofore been introduced on the subject, we do not think that it was prejudicial.

There was other evidence of like import, unobjected to by plaintiff, for example, Abraham Rosenstein testified, in part: "All I know of the real estate transactions is that my father and Eric Copeland asked me to accommodate them as trustee in this matter so that my mother and Ernest Booth's wife would not have to sign deed for any transaction. In those days, real estate was booming and in case they wanted to make a transaction quick, we would not have to call upon their wives to sign the deed. It was my understanding I would be a trustee simply and purely. I didn't have any interest in the property and didn't know anything about it, and it was simply a matter of accommodation for my father and Mr. Copeland. At the time I signed the notes, it was my understanding that I was just a trustee and had no responsibility whatever beyond the value of the property. I have never paid any interest on any of the notes and never received any benefit from the land."

Eric Copeland testified, in part: "We told Mr. Hogan (cashier of the plaintiff's bank) that he, Abraham Rosenstein, had no interest in the property and was signing as a convenience and accommodation to the other owners, and he was not responsible for the property or anything. We had to have the money to buy the property. That at the time the loan was secured the financial condition of N. Rosenstein and Booth was good. Dr. Abraham Rosenstein did not pay any part of the interest on the note to the Bank of Chapel Hill."

The other exceptions and assignments of error made by plaintiff and to the charge of the court below we think unnecessary to consider. The admission of this evidence was the "milk in the cocoanut." Was evidence of this collateral agreement competent? We think so.

In *Justice v. Coxe,* 198 N. C., 263 (265-6-7), speaking to the subject, is the following: "Parol evidence offered by defendant for the purpose of showing all the terms of the contract between plaintiff and defendant with respect to the transaction of which the execution of the notes was only a part, was admissible and competent for that purpose. *Crown Co. v. Jones,* 196 N. C., 208, 145 S. E., 5. The agreement shown by the evidence does not contradict, add to, alter, or vary the terms of the notes. . . . The contract, which defendant alleged in his answer was entered into by and between him and the plaintiff contemporaneously with the execution of the notes, was, in effect, that defendant should be discharged of liability upon his conveyance of the land to George W. Knight, Edward Higgins, and Samuel Puleston, and upon their assumption of the notes. Parol evidence to show this contract was admissible upon the principle on which *Bank v. Winslow,* 193 N. C., 470, 137 S. E., 320, was decided. In the opinion in that case it is said, 'The law is firmly established that parol evidence is inadmissible to contradict or vary the terms of a negotiable instrument, but this rule does not apply to a parol agreement made contemporaneously with the writing providing a mode of payment.' Nor does the rule apply to such parol agreement providing for discharge of the maker otherwise than by payment." *Stack v. Stack,* 202 N. C., 461; *Wilson v. Allsbrook,* 203 N. C., 498; *Trust Co. v. Wilder,* 206 N. C., 124; *Galloway v. Thrash, ante,* 165.

The plaintiff contends that the original note was paid by renewals from time to time. We cannot so hold. The substitution of a new endorser who acquired another endorser's interest in the land was done by consent of all. This action is between the original parties. If the note had been transferred in due course, another principle would apply. In *Grace v. Strickland,* 188 N. C., 369 (372), we find the following: "In 8 C. J., 443 (656), it is said: 'Where a note is given merely in renewal of another note, and not in payment, the renewal does not extinguish the original debt nor in any way change the debt, except by

postponing the time of payment.' *Bank v. Bridgers,* 98 N. C., 67. If the second note be given and accepted in payment of the debt, and not in renewal of the obligation, a different principle will apply. *Wilkes v. Miller,* 156 N. C., 428; *Collins v. Davis,* 132 N. C., 106; *Smith v. Bynum,* 92 N. C., 108. The first note was surrendered, it is true, but the plaintiffs' admission that the note sued on was accepted in renewal is inconsistent with any suggestion that the original debt was thereby extinguished."

For the reasons given, we see no prejudicial or reversible error on the record.

No error.

THE EQUITABLE TRUST COMPANY, TRUSTEE, v. THE WIDOWS' FUND OF OASIS AND OMAR TEMPLES, CHARLOTTE, NORTH CAROLINA, AND MRS. ANNA LEA LANSBURGH v. THE WIDOWS' FUND OF OASIS AND OMAR TEMPLES, CHARLOTTE, NORTH CAROLINA.

(Filed 1 January, 1935.)

1. Insurance G a — Contract defining association as Fraternal Benefit Society held Fraternal Benefit Contract governed by C. S., 6508.

A contract in the form of a life insurance policy with a mutual benefit society, which contract stipulates that insured agrees that the society is a Fraternal Benefit Society as defined by C. S., 6497, is a Fraternal Benefit Contract, and C. S., 6508, prescribing certain limitations upon the designation of beneficiaries in such contracts applies, and the contention that the contract is not controlled by the statute for that the statute applies only to membership benefits and not to insurance policies, cannot be sustained.

2. Insurance G f—Trust company held not properly named beneficiary in Fraternal Benefit Contract.

An incorporated trust company, authorized by a trust agreement to collect the proceeds of life insurance policies on the life of the trustor upon his death, and administer the funds for the benefit of the children of the trustor's sisters, with power to advance money to the trustor's administrator to pay taxes, claims, or other indebtedness of the estate, may not be named beneficiary in a Fraternal Benefit Contract on the trustor's life, the trustee not being a natural person nor a charitable institution as defined by C. S., 6508, and being empowered to use the funds for purposes other than for the benefit of the trustor's kindred, and where the wife of the trustor is named beneficiary in the Fraternal Benefit Contract and the attempted change of beneficiary to the trust company is made without the consent of the wife, as required by the by-laws of the society, made a part of the contract, for change of beneficiary, the trustor's wife and not the trust company is entitled to the proceeds of the Fraternal Benefit Contract.

CIVIL ACTION, before *Shaw, Emergency J.,* at April Special Term, 1934, of MECKLENBURG.

On 1 May, 1930, Henry B. Lansburgh received a benefit certificate, No. 1224, from The Widows' Fund of Oasis and Omar Temples. The amount of insurance provided in said certificate was $1,200, and the beneficiary named therein was Mrs. Anna Lea Lansburgh, wife of the insured.

On 14 January, 1932, Henry B. Lansburgh executed a trust agreement with the Equitable Trust Company, trustee. This trust agreement recites that "the insured desires to establish a trust of certain policies of insurance upon his life, and of the proceeds of said policies, which policies are set forth in Schedule A," etc. Paragraph 5 of the trust agreement provides that "on the death of the insured, the trustee shall, with reasonable diligence and dispatch, collect the net proceeds of such of said life insurance policies so made payable to it as are then in force. . . . But the trustee may utilize the proceeds of any policy to meet expenses incurred in connection with enforcing payment of any other policy." Paragraph 7 authorizes "said trustee, in the exercise of its sole and absolute discretion, may purchase securities or property of any kind, . . . make loans or advances to the executor or administrator of the insured in case such executor or administrator is in the opinion of said trustee in need of cash with which to pay taxes, claims, or other indebtedness of the estate of the insured." It was further provided that the net proceeds of the trust should be held by said trustee for the use and benefit of the children of sisters of the insured according to certain limitations set forth in the instrument.

On 26 October, 1932, the insured made an application to the Widows' Fund of Oasis and Omar Temples, declaring that the aforesaid Certificate No. 1224 had been lost and applying for insurance in the amount of $1,200, and specifying that in the new certificate or policy his wife, Anna Lea Lansburgh, should be made beneficiary, reserving the right to change the beneficiary. Accordingly, Policy or Certificate No. 11689 was duly issued to the insured and such policy named Anna Lea Lansburgh as beneficiary.

Thereafter, on 13 March, 1933, the insured requested the Widows' Fund of Oasis and Omar Temples to name the Equitable Trust Company of Baltimore, Maryland, trustee, as the beneficiary in said policy.

The insured died on 24 March, 1933. After the death of the insured the widow, Anna Lea Lansburgh, claimed the fund and brought a suit against the Widows' Fund of Oasis and Omar Temples, Charlotte, North Carolina, to recover the same. In the meantime, the Equitable Trust Company, trustee, brought a suit against the same defendant, asserting that it was entitled to the insurance fund by virtue of the fact of the change of beneficiary from the wife to said plaintiff.

The cases were consolidated for trial.

The widow, Anna Lea Lansburgh, offered in evidence the by-laws of the Widows' Fund and certain allegations in the pleadings tending to show the facts as above stated. The Equitable Trust Company offered in evidence Policy No. 11689, "with the name of Anna Lea Lansburgh, wife of beneficiary, stricken out with red ink," etc., and also offered the trust agreement between it and the insured. Section 10 of the by-laws of the Widows' Fund is as follows: "In case the certificate of membership shall be lost or destroyed, and a member desires to procure a new certificate of membership, or desires to change the beneficiary designated therein, he shall have the designated beneficiary, if living, join in the application for a new certificate, or for change of the beneficiary."

Two issues were submitted to the jury, as follows:

1. "Is the defendant indebted to the plaintiff, Mrs. Anna Lea Lansburgh; if so, in what amount?"

2. "Is the defendant indebted to the plaintiff Equitable Trust Company; if so, in what amount?"

The court instructed the jury to answer the first issue "Yes," and the second issue "No."

From judgment upon the verdict in favor of the widow, the Equitable Trust Company, trustee, appealed.

J. L. DeLaney for Mrs. Anna Lea Lansburgh.
Wm. Lentz and Murray Allen for Equitable Trust Company.
Thos. W. Alexander for defendant.

BROGDEN, J. The legal problems presented are:

1. Does Contract No. 11689, issued by the Widows' Fund, fall within the provision of C. S., 6508?

2. Was the substitution of the Equitable Trust Company, trustee, for Anna Lea Lansburgh, wife, a valid change of beneficiary?

C. S., sec. 6491, *et seq.*, constitutes the statutory law with reference to fraternal orders and societies. (a) "Fraternal Benefit Society" is defined by C. S., 6497. C. S., 6508, specifies the beneficiary in fraternal certificates or policies issued to members of the order. It is noteworthy that such beneficiary shall be natural persons, who are kin to the insured by blood, marriage, or adoption, or dependent "upon the member." Certain charitable institutions may be a beneficiary, but the Equitable Trust Company, trustee, is not within such statutory designation. The statute provides that "within the above instructions each member shall have the right to designate his beneficiary, and, from time to time, have the same changed in accordance with the laws, rules, and regulations of society," etc.

The Equitable Trust Company, trustee, insists, however, that the statute applies to membership benefits, and that as Contract No. 11689

is a policy of insurance, it is thereby excluded from the operation of C. S., 6508. Contract No. 11689 is in the form of an insurance policy. It requires the payment of a monthly premium and contains certain provisions relating to forfeitures, loans, assignments, legal reserve, etc. However, paragraph 12 of the contract is as follows: "The insured agrees that the Widows' Fund of Oasis and Omar Temples is a Fraternal Benefit Society without capital stock, organized and carried on solely for the mutual benefit of its insured members and their beneficiaries and not for profit, and having a lodge system and representative form of government; that the by-laws of the association, the application for membership therein, the medical examination, if any, signed by the applicant, and this policy, constitute the entire agreement between the parties hereto," etc. This declaration in the contract classifies it squarely within the definition of Fraternal Benefit Society contained in C. S., 6497. Manifestly, therefore, the contract must be interpreted and construed as a Fraternal Benefit Contract, and, if so, C. S., 6508, is applicable.

In answering the second problem of law, it must, therefore, be assumed that C. S., 6508, governs the interpretation of contract. The Equitable Trust Company, trustee, is not a relative by blood or marriage to the insured, nor is it a dependent. While the trust company, under the trust agreement with the insured, is in general terms required to use the fund for the use and benefit of the children of the sisters of the insured, nevertheless the trust agreement authorizes and empowers the trustee in the exercise of its discretion to advance money to the executor or administrator of the insured "with which to pay taxes, claims, or other indebtedness of the estate of the insured."

Furthermore, the by-laws of Widows' Fund were offered in evidence and article 10 thereof declares "in case the certificate of membership shall be lost or destroyed, and a member desires to procure a new certificate of membership, or desires to change the beneficiary designated therein, he shall have the designated beneficiary, if living, join in the application for a new certificate," etc. Paragraph 12 of Contract 11689 specifies that the by-laws as well as the policy shall be a part of the agreement between the parties. There is no evidence that the wife, Anna Lea Lansburgh, the beneficiary in the original membership certificate which was lost, consented to the elimination of her name as beneficiary in Contract No. 11689 and the substitution of Equitable Trust Company, trustee.

Therefore, the court concludes upon the entire record that as C. S., 6508, is applicable, the change of beneficiary was invalid. It necessarily follows that the wife, Anna Lea Lansburgh, is entitled to the proceeds of the contract, and that the ruling of the trial judge was correct.

Affirmed.

FANNIE A. GROOME v. CITY OF STATESVILLE.

(Filed 1 January, 1935.)

1. Negligence C a—Court's refusal to charge that choice of dangerous way was contributory negligence where safe way was open held error.

The evidence in this case tended to show that plaintiff, in recrossing a street at an intersection in a slightly diagonal course by the same route used by her in crossing the street a short time before, slipped on ice and snow along the gutter on the south side of the street and fell to her injury. There was evidence that plaintiff could have avoided the ice and snow by crossing directly at the intersection, and defendant pleaded plaintiff's failure to have so avoided the hazard as contributory negligence, and aptly requested special instructions on this aspect of the case: *Held*, the court's refusal to give the requested instructions was error entitling defendant to a new trial although the court correctly stated the abstract law of contributory negligence, and the charge would have been sufficiently full in the absence of the request for special instruction.

2. Trial E e—

The refusal of the court to give instructions aptly requested which present a material aspect of the case supported by the evidence and pleadings is reversible error.

3. Same—Form of special instructions requested held not fatally defective in this case.

A request for special instructions will not be held fatally defective because prefaced upon the finding of the jury from all the evidence instead of by its greater weight, since the instruction as requested would have been substantially correct when taken in connection with a correct instruction from the court on the burden of proof on the issue.

APPEAL from *Harding, J.*, at March Term, 1934, of IREDELL. New trial.

This action was instituted by the plaintiff for personal injuries sustained by her from a fall while crossing Court Street, on snow and ice alleged to have been negligently allowed by the defendant to accumulate and remain at the intersection of Court Street and Meeting Street in the city of Statesville. The defendant denied that it negligently allowed the accumulation of snow and ice, and alleged "that the plaintiff, with full knowledge of the then existing conditions, negligently and carelessly attempted to cross said street and slipped upon the ice and fell upon the street, and that such injuries as she may have sustained were solely due to her own carelessness and negligence," and pleaded the contributory negligence of the plaintiff in bar of recovery.

The usual issues of negligence of the defendant, contributory negligence of the plaintiff, and of damages sustained, were submitted to the jury and all answered in favor of the plaintiff.

From the judgment based upon the verdict the defendant appealed to the Supreme Court, assigning errors.

Grier, Joyner & Hartness, W. R. Battley, Lewis & Lewis, Bagby & Aiken, and Stewart & Bobbitt for plaintiff.

Land & Sowers and Z. V. Long for defendant.

SCHENCK, J. The defendant in apt time requested the court to charge the jury as follows: "That if the jury shall find from all of the evidence that there was ice or snow at the point where the plaintiff slipped and fell, and that there was danger of slipping and falling on such ice or snow to one attempting to walk on or across the same, and shall further find that the plaintiff saw or should have seen the danger, and shall further find that she could have reached her automobile by going around said ice or snow, or by another route, but that she continued on and stepped upon said ice or snow and slipped and fell, then the plaintiff would be guilty of contributory negligence and the jury would answer the second issue 'Yes.'" His Honor declined to give the instruction and the defendant excepted.

There was evidence tending to show that the plaintiff first crossed Court Street, in a slightly diagonal course, from the south to the north side thereof, made purchases at the Curb Market, and then recrossed Court Street back to the south side, practically retracing her steps, with packages under her arms, and that as she reached the accumulation of snow and ice at the south side of Court Street, over which she had passed but a few minutes before, she placed her foot upon said snow and ice and fell. There was evidence tending to show that the streets and sidewalks were clear of snow and ice except the south side of Court Street, and that there was no snow or ice on the north side or in the middle of this street, and none on Meeting Street, and that the plaintiff could have gone to the northeast corner of the intersection of Court Street and Meeting Street and then have gone directly from there across Court Street to the southeast corner of such intersection, instead of going diagonally across Court Street, and then proceeded on Meeting Street to her automobile without encountering the accumulation of snow and ice upon which she fell.

We think that this evidence furnishes a sufficient basis for the requested instruction. We have examined the charge, and while it appears to be a correct statement of the law of contributory negligence, and was possibly sufficiently full in the absence of the prayer for special instructions, it does not, either in words or in substance, present to the jury the principle advanced by the instruction requested that a person to whom two courses of conduct are open, one dangerous and the other safe, is required to exercise due care in choosing which course to pursue.

"If two ways are open to a person to use, one safe and the other dangerous, the choice of the dangerous way, with knowledge of the danger, constitutes contributory negligence. . . . And where a person *sui juris* knows of a dangerous condition and voluntarily goes into the place of danger, he is guilty of contributory negligence, which will bar his recovery." *Dunnevant v. R. R.*, 167 N. C., 232. 45 C. J., 961.

It is a well-established rule in this jurisdiction that if a request is made for a specific instruction, which is correct in itself and supported by evidence, the court must give at least the substance thereof, and that a general abstract charge as to the law of the case will not be considered a sufficient compliance with the rule. *S. v. Henderson,* 206 N. C., 830.

In *Baker v. R. R.*, 144 N. C., 36, it is written: "We have held repeatedly that if there is a general charge upon the law of the case, it cannot be assigned here as error that the court did not instruct the jury as to some particular phase of the case, unless it was specially requested so to do. . . . 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."

The plaintiff's position that the defendant's prayer for special instruction is fatally defective because it is prefaced by the words "That if the jury shall find from all the evidence," instead of "That if the jury shall find by the greater weight of the evidence," is untenable, for the reason that the defendant had a right to assume that the court would properly charge the jury, as he did, that the burden of proof upon the issue of contributory negligence was upon the defendant to establish the affirmative by the greater weight of the evidence, and if the requested instruction had been given, in the language in which it was couched, in connection with this general instruction as to the degree of proof required of the defendant, it would have been in substantial conformity with the rule.

The defendant, at the proper time and in the proper form, having requested special instruction as to the duty of the plaintiff to use due care in selecting her route on recrossing the street, rather than rely upon the general charge as to contributory negligence, and having made sufficient allegation and offered sufficient evidence upon which to base such special instruction, we conclude that his Honor's refusal to comply with the defendant's request was error.

Since there must be a new trial for the error assigned, no useful purpose can be served by a discussion of the other interesting questions presented in the record, as they are not likely to again arise.

New trial.

ALBERT WILSON v. E. H. CLEMENT COMPANY AND UNITED STATES CASUALTY COMPANY.

(Filed 1 January, 1935.)

Master and Servant F c—Evidence held insufficient to invoke principle of equitable estoppel relied on by claimant to defeat N. C. Code, 8081 (ff).

Claimant sustained an injury by accident arising out of and in the course of his employment, but no claim for compensation was filed with the Industrial Commission for more than twelve months after the injury, N. C. Code, 8081 (ff). Claimant testified that within the twelve months period he inquired of his superintendent several times as to compensation, and was told on one occasion that his "wages were going on," and that he relied upon the foreman's statement. The evidence disclosed that he received no wages or compensation for over twelve months after the injury: *Held*, the facts do not bring the case within the principle of equitable estoppel, there being no request by defendant that claimant delay the pursuit of his rights, nor was there an express or implied agreement not to plead the statute, and claimant's right to compensation was barred by N. C. Code, 8081 (ff). Whether N. C. Code, 8081 (ff), is a statute of limitations or condition precedent to the right to recover compensation which cannot be waived by the parties, *quære?*

CIVIL ACTION, before *Sinclair, J.*, at March Term, 1934, of ORANGE.

Plaintiff suffered an injury by accident in the course of his employment on 15 August, 1929. He employed counsel and filed a claim with the Industrial Commission on 8 September, 1930. Thereupon, a hearing was had before Commissioner Allen, who found that the injury to plaintiff arose out of and in the course of his employment, and that as a result thereof he had sustained a twenty per cent permanent loss of use of his right leg. He also found "that no written report of the accident by the employee, employer, or insurance carrier was filed with the Industrial Commission within one year from the date of the accident," and denied an award. There was an appeal to the full Commission, and it found that no claim for compensation had been filed by anyone within one year after the accident, and also that "the claimant was led to believe by officials of the defendant employer that he would be taken care of, and in relying upon their statements that he would be taken care of, prevented him from employing counsel and filing his claim within twelve months," and concluded that "the defendant ought not to be permitted to plead the statute and defeat the rights of the employee in this case, and we believe that the principle of equitable estoppel ought to be invoked and that the claimant ought to be awarded compensation."

Consequently, an award was made and the defendant appealed to the Superior Court.

The testimony of plaintiff appearing in the record upon which the doctrine of equitable estoppel was based is substantially as follows: Plaintiff was hurt on or about the middle of August, and on Saturday following his injury he went down to the quarry and saw Mr. Dickinson, the superintendent. Plaintiff said: "I said to Mr. Dickinson, 'I got to quit work, I can't walk.' He said: 'Can you carry water?' I said: 'I can't walk and couldn't carry water when I can't walk.'" Some time subsequent to the foregoing conversation the plaintiff went to see Mr. Dickinson again and narrates the conversation as follows: "I said: 'Mr. Dickinson, I'm not able to work yet because I can't walk yet.' . . . 'You have not paid me anything for getting hurt around here.' He said: 'Well, I would pay you as much as $10.00 if you come back and go to work.' I told him I couldn't walk. That is the second time I told him. The third time I told him I couldn't walk and couldn't work, he said: 'You can have a job as long as you want it.' I told him I couldn't work. He said, 'You got on good clothes, you better go ahead and go to preaching.' I said: 'I was not called to preach.' I said: 'I have got to get an operation and it looks like you could give me a little compensation. I'm a man with six children.' . . . He told me my wages was going on, and I told him I had never received anything. . . . He said, 'Your wages is going on, they come here,' and I told him I didn't get it. I never have received anything. . . . I saw Mr. Dickinson and depended on him as I did once before when I got hurt down there. He said, 'I will pay you when you come back and go to work.'"

The claimant was treated by Drs. Thompson, Coleman, and Markham prior to the time the notice of claim was filed.

The trial judge affirmed the award of the full Commission, and the defendant appealed to the Supreme Court.

Graham & Sawyer and Thomas C. Carter for plaintiff.
Thos. Creekmore and Murray Allen for defendant.

BROGDEN, J. Is the claimant entitled to receive compensation for the injury sustained on or about 15 August, 1929?

C. S., 8081 (dd), 8081 (ee), and 8081 (ff), prescribe the method of giving notice and of filing a claim with the Industrial Commission. C. S., 8081 (ff), declares in plain and unequivocal language that "the right to compensation . . . shall be forever barred unless the claim be filed with the Industrial Commission within one year after the accident," etc. It was found as a fact by the Industrial Commission that no

claim was filed by anyone within a year from the date of the accident, and, consequently, nothing else appearing, plaintiff would not be entitled to recover.

However, the plaintiff asserts that C. S., 8081 (ff), is a statute of limitations, and that the same has been waived by the defendants, or that by their conduct they lulled the plaintiff to sleep, and while he slept deprived him of his right of compensation, and therefore the principle of equitable estoppel prevents them from asserting the bar of the statute.

The defendants assert with equal conviction that the statute is not a statute of limitations, but a condition precedent annexed to the cause of action, and cannot be waived by the parties. The defendants further assert that, even if it be conceded that the principle of equitable estoppel would be applicable, there is no evidence in the record sufficient to invoke such doctrine.

It is unnecessary to decide whether C. S., 8081 (ff), is a condition precedent or a statute of limitations.

Of course, if it is a condition annexed to the cause of action of similar character to C. S., 160, obviously the claimant was entitled to no compensation. Conceding, but not deciding, that the statute is one of limitations, is there any evidence upon which to base the doctrine of equitable estoppel? The nature of such estoppel and the elements thereof, as heretofore declared and applied, were stated in *Franklin v. Franks,* 205 N. C., 96. The Court said: "The general rule is that a party may either by agreement or conduct estop himself from pleading the statute of limitations as a defense to an obligation. . . . To constitute such estoppel, there must be more than a mere delay or indulgence at the request of the debtor. There must be an express agreement not to plead the statute, or such conduct on the part of the debtor as would make it inequitable for him to do so. . . . See *Lyon v. Lyon,* 43 N. C., 201; *Daniel v. Comrs.,* 74 N. C., 494; *Haymore v. Comrs.,* 85 N. C., 268; *Whitehurst v. Dey,* 90 N. C., 542; *Brown v. R. R.,* 147 N. C., 217, 60 S. E., 985.

"In the *Dey case, supra,* it was intimated by the Court that it would constitute a species of fraud for a person to actively request or cause a delay in asserting a cause of action and then plead the statute of limitations as a defense when the suit was brought. The Court said: 'No such fraudulent element is found in the facts of this transaction. The failure to sue was not in consequence of any request from the defendant, nor under any agreement making payment contingent or any undetermined future event, as an underlying condition requiring delay.' "

The facts in the case at bar do not bring it within the principle of equitable estoppel. The defendants did not request the claimant to delay the pursuit of his rights. There was neither express nor implied

agreement upon their part not to plead the statute. While it is true that the defendants told the claimant that his wages were going on, nevertheless he did not receive a penny in wages for more than twelve months, and, consequently, was bound to know that no wages were being paid.

The Court is of the opinion that the admitted facts are not sufficient to warrant the application of the doctrine of equitable estoppel and thus to preclude the defendants from pleading the bar of C. S., 8081 (ff).

Reversed.

K. B. JOHNSON v. G. E. HUGHES AND SOUTHERN DAIRIES, INC.

(Filed 1 January, 1935.)

Master and Servant F a—Physical breakdown from overwork, although the result of negligence, is compensable under Compensation Act.

Plaintiff brought action in the Superior Court alleging that as a result of being required to move heavy objects in the performance of his work over a period of years plaintiff's health had been shattered, and that defendant had negligently ordered plaintiff to move the heavy objects without furnishing plaintiff sufficient help to do the work. Defendant demurred upon the ground that the action was within the exclusive jurisdiction of the Industrial Commission: *Held*, the demurrer was properly sustained, injuries to employees by accident in the course of their employment being compensable whether resulting from active negligence or not, and sickness or physical breakdown produced solely by negligence not being *per se* an "occupational disease."

CIVIL ACTION, before *Pless, J.*, at June Term, 1934, of BUNCOMBE.

The plaintiff brought a civil action for damages for personal injury. He alleged that on or about 16 May, 1931, and on various days thereafter, and while in the employment of the defendant, he was required to move certain heavy equipment, consisting of metal pipe, coils, pumps, electric motors, bottle fillers, vats, ice cream freezers, etc., and that in the performance of such duties he was not furnished sufficient help, and that as a result "of defendant's said negligence and wilful acts and commands and orders, the plaintiff's nerves and nervous system, strength and general health were impaired, shattered, and destroyed, and the plaintiff has been seriously, permanently, and totally incapacitated for the prosecution of work for which he previously earned about $50.00 per week," etc. The defendant demurred upon the ground that it appeared upon the face of the complaint that the relation of employer and employee existed between the plaintiff and the defendant "at the time plain-

tiff's alleged cause of action arose, and that such rights and remedies as plaintiff had, if any, are governed by the provisions of the Workmen's Compensation Act, and that therefore only the Industrial Commission of North Carolina had jurisdiction to hear and determine the matters alleged and set forth in the complaint."

No point is made that the defendant did not have in his employment the necessary number of workmen. The demurrer was sustained by the judge of the county court, and upon appeal to the Superior Court the judgment of the county court was affirmed. Thereupon, the plaintiff appealed to the Supreme Court.

Geo. M. Pritchard for plaintiff.
Johnson, Rollins & Uzzell for defendant.

PER CURIAM. It was held in *McNeely v. Asbestos Co.*, 206 N. C., 568, that injuries by accident sustained by a workman, in the course of his employment, were compensable, whether such injuries resulted from active negligence or not. It was further held that sickness or physical breakdown, produced solely by negligence, was not *per se* an "occupational disease," but an injury by accident within the meaning of the Compensation Act.

The case at bar, therefore, is controlled by the *McNeely case, supra.*

Affirmed.

JAMES OSBORNE, BY HIS NEXT FRIEND, M. A. OSBORNE, v. ATLANTIC ICE AND COAL COMPANY, INC., AND M. A. OSBORNE v. ATLANTIC ICE AND COAL COMPANY, INC.

(Filed 1 January, 1935.)

Negligence B e—Injury in this case held not foreseeable in exercise of due care, and defendant's motion of nonsuit was properly granted.

The evidence tended to show that plaintiff, an eleven-year-old boy, was walking along the highway, and that defendant's truck driver attempted to stop the truck to give plaintiff a ride, but that because of defective brakes the driver was unable to stop the truck before reaching plaintiff, that plaintiff attempted to jump on the truck as it went by him and fell to his injury, and that the truck traveled fifteen feet after plaintiff fell before it could be stopped: *Held*, the injury to plaintiff by reason of the defective brakes could not have been foreseen in the exercise of due care, and foreseeable injury being a necessary element of proximate cause, defendant's motion as of nonsuit should have been allowed.

OSBORNE *v.* COAL CO.

APPEALS by the plaintiffs from *Clement, J.*, at February Term, 1934, of DAVIDSON. Affirmed.

Spruill & Olive for appellants.
Don A. Walser and Linn & Linn for appellee.

PER CURIAM. The minor plaintiff, by his next friend, instituted an action for personal injuries alleged to have been inflicted upon him by the negligence of the servant of the defendant company. The father of the minor plaintiff instituted suit to recover for the loss of services of his son. The two cases were consolidated for the purposes of trial.

Construing the evidence most favorably to the plaintiffs, it appears that the defendant's servant was driving a truck loaded with ice in the business of his master. The driver, overtaking the minor plaintiff, a lad seven years old, on the highway, called to him and asked him if he wanted to ride, and the plaintiff replied that he did. Whereupon, the driver applied the brakes of the truck, which slowed down but went beyond the plaintiff before stopping. As it slowed down and went past him the plaintiff jumped on the moving truck, catching hold of the door, and, as he did so, fell or was thrown from the truck and injured. The brakes of the car were defective, and the car went some fifteen feet before stopping after the boy had fallen.

Persons are held liable by the law for the consequences of their acts, which they can and should foresee, and by reasonable care and prudence guard against. The act of the minor plaintiff in jumping upon and falling from the moving car was not such as the defendant in the exercise of due care could have reasonably foreseen, and to make such a requirement of it would, in the language of *Brogden, J.*, in *Gant v. Gant*, 197 N. C., 164, "practically stretch foresight into omniscience. The law does not require omniscience." The law only requires reasonable foresight, and when the injury complained of is not reasonably foreseeable, in the exercise of due care, the party whose conduct is under investigation is not answerable therefor. Foreseeable injury is a requisite of proximate cause, and proximate cause is a requisite for actionable negligence, and actionable negligence is a requisite for recovery in an action for personal injury negligently inflicted. In these cases there is an absence of foreseeable injury, and consequently there was no error in entering the judgments as of nonsuit, and they are therefore

Affirmed.

GRACE HULIN ALBERTSON v. W. H. ALBERTSON.

(Filed 28 January, 1935.)

1. Courts B a—Power of Legislature to create courts inferior to Supreme Court.

Under constitutional authority, Art. IV, sec. 12, the General Assembly may create courts inferior to the Supreme Court, provided the General Assembly does not delegate its discretion (N. C. Code, Art. 18, subch. 4), and provided such inferior courts do not have substantially the same powers as those of the Superior Courts, and are given a less extensive jurisdiction, with provision for appeal from such inferior court to the Superior Courts, so that the constitutional powers and provisions relative to the Superior Courts are not invaded.

2. Same—Municipal Court of City of High Point held to have had jurisdiction of suit for divorce between the parties.

The municipal court of the city of High Point is held to have had jurisdiction to grant a judgment for absolute divorce between the parties to this action under the provisions of ch. 699, Public-Local Laws of 1927, amending ch. 569, Public-Local Laws of 1913, both parties being residents of the city, and the act giving the city court jurisdiction in divorce actions providing for appeal to the Superior Court, and the city court being given an original jurisdiction less extensive than that of the Superior Court of the county.

3. Statutes A e—

A statute will not be declared unconstitutional unless clearly so.

STACY, C. J., dissents.

APPEAL by plaintiff from *Clement, J.*, at June Term, 1934, of GUILFORD. Affirmed.

This is an action, brought by plaintiff against defendant in the Superior Court of Guilford County, N. C., to declare null and void a judgment of absolute divorce obtained by defendant against plaintiff in the municipal court of the city of High Point.

The plaintiff alleged in her complaint: "That chapter 699 of the Public-Local Laws of 1927, and all acts amendatory thereof, are illegal, invalid, and unconstitutional so far as they purport or intend to confer jurisdiction upon the municipal court of the city of High Point to grant divorces, and particularly with respect to the judgment of divorce purported to have been granted against the plaintiff."

The judgment of the court below is as follows: "This cause coming on to be heard and being heard at the June Term of the Superior Court of Guilford County, before the Hon. J. H. Clement, judge presiding, on agreement of counsel for the plaintiff and the defendant that the court should hear the evidence and make findings of fact and conclusions of

law as judge and jury, both the counsel for the plaintiff and the counsel for the defendant expressly waiving the right to a jury trial in open court, and the court finding the following facts, to wit: (1) That Grace H. Albertson and W. H. Albertson were married to each other on 19 June, 1923. (2) That on 30 May, 1932, an action was started in the municipal court of the city of High Point by W. H. Albertson against Grace H. Albertson for an absolute divorce. (3) That the said action was tried at the September, 1932, Term of municipal court of the city of High Point and a judgment for absolute divorce was signed on 20 September, 1932, which said judgment is the judgment referred to in paragraph 3 of the complaint. (4) That at the time the said action for divorce was started in the municipal court of the city of High Point, and at the time the same was tried there, both W. H. Albertson and Grace H. Albertson were residents of the city of High Point, and High Point Township, in Guilford County, North Carolina. (5) That the municipal court of the city of High Point derives its authority to proceed in civil matters and divorce actions from chapter 699 of the Public-Local Laws of 1927, and acts amendatory thereof.

"On the foregoing finding of facts, the court being of the opinion that the municipal court of the city of High Point is a valid and constitutional court, and had at the time the said action for divorce was instituted and tried, jurisdiction over both the parties and the subject-matter to the said divorce action; and the court further being of the opinion that the said judgment, signed on 30 September, 1932, granting absolute divorce to W. H. Albertson, is a valid and subsisting judgment rendered by a competent court: It is therefore ordered, adjudged, and decreed that the action of the plaintiff be and the same is hereby dismissed. It is further ordered, adjudged, and decreed that the plaintiff pay the cost of this action, to be taxed by the clerk. This 21 June, 1934. J. H. Clement, judge holding courts of the Twelfth Judicial District."

The plaintiff excepted and assigned error as to the signing of the judgment set out in the record, and appealed to the Supreme Court.

Thomas Turner, Jr., for plaintiff.
T. W. Albertson and Walser & Casey for defendant.

CLARKSON, J. Is the judgment of the municipal court of the city of High Point granting the defendant an absolute divorce null and void? We think not.

The Constitution of North Carolina, Art. IV, sec. 12, is as follows: "Jurisdiction of courts inferior to Supreme Court.—The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a coördinate depart-

ment of the government; but the General Assembly shall allot and distribute that portion of this power and jurisdiction which does not pertain to the Supreme Court among the other courts prescribed in this Constitution, or which may be established by law, in such manner as it may deem best; provide also a proper system of appeals; and regulate by law, when necessary, the methods of proceeding in the exercise of their powers, of all the courts below the Supreme Court, so far as the same may be done, without conflict with other provisions of this Constitution."

N. C. Code of 1931 (Michie), sec. 1436, is as follows: "The Superior Court has original jurisdiction of all civil actions whereof exclusive original jurisdiction is not given to some other court; and of all criminal actions in which the punishment may exceed a fine of fifty dollars, or imprisonment for thirty days; and of all such affrays as shall be committed within one mile of the place where, and during the time, such court is being held; and of all offenses whereof exclusive original jurisdiction is given to justices of the peace, if some justice of the peace shall not within twelve months after the commission of the offense proceed to take official cognizance thereof."

In *Rhyne v. Lipscombe,* 122 N. C., 650 (653), speaking to the subject: "While the General Assembly is given the power to allot and distribute the jurisdiction of the courts below the Supreme Court, this is with the important limitation that it must be done 'without conflict with other provisions of this Constitution.' This renders it essential to consider what is the inherent nature of the Superior Courts created by those 'other provisions' of the Constitution itself, which treats them with so much consideration, prescribing the election and terms of whose officers, besides the other provisions above recited. *The General Assembly may allot and distribute the jurisdiction below the Supreme Court, but it cannot in doing so create new courts with substantially the same powers as the Superior Court* and make the officials thereof elective otherwise than by the people, subject to be abolished by legislative enactment, and hence without independent tenure of office as prescribed by the Constitution and freed from the provisions as to rotation, the residence of the judges and the requirements as to two terms annually in each county, and being always open. All this cannot be done simply by creating new Superior Courts, styling them 'Circuit Courts' or 'Criminal Courts,' or otherwise." (Italics ours.) . . . "What was the 'Superior Court' as the term was well understood at the time of the adoption of the Constitution? It meant the highest court in the State, next to the Supreme Court and superior to all others, from which alone appeals lay direct to the Supreme Court, and possessed of general jurisdiction, criminal as well as civil, and both in law and equity. It cannot be deprived of that superiority and preëminence, or deprived of either its criminal or civil

jurisdiction without conflict with the constitutional provisions creating it. That jurisdiction may be made largely appellate by conferring such part of its original jurisdiction on inferior courts as the General Assembly may provide, but it cannot retrench the extent of its jurisdiction, which it must retain either by original or appellate process. . . . There are these restrictions and the further inherent one, as above stated, that the Superior Court is at the head of the court system below the Supreme Court, and that from it alone appeals can come up to this Court. From the inferior courts, therefore, appeals must go to the Superior Court of the county and not direct to this Court."

The vice in the *Rhyne case, supra,* was that the General Assembly gave the courts "concurrent, equal jurisdiction, power, and authority with the judges of the Superior Courts of this State," etc. Further, an appeal must be taken when an inferior court has jurisdiction to the Superior Court.

Under this article of the Constitution (Art. IV, sec. 12) the General Assembly of North Carolina has made provision for inferior courts. N. C. Code of 1931 (Michie), subchapter 4, Art. 18, The establishment, organization, jurisdiction, and procedure is set forth for (1) Municipal Recorder's Courts; Art. 19, (2) County Recorder's Courts; Art. 20, (3) Municipal County Courts; subchapter 5, Art. 24, (4) General County Courts; 25A, (5) District County Courts; subchapter 6, (6) Civil County Courts; subchapter 7, (7) County Criminal Courts.

In *Provision Co. v. Daves,* 190 N. C., 7 (12), it is said: "The recorder's court of Durham County has been in existence, exercising limited jurisdiction in criminal matters, for some time; *as to whether further power and jurisdiction of a civil nature shall be allotted and distributed to it is a question for the General Assembly to decide, and this may not be delegated to the commissioners of Durham County.* It will be observed that the present act does not purport to confer civil jurisdiction on recorders' courts, leaving only to the commissioners of the respective counties the decision as to whether local conditions make it desirable to bring their county within the operation of the law; but the discretion and power to confer limited civil jurisdiction is by the act expressly delegated to the local bodies. This is clearly a delegation of legislative power and cannot be upheld." (Italics ours.)

The above case decided that the General Assembly could not delegate its discretion. In the recent (*Oil case*) *Panama Refining Company et al. v. Ryan et al.,* decided 7 January, 1935, the Supreme Court of the United States held a provision of sec. 9 (c), the National Recovery Act, unconstitutional as an unwarranted delegation of legislative power to the Executive.

The validity of these courts established by the General Assembly have been repeatedly upheld. *Jones v. Brinkley,* 174 N. C., 23 (26); *Sewing Machine Co. v. Burger,* 181 N. C., 241 (244); *In re Harris,* 183 N. C., 633; *Williams v. Williams,* 188 N. C., 728 (730); *Queen v. Comrs. of Haywood,* 193 N. C., 821. Under the general acts, *supra,* inferior courts have been established all over the State. By legislative enactments, they have been established in certain large counties, like Forsyth, Buncombe, and others, in the State. These courts have aided greatly in the administration of justice. They have limited jurisdiction, less and not substantially the same powers as the Superior Courts, with right of appeal to the Superior Courts on matters of law or legal inference. They have been useful in having justice administered without "delay." Constitution of North Carolina, Art. I, sec. 35.

In *Cook v. Bailey,* 190 N. C., 599 (601), it is said: "It will be noted that the appeal from the Forsyth County Court to the Superior Court is for 'errors assigned in matters of law in the same manner and under the same requirements as are now provided by law for appeals from the Superior Court to the Supreme Court.' Appeals must be taken from an inferior court to the Superior Court, and thence to the Supreme Court. *Rhyne v. Lipscombe,* 122 N. C., 650; *S. v. Lytle,* 138 N. C., 741; *Oil Co. v. Grocery Co.,* 169 N. C., 523; *Hosiery Mills v. R. R.,* 174 N. C., 453; *Sewing Machine Co. v. Burger,* 181 N. C., 241; *Thompson v. Dillingham,* 183 N. C., 568."

Under chapter 569, Public-Local Laws of 1913, the General Assembly passed an act entitled, "An act to establish a municipal court for the city of High Point," before Art. II, sec. 29, of the Constitution of North Carolina became effective on 10 January, 1917.

Chapter 699, Public-Local Laws of 1927, amended chapter 569, *supra,* relative to adding civil jurisdiction to the municipal court for the city of High Point, sec. 5 (a), in part, is as follows: "Exclusive original jurisdiction in all civil actions, and divorce actions, matters and proceedings, including also all proceedings whatever, ancillary, provisional, and remedial to civil actions founded on contract or tort, wherein the Superior Court of Guilford County now has exclusive original jurisdiction, excepting special proceedings, *quo warranto, mandamus,* caveat to wills, administrations, condemnation proceedings, and street widening proceedings: *Provided,* the party plaintiff be a resident of the city of High Point or one mile thereof. . . . (j) That appeals may be taken by either the plaintiff or the defendant in civil actions or by the defendant in any criminal action and by the State in such criminal actions as the State is allowed appeals from the Superior Court, from the High Point Municipal Court to the Superior Court of Guilford County in term time for errors assigned in matters of law in the same

manner and under the same requirements as are now provided by law for appeals from the Superior Court to the Supreme Court," etc.

The cases of *Hendrix v. R. R.*, 202 N. C., 579, and *Lewellyn v. Lewellyn*, 203 N. C., 575, concerned the municipal court of the city of High Point. We think the factual situation in those cases were different from the present case. In the case at bar, the finding of fact (4) is: "That at the time the said action for divorce was started in the municipal court of the city of High Point, and at the time the same was tried there, both W. H. Albertson and Grace H. Albertson were residents of the city of High Point and High Point Township, in Guilford County, North Carolina."

From the findings of fact, Grace H. Albertson was served with summons, the facts entitling W. H. Albertson's right to an absolute divorce were found against her by a jury. She took no appeal.

The judgment of the court below is as follows, in part: "On the foregoing finding of facts, the court being of the opinion that the municipal court of the city of High Point is a valid and constitutional court, and had, at the time the said action for divorce was instituted and tried, jurisdiction over both the parties and the subject-matter to the said divorce action; and the court further being of the opinion that the said judgment, signed on 30 September, 1932, granting absolute divorce to W. H. Albertson is a valid and subsisting judgment, rendered by a competent court."

We see no error in same. The General Assembly amended again chapter 569 of the Public-Local Laws establishing a municipal court for the city of High Point. Private Laws 1933, ch. 132, sec. 2 (a), is as follows: ". . . The municipal court of the city of High Point shall have original concurrent jurisdiction with the Superior Courts in all civil actions, matters, and proceedings, and divorce actions," etc.

This amendment was made, no doubt, to meet the factual situation in the *Hendrix case, supra,* which is different from the present case.

In regard to declaring an act of the General Assembly unconstitutional, it is said in the *Queen case, supra,* at page 823: "If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people. *Sutton v. Phillips,* 116 N. C., at p. 504; *Hinton v. State Treasurer,* 193 N. C., 499."

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

Affirmed.

STACY, C. J., dissents.

IN RE CUSTODY OF JAMES LESLIE ALBERTSON.

(Filed 28 January, 1935.)

APPEAL from *Clement, J.*, by Grace H. Albertson, at March Term, 1934, of GUILFORD. Affirmed.

Thomas Turner, Jr., for petitioner Grace H. Albertson.
T. W. Albertson and Walser & Casey for respondent W. H. Albertson.

CLARKSON, J. This proceeding concerns a writ of *habeas corpus* instituted by Grace H. Albertson for the custody of James Leslie Albertson, infant son, about 8 years of age, of Grace H. and W. H. Albertson. The matter has heretofore been before this Court. *In re Albertson,* 205 N. C., 742.

The brief of petitioner appellant says: "The appellant concedes that if the judgment of the High Point municipal court is a valid judgment, the petitioner must seek her remedy by a motion in the cause in the municipal court of the city of High Point, *In re Blake,* 184 N. C., 278. But if the said judgment is a void judgment, it can have no effect whatsoever upon the petitioner's rights, and *habeas corpus* will lie to determine the custody of the child." See *In re Albertson, supra.* This proceeding is governed by the action of *Grace Hulin Albertson v. W. H. Albertson, ante,* 547.

The judgment of the court below is
Affirmed.

STACY, C. J., dissents.

MISS JANET GAFFNEY v. Z. B. PHELPS, JOHN WILSON, G. R. LEITER, AND C. M. ALLRED.

(Filed 28 January, 1935.)

1. Automobiles D b—

Where the evidence tends to show that the driver of an automobile involved in a collision had borrowed the car from the owner, and at the time of the accident was engaged in an enterprise of his own and not for the owner, the owner's motion as of nonsuit is properly allowed.

2. Automobiles C j—

The negligence of the driver of a car will not be imputed to a gratuitous passenger therein who has no control over the car or driver.

3. Automobiles C b — Evidence held for jury on issue of concurrent negligence of drivers of cars colliding at street intersection.

Plaintiff, a gratuitous passenger in an automobile, was injured in a collision occurring at a street intersection in the corporate limits of a city as the car in which she was riding attempted to cross an intersecting "through street." Plaintiff introduced in evidence an ordinance of the city requiring drivers of vehicles to stop before crossing intersections with "through streets." Plaintiff testified that the driver of the car in which she was riding failed to stop before attempting to cross the intersection, and that the other car was being driven along the through street recklessly and at a rate of speed in excess of that allowed by the ordinance on such "through streets": *Held*, the evidence, together with other evidence of negligence and proximate cause, was sufficient to be submitted to the jury on the issue of the concurrent negligence of the drivers of the cars, the evidence tending to show a violation of the ordinance by both drivers.

4. Automobiles C g—

The violation of a traffic ordinance of a city is negligence *per se*.

5. Automobiles C b—Evidence that intersection was obstructed held sufficient to support charge under N. C. Code, 2621(46).

Evidence that as defendant driver of an automobile approached a street intersection in a city his view was obstructed by a four-foot hedge growing on top of a three-foot embankment *is held* sufficient to support an instruction that if the jury should find from the greater weight of the evidence that defendant drove his car into the intersection when his view was obstructed, as defined by the court, at a speed in excess of 15 miles an hour he would be guilty of negligence, C. S., 2621 (46), and as the undisputed facts showed the intersection was obstructed as defined by the statute, the instruction cannot be held for error as a peremptory instruction or an expression of opinion by the court.

6. Evidence D h—

Testimony of a witness that some nine months after the accident in suit he saw at the scene of the accident a growing hedge four feet high is held some evidence that the hedge was there at the time of the accident, it being common knowledge that it takes time for a hedge to grow four feet high.

7. Pleadings E a—

The court has discretionary power to allow an amendment of the complaint during the trial. N. C. Code, 547.

8. Appeal and Error F a—

The exclusion of testimony of a witness on cross-examination by one defendant cannot be made the basis on complaint by the other defendant on appeal.

9. Appeal and Error J e—

The exclusion of testimony of a witness cannot be held prejudicial on exception where it appears that the answer of the witness, if he had been allowed to testify, would not have been responsive to the question, and it appears that testimony of the same import as that sought to be adduced by the question was admitted during the trial.

10. Same—

The admission of a conclusion of an expert witness prefaced by the words "that would be hard to answer" *is held* not prejudicial in view of the other testimony elicited from the witness during the trial.

APPEAL by defendant C. M. Allred from *Hill, J.*, and a jury, at June Term, 1934, of MECKLENBURG. No error.

This is an action for actionable negligence brought by plaintiff against the defendants. The issues submitted to the jury and their answers thereto were as follows: "(1) Was the plaintiff injured by the joint and concurring negligence of the defendants John Wilson and C. M. Allred, as alleged in the complaint? A. 'Yes.' (2) Was the plaintiff injured by the sole negligence of the defendant John Wilson? A. ..... (3) Was the plaintiff injured by the sole negligence of defendant C. M. Allred? A. ..... (4) What amount of damage, if any, is the plaintiff entitled to recover? A. '$5,000.'"

Defendant John Wilson did not appeal from the verdict and judgment. An appeal was taken by defendant C. M. Allred, who made numerous exceptions and assignments of error. The material ones will be considered in the opinion.

Stancill & Davis and Stewart & Bobbitt for plaintiff.
Goebel Porter and Henry E. Fisher for C. M. Allred.

CLARKSON, J. When the collision occurred at the intersection of East Fourth Street and Caswell Road, in Charlotte, N. C., the plaintiff was a guest in a car driven by defendant C. M. Allred, which was owned by defendant G. R. Leiter. John Wilson, one of the defendants, was driving a car owned by Z. B. Phelps. At the close of plaintiff's evidence the defendants Phelps, Leiter, and Allred made motions in the court below for judgment as in case of nonsuit. C. S., 567. The court below sustained the motions as to Phelps and Leiter and overruled same as to Allred. At the close of all the evidence the defendant Allred renewed his motion for judgment as in case of nonsuit and the court below overruled same. We can see no error in the ruling of the court below.

Leiter testified: "I gave Mr. Allred permission to use my car on the night of 19 August, 1933. Mr. Allred was not on any mission of mine in going out there and coming back that night. . . . Mr. Allred was not using this car on this occasion on any personal business of mine."

John Wilson testified, in part: "I cannot write. I did not write my name on that paper. . . . I did not write the words 'John' and 'Wilson' there. I can make a mark, but did not make those marks."

This testimony was not disputed and, of course, the paper-writing was no evidence. This witness further testified: "The keys were in the car

all the time. I would leave the keys in the car and I did not have to get them from Mr. Phelps when I would go to use the car. The keys were in the car when I first began using it. Q. The night of the accident, what did he tell you about going in the car? A. Just before I left to go off, he sent me to get some sandwiches, but when I left the other time, he didn't tell me to go anywhere. I went to see my sick mother, and I took it on myself. . . . I took the car to see my sick mother and was on the way back when the accident happened. Phelps didn't know that I had the car." John Wilson did not make a motion in the court below for judgment as in case of nonsuit. *Brown v. Wood,* 201 N. C., 309.

All the evidence was to the effect that the plaintiff was a guest or gratuitous passenger in the car driven by defendant Allred. She did not own or have any control over the car or driver. The negligence of the driver of the car will not ordinarily be imputed to the guest or passenger. *Newman v. Queen City Coach Co.,* 205 N. C., 26; *Keller v. R. R.,* 205 N. C., 269 (278-9).

The plaintiff Janet Gaffney testified, in part: "I was hurt in the collision at intersection of Caswell Road and Fourth Street last August. I am in my twenties. I was riding in Mr. Leiter's car, who is one of the defendants. Mr. Allred, another defendant, was driving the car. I was sitting on the right and Miss Moore, who is now Mrs. Allred, in the middle, and Mr. Allred driving. I was a guest in the car. We were going south on Caswell Road. The car that had a collision with us was going east on Fourth Street. John Wilson was operating the car going east. John Wilson was about one-quarter of a block from the intersection when I first saw his car. John Wilson was going 40 miles an hour from that time up until the collision. The car in which I was riding was going 25 to 30 miles an hour as it approached the intersection.

"Q. State whether or not either car stopped before proceeding onto the crossing? A. No, it didn't stop. As well as I remember it, we were hit by the other car on the side on which I was sitting, by the front of the car, because I felt an awful lick on this side. The right door of our car would not open and they took me out the left door after the collision. They then took me to the Presbyterian Hospital. I suffered agony; I couldn't even be straightened out for a while, because I was broken all through the pelvis. I was broken through my shoulders. That agonizing suffering lasted on for weeks and weeks. . . . The Wilson car was about a quarter of a block away when I first saw it. I was traveling about 25 miles an hour when within 100 feet of the intersection. . . . This accident happened on 20 August, 1933. I went back to work on 13 November, 1933."

We think the evidence plenary to be submitted to the jury as to actionable negligence against both Wilson and Allred. The plaintiff introduced ordinance, section 731 of the Code of the City of Charlotte, N. C. The ordinance related to the intersection of East Fourth Street and Caswell Road in the city, where the collision occurred. West and East Fourth streets were "arterial highways" or "through streets."

Part of said ordinance is as follows: "Section 731 (2). Every operator of a vehicle, street car, or other conveyance traveling upon any of the above designated 'arterial highways' or 'through streets' shall have the right of way over vehicles, street cars, or other vehicles approaching said 'arterial highways' or 'through streets' from or along intersecting streets.

"(3) Every operator of a vehicle, street car, or other conveyance traveling upon any street intersecting any 'arterial highway' or 'through street,' as designated in section 1 hereof, shall bring such vehicle, street car, or conveyance to a full stop at the place where such street meets the prolongation of the nearest property line of such 'arterial highway' or 'through street,' subject, however, to the direction of any traffic control sign or signal, or any police officer, at such intersection.

"(4) The operator of any vehicle who has come to a full stop, as required in section 3 hereof, upon entering the 'arterial highway' or 'through street,' shall yield the right of way to all vehicles moving along and upon said 'arterial highway' or 'through street.' . . . (9) Any person driving a vehicle on the 'arterial highway' or 'through street,' designated in section 1 hereto, shall drive same in a careful and prudent manner, and in no event at a rate of speed of more than 30 miles per hour."

From plaintiff's evidence, both defendants Wilson and Allred were violating the ordinance of the city of Charlotte. This is negligence *per se*. *Jones v. Bagwell, ante,* 378 (382). The court below charged the jury, to which there was no exception, as follows: "Therefore, the law says the burden of that issue is upon her to satisfy you, by the greater weight of the evidence, that she was injured by the joint and concurring negligence of defendants John Wilson and C. M. Allred before she would be entitled to have you answer the first issue 'Yes.' If, however, after consideration of all the evidence, you are satisfied by the greater weight of the evidence that the plaintiff was injured by the joint and concurring negligence of John Wilson and C. M. Allred, then the court instructs you it will be your duty to answer the first issue 'Yes.' If plaintiff fails to so satisfy you, it will be your duty to answer the first issue 'No.'

"If you find from the evidence, and by its greater weight, that defendant Wilson operated his automobile into the intersection at a care-

less and reckless rate of speed, then the court instructs you he would be guilty of negligence, and if you further find from the evidence, and by its greater weight, that the breach of duty by him was one of the proximate causes of injury to the plaintiff, the court instructs you he would be guilty of actionable negligence, or if you find from the evidence, and by its greater (weight) that he exceeded the speed limit as provided in subsection 9 of the city ordinance in excess of thirty (30) miles an hour, the court instructs you, upon that finding, he would be guilty of negligence, and if the plaintiff has further satisfied you, by the greater weight of the evidence, that the violation was the proximate cause or one of the proximate causes of her injury, then the court instructs you that that would be actionable negligence.

"Now, if you find from the evidence, and by its greater weight, that as Mr. Allred approached the intersection of East Fourth Street and Caswell Road, he didn't stop at the 'arterial highway,' as provided in the city ordinance, but drove on out in the highway without stopping, then the court instructs you he would be guilty of negligence, and if the plaintiff has further satisfied you, by the greater weight of the evidence, that that violation was the proximate cause or one of the proximate causes of her injury, then the court instructs you that would be actionable negligence on the part of defendant Allred." *White v. Realty Co.*, 182 N. C., 536 (538); *Eller v. Dent*, 203 N. C., 439; *Jones v. Bagwell, supra.*

The court below also charged the jury: "If you further find from the evidence, and by the greater weight, that he (Allred) operated his automobile in the intersection when his view was obstructed, as has been defined to you by the court and as has also been read to you by the court from section 2621 (46) of the Consolidated Statutes, subsection 3. If he drove into the intersection with his view obstructed, at a speed in excess of 15 miles an hour, that would be negligence, and if that negligence was the proximate cause or one of the proximate causes of plaintiff's injuries, then the court instructs you it will be your duty to find actionable negligence in favor of the plaintiff against defendant Allred."

To this portion of the charge the defendant Allred excepted, and assigned error. We do not think this exception and assignment of error can be sustained. We think there was sufficient evidence on which to base the charge.

Leiter testified, in part: "There was a stop sign on the north side of Caswell Road. I know that on the night of this accident that there is an embankment here before you get up to the edge—rather high embankment on this northwest corner, about 3 feet high, with a hedge on top of it, and that hedge continues up Caswell Road along that Presbyterian Hospital lot, and there are trees in there, but not right on the

corner; I would say they are 10 to 15 feet from the corner, which trees are about as close to Caswell Road as Fourth Street. I can stop at the stop sign and see forty-five yards down Fourth Street."

Jack Spratt, county surveyor, a witness for defendant Wilson, testified that he made a measurement the morning of the day he testified. "Court: Do you know whether or not the hedge was there in 1933? A. Yes, it is the same hedge as far as I know, with exception of trimming it up—I should say it is practically the same. Attorney Porter (for defendant Allred) requests court's permission to qualify this witness, which is allowed. Porter: Q. Were you at that place to look at those hedges on 20 August, 1933? A. I can't say that I was. Q. You don't know whether the hedges were cut down at that time or not, of your own knowledge? A. No. . . . This hedge is approximately four (4) feet high. At the intersection of these two streets, the northwest intersection, this hedge is located about ten (10) feet from the intersection of these two streets. It is on a curve—right like that, and after it hits Fourth Street, the hedge is five (5) feet back from the inner edge of the sidewalk line, and it keeps approximately the same height all the way down. At this particular point the hedge is planted on a grade about two (2) feet higher than top of sidewalk, which would make the top of the hedge about six (6) feet higher at the northwest intersection of these two streets. Court: Is that all the way around the intersection? A. It gets higher as it goes up here and the hill is higher on East Fourth Street. I would say that it is about the same for one hundred (100) feet or more down to the entrance of the hospital."

This testimony is some evidence to indicate that the hedge was there on 20 August, 1933—some nine months before. Taking the testimony of Leiter and Spratt as a whole, on this aspect we see no prejudicial error. It is a matter of common knowledge that it takes time for a hedge to grow four feet high. Allred further contends that it was error for the court below to charge the jury that if it found Allred violated C. S., 2621 (46), he would be guilty of negligence. Taking a liberal view of the allegations of the complaint, we see no prejudicial error on this aspect of the charge. It is further contended by Allred that the court below expressed an opinion and gave a peremptory instruction on same. We cannot so hold. We think, from the view we take of the evidence, the admitted—at least, the undisputed—facts, show that Allred approached a blind corner, and C. S., 2621 (46), was applicable. It was in the discretion of the court below to amend the complaint during the trial. N. C. Code 1931 (Michie), sec. 547. *Hood, Comr., v. Love,* 203 N. C., 583.

On cross-examination of witness Wilson by defendant Leiter, witness was asked: "Did they convict you in police court for driving this car

while drunk?" Defendant Wilson, who was the witness, objected. Objection was sustained. The answer would have been, "They got me over there." The defendant Allred did not ask this question, and certainly he cannot be heard to complain. The answer would not have been responsive, and no one was prejudiced by sustaining the objection; and if anyone had a right to complain it would have been the defendant Leiter and not defendant Allred. It will also be noticed that the policeman testified that Wilson, at the time of the collision, was drunk and they locked him up. It will also be noticed that Wilson was a defendant and was being examined by the plaintiff under the statute, and the plaintiff did not ask this question, and was in no wise connected with it. If error, we do not see how it is prejudicial to Allred.

Dr. Martin, from the question asked him, said: "That would be hard to answer. . . . There is no way for me to say positively that she would have trouble or not, but there is a possibility that she would."

If there was error, we do not think it prejudicial. The defendant Allred, on recross-examination, brought out the fact: "The pelvis itself is normal in size." The issues submitted by the court below, we think, were correct, and the issues tendered by the defendant not applicable to this controversy, nor was C. S., 618.

We have read the charge of the court below with care, and the learned brief of defendant Allred, but cannot say on the record and taking the charge as a whole that there was prejudicial or reversible error.

No error.

GURNEY P. HOOD, COMMISSIONER OF BANKS OF THE STATE OF NORTH CAROLINA, EX REL. HIGH POINT MORRIS PLAN BANK, v. DR. J. T. BURRUS.

(Filed 28 January, 1935.)

1. Banks and Banking H a—In action on liability of stockholder joinder of parties contracting to pay liabilities of bank held proper.

A stockholder in an insolvent bank filed answer to the assessment of the statutory liability against him, C. S., 218 (c) (13), alleging that prior to the insolvency of the bank three corporations contracted to pay the liabilities of the bank and save the stockholders from liability on their stock if the assets of the insolvent bank were transferred to them, that the assets of the bank were transferred in accordance with the contract and that the contracting parties took possession of the bank, but that they had not complied with their contract, but were seeking to avoid compliance therewith. Defendant stockholder moved in apt time that the parties contracting to pay the liabilities of the bank be made parties defendant: *Held*, the motion for joinder of the contracting parties as parties

defendant should have been allowed, the matter involving an accounting equitable in its nature, and the joinder of such parties being necessary to a complete determination of the questions involved in the action. C. S., 456.

2. Banks and Banking H c—

C. S., 218, does not deprive the Superior Courts of their equitable jurisdiction, upon a proper showing, over the Commissioner of Banks as an administrative officer of the State in the liquidation of banks.

CONNOR, J., dissents.

APPEAL by defendant from *Clement, J.*, at June Term, 1934, of GUILFORD. Reversed.

The High Point Morris Plan Bank was an industrial bank, transacting business in the city of High Point prior to 4 March, 1925, and subsequent to 4 March, 1925. It was engaged in such business until on or about 1 February, 1934, when it was taken possession of by Gurney P. Hood, Commissioner of Banks for North Carolina. The defendant, or appellant, J. T. Burrus, was a stockholder in said bank, owning twenty-five (25) shares of stock which were issued to him prior to 4 March, 1925, and six (6) shares of stock which were issued to him subsequent to 4 March, 1925. The certificates of stock issued by the High Point Morris Plan Bank to the defendant had written in them a clause to the effect that said stock was nonassessable. When the first twenty-five (25) shares of stock were issued to defendant Burrus, the word "Bank" did not appear in the name of the corporation, but during the time of the ownership of the stock by the defendant the name of the corporation was changed so as to be the High Point Morris Plan Bank.

A part of the liabilities of the High Point Morris Plan Bank on 1 February, 1934, the date on which the Commissioner of Banks for the State of North Carolina took possession, were contracted prior to 4 March, 1925, and the balance of said liabilities were contracted by said bank subsequent to 4 March, 1925.

After taking possession of the plaintiff bank on or about the first day of February, 1934, Commissioner of Banks filed in the office of the clerk of Superior Court of Guilford County, pursuant to section 218 (c) (3) of the North Carolina Code of 1931, a notice of his action, stating the reason therefor. On 3 March, 1934, under and by virtue of the authority in subsection 13 of section 218 (c), Consolidated Statutes, the Commissioner of Banks levied an assessment against the stockholders of the High Point Morris Plan Bank equal to the stock liability of each stockholder. The assessment levied against the defendant is in the sum of thirty-one hundred dollars ($3,100), being the par value of the stock owned and held by him in the High Point Morris Plan Bank. There-

after, in apt time, the defendant caused to be filed in the office of the clerk of the Superior Court of Guilford County his answer to and appeal from said stock assessment.

In the answer of defendant, as a second ground of defense, he says: "That on or about July, 1933, the Morris Plan Bank of Virginia, the Morris Plan Bank of Greensboro, and the Morris Plan Bank of Winston-Salem, acting through their duly authorized representative and agent, Mr. J. R. Phane, held a conference with the directors of the High Point Morris Plan Bank at High Point, N. C., and jointly and severally entered into a contract with the High Point Morris Plan Bank to effect that in the event the High Point Morris Plan Bank would transfer and assign to it all its assets, tangible and intangible, they would assume and pay all the indebtedness of the High Point Morris Plan Bank, and would relieve the stockholders of said bank of any liability whatever upon their stock in the event of an effort to have them assessed, and would guarantee and assure the stockholders of said bank that they would incur no loss through any statutory liability upon their stock.

"That thereupon the High Point Morris Plan Bank transferred its assets, as aforesaid, to J. B. Carpenter, trustee for the said Morris Plan Bank of Greensboro, the Morris Plan Bank of Winston-Salem, and the Morris Plan Bank of Virginia, and relied upon the contract being carried out as agreed to.

"That thereupon the said corporations, through their officers and agents, took over the affairs of the High Point Morris Plan Bank, and have been conducting said institution since that time.

"That at the time of the above assignments the assets of the High Point Morris Plan Bank were in excess of two hundred and twenty thousand dollars ($220,000); that the liabilities were about forty-two thousand dollars ($42,000), and that the collections were averaging in excess of three thousand six hundred dollars ($3,600) per month.

"That this defendant is informed and believes the said corporations have not complied with their contract, and are seeking to avoid compliance therewith, and he is advised and alleges that they should be required to keep their contract in all particulars, and, in order that they may be compelled to do so, he is advised that they should be made parties to this action.

"That he is advised that the plaintiff in this action should seek to cause said corporations to comply with their contract for the protection of the creditors of the High Point Morris Plan Bank, and also for the purpose of protecting this defendant and all other stockholders of the High Point Morris Plan Bank.

"That the liability of the High Point Morris Plan Bank to depositors is less than four thousand dollars ($4,000), and for taxes less than ten

thousand dollars ($10,000), and the other indebtedness of the High Point Morris Plan Bank is thirty thousand dollars ($30,000), with the creditors of the Morris Plan Bank of Greensboro, the Morris Plan Bank of Winston-Salem, and the Morris Plan Bank of Virginia.

"Wherefore, respondent prays: That an order issue directing that the Morris Plan Bank of Greensboro, the Morris Plan Bank of Winston-Salem, and the Morris Plan Bank of Virginia be made parties to this action in order that the rights of this defendant, as well as the rights of all the stockholders of the High Point Morris Plan Bank and all its creditors may be protected and preserved in all particulars. That respondent recover his costs. For such other and further relief as to the court may seem just and proper. This 31 March, 1934."

The said case was calendared for trial on Wednesday, 13 June, 1934, at the two weeks term of Guilford Superior Court, beginning Monday, 4 June, 1934. On Tuesday, 12 June, 1934, the defendant, through his counsel, called attention of the court to the motion made in the answer and appeal of the defendant, to the effect that the other firms and corporations named in said answer and appeal be made parties to this action, and thereupon made a motion that the case be continued until said firms and corporations could be made parties. The court overruled the motion of the defendant, to which the defendant excepted, and this is the defendant's Exception No. 1. The defendant then made a motion that the said firms and corporations be made parties to this action. The court overruled this motion of the defendant, to which the defendant excepted. This is the defendant's Exception No. 2. On Wednesday, 13 June, 1934, the case was reached and called for trial before Hon. J. H. Clement, judge presiding, and a jury.

On the plaintiff's evidence, the court below charged the jury on all the issues, that if they find the evidence true, as testified by the witnesses, that they would answer them for plaintiff. Judgment was duly rendered by the court below against the defendant, on the verdict. It is as follows: "Now, therefore, it is ordered, adjudged, and decreed that the plaintiff have and recover judgment against the defendant (a) for the sum of $2,500.00; (b) for the sum of $600.00; and (c) for the costs of this action, to be taxed by the clerk.

"It is further ordered and adjudged that if and when the judgment herein rendered for the sum of $2,500.00 is paid, the proceeds shall not be applied by the plaintiff or the liquidating agent of the High Point Morris Plan Bank to the payment of that part of the indebtedness due by said bank on 1 February, 1934, which was contracted before 4 March, 1925, said amount being $77.85."

The defendant assigned errors to the above exceptions and appealed to the Supreme Court.

York & Boyd for plaintiff.
Gold, McAnally & Gold and Reitzel & Waynick for defendant.

CLARKSON, J. The following questions involved in this appeal we do not think, on the present state of the record, it is necessary to pass on: "Is a stockholder in an industrial bank liable for an assessment on his stock when said nonassessable stock was owned prior to the passage of C. S., 225 (o), and the liabilities were contracted prior and subsequent to the said enactment?

"Is a stockholder in an industrial bank subject to an assessment on his stock acquired after 4 March, 1925, which is the date of the passage of C. S., 225 (o), when his stock certificates contained a clause that said stock was nonassessable?"

The question now involved: "When a stockholder in an insolvent bank appeals from an assessment levy and sets forth in Superior Court that three corporations had agreed to assume and pay all the indebtedness of the said bank, before insolvency, and relieve the stockholders of any liability, provided the said bank would assign all its assets to said corporations, which was done, is it error to overrule the defendant's motion to make the said corporations parties to the action?" Under the facts and circumstances of this case, we think so.

N. C. Code 1931 (Michie), sec. 456, in part, is as follows: "All persons may be made defendants, jointly, severally, or in the alternative, who have, or claim an interest in the controversy adverse to the plaintiff, or who are necessary parties to a complete determination or settlement of the questions involved."

N. C. Practice and Procedure in Civil Cases, McIntosh, part of sec. 226, p. 210, in part is as follows: "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiffs, or who is a necessary party to a complete determination and settlement of the questions involved. This includes the common-law rule, that the defendant is one who claims adversely to the legal claim of the plaintiff, or who has incurred a legal liability with reference to the plaintiff's claim, and where there were several defendants, they should all represent a common interest or liability, and not separate and independent rights. It also includes the equity rule, that all persons interested in the controversy adversely to the plaintiff, or whose presence is necessary to a complete adjustment of the controversy, should be defendants. 'Equity delights to do complete justice, and not by halves.' Hence, all persons who have a material interest in the subject-matter, and who would be affected by the action of the court, should be present, so as to be concluded by the adjudication, and thus avoid the vexation and expense of further litigation."

We think, under the facts and circumstances of this case, the motion of defendant was in apt time and should have been granted. The court below should have made an order to issue, directing that the Morris Plan Bank of Greensboro, N. C., the Morris Plan Bank of Winston-Salem, N. C., and the Morris Plan Bank of Virginia be made parties "to a complete determination or settlement of the questions involved." N. C. Code 1931 (Michie), sec. 218 (c), subsec. 13, in part is as follows: "Any stockholder may appeal to the Superior Court from the levy of assessment; the issue raised by the appeal may be determined as other actions in the Superior Court."

In *Bank v. Earley,* 204 N. C., 297 (299), it is said: "This action involves primarily an accounting, and for that reason is equitable in its nature. The accounting may be had only in the Superior Court. *Trust Co. v. Leggett,* 191 N. C., 362, 131 S. E., 752. All the stockholders of the insolvent bank are proper if not necessary parties. The complaint is not demurrable for misjoinder of parties or causes of action. No judgment can be rendered against any of the stockholders until the amount for which each stockholder is liable has been determined. This amount cannot exceed the par value of the shares of stock owned by him, but may be less."

In *Trust Co. v. Hood,* 206 N. C., 543 (546), is the following: "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."

In the brief of plaintiff is the following: "Defendant alleges a contract made and entered into between the bank of which he was a stockholder and the three corporations named therein; alleges that the said corporations have not complied with their contract and are seeking to avoid compliance therewith; alleges that the Commissioner of Banks should seek to cause said corporations to comply with their contract. Certainly, if the High Point Morris Plan Bank has a contract with the three corporations named in the defendant's pleading, the Commissioner of Banks should and will, if he has not already done so, seek to cause said corporations to comply with their contract, but that will have to be done in a proper action instituted by the Commissioner of Banks against these corporations, and not in the case at bar."

Under section 456, *supra,* "to a complete determination or settlement of the questions involved," we see no reason why the motion of defendant

should have been overruled by the court below to bring in the parties mentioned so that the whole controversy may be settled in this action. The matter involved an accounting equitable in its nature and subject to the jurisdiction of the Superior Court.

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

Reversed.

CONNOR, J., dissents.

STATE OF NORTH CAROLINA ON THE RELATION OF JOSEPH B. CHESHIRE, JR., GUARDIAN OF FRANK BRIGGS HOWARD, A MINOR, v. IRMA R. HOWARD, M. G. JONES, AND A. M. MOORE.

(Filed 28 January, 1935.)

1. Guardian and Ward B e—Sureties on guardianship bond held estopped by recital in bond from attacking validity of guardian's appointment.

Persons signing a guardianship bond as sureties, which bond recites that the guardian therein bonded had been duly appointed by the clerk, are estopped by the recital in the bond from attacking the validity of the appointment of the guardian for that the guardian had not signed the application for appointment or the required oath, the guardian having been appointed by the clerk and having received the estate pursuant thereto and filed the bond signed by the sureties, and the guardian not denying the validity of her appointment or her liability as guardian.

2. Guardian and Ward H a — Persons signing guardianship bond as sureties are not relieved of liability thereon by guardian's failure to sign.

Although the acceptance by the clerk of a guardianship bond without the signature of the guardian as principal thereon, C. S., 2162, 2163, is an irregularity, the sureties signing the bond are not thereby relieved of liability, the guardian being liable because filing the bond with the court, and the sureties being liable because signing same, and the failure of the guardian to sign same being a mere technical defect resulting in no injury to the sureties since upon payment by them upon default of the guardian a cause of action accrues in their favor against the guardian.

3. Same—Allegation that liability of sureties on guardianship bond was conditioned upon signature of guardian held insufficient to state defense.

Defendants signed the guardianship bond in question on the same day the guardian therein named was appointed. In an action against them on the bond they alleged that they signed the bond upon assurance that the guardian therein named would sign the bond, and that the bond would not be effective as to them unless signed by the guardian, and that the guardian did not sign the bond until the institution of the action: *Held*, it was not error for the court to refuse to admit evidence in support of such allegations since it was not alleged by whom such assurances had been given, and it being doubtful whether the clerk could have accepted the bond conditionally.

CHESHIRE *v.* HOWARD.

APPEAL by defendants M. G. Jones and A. M. Moore, from *Grady, J.*, at June Term, 1934, of WAKE. Affirmed.

This is an action to recover damages for the breach of a guardian's bond. The action was begun on 31 August, 1933.

Judgment by default and inquiry was rendered by the clerk of the Superior Court of Wake County, on 30 October, 1933, in favor of the plaintiff and against the defendant Irma R. Howard, as principal, because of her failure to demur or file answer to the complaint. She did not except to or appeal from the judgment.

When the action was called for the trial of the issues raised by the answers of the defendants M. G. Jones and A. M. Moore, a trial by jury was duly waived, and it was agreed by the parties to the action that the judge might hear the evidence, find the facts, and render judgment accordingly.

Pursuant to said agreement, the judge heard the evidence, found the facts, and rendered judgment as follows:

"This cause coming on to be heard at June Term, 1934, of the Superior Court of Wake County before his Honor, Henry A. Grady, judge presiding, and the parties hereto having agreed in open court that his Honor might hear the evidence and find the facts without the intervention of a jury, and render judgment either in or out of term, and either in or out of the district, and his Honor having heard the evidence of the plaintiff, and having permitted the defendants M. G. Jones and A. M. Moore to examine their codefendant, Irma R. Howard, before the clerk, and a transcript of the evidence taken at the examination of Irma R. Howard being before the court, his Honor finds the following facts:

1. Irma R. Howard qualified as the guardian of Frank Briggs Howard before the clerk of the Superior Court of Wake County, North Carolina, on 11 February, 1925, by giving bond in the penal sum of $4,666.67, with the defendants M. G. Jones and A. M. Moore, as sureties. The defendant Irma R. Howard did not sign the bond at the time of her qualification, but has signed the same since the institution of this action. The defendants M. G. Jones and A. M. Moore each signed the said bond and justified before the clerk of the Superior Court of Wake County. A true copy of the bond is attached to the complaint of the plaintiff in this action.

2. Irma R. Howard, as guardian of Frank Briggs Howard, received the sum of $2,333.33, a part of which, to wit: $121.53, she expended for the benefit of Frank Briggs Howard without court authority, and the balance of which, to wit, $2,211.81, she loaned to her brother-in-law, M. B. Crigler, of Cheraw, South Carolina, upon his promissory note, without endorsement, and without taking any security therefor. M. B.

Crigler is now insolvent. Irma R. Howard received interest upon the note of M. B. Crigler from the date of its execution to 1 September, 1933, which she expended for the care and maintenance of her ward, and that such expenditure, though without court authority, was reasonable and necessary for her ward's welfare.

3. Irma R. Howard was removed as guardian of Frank Briggs Howard, for sufficient cause and after the notice prescribed by law, on 27 July, 1933, and Joseph B. Cheshire, Jr., was thereupon appointed and qualified as the guardian of Frank Briggs Howard.

4. The defendant Irma R. Howard had been grossly negligent in the management of the estate of her ward, Frank Briggs Howard.

5. The answers of the defendants M. G. Jones and A. M. Moore do not constitute a valid defense to the action.

6. Irma R. Howard has property which should be applied *pro tanto* to the satisfaction of this judgment.

It is now therefore considered, ordered, and adjudged by the court that the plaintiff Joseph B. Cheshire, Jr., guardian of Frank Briggs Howard, have judgment against and recover from Irma R. Howard, as principal, and M. G. Jones and A. M. Moore, as sureties, jointly and severally, the sum of $4,666.67, the penalty of their bond, the same to be discharged upon the payment of the sum of $2,333.33, with interest thereon from 1 September, 1933, compounded annually, until paid, together with the costs of this action.

It is further considered, ordered, and adjudged by the court that as between the defendants herein, without affecting the right of the plaintiff to recover of all the defendants herein in accordance with the judgment hereinbefore pronounced, Robert N. Simms, Jr., be appointed receiver in this action to take into his possession all the property, both real and personal, tangible and intangible, of the defendant, Irma R. Howard, and sell and collect upon the same, or so much thereof as may be necessary for the satisfaction of this judgment, including the costs and expenses of this action, and the reasonable costs and expenses of the receiver as the same may be allowed by the court. The receiver shall have all the power conferred upon receivers by statute in such cases. The bond of the receiver is fixed at $250.00, to be approved by the clerk of the court.

Execution shall not issue herein for a period of six months from this date if the defendants M. G. Jones and A. M. Moore shall, within ten days, execute and deliver to the clerk of this court sufficient bond, to be approved by him, in the penal sum of $4,666.67, conditioned upon the payment of this judgment in full, principal, interest, and costs. The court reserves the right to further suspend execution against the defendants upon a proper showing."

The defendants M. G. Jones and A. M. Moore excepted to the foregoing judgment, and appealed to the Supreme Court, assigning errors based upon their exceptions to the admission of evidence, to the findings of fact, and to the judgment.

Paul F. Smith for plaintiff.
Weisner Farmer for defendant M. G. Jones.
Simms & Simms for defendant A. M. Moore.

CONNOR, J. On their appeal to this Court, the defendants M. G. Jones and A. M. Moore contend:

1. That there was error in the finding by Judge Grady that the defendant Irma R. Howard qualified as guardian of Frank Briggs Howard before the clerk of the Superior Court of Wake County on 11 February, 1925, for that it appears from the record in the proceeding entitled, "In the matter of Frank Briggs Howard, a minor," that the said defendant did not, before the commencement of this action, sign either the application for her appointment as such guardian or the oath appearing in said record;

2. That there was error in the holding by Judge Grady that the defendants M. G. Jones and A. M. Moore, who signed the bond sued on in this action as sureties, are liable on said bond, notwithstanding the failure of the defendant Irma R. Howard, who is named in said bond as principal, to sign the same;

3. That there was error in the holding by Judge Grady that the facts alleged in the answers filed by the defendants M. G. Jones and A. M. Moore are not sufficient to constitute a defense to this action, and that for that reason evidence tending to support the said allegations was irrelevant.

The allegations in the answers are to the effect that each of said defendants signed the bond sued on in this action as surety on the assurance that the defendant Irma R. Howard would sign the same as principal, and that said bond would not be effective as to said defendants, or either of them, unless and until the said Irma R. Howard had signed the same as principal.

Each of these contentions is presented to this Court by assignments of error duly made by appellants on this appeal. Neither of them can be sustained.

1. The first contention cannot be sustained because all the evidence on the hearing before Judge Grady shows that the defendant Irma R. Howard was appointed by the clerk of the Superior Court of Wake County, upon her application, as guardian of Frank Briggs Howard, her infant son, on 11 February, 1925, and that after such appointment

and pursuant thereto, she received the sum of $2,333.33 as guardian of the said Frank Briggs Howard, and undertook to perform her duties as such guardian. Prior to her appointment, she had filed the bond sued on in this action. This bond is signed by the defendants M. G. Jones and A. M. Moore, as sureties, and is duly recorded in the office of the clerk of the Superior Court of Wake County. She does not deny the validity of her appointment, or her liability as guardian of her ward. She has not appealed either from the judgment against her by default and inquiry or from the judgment that plaintiff recover of her as principal in the bond the sum of $2,333.33, with interest and costs. Neither of the appealing defendants can challenge in this action the validity of the appointment or qualification of the defendant Irma R. Howard as guardian of Frank Briggs Howard, or deny her liability for her breach of the bond sued on in this action.

The failure of the clerk of the Superior Court of Wake County to require the defendant Irma R. Howard to sign the application for her appointment as guardian, or to sign the oath appearing in the record, is an irregularity, for which no excuse or explanation appears in the record; such irregularity, however, does not render the appointment void as against the defendant Irma R. Howard, or as against the defendants M. G. Jones and A. M. Moore. The bond contains a recital to the effect that the defendant Irma R. Howard had been appointed by the clerk of the Superior Court of Wake County as guardian of Frank Briggs Howard, a minor. This recital is conclusive on the defendants M. G. Jones and A. M. Moore. They are estopped by the recital in the bond which they signed as sureties from denying in this action the validity of the appointment or qualification of their principal as guardian of her ward. *State ex rel. Barnes v. Lewis,* 73 N. C., 138. In that case it was held that the defendant was estopped by the recital in the bond which he had signed as surety to deny that the principal in the bond had been rightfully appointed as guardian.

2. The second contention cannot be sustained because there is no statute in this State which requires a guardian of an infant, who has been appointed by a court of competent jurisdiction to sign the bond which such guardian is required by statute to file with the court before he is permitted to receive property belonging to the estate of his ward. It is provided by statute that "every guardian of an estate, before letters of appointment are issued to him, must give bond payable to the State, with two or more sufficient sureties, to be acknowledged before and approved by the clerk of the Superior Court, and to be jointly and severally bound." C. S., 2162. Such bond must be recorded in the office of the clerk of the Superior Court by which the guardian was appointed. C. S., 2163.

The bond in the instant case was signed by the defendants M. G. Jones and A. M. Moore, and acknowledged by them before the clerk of the Superior Court of Wake County. It was duly recorded in the office of said clerk. The bond was executed by the sureties and recorded by the clerk in strict compliance with the statute.

Undoubtedly, the statute contemplates that the bond shall be signed and acknowledged by the guardian as principal, as well as by the sureties. The acceptance and approval of the bond by the clerk of the Superior Court without the signature of the guardian as principal is an irregularity, but such irregularity does not render the bond void either as to the principal or as to his sureties. Both the guardian and the sureties are bound—the guardian because he has filed the bond with the court, the sureties because they have signed the bond. See *Comrs. v. Inman,* 203 N. C., 542, 166 S. E., 519; *S. v. Bradsher,* 189 N. C., 401, 127 S. E., 349.

The law applicable to this contention, as settled by judicial decisions, is stated in Stearns on the Law of Suretyship (4th Ed.), paragraph 149, as follows:

"The omission of the name of the principal as one of the signers of an official bond, even where his name appears in the body of the instrument as an obligor, is a mere technical defect and will not release the surety, except in those cases where the surety signs upon condition, known to the obligee, that the bond is not to take effect until signed by the principal. The sureties are not injured by the failure of the principal to sign; if they are compelled to pay the penalty of the bond because of the default of the principal, they can recover the amount back from the principal whether he signed the bond or not. When the bond is accepted and approved without the signature of the principal, and the latter enters upon his office by reason of the reliance of the obligee upon the bond, it would be giving the sureties the benefit of the contract without imposing its burdens to permit them to escape liability." This statement of the law is fully supported by the decisions cited in the notes.

3. The third contention cannot be sustained because it is not alleged in the answers by whom the assurance on which the defendants relied was given. It is not alleged that the clerk of the court gave the assurance, or that he was informed that the sureties had signed the bond conditionally. Even if it had been so alleged, it is doubtful whether the clerk of the court, who was required to approve and who did approve the bond, had the power to accept the bond conditionally. See *S. v. Bradsher, supra.* It is significant that in this case the appointment of the guardian was made on the same day that the bond was signed by the appealing defendants.

It is said in the brief filed in this Court for the appellants that this is a hard case. So it is. It is hard for the defendants to be called upon to answer for the default of the guardian, who is the mother of her ward. It would be equally as hard, however, if the ward should lose the money which was paid to his guardian to compensate him, in some measure, for the death of his father. The defendants voluntarily assumed liability for such loss as should result from the default of the guardian and cannot justly complain that the law now requires them to discharge their liability. There was no evidence tending to show that the sureties in this case were prejudiced by the irregularities appearing in the record. For that reason, the irregularities are immaterial.

We find no error in the judgment. It is

Affirmed.

J. O. COBB v. DIBRELL BROTHERS, INC., AND VENABLE TOBACCO COMPANY, INC., GARNISHEE.

(Filed 28 January, 1935.)

1. Contracts A b—

The essential elements of a valid contract of sale are a completed and communicated offer and an acceptance in the exact terms thereof.

2. Contracts F c—Conflicting evidence as to agreement to sell held for jury.

Plaintiff offered evidence tending to show that plaintiff's father, acting in behalf of plaintiff, offered to purchase certain stock at a stipulated price, and that defendant accepted the offer, and that at the time defendant understood that plaintiff was purchasing the stock: *Held*, the evidence was sufficient for the jury upon the question of the existence of a valid contract, although defendant offered evidence that at the time of the alleged agreement he thought he was dealing solely with plaintiff's father.

3. Contracts A b—

The agreement of the parties gives rise to a contract unaffected by what either party thought the agreement to be.

4. Trial B f—

Where part but not all of a letter offered in evidence is competent, it is the duty of the objecting party to point out the objection at the time and request the court to properly restrict its admission.

5. Contracts D b—

In this case *held* there was no evidence of abandonment of the contract in suit by any of the recognized and accepted methods pointed out in *Bixler v. Britton*, 192 N. C., 199.

6. Principal and Agent C e—

An undisclosed principal may maintain an action to enforce a contract made by his agent in his own name.

COBB *v.* DIBRELL BROTHERS, INC.

CIVIL ACTION, before *Cranmer, J.*, at September Term, 1934, of DURHAM.

The Venable Tobacco Company is a corporation doing business in Durham. J. S. Cobb owned 130 shares and his son, the plaintiff J. O. Cobb, owned 100 shares of the capital stock of said corporation. This stock had been hypothecated to secure a loan from the First National Bank of Durham. The bank failed on or about 18 January, 1932. Thereafter, the receiver of said bank, in an effort to liquidate the assets, was desirous of disposing of said stock, and approached the Standard Investment Company of Durham for the purpose of effecting a sale. The defendant Dibrell Brothers is a corporation, doing business in Danville, Virginia, and was a stockholder of the Venable Tobacco Company. On 8 November, 1932, the Standard Investment Company wrote a letter to Dibrell Brothers stating that the Standard Investment Company had for sale 230 shares of Venable Tobacco Company stock and solicited a bid thereon. In response to said letter Dibrell Brothers wrote, on 9 November, 1932, that it might, "however, be induced to pay $5.00 a share for this stock." Thereupon, the Investment Company agreed to sell the 230 shares to the defendant Dibrell Brothers. However, in closing the transaction the Investment Company found that 100 shares of the stock were not properly endorsed to the First National Bank, and on 18 November, 1932, advised Dibrell Brothers of that fact. The said defendant advised that it could not accept the certificates unless properly endorsed. Thereafter, the Investment Company forwarded to the defendant Dibrell Brothers 130 shares of said stock standing in the name of J. S. Cobb and the attached draft was paid. Subsequently, the defective endorsement for the 100 shares standing in the name of plaintiff J. O. Cobb was corrected and on 7 December, 1932, the Investment Company forwarded to the defendant Dibrell Brothers Certificate No. 8 for 100 shares of said stock, issued in the name of plaintiff J. O. Cobb, and the attached draft was paid.

J. S. Cobb, father of the plaintiff, said at the trial: "I had 130 shares of that stock pledged with the First National Bank against our loan. The stock was sold without my knowledge. . . . I found out Dibrell Brothers had bought it. I called up Colonel Carrington and told him . . . that I would like to have the stock back, that is, 130 shares. He said, 'All right.' . . . He told me Dibrell Brothers had paid $5.00 a share for it. He agreed to sell it to me for the same price. The stock was delivered to the bank. . . . I found out just after this stock had been delivered to me that it also bought 100 shares belonging to James (plaintiff J. O. Cobb); so I called Colonel Carrington and told him the stock was sold without his knowledge and that we would like to have it back. He said, all right, we could have it back.

He stated that Dibrell Brothers paid the same for it they did for mine. . . . As soon as I found out that they got this stock I called him right away. I don't think that 100 shares of stock had been delivered to Dibrell Brothers, Inc., at the time I called Colonel Carrington. I am not sure at all when they bought it. . . . I told Colonel Carrington that the 100 shares of stock belonged to my son, James O. Cobb. . . . I told him when I called him it was Jim's stock. Colonel Carrington said he could have the 100 shares of stock back. I mean by that . . . that he could have it back just as I got mine back, at the price he bought it at. By he I mean Jimmie (plaintiff J. O. Cobb). All the correspondence I remember with Dibrell Brothers, Inc., through any of its officers regarding the 100 shares of stock was writing to Colonel Carrington and thanking him for letting us have the stock." On 1 December, 1932, Dibrell Brothers wrote J. S. Cobb in part as follows: "We suggest, however, in order to get it out of their hands to allow them to forward it to us, and we in turn will be glad to let you have it back," etc. J. S. Cobb, replying to said letter, stated: "I am turning your letter over to my son, J. O. Cobb, and he will write you how he prefers to handle same," etc.

On 7 August, 1933, J. S. Cobb wrote a letter to Dibrell Brothers in part as follows: "I am advised by my son, James O. Cobb, that you have until the present time refused to deliver to him the 100 shares of stock of Venable Tobacco Company at $5.00. . . . You must remember the agreement which we had to the effect that you would let us have the stock upon payment of the sum of $5.00 per share, with accrued interest, which represented the cost to you under the terms of your bid to Standard Investment Company. One hundred and thirty shares was for me and the remaining 100 shares was for my son, James O. Cobb. I know that you understood this at the time we were discussing the matter. . . . Therefore, I am writing to request that in keeping with the terms of your agreement that you deliver the stock to my son or forward same to me so that I may deliver it to him," etc.

The record shows that when the foregoing letter was identified by counsel for the plaintiff, and that Mr. J. S. Cobb testified that the signature was in his handwriting, the defendant objected. The objection was overruled and exception taken. Thereafter the letter was offered in evidence by the plaintiff and no objection to the letter itself or its contents appears in the record. The witness J. S. Cobb further testified on cross-examination that Colonel Carrington, of defendant Dibrell Brothers, stated in a telephone conversation that "James (plaintiff J. O. Cobb) could have it, plus interest. . . . He agreed to let Jim and not me have the stock for $5.00, the 100 shares. I was not asking it for myself. I was asking him to let James have it back.

He said he would, and I told him it was James' when I called him. If it had been mine it would have come back with the 130 shares."

The plaintiff J. O. Cobb testified, without objection: "My father was acting as my agent and negotiated with Dibrell Brothers Inc., for the purchase of 100 shares of stock that had previously stood upon the books of Venable Tobacco Company in my name. My father told me of the conversation that he had with Colonel Carrington regarding this stock. He told me he talked to him over telephone and Colonel Carrington agreed to let me have the stock back."

Several letters appear in the record written by the parties, and finally, on 8 July, 1933, the defendant Dibrell Brothers wrote to the plaintiff J. O. Cobb, stating in substance that they would not deliver the 100 shares of stock to the plaintiff at $5.00 per share for the reason, among others, that at the time they made the agreement with J. S. Cobb, father of the plaintiff, for the purchase of the stock the company was of the opinion that their contract to sell was with the father exclusively, and that, therefore, they had made no offer to sell the stock to the plaintiff except upon condition that the plaintiff would pay to the Venable Tobacco Company a certain sum which he owed to that corporation.

Thereafter, the plaintiff brought the present suit against the defendants, setting out the contract and requesting specific performance thereof, or in the event that specific performance could not be had, that the plaintiff recover damages for the value of said stock. The defendant Dibrell Brothers filed an answer denying the contract as alleged by the plaintiff, and alleging that it did not deal with J. S. Cobb as agent for the plaintiff, and that the agreement was without consideration.

At the trial the defendant Dibrell Brothers stipulated in open court "that if the issues are answered in favor of plaintiff that it is ready, able, and willing to make delivery of the stock in question."

The following issues were submitted to the jury:

1. "Did the defendant Dibrell Brothers, Inc., contract and agree to sell and deliver to the plaintiff J. O. Cobb one hundred shares of common stock of the Venable Tobacco Company at five dollars per share, and accrued interest at the rate of 6 per cent per annum from 8 December, 1932, as alleged in the complaint?"

2. "If so, did the defendant Dibrell Brothers, Inc., breach said contract?"

3. "If so, was the plaintiff, at the time of said breach and within a reasonable time after said agreement, ready, able, and willing to comply with the terms of said contract?"

4. "Is the plaintiff entitled to have said one hundred shares of common stock of the Venable Tobacco Company delivered to him by the defendant Dibrell Brothers, Inc., upon the payment of five dollars per

share, and accrued interest at the rate of 6 per cent per annum from 8 December, 1932, as alleged in the complaint?"

The jury answered all of the issues "Yes," and from judgment upon the verdict the defendant Dibrell Brothers appealed.

Basil M. Watkins and Fuller, Reade & Fuller for plaintiff.

Hedrick & Hall and Harris, Harvey & Brown, of Danville, Va., for Dibrell Brothers, Inc.

BROGDEN, J. The chief questions of law presented for solution are as follows:

1. Was there any competent evidence of a valid contract of sale of the shares of stock in controversy to the plaintiff?

2. Was such contract abandoned or relinquished?

3. Did the trial judge correctly instruct the jury?

It is familiar learning that offer and acceptance are the essential elements of a valid contract of sale. The offer must be complete, communicated and accepted in its exact terms. *Rucker v. Sanders,* 182 N. C., 607, 109 S. E., 857; *Overall Co. v. Holmes,* 186 N. C., 428, 119 S. E., 817; *Gravel Co. v. Casualty Co.,* 191 N. C., 313, 131 S. E., 754; *Dodds v. Trust Co.,* 205 N. C., 153, 170 S. E., 652.

Manifestly there was sufficient evidence of a valid contract of sale to be considered by a jury. Conceding that the defendant Dibrell Brothers thought at the time that they were dealing with the father, nevertheless his testimony was unequivocal that positive notice was given that he was dealing for his son, the plaintiff in this action. Moreover, a contract does not result from what either party thought about the transaction, but rather upon what both parties agreed. *Brunhild v. Freeman,* 77 N. C., 128; *Building Co. v. Greensboro,* 190 N. C., 501, 130 S. E., 200; *McCain v. Ins. Co.,* 190 N. C., 549, 130 S. E., 186.

The defendant excepted to the introduction of a letter written by J. S. Cobb to the defendant Dibrell Brothers, dated 7 August, 1933, in which Cobb recites the agreement between the parties. Of course, this letter, perhaps, contains certain assertions favorable to plaintiff's theory of the case, but manifestly portions of the letter were competent as corroborating evidence. It is the duty of a party objecting to evidence which is competent for some purposes but not for all, to point the objection at the time it is taken and to request the court to properly restrict it. *Barnhardt v. Smith,* 86 N. C., 473; *Smiley v. Pearce,* 98 N. C., 185, 3 S. E., 631; *Dunn v. Lumber Co.,* 172 N. C., 129, 90 S. E., 18; *Singleton v. Roebuck,* 178 N. C., 201, 100 S. E., 313.

There was no evidence that the contract had been abandoned in accordance with any of the recognized and accepted methods pointed out in *Bixler v. Britton,* 192 N. C., 199, 134 S. E., 488.

The defendant excepted to a certain instruction given the jury by the trial judge to the effect that an agent may bind his principal and the other contracting party without disclosing the fact of agency. This instruction was pertinent to a contention made by the appealing defendant that it was under the impression it was dealing with the father, J. S. Cobb, and not the plaintiff J. O. Cobb. The applicable principle of law was tersely stated in *Williams v. Honeycutt*, 176 N. C., 102, 96 S. E., 730, as follows: "The right of a principal to maintain an action to enforce a contract made by his agent in his own name without disclosing the name of the principal is well settled."

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

Affirmed.

VIRGINIA-CAROLINA JOINT STOCK LAND BANK v. W. A. WATT, R. B. PATTERSON, FOURTH CREEK DRAINAGE DISTRICT, AND PEOPLE'S LOAN AND SAVINGS BANK.

(Filed 28 January, 1935.)

1. Drainage Districts C a—Assessment is not lien against land until due, and judgment against district creates no lien on lands therein.

The owner of land within a drainage district paid the full amount of assessments levied against the land by the district. Thereafter judgment was obtained by holders of bonds issued by the district, the full amount of the district's bonds not having been liquidated by the district from collections of assessments therein: *Held*, the lands of the owner paying his assessments were not subject to a lien in violation of warranties in his warranty deed, drainage assessments not being a lien upon lands in the district until the assessments are due, and the judgment against the district not being a lien on the lands within the district.

2. Drainage Districts B c—Lands within district are subject to additional assessments until district's original debt for improvements is paid.

The owner of land within a drainage district paid the full amount of assessments levied against the land by the district. Thereafter judgment was obtained by holders of bonds issued by the district, the full amount of the district's bond not having been liquidated by the district from collection of assessments therein: *Held*, the land of the owner who had paid his assessments was subject to additional assessments, the lands in the district being liable until the original bond issue for making the improvements or indebtedness incurred therefor is paid in full, C. S., 5352, and the owner was liable for such additional assessments as might be levied against the lands under his contract with a party purchasing the land from him.

3. Same—

N. C. Code, 5373 (g), *is held* not to affect the liability of lands within a drainage district for additional assessments necessary to pay a judgment against the district rendered prior to the effective date of the statute for improvements theretofore made by the district.

CIVIL ACTION, before *Harding, J.*, at June Term, 1934, of IREDELL.

The rights of the parties were submitted to the trial judge upon an agreed statement of facts and a contract between the parties made a part thereof. The chronology of facts is substantially as follows:

1. The Fourth Creek Drainage District was properly and legally organized by a final judgment on 15 May, 1911, and the drainage work was completed prior to 22 January, 1915. Seventy-five and seven-tenths acres of land in controversy lies within the boundaries of the district.

2. On 1 January, 1913, bonds were issued by the district in the sum of $25,000. These bonds were placed as collateral to a note given by the district for money borrowed from the First National Bank, which said note was renewed from time to time and as assessments were collected the principal was reduced.

3. That Dr. W. W. Wilhelm owned the land in controversy, and on 28 February, 1917, duly paid the sum of $1,896.96 to the proper officers of the drainage district, "which represented this particular land's full and complete proportionate part of the indebtedness, including the expense and cost of the Fourth District Drainage District."

4. The plaintiff Land Bank, for the sum of $4,800, and in pursuance of such agreement, executed and delivered to said defendants a deed with full covenants and warranties, conveying said property. In examining the title to the property, counsel for Watt and Patterson discovered that a portion of the land, to wit, 75.7 acres, lay within the boundaries of the drainage district, and that the People's Loan and Savings Bank had secured judgment against said district amounting to $7,248.66, which judgment was duly docketed. The amount of the judgment represented the balance due on the bond issue hereinbefore mentioned.

5. The original assessment was made against the land within the district about 1915, and no further assessment has been made or levied against the property for any purpose, and "that all assessments which have ever been levied or made against this property, . . . due and payable to the Fourth Creek Drainage District for the payment of cost and expense of improvements have been fully paid and satisfied."

6. Watt and Patterson refused to accept the deed, and the parties entered into a written contract. This contract was made on 28 October, 1933, by and between Watt and Patterson and the Virginia-Carolina Joint Stock Land Bank. This instrument recites the judgment of the People's Loan and Savings Bank against the drainage district, and fur-

ther, that "the parties of the first part (Watt and Patterson) contend that the lands hereinbefore mentioned are located within the boundaries of said district, and are liable for certain assessments which should be made to provide for payment of the indebtedness of said district, and the said Virginia-Carolina Joint Stock Land Bank contends that the said land is not within the boundaries of said district, and is not liable for any assessment, or for the indebtedness of any drainage district."

It was further recited that the Land Bank had deposited the sum of $559.68 with the clerk of the Superior Court upon the following conditions:

(a) "The Land Bank . . . shall, within 60 days, . . . institute legal action for the purpose of having determined whether there is any liability against the land hereinbefore referred to on account of any drainage assessment or indebtedness due by the Fourth Creek Drainage District, if there is such a district in existence."

(b) "That the clerk, . . . after the determination of liability of the . . . Land Bank under the warranties contained in its deed . . . on account of any liability, if such exists, shall, if it is finally judicially determined that the said land is liable, pay over to the parties of the first part (Watt and Patterson) the said sum of $559.68. . . . If it is finally judicially determined that there is no liability, as hereinbefore recited, . . . then the . . . clerk shall pay over to the . . . Land Bank the amount of $559.68 deposited under this agreement."

(c) "In the event that liability is established, but the same does not amount to the total of deposits hereunder made, then the clerk shall pay to the parties of the first part (Watt and Patterson) the amount of liability, and any amount remaining shall be paid by him to the . . . Land Bank."

Within the time specified in the agreements between the parties the Land Bank instituted this action. The defendants Watt and Patterson filed a motion praying that the drainage district and the People's Loan and Savings Bank, the judgment creditor, be made parties.

The question was heard by the trial judge, who was of the opinion, and so adjudged, that the judgment against the drainage district "constitutes an encumbrance against the property in question in contemplation of the warranties contained in the Land Bank deed to W. A. Watt and R. B. Patterson, . . . and the simultaneous contract entered into by the Land Bank and W. A. Watt and R. B. Patterson, dated 28 October, 1933." It was further adjudged that the defendants Watt and Patterson were entitled to the possession of the sum of $559.68 held in escrow by the clerk of the Superior Court under the agreement here-

inbefore mentioned. The trial judge also approved the order of the clerk making the drainage district and judgment creditor parties to the action.

From judgment so rendered the plaintiff Land Bank appealed.

W. A. Worth and C. H. Dearman for plaintiff.

Scott & Collier for Watt and Patterson.

P. P. Dulin for Fourth Creek Drainage District and People's Loan and Savings Bank.

BROGDEN, J. The decisive questions of law are:

1. Does the judgment of the People's Loan and Savings Bank against the Fourth Creek Drainage District constitute a lien or encumbrance upon that portion of the land within the district and within the contemplation of the warranty clause in the deed?

2. Is the land liable or subject to further assessment?

Drainage assessments are "charges" attaching to the land as they fall due from time to time, and follow the land until all have been liquidated. They are not liens upon land until levied and due. Hence, unmatured drainage assessments are not within the boundaries of a warranty clause of a deed duly executed and delivered by the owner of land within such district to a purchaser. *Pate v. Banks,* 178 N. C., 139, 100 S. E., 251; *Branch v. Saunders,* 195 N. C., 176, 141 S. E., 583; *Carawan v. Barnett,* 197 N. C., 511, 149 S. E., 740. Nor would a judgment against a municipal corporation constitute a lien upon the real estate of an owner of land within the boundary or geographical area of such corporation.

The foregoing authorities answer the first question of law "No."

The statutes covering assessments and bond issues for drainage districts are C. S., 5351 to 5374. C. S., 5352, provides, in part: "Any landowner in the district not wanting to pay interest on the bonds may, within fifteen days after the publication of such notice, pay to the county treasurer the full amount for which his land is liable, to be ascertained from the classification sheet and certificate of the board showing the total cost of the improvement, and have his lands released from liability to be assessed for the improvement; but such land shall continue liable for any future assessment for maintenance or for any increased assessment authorized under the law." It is obvious that the drainage statutes impose liability upon the land within the district until the original bond issue for making the improvements or indebtedness incurred therefor has been paid.

The contract between the parties undertakes to provide for such liability accruing in the future, and it seems to be the intent of the agree-

ment, as construed by the court, to safeguard the purchaser against such liability arising on a reassessment of the land as provided by statute. Therefore, the Court is of the opinion that the land within the district remains liable for the indebtedness originally created for making the improvement, and that the Land Bank, by virtue of the terms of the contract, has deposited with the clerk of the Superior Court the specified sum of money to cover such liability.

The Land Bank relies upon C. S., 5373 (g). However, this act was passed in 1933, and is not deemed to affect the rights of the parties as disclosed by the record in the present case.

Affirmed.

MABEL T. COLSON v. THE STATE MUTUAL LIFE ASSURANCE COMPANY OF WORCESTER, MASSACHUSETTS.

(Filed 28 January, 1935.)

1. Insurance K a—Local agent's knowledge that insured had diabetes at time of application for reinstatement of policy held imputed to insurer.

In the absence of fraud or collusion on the part of the local agent of insurer, knowledge of the local agent accepting insured's application for reinstatement of the policy that insured was then suffering with diabetes, is imputed to insurer and is a waiver of the provisions of the application for reinstatement signed by insured that he had not suffered from any disease whatsoever for the past twelve months, and that the truth of the statements in the application was made the basis for reinstatement of the policy, and the evidence in this case was properly submitted to the jury under correct instructions from the court.

2. Appeal and Error J e—

The admission of evidence over defendant's objection is held not prejudicial under the facts of this case, the evidence objected to not being material to plaintiff's right to recover and its admission not being harmful to defendant.

APPEAL by defendant from *Hill, Special Judge,* and a jury, 16 April Term, 1934. From FORSYTH. *No error.*

The following issues were submitted to the jury and their answers thereto: "(1) Did James H. Colson, in the application for reinstatement of the policy sued on, declare that he was then in sound health and that during the past twelve months he has had no disease, injury, or impairment of health, as alleged? A. 'Yes.' (2) Did said James H. Colson, at the time he applied for reinstatement of the policy sued on, have diabetes, and had he been suffering from such disease within twelve

months prior thereto, as alleged in the answer? A. 'Yes.' (3) Did James H. Colson know at the time he made said declarations that he had diabetes? A. 'Yes.' (4) Did the defendant, through its agent, E. M. Spivey, at the time of the reinstatement of the policy sued on, have knowledge that James H. Colson was suffering from diabetes? A. 'Yes.' "

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.

John C. Wallace and Parrish & Deal for plaintiff.
Manly, Hendren & Womble for defendant.

CLARKSON, J. The defendant admitted that, pursuant to a written application, it, under date of 3 April, 1931, issued and delivered to James H. Colson, the husband of the plaintiff, a policy of insurance upon the life of the said James H. Colson, No. 388016, in the face amount of five thousand dollars ($5,000), the plaintiff Mabel T. Colson being the beneficiary therein, and that premiums due 3 January, 1933; 3 April, 1933; 3 July, 1933; and 3 October, 1933, were duly paid; the defendant further admitted that James H. Colson died in Winston-Salem, N. C., on 6 October, 1933, and that due proofs of death were filed, and that demand had been made upon it for the payment of the face amount of said policy. The policy was offered in evidence. The only provision in the policy pertinent to this suit is that with respect to reinstatement, which reads as follows: "This policy may be reinstated at any time after default in premium payment, provided it has not been surrendered for its cash value, or its extension period expired, upon the production of evidence, satisfactory to the company, of the insurability of the person whose life was insured and the payment of all overdue premiums and the payment or reinstatement of any other indebtedness to the company under this policy, with simple interest at the rate of six per cent per annum."

The application for reinstatement is as follows: "Application for Reinstatement to State Mutual Life Assurance Company of Worcester, Massachusetts, Policy No. 388016; Premium, $40.55, Due Date, 3 October, 1933. I hereby make application for reinstatement of the above numbered policy, which lapsed for nonpayment of the premium indicated; and for the purpose of inducing the company to reinstate said policy I do hereby declare that I am now in sound health and that during the past twelve months I have had no disease, injury, or impairment of health whatsoever, neither have I consulted nor been treated by any physician, surgeon, or practitioner; and that I have made no

application for life insurance to any company or society which was rejected, postponed, or modified in kind, amount, or rate. I further agree that the truth of the foregoing statements shall be the basis of reinstatement of said policy, and the acceptance by the company of the premium now in default shall not be taken as a precedent for future similar action. (Signed) James Hardy Colson, Applicant. (Colson) written in lead pencil. This application must be dated and witnessed when signed. I certify that the foregoing application was signed in my presence at Winston-Salem, State of North Carolina, under date of 28 November, 1932. Witness: E. M. Spivey. This application is required if the premium is paid after thirty-one days, but within two months of the due date."

It is contended by defendant that the statements made by James Hardy Colson in the application for reinstatement of the policy were false. That he was not in sound health, but had diabetes. That the defendant company is not estopped or the provision waived by the knowledge of the agent of the false answers of the insured. On the other hand, plaintiff contended that E. M. Spivey was an agent of defendant company and had full authority to reinstate James Hardy Colson. That with full knowledge of all the facts, and in the scope of his employment, and without fraud or collusion on the part of the insured and agent, waived the provision as to diabetes in the application for reinstatement, and reinstated the applicant to full benefits under the insurance policy.

The controversy waged around the fourth issue, which was mainly one of fact. The jury answered this disputed fact from a charge of the court below, free from error, in favor of the plaintiff. We do not think the verdict and judgment should be disturbed. The defendant, in its brief, states: "The theory upon which the case was tried is that the verdict and judgment should be for the defendant upon issues 1, 2, and 3, unless the knowledge of the agent (Spivey) is imputed to the defendant. So the principal question is: Under what circumstances is the knowledge of an agent of an insurance company to be imputed to the principal?" On this aspect the court below charged the jury: "With reference to the fourth issue, gentlemen, the court instructs you that the knowledge of an agent, when acting within the scope of the powers entrusted to him, will be imputed to his principal, the company, provided there is no fraud or collusion between the insured and the agent. If there should be fraud or collusion between the insured and the agent, then knowledge of the agent would not be imputed to the company, that is, the principal."

In *Laughinghouse v. Insurance Co.*, 200 N. C., 434 (436), speaking to the subject, we find: "It is held that in the absence of fraud or collu-

sion between the insured and the agent, the knowledge of the agent, when acting within the scope of the powers entrusted to him, will be imputed to the company, though the policy contains a stipulation to the contrary. *Short v. LaFayette Ins. Co.*, 194 N. C., 649; *Insurance Co. v. Grady*, 185 N. C., 348."

In *Trust Co. v. Insurance Co.*, 201 N. C., 552 (555), we find: "Couch, Encyclopedia of Insurance Law, Vol. 6, sec. 1375, states the proposition as follows: 'And a contract for reinstatement of a life policy is not a new contract; rather, it is merely a waiver of forfeiture, so that the original policy is restored and made as effective as if no forfeiture had occurred, unless the contract for reinstatement is itself tainted with such fraud as would justify the company in repudiating.'"

Dr. Wingate M. Johnson, a witness for defendant, testified, in part: "Until the discovery of insulin diabetes would have a good deal of effect towards shortening the normal span of life, but since the discovery of insulin, it is possible to live out a normal life expectancy."

We see no error in the exclusion of the opinion of this doctor as to whether a person who has diabetes has an insurable risk. It was immaterial to the controversy—it may not be amiss to state that the evidence is to the effect that Colson did not die of diabetes, but another cause wholly apart from this disease. The charge of the court below gave all the contentions of the parties to the controversy fairly and charged the law applicable to the facts correctly. We see no prejudicial or reversible error.

No error.

IN RE THE LAST WILL AND TESTAMENT OF ANNIE PARSONS, DECEASED.

(Filed 28 January, 1935.)

Wills C d—Fact that paper-writing in testatrix's handwriting contains immaterial, printed words does not render writing invalid as holographic will.

A paper-writing in the handwriting of testatrix, duly proven by three credible witnesses, signed by testatrix and found among her valuable papers after her death, which paper-writing contains dispositive words sufficient to dispose of the estate, is valid as a holograph will, and it is not necessary that the writing be dated or show the place of execution, N. C. Code, 4131, 4144 (2), and the fact that the paper-writing contains printed words not essential to the meaning of the written words does not render such paper-writing invalid as a holograph will, and the charge of the court on this aspect of the case *is held* without error. In this case the will was written on a printed form for nuncupative wills and there was evidence that the written words disposed of the estate in accordance with the declared intention of testatrix.

IN RE WILL OF PARSONS.

APPEAL by caveators, from *McElroy, J.*, and a jury, at July, 1934, Term, of ASHE. No error.

Annie Parsons died on 10 April, 1933. On 10 July, 1933, under N. C. Code 1931 (Michie), secs. 4131 and 4144, subsec. 2, the purported will was duly probated in common form by the clerk of the Superior Court of Ashe County, N. C.

The purported will is as follows: *"In the Name of God Amen.* (All words and letters in italics being in printed form of purported will.) Here a space is cut and removed—7⅛ x 10¼. 3rd. I give the Asa Weaver old home place to my niece, Luna Weaver, with all the personal property house furnishing provided she takes care of my brother George W. Weaver during his lifetime.

"I hereby appoint Winfield A. Weaver, of Piney Creek, Alleghany County, North Carolina, *to be Executor of this my last Will and testament hereby revoking all former Wills by me made.*

"In witness whereof I have hereunto subscribed my name and affixed my seal the 14 day of July, in the year of our Lord, 1922. Witnesses: B. C. Waddell, Margaret Rankin—Annie Parsons.

"University Hospital, Baltimore, Md. *Subscribed by.....the Testat..... named in the foregoing Will, in the presence of us and at the time of making such subscription, the above instrument was declared by the said Testat..... to be.....last Will and Testament, and each of us, at the request of said Testat.....and in .....presence and in the presence of each other, signed our names as witnesses thereto.*

"..... Residing .....

"..... Residing .....

"..... Residing .....

Notary Public

.....

(OVER)

"On the opposite side appears the following: 'I want my sister-in-law, Ettie King, to have J. O. Parsons .....'"

A caveat was filed by the sister of Annie Parsons, Mary S. Phipps, *et al.*, and citation was duly issued in accordance with law for the heirs at law and next of kin of Annie Parsons. The cause was duly transferred to the Superior Court on the issue of *devisavit vel non.*

The following issue was submitted to the jury and their answer thereto: "Is the script or paper-writing offered for probate, and every part thereof, except the printed matter and the signatures of the witnesses, the last will and testament of Annie Parsons, deceased? The jury answered the foregoing issue, 'Yes.'"

On the verdict, judgment was rendered for propounders. Caveators made numerous exceptions and assignments of error and appealed to the Supreme Court.

Ira T. Johnson and Grant Bauguess for caveators-appellants.
R. A. Doughton and R. F. Crouse for propounder-appellees.

CLARKSON, J. The question presented is whether or not the purported will, as set forth in the record, complies with the requirements of law so as to be admitted to probate as a holograph will, under N. C. Code 1931 (Michie), sec. 4131 and sec. 4144, subsec. 2. We think so, under the facts and circumstances of the case.

Section 4131 is as follows: "No last will and testament shall be good or sufficient in law to convey or give any estate, real or personal, unless such last will shall have been written in the testator's lifetime, and signed by him, or by some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least, no one of whom shall be interested in the devise or bequest of the estate, except as hereinafter provided; or, unless such last will and testament be found among the valuable papers and effects of any deceased person, or shall have been lodged in the hands of any person for safe-keeping, and the same shall be in the handwriting of such deceased person, with his name subscribed thereto or inserted in some part of such will; and if such handwriting shall be proved by three credible witnesses, who verily believe such will and every part thereof is in the handwriting of the person whose will it appears to be, then such will shall be sufficient to give and convey real and personal estate."

Sec. 4144, subsec. 2, is as follows: "In case of a holograph will, on the oath of at least three credible witnesses, who state that they verily believe such will and every part thereof is the handwriting of the person whose will it purports to be, and whose name must be subscribed thereto, or inserted in some part thereof. It must further appear on the oath of some one of the witnesses, or of some other credible person, that such will was found among the valuable papers and effects of the decedent, or was lodged in the hands of some person for safe-keeping."

The following is in the handwriting of Annie Parsons and found among her valuable papers: "3rd. I give the Asa Weaver old home place to my niece, Luna Weaver, with all the personal property house furnishing provided she takes care of my brother George W. Weaver during his lifetime. . . . Annie Parsons."

The court below, among other things, charged the jury as follows: "The paper must be in the handwriting of the deceased. This is to identify the testator and to form the casual connection between the

writer and the writing and to prevent the possibility of change and alterations without consent of the testator. The name of the testator must be subscribed to the paper or inserted in some part thereof, and this is also for identification of the testator, and to furnish evidence of the paper being a completed instrument.

"It is said that the provisions of the statute are, of course, mandatory and not directory, and, therefore, there must be a strict compliance with them before there can be a valid execution and probate of a holograph script as a will; but this does not mean that the construction of the statute should be so rigid and binding as to defeat its clear expressed purpose. It must be construed and enforced strictly, but at the same time reasonably.

"(When all the words appearing on a paper in the handwriting of the deceased person are sufficient to constitute a last will and testament, the mere fact that other words appear thereon, not in such handwriting, but not essential to the meaning of the words in such handwriting, cannot be held to defeat the intention of the deceased, otherwise clearly expressed, that such paper-writing is and shall be her last will and testament. There is no statutory requirement in this State that the holograph script shall be dated, or shall show the place where it was executed by the testator.)"

To the latter part of the charge, in parentheses, the caveators excepted and assigned error. This exception and assignment of error cannot be sustained.

In re Will of Lowrance, 199 N. C., 782 (785), it is said: "When all the words appearing on a paper in the handwriting of the deceased person are sufficient, as in the instant case, to constitute a last will and testament, the mere fact that other words appear thereon, not in such handwriting, but not essential to the meaning of the words in such handwriting, cannot be held to defeat the intention of the deceased, otherwise clearly expressed, that such paper-writing is and shall be his last will and testament. There is no statutory requirement in this State that the holograph script shall be dated or shall show the place where it was executed by the testator. The words in print appearing on the sheets of paper propounded in the instant case are surplusage. They are not essential to the meaning of the words shown by three credible witnesses to be in the handwriting of Mrs. S. A. Lowrance. These words, without the printed words, are sufficient to constitute a testamentary disposition of property, both real and personal."

The above case, we think, supports the charge of the court below and is similar to the present case. See discussion of the law in different states, in Page on Wills, 1st Volume, 2d Edition, sec. 367, pp.

It was in evidence that Annie Parsons had a brother, George W. Weaver. She owned a place known as the Asa Weaver old home place, on which she and her brother, George, lived. George had lived with her about 26 years and was about 75 years of age. George's mind was not good and he lived in the old storehouse in the yard, about 100 feet from the house. Annie Parsons looked after him. Luna Weaver is a niece, who, when she taught school in the county, boarded with her aunt.

Dewey Eller testified, in part: "I heard Mrs. Parsons say during her lifetime, after she came back from the hospital, that she stopped at Ettie King's and was not treated right, and she was afraid she would not treat her brother, George, right, and that she changed her will. And I heard her say that she did not want Charlie and Chester Phipps to have anything she had."

The charge of the able and learned judge in the court below was full and explicit, covered every phase of the controversy, and explained the law applicable to the facts. The only exception to the charge is the one above set forth. There was no error in the refusal of the court below to give certain special instructions prayed for by caveators. We think the issue submitted to the jury correct, under the facts in this case, and determinative of the controversy.

In the judgment of the court below we find

No error.

A. F. SAIN, B. Z. SAIN, ET AL., v. W. T. LOVE, WADE S. BUICE, ET AL.

(Filed 28 January, 1935.)

Banks and Banking H b—Complaint held to allege cause accruing to receiver against bank directors and depositors could not maintain action.

A complaint setting out certain duties of the officers and directors of a bank and alleging that defendants, officers and directors of the bank in question, brought about a merger of several small banks which resulted in the insolvency of the parent bank, that defendants loaned directly or indirectly to various officers and directors sums exceeding a half-million dollars, and that defendants wrongfully received or wrongfully permitted employees to receive deposits of plaintiffs and others when they knew the bank to be insolvent, and that by reason of defendants' wrongful acts as alleged plaintiffs were damaged in the sum of their deposits, less a dividend paid by the receiver of the bank, *is held* to state a cause of action accruing to the receiver for wrongful acts resulting in loss to the bank, and in the absence of allegation that demand had been made upon the receiver to bring the action, defendants' demurrer to the complaint was properly sustained.

SAIN *v.* LOVE.

CIVIL ACTION, before *Oglesby, J.,* at January Term, 1934, of LINCOLN.

The plaintiffs named in the complaint are residents of Lincoln County, and the defendants were officers and directors of the Commercial Bank and Trust Company, which maintained its main office and place of business at Gastonia, North Carolina, and which had branch offices at Mt. Holly, Lincolnton, Kings Mountain, and Cherryville in said State.

Plaintiffs bring the suit on behalf of themselves and other depositors of the bank. A list of such depositors appears in the complaint and numbers approximately two hundred and sixty-five names. This list shows the amount of the deposit of each of said depositors and these sums range from $1.79 to $13,814.25. The total of such deposits is $149,336.05.

The pertinent allegations in the complaint may be capitulated as follows:

(A) "That from the date of their qualification as directors and officers aforesaid that said defendants assumed and were legally bound to perform the duties of said positions for the protection and conservation of the assets of said banking institution, and in fact and law the corporate powers, business, and property of the said bank were exercised, conducted, and controlled by the defendants herein named as directors of said banking institution, the duties of said positions being substantially as follows:

"To keep closely in touch with all of the affairs of said institution, to keep themselves informed about its financial condition, and state of its assets and liabilities, the condition of its reserve fund, the amount, character, and solvency of its loans and discounts, and to so manage and superintend its affairs as to prevent a discount or purchase of paper not financially good or safe, and at all times to see to it that its reserve was maintained in accordance with law; and, likewise, they were responsible at stated intervals to examine the discount books and records of said institution as to its loans and discounts; that it was further the duty of said directors to appoint at all reasonable times proper auditors and audit agents for the purpose of having careful and correct accountings submitted to said board, and each member thereof, for their personal consideration and information, and that it was further the duty of said board, and each member thereof, at all times to have direct and first-hand information as to the amount of the currency and securities on hand, and to know the value of said securities, and to see to it they were kept safely, and that the value thereof was not unreasonably allowed to become depreciated by delays or neglect in the collection thereof, and to generally supervise all of the activities of said banking institution in order that its solvency be sustained, its legal reserve kept intact, and

your complainants say that they severally relied upon the defendants as such directors in said behalf, and because of said reliance deposited their money in said banking institution in the amounts hereinafter stated."

(B) "That at the time of the merger of the various banking institutions . . . no additional capital was added to the outstanding capital. . . . That these plaintiffs are informed and believe that the capital stock of all of said banking institutions were impaired at the time of the said merger, and that the cash market value of the assets of such banks was insufficient to pay their respective liabilities to depositors and other creditors, . . . and that therefore the said institution was insolvent."

(C) "That the defendants, acting as board of directors of said parent bank, well knew that said institution was insolvent and could only hope to remain open for business by a concentrated effort individually and collectively . . . to influence the public, and particularly the plaintiffs herein, to deposit money in said insolvent institution, and that in furtherance of said organized effort the said defendants, at various times and by various and sundry representations, schemes, and untruthful and misleading statements as hereinafter set out, caused the public, and particularly the plaintiffs herein, to deposit their money as a class, namely, unsecured depositors, in said institution."

(D) "That in spite of the knowledge on the part of the defendants, acting as directors of said parent bank, that the said bank was insolvent, unsafe, and without assets sufficient to meet its deposit liabilities and other creditors at the time of its organization, the defendants continued with reckless disregard of the rights of the plaintiffs and the general public . . . to operate a banking institution with full knowledge that the financial condition of the said institution was hopelessly involved, . . . and said defendants wrongfully received or wrongfully permitted the employees of the bank to receive deposits in said insolvent institution, and particularly the deposits of the plaintiffs. . . . That the plaintiffs, at various times between the opening of said parent bank on 11 February, 1927, to the date of its closing on 4 April, 1929, severally deposited in said bank as a class, namely, unsecured depositors, varying amounts as more particularly set out, . . . which said statement represents the amount of deposits to the credit of the various plaintiffs named therein at the time of the closing of the parent bank on 4 April, 1929, less 40 per cent dividend paid by the receiver."

(E) "That the defendants loaned or permitted to be loaned directly or indirectly to the officers and directors of the institution the sum of $525,867.44."

(F) "That by reason of the wrongful acts of the defendants as hereinbefore set out, the plaintiffs have met with a loss individually and collectively in the sum of $149,336.05."

The prayer of the complaint was that the plaintiffs have judgment against the defendant "jointly and severally in the sum of $149,336.05," etc.

The defendants demurred to the complaint for that:

1. There was a misjoinder of causes of action and parties.

2. That the complaint does not state facts sufficient to constitute a cause of action in behalf of plaintiffs, as they have suffered no special damages peculiar to themselves as distinguished from all other depositors of said trust company, and further, that the right to institute the action rested solely with the Commissioner of Banks.

It appears from the complaint that the bank was closed on 4 April, 1929.

The trial judge was of the opinion that the demurrer should be sustained and the action dismissed, and from judgment accordingly plaintiffs appeal.

W. H. Childs, W. M. Nicholson, and J. Laurence Jones for plaintiffs.

Clyde R. Hoey, W. C. Feimster, A. C. Jones, E. B. Denny, E. R. Warren, and A. L. Quickel for defendants.

BROGDEN, J. The ultimate question in the case is whether the words of the complaint, reasonably construed, classify the action within the principle of *Douglass v. Dawson,* 190 N. C., 458, 130 S. E., 195, or within the principle applied in *Bane v. Powell,* 192 N. C., 387, 135 S. E., 118.

One of the distinctions between those two cases was pointed out in *Wall v. Howard,* 194 N. C., 310, 139 S. E., 449. *Stacy, C. J.,* writing in *Corporation Commission v. Bank,* 193 N. C., 113, 136 S. E., 362, declares: "That the right of action against the officers and directors of a banking corporation for loss or depreciation of the company's assets, due to their wilful or negligent failure to perform their official duties, is a right accruing to the bank, enforceable by the bank itself, prior to insolvency, and hence enforceable by the receiver for the benefit of the bank, as well as for the benefit of its creditors, is the holding or rationale of all the decisions on the subject."

The thought movement of the complaint begins with specifically pointing out the duties of the officers and directors and defining them to be: (a) Accurate information as to assets and liabilities; (b) condition of reserve fund; (c) character and insolvency of loans and discounts, and "to so manage and superintend its affairs as to prevent a

discount or purchase of paper not financially good for sale, and at all times to see to it that its reserve was maintained in accordance with law." It is then alleged that the directors and officers brought about a merger of several small banks, and that as a result of the merger the parent bank was thereby rendered insolvent. Furthermore, it was asserted that the officers and defendants, with reckless disregard of the rights of the plaintiffs, wrongfully received or wrongfully permitted employees to receive deposits of the plaintiffs and others, well knowing that the institution was insolvent. It was further alleged that the defendants had loaned directly or indirectly to various officers and directors of the bank sums of money exceeding a half million dollars.

The concluding paragraph of the complaint asserts "that by reason of the wrongful acts of defendants, as hereinbefore set out, plaintiffs have met with a loss individually and collectively in the sum of $149,336.05," etc.

There is no specific allegation that the Commissioner of Banks took charge of the assets of the Commercial Bank and Trust Company of Gastonia when its doors were closed on 4 April, 1929, but it does appear from paragraph 15 of the complaint that the plaintiffs have received a forty per cent dividend, "paid by the receiver."

There is no allegation that demand has been made upon the receiver or Commissioner of Banks to institute an action against the officers and directors, or that such receiver has otherwise failed to perform his duties.

An analysis of the complaint leads the court to the conclusion that the complaint invokes the principles applied in *Douglass v. Dawson, supra; Roscower v. Bizzell,* 199 N. C., 656, 155 S. E., 558, and *Merrimon v. Asheville,* 201 N. C., 181.

Affirmed.

S. P. HOUSER v. W. T. LOVE, J. WHITE WARE, ET AL.

(Filed 28 January, 1935.)

CIVIL ACTION, before *Oglesby, J.,* at January Term, 1934. From LINCOLN.

Plaintiff was a depositor in the Commercial Bank and Trust Company of Gastonia, and the defendants are officers and directors of said bank. The allegations of the complaint are substantially identical with those appearing in *Sain et al. v. Love et al., ante,* 588. The substantial

difference in the allegations of the complaint in the two actions are perhaps found in paragraph 17 of the complaint in the case at bar. In said paragraph the plaintiff alleges that he deposited certain sums of money on 21 March, 1929, and prior to 3 April, 1929, and on 4 April, 1929, the day the bank was closed, and that "since closing of said bank on 4 April, 1929, plaintiff has received several dividends from the liquidating agent, together with paid checks, amounting to $1,500."

The defendants demurred to the complaint upon the same ground as set out in the *Sain case, supra.* The trial judge sustained the demurrer and the plaintiff appealed.

S. J. Durham, W. H. Childs, W. M. Nicholson, and J. Laurence Jones for plaintiff.

Clyde R. Hoey, W. C. Feimster, A. C. Jones, E. B. Denny, E. R. Warren, and A. L. Quickel for defendants.

PER CURIAM. The judgment is affirmed upon authority of *Sain v. Love, supra.*

Affirmed.

ORANGE COUNTY v. GEORGE D. ATKINSON AND WIFE, MRS. GEORGE D. ATKINSON (AND C. M. CATES, LIENHOLDER, AND MYRON PERRY LLOYD AND WIFE, MAE HOLMES LLOYD, ADDITIONAL PARTIES DEFENDANT).

(Filed 28 January, 1935.)

1. Appeal and Error F b—Exception to signing of judgment presents question of sufficiency of agreed facts to support judgment.

Intervenors, the trustee and holder of notes secured by the deed of trust, moved to set aside foreclosure of the tax-sale certificate against the property for irregularities in that the sale was not held on the proper day under the provisions of the statute. Judgment was entered on the agreed facts denying the motion. Movants excepted for that the court signed the judgment: *Held*, the exception presents the question of whether the judgment was supported by the facts agreed, and it appearing of record that movants had not been made parties to the foreclosure of the tax-sale certificate, judgment is reversed for that the facts found and admitted are not sufficient to support it.

2. Appeal and Error J g—

The judgment denying motion to set aside foreclosure of tax-sale certificate being reversed for irregularity in that holders of registered liens were not made parties, the exception based upon the ground that the sale was not had on the proper day under the provisions of the statute need not be considered.

3. Taxation H b—

Where the trustee and holders of notes secured by registered deed of trust against the property are not made parties to the foreclosure of the tax-sale certificate, they may intervene and make motion in the cause to set aside the tax foreclosure for such irregularity.

APPEAL by defendant C. M. Cates, from *Cranmer, J.*, at October Term, 1934, of ORANGE. Reversed.

"Agreed statement of facts: The above-entitled action was brought in the Superior Court of Orange County to foreclose a tax certificate held by the plaintiff on property situated in Orange County and listed for taxes in the name of George D. Atkinson. C. M. Cates has duly been made a party defendant for the purpose of making a motion to set aside the sale of the property on the grounds that same is irregular, and should therefore be declared void. The parties to this motion, through their counsel, have agreed that the following are the true facts relative to said proceeding, and hereby move the court to render judgment on these facts: (1) That on 2 December, 1930, the plaintiff Orange County instituted an action to foreclose a tax certificate held by it against the lands listed in the name of George D. Atkinson, and on said date summons was issued and thereafter duly served upon the defendants George D. Atkinson and wife. That complaint was filed on 4 December, 1930, alleging the nonpayment of taxes assessed against the lands described therein for the year 1928 in the sum of $15.70, demanding judgment for said amount and the foreclosure of the tax certificate by the sale of said lands.

"(2) That no answer was filed by the defendants George D. Atkinson and wife, and on 1 June, 1931, an interlocutory judgment was entered by the clerk for the recovery of said sum of $15.70 and an order of the sale of the said lands as follows, to wit: 'And the same be and they are hereby condemned to be sold under the direction of this court for the purpose of applying the proceeds thereof on said debt, interest and cost, and Bonner D. Sawyer is hereby appointed commissioner to sell said land at public auction at the courthouse door in Hillsboro, N. C., to the highest bidder for cash, after having posted a notice of sale at the courthouse door and three public places in Orange County thirty days prior to said sale, and by publishing a notice thereof once a week for four successive weeks immediately preceding said sale in some newspaper published in Orange County, and report the said sale to this court immediately; said sale may be had on any day except Sunday.'

"(3) That the said land was sold by the commissioner on Monday, 13 July, 1931, for the sum of $120.00, and report of sale made on that date. That thereafter, and within the time allowed by law, an upset bid was placed upon said land and paid into the office of the clerk.

"(4) That on 3 August, 1931, an order was entered by the clerk as follows: 'Now, therefore, it is ordered, considered, and adjudged that Bonner D. Sawyer, commissioner, advertise said land for resale 15 days in some newspaper published in Orange County, as prescribed by law.' That pursuant to said order, the commissioner advertised the said land and resold same on Monday, 24 August, 1931, and filed his report on said date. That at said sale J. W. Bennett and J. F. Thompson became the last and highest bidders in the sum of $135.00.

"(5) That said sale was confirmed by the clerk on 7 September, 1931, and the commissioner ordered to execute a deed to the purchasers at the sale. That on 9 September thereafter the said J. W. Bennett and J. F. Thompson, in writing, assigned their bid to Myron Perry Lloyd and Mae Holmes Lloyd, and same was filed in the office of the clerk. That on said 9 September, 1931, the commissioner executed and delivered to the said assignees a deed for the said land, same now being of record in Book of Deeds No. 92, at page 220, office of the register of deeds of Orange County.

"(6) That C. M. Cates, at the time of the institution of this action, was and is the holder and owner of a deed of trust on said land, and the same is a subsisting lien thereon, as set forth in his verified motion filed herein. Respectfully submitted and agreed, Giles & Giles, attorneys for C. M. Cates. Graham & Sawyer, attorneys for Orange County."

The judgment in the court below was as follows: "This cause coming on to be heard on appeal from the clerk, before his Honor, E. H. Cranmer, judge holding the courts of the Tenth Judicial District, at this October Term of Orange County Superior Court, upon motion of C. M. Cates, who holds a deed of trust and note on the land previously sold for taxes, and it appearing to the court that the parties, through their counsel, have agreed on the facts involved, and that the only question in controversy is the validity of the sale of the property on any Monday in any month, or whether the same should have been sold on the first Monday or the first three days of the term of court; the court is of the opinion, and so holds, that said sale was properly held, and the motion of C. M. Cates is hereby denied. E. H. Cranmer, Judge presiding."

The exception and assignment of error made by C. M. Cates is as follows: "The court signed the judgment as appears in the record, and the appellant assigns the same as error," and appealed to the Supreme Court.

Graham & Sawyer for plaintiff.
Giles & Giles for C. M. Cates.

CLARKSON, J. From the agreed statement of facts and C. M. Cates' verified motion, the record shows the following: "C. M. Cates has been

duly made a party defendant for the purpose of making a motion to set aside the sale of the property on the grounds that the same is irregular, and should therefore be declared void." From the view we take of this case, we think it immaterial on which day the sale was held. The sale was void as to C. M. Cates. The judgment in the court below recites that the decision was based on whether the sale was made on a proper day under the statutes, and held that it was. C. M. Cates excepted and assigned error that "the court signed the judgment as appears in the record," and appealed to the Supreme Court.

In *Wilson v. Charlotte,* 206 N. C., 856 (858), it is said: "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."

On the face of the record, there was irregularity in the judgment as to C. M. Cates, it was void. The facts found and admitted are not sufficient to support the judgment. *Dixon v. Osborne,* 201 N. C., 489.

It is found in the agreed statement of facts: "(6) That C. M. Cates, at the time of the institution of this action, was and is the holder and owner of a deed of trust on said land, and the same is a subsisting lien thereon, as set forth in his verified motion filed herein."

The defendant George D. Atkinson owned a certain tract of land in Orange County, N. C. For the year 1928 taxes were assessed against the land in the name of Atkinson in the sum of $15.70. The land was foreclosed and sale confirmed for the nonpayment of the tax. The land was purchased by J. W. Bennett and J. F. Thompson for the sum of $135.00. They assigned their bid to Myron Perry Lloyd and Mae Holmes Lloyd, and deed was duly made to them by the commissioner.

The land was encumbered with a deed of trust to J. A. Giles, trustee for C. M. Cates, for purchase price of $2,250.00 for the land. The deed of trust was dated 19 January, 1924, and duly recorded in Book of Mortgages No. 70, page 17, register of deeds' office for said county. In the foreclosure proceeding neither C. M. Cates nor J. A. Giles, trustee, were made parties to the action.

The question involved: Can the purchasers obtain, in the foreclosure action for the 1928 tax of $15.70, a title free and clear of the lien of $2,250 without making C. M. Cates, or the trusteee, J. A. Giles, a party to the foreclosure action, and without notice and opportunity given them or either of them to be heard? We think not. *Beaufort County v.*

Mayo, ante, 211. In the *Beaufort County case* this matter was given careful and thorough consideration. A petition to rehear was filed and dismissed on 10 January, 1935. In the petition and motion of C. M. Cates to be made a party and opportunity given him to be heard is the following: "That the said C. M. Cates stands ready, able, and willing to pay the said taxes for 1928, and all taxes rightly due and owing on the said lands, and hereby tenders said taxes."

In accordance with the above, all the taxes for 1928 and subsequently rightly due and owing on the land to Orange County must be paid. The *Beaufort County case, supra,* was not decided until 31 October, 1934, after the present case was heard in the court below.

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

Reversed.

THE TOWN OF SMITHFIELD AND E. S. STEVENS v. THE CITY OF RALEIGH AND GEORGE A. ISELEY, J. H. BROWN, AND ED. M. BARTON, COMMISSIONERS OF THE CITY OF RALEIGH.

(Filed 28 January, 1935.)

Municipal Corporations E d—C. S., 7125, does not impose mandatory duty on court to restrain city from discharging raw sewage in stream.

C. S., 7125, does not impose the mandatory duty upon the trial judge of enjoining a municipality from discharging raw sewage into a stream from which another municipality takes its water supply, and where in an action for such injunctive relief the trial court finds that the acts complained of have resulted in no injury or inconvenience to the inhabitants of complaining municipality, and that there were no facts tending to show immediate menace to them, and that the financial condition of defendant municipality is such that it could not immediately install purification plants, and that therefore the granting of the order prayed for would cause untold hardship upon the inhabitants of defendant municipality, the court's order denying the injunctive relief but providing that the judgment should not prevent the bringing of another suit for the same relief upon a change in the fundamental conditions, will be upheld on appeal.

CIVIL ACTION, before *Grady, J.,* at June Term, 1934, of WAKE.

The plaintiff alleged in substance that the town of Smithfield is situated on the banks of Neuse River; that the defendants maintain a sewerage system for the use of the citizens of the municipality, and that such system is used by residents, hotels, business houses, and hospitals of the city of Raleigh, and that through the various sewer lines of the defendant "raw sewage is discharged into Walnut Creek and Crabtree

Creek, and through said creeks flows into the Neuse River, a short distance from Raleigh, thereby polluting and contaminating the waters not only of Walnut Creek and Crabtree Creek, but also the waters of Neuse River." It was further alleged that the town of Smithfield takes its water supply from Neuse River below the points on said river where the defendants cause said raw sewage to be discharged, and that "the continued acts of defendants in the maintenance and operation of the sewer line, . . . and the discharge of raw sewage into said creeks and through said creeks into the Neuse River, constitutes a menace to the health of the citizens of the town of Smithfield; and in the event of an epidemic of typhoid fever or other contagious disease in the city of Raleigh, the citizens of Smithfield could not possibly be protected against said epidemic."

The defendants admitted that the city of Raleigh "has no improved or modern sewerage or treatment plant, but . . . the sewage emptied by the city of Raleigh into Walnut Creek and Crabtree Creek is by means of infiltration, oxidation, and stream flow, subjected to such purification that it constitutes no sort of detriment or menace to the town of Smithfield or its inhabitants," etc.

Upon the pleadings and certain affidavits appearing in the record the plaintiffs ask "that the defendants immediately be restrained and enjoined from discharging untreated sewage into said creeks and through said creeks into the waters of Neuse River, as above set out."

The trial judge found the facts substantially as follows:

1. Smithfield is a municipal corporation, situate upon the eastern bank of Neuse River, with a population, according to the census of 1928, of 2,548. It owns and operates a water plant, established in 1916, and enlarged in 1924. The water is pumped out of Neuse River, purified by chlorination, and distributed to its citizens for the usual household purposes.

2. Raleigh is a municipal corporation, situated upon the plateau between Walnut and Crabtree creeks, in Wake County. The population, according to the last census, was 37,379, and included within the area to be affected by the decree are several suburban developments and public institutions, "and the court finds that the present total population of the area in question, which uses the water and sewerage system of the defendant corporation, is approximately 42,000."

3. In 1891 Raleigh constructed its sewerage system with one line emptying into Walnut Creek and the other in Crabtree Creek, at points approximately 33 miles distant from the town of Smithfield. Said sewage is not treated, but is emptied into said creeks in a raw state. Said sewerage system further serves State College, State Prison, Central

Hospital for the Insane, the Institution for the Blind, the State Capitol, Governor's Mansion, all State Departments, Peace Institute, St. Mary's College, and various suburban developments.

4. Evidence was offered by both sides as to the effect of sewage upon the waters of Neuse River at Smithfield, but such evidence is very unsatisfactory.

5. The stoppage of the flow of sewage into Walnut and Crabtree creeks would result in untold misery and discomfort to more than 40,000 people. The city of Raleigh is two years in default on the payment of its bonded indebtedness, amounting to $5,500,000. "Its borrowing capacity has reached its limit and application has been made to Federal agencies for a loan of $800,000 with which to construct a sewage disposal plant," etc.

6. There was no evidence that Smithfield has suffered inconvenience by reason of the defendant's violation of C. S., 7125, and there was no evidence of a single case of typhoid fever, colitis, dysentery, or any other disease caused by pathogenic bacteria. The population of Smithfield represents 6.81 per cent of the population which would be affected by the decree prayed for. "The court has drunk of its water and bathed in it, and has suffered no ill effects therefrom."

From the findings of fact made, the trial judge entered judgment in part as follows: "Upon the facts admitted and found by the court, it is now ordered and adjudged that the petition be denied, and the action is dismissed at the cost of the plaintiffs. . . . This judgment shall not be taken hereafter, or held to be an estoppel against the plaintiffs, in case another action is brought for the same cause, whenever it shall be made to appear that the defendants are in a position to comply with the statute which forms the basis of this action."

The only assignment of error is as follows: "That the judgment of his Honor upon the pleadings and upon the facts found by the court is erroneous."

From judgment rendered plaintiffs appealed.

G. A. Martin for plaintiffs.

J. M. Broughton and W. H. Yarborough, Jr., for defendants.

BROGDEN, J. Does C. S., 7125, impose upon the trial judge the mandatory duty of enjoining a municipality from discharging raw sewage into a stream from which another municipality takes its water supply?

There were no exceptions taken to the findings of fact made by the trial judge. The pertinent findings were: (a) That the discharge of raw sewage into Neuse River, in view of the facts and circumstances, had produced no injury to the plaintiff, and there were no facts tending

to show immediate menace to the inhabitants of the plaintiff municipality; (b) that the defendant is not in a financial condition to immediately install purification plants necessary to comply with the provision of the statute.

Indeed, it seems that the trial judge subjected the question to "trial by water," because the record discloses that his Honor "had drunk of the water, bathed in it, and suffered no ill effects." The ancient mode of "trial by water" was aforetime deemed efficacious in determining the guilt or innocence of witches, and by applying the practices of the ancient law the distinguished jurist has found the waters of Neuse River not guilty.

The principal cases in this jurisdiction construing C. S., 7125, are: *Durham v. Cotton Mills,* 141 N. C., 615, 54 S. E., 453; *Shelby v. Power Co.,* 155 N. C., 196, 71 S. E., 218; *Board of Health v. Commissioners,* 173 N. C., 250, 91 S. E., 1019. These cases proceed upon the theory that a violation of C. S., 7125, authorizes the exercise of the restraining power of a court of equity, irrespective of the fact that no injury has actually occurred. It is the threat or potentiality of menace rather than the accomplished fact thereof that warrants the interposition of equitable power. Notwithstanding, common sense is older than the common law, statutory law, or equity, and this saving grace of human experience must be reckoned with in determining the application of technical rules of behavior. If the trial judge had granted the prayer of the plaintiffs and had immediately restrained the city of Raleigh from using its sewerage system and plugged the entire system with the force of law, untold misery and suffering would be entailed upon a population of over 40,000 people. The statute recognizes such practical exigencies of social life, and declares that "the continued flow and discharge of such sewage may be enjoined upon application of any person." The words "may be enjoined" clearly demonstrate that surrounding facts and circumstances must be considered in entering a peremptory order of the kind sought in this action. The cases referred to all disclose that a reasonable time was accorded for complying with the statute.

Manifestly, Raleigh must comply with C. S., 7125. This statute pronounces the public policy of the State, against which, temporizing and unreasonable delay will not avail. This idea was doubtless in the mind of the trial judge because it is particularly specified in the judgment that the same "shall not be taken hereafter, or held to be an estoppel against the plaintiffs, in case another action is brought for the same cause," etc.

Affirmed.

K. M. BIGGS, TRUSTEE, v. WALTER L. OXENDINE.

(Filed 28 January, 1935.)

1. Ejectment A a—

In an action in ejectment in which both parties claim title to the land in controversy from a common source, plaintiff may connect defendant with the common source of title and show in himself a better title from that source.

2. Mortgages H h—The law presumes regularity in the execution of the power of sale in a deed of trust.

The law presumes regularity in the execution of the power of sale in a deed of trust duly executed and regular upon its face, and the recital of proper advertisement in the trustee's deed to the purchaser at the sale is *prima facie* evidence of proper advertisement, and the burden is on the party attacking the validity of the sale to show failure of the trustee to properly advertise the sale.

3. Same—

It is not required that the trustee in a deed of trust give notice of sale under power contained in the instrument to the mortgagor or the purchaser of the equity of redemption, nor is the notice of sale defective for the sole reason that the name of the mortgagor is not recited therein.

4. Ejectment C b: Mortgages C c—

Where plaintiff in ejectment claims title as purchaser at the foreclosure sale of a registered deed of trust against the property, defendant's subsequently registered contract of conveyance from the mortgagor is properly excluded from evidence, plaintiff's prior registered deed of trust being notice to the world.

5. Mortgages H h—

Where foreclosure under power in a deed of trust is advertised according to law, the recital in the trustee's deed to the purchaser at the sale that the advertisement was printed in one newspaper published in the county, whereas in fact the advertisement was published in another newspaper published in the county, is not a vital defect.

CLARKSON, J., concurs in result.

CIVIL ACTION, before *Cranmer, J.*, at April Civil Term, 1934, of ROBESON.

J. H. Hagen and wife were indebted to I. P. Graham and wife in the sum of $357.75. On 28 May, 1927, the said Hagen and wife executed a promissory note for said indebtedness, due 1 November, 1927, and in order to secure the same duly executed and delivered a deed of trust upon the property to E. M. Johnson, trustee, which said deed of trust was duly recorded on 28 May, 1927. Default was made in the payment of said indebtedness, and thereafter, to wit, on 8 December, 1930, E. M. Johnson, trustee, executed and delivered to the plaintiff K. M. Biggs,

trustee, a deed of conveyance for said property. This deed recites the mortgage given by Hagen on 28 May, 1927, and the registration thereof in Book 76, page 193, in the office of the register of deeds for Robeson County, and that there was default in the payment of the note secured thereby, and that the lands described therein were "duly advertised for sale by publishing a notice in the *Robesonian,* a newspaper published in the town of Lumberton, North Carolina, for a period of thirty days, and by publishing a notice of said sale at the courthouse door and three other public places in Robeson County." The deed further recites that pursuant to such notice the lands were duly sold at public auction at the courthouse door on 24 November, 1930, when and where the plaintiff became the purchaser for the sum of $300.00, etc. The sale was made under a second deed of trust. Hagen, the grantor in the deed of trust, remained in possession of the land until his death in August, 1933.

On 25 November, 1933, the plaintiff brought a suit in ejectment against the defendant, alleging the execution and delivery of the deed of trust and the sale thereunder, together with deed from Johnson, trustee, to the plaintiff, and further alleging that after the death of Hagen, the defendant, "without the knowledge or consent of the plaintiff, entered upon the land, . . . and thereafter forbade . . . a tenant of the plaintiff, and in possession of said land, to continue to use the stables, . . . and by threats, commands, and acts has interfered with the work of said tenant, so that the said tenant has been unable and is now unable to continue to fulfill and carry out his obligations as tenant," etc. Upon such allegation the plaintiff prayed that he be declared to be the owner and entitled to the possession of the land, etc.

The defendant answered denying that the plaintiff was the owner of the land, but admitting that he was in possession thereof. He also denied that the sale under the deed of trust was proper or valid, and alleged that there was a written contract between Hagen and the defendant, dated 28 May, 1927, providing, among other agreements, "that in the event of the death of J. H. Hagen before either of the above-mentioned mortgages had been paid in full, or in the event the said J. H. Hagen is unable to pay any installment of principal or interest on either of said mortgages, . . . the said fifty-eight acres above mentioned shall become the property of said Walter L. Oxendine," etc. This contract was duly recorded on 15 July, 1927.

At the trial the plaintiff offered the deed of trust from Hagen and wife to Johnson, trustee, and the deed from Johnson, trustee, to the plaintiff, and rested. The defendant attempted to offer evidence tending to show: (a) That he had no notice of the advertisement of the property; (b) that the same was advertised in the *Scottish Chief,* a newspaper published in Robeson County, although the deed from the

trustee recited that the notice of sale had been published in the *Robesonian*, a newspaper published in Robeson County. It was admitted by the plaintiff "that the advertisement offered in evidence was published . . . in the *Scottish Chief*, a newspaper published in Robeson County." (c) That Biggs, the plaintiff, knew about the contract or agreement between Hagen and the defendant; (d) that he owned land near the land in controversy; (e) that he had a written contract with Hagen with reference to the land, hereinbefore referred to, by virtue of which he claimed title.

The trial judge excluded testimony relating to the matters referred to, and the defendant took various exceptions to such rulings.

Two issues were submitted to the jury, as follows:

1. "Is plaintiff the owner and entitled to the possession of the lands described in the complaint?"

2. "Does defendant unlawfully withhold the possession?"

The jury was instructed to answer the issues in favor of the plaintiff, and from judgment upon the verdict the defendant appealed.

Varser, McIntyre & Henry for plaintiff.

McNeill & McKimmon and David H. Fuller for defendant.

BROGDEN, J. This is an action in ejectment and both parties claim title to the land in controversy from a common source. Under such circumstances the "plaintiff may connect the defendant with a common source of title and show in himself a better title from that source." *Mobley v. Griffin*, 104 N. C., 113, 10 S. E., 142; *Ricks v. Brooks*, 179 N. C., 204, 102 S. E., 207; *Moore v. Miller*, 179 N. C., 396, 102 S. E., 627. Pursuant to the accepted principle so established, the plaintiff offered the deed of trust from Hagen to Johnson, trustee, which was in due form, properly executed and duly recorded on 28 May, 1927, together with the deed from Johnson, trustee, dated 8 December, 1930, and duly recorded on 5 May, 1932. The law presumes regularity in the execution of the power of sale in a deed of trust duly executed and regular upon its face; and if there is any failure to advertise properly, the burden is on the attacking party to show it. *Jenkins v. Griffin*, 175 N. C., 184, 95 S. E., 166; *Lumber Co. v. Waggoner*, 198 N. C., 221, 157 S. E., 193; *Phipps v. Wyatt*, 199 N. C., 727, 155 S. E., 721. Furthermore, the recital of proper advertisement in a deed made in the exercise of such power of sale is *prima facie* evidence of such fact. *Brewington v. Hargrove*, 178 N. C., 143, 100 S. E., 308.

The defendant offered no evidence of fraud, suppressed bidding, or other facts cognizable by a court of equity. While it is proper and desirable for a trustee or a mortgagee to give notice of sale to the mort-

gagor, nevertheless such notice is not required. *Call v. Dancy,* 144 N. C., 494, 57 S. E., 220. Nor is a notice of sale defective for the sole reason that the name of the mortgagor is not recited in the notice, which is otherwise correct and formal.

The ruling of the trial judge in excluding the contract between the defendant and Hagen, the mortgagor, is sustained for the reason that the deed of trust through which the plaintiff derives title was recorded prior to the contract between Hagen and the defendant, and such registration is notice to the world.

The deed from the trustee to the plaintiff recites that the notice of sale was published in the *Robesonian,* and at the trial it was admitted that the land was advertised in the *Scottish Chief,* both newspapers being published in Robeson County. There is no evidence that the notice of sale was not published in the *Robesonian,* as recited in the deed; but if, as a matter of fact, the said notice was duly published in a newspaper as required by law, the recital in the deed of a different newspaper would not constitute a valid defect.

In the last analysis the plaintiff held a deed for the premises, complete and regular upon its face, reciting the performance of all legal requirements in conducting the sale, and the defendant proffered no testimony or evidence tending to impeach the sale or to overthrow the presumption of regularity, and therefore the Court is of the opinion that the rulings of the trial judge were correct.

Affirmed.

CLARKSON, J., concurs in result.

J. W. HOKE, ADMINISTRATOR OF D. A. ABERNETHY, DECEASED, v. FIRST SECURITY TRUST COMPANY, TRUSTEE.

(Filed 28 January, 1935.)

Executors and Administrators C b: Mortgages H b—Executor may not maintain suit to restrain foreclosure of mortgage on lands devised by will.

The owner of lands executed a will devising certain lands to his wife and children in common, with direction to the executor named in the instrument to divide the lands equally among them. Thereafter he executed a power of attorney and deed of trust on the lands. After his death the administrator *c. t. a.* brought action to cancel the power of attorney and deed of trust and restrain foreclosure thereunder upon allegations of mental incapacity: *Held,* the action should have been dismissed and the temporary restraining order dissolved, since the administrator

c. t. a. had no interest in the lands and could not maintain an action in respect thereto, the law casting title to the lands upon the devisees upon the death of testator, and the direction for equal division of the lands not conveying any interest therein to the executor. Nor would this result be altered by an allegation that the personalty of deceased was insufficient to pay the debts of the estate, since an executor authorized to sell lands to make assets may not enjoin the foreclosure of a valid deed of trust against the property.

APPEAL by defendant from *Harding, J.*, at August Term, 1934, of CATAWBA. Reversed.

The plaintiff is the administrator *cum testamento annexo* of D. A. Abernethy, who died in Catawba County, North Carolina, during the month of October, 1933, having first made and published his last will and testament, which has been duly probated and recorded. The said last will and testament was executed on 31 July, 1928, and contains the following provisions with respect to the real estate of the testator:

"Third. I desire that my real estate be divided equally in value between my wife and my children; accordingly I devise to my wife and to each of my children a one-sixth undivided interest in all my real estate. My executor shall divide said real estate, and in making said division I recommend that my wife receive the home place, with sufficient land and timber but not including the Mill Property, and that the value of her share of real estate be as of the time of my death of the actual land owned by me and before any debts are charged against any real estate. The share of John W. Abernethy to include the property which he has improved and where he now lives. The share of Dr. Andrew Abernethy to be allotted next to and adjoining his present farm which he purchased from Mrs. Bell Bowman. The share of my deceased son, Arvin M. Abernethy, which goes to his children, to embrace the lands closest to his late home place. In each and all cases, I direct that my executor allot the real estate to each child so as to place each child's share adjoining, if possible, land already owned by said child.

"In the equalization of the value of the shares herein directed, the improvements made by John W. Abernethy shall not be considered, that is, such improvements which were made by him shall be allotted to him and not charged against him.

"In the equalization of the shares of my deceased son, Arvin M. Abernethy, I direct that my executor take into consideration an exchange of land between myself and my late son wherein I deeded to him some good land in exchange for some poor land, and it was understood that the value of the poor land should be raised to that of the good land in ascertaining the value of his share."

"Fourth. I desire that my wife receive her share of the real estate free and clear of all obligations, and to that end I direct that my execu-

tor look to the balance of the real estate for the payment of any obligations of the estate in the event there should not be sufficient personal property not bequeathed."

By a codicil executed by the testator on 13 May, 1929, the share of his real estate devised to his wife in fee simple was devised to her for and during the term of her natural life.

On 13 May, 1929, D. A. Abernethy and his wife, Alice Abernethy, executed a power of attorney by which they appointed Dr. A. D. Abernethy as their attorney in fact. Among other things, the said Dr. A. D. Abernethy, as attorney in fact for the said D. A. Abernethy and his wife, Alice Abernethy, was authorized and empowered "to borrow money and make, execute, sign, and deliver mortgages on real estate now owned by us or any one of us, and standing in our names or in the name of any one of us, and to make, execute, sign, and deliver any and all promissory notes necessary in the premises."

It was provided in said power of attorney that the said Dr. A. D. Abernethy, out of the proceeds of the sale of any timber or land made by him, or out of any money borrowed by him, should pay the indebtedness of the said D. A. Abernethy or his wife, Alice Abernethy, to the First National Bank of Hickory, North Carolina.

The said power of attorney was duly recorded in the office of the Register of Deeds of Catawba County.

On 14 December, 1929, D. A. Abernethy and his wife, Alice Abernethy, executed a deed of trust by which, for the purpose of securing their two notes aggregating the sum of $4,295.37, payable to the First National Bank of Hickory, ninety days after date, they conveyed to the defendant First Security Trust Company, trustee, the lands described therein. Dr. A. D. Abernethy, as attorney in fact, joined in the execution of said deed of trust, which was thereafter duly recorded in the office of the register of deeds of Catawba County. The notes secured by said deed of trust have not been paid. At the request of the holder of said notes, the defendant, under the power of sale contained in said deed of trust, advertised the lands described therein for sale on 28 July, 1934.

This action was begun on 28 July, 1934, to restrain the sale of the lands described in the deed of trust by the defendant, and for the cancellation of the power of attorney and the deed of trust executed by D. A. Abernethy, deceased, on the ground that at the dates of their execution, respectively, the said D. A. Abernethy, on account of his advanced age and physical infirmities, was without sufficient mental capacity to execute either the power of attorney or the deed of trust.

The action was heard (1) on the motion of the defendant that the action be dismissed for that the plaintiff, on the facts alleged in his complaint, is not entitled to maintain the same, and (2) on the motion

of the defendant that the temporary restraining order issued in the action be dissolved.

Both motions were denied. From order continuing the restraining order to the final hearing, the defendant appealed to the Supreme Court.

A. A. Whitener and Louis A. Whitener for plaintiff.
E. B. Cline and C. W. Bagby for defendant.

CONNOR, J. In *Speed v. Perry,* 167 N. C., 122, 83 S. E., 176, which was an action to set aside certain deeds described in the complaint on the ground, among others, that the grantor in said deeds was without sufficient mental capacity to execute the same, it is said:

"There is another question in this case; the plaintiffs have shown no right to bring this suit. They have no cause of action. The real estate did not vest in them. This Court held, in *Floyd v. Herring,* 64 N. C., 409, following *Ferebee v. Procter,* 19 N. C., 439, that 'a personal representative has no control of the freehold estate of the deceased, unless it vested in him by a will, or where there is a deficiency of personal property and he obtains a license to sell real estate for the payment of debts. The control derived from a will may be either a naked power of sale or a power coupled with an interest. The heir of the testator is not divested of the estate which the law casts upon him by any power or trust until it is executed.'

"It is admitted that Mr. Davis' estate is solvent, he having had valuable property not encumbered by any debt. This being so, the executors cannot even sell to pay debts, for there are none. We do not know what disposition is made of the estate in the will, and unless they have acquired a right under it to bring this action, they are without standing in the court."

The plaintiff has acquired no right under the will of D. A. Abernethy, deceased, to bring this action. The testator devised all his real estate, including the land conveyed by the deed of trust, to the devisees named in the will. The direction in the will that the executor named therein divide all his real estate among the devisees in equal shares does not confer upon the plaintiff any interest in the land conveyed by the deed of trust. He therefore has no cause of action with respect to the real estate of the deceased by reason of the will. See *Barbee v. Cannady,* 191 N. C., 529, 132 S. E., 572.

It is not alleged in the complaint in this action, nor was it made to appear at the hearing, that the estate of D. A. Abernethy, deceased, is insolvent. Even if it had been so alleged, or if it had been made so to appear, the plaintiff was not entitled to an order restraining the sale of the land described in the deed of trust by the defendant. See *Miller v.*

Shore, 206 N. C., 732, 175 S. E., 133. In that case it is held that an executor is not entitled to an order restraining the sale of land owned by his testator at his death, under a valid deed of trust, which was executed by his testator, although the executor had obtained an order for the sale of the lands of his testator to make assets.

There was error in the refusal of defendant's motion that the action be dismissed. The order continuing the temporary restraining order to the final hearing is

Reversed.

STATE v. HARRISON MICKEY.

(Filed 28 January, 1935.)

1. Criminal Law I g—Instruction in this case is held for error in not conforming to averments of indictment.

The indictment charged defendant with unlawfully conspiring with M. and G., without words indicating conspirators other than those named. The trial court charged the jury that defendant would be guilty if he conspired as charged with M. and G., "or with others": *Held*, the charge was erroneous in that it went beyond the averments of the indictment, upon which defendant was entitled to rely for information of the accusation against him.

2. Criminal Law L e—Error in charge held not cured by contextual construction nor was the error harmless in the light of the evidence.

The court erroneously instructed the jury that defendant would be guilty if he unlawfully conspired with named conspirators, "or with others," when the indictment charged unlawful conspiracy with those named in the charge without words indicating others: *Held*, the error in the charge is not cured by construing the charge contextually as a whole, since it appears that the erroneous portion is in accord with the theory of the charge as a whole, nor was the error rendered harmless when considered in the light of the evidence upon the trial, since there was evidence introduced tending to show that defendant entered into the unlawful conspiracy with persons not named in the indictment.

APPEAL from *Clement, J.,* at June Term, 1934, of GUILFORD. New trial.

The bill of indictment upon which the defendant was tried and convicted is as follows:

"State of North Carolina—Guilford County.

Superior Court—June Term, A.D. 1934.

"The Jurors for the State Upon Their Oath Present, That Harrison Mickey, late of the County of Guilford, on the 20th day of April, in the year of our Lord one thousand nine hundred and thirty-four, with force

and arms, at and in the county aforesaid, unlawfully, wilfully, maliciously, and feloniously did secretly conspire and confederate with Robert H. Murphy and Howard Griffin to kill and murder one W. W. Dick and in carrying out said conspiracy and confederation to kill and murder said W. W. Dick, did unlawfully, wilfully, and maliciously and feloniously contract to pay Howard Griffin the sum of $6,000.00 and Robert H. Murphy the sum of $3,000.00, after W. W. Dick had been killed, and did come to Greensboro, N. C., with Robert H. Murphy and Howard Griffin, unlawfully, wilfully, and feloniously in furtherance of the aforesaid conspiracy and confederation to show or point out the said W. W. Dick to the said Robert H. Murphy and Howard Griffin, and did point out and show to the said Robert H. Murphy and Howard Griffin the place of business and residence of the said W. W. Dick, against the form of the statute in such case made and provided and against the peace and dignity of the State. H. L. KOONTZ, *Solicitor.*"

From judgment pronounced on the verdict, the defendant appealed to the Supreme Court, assigning errors.

John J. Ingle for defendant.

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

SCHENCK, J. The basis of one of the defendant's exceptive assignments of error is the following extract from the court's charge: "The burden is on the State to satisfy you beyond a reasonable doubt that this defendant is guilty of agreeing together with Griffin or Murphy, or both of them, or others to do an unlawful thing, to wit, kill W. W. Dick, before this defendant would be guilty of violating the law."

In view of the fact that the indictment charges *nominatim* the alleged conspirators and is not *cum multis aliis,* we are constrained to hold that his Honor erred in charging the jury in effect that if they should find beyond a reasonable doubt that the defendant conspired with Robert H. Murphy and Howard Griffin, or both of them, *or others,* to kill W. W. Dick, he would be guilty. The bill of indictment nowhere contains the words "others" or "another," or any other word or phrase indicating a charge against the defendant of conspiring with any other person or persons than Murphy and Griffin. The charge of his Honor virtually puts the defendant upon trial for an additional offense to that named in the bill, namely, conspiring with others than Murphy and Griffin. Upon the principle that "in all criminal prosecutions every man has the right to be informed of the accusation against him" (N. C. Const., Art. I, sec. 11), it oftentimes becomes necessary to set out the names of third parties, or at least indicate that there are such third parties, when

such parties are necessary for the consummation of the offense, or constitute a necessary part of the description of the offense. 14 R. C. L., 183.

We have examined the charge with the view of ascertaining whether, when considered contextually as a whole and not disconnectedly, the portion assailed by the defendant's exception is explained and cured, and have reached a contrary conclusion. For instance, in declaring and explaining the law his Honor used the following language: "Now, if you find beyond a reasonable doubt, gentlemen, that there was an agreement by this defendant and Griffin or Murphy, or both of them, that he was to pay him to kill Dick, then that would be unlawful, that would be a violation of the criminal law, because if he and anyone else, or any number of others, entered into an unlawful agreement to kill Dick, or to kill anybody else, that is, they agreed to do it, then they would be violating the law at that time, and it would make no difference whether they carried that plan out or not"; and, in setting forth the contentions of the defendant, told the jury: "The State contends from this testimony that you should be satisfied beyond a reasonable doubt that this defendant is guilty of conspiring together with Murphy, Griffin, and others to kill W. W. Dick." It would therefore appear that the portion assailed was in accord with the theory of the charge as a whole, and leads us to believe that his Honor was not advertent to the fact that the bill of indictment was limited to the defendant and Murphy and Griffin.

It is argued in the brief that this error of his Honor is harmless in that there was no evidence of any conspiracy with anyone other than Murphy and Griffin. This argument might avail if we could agree that there is no evidence upon which the jury might have found that the defendant conspired with others than Murphy and Griffin. An affidavit by the witness Robert H. Murphy contains the following: "Mickey told Howard Griffin if he did not do it he would have to get somebody else." An affidavit by Howard Griffin contains the following: "Mr. Mickey told me that he had given another man $20.00 to buy a gun to do this job, but that he had backed out," and again: "Mr. Mickey told me that if I did not hurry up and do the job that he was going to have to get somebody else, as the man who held the policy was pushing him for action." These affidavits, admitted in evidence over the objection of the defendant, tend to show a conspiracy, or at least a prospective conspiracy, between the defendant and some other person than Murphy and Griffin to kill W. W. Dick. They also tend to show that a conspiracy to kill W. W. Dick had existed between the defendant and "another man" to whom he had given "$20.00 to buy a pistol to do this job." They also further tend to show that a conspiracy to kill W. W. Dick existed between the defendant and "the man who held the policy."

In the light of this evidence, we think it was prejudicial to the defendant for the judge to have charged the jury in effect that they could convict him of conspiring with "others" when the bill of indictment charged the alleged conspirators by name and contained no words indicating others. This holding is in accord with *S. v. Diggs,* 181 N. C., 550.

There are other interesting questions raised in the record, but since the case goes back for a new trial we can see no good reason for commenting further upon them.

New trial.

D. NEWTON FARNELL, JR., ADMINISTRATOR C. T. A. OF TALLIE A. POOLE, DECEASED, v. GLADYS H. DONGAN AND HER HUSBAND, R. LEE DONGAN, C. L. HOLDEN, R. F. POOLE, AND OTHERS.

(Filed 28 January, 1935.)

Wills F h—Under C. S., 4166, devise lapses upon prior death of devisee unless devisee would have been heir at law and bequest lapses unless legatee would have been distributee of testator.

The owner of real and personal property executed a will devising and bequeathing all his property, both real and personal, to his wife. His wife predeceased the testator. Testator left no children him surviving. *Held,* the collateral heirs at law of testator are entitled to the real property, the devise to the wife having lapsed by reason of her prior death, and the provisions of C. S., 4166, not applying to prevent such lapse of the devise, since the wife would not have been an heir at law of testator had she survived him, but the children of the wife by a prior marriage are entitled to the personalty, since the wife would have been a distributee of the personal estate of her husband had she survived him, and the statute, C. S., 4166, providing that in such case the legacy should not lapse, but should go to the surviving issue of the legatee, the statute clearly recognizing the distinction between real and personal property for the purposes of devolution.

APPEAL by the defendants other than Gladys H. Dongan and her husband, R. Lee Dongan, and C. L. Holden, from *Alley, J.,* at November Term, 1934, of the Superior Court of GUILFORD. Modified and affirmed.

This is an action for a judgment declaratory of the rights of the defendants in and to the property, real and personal, which constitutes the estate of Tallie A. Poole, deceased. Ch. 102, Public Laws of N. C., 1931; N. C. Code of 1931, Art. 25 (a).

When the action was called for trial, the parties filed with the court a statement of facts agreed, which are as follows:

1. Tallie A. Poole died in Guilford County, North Carolina, on 2 February, 1934, leaving as his heirs at law and next of kin the defendants other than Gladys H. Dongan and her husband, R. Lee Dongan, and C. L. Holden. The defendants Gladys H. Dongan and C. L. Holden are the children, by a former marriage, of his wife, Nellie Bilbro Poole, who died on 12 January, 1931. Tallie A. Poole and Nellie Bilbro Poole were married to each other on 20 June, 1924. No children were born of their marriage. Tallie A. Poole left no issue surviving him. The defendants other than Gladys H. Dongan and her husband, R. Lee Dongan, and C. L. Holden, are his brothers and sisters, and nieces and nephews, the children of deceased brothers and sisters.

2. On 4 February, 1927, Tallie A. Poole duly executed as his last will and testament a paper-writing which is as follows:

"I, Tallie A. Poole, of Guilford County, North Carolina, declare this to be my last will, and hereby revoke all former wills:

"I will and bequeath to my wife, Nellie B. Poole, all of my property of every nature, both real and personal, to be hers forever. I hereby appoint my wife, Nellie B. Poole, to be my sole administratrix, to serve without bond."

3. After the death of Tallie A. Poole, the said paper-writing was duly probated and recorded as his last will and testament. The plaintiff was duly appointed as administrator *c. t. a.* of the estate of Tallie A. Poole.

4. After the payment of all the costs and expenses of the administration, and of all claims of creditors of the estate, the estate of Tallie A. Poole will consist of personal property of the value of about $300.00, and of real property of the value of about $1,500.

The defendants Gladys H. Dongan and C. L. Holden contend that as the surviving children of their mother, Nellie Bilbro Poole, the sole devisee and legatee of Tallie A. Poole, they are entitled, under the provisions of C. S., 4166, to all the property, both real and personal, which will constitute the net estate of Tallie A. Poole.

The defendants other than Gladys H. Dongan and her husband, R. Lee Dongan, and C. L. Holden, contend that as heirs at law and next of kin of Tallie A. Poole, deceased, they are entitled to said estate, for the reason that his wife, Nellie Bilbro Poole, predeceased him, and that the provisions of C. S., 4166, are not applicable to said estate.

The court was of the opinion that by virtue of the provisions of C. S., 4166, the defendants Gladys H. Dongan and C. L. Holden are entitled to all the property, both real and personal, which will constitute the estate of Tallie A. Poole, deceased, and so adjudged.

The defendants other than Gladys H. Dongan and C. L. Holden appealed to the Supreme Court.

Herbert S. Falk for defendants Gladys H. Dongan, R. Lee Dongan, and C. L. Holden.

Brooks, McLendon & Holderness and Robert A. Merritt for defendants R. F. Poole and others.

CONNOR, J. Nellie Bilbro Poole, the sole devisee and legatee in the last will and testament of her husband, Tallie A. Poole, having predeceased him, both the devise of the real property and the legacy of the personal property referred to in the will lapsed, unless the provisions of C. S., 4166, are applicable to the facts in this case. Otherwise, the real property devised to her in the will descended to the heirs at law of the testator, and the personal property bequeathed to her must be distributed among his next of kin. In that event, the defendants Gladys H. Dongan and C. L. Holden, the children of Nellie Bilbro Poole, by a former marriage, would not be entitled to either the real property devised to their mother, or to the personal property bequeathed to her, in the will. Their rights in and to the property, if any, are dependent upon the statute.

C. S., 4166, is as follows: "Unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary clause (if any) contained in such will: *Provided,* there shall be no lapse of the devise or the legacy by reason of the death of the devisee or legatee during the life of the testator, if such devisee or legatee would have been an heir at law or distributee of such testator had he died intestate, and if such devisee or legatee shall leave issue surviving him; and if there is issue surviving him, then the said issue shall have the devise or bequest named in the will."

Nellie Bilbro Poole, wife of Tallie A. Poole, would not have been an heir at law of her husband had she been living at his death; she would, however, have been a distributee of his personal estate. For this reason, under the statute, the devise in the will lapsed, notwithstanding the provisions of the statute. Not so, however, with respect to the legacy.

The devise in the last will and testament of Tallie A. Poole having lapsed, the real property, which was the subject-matter of the devise, descended to the defendants, who are heirs at law of the testator.

The legacy did not lapse. As the legatee would have been a distributee of the estate of the testator had she been living at his death, and had he died intestate, and having left issue surviving her, the per-

sonal property which was the subject-matter of the legacy must be distributed to such issue.

The defendants Gladys H. Dongan and C. L. Holden, by virtue of the provisions of C. S., 4166, are entitled to the personal property now in the hands of the plaintiff for distribution. They are not entitled to the real property which was owned by Tallie A. Poole at his death. The defendants other than Gladys H. Dongan and C. S. Holden, who are heirs at law of Tallie A. Poole, are entitled to the real property which was owned by him at his death.

The statute is not ambiguous. The intention of the General Assembly in its enactment is expressed in language which leaves no room for judicial construction. The distinction found in the common law between real and personal property for purposes of devolution is recognized and preserved. This appears from the use of the words "devise" and "legacy," "heir at law," and "distributee." Whether this distinction should be abandoned in the law of this State, as having no sound basis under modern social and economic conditions, is a matter for the General Assembly, and not this Court, to determine.

The judgment, as modified in accordance with this opinion, is affirmed.

Modified and affirmed.

L. A. LENTZ, RECEIVER OF THE COMMERCIAL NATIONAL BANK OF RALEIGH, v. K. B. JOHNSON & SONS, INC.

(Filed 28 January, 1935.)

1. Bills and Notes A a—

While the execution and delivery of a note under seal raises the presumption of consideration, such presumption is rebuttable as against any person not a holder in due course. C. S., 3008.

2. Same: Bills and Notes H b—Evidence of failure of consideration held for jury in this case.

The receiver of the payee of a promissory note under seal brought action thereon against the corporate maker. Defendant introduced evidence that its president signed the note for the accommodation of the payee bank, the note being used to cover an indebtedness due the bank by the brother of the president of defendant corporation in order that the bank's records should not show the total amount loaned to the president's brother, and that defendant corporation received no benefit from the transaction, and that the payee bank paid nothing for the note: *Held*, the evidence of failure of consideration was competent and should have been submitted to the jury, and a directed verdict in plaintiff's favor was error.

3. Corporations G c—Corporation held entitled to show that its president was without authority to execute corporate note under facts of this case.

The corporate maker of a note may escape liability thereon on the plea of *ultra vires* upon a showing that the execution of the note by its president was not in pursuance of its corporate business, or incident thereto, and was wholly without consideration or benefit to the corporation to the knowledge of the payee. *White v. Johnson & Sons, Inc.*, 205 N. C., 773, distinguished in that the evidence in that case showed consideration to the corporation.

4. Appeal and Error B b—

Where a theory of the case argued on appeal is not supported by allegations in the pleadings, it will not be considered on appeal.

CIVIL ACTION, before *Grady, J.*, at Second June Term, 1934, of WAKE.

The plaintiff is the receiver of the Commercial National Bank of Raleigh. Among the assets of the bank were found two notes, payable to the bank and executed by the defendant corporation. One note for $3,000 was dated 15 November, 1931, payable to the Commercial National Bank, and the other was a note executed by the defendant on 13 July, 1931, for $7,581.69, payable to said bank. The defendant alleged and offered evidence tending to show that the Coastal Land and Timber Company, a corporation, owed the bank a large amount of money, evidenced by various notes, including a $3,000 note and a note for $7,412.50. It was admitted that Mr. E. B. Crow was vice-president and active manager of the Commercial National Bank.

K. B. Johnson, president of defendant corporation, testified: "The Hanover Land and Timber Company and the Coastal Land and Timber Company were two corporations. My brother, J. Beal Johnson, owed the bank considerable money—several notes—and on account of the several notes in the bank with their names on them, Mr. Crow asked me to sign this as K. B. Johnson & Sons, Inc., in order to relieve the bank of so many signatures on notes bearing the same signatures. I told Mr. Crow that we did not owe the bank anything, of course, and had never borrowed a dollar from them; that K. B. Johnson & Sons, Inc., had not. He insisted that it be done as a matter of form to keep the bank's notes in better shape with the bank examiners. He said there were too many notes with the same signatures. I reluctantly signed this way just to suit them. K. B. Johnson & Sons, Inc., had no liability or obligation with respect to either of those two corporations. . . . That note there represented the interest upon past-due notes at the Commercial National Bank by the Hanover Land and Timber Company and the Coastal Land and Timber Company. I had no authority from the corporation, K. B. Johnson & Sons, Inc., to execute the notes which you hold in your hands. . . . Mr. Crow, the active manager of the

bank, had knowledge of the fact that K. B. Johnson & Sons, Inc., had no obligation with respect to the notes of Hanover Land and Timber Company and Coastal Land and Timber Company. He knew all about that. . . . It was understood that we could not pay the notes. We did not owe them and could not pay them, but he (Mr. Crow) said: 'We want it this way to make it look better in the bank.' . . . Mr. Crow asked me to sign a note by K. B. Johnson & Sons, Inc., to cover the past-due interest on those notes. He said the bank examiners were fussing about it and it gave them a bad standing to have notes past due. I told him, as I did before, that K. B. Johnson & Sons, Inc., owed no notes and could not pay any. He said: 'Well, just sign them this way anyhow to take care of the bank situation.' I signed them reluctantly that way. . . . K. B. Johnson & Sons, Inc., did not derive any benefit from this note."

There was evidence tending to show that K. B. Johnson, president of defendant corporation, paid to the bank, on 15 December, 1931, the sum of $15.00 interest on the $3,000 note. This payment was enclosed in a letter to the bank, reading as follows: "I herewith enclose check for $15.00 to cover interest on our note for $3,000 for thirty days. Very respectfully, K. B. Johnson & Sons, Inc." There was evidence that, while this check was issued by the corporation, it was charged to the personal account of K. B. Johnson, president thereof.

The following issues were submitted to the jury:

1. "What amount, if anything, is due plaintiff on account of the note for $3,000, dated 15 November, 1931?"

2. "What amount, if anything, is due plaintiff on account of the note for $7,581.69, dated 13 July, 1931?"

3. "Is the defendant entitled to be relieved and discharged from liability on said two notes, or either one of them, because of the matters and things alleged in the answer?"

The trial judge directed the jury to answer the first issue, "$3,000, with interest from 15 November, 1931," etc.; the second issue, "$7,581.69, with interest," etc.; and the third issue "No."

From judgment upon the verdict the defendant appealed.

Briggs & West for plaintiff.

A. J. Fletcher, Douglass & Douglass, and Clyde A. Douglass for defendant.

BROGDEN, J. The two decisive questions of law presented are:

1. If the president of a corporation executes a promissory note in the name of the corporation, payable to a bank, and delivers same to said payee at the request and for the accommodation of said payee, without

the knowledge or authority of the officers or directors of the maker, can such maker in a suit by the receiver of the payee assert failure of consideration as a valid defense to the action?

2. Was such execution and delivery of the instrument an *ultra vires* act?

The statute, C. S., 3008, provides that failure of consideration is a valid defense to a negotiable instrument "against any person not a holder in due course," etc. While, of course, there is a presumption of consideration arising from the execution and delivery of a sealed instrument, such presumption is rebuttable. *Farrington v. McNeill,* 174 N. C., 420, 93 S. E., 957; *Patterson v. Fuller,* 203 N. C., 788, 167 S. E., 74.

The defendant offered evidence tending to show that the notes in controversy were executed and delivered by him as president of the defendant corporation and in the name of the corporation, at the request of the Commercial National Bank, the payee named in the notes. The evidence further tended to show that the bank paid nothing for the note, and that the maker received no valuable consideration as contemplated by law. Consequently, if the jury should find the facts to be as contended by the defendant, the defense of failure of consideration would be available. Manifestly, there was competent evidence of failure of consideration to be submitted to a jury. Therefore, the first question of law must be answered in the affirmative.

The second question of law depends upon pertinent facts and circumstances. If it shall be found that the notes executed by the president of defendant corporation, not in pursuance of or as an incident of the corporate business, wholly without consideration, or benefit of any kind to the corporation, then such execution and delivery of the notes would be an *ultra vires* act. See *Bank v. Odom,* 188 N. C., 672, 125 S. E., 394; *Commissioners of Brunswick v. Bank,* 196 N. C., 198, 145 S. E., 227; *Indemnity Co. v. Perry,* 198 N. C., 286, 157 S. E., 629.

There is no allegation in the pleadings that the payment of $15.00 interest on the $3,000 note constituted ratification, and therefore such question is not pertinent to the case as now constituted.

Apparently the plaintiff relied upon the case of *White v. Johnson,* 205 N. C., 773, 172 S. E., 370. In that case, however, the evidence tended to show that the plaintiff loaned the defendant the sum of $2,000 in cash. Obviously, nothing else appearing, the defendant received the benefit of the contract, and the plea of *ultra vires* was, therefore, not available.

The Court concludes that there was competent evidence of a valid defense to the instruments to be considered by the jury; and hence the peremptory instructions were erroneously given.

Reversed.

STATE v. FAISON GORE.

(Filed 28 January, 1935.)

1. Criminal Law G r—Held: Credibility of witness was impeached in this case, and evidence corroborating his testimony was competent.

Defendant was charged with being an accessory before the fact of murder, and pleaded not guilty. Upon the trial the perpetrator of the crime testified that he killed deceased because of the promises and inducements of defendant. Defendant cross-examined the witness and sought to impeach his character: *Held*, certain written and oral statements made by the witness to others prior to the trial were competent as tending to corroborate his testimony, the credibility of the witness having been challenged by the plea of not guilty, the cross-examination, and the evidence of his bad character.

2. Criminal Law G u—

Evidence of the circumstances under which a witness had made statements, competent upon the trial as corroborative of his testimony, is properly admitted to enable the jury to determine the weight to be given the statements upon the basis of whether they were voluntary or were obtained by coercion or duress.

3. Homicide G d: Criminal Law G r—

Defendant was charged with being an accessory before the fact of murder in procuring the murder of deceased: *Held*, testimony of a quarrel between defendant and his wife over the attentions paid defendant's wife by deceased was competent to show motive and as corroborative of the testimony of the perpetrator of the crime that defendant stated this was his motive.

4. Criminal Law L e—

Error, if any, in the admission of a note written to defendant by his wife, *is held* cured by her testimony upon the trial in his behalf, the note tending to discredit her testimony on the trial.

5. Criminal Law G r—

The cross-examination of defendant in this case *held* well within the latitude allowed by law.

6. Criminal Law I J—

The unsupported testimony of an accomplice is sufficient to overrule a motion for nonsuit, since such testimony is sufficient to sustain a verdict of guilty.

7. Criminal Law I g—Instructions in this case held sufficiently full.

An exception based upon the court's failure to define an "accessory before the fact" in a prosecution of defendant for being an accessory before the fact of murder, cannot be sustained where the record shows the court read to the jury the indictment which fully described the offense, it being the duty of defendant, if he desires more elaborate instruction, to aptly tender a request therefor.

8. Indictment E c—

In a prosecution of defendant for being an accessory before the fact of murder, variance of a few days between the indictment and proof as to the day the murder was committed is not fatal, C. S., 4625.

APPEAL from *Harris, J.*, at June Term, 1934, of NEW HANOVER. No error.

The defendant was tried and convicted upon the following bill of indictment:

"The jurors for the State upon their oath present, that Faison Gore, late of the county of New Hanover, on 3 May, 1934, with force and arms, at and in the county aforesaid, did unlawfully and wilfully, feloniously be and become an accessory before the fact to the murder of Karl Hayduck, by counseling, procuring, or commanding Ben Johnson to commit a felony, to wit: kill and murder Karl Hayduck, and in confirmation of said counseling, procuring, or commanding of said Faison Gore, he, the said Ben Johnson, on or about 3 May, did unlawfully, wilfully, feloniously, and with malice aforethought, kill and murder the said Karl Hayduck, against the form of statute in such case made and provided against the peace and dignity of the State.

"WOODUS KELLUM, *Solicitor.*"

From judgment pronounced on the verdict that he be imprisoned in the State prison for the term of his natural life, the defendant appealed to the Supreme Court, assigning errors.

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

R. M. Kermon for defendant appellant.

SCHENCK, J. The basis of seven of the defendant's exceptive assignments of error is the admission of certain written statements and certain oral statements made by the State's principal witness to others at various times prior to the trial of this cause. The statements were admitted for, and only for, the purpose of corroboration, and the judge so told the jury at the time of their admission. The evidence of this witness, upon which the State largely relied, was to the effect that he, Ben Johnson, struck the fatal blow that killed the deceased, Karl Hayduck, and he did so because of promises and inducements held out to him by the defendant Faison Gore. We have carefully examined these statements and think they all tend to corroborate the testimony of Johnson. We cannot agree with the position taken in the defendant's brief that the corroborating evidence was inadmissible because the witness Ben Johnson had not been impeached. The defendant, having pleaded not guilty, the very nature of the circumstances challenged the

testimony of the witness to the effect that the defendant procured him, the witness, to kill the deceased; and also the cross-examination of the witness was an attack upon and an impeachment of his testimony in that it sought to show that such testimony was false, and that the witness had been frequently tried and convicted in various criminal courts and was therefore a man of bad character, whose testimony should not be given credence. *S. v. Parish,* 79 N. C., 610; *S. v. Melvin,* 194 N. C., 394.

The evidence of the circumstances under which the corroborative statements were made, to which the defendant excepted, was properly admitted in order to enable the jury to determine the weight that should be given to such statements; since if they were obtained by coercion or duress they might carry but little if any force, but if given freely and voluntarily, they might carry considerable force. The admission of such evidence was logical, sensible, and did justice to all concerned.

The exception to the evidence tending to show a quarrel between the defendant and his wife is untenable, as such evidence was competent to show both motive for the crime charged and to corroborate the witness Ben Johnson, who testified that the defendant told him that the deceased was "going with his wife" and he "didn't like it," and gave this as one of the reasons for wanting him "to knock him out."

If there was error in the admission of the note written by the wife of the defendant to him while in jail, to which the defendant excepted, such error was cured when the wife went upon the stand as a witness in her husband's behalf and at his behest and admitted that she wrote the letter, since it tended to discredit her by showing that she proposed to make her testimony agree with his. Witness this clause: "Honey, what time did you tell them so I can tell the same thing. Let me know all you told."

Those portions of the cross-examination of the defendant to which exceptions were lodged, in our opinion are well within the latitude allowed on such examinations, as the reason for the search for Hayduck and the manner of such search were proper to be considered by the jury; and especially was this so in the light of the fact that the defendant directed the search and suggested that one Mazur look behind the toilet where the deceased was found wounded and unconscious.

The motion for nonsuit was properly denied as the testimony of Ben Johnson alone was sufficient to carry the case to the jury. It has been repeatedly held by this Court that the unsupported testimony of an accomplice, while it should be received with caution, if it produces convincing proof of the defendant's guilt is sufficient to sustain a conviction. *S. v. Ashburn,* 187 N. C., 717 (728), and cases there cited.

The defendant excepted to the charge for that "the court failed to charge the jury what constituted 'an accessory before the fact,'" and "failed to charge the jury as to the law applicable to 'an accessory before the fact.'" The court read the bill of indictment to the jury, including the following: "That Faison Gore . . . did unlawfully and wilfully, feloniously be and become an accessory before the fact of the murder of Karl Hayduck, by counseling, procuring, or commanding Ben Johnson to commit a felony, to wit: kill and murder Karl Hayduck, . . ." The description of the offense contained in the bill is full and complete and needs no explanation to be understood. The charge is in compliance with C. S., 564. If the defendant desired more specific and elaborate instructions or explanations he should have submitted appropriate prayers. *S. v. McLamb,* 203 N. C., 442; *S. v. O'Neal,* 187 N. C., 22, and cases there cited.

The defendant's motion for arrest of judgment for that the bill of indictment charges that the murder of Karl Hayduck was committed on 3 May, 1934, when all of the evidence tended to show that it was committed on 29 April was properly denied, since "time is not of the essence of the offense" charged. C. S., 4625.

A perusal of the record leads us to the conclusion that the case has been carefully tried in conformity with the practice and authorities in this jurisdiction, and the verdict and judgment will therefore be upheld.

No error.

GURNEY P. HOOD, COMMISSIONER OF BANKS, ET AL., v. J. ROBT. LANDRETH, L. M. LOWDERMILK, L. S. McALISTER, N. L. EURE, TRUSTEE, ET AL.

(Filed 28 January, 1935.)

Mortgages C c—Mortgages filed for registration at same instant of time are equal and neither has priority over the other.

Where the record discloses that a purchase-money mortgage and another mortgage given to another party to secure the cash payment required by the grantor for the land were filed for registration at the same instant of time, neither mortgage has priority over the other, but both constitute a first lien on the land, C. S., 3561, and fact that one necessarily appeared before the other on the index of the day's transactions does not alter this result, since the record fails to show that the mortgages were not indexed at the same time.

CIVIL ACTION, before *Alley, J.,* at August Term, 1934, of GUILFORD.

L. M. Lowdermilk and wife conveyed a tract of land to J. Robert Landreth and wife. Landreth, in payment of the purchase price, exe-

cuted four notes to Lowdermilk, aggregating $5,292.15. In order to secure the notes he executed and delivered a mortgage upon said premises to said Lowdermilk, dated 10 July, 1928.

On the same day, to wit, 10 July, 1928, in order to procure a part of the purchase price for said land, Landreth and wife executed and delivered to L. S. McAlister a mortgage, dated 10 July, 1928. Both deeds of trust were probated before the assistant clerk of the Superior Court on 14 July, 1928, and the register of deeds for Guilford County entered upon both instruments the following: "Filed for registration on 14 July, 1928, at ten o'clock a.m., and duly recorded." The evidence tended to show that the register of deeds kept a temporary index and cross-index. This temporary sheet was offered in evidence and shows that both of the aforesaid deeds of trust were indexed on 14 July, 1928. The order of names on the index is as follows: (a) Deed, Lowdermilk, L. M., to J. Robt. Landreth *et ux.*, grantees; (b) Mortgage deed, J. Robt. Landreth, grantor, to J. M. Lowdermilk, grantee; (c) Deed, Layton, J. A., grantor, to J. T. Neese, grantee; (d) Mortgage deed, Landreth, J. Robt., to L. S. McAlister, grantee; (e) Deed, J. Robt. Landreth, grantor, to L. F. Weaver, grantee.

The foregoing entries constitute the day's work on 14 July, 1928.

The plaintiffs brought suit against the defendants, alleging that the Lowdermilk mortgage deed constituted a prior lien upon the land, and asked that a commissioner be appointed by the court to sell the property and apply the net proceeds to the payment of the Lowdermilk mortgage. The defendant McAlister filed an answer alleging that his mortgage to secure $1,000 was a prior mortgage upon the premises, and asked that a commissioner be appointed to sell the land and to apply the net proceeds to the note secured by his mortgage.

The following issues were submitted to the jury:

1. "In what amount, if any, are the defendants J. Robert Landreth and Minnie R. Landreth indebted to the plaintiffs?"

2. "Does said indebtedness represent part of the purchase price of the property described in plaintiffs' complaint?"

3. "Is said indebtedness secured by the mortgage to the defendant L. M. Lowdermilk described in plaintiff's complaint?"

4. "Was the mortgage to the defendant L. M. Lowdermilk described in plaintiffs' complaint filed for registration and indexed in the office of the register of deeds of Guilford County prior to or at the same time as the deed from the defendant L. M. Lowdermilk to the defendants J. Robert Landreth and Minnie R. Landreth described in plaintiffs' complaint?"

5. "If not, was said mortgage to the defendant L. M. Lowdermilk filed for registration and indexed in the office of said register of deeds

prior to the mortgage to the defendant L. S. McAlister described in plaintiffs' complaint?"

The jury answered the first issue, "$3,533.80"; the second issue, "Yes"; and the third issue, "Yes."

The trial judge was of the opinion that the fourth and fifth issues were unnecessary.

From judgment upon the verdict appointing a commissioner to sell the property and directing that the net proceeds, subject to the payment of cost and certain taxes, be applied to the discharge of the Lowdermilk mortgage, the defendant McAlister appealed.

Brooks, McLendon & Holderness for plaintiff.
Duke & Bridges for defendant McAlister.

BROGDEN, J. Two mortgage deeds are delivered to and received by the register of deeds and marked "filed for registration" at the same instant of time. Both instruments appear on the temporary index on the same day, although one appears ahead of the other on such index. The question of law is: Which mortgage deed has priority? The answer is neither. Both stand upon the same level and constitute a first lien upon the premises for the reason that both have parity of registration.

Certain issues were submitted to the jury, but the record discloses that the facts with reference to the registration of the instruments were not controverted.

The plaintiffs contend that while it has been formerly held that filing for registration determined priority, nevertheless such decisions have been overruled by reason of the fact that the Court has interpreted C. S., 3561, as requiring indexing as an essential part of the act of registration. The authorities relating to indexing are assembled in *Story v. Slade*, 199 N. C., 596, 155 S. E., 256. See, also, *Woodley v. Gregory*, 205 N. C., 280, 171 S. E., 65.

In the case at bar the register of deeds kept a temporary index, and while the mortgage deed of Lowdermilk appears first on such record, there is nothing to indicate that all the papers were not indexed at the same time. Obviously two entries could not occupy the same space at the same time on the records, and consequently it is necessarily apparent that in the act of entering a list of names on a record that one name had to come first.

In the final analysis two deeds of trust were filed at the same instant of time, and so far as the record discloses, were indexed at the same instant of time. Therefore, the Court is of the opinion that both mortgage deeds constitute a first lien upon the land.

Reversed.

JAKE WATSON v. CITY OF DURHAM.

(Filed 28 January, 1935.)

1. Evidence K b—

In reply to a question as to the condition of a hammer furnished plaintiff for the performance of his work, defendant's witness, who had observed the hammer, was permitted to testify, "I would say it was in good condition": *Held*, the testimony was competent as opinion testimony.

2. Evidence D h—

The exclusion of testimony that others had been injured in the rock quarry in which plaintiff received the injury in suit *is held* without error in this case, the evidence failing to disclose the required substantial identity of circumstances or proximity of time.

3. Trial E c—

Where the contention of plaintiff is not supported by allegations in the complaint, the refusal of the court to submit such contention will not be held for error.

CIVIL ACTION, before *Cranmer, J.*, at September Term, 1934, of DURHAM.

Plaintiff was sentenced to the State's prison for a term of years, and soon thereafter, by virtue of a contract between the city of Durham and the State's prison authorities, he was sent to work at a quarry owned and operated by the city of Durham. He had worked in the quarry for approximately four years and was hurt on 22 September, 1930. Plaintiff testified: "On 22 September I was breaking rock with a hammer, . . . and a piece from that hammer hit me in my right eye and put it out." There was evidence that this hammer was a rock hammer, weighing about eighteen pounds, and that it was "all crumpled and battered and would shoot spraws . . . and fine pieces of rock." Plaintiff further testified that he had asked for goggles to protect his eyes and his request had been denied. He also testified that he had asked for a new hammer and that the same had not been furnished. He offered evidence that goggles were appliances approved and in general use for workmen engaged in breaking rock.

The defendant offered evidence tending to show that goggles were not appliances approved and in general use for the particular work that plaintiff was required to do, and that the hammer furnished had been inspected as required by reasonable prudence, and that said instrument was free from defects, and was a proper appliance for breaking rock.

There was sufficient evidence of negligence to be submitted to the jury, and the trial judge submitted issues of negligence, contributory negligence, and damages. The jury answered the issue of negligence "No," and from judgment upon the verdict the plaintiff appealed.

P. R. Hines, Julius Brown, and R. O. Everett for plaintiff.
S. C. Chambers for defendant.

BROGDEN, J. The trial judge properly submitted the cause to the jury. He stated and arrayed the contentions of the parties with clearness and impartiality and correctly stated the principles of law applicable to the various phases of the evidence.

The defendant offered one of the guards as a witness, who was present at the time of the injury, and was asked what was the condition of the hammer plaintiff was using. He replied: "I would say it was in good condition."

The plaintiff insists that the evidence was incompetent and should have been excluded by application of the rule heretofore announced in *Marshall v. Telephone Co.*, 181 N. C., 292, 106 S. E., 818. However, the ruling of the trial judge is sustained. The identical point was considered in *Bane v. R. R.*, 171 N. C., 328, 88 S. E., 477. The Court said: "The instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time, are, legally speaking, matters of fact, and are admissible in evidence," etc. See, also, *McCord v. Harrison-Wright Co.*, 198 N. C., 742, 153 S. E., 406.

The plaintiff also attempted to offer evidence that other persons had suffered injuries "while working in the rock quarry belonging to the city of Durham, while breaking rock," in the same manner as the plaintiff. The trial judge properly excluded the evidence for the reason that the evidence did not disclose "the substantial identity of circumstances or proximity of time which the law contemplates." *Etheridge v. R. R.*, 206 N. C., 657, 175 S. E., 124.

Plaintiff further insisted that it was error for the trial judge to decline to state his contentions to the effect that he was being worked in violation of the Constitution and laws upon the theory that C. S., 7758, authorizes convicts to be worked on the roads or streets, and, therefore, excludes work in quarries. Even if it be conceded that such contention is sound, there were no allegations in the pleadings raising the question, and hence the trial judge ruled correctly in declining to submit such contention.

A careful examination of all the exceptions does not disclose to the Court any error of law.

Affirmed.

J. L. SNYDER, J. B. IVEY, F. A. WILKINSON, DR. A. M. WHISNANT, MRS. JOSEPH McLAUGHLIN, A. J. HAGOOD, W. B. LOVE, PAUL J. KIKER, AND J. L. LITTLE, TRUSTEES OF CHARLOTTE DISTRICT OF WESTERN NORTH CAROLINA CONFERENCE OF METHODIST EPISCOPAL CHURCH, SOUTH, v. JOHN C. CALDWELL.

(Filed 28 January, 1935.)

Deeds and Conveyances C g—Covenant restricting use of property to residential purposes held inoperative by change in character of development.

Plaintiff's grantor obtained title to the property in question by deed containing a covenant restricting the use of the property to residential purposes. Plaintiff contracted in writing to sell the property to defendant free from restrictions, and upon defendant's refusal to accept the deed, brought suit. The trial court found that the fundamental character of the property in the vicinity had changed from residential to business property and had rendered plaintiff's property wholly unfit for use for residential purposes, and decreed that plaintiff's deed would convey the property free from the restrictions: *Held*, the judgment is affirmed under the principle announced in *Starkey v. Gardner*, 194 N. C., 74.

CIVIL ACTION, before *Alley, J.*, at Regular Term, beginning 19 November, 1934, of MECKLENBURG.

On 28 February, 1901, the Piedmont Realty Company conveyed to James O. Gardner and wife lots Nos. 8, 9, and 10, in Block 4, as shown on the map of Piedmont Park. The property fronts on Central Avenue at the intersection of Louise Avenue and Tenth Street. The deed to Gardner contains certain restrictive covenants to the effect "that no owner of said real estate shall at any time hereafter erect upon said real estate any structure except a dwelling-house, . . . and no owner . . . shall permit any building erected thereon to be used for other purpose than dwelling and necessary outhouses."

On 26 November, 1921, Gardner and wife conveyed the property to the trustees of Charlotte District Conference of the Western North Carolina Conference of the Methodist Episcopal Church, South, free of all conditions and restrictions, subject, however, to the following trust: "In trust that such premises shall be held, kept, maintained, and disposed of as a place of residence for the use and occupancy of the preachers of the Methodist Episcopal Church, South," etc.

There was evidence that the Piedmont Realty Company was dissolved on 7 April, 1900, and that since said property was conveyed to the plaintiffs "the character and surroundings in the neighborhood of plaintiffs' lots have changed to such an extent that the said lots of

plaintiffs are no longer suitable solely for residence purposes; that the said lots are situated upon and face Central Avenue and Tenth Street, which are two of the principal streets in the city of Charlotte, and the streets have been paved and are now heavily traveled by automobiles, trucks and busses, and Central Avenue is now a State highway leading from Charlotte to Raleigh; that when the Piedmont Realty Company began the development of the said property more than 30 years ago, the whole of said tract lay outside of the corporate limits of the city of Charlotte, and far beyond the business district of said city; that since that time the corporate limits of the city have been so extended that they not only take in all of said tract, but extend far beyond the remotest part of it; that said property is now and has been for more than 20 years an integral part of the city of Charlotte; that filling stations, drug stores, and grocery stores have sprung up directly opposite the plaintiffs' property on Central Avenue, and also across from said property on Tenth Street; that a high school has been built only two blocks away from said plaintiffs' property; that stores, shops, filling stations, and other businesses are being operated across the streets from said plaintiffs' property, and the indications point to an increase in number of such places of business, and a further and rapid development of a business center near the plaintiffs' property," etc.

The defendant owned a lot in Myers Park and agreed in writing to sell his lot to the plaintiffs and to take a deed for plaintiffs' property in part payment thereof, provided the plaintiffs could give him a deed free of the restrictions.

The plaintiffs tendered a deed to the defendant free of restrictions, but he declined to accept the same upon the ground that the plaintiffs could not deliver a deed free of restrictions.

Thereupon the plaintiffs instituted this action to compel the defendant to convey to them the Myers Park lot and to accept a deed free of restrictions for the Central Avenue property. Jury trial was waived and the judge found the facts substantially as hereinbefore mentioned. It was further found "that the changes heretofore enumerated in the use of the property in the subdivision known as Piedmont Park and in the vicinity of the plaintiffs' property and in the growth and development of the city of Charlotte and the increase of the volume of travel and business and other nonresidential uses of property in close proximity to the section in which the plaintiffs' property is located have radically changed the fundamental character of the plaintiffs' property and the property in the vicinity thereof from residential to commercial property, and have rendered the plaintiffs' lots and the other property in the vicinity thereof wholly unfit and unsuitable for use for residential purposes and more suitable for business purposes."

Upon such findings, supported by evidence, it was adjudged that the defendant accept the deed which the plaintiffs have tendered, "and that the said lots be conveyed to said defendant free of any and all conditions or restrictions, and free of any trust." It was further adjudged that the defendant execute and deliver to the plaintiffs a good and sufficient deed of proper warranty to the Myers Park property owned by him.

From the foregoing judgment the defendant appealed.

Charles W. Bundy and D. E. Henderson for plaintiffs.
F. A. McCleneghan for defendant.

BROGDEN, J. The judgment and findings of fact present the question as to whether the case at bar is to be determined by the principle applied in *Starkey v. Gardner,* 194 N. C., 74, 138 S. E., 408, or *McLeskey v. Heinlein,* 200 N. C., 290, 156 S. E., 489.

The Court is of the opinion, and so adjudges, that *Starkey v. Gardner, supra,* is determinative, and the judgment as rendered is approved.

Affirmed.

JUNIUS McKAY v. G. F. BULLARD.

(Filed 28 January, 1935.)

1. Adverse Possession C b—Claimant must show not only possession but also that possession was adverse and under definite boundaries.

It is error for the court to direct the jury to answer the issue of adverse possession in favor of the party claiming by such adverse possession if the jury should find the facts as the evidence tends to show, merely upon uncontradicted evidence of thirty years possession, it being necessary for claimant to show by evidence that such possession was adverse and was under known and visible lines and boundaries. C. S., 425.

2. Adverse Possession A f—

In order for possession to be hostile the possessor must exercise dominion by exclusive use of the land for purposes for which it is reasonably susceptible, and such occupancy must extend to the boundaries claimed.

EJECTMENT, tried at April Term, 1934, of BLADEN, before *Cranmer, J.* New trial.

Judgment for plaintiff; appeal by defendant.

H. H. Clark for plaintiff appellee.
A. M. Moore for defendant appellant.

SCHENCK, J. The plaintiff alleged that he and the other heirs at law of R. L. McKay are the owners in fee and entitled to the possession of the following described lot or parcel of land, of which the defendant is in the unlawful possession, to wit: "In the town of Elizabethtown. Beginning at the northeast corner of the intersection of Queen and Poplar streets, and running thence as the east line of Poplar Street now north 22¼ east 3.18 chains (210 ft.) to an iron rod, a corner of lot; thence as line of that lot, now south 47¾ deg. east 3.18 (210 ft.) across the end of Cape Fear River bridge fill to an iron rod, now a large tree, a corner of.....lot; thence a line of that lot south 22¼ west 3.18 chains to a piece of piping in the north line of Queen Street; thence as that line north 67¾ deg. west 3.8 chains to the beginning."

The third issue reads: "Are the plaintiffs the owners of and entitled to the possession of the lands described in the complaint?"—upon which his Honor instructed the jury: "If you find the facts to be, by the greater weight of the evidence, as the evidence tends to show, you will answer the issue 'Yes,'" which charge the defendant made the basis of an exceptive assignment of error.

The plaintiff, through his counsel, in response to an interrogation by the court, stated that the plaintiff claimed not by virtue of any deed or grant, but by "metes and bounds as described in the complaint," and introduced no deed or grant containing any description from which the land in controversy could be located.

Construing the evidence favorable to the plaintiff, the most it tends to show is that the father and mother of the plaintiff and the plaintiff and his brothers and sisters lived in a house on an half-acre tract of land on Queen and Poplar streets in the town of Elizabethtown, on the top of the hill near the Cape Fear River bridge, for more than thirty years, and that after the death of his parents the plaintiff rented the house to various families and that the plaintiff sold the sand on the land to a bridge construction company and the house was torn away in getting the sand.

There is no evidence of possession of the land except the occupancy of the house and the hauling of the sand; and no evidence as to what part of the land the sand was hauled from, except that the hauling caused the house to be torn down; and no evidence as to character of the land or the uses to which it was susceptible. Not a witness could locate by name the streets mentioned in the description in the complaint. The plaintiff himself, on cross-examination, testified: "I know where the lands begin but I don't know the names of the streets. I don't know where any of the corners are since it was cut down." The nearest approach to locating the streets was by the witness Sheron, who testified: "I am familiar with the description of the tract of land on Queen and Poplar streets, which I heard you read. The place was

owned by R. L. McKay. I know when he lived on that tract of land." . . . "He (the plaintiff) sold the sand and they tore the house down." This witness, however, on cross-examination, when the description contained in the complaint was read to him, said: "I don't recognize it."

Conceding, but not deciding, that the evidence establishes 30 years possession of an one-half-acre tract of land on Queen and Poplar streets in the town of Elizabethtown by the plaintiff and those under whom he claimed, there was still left for the jury's determination the questions as to whether such possession was adverse, and as to whether such possession was held up to known and visible lines and boundaries, as required by C. S., 425.

Adverse possession within the meaning of the law consists in actual possession with intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion in making the ordinary use and taking the ordinary profits of which the land is susceptible. The possession must be as decided and notorious as the nature of the land will permit and afford unequivocal indication to all persons that the possessor is acting in the character of owner, *Locklear v. Savage*, 159 N. C., 236, and this possession must be "ascertained and identified under known and visible lines and boundaries," that is, the physical occupation must be connected with the boundaries claimed.

A perusal of the evidence leads us to the conclusion that there was error in the peremptory instruction of his Honor to the effect that the evidence established that the thirty years possession of the plaintiff and those under whom he claims was adverse and identified under known and visible boundaries, and that this error entitles the defendant to a new trial.

New trial.

ROSA WESTBROOK v. HOME SECURITY LIFE INSURANCE COMPANY.

(Filed 28 January, 1935.)

1. Insurance J a—Breach of provision in policy giving insurer right to inspect policy held not to work forfeiture of policy.

The policy of life, disability, and accident insurance in this case contained a clause stipulating that insurer should have the right to inspect the policy and receipt book, and by later cancellation clause provided that insurer should have the right to cancel the policy for nonpayment of premiums, and the right to cancel or reduce the disability and accident insurance upon written notice: *Held*, insured's refusal to allow insurer to inspect the policy would not work a forfeiture of the policy, the clause of the policy relating to insurer's right of inspection not providing for forfeiture for its breach, and the law not favoring forfeitures.

2. Insurance H a—

Where a policy has not been canceled in accordance with its provisions relating thereto, and has not been forfeited by insured, the refusal of insurer's agents to accept premiums thereon will not terminate the contract.

3. Insurance P a—

Where a policy of insurance is subsisting and effective, the policy not having been forfeited or canceled, insured may not maintain an action to recover premiums paid on the contract.

CIVIL ACTION, before *Alley, J.*, at June Term, 1934, of FORSYTH.

On 21 January, 1921, the defendant issued to plaintiff a policy of insurance, specifying that twenty per cent of the premium was for life insurance and eighty per cent was for sickness or accident insurance. The policy contained the following provision: "This policy and receipt book, or card, containing the entries of premiums paid shall be exhibited on demand to the officers or authorized agent of the company at any time or before payment thereunder," etc. The pertinent portions of the cancellation clause of the policy are as follows: "Except within the contestable period of two years from date of policy, and then only for material misrepresentation on the application therefor, the company will have no right to cancel the insurance payable at death, except for nonpayment of premium. However either the company or the insured has the right to cancel or reduce the insurance granted herein against disability from sickness or accident, in which event that part of the premium payable to such disability insurance would be discontinued or proportionately reduced: *Provided*, that the company may exercise this right only by written notice, either delivered to the insured or mailed to the insured's last address as shown by the records of the company with cash or company's check for unearned premiums," etc.

The plaintiff paid the premiums up to and including 18 September, 1933. The plaintiff had received certain disability benefits, and the defendant made demand upon the plaintiff to exhibit the policy in accordance with the terms thereof. The plaintiff declined to deliver or exhibit the policy to the agent of defendant. The husband of plaintiff, who paid the premiums for her, said: "The general manager . . . came to the window and took my book and looked at it and said: 'I won't accept any more premiums until you give me them policies.' I said I was not going to give them up because I didn't want them canceled, and I started on off. He said he would send the sheriff out there and get them. I said: 'Send the sheriff, and if he command them, I have to give them over.' I told them I had come to pay the premium and presented the money and book at the office window, and they told me they wouldn't accept any more premiums until I gave up those

policies, and I told them all right, and took the book and started on off. . . . . Mr. Todd didn't say anything about showing him the policies. Said he would not accept any more premiums until I gave him those policies. He didn't tell me at that time that all he wanted to do was see the policies and he would give them back to me. He told me to give up the policies or he was going to send the sheriff and demand them."

The defendant offered evidence tending to show that the local office did not carry copies of all policies written through the office for the reason that such records would be very voluminous, and that they made demand upon the plaintiff to exhibit the policy in accordance with the terms thereof for the purpose of checking their records, and that they had no intention of trying to deprive the plaintiff of the policy. The plaintiff brought a suit before a justice of the peace for the sum of $160.00, presumably for breach of contract and to recover premiums paid to the defendant. The defendant issued a notice to produce the policy at the trial, and after judgment had been rendered in favor of the plaintiff, the defendant notified the plaintiff that it would continue the policy in full force if the plaintiff would continue to pay the premiums. Plaintiff declined to comply with this offer.

Upon appeal to the Superior Court, the trial judge nonsuited the case at the conclusion of the evidence. From such judgment the plaintiff appealed.

E. E. Risner for plaintiff.
Efird & Liipfert for defendant.

BROGDEN, J. The policy of insurance specified a particular method of cancellation. There is no evidence that this method has been pursued, and therefore the refusal of the agents of the company to accept further premiums did not terminate the contract. The policy further provided that the agents of the company should have the right to inspect the policy. The plaintiff declined to tender the policy for inspection, but the inspection clause in the policy did not impose forfeiture for the breach of such provision, and as the law does not favor forfeitures, the defendant had no right to forfeit the policy because the plaintiff refused to exhibit it upon demand. It necessarily follows that as the policy neither has been forfeited nor canceled that it is still in force as a valid and subsisting contract. Hence, the plaintiff could not maintain an action to recover premiums paid on the contract.

Affirmed.

NATIONAL LINEN SERVICE CORPORATION, TRADING AS CAROLINA LINEN SUPPLY COMPANY, v. JOHN M. CRISP, TREASURER OF THE TOWN OF LENOIR.

(Filed 28 January, 1935.)

1. Taxation B c—Plaintiff held not liable for franchise tax under provision of ordinance under which the tax was collected.

Plaintiff paid, under protest, a municipal franchise tax levied against persons renting or supplying clean linen who solicited business for services to be performed outside the city. The statement of facts agreed disclosed that plaintiff supplied clean linen to its customers within the city under contract giving it the option to supply new linen or to have the soiled linen of its customers laundered and returned, but the facts agreed did not show that plaintiff laundered the soiled linen of its customers: *Held*, plaintiff did not render any service to its customers outside the city, and was not liable for the tax.

2. Municipal Corporations K e—

A party not liable for a franchise tax imposed by municipal ordinance may not attack the constitutionality of the ordinance.

APPEAL by plaintiff from *Harding, J.*, at August Term, 1934, of CALDWELL. Reversed.

This is an action to recover of the defendant the sum of $50.00, which was paid by the plaintiff to the defendant on 27 July, 1933, under protest, as a license tax levied by the town of Lenoir, under an ordinance of said town. Demand for the payment of the said sum was made by the plaintiff and refused by the defendant before the commencement of the action.

The action was begun on 14 May, 1934, in the court of a justice of the peace of Caldwell County.

From the judgment of said court that plaintiff recover nothing of the defendant, the plaintiff appealed to the Superior Court of Caldwell County.

When the action was called for trial in the Superior Court, the parties waived a trial by jury, and agreed that judgment might be rendered by the court on the statement of facts agreed submitted by the parties.

From the judgment on said statement that plaintiff recover nothing of the defendant, the plaintiff appealed to the Supreme Court.

Bertram S. Boley, John M. Robinson, and Hunter M. Jones for plaintiff.

L. H. Wall for defendant.

CONNOR, J. The ordinance under which the license tax involved in this action was levied on the plaintiff is as follows:

"*Laundries.* (a) Every person engaged in the operation of a steam laundry, Chinese laundry, wet-wash laundry, or agents therefor, shall pay an annual license tax of $25.00: *Provided,* that persons soliciting business for services to be performed outside the city shall pay an annual license tax of $50.00.

"(b) Every person engaged in the business of supplying or renting clean linen or towels shall pay an annual tax of $25.00: *Provided,* that persons soliciting business for services to be performed outside the city shall pay an annual license tax of $50.00."

It does not appear from the statement of agreed facts submitted to the court that the plaintiff was engaged during the year 1933 in soliciting business for services to be performed outside the city of Lenoir. The plaintiff was engaged in the business of supplying or renting clean linen to persons residing in the said city. It did not undertake to have the clean linen which it supplied or rented to its customers in the city of Lenoir laundered in the city of Charlotte, or elsewhere, when the said linen became soiled. Under its contract with its customers the plaintiff had the option to supply new linen, when the linen which it had supplied became soiled, or to have the soiled linen laundered, and returned to its customers. It rendered no service to its customers outside the city of Lenoir. The only service it rendered to them was rendered in the city of Lenoir. No service was rendered by the plaintiff to its customers in the city of Lenoir except the delivery to them of clean linen. For this reason, the plaintiff was not liable to the city of Lenoir for a license tax under the proviso contained in section (b) of the ordinance involved in this action, and is therefore entitled to recover of the defendant the sum of $50.00, which it paid to the defendant under protest.

We do not discuss the validity of the ordinance which is challenged by the plaintiff on the grounds discussed in the briefs filed in this Court, for the reason that the proviso contained in section (b) of the ordinance is not applicable to the plaintiff. The plaintiff is not injured by the ordinance, and therefore cannot attack its validity in this action. *Yarborough v. N. C. Park Commission,* 196 N. C., 284, 145 S. E., 563. In *Chemical Co. v. Turner,* 190 N. C., 471, 130 S. E., 154, it is said:

"Courts never anticipate a question of constitutional law before the necessity of deciding it arises."

In accordance with this opinion, the judgment is

Reversed.

ISAAC M. DOTSON v. F. S. ROYSTER GUANO COMPANY.

(Filed 28 January, 1935.)

1. Master and Servant A a—

The trial of the issues relating to the establishment and breach of the contract of employment sued on *held* without error in this case.

2. Damages F b—Measure of damages for breach of contract of employment.

Plaintiff declared upon a contract of employment, based upon sufficient consideration, under which defendant agreed to continue to give plaintiff employment for life or so long as he was able to perform same, of the kind and character he was performing at the time of the execution of the contract. Defendant promoted plaintiff from time to time with increased compensation, but thereafter discharged plaintiff: *Held*, in plaintiff's action for breach of the contract, under the evidence the damages should have been limited to and based upon the rate of compensation paid for the kind and character of the work plaintiff was performing at the time the contract was executed, and the rule that a contract will be construed in connection with the practical interpretation given thereto by the parties, has no application to the case.

APPEAL by defendant from *Cowper, Special Judge,* at June Term, 1934, of MECKLENBURG.

Civil action to recover for breach of contract to give plaintiff employment, which he alleges the defendant made as a part of the consideration for his executing a release of claim for damages growing out of a personal injury suffered by him while in the defendant's employ.

The injury suffered by plaintiff, which ultimately resulted in the amputation or loss of his right leg, occurred 13 December, 1913, while plaintiff was employed at defendant's Spartanburg plant. In 1914 plaintiff was transferred to defendant's Charlotte plant and given the occupation of timekeeper, which position he held in August, 1915, when the contract sued upon is alleged to have been made. Thereafter, in 1917, the plaintiff was promoted to factory bookkeeper, and again in 1926 he was moved to the uptown office and given the duties of bookkeeper and cashier. He was discharged from defendant's employ at the close of 1931. The salary of timekeeper at defendant's Charlotte plant during 1932 and 1933, the time for which he presently sues, was $20 per week.

Upon denial of liability and issues joined, the jury returned the following verdict:

"1. Did the plaintiff and the defendant enter into a contract by the terms of which the defendant agreed, for the period of the plaintiff's life or as long as he was able to perform same, to give plaintiff employment

of the kind and character he was performing in August, 1915, at the regular compensation therefor? Answer: 'Yes.'

"2. Has the plaintiff at all times been able, ready, and willing to perform the said contract, as alleged in the complaint? Answer: 'Yes.'

"3. Did the defendant wrongfully breach said contract, as alleged in the complaint? Answer: 'Yes.'

"4. If so, what damages, if any, is the plaintiff entitled to recover for the period from 1 January, 1932, to 31 December, 1932? Answer: '$2,100.'

"5. What damages, if any, is the plaintiff entitled to recover for the period from 1 January, 1933, to 31 December, 1933? Answer: '$1,700.' "

With plaintiff's consent, the court reduced the award of damages given in response to the fourth issue to $1,800, and that given in response to the fifth issue to $1,600, and rendered judgment accordingly.

From the judgment thus rendered the defendant appeals, assigning errors.

John M. Robinson and Marvin L. Ritch for plaintiff.

Willcox, Cooke & Willcox and Tillett, Tillett & Kennedy for defendant.

STACY, C. J. A careful perusal of the record leaves us with the impression that no error was committed on the trial of the first three issues establishing the alleged contract and its breach. *Jones v. Light Co.*, 206 N. C., 862, 175 S. E., 167; *Stevens v. R. R.*, 187 N. C., 528, 122 S. E., 295; *Fisher v. Lumber Co.*, 183 N. C., 485, 111 S. E., 857. But a contrary impression prevails with respect to the fourth and fifth issues.

In apt time, the defendant asked the court to instruct the jury as follows:

"The court instructs the jury that the alleged contract for 'employment of the kind and character the plaintiff was then performing' means the same kind and character of employment which the plaintiff was performing in August, 1915, at the time the alleged contract was made. The plaintiff's own evidence is that he was employed as a timekeeper at that time. In arriving at the amount of damages to which the plaintiff is entitled, if you find he is entitled to damages, you can consider only the regular compensation for a timekeeper at the Charlotte factory of the defendant in the years 1932 and 1933. The uncontradicted evidence is that such pay for each year was $20.00 per week. Therefore, the maximum amount of damages for such year is $1,040, from which must be deducted the amount the plaintiff earned in each year, or could have earned by due diligence."

The refusal to give the instruction thus requested forms the basis of one of defendant's exceptive assignments of error. Under the contract

alleged by the plaintiff, and as established by the jury's answer to the first issue, and the admitted evidence in the case, it would seem that the defendant's prayer to the above effect should have been granted. The fact that plaintiff was advanced in his work from time to time, with increased compensation, even if regarded in fulfillment of defendant's promise to give him employment, would not change the terms of the original agreement. The contract was to give the plaintiff employment of the kind and character he was performing in August, 1915, and not of the kind and character he was then performing, with reasonable advancement from time to time. Nor can generosity of fulfillment for awhile be construed as an enlargement of the contract. The practical interpretation of the parties is not applicable to the case. *Cole v. Fibre Co.*, 200 N. C., 484, 157 S. E., 857. The plaintiff has limited his recovery by the plain terms of the agreement upon which he sues.

Partial new trial.

H. P. SWINSON v. LANCE PACKING COMPANY ET AL.

(Filed 28 January, 1935.)

1. Libel and Slander D c—Competency of evidence of secondary publications.

While evidence of secondary publications of an alleged slander are admissible on the issue of damages when such secondary publications are the natural, probable, and foreseeable consequences of the original slander sued on, the evidence of subsequent defamatory statements made by others was erroneously admitted in this case for that it appeared the subsequent statements were not repetitions or secondary publications of the original slander which was the basis of the cause of action.

2. Appeal and Error J c—

The admission of incompetent evidence cannot be held harmless where it appears that it augmented the recovery, and a new trial will be awarded on defendant's exception.

3. Appeal and Error J g—

Where a new trial is awarded for the admission of incompetent evidence, other exceptions that may not arise on another hearing will not be considered on the appeal.

APPEAL by defendant from *Hill, Special Judge,* at May Term, 1934, of MECKLENBURG.

Civil action for slander.

The complaint sets out three causes of action.

1. That some time prior to 27 May, 1931, E. L. Hester, Jr., manager of the defendant's branch plant at Greensboro, N. C., in his capacity as

such, uttered slanderous words of and concerning the plaintiff by saying to F. K. George: "I have found out why Lance Packing Company fired Swinson. Swinson was about to own the Lance Packing Company. He had several thousand dollars put away that he could not account for."

2. That about the same time, in the city of Charlotte, S. A. Van Every, president of the defendant company, in his capacity as such, and personally, uttered slanderous words of and concerning the plaintiff by saying in the presence of J. D. Mangum and others that the plaintiff "was a smart crook; that you could not catch him stealing."

3. That on 27 May, 1931, E. L. Hester, Jr., in his capacity as manager of one of defendant's plants, and while about the defendant's business, uttered slanderous words of and concerning the plaintiff by saying to Vance Miller, at or near Greensboro, N. C.: "Swinson worked for us for nine years. The Lance Packing Company fired him because he was a crook."

Only the third cause of action, as above set out, was submitted to the jury. The other two were nonsuited, the second at the close of the plaintiff's evidence and the first at the close of all the evidence. The evidence tending to support the first cause of action was, however, allowed to be considered by the jury on the third cause of action as giving meaning, color, and content to the words used by Hester in speaking to Miller.

J. B. Watts, a merchant at Pageland, S. C., was allowed to testify that while in his place of business in June, 1931, Charles Mygatter, salesman for Lance Packing Company, told him: "Swinson stole enough money from the Lance Packing Company to open up a business of his own." Objection; overruled; exception. "He said he heard Swinson stole enough money from Lance Packing Company to open up a business of his own." Objection; overruled; exception.

Carol Mangum, also a merchant at Pageland, S. C., testified that while in his store, in June, 1931, Charles Mygatter, salesman for Lance Packing Company, said to him that "he heard Swinson had stolen enough money from Lance Packing Company to go in business and open up a business of his own." Objection; overruled; exception.

The testimony of Watts and Mangum was limited to the issue of damages; and, in the court's charge, the jury was instructed not to consider these statements made by Mygatter in South Carolina, unless they were repetitions of the statement made by Hester to Miller, in Greensboro, on 27 May, 1931.

There was a verdict for the plaintiff on the third cause of action, compensatory damages being assessed at $2,500, and punitive damages in the sum of $3,000 also being awarded the plaintiff. Judgment on the verdict, from which the defendant appeals, assigning errors.

Carswell & Ervin for plaintiff.
Tillett, Tillett & Kennedy for defendant Lance Packing Company.

STACY, C. J. The liability of a defamer for the repetition or secondary publication of a defamation, and the admissibility of evidence to establish such liability, were considered in *Sawyer v. Gilmers, Inc.*, 189 N. C., 7, 126 S. E., 183. There *Connor, J.*, delivering the opinion of the Court, said: "We hold it to be the law in this State that the author of a defamation, whether it be libel or slander, is liable for damages caused by or resulting directly and proximately from any secondary publication or repetition which is the natural and probable consequence of this act. He is not liable for such damages where the secondary publication or repetition is without authority from him, express or implied. If the defamation is uttered under such circumstances as to time, place, or conditions as that a repetition or secondary publication is the natural and probable consequence of the original defamation and damage resulting therefrom, he is liable for such damages, and evidence of such repetition or secondary publication, and of damages resulting therefrom, is admissible. It is for the jury to determine, under instructions of the court, whether in view of the circumstances under which the original defamation was uttered, a secondary publication or repetition was the natural and probable consequence of such defamation, which could and should have been foreseen or anticipated by the defendant in an action for damages for the original defamation."

Tested by this rule, it would seem that the testimony of Watts and Mangum as to what Mygatter said to them in Pageland, S. C., should have been excluded. Annotation 90 A. L. R., 1183. The first statement made by Mygatter to Watts did not purport to be a repetition or secondary publication of the original defamation (*Hamilton v. Nance*, 159 N. C., 56, 74 S. E., 627), and if thereafter he were undertaking to quote Hester, it would seem the quotation was of what Hester is alleged to have said to George, rather than of what he said to Miller. *Johnston v. Lance*, 29 N. C., 448; *Hampton v. Wilson*, 15 N. C., 468. In any event, the evidence appears to be incompetent. Annotation 16 A. L. R., 726 (with full citation of authorities). It undoubtedly augmented the recovery. *Lamont v. Hospital*, 206 N. C., 111, 173 S. E., 46.

There are other exceptions on the record, worthy of consideration, but as they may not arise on another hearing, we shall omit rulings upon them now. *Oates v. Trust Co.*, 205 N. C., 14, 169 S. E., 869.

New trial.

N. W. GENNETT, GUARDIAN, v. JEFFERSON STANDARD LIFE INSURANCE COMPANY.

(Filed 28 January, 1935.)

1. Insurance R c—Conflicting testimony on question of insured's disability held for jury.

Testimony that insured was rendered wholly disabled by disease from following any occupation for remuneration or profit *held* sufficient to take the case to the jury in this action on a disability clause in a policy of life insurance, although the testimony of other witnesses was in sharp conflict.

2. Same—

An incurable disease requiring careful and close observation of a physician, and requiring that the patient refrain from the ordinary exactions of a fixed employment *is held* to have been within the contemplation of the parties as a permanent and total disability at the time the policies sued on were executed.

3. Same—

Attending school is not pursuing an occupation for remuneration or profit as a matter of law.

APPEAL by defendant from *Finley, J.*, at July Term, 1934, of BUNCOMBE.

Civil action to recover disability benefits on two policies of insurance, one $10,000 policy, issued 15 March, 1924, the other a $7,000 policy, issued 30 April, 1924, and both containing identical provisions, as follows:

"TOTAL AND PERMANENT DISABILITY.

"If after one full annual premium shall have been paid on this policy, and before default in the payment of any subsequent premium, the insured shall furnish to the company due proof that he has been wholly or continuously disabled by bodily injuries or disease and will be permanently, continuously, and wholly prevented thereby from pursuing any occupation whatsoever for remuneration or profit, provided, that such total and permanent disability shall occur before the anniversary of the policy on which his age at nearest birthday is sixty years, the company, by endorsement in writing on this contract, will agree to pay (certain designated benefits—amounts not in dispute).

"If disability is total, but not obviously permanent, it shall be presumed to be permanent after continuous total disability for three months."

The plaintiff was ten years old at the time of the issuance of the policies in suit. Six years thereafter he became totally incapacitated from diabetes mellitus. In May, 1931, he filed due proof of total and

permanent disability. Benefits were paid under said policies for two years and five months, or until September, 1933, when he entered the University of North Carolina as a student.

Upon denial of further liability, and issues joined, the jury returned the following verdict:

"1. Was plaintiff's ward, Nat W. Gennett, Jr., on 8 September, 1933, and thereafter up to the time of the commencement of this action totally and permanently disabled so that he was wholly and continuously disabled by bodily injuries or disease, and will be permanently, continuously, and wholly prevented thereby from pursuing any occupation whatsoever for remuneration or profit, as alleged in the complaint? Answer: 'Yes.'

"2. Has the plaintiff furnished to the defendant due proof of such total and permanent disability, as required by the policy and as alleged in the complaint? Answer: 'Yes.'"

It was in evidence that, notwithstanding plaintiff's studentship, he was "subject to coma or insulin reactions," constantly under the care of a physician, and wholly unable to pursue any occupation whatsoever for remuneration or profit.

His roommate testified that he had spells of unconsciousness about once a week: "Sometimes he will have a reaction within three days and sometimes he will go a week or ten days without a reaction. . . . When he does run a reaction, there is a lapse of coma, perspiration breaks out, he gets sleepy and doesn't know what he is doing, unconscious. Another time he gets crazy, doesn't know what he is doing. . . . Last week, during examinations, he had two reactions. I mean reactions from insulin."

There was also expert medical opinion evidence in support of plaintiff's claim, and similar testimony, offered by defendant in opposition to his right to recover.

Judgment on the verdict for plaintiff, from which the defendant appeals, relying principally upon its exception to the refusal of the court to sustain its demurrer to the evidence.

R. R. Williams and Cathey & McKinney for plaintiff.

Smith, Wharton & Hudgins, Harkins, Van Winkle & Walton, and John Izard for defendant.

STACY, C. J., after stating the case: The evidence was amply sufficient to carry the case to the jury. *Guy v. Ins. Co.*, 206 N. C., 118, 172 S. E., 885; *Baker v. Ins. Co.*, 206 N. C., 106, 172 S. E., 882; *Misskelley v. Ins. Co.*, 205 N. C., 496, 171 S. E., 862; *Mitchell v. Assurance Society*, 205 N. C., 721, 172 S. E., 497; *Bulluck v. Ins. Co.*, 200

N. C., 642, 158 S. E. 185. The witnesses differed sharply in their observations and conclusions. This made it a matter for the twelve.

It will be observed that plaintiff's disability arises out of an incurable disease, diabetes mellitus, which calls for careful treatment and close observation, to prevent its progressing and causing death. It is the part of wisdom, so his physician thinks, that plaintiff refrain from the ordinary exactions of a fixed employment to insure his living. Such total and permanent disability, we apprehend, was reasonably within the contemplation of the parties when the policies in suit were written. *Prudential Ins. Co. v. Faulkner,* 68 Fed. (2d), 676; *Mutual Benefit Health and Accident Asso. v. Mathis,* 142 So. (Miss.), 494.

The principle announced in *Thigpen v. Ins. Co.,* 204 N. C., 551, 168 S. E. 845, that one who receives $40 a month as a court crier cannot be regarded as wholly disabled "from pursuing any occupation whatsoever for remuneration or profit," is neither controlling nor applicable to the facts of the present record, for it cannot be said, as a matter of law, that attending school is pursuing an occupation for remuneration or profit. *U. S. v. Scott,* 50 Fed. (2d), 773. Likewise, the cases of *Boozer v. Assur. Society,* 206 N. C., 848, and *Buckner v. Ins. Co.,* 172 N. C., 762, 90 S. E., 897, are distinguishable.

The case presents but little more than an issue of fact. Upon sharply conflicting evidence, this has been found in favor of the plaintiff. The rulings of the Superior Court are free from reversible error.

The other matters debated on briefs are not sufficient to affect the result.

Affirmed.

STATE v. J. CLYDE RAY.

(Filed 28 January, 1935.)

1. Judicial Sales A a—

A commissioner appointed by the court to sell lands and disburse the proceeds according to law is not a trustee in the general meaning of that term, nor an agent either of the court or the parties to the suit.

2. Embezzlement B d—Charge in this case held insufficient in failing to explain law arising upon the evidence.

The indictment charged defendant with embezzlement of funds, in one count as commissioner appointed to sell lands, and in a second count as agent and attorney. The evidence tended to show embezzlement by defendant of funds coming into his hands solely as commissioner: *Held,* the charge of the court which failed to point out the distinction between the counts in the indictment, and which left the jury with the impression that both counts were valid, was inadequate, C. S., 564, 4268, the sole question to be considered by the jury being whether defendant had embezzled funds coming into his hands as commissioner.

3. Embezzlement B c—

In a prosecution of defendant for embezzlement of funds coming into his hands as commissioner to sell lands, defendant is entitled to have the jury consider the fact that defendant was looking for some of the heirs at the time he filed his report showing his failure to account for some of the funds.

APPEAL by defendant from *Cranmer, J.*, at August Term, 1934, of ORANGE.

Criminal prosecution, tried upon indictment charging the defendant (a person over the age of sixteen years) in one count, "as commissioner of the Superior Court of Orange County, and as agent of the Superior Court of Orange County, and the aforesaid parties," with receiving, having in his possession, and embezzling $2,955, the property of J. L. Phelps and others, and in a second count, "as agent and attorney of J. L. Phelps and others," with receiving, having in his possession, and embezzling the said $2,955, etc.

The evidence on behalf of the State tends to show that on 8 December, 1930, in a special proceeding pending in the Superior Court of Orange County entitled, *"John L. Phelps et al. v. Ida Hughes et al.,"* the defendant was appointed commissioner to sell the lands belonging to the estate of John Malone. The defendant entered upon his duties, sold the lands as directed, and took into his possession, as such commissioner, the proceeds derived therefrom, $4,365, and has failed to account for $2,955 of said funds, though repeated demands have been made upon him for their proper disbursement. The defendant told several of the heirs that "he had collected all the moneys," and Otis D. Blackwell testified: "He told me that he got all the money and he was going to pay it out right away, but he never did."

The clerk of the court testified: "In the statement filed 8 October, 1932, Mr. Ray admitted he had not accounted for $2,967. Later, certain credits cut it down to $2,955. I don't think all the heirs had been ascertained, but nothing came up about that until after this account was filed, showing the balance due at that time."

An account was carried by "J. Clyde Ray, Commissioner," at the Farmers and Merchants Bank of Hillsboro (which seems to have been opened on 23 August, 1928), and between the dates of 21 February, 1931 (when the account showed a balance of 88c.) and 23 October, 1931, deposits amounting to $4,429.10 were credited to said account. Numerous small checks, over 250 in number, were drawn against this account between 23 February, 1931, and 27 April, 1933. On the latter date the account showed a balance of thirty-one cents.

The defendant offered no evidence, but relied upon his motion to nonsuit.

The court, in charging the jury, defined embezzlement as follows: "I instruct you that embezzlement is a breach of trust by misapplying or converting the property entrusted to a person, when done with a fraudulent intent." Exception. And again: "Another definition of embezzlement is about the same thing, but in different words, gentlemen, is the fraudulent conversion of property by one who has lawfully acquired possession of it, for the use and benefit of another." Exception.

Verdict: Guilty in the manner and form as charged in the bill of indictment.

Judgment: Imprisonment in the State's Prison for not less than three nor more than five years.

The defendant appeals, assigning errors.

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

S. M. Gattis, Jr., and R. O. Everett for defendant.

STACY, C. J. In *Peal v. Martin, ante,* 106, 176 S. E., 282, it was said: "A commissioner appointed by a court of equity to sell land is empowered to do one specific act, viz.: to sell the land and distribute the proceeds to the parties entitled thereto. He has no authority and can exercise no powers except such as may be necessary to execute the decree of the court. Immediately upon his appointment he ceases to be an attorney or agent for either party, but becomes in a certain sense an officer of the court for the specific purposes designated in the judgment." And later, in the same opinion: "A commissioner is not a trustee within the general meaning of that term." The holding was that an action brought by one of the parties against a commissioner for money had and received was barred by the three-year statute of limitations. It follows, therefore, that the status of a commissioner appointed to sell land is not that of a trustee, generally speaking, nor of an agent, either of the court or of the parties to the suit. Thus, it would seem, in view of the evidence in the case, that the definitions of embezzlement, given by the court to the jury, were hardly sufficient or adequate. C. S., 564. The defendant could not be convicted on the second count as agent or attorney, but only on the first as commissioner. C. S., 4268. This distinction was not pointed out to the twelve. Indeed, the jury was left with the impression that both counts in the bill were valid, and that a conviction might be had on either or both. It appears that, as commissioner, the defendant was seeking to locate some of the heirs at the time he filed his report. He was entitled to have the jury consider this fact in passing upon his conduct as commissioner. *S. v. Lancaster,* 202 N. C., 204, 162 S. E., 367; *S. v. Eubanks,* 194 N. C., 319, 139 S. E., 451; *S. v. Summers,* 141 N. C., 841, 53 S. E., 856.

Whether the defendant had embezzled any part of the funds which came into his hands as commissioner, and not as agent or attorney, was the issue arising on the evidence. *S. v. Gulledge,* 173 N. C., 746, 91 S. E., 362; *S. v. Cohoon,* 206 N. C., 388, 174 S. E., 91; *S. v. McDonald,* 133 N. C., 680, 45 S. E., 582. This, and this alone, was the question to be determined by the jury. *S. v. Foust,* 114 N. C., 842, 19 S. E., 275.

The record also discloses that, over objection, the prosecution was allowed to show the surety on defendant's bond, as commissioner was now "in the hands of a receiver, being liquidated by the Commissioner of Insurance of the State of New York." The pertinency of this evidence is not apparent.

New trial.

HORACE KEITH v. LIGGETT & MYERS TOBACCO COMPANY.

(Filed 28 January, 1935.)

Food A a—Evidence held insufficient to connect manufacturer with foreign substance found in tobacco by consumer.

Evidence that plaintiff purchased a plug of chewing tobacco from a retail merchant of the same brand as manufactured by defendant, and that the tobacco contained a foreign, deleterious substance causing injury to plaintiff is insufficient to resist defendant's motion as of nonsuit. There is no evidence to show a complete chain from the manufacturer to the consumer.

APPEAL by plaintiff from *Cranmer, J.,* at September, 1934, Civil Term, of DURHAM. Affirmed.

This was a civil action, tried before Hon. E. H. Cranmer, Judge, at the September Term, 1934, of the Superior Court of Durham County.

The plaintiff alleged that on or about 9 September, 1933, he purchased a piece of "Spark Plug" tobacco from the store of J. T. May, in the city of Durham, and paid five cents (5c.) for it; that soon after he purchased said tobacco, he took a chew of it and discovered that there was a big, long, green-looking bug embedded in the piece of said tobacco, and as a result thereof he became sick, suffered severe pains, was confined to his bed for a few days, and as a result of said sickness lost about two weeks from his work; that he was employed at the time he became sick and incurred a doctor's and medical bill. He alleged negligence on the part of the defendant in manufacturing the said tobacco and that the said negligence was the sole, efficient, and proximate cause of his sickness and injury and prays for damage in the sum of $2,000.

The defendant in its answer admitted that it manufactured a brand of tobacco known as "Spark Plug," but denied any negligence on its

part in manufacturing said tobacco. The defendant introduced no evidence and at the close of plaintiff's evidence the defendant made a motion for judgment as in case of nonsuit. C. S., 567. The court below allowed the motion. Plaintiff excepted, assigned error, and appealed to the Supreme Court.

J. Grover Lee, S. J. Bennett, and A. A. McDonald for plaintiff.
Fuller, Reade & Fuller for defendant.

CLARKSON, J. The principle involved in this case is set forth in *Corum v. Tobacco Co.*, 205 N. C., 213. This decision was cited with approval in *Straughn v. Coca-Cola Co.*, 205 N. C., 836. In the *Corum case, supra,* the evidence was (p. 214): "The defendant manufactures a brand of plug or chewing tobacco known as 'Apple Sun-cured.' It sold some of this tobacco to J. W. Smitherman, a wholesale merchant in Winston-Salem, who in turn sold it to Norman Brothers at East Bend, in Yadkin County. On 4 June, 1931, the plaintiff bought a plug of it from Norman Brothers." The evidence in that action was sufficient to be submitted to the jury to show a complete chain from the manufacturer to the consumer. There is no sufficient evidence in the present action to be submitted to the jury on this aspect, and therefore there was no error in the judgment of nonsuit in the court below.

The judgment of the court below is

Affirmed.

AULENO FLYNT PORTER ET AL. v. JEFFERSON STANDARD LIFE INSURANCE COMPANY.

(Filed 28 January, 1935.)

1. Mortgages H b—Continuance of restraining order against foreclosure of first deed of trust in suit by junior lienor upheld in this case.

In a suit by a junior lienor to restrain foreclosure under a first lien on the lands, the continuance of the temporary restraining order to the hearing upon the contention of the junior lienor that the amount due on the first lien is in dispute will not be disturbed on appeal where it appears that the continuance results in no injury to the first lienor, although the first lienor contends that the amount secured by the first deed of trust is no longer in dispute.

2. Injunctions D b—

A temporary restraining order will ordinarily be continued to the hearing upon a *prima facie* showing for injunctive relief when it appears that no harm can come to defendant from such continuance, and great injury might result to plaintiff from its dissolution.

APPEAL by defendants from *Hill, Special Judge,* at July-August Term, 1934, of FORSYTH.

Civil action by holder of the second deed of trust to restrain foreclosure of first deed of trust until the correct amount of the indebtedness due under the prior lien can be ascertained and determined.

From an order continuing the temporary injunction to the hearing, the defendants appeal.

William Porter for plaintiffs.

Manly, Hendren & Womble and Smith, Wharton & Hudgins for defendants Insurance Company and Julian Price, trustee.

STACY, C. J. Plaintiffs ground their action on the decisions in *Wilson v. Trust Co.,* 200 N. C., 788, 158 S. E., 479, and *Parker Co. v. Bank,* 200 N. C., 441, 157 S. E., 419, where it was held that a junior lienholder is entitled to know the amount legally due and collectible under a prior encumbrance so that he may properly protect his interests against foreclosure. *Broadhurst v. Brooks,* 184 N. C., 123, 113 S. E., 576; *Riley v. Sears,* 154 N. C., 509, 70 S. E., 997.

Speaking directly to the point in *Wilson v. Trust Co., supra, Connor, J.,* delivering the opinion of the Court, said: "Plaintiff in this action is not the debtor on the bonds secured in the (first) deed of trust; he is junior mortgagee. As such, he is under no obligation, legal or moral, to pay the amounts due on the bonds. He has the right, enforceable in this action, to have the amount due on the bonds secured by the deed of trust, which has priority over the mortgage by which his note is secured, ascertained and definitely determined, and upon paying the amount so ascertained and definitely determined to have the bonds and the deed of trust assigned to him. *Elliott v. Brady,* 172 N. C., 828, 90 S. E., 951. Until this amount, which is in controversy between plaintiff and the answering defendants, has been ascertained and definitely determined, plaintiff is entitled to have the sale of the land described in the complaint, under the power of sale contained in the deed of trust, enjoined and restrained. *Parker Co. v. Bank,* 200 N. C., 441, 157 S. E., 419."

In the instant case it is contended by the defendants, to which the plaintiffs do not assent, that the amount secured by the first deed of trust is no longer in dispute, but as the continuance of the temporary restraining order is without apparent injury to the defendants, the judgment will not be disturbed. *Boushiar v. Willis, ante,* 511, and cases there cited.

It is the general practice of equity courts, upon a *prima facie* showing for injunctive relief, to continue the restraining order to the hearing,

when it appears that no harm can come to the defendant from such continuance, and great injury might result to the plaintiff from a dissolution of the injunction. *Cullins v. State College,* 198 N. C., 337, 151 S. E., 646; *Hurwitz v. Sand Co.,* 189 N. C., 1, 126 S. E., 171; *Seip v. Wright,* 173 N. C., 14, 91 S. E., 359.

Affirmed.

STATE v. JACK HOOKER.

(Filed 28 January, 1935.)

1. Criminal Law L d—

The failure of defendant to file a brief on appeal works an abandonment of the assignments of error.

2. Criminal Law L a—Appeal in this case is dismissed for failure of defendant to prosecute the appeal in accordance with Rules of Court.

The appeal in this case is dismissed for failure of defendant to prosecute the appeal in accordance with the Rules of Court, the defendant having failed to take any steps toward perfecting the appeal after the service of case on appeal on the solicitor, but as defendant was convicted of a capital felony, the appeal is dismissed only after an inspection of the record for errors appearing on its face.

APPEAL by defendant from *Hill, Special Judge,* at April Term, 1934, of FORSYTH.

Criminal prosecution tried, upon indictment charging the defendant with the murder of one Sallie Anderson.

Verdict: Guilty of murder in the first degree.

Judgment: Death by electrocution.

The defendant gave notice of appeal.

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

No counsel appearing for defendant.

STACY, C. J. The evidence on behalf of the State tends to show that on 4 March, 1934, the defendant shot and killed Sallie Anderson under circumstances indicative of a mind fatally bent on mischief and a heart devoid of social duties. On the day of the homicide the deceased was in her apartment, in company with Bryce Mobley and others, when the defendant appeared at the door and said: "Sallie, when I am talking to you I can't tell you a damned thing. Bryce can. Come here, I have got something to tell you." The defendant and the deceased went into

an adjoining room, "walking side by side." Pretty soon three pistol shots were heard and Sallie Anderson was seen to fall across the bed mortally wounded. Several of the guests fled from the scene.

The defendant contended that the shooting was accidental, but the jury rejected this theory of the killing.

Notice of appeal was given in open court, and the defendant was allowed to prosecute the same *in forma pauperis,* but this has not been done in accordance with the rules governing such procedure. *S. v. Brown,* 206 N. C., 747, 175 S. E., 116. In the first place, the defendant's statement of case on appeal was not served on the solicitor until some time in July, 1934, long after the time for serving the same had expired, *Smith v. Smith,* 199 N. C., 463, 154 S. E., 737, though this may have been extended or waived, *Roberts v. Bus Co.,* 198 N. C., 779, 153 S. E., 398, and nothing more has been done. *S. v. Ray,* 206 N. C., 736, 175 S. E., 109; *Weaver v. Hampton,* 206 N. C., 741, 175 S. E., 110. In the next place, no brief has been filed for the appellant in this Court, which works an abandonment of the assignments of error, *S. v. Lea,* 203 N. C., 13, 164 S. E., 737, and no error appears on the face of the record. *S. v. Hamlet,* 206 N. C., 568, 174 S. E., 451; *S. v. Edney,* 202 N. C., 706, 164 S. E., 23.

The appeal must be dismissed in accordance with the usual practice in such cases. *S. v. Johnson,* 205 N. C., 610, 172 S. E., 219; *Pruitt v. Wood,* 199 N. C., 788, 156 N. C., 126.

Appeal dismissed.

STATE v. RAS TUTTLE.

(Filed 28 January, 1935.)

1. Seduction B d—

In a prosecution for seduction testimony of witnesses that prosecutrix told them she was engaged to defendant is competent in corroboration of prosecutrix's testimony that defendant promised to marry her.

2. Criminal Law I c—

Where testimony is competent as corroborative evidence, the failure of the trial court to so restrict its admission will not be held for error in the absence of a request to that effect by defendant.

3. Seduction B d—Testimony of prosecutrix as to each essential element of the offense held supported by other evidence in this case.

In this prosecution for seduction, defendant's objection to the sufficiency of the evidence on the ground that he could not be convicted on the unsupported testimony of prosecutrix, is not sustained, the testimony of prosecutrix on each essential element of the offense being supported by

other testimony, the promise of marriage by testimony of witnesses that prosecutrix told them defendant was going to marry her and by testimony of conversations between prosecutrix and defendant and by the circumstance of their long and constant association, her virtue by evidence of her good character, and the intercourse by defendant's admission. C. S., 4339.

4. Criminal Law L d—

The requirements of Rule 28, relating to setting out and numbering exceptions and assignments of error with authorities relied on classified under each assignment, and with reference to the printed pages of the transcript, are pointed out.

APPEAL from *Clement, J.*, at April Term, 1934, of STOKES. No error.

The defendant was tried and convicted upon a bill of indictment charging the seduction of an innocent and virtuous woman under promise of marriage, in violation of C. S., 4339. From judgment pronounced upon the verdict the defendant appealed to the Supreme Court, assigning errors.

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

W. Reade Johnson for defendant appellant.

SCHENCK, J. The basis of what appears to be the defendant's prinpal exceptive assignments of error is the court's allowing certain witnesses to testify that the prosecuting witness told them of her engagement to the defendant and of their purpose to be married. These exceptions cannot be sustained. In *S. v. Pace,* 159 N. C., 462, wherein the defendant was charged under the same statute as is the defendant in this case, it is written: "It is settled that statements to others that the prosecutrix and the defendant were going to be married are competent for the purpose of corroborating the testimony of the prosecutrix that the defendant had offered and promised to marry her. *S. v. Kincaid,* 142 N. C., 657; *S. v. Whitley,* 141 N. C., 823." Nor was this evidence objectionable because the court did not instruct the jury that it was admitted only for the purpose of corroboration. ". . . Nor will it be ground for exception that evidence competent for some purpose, but not for all purposes, is admitted generally, unless the appellant asks, at the time of its admission, that its purposes be restricted to the use for which it is competent. *S. v. Steele,* 190 N. C., 506, 130 S. E., 308; Rule 21, Supreme Court, 200 N. C., 827." *S. v. McKeithan,* 203 N. C., 494. The appellant did not ask that the purpose of the evidence be restricted.

The proviso that "the unsupported testimony of the woman shall not be sufficient to convict" is fully met in that the testimony of the prosecutrix was corroborated in respect to each essential element of the

offense charged: as to the promise of marriage by evidence of the prosecutrix' statements to others, and by the witness who "heard them talking," and by the further circumstance of the long and constant association of the defendant with the prosecutrix; as to her innocence and virtue by the evidence of her good character; and as to the intercourse by the admission of the defendant.

While we have endeavored to ascertain the exceptions relied on by the defendant, and the reasons assigned for such reliance, we call attention to the fact that his brief does not comply with Rule 28 of this Court, 200 N. C., 831, in that it fails to "contain, properly numbered, the several grounds of exception and assignment of error with reference to printed pages of transcript, and the authorities relied on classified under each assignment; . . ."

On the record we find

No error.

W. J. HARRELSON ET AL. v. E. J. COX ET AL.

(Filed 28 January, 1935.)

Mortgages F c—

A complaint alleging that a mortgagee in possession by fraud and artifice procured the mortgagors to deed him their equity of redemption is good as against a demurrer unaffected of admissions made by counsel in response to interrogation by the court.

APPEAL by plaintiffs from *Cranmer, J.*, at April Term, 1934, of BLADEN.

Civil action in ejectment, for an accounting, and to remove cloud from title.

The complaint alleges:

1. That on 1 May, 1922, the plaintiffs executed to E. J. Cox a mortgage on their eighteen acres of land situate in Bladen County, to secure payment of their certain indebtedness to him.

2. That on 1 November, 1923, the said E. J. Cox, mortgagee, agreed to take over said lands, and out of the crops to pay taxes, dues to the Federal Land Bank, etc., and to restore possession of said premises at the end of five years free and clear of all encumbrances.

3. That thereafter, on 1 December, 1923, by artifice, fraud, etc., the said E. J. Cox forced the plaintiffs against their will to execute deed for said premises to himself and wife.

4. That on 5 December, 1925, with intent to cheat and deprive the plaintiffs of their equity of redemption in said lands, the said E. J. Cox and wife, with full knowledge and ulterior design, attempted to sell the same to their codefendant, L. R. Hayes;

Wherefore, plaintiffs pray for relief:

The following judgment was entered: "It appearing to the court upon the reading of the pleadings and admissions of counsel in response to questions by the court that the plaintiff has not pleaded facts sufficient to constitute a cause of action, and that the plaintiff is not entitled to recover of the defendants, or either of them;

"It is now, on motion . . . ordered and adjudged that . . . this action be and the same is hereby dismissed."

Plaintiffs appeal, assigning errors.

A. M. Moore for plaintiffs.
Hector H. Clark for defendants Cox.
R. J. Hester, Jr., and Oliver Carter, Jr., for defendant Hayes.

STACY, C. J. We think there was error in dismissing the action as upon demurrer to the complaint. Where a mortgagee takes from his mortgagor a deed for the mortgaged premises, under circumstances such as here alleged, the transaction is open to investigation, with the burden of fairness upon the mortgagee. *Hinton v. West, post,* 708; *Jones v. Williams,* 176 N. C., 245, 96 S. E., 1036; *Cole v. Boyd,* 175 N. C., 555, 95 S. E., 778; *Jones v. Pullen,* 115 N. C., 465, 20 S. E., 624. In this jurisdiction the principle is often referred to as the "doctrine of *McLeod v. Bullard,*" 84 N. C., 516, approved on rehearing, 86 N. C., 210: "Where a mortgagee buys the equity of redemption of his mortgagor, the law presumes fraud, and the burden of proof is upon the mortgagee to show the *bona fides* of the transaction."

We are not advised as to what admissions were made by counsel in response to the court's interrogatories, but the complaint would seem to be good as against a demurrer. *Dix-Downing v. White,* 206 N. C., 567, 174 S. E., 451.

Reversed.

UNION CENTRAL LIFE INSURANCE, INC., v. G. F. BULLARD ET AL.

(Filed 28 January, 1935.)

1. Appeal and Error E g—

Where there is a conflict between recitals in the case on appeal and the judgment appealed from, the recitals in the judgment are controlling.

2. Appeal and Error E a—

Where the pleadings are omitted from the record by agreement of the parties the appeal will be dismissed, since the pleadings are necessary to inform the Court of the nature of the action or proceeding and the Court can judicially know only what appears on the record. Rule 19, sec. 1.

INSURANCE CO. *v.* BULLARD.

APPEAL by defendants from *Cranmer, J.,* at May Term, 1934, of BLADEN.

Summary proceeding in ejectment, tried before a justice of the peace on 5 April, 1934, which resulted in a judgment for the plaintiff.

In the agreed statement of case on appeal it appears that "on 11 April, 1934, the justice of the peace duly sent up the defendant's case on appeal and the same was duly docketed by the clerk of the Superior Court." Notice of appeal, dated 11 April, 1934, showing service by sheriff on counsel and agent for plaintiff, "time 11:30 a.m.," also appears in the agreed statement of case on appeal.

But it is recited in the judgment, "and it further appearing to the court from the records, and by admission of counsel for defendants, that no notice of appeal was given in open court, and that thereafter no notice of appeal was ever served upon the plaintiff as by statute in such cases made and provided, and that no proper notice of appeal has ever been given the plaintiff";

Now, therefore, on motion of counsel for plaintiff, appearing specifically for the purpose of moving to dismiss the appeal, it is "ordered and decreed that the appeal of the defendants be and the same is hereby dismissed."

From this ruling the defendants appeal, assigning errors.

Oliver Carter, Jr., and H. H. Clark for plaintiff.
A. M. Moore for defendants.

STACY, C. J. It will be observed that there is an apparent conflict between what appears in the judgment and the case on appeal. Where such conflict exists, the recitals appearing in the record proper are controlling. *Bartholomew v. Parrish,* 190 N. C., 151, 129 S. E., 190; *Moore v. Moore,* 185 N. C., 332, 117 S. E., 12; *S. v. Wheeler,* 185 N. C., 670, 116 S. E., 413. "Where there is a repugnancy between the record and the case stated, the record will control." *S. v. Keeler,* 80 N. C., 472.

But for another reason the appeal must be dismissed. It is agreed "that the affidavits, summons, and pleadings were in due form," and therefore they were omitted from the record. This is fatal to the appeal. *Riggan v. Harrison,* 203 N. C., 191, 165 S. E., 358; *Waters v. Waters,* 199 N. C., 667, 155 S. E., 564. It is provided by Rule 19, sec. 1, of the Rules of Practice that "the pleadings on which the case is tried, the issues, and the judgment appealed from shall be a part of the transcript in all cases." The pleadings are essential in order that we may be advised as to the nature of the action or proceeding. *Waters v. Waters, supra.* We can judicially know only what properly appears on the record. *S. v. Lumber Co., ante,* 47, 175 S. E., 713.

Appeal dismissed.

J. CLYDE RAY v. ATLANTIC LIFE INSURANCE COMPANY.

(Filed 28 January, 1935.)

Usury A a—Sum deducted by lender in excess of legal interest must be reserved by him as interest in order to constitute usury.

In this action against the purchaser of notes to recover the amount of interest paid thereon on the ground that the notes were tainted with usury, C. S., 2306, it appeared from the facts agreed that the borrower executed notes for the principal sum borrowed and notes for the interest on the principal notes from the time of their execution until their respective maturities, and that the lender paid the borrower the principal sum borrowed less an amount deducted and retained by the lender: *Held*, in the absence of an agreed fact or a finding by the court that the sum deducted was reserved by the lender as interest, the transaction did not constitute usury, and therefore the notes were not tainted with usury in the hands of the purchaser.

APPEAL by plaintiff from *Sinclair, J.*, at May Term, 1934, of ORANGE. Affirmed.

This is an action to recover a sum of money paid by the plaintiff to the defendant as interest on certain notes which were executed by the plaintiff and his wife and are now held by the defendant as a purchaser for value and in due course from the payee.

It is alleged in the complaint that the payee of said notes at the date of their delivery knowingly charged and received from the plaintiff interest on said notes at a rate in excess of six per cent per annum, and that for that reason all interest on said notes was forfeited as provided by statute. C. S., 2306.

This allegation is denied in the answer filed by the defendant.

At the trial of the action the parties waived trial by jury, and agreed that the court might render judgment on a statement of facts agreed submitted by them.

From judgment on the facts agreed that plaintiff recover nothing of the defendant, the plaintiff appealed to the Supreme Court.

S. M. Gattis, Jr., for plaintiff.
Giles & Giles for defendant.

CONNOR, J. On or about 15 August, 1925, the plaintiff and his wife executed and delivered to the Federal Trust Company of Richmond, Va., at Hillsboro, N. C., ten notes aggregating the sum of $3,000, and twenty notes aggregating the sum of $990. The consideration for the ten notes was the agreement of the Federal Trust Company to lend to the plaintiff the sum of $3,000. The consideration of the twenty notes was

the interest which would accrue on the ten notes from their date to their respective maturities. Upon the delivery of said notes to it, the Federal Trust Company delivered to the plaintiff the sum of $2,797, "which sum represented all the proceeds of the loan received by the plaintiff." It was agreed by the parties that the sum of $203 was "knowingly retained by the lender—the Federal Trust Company." It does not appear from the statement of facts agreed that the sum of $203 was retained by the Federal Trust Company as interest. It does not appear for what purpose the said sum was retained. In the absence of an agreement by the parties or a finding of fact by the court that said sum was reserved by the lender as interest, its retention did not constitute usury. *Bank v. Jones,* 205 N. C., 648, 172 S. E., 185. In the cited case it was admitted at the trial that the payee of the note sued on had charged, reserved, and received usury on the note prior to its purchase by the plaintiff. For this reason it was held in that case that all interest on the note had been forfeited, even in the hands of an innocent purchaser for value. In the instant case it is denied in the answer that the payee had charged, reserved, or received usury on the note prior to its purchase by the defendant.

On or about 19 August, 1925, the defendant Atlantic Life Insurance Company of Richmond, Va., purchased from the Federal Trust Company all the notes which were executed by the plaintiff, and became the holder for value in due course of all said notes. All of said notes—both those for principal and those for interest—have been paid by the plaintiff, some voluntarily, and others by foreclosure of the deed of trust by which said notes were secured.

On the facts agreed at the trial of this action, none of the notes which plaintiff executed, and which were subsequently paid, were tainted with usury. There is no error in the judgment.

Affirmed.

KATE KENNINGTON BYRUM v. ERNEST BYRUM.

(Filed 28 January, 1935.)

Divorce E c—Where wife leaves husband's home without excuse or justification she is not entitled to alimony without divorce.

Where in an action for alimony without divorce the wife alleges that she left the home of her husband because of his conduct toward her, but the jury answers the issue in conformity with the contention of the husband that the wife left his home without excuse or justification, the wife is not entitled to alimony.

APPEAL by defendant from *Stack, J.,* at June Term, 1934, of MECKLENBURG. Reversed.

The plaintiff and the defendant were married to each other on 4 March, 1925. They lived together as husband and wife in a home in this State, which was provided by the defendant, until 24 February, 1932, when the plaintiff left the home of the defendant.

Two children were born of the marriage of the plaintiff and the defendant, one, a boy about four years of age, who is now in the custody of the defendant, the other, a girl about one year of age, who is now in the custody of the plaintiff.

This action was begun by the plaintiff on 15 June, 1932, for the custody of her son and for alimony without divorce.

The plaintiff alleges in her complaint that on 24 February, 1932, because of the conduct of the defendant toward her, she left her home and went to the home of her father, where she has since resided.

The defendant in his answer denies the allegations of the complaint with respect to his conduct toward the plaintiff, and alleges that plaintiff left his home without excuse or justification; he further alleges in defense of plaintiff's recovery in this action that since she left his home the plaintiff has on many occasions committed acts of adultery.

The issues submitted to the jury were answered as follows:

"1. Did the plaintiff commit acts of adultery, as alleged in the defendant's answer? Answer: 'No.'

"2. Did the defendant, by his conduct, make the condition of the plaintiff intolerable and her life burdensome, as alleged in the complaint? Answer: 'No.'"

On the verdict and the facts set out in the judgment, it was ordered and adjudged by the court that the defendant pay to the plaintiff from time to time, for her support and the support of her infant daughter, certain sums of money.

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

Carswell & Ervin for defendant.

CONNOR, J. The judgment in this action is reversed on the authority of *Carnes v. Carnes,* 204 N. C., 636, 169 S. E., 222. In that case it is said that "as long as the fifth issue stands undisturbed, it would seem that the defendant (his wife) is not entitled to the relief demanded by her, certainly not to allowance for alimony and counsel fees." In the instant case, in view of the allegation in the complaint that the plaintiff left the home of the defendant, taken in connection with the answer to the second issue, establishing the contention of the defendant that plain-

tiff left his home without excuse or justification, the plaintiff is not entitled to alimony. See *McManus v. McManus,* 191 N. C., 740, 133 S. E., 9. On the verdict, the defendant is entitled to judgment that plaintiff take nothing by her action.

The judgment is reversed and the action remanded to the Superior Court of Mecklenburg County, with direction that judgment be entered in accordance with this opinion.

Reversed.

STATE v. LOUELLA MARTIN CLARK AND AGNES M. LEE.

(Filed 28 January, 1935.)

Contempt A b—Refusal to effectuate agreement to sign consent judgment may not be made basis for contempt proceedings where it does not appear that parties ever agreed to exact terms of such judgment.

In this proceeding for contempt it appeared that respondents, as defendants in partition proceedings, had agreed to enter a consent judgment in that proceeding, and that the matter was continued from time to time upon representations made in open court that a consent judgment would be submitted to the court, that several tentative drafts of the proposed judgment had been made but none actually signed by the parties, that the petitioner in that proceeding had died, rendering it more troublesome to establish the allegations of the petition, and that respondents now decline to sign the proposed consent judgment, contending that at no time had they consented to its terms: *Held,* the record does not support a judgment for contempt, C. S., 985, it appearing that the exact terms of the proposed consent judgment had never been agreed upon by the parties or their counsel.

APPEAL by respondents from *Alley, J.,* at March Term, 1934, of FORSYTH.

Proceeding as for contempt.

The facts are these:

1. In 1930, Wm. T. Butler filed in the Superior Court of Forsyth County petition for partition of certain land, alleging that he and the defendants therein were equal owners of said land as tenants in common.

2. The matter was continued from time to time, over a period of eighteen months or two years, upon representations made in open court that a compromise consent judgment had been agreed upon and would be presented for the court's approval.

3. Several tentative drafts of the proposed judgment were prepared, but none actually signed by the parties or their counsel, and none approved by the court.

4. In the meantime the petitioner died, rendering it more troublesome and difficult to establish the allegations of the petition.

5. The respondents, who were defendants in the partition proceeding, now decline to consent to the proposed compromise judgment, contending that at no time had they agreed to its terms.

Upon these, the facts chiefly pertinent, the court found that the acts of the respondents "as set forth above did tend to defeat, impair, impede, or prejudice the rights or remedies of the plaintiff and the other defendants in this cause"; whereupon they were adjudged in contempt and fined "$25.00 each, and the costs of the court for this term."

Respondents appeal, assigning errors.

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

Ingle & Rucker for respondents.

STACY, C. J. The judgment as for contempt is not supported by the record. C. S., 985. The exact details of the proposed consent judgment in the partition proceeding were never agreed upon, either by the parties or their counsel. Nor was the judgment ever presented to the court for approval. It is not an unusual experience for proposed agreements to fail when it comes to putting them in writing. Misunderstandings arise over details and forms of expression. From parol to writing is not always an easy step to take in the negotiation of agreements. It sometimes proves unsuccessful. The record discloses just such a stumble in the instant case, and apparently no more.

Error.

J. S. CURRENT v. WILLIAM E. CHURCH, CLERK.

(Filed 28 January, 1935.)

1. Supersedeas A a—Recognizance may not be construed to operate as stay bond.

Defendant in a criminal action was allowed to appeal from judgment imposing a fine and a road sentence upon filing a bond for his appearance at the next criminal term of the court with sufficient surety, but the stay bond required by C. S., 4650, was not filed: *Held*, upon affirmance of the judgment by the Supreme Court, judgment may not be had against the surety on the appearance bond for the amount of the fine, and as there was nothing to stay execution of the judgment at any time, C. S., 4654, 4655, 650, the recognizance may not be construed as a stay bond on the ground that the parties so intended.

2. Bail B e—

A bond conditioned upon the appearance of defendant at a subsequent term of court does not obligate the surety thereon to take the place of defendant and abide by the judgment of the court.

APPEAL by the State and Board of Education of Forsyth County from *Alley, J.*, at June Term, 1934, of FORSYTH.

By agreement the petition filed in the above-entitled cause was transferred and treated as a motion in the cause for return of cash bond deposited for appearance of the defendant in the case of *S. v. Fowler,* 205 N. C., 608, 172 S. E., 191.

The facts are these:

1. At the May Term, 1933, of Forsyth Superior Court, Clyde Fowler was convicted of operating a lottery and sentenced to six months on the roads, and to pay a fine of $1,000 and the costs.

2. An appeal was taken and a "Recognizance of Defendant" in the sum of $1,500 was entered into by the defendant with J. S. Current as surety to "personally appear at the next criminal term of the Superior Court of Forsyth County, . . . on 19 June, 1933, . . . to answer the charge preferred against him for lottery, . . . to do and receive what shall by the court be then and there enjoined upon him, . . . and shall not depart the court without leave."

3. The surety deposited with the clerk of the Superior Court the sum of $1,500 in cash.

4. The appeal of the defendant Fowler was heard at the Fall Term, 1933, and the judgment affirmed 10 January, 1934.

5. The defendant voluntarily entered into the execution of his road sentence, but is insolvent, and has failed and refused to pay the fine and costs imposed upon him.

6. Execution against the property of the defendant having been returned *nulla bona,* the same was served against the cash bond in the hands of the clerk.

The court being of opinion that the "Recognizance of Defendant" was not a stay bond within the meaning of the law, dismissed the execution and ordered that the $1,500 deposited with the clerk in lieu of bond be returned to the surety.

From this ruling the State and the Board of Education of Forsyth County appeal, assigning errors.

Hastings & Boone, Peyton B. Abbott, and J. Erle McMichael for appellants.

Slawter & Wall and Brooks, McLendon & Holderness for appellee.

STACY, C. J. What has happened in this case is that, instead of "giving adequate security to abide the sentence, judgment, or decree of

the Supreme Court," as required of appellants under C. S., 4650, the defendant Clyde Fowler executed a recognizance with J. S. Current as surety to appear at the next term of the Superior Court of Forsyth County, then and there to answer the charge preferred against him, etc. It has never been understood that a surety on an appearance bond was to take the place of the defendant and abide the judgment of the court. *S. v. Bradsher,* 189 N. C., 401, 127 S. E., 349; *S. v. White,* 164 N. C., 408, 79 S. E., 297; *S. v. Schenck,* 138 N. C., 560, 49 S. E., 917.

But it is said the parties intended the "Recognizance" to operate as a stay within the meaning of the law, and it should accordingly be construed. *Walker v. Williams,* 88 N. C., 7. The fact is, however, there was nothing to stay the execution of the judgment at any time. C. S., 4654-4655, and 650. This was the view of the court below, and no error has been made to appear on the record.

Affirmed.

OLIVER C. FULLER v. RHODODENDRON CORPORATION.

(Filed 28 January, 1935.)

Wills E d—Remainder held to vest at termination of life estate and not upon death of testator.

A devise to testator's wife for life, the property then to be sold and divided equally among testator's children by his first wife, "and if none alive, to my first wife's grandchildren," *is held* to vest the remainder after the life estate in the sole survivor of testator's children by his first wife as of the date of the death of his widow, unaffected by the direction to sell the land and divide the proceeds.

APPEAL by defendant from *Warlick, J.,* at November Term, 1934, of HENDERSON.

Civil action for specific performance.

Plaintiff being under contract to convey a certain tract of land on Mount Hebron, Henderson County, to the defendant, duly executed warranty deed therefor, tendered same to the defendant, and demanded payment of the purchase price as agreed. The defendant refused to accept said deed and declined to pay the purchase price on the ground that the title offered is defective.

The case was heard upon the pleadings and facts agreed.

There was judgment for the plaintiff, from which the defendant appeals, assigning error.

Shipman & Arledge for plaintiff.
Thomas H. Franks for defendant.

STACY, C. J. On the hearing the title offered was properly made to depend upon the construction of the following item in the will of Solomon Jones:

"I give, devise, and bequeath my estate and property, real and personal, as follows, that is to say:

"My real and personal estate on 'Mt. Hebron,' in Henderson County, North Carolina, to go to my wife, Assena T. Jones, during her mortal life, then to be sold and divided equally among my first wife's children, and if none alive, to my first wife's grandchildren."

The case states that Jane Cox was the only child of the testator's first wife to survive his widow, Assena T. Jones. The plaintiff has acquired, by *mesne* conveyances, all of Jane Cox's interest in said land.

On authority of *Brown v. Guthery,* 190 N. C., 822, the trial court held that, under the will of Solomon Jones, his widow, Assena T. Jones, took a life estate in said land, with remainder in fee to the children of the testator's first wife who should survive his widow, and that as Jane Cox alone of his first wife's children survived his widow, she was entitled to the remainder in fee. This ruling would seem to be correct. *Watson v. Smith,* 110 N. C., 6, 14 S. E., 640.

Nor is plaintiff's title affected by the testator's direction to sell the land and divide the proceeds. *Witty v. Witty,* 184 N. C., 375, 114 S. E., 482; 40 Cyc., 1999.

Affirmed.

STANDARD ACCIDENT INSURANCE COMPANY v. HARRISON-WRIGHT COMPANY.

(Filed 28 January, 1935.)

1. Insurance S a — Property damage insurance in this case held to include damage to property from blasting, though policy excluded "explosions."

Insurer's printed property damage certificate provided that insurer should pay all damage to property of third persons caused by insured in the performance of the construction work contemplated in the policy, with certain printed exceptions, one of which excepted losses due to "explosions of any character." The schedule referred to in the certificate was a printed form in which the name of insured and the business operations covered by the insurance were typewritten, the schedule providing that the business operations were correctly described as "sewer construction—all operations—excluding tunnelling, except at street crossings." In constructing the sewer it was necessary for insured to blast rock with dynamite, and the property of third persons was damaged by the operations: *Held*, the policy covered the damage to property resulting from the dynamiting, the printed exclusion in the certificate not being sufficient to nullify the clear typewritten language of the schedule which covered

all operations necessary in the construction of the sewer, and which did not exclude "explosions," and the term "explosion" being ambiguous and not necessarily including intentional blasting with dynamite, and it being apparent from a construction of the entire contract that the parties intended to insure against damage to property resulting from all necessary operations in the construction of the sewer.

2. Insurance E b—

A manual of an insurance company issued by it to guide its local agents as to rates, which is not made a part of the insurance contract, will not be considered in construing the contract as to risks covered.

3. Same—

Where a policy of insurance is reasonably susceptible to two constructions, the construction favorable to insured will be adopted, the insurer having chosen the language of the policy.

4. Insurance L e—Insurer held liable under policy for fees of attorneys employed by insured to defend suit after insurer's refusal to defend.

The policy of property damage and personal injury insurance in this case provided that insurer would defend any suits brought against insured covered by the policy. Suit for property damage and personal injury was brought against insured by a third person, and insurer disclaimed any liability under the policy and refused to defend the suit. Insured employed attorneys to defend the suit, and thereafter insurer offered to defend the suit, but affirmed its denial of liability for the property damage feature of the case, and upon insured's refusal to allow insurer's attorneys to have complete control of the case, denied liability for either the property damage or personal injury: *Held*, upon a judicial determination that the suit was covered by the policy, insured is entitled to recover the reasonable costs and expenses, including attorney fees, expended by insured in defending the suit, insured being entitled to treat insurer's positive and unequivocal denial of liability for the suit as final, and insurer's later and conditional offer to defend the suit came too late, and insurer's later denial of liability confirming its original denial.

APPEAL by plaintiff from *Shaw, J.*, at April Special Term, 1934, of MECKLENBURG. Affirmed.

The record discloses that: "Upon the call of this case for trial, and after empaneling the jury and reading the pleadings, the court suggested the first question to be determined in the case was: 'What was the real contract between plaintiff and defendant as to the matters in controversy in this action?' And with the consent of the attorneys, the court directed counsel upon both sides to present to the court and jury such evidence as they had of the contract, and to present all the evidence they had bearing upon the contract and the construction thereof. The court announced to counsel that upon determining what the real contract was between the parties the court would refer the question of damages, if any, to be determined by a referee.

"After the introduction of evidence, counsel announced they had no more evidence to offer upon the above question, and counsel for both

sides agreed that upon the evidence offered it is a question of law for the court to determine what the contract was between the parties, and whether or not, if defendant was damaged as alleged in its counterclaim, plaintiff would be liable for such damages.

"After hearing argument of counsel on both sides, the court holds that the paper-writing offered in evidence by defendant, marked 'Exhibit 1,' was the contract between the parties, and that under the terms and provisions of the contract it covered damages to property by blasting, and the plaintiff would be liable to the defendant for damages, if any, caused by blasting or explosion, as well as for expenses reasonably incurred by the defendant in the settlement of such matters. To which ruling the plaintiff excepts.

"Subject to plaintiff's exceptions to the court's ruling and to the plaintiff's right to appeal, and except as stated below with reference to attorney's fees it is agreed that if the court, in making the ruling above, is correct, that under the provisions and conditions of the policy in question the plaintiff would be liable to the defendant for damages under its counterclaim, and that such damages would be as follows:" (Naming them.)

"It is agreed that the foregoing amounts were paid by the defendants on account of the valid claims for negligence of Harrison-Wright Company in the construction of sewer lines in Greenville, S. C., as alleged in the counterclaim, said claims having been made against Harrison-Wright Company on account of property damages suffered by Crisp, Talley, Burdette, Whiteside, and Goodman in connection with the blasting operations described in the pleadings, and that the amounts paid H. C. Jones, Hicks & Johnston, and Tillett, Tillett & Kennedy were on account of expenses incurred by the defendant in connection with the settlement of the Crisp, Talley, Burdette, and Whiteside claims, and the suit brought by Goodman.

"The foregoing recovery to be subject to a credit in favor of the plaintiff against the defendant for $723.62, with interest from 9 March, 1932. Notwithstanding anything in the stipulations and entries heretofore made and entered, the plaintiff contends that it is not liable for the payment of attorney fees incurred by the defendant in the Goodman case, and as a basis for this contention offers the following portions of letters, marked 'Plaintiff's Exhibit B.'

"It is agreed, and a jury trial being waived, the court finds as a fact that the negotiations between the plaintiff and defendant with respect to furnishing counsel to defend the Goodman suit were as shown by correspondence, which has been introduced in evidence as 'Plaintiff's Exhibit B,' and the above stipulations and agreements are made with the reservation that the plaintiff shall be entitled to contend in the

Supreme Court that the facts being as shown by said correspondence, it is not liable to the defendant for the attorney fees paid on account of the Goodman suit." (Correspondence set forth.) "The plaintiff's motion to amend the pleadings is allowed. Thomas J. Shaw, Judge Presiding. This 5 May, 1934."

The judgment of the court below is as follows: "This cause came on to be heard before Thomas J. Shaw, judge presiding, and a jury, at the 30 April, 1934, Special Term. Proceedings were had, stipulations and agreements were entered into, and rulings were made by the court, as appears upon the record of same which is attached to this judgment. Upon the said proceedings, stipulations, agreements, and rulings the court finds and holds that the defendant is indebted to the plaintiff in the sum of eight hundred seventeen and 81/100 dollars ($817.81), which includes interest to 30 April, 1934, and that the plaintiff is indebted to the defendant in the sum of four thousand four hundred twenty-five and 79/100 dollars ($4,425.79), which includes interest to 30 April, 1934; that the amount of defendant's indebtedness to the plaintiff should be offset against the amount of plaintiff's indebtedness to the defendant, leaving a net amount due by the plaintiff to the defendant of three thousand six hundred seven and 98/100 dollars ($3,607.98), with interest from 30 April, 1934. Upon motion of Tillett, Tillett & Kennedy, attorneys for the defendant, it is ordered, adjudged, and decreed that the defendant recover of the plaintiff the sum of three thousand six hundred seven and 98/100 dollars ($3,607.98), with interest from 30 April, 1934, and the costs of the action, to be taxed by the clerk. This 5 May, 1934. Thomas J. Shaw, Judge Presiding."

The plaintiff's exceptions and assignments of error are as follows: "(1) That the court, at the close of the evidence of the defendant on its counterclaim, overruled the plaintiff's demurrer to the defendant's evidence upon the counterclaim and its motion to dismiss the counterclaim as of nonsuit. (2) After hearing the arguments of counsel, the court ruled that the paper-writing offered in evidence by the defendant, marked 'Defendant's Exhibit No. 1,' was the contract between the parties, and that under the terms and provisions of the contract covered damages to property by blasting, and that plaintiff would be liable to the defendant for damages, if any, caused by blasting or explosion, as well as for expenses reasonably incurred by the defendant in the settlement of such matters. (3) That at the close of all the evidence the court overruled the plaintiff's demurrer to the defendant's evidence on its counterclaim, and motion for judgment as of nonsuit upon the counterclaim then made. (4) That the court entered a judgment in favor of the defendant, as appears in the record."

Appeal was duly taken to the Supreme Court. The necessary facts will be set forth in the opinion.

C. H. Gover and William T. Covington, Jr., for plaintiff.
Tillett, Tillett & Kennedy for defendant.

CLARKSON, J. Trial by jury was waived. The whole controversy was reduced to two questions: (1) Did the policy and/or the certificate cover the losses of the defendant set out in its counterclaim? (2) What was the amount of those losses? The judge ruled as a matter of law that the policy and/or certificate covered the losses. The amounts of the losses were fixed by an agreement of the parties. Judgment was entered on the judge's ruling and the agreement of parties. The judgment awarded the defendant the difference between the fixed amounts of the defendant's losses and the amount of the premiums admittedly due from the defendant to the plaintiff.

From this judgment the plaintiff appealed to this Court. The plaintiff contended that as a matter of law neither the policy nor the certificate of liability insurance covered the particular losses of the defendant enumerated in its counterclaim. We cannot so hold.

Harrison-Wright Company, the defendant, is a corporation engaged in the general contracting business extending over a number of states. While it was engaged in laying sewer pipes for the city of Greenville, S. C., certain damage was done to property owners, and one resident of Greenville, Mrs. Goodman, claimed that she suffered personal injuries, all arising out of blasting which was done by Harrison-Wright Company in removing rock in connection with the sewer construction.

The material part of the property damage certificate (Manufacturers and Contractors Form), issued by plaintiff to defendant, which is printed as follows: "Property Damage Certificate. (Manufacturers and Contractors Form.) . . . Does hereby agree, in consideration of the estimated advance premium shown in the schedule on the reverse side hereof, insuring agreements with the assured named and described in said schedule, subject to the conditions and agreements hereinafter provided, as respects damage to or the destruction of property of every description. . . . (1) To pay, within the limits as specified in Item 4 of said schedule, the loss from the liability imposed by law upon the assured for such damage to or destruction of property so caused (a) while within or upon the premises described in said schedule or upon the sidewalks or other ways immediately adjacent thereto and caused by reason of and during the prosecution of the business operations of the assured as described in said schedule; (b) while elsewhere if caused by reason of and during the prosecution of the business operations of the assured as described in said schedule and conducted at the premises described in said schedule, or by employees engaged as such in said operations who are required in the discharge of their duties to be away

from said premises. For the purpose of this insurance 'business operations' shall include operations incident or appurtenant thereto."

"Exclusions II. . . . (3) This certificate does not cover any loss on account of accidents due to or caused by" (naming many) "(i) an explosion of any character."

"Schedule referred to in property damage certificate. Item 1. Name of the assured: Harrison-Wright Company. . . . Item 3. *The business operations and the premises insured under this certificate are correctly described as follows:* Description of business operations to be insured: *Sewer construction—all operations—excluding tunnelling, except at street crossings.*" (Italics ours.) . . . Item 4. The company's liability under this certificate on account of any one accident resulting in damage to or destruction of the property of one or more persons shall be the actual value of the property damaged or destroyed at the time of such damage or destruction, together with the loss of use thereof, but in no event in excess of the total sum of one thousand dollars. Countersigned at Charlotte, N. C. Horace Davis, Inc., Gen'l Agent. By: Horace Davis, Authorized Agent."

The following is not on printed form, but typewritten: *"Sewer construction—all operations—excluding tunnelling, except at street crossings."* It will be noted that Item 3 says: "The business operations and the premises insured under this certificate *are correctly described as follows:"*

In clear language we have: "The business operations and the premises insured under this certificate are correctly described as follows: description of business operations to be insured." The following is typed: "Sewer construction—all operations—excluding tunnelling, except at street crossings."

The defendant wanted insurance to protect it in *sewer construction—All operations*—what is the meaning of *All?* Webster's New International Dictionary defines the word as follows: "The entire thing; everything included or concerned; the aggregate; the whole; totality."

Then is added, "excluding tunnelling, except at street crossings." If the insured and the insurer had wanted a further exclusion, how easily there could have been added "an explosion of any character." The typed language correctly described the business operations for which defendant was insured.

The question is, whether these words, "sewer construction—all operations," which were inserted with the typewriter and written into the policy, were words which the parties chose as directly appropriate, or whether certain printed words in other parts of the contract were to be considered as overruling and setting at naught this clear language. We think not.

The court below held: "That the paper-writing offered in evidence by defendant, marked 'Exhibit 1,' was the contract between the parties, and that under the terms and provisions of the contract it covered damages to property by blasting, and the plaintiff would be liable to the defendant for damages, if any, caused by blasting or explosion, as well as for expenses reasonably incurred by the defendant in the settlement of such matters."

It was said on the argument, and appears in defendant's brief, that the policy was fourteen feet in length and the Insurance Company's Manual contains several hundred pages. We think the manual immaterial.

G. T. Spruce testified: "In January and February, 1932, I was superintendent of construction for Harrison-Wright Company at Greenville, S. C. *We were laying sewer in the northern section, and in connection with that sewer it was necessary to do some blasting.* We dug our first sewer and did our first blasting along Ashley Avenue, on which street were located the Crisp, Talley, Burdette, and Whiteside houses. Just about the time we finished this sewer we started digging an outfall in a hollow some distance away from Ashley Avenue. *As an incident to digging that sewer, it became necessary to do some blasting down in the hollow.* The damages complained of by Crisp, Talley, Burdette, and Whiteside resulted from blasting done on Ashley Avenue, and the damage done to the Goodman house was done by the blasting in the hollow. It was from twelve to fifteen hundred feet from Ashley Avenue to the Goodman house across the hollow; it was approximately four hundred feet from the place we blasted on Ashley Avenue to the place we blasted in the hollow to the Goodman house."

The wishes of defendant were simple. It wanted insurance to protect it in the kind of work above described. It goes to the agent of plaintiff in Charlotte, N. C., and obtains from him a policy for a year effective from 4 May, 1931. It appears that the defendant was solvent, and had considerable dealing with plaintiff. The fixing of the premium was with the company. We think 6301 of the manual was put there to guide the local agents as to rates, etc. The manual was not made a part of the contract. It starts out, "General Instruction." To whom? The agents.

In *Miller v. Missouri State Life Insurance Co.* (Missouri), 153 S. W., 1080, the Court said: "The manual giving these definitions was not a part of the policy, nor was it mentioned or referred to therein; yet, if its provisions were to have the effect desired by defendant, they would have become one of the principal parts of the contract. To have had this effect, they should have been embodied in the face of the contract, or referred to therein and made a part thereof in plain, unmistakable

terms. *McDonald v. Insurance Co.,* 154 Mo. *loc. cit.,* 628, 629, 55 S. W., 999; *Elliott v. Safety Fund Life Ins. Co.,* 76 Mo. App., 562; 1 Joyce on Insurance, sec. 191."

In 1 Couch, Cyc. of Insurance Law, part of sec. 161, it is said: "Obviously definitions given in an underwriter's manual, of which insured had no knowledge and which are not embodied in his policy, are not binding upon him."

We think the language controlling and predominant: "Sewer construction—all operations—excluding tunnelling, except at street crossings." It goes without saying and it is a matter of common knowledge that in a Piedmont city like Greenville, S. C., that in *"sewer construction—all operations,"* that blasting would be necessary. In the typed agreement, we think blasting was included.

In *Kenan v. Motor Co.,* 203 N. C., 108 (110): "The policy uses the broad language 'all other employees,' etc. If the clause in question is ambiguously worded, so that there is any uncertainty as to its right interpretation, or if for any reason there is doubt in our minds concerning its true meaning, we should construe it rather against the defendant, who was its author, than against the plaintiffs, and any such doubt should be resolved in favor of the latter, giving, of course, legal effect to the intention, if it can be ascertained, although it may have been imperfectly or obscurely expressed. *Walker, J.,* in *Bray v. Insurance Co.,* 139 N. C., at p. 393; *Allgood v. Insurance Co.,* 186 N. C., at pp. 420-21." *Jones v. Casualty Co.,* 140 N. C., 263; *Johnson v. Insurance Co.,* 172 N. C., 142; *Smith v. Fire Insurance Co.,* 175 N. C., 314; *Underwood v. Insurance Co.,* 177 N. C., 327.

In *Conyard v. Insurance Co.,* 204 N. C., 506 (507), speaking to the subject, we find: "The rule of construction is, that when an insurance policy is reasonably susceptible of two interpretations, the one more favorable to the assured will be adopted. 'The policy having been prepared by the insurers, it should be construed most strongly against them.' *Bank v. Insurance Co.,* 94 U. S., 673; *Jolley v. Insurance Co.,* 199 N. C., 269, 154 S. E., 400; *Underwood v. Insurance Co.,* 185 N. C., 538, 117 S. E., 790." *Hallock v. Casualty Co., ante,* 195.

It may also be noted that the form language, "an explosion of any character," may be reconciled with the typed language. In *Bolich v. Insurance Co.,* 205 N. C., 43 (46-7), is the following: "The word 'explosion' is variously used, and is not one that admits of exact definition, having no fixed or definite meaning, either in ordinary speech or in the law. 25 C. J., 178. It implies, however, a sudden expansion of a liquid substance, with the result that the gas generated by the expansion escapes with violence, usually causing a loud noise. The word as used in a policy of insurance should be construed in its popular sense, as

used by ordinary men, and not in a scientific sense as used by scientific men. There was evidence at the trial of this action which tended to show that the hot water which struck the plaintiff in the face and injured his eyes was forced out of the radiator by an explosion in the automobile."

We think perhaps there is a distinction between the use of the words "an explosion of any character" and blasting. In ordinary parlance, we say blasting rock, we do not mean an explosion like the explosion of an engine.

In *Baum v. Insurance Co.*, 201 N. C., 445 (448-9), is the following: "In *Bouchard v. Dirigo Mut. Fire, etc., Co.*, 113 Me., 17, L. R. A., 1915D, 187, it is held: 'That both clauses should be construed in the light of the entire contract, the situation and character of the property insured, and the natural and necessary uses to which it must be put by the owner, and the application of this rule of construction confirms the inference already drawn from the language of the clauses themselves. That the policy is not avoided when the use made of the prohibited articles or the general use and operation of the property is necessarily incident to the business of the insured, and therefore presumed to be recognized and impliedly permitted by the insurer.'" *S. c.*, 204 N. C., 57. *Collins v. Ins. Co.*, 79 N. C., 279. The case of *Johnston v. Niagara Fire Ins. Co.*, 118 N. C., 643, is distinguishable from the present case.

In Clark on Contracts, at page 407, it is said: "Where, as in the use of printed forms, a contract is partly printed and partly written, and there is a conflict between the printing and the writing, the latter will control."

In May on Insurance, Vol. 1, part sec. 177, is the following: "These written clauses, nevertheless, contain the elements of the contract, and being framed under the immediate eye of the parties, and with special reference to the exigencies of the particular contract, and to the terms agreed upon, they sometimes present a contract to which some of the printed parts of the policy are inapplicable. And as effect must be given to the acknowledged intentions of the parties, these written clauses must necessarily supersede and control such of the printed clauses as would, if enforced and literally applied, be inconsistent with them."

The next question: The court below held that plaintiff company was liable for expenses reasonably incurred—that is, the attorney's fees paid in the Goodman case. We see no error in this.

The "Defendant's Exhibit No. 1," Public Liability Policy, provides: "III. To defend in the name and on behalf of the assured any suits which may at any time be brought against him on account of such injuries, including suits alleging such injuries and demanding damages therefor, although such suits, allegations, or demands are wholly ground-

less, false, or fraudulent. IV. To pay (a) all costs taxed against the assured in any legal proceeding defended by the company according to Insuring Agreement III above; (b) all interest accruing upon such part of any judgment rendered against the assured as is not in excess of the company's limit of liability as hereinafter expressed, and until the company has paid, tendered, or deposited in court its part of such judgment; (c) and all expenses incurred by the company for investigation, negotiation, and defense. . . . Action against company: F. No action shall lie against the company to recover upon any claim or for any loss under this policy, unless brought after the amount of such claim or loss shall have been fixed and rendered certain either by final judgment against the assured after trial of the issue or by agreement between the parties with the written consent of the company, nor in any event unless brought within two years thereafter."

The property damage, under Item 4, in the Property Damage Certificate, cannot be in excess of the total sum of $1,000 on account of any one accident. An action was brought against the defendant by Mrs. Goodman for both personal injuries and property damage in the same suit.

The plaintiff, in its brief, says: "In the case of *Byrd v. Georgia Casualty Co.*, 184 N. C., 224, the North Carolina Court held that an insurance company was not liable for the expense incurred by the insured in defending a suit for damages not covered by the policy. If, on the other hand, the Property Damage Certificate containing the specific exclusion of loss from property damage caused by explosion covered such loss, the authorities seem to indicate that the plaintiff would be liable for money expended by the defendant on account of the defense of the property damage phase of the Goodman action. It is submitted, however, that in no event is the plaintiff responsible under the Public Liability Policy for that portion of the attorney's fees which is properly assignable to the defense of the personal-injury phase of the action brought by Mrs. Goodman."

The record discloses that a jury trial was waived, and it was left to the court below to determine from the correspondence between the attorneys, together with the terms of the policy, whether the insurance company is liable for these fees. In so far as this finding involves any questions of fact, they are conclusive.

It may be noted that before the Goodman suit was commenced in South Carolina, Harrison-Wright Company had called upon the insurance company to take charge of all claims preferred against the contractors for personal injury and property damage alleged to have been caused by the blasting made necessary in the excavations for sewer. The insurance company caused its adjuster, Eden, to write the letter which is set forth in the pleadings and which denies all liability either for

personal injury or property damage upon the ground that neither comes within the purview of the contract; and the insurance company declined to investigate these claims, or have anything to do with the matter.

It is alleged in paragraph 8 of the answer and counterclaim of defendant that certain damage was done by blasting, to several property owners, and that Harrison-Wright Company called upon the insurance company to take charge of these claims, but that it "refused to assume any liability or to take any part in any settling or otherwise disposing of the claims made by the property owners."

It is further alleged in respect to the Goodman suit that the refusal of the insurance company to take charge of this case made it necessary for the insured to employ a firm of lawyers in Greenville, S. C., and its local counsel in Charlotte, N. C., to represent it in that suit, and in the fourteenth paragraph of the insurance company's answer to the amended counterclaim it is admitted that after this refusal of the insurance company to employ attorneys "it became necessary for the defendant to defend the said action, and that for this purpose it employed as its counsel Hicks & Johnston, of Greenville, S. C., and Tillett, Tillett & Kennedy, of Charlotte, N. C., to represent it in said action, and to do all things necessary and proper to be done to defeat a recovery on the part of the said Mrs. Goodman."

In regard to the correspondence, we do not think it necessary to go into detail. It appears from the correspondence that while Mr. Hayden, general counsel, had, in his first letter, notified counsel for Harrison-Wright Company, and had notified Harrison-Wright Company itself, that the company would withdraw any denial of liability for the personal injury alleged to have been suffered by Mrs. Goodman, yet when counsel for Harrison-Wright Company declined to allow counsel for the insurance company to have complete control of the case, then the insurance company, through the local attorney, notified Harrison-Wright Company that the insurance company would not be responsible for any judgment rendered in the case—that is, would not only disclaim liability for property damage, but would refuse to pay any damage that might be allowed for personal injury.

In the correspondence, counsel for Harrison-Wright Company gave as a reason for not allowing counsel for the insurance company to have complete control of the case, because counsel, without any intention of doing any wrong, might minimize damage to the person and magnify the damage to the property; and besides, might contend that all of the injury was caused by one blast of dynamite, and thus bring the property damage within the provision of the policy that restricted the damage for one accident to $1,000. If the attorneys for the insurance company had appeared in the case and had control of it, they could not have

accomplished more than the attorneys who actually appeared. These attorneys succeeded in having the jury in the Goodman case find that there was no damage to the person of Mrs. Goodman. The damage that might be found by the jury for injury to property these attorneys did not at that time regard as of importance to the insurance company because of the fact that they claimed that the property damage was not within the provisions of the policy. Insurance company's refusal to pay and attempt to evade payment of attorney's fees in the Goodman case came too late.

When the insurance company wrote the Eden letter entering a positive and unequivocal denial of any responsibility, Harrison-Wright Company were entitled to treat this as a final denial; and this right to treat the Eden letter as final is confirmed by the averment in the present answer to the effect that its offer to defend the Goodman suit was upon the express condition that it should not be liable for any judgment.

In *Ohio and Miss. Ry. Co. v. McCarthy,* 96 U. S., 258 (267-8), the Court said: "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law." *Robb v. Vos,* 155 U. S., 13, 39 L. Ed., 52.

The defendant company, having refused to defend the Goodman suit, is liable for all the reasonable costs and expenses, including attorney fees, which the plaintiff incurred in defending the suit.

In *Lowe v. Fidelity and Casualty Co.,* 170 N. C., 445, it is said: "The defendant appeals because the judge rendered judgment in favor of the plaintiff receiver for costs, expenses, and attorney's fees incurred by plaintiff in defending the Marcus suit. . . . The contract makes it the duty of defendant, at its expense, 'to defend in the name and on behalf of the assured any suit brought against the assured to enforce a claim, whether groundless or not, for damages on account of bodily injuries or death suffered, or alleged to have been suffered, through the assured's negligence, by the persons described in subsections (a) and (b) of the preceding paragraph, at the places and under the circumstances therein described, and as the result of an accident occurring while the policy is in force.' The failure of the defendant to defend the suit, after repudiating its liability to the assured, constituted a distinct breach of contract and justified the plaintiff in defending it at his own expense. *Beef Co. v. Casualty Co.,* 201 U. S., 173. These costs and expenses constitute a primary liability of defendant that plaintiff may recover as damages for the breach of the contract. *Power Co. v. Casualty Co.,* 153 N. C., 279."

In 5 Couch Cyc. of Insurance Law, at page 4108, it is said: "But an insurer cannot deny liability as against the insured on the ground that the injured employee was not covered by the policy and at the same time insist on controlling the defense, since its right to defend arises only by virtue of its contract."

In 7 Couch Cyc. of Insurance Law, sec. 1875 (e), at page 6255, it is said: "If the insurer refuses to defend a suit against the insured under the policy stipulations and insured is compelled to undertake the defense and does so, insurer is liable for the amount of the judgment and expenses incurred in conducting said defense."

Under plaintiff's contract with defendant, in a matter of so grave importance to defendant, plaintiff cannot be permitted to "blow hot and cold" in the same breath. The briefs in the case were exhaustive, well prepared, and covered every angle of the controversy. We have read the record and the briefs with care. We see no error in the judgment of the court below, and it must be

Affirmed.

STATE v. DWIGHT BEARD.

(Filed 28 January, 1935.)

1. Indictment C a—Motion to quash should be made before plea to indictment.

A motion to quash the bill of indictment on the ground that all the evidence before the grand jury was incompetent, which motion is not made until after defendant had entered a plea of not guilty upon his arraignment, is not made in apt time, and it is not error for the trial court to refuse to hear evidence in support of the motion to quash.

2. Homicide G d—Evidence of custom of deceased to have large sums in cash on certain day of each week held competent in this prosecution for homicide committed in perpetration of robbery.

The State contended defendant murdered deceased in the perpetration of a robbery. The homicide occurred on a Thursday night. The State offered evidence that it had been the custom of deceased, for business reasons, to have in his possession large sums of money on Thursday of each week, and that he was robbed of such sums on the night of the homicide: *Held*, the evidence of the custom of deceased was competent as tending to show deceased had such sum of money in his possession on the night of the homicide, and that the homicide was murder in the first degree, in that it was committed in the perpetration of a robbery. There was also evidence tending to show that defendant knew deceased had such sums of money on the day of the homicide.

3. Criminal Law L e—Admission of evidence held at least not prejudicial under facts of this case.

The State introduced evidence that after the arrest of a person involved in the crime with which defendant was charged, officers went to the place where defendant was living, and that defendant was not there. Defendant introduced evidence showing that he left his home and the State before he was charged with the crime in compliance with the terms of a judgment entered against him in a criminal prosecution: *Held*, the admission of the State's evidence was at least not prejudicial to defendant.

4. Homicide G c—Testimony held properly admitted as being of dying declarations.

Defendant was charged with murder in the perpetration of robbery. Deceased died three days after the fatal shooting, and before his death stated, in effect, that he knew he could not recover from his wound, and that he was shot as he attempted to recover the money of which he had been robbed: *Held*, testimony of the statements was competent as being testimony of deceased's dying declarations.

5. Criminal Law L e—Charge of court in this case held not to contain prejudicial error when construed contextually as a whole.

In this prosecution for murder defendant relied on an alibi. The court instructed the jury as to the presumption of innocence and that no burden of proof rested upon defendant, but that the burden of proof was on the State to prove defendant's guilt beyond a reasonable doubt, and correctly defined reasonable doubt, and that before returning a verdict of guilty they should so find the defendant guilty "from the evidence or lack of evidence in the case": *Held*, defendant's contention that the phrase "or lack of evidence" placed the burden of proving his alibi on him cannot be sustained, and the phrase complained of cannot be held for prejudicial error when construed contextually with the whole charge upon the burden of proof.

BROGDEN and SCHENCK, JJ., dissenting opinions.

APPEAL by defendant from *Warlick, J.*, at April Special Term, 1934, of BURKE. No error.

At December Term, 1933, of the Superior Court of Burke County the grand jury returned a bill of indictment, as follows:

"STATE OF NORTH CAROLINA—BURKE COUNTY.

SUPERIOR COURT, DECEMBER TERM, 1933.

"The jurors for the State upon their oath present that Dwight Beard, late of the county of Burke, on the 18th day of February, in the year of our Lord one thousand nine hundred and thirty-two, with force and arms, at and in the county aforesaid, unlawfully and wilfully, feloniously and with premeditation and deliberation, and of his malice aforethought, did kill and murder one Augustus Bounes, a human being, against the form of the statute in such case made and provided and against the peace and dignity of the State.

"L. S. SPURLING, *Solicitor.*"

When it was returned by the grand jury, the said bill of indictment was endorsed as follows:

"No. 277. State *v.* Dwight Beard.
State, Pros. Witnesses,
J. P. Coffey X
Alvin Eller.

"Those marked X sworn by the undersigned foreman, and examined before the grand jury, and this bill found a True Bill.
"A. L. BENNETT, *Foreman Grand Jury.*"

The bill of indictment, with the said endorsement, was duly received by the presiding judge, and duly entered on the records of the court by the clerk.

Thereafter, during said December Term, 1933, of the court, the defendant Dwight Beard was duly arraigned on said indictment, and on such arraignment entered a plea of "Not guilty."

After the defendant had entered a plea of not guilty, as aforesaid, his counsel moved the court for a writ of special venire to be directed to the sheriff of Catawba County, commanding the said sheriff to summon from said county seventy-five men to be and appear at the courthouse in Morganton during said term of court to serve as jurors at the trial of this action. The said motion was supported by affidavits, as required by the statute, C. S., 473, and was allowed by the court.

Thereafter, on motion of the solicitor for the State, and without objection by the defendant, the action was continued until the next term of the court, and the defendant Dwight Beard was remanded to the custody of the sheriff of Burke County.

When the action was called for trial at the next term of the court, to wit: April Special Term, 1934, counsel for defendant moved the court for a writ of special venire to be directed to the sheriff of McDowell County, commanding the said sheriff to summon from said county seventy-five men to be and appear at the courthouse in Morganton on 30 April, 1934, then and there to serve as jurors at the trial of this action. The said motion was supported by affidavits as required by statute, C. S., 473, and was allowed by the court. The writ was duly issued to and served by the sheriff of McDowell County.

When the action was called for trial, after twelve jurors had been chosen from the special venire, but before they had been impaneled, counsel for the defendant moved the court to quash the indictment on the ground that the bill had been found a true bill by the grand jury at the December Term, 1933, of the court, on evidence which was wholly incompetent.

Counsel for defendant stated to the court that they were able to show, and would show if permitted by the court to do so, that J. P. Coffey was the only witness who had been sworn and who had been examined before the grand jury, and that his testimony was wholly hearsay, in that said testimony was founded wholly on statements made to the said J. P. Coffey, in the absence of the defendant Dwight Beard, by Alvin Eller, whose name was endorsed on the bill of indictment as a witness for the State, but who had not been sworn or examined before the grand jury. Counsel for defendant further stated to the court that they were able to show, and would show if permitted by the court to do so, that a statement in writing, signed by Alvin Eller, had been read to the grand jury as evidence, and that the bill had been found by the grand jury as a true bill solely on the testimony of J. P. Coffey and the statement of Alvin Eller.

The court declined to hear evidence in support of the motion to quash, and denied the motion. The defendant excepted.

At the trial of the action the evidence for the State showed that the deceased Augustus Bounos was shot and fatally wounded near his home in Valdese, Burke County, at about nine o'clock on Thursday night, 18 February, 1932, and that as the result of his wounds the said Augustus Bounos died in a hospital at Morganton on the Sunday following; that within a short time before he was shot the deceased had returned to his home from his place of business in Valdese, in a truck, which he had parked at the garage in his back yard; that after he had parked his truck the deceased was assaulted and robbed of a large sum of money—about $1,800, which he had in a wallet in his pocket; that the deceased pursued the man who had assaulted and robbed him on the highway for a short distance; and that when the deceased overtook him near a mail box on the highway, the man who had assaulted and robbed the deceased turned and shot the deceased twice with a pistol, thereby inflicting the wounds which resulted in his death on the following Sunday.

The evidence for the State further tended to show that the defendant Dwight Beard is the man who shot and fatally wounded the deceased near the mail box on the highway; that immediately after the defendant turned and shot the deceased, who was pursuing him to prevent his escape, Alvin Eller, who had been with the defendant shortly before the robbery, near the home of the deceased, joined the defendant on the highway, and that they both ran from the scene of the homicide and escaped.

There was evidence for the State which showed that at the time he was shot, and for about five years prior to said time, the deceased Augustus Bounos operated a market and grocery store in Valdese; that

during said time certain factories located in and near Valdese paid their employees by checks on Friday of each week; and that it was the custom of the deceased to go to Morganton—a distance of about nine miles—on Thursday of each week and to return to Valdese with a large sum of money, which he used to pay the checks of employees of the factories, who were his customers, on the succeeding Friday. There was also evidence for the State tending to show that the deceased went to Morganton on Thursday, 18 February, 1932, and returned to his place of business during the afternoon with about $1,800 in money, and that when he left his place of business at about 8:30 that night he had the money in a wallet in his pocket. Neither the money nor the wallet was found on his person or near the scene of the homicide, after he was shot. The defendant objected to the introduction of evidence tending to show the custom of the deceased, and excepted to the refusal of the court to sustain his objections.

There was also evidence for the State tending to show that some time after the homicide, in consequence of statements made to them by Alvin Eller, who had been arrested on a warrant charging him with the murder of the deceased, officers went to the home of the father of the defendant at Lenoir, N. C., where defendant was living at the date of the homicide, in search of the defendant, and that the officers did not find the defendant in his father's home. The defendant objected to the introduction of this evidence, and excepted to the refusal of the court to sustain his objections.

There was also evidence for the State tending to show that after he was shot and while he was in the hospital at Morganton, where he died, the deceased made a statement to his brother tending to show that he was assaulted and robbed in his yard by the man who shot him on the highway, and that he pursued the man after the robbery for the purpose of recovering his money. The deceased said that he did not know the name of the man who had shot him, but that he had seen him about Valdese during the past three or four weeks, and would know his face if he could see him again. Before making this statement to his brother, in response to questions as to how he was feeling, the deceased had said: "The man got me; I am suffering terribly; I ain't going to make it; I can't make it." The defendant objected to the admission of the statements of the deceased to his brother as "dying declarations," and excepted to the refusal of the court to sustain his objection.

The evidence for the defendant tended to show that during the month of February, 1932, the defendant lived in the home of his father at Lenoir, N. C.; that for several weeks prior to the date of the homicide the defendant had been from time to time in Valdese, seeking employment there; that he left his father's home in Lenoir at about 4:30 p.m.

on Thursday, 18 February, 1932, and went to Valdese, by bus, arriving there at about 9 o'clock p.m.; that he did not know the deceased, and did not go to the home of the deceased at any time after his arrival in Valdese, and that he spent the evening in the company of friends, and left Valdese for Hickory at about 11 o'clock p.m. The testimony of the defendant to this effect was corroborated by the testimony of other witnesses in his behalf. He denied that he is the man who assaulted and robbed the deceased at his home, and thereafter shot him near the mail box on the highway.

With respect to the burden of proof in this action, the court instructed the jury as follows:

"The law puts upon the State, which has made this charge against the defendant, the burden of proof. There is in this case, and I now so instruct you, lest I may later overlook giving you the instruction, no burden of proof on the defendant. The sole burden of proof is and rests and remains on the State throughout the trial. The State must satisfy you by the evidence in this case, beyond a reasonable doubt, of the guilt of the defendant before you will be justified in returning a verdict of guilty. As to the term 'reasonable doubt,' that does not mean that you must be satisfied beyond all doubt, nor beyond any doubt, nor satisfied beyond a doubt; it means that you must be satisfied beyond a reasonable doubt, or fully satisfied, satisfied to a moral certainty of the guilt of the defendant *from the evidence or lack of evidence in the case.* I instruct you that the defendant is presumed by the law to be innocent, as is the case of the defendant in every criminal action, and that the burden is upon the State, as I have previously told you, to satisfy you by the evidence beyond a reasonable doubt of the guilt of the defendant, that is, before you will be justified in returning a verdict of guilty in this case."

The defendant excepted to the instruction that the jury must be satisfied beyond a reasonable doubt "from the evidence or the lack of evidence in the case."

On all the evidence at the trial, and under the instructions of the court in the charge, the jury returned a verdict that the defendant is guilty of murder in the first degree.

From judgment that he suffer death as prescribed by statute, C. S., 4200, the defendant appealed to the Supreme Court, assigning errors based on his exceptions appearing in the statement of the case on appeal.

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

Newland & Townsend, Hunter Martin, and John C. Stroupe for defendant.

CONNOR, J. There was no error in the refusal of the court to hear evidence in support of the motion of the defendant that the indictment in this case be quashed on the ground that the bill was found by the grand jury to be a true bill on evidence which was wholly incompetent. Conceding that the facts are as contended by the defendant, there was no error in the denial of the motion, for the reason that the motion was made at April Term, 1934, after the defendant, on his arraignment at December Term, 1933, had entered a plea of not guilty. The motion to quash, which may be treated as a plea in abatement, was not made in apt time.

In *S. v. Moore,* 204 N. C., 545, 168 S. E., 842, it is said: "It is well settled as the law of this State that when a bill of indictment has been returned by the grand jury as a true bill upon testimony, all of which was incompetent, or upon the testimony of witnesses all of whom were disqualified by statute or by some well-settled principle of law in force in this State, the indictment will be quashed on the motion of the defendant, made in apt time; but where some of the testimony was competent and some incompetent, or some of the witnesses were qualified and some disqualified, the court will not go into the barren inquiry of how far testimony which was incompetent or witnesses who were disqualified contributed to the finding of the bill of indictment as a true bill. *S. v. Levy,* 200 N. C., 586, 158 S. E., 94; *S. v. Mitchem,* 188 N. C., 608, 125 S. E., 190; *S. v. Coates,* 130 N. C., 701, 41 S. E., 706. This is the general rule in other jurisdictions. 31 C. J., 808, and cases cited."

In *S. v. Levy, supra,* it was held that there was no error in the refusal of the court to hear witnesses who had testified before the grand jury, in support of the defendant's motion that the indictment be quashed on the ground that the bill was found a true bill solely on the testimony of these witnesses, which was incompetent because wholly hearsay. In the opinion in that case the late *Justice Adams,* speaking for the Court, says: "The suggested practice would hinder the trial and result in useless delay. It would often require the examination of a number of witnesses, including, perchance, members of the grand jury; it would demand of the judge that he invade the province of the grand jury or exercise the function of a petit jury in finding the facts from conflicting evidence and passing upon the credibility of witnesses; it would turn the Superior Court into a forum for an unseemly contest between members of the grand jury and those whom they may have charged with crime. Besides, such a practice is unnecessary; if the evidence is incompetent it will be excluded by the trial court."

In *S. v. Pace,* 159 N. C., 462, 74 S. E., 1018, it is said: "It is well settled that a plea in abatement, or a motion to quash a bill of indictment after a plea of not guilty is entered, is only allowed in the discre-

tion of the court. His Honor declined, in his discretion, to permit the plea to be filed. The exercise of his discretion is not reviewable by us. *S. v. Jones,* 88 N. C., 672."

The first assignment of error on this appeal, based on defendant's exception to the denial of his motion that the bill be quashed for the reasons assigned, cannot be sustained.

The assignments of error based on defendant's exceptions to the refusal of the court to sustain his objections to evidence offered by the State cannot be sustained.

The evidence tending to show that the custom of the deceased to have in his possession at his place of business in Valdese, on Thursday and Friday of each week, a large sum of money was competent as tending to show that the deceased had such sum of money in his possession on the night of the homicide, and that the homicide was murder in the first degree, as contended by the State. There was evidence also tending to show facts from which the jury might well infer that the defendant, when he returned to Valdese from his home in Lenoir on Thursday afternoon knew that the deceased had gone to Morganton that day and returned to Valdese with a large sum of money.

The evidence tending to show that the defendant was not at his father's home in Lenoir when the officers went there, after the arrest of Alvin Eller, in search of the defendant, was at least not prejudicial to the defendant, whose evidence tended to show that his absence from his father's home, where he was living at the date of the homicide, had no connection with the charge against him in this case. The evidence for the defendant tended to show that he left his father's home several days after the homicide and before he was accused of the murder of the deceased, and went to a distant state, in compliance with the terms of a judgment against the defendant in a criminal action pending in the Superior Court of Caldwell County. This evidence was properly submitted to the jury as tending to rebut any presumption against the defendant in this case, from his absence from his home after the murder of Augustus Bounos.

The evidence tending to show that after he was shot and fatally wounded on Thursday night and before he died in the hospital at Morganton on the following Sunday, the deceased made statements to his brother tending to show that he was shot and wounded while he was attempting to recover the money of which he had been robbed, were competent as dying declarations. Before making these statements as testified by his brother, the deceased, in response to questions as to how he felt, had said: "The man got me; I am suffering terribly; I can't make it; I ain't going to make it; I do not know the name of the man who shot me, but would know him if I could see him again; he has been in and around Valdese for the past few weeks."

The evidence was sufficient to show that at the time he made the statements the deceased was in actual danger of death, and that he was fully apprehensive of his approaching death. The statements made by the deceased under these conditions were properly admitted as dying declarations. *S. v. Ham,* 205 N. C., 749, 172 S. E., 473, and cases cited.

The defendant assigns as error the instruction of the court to the jury that the jury would not be justified in finding the defendant in this case guilty unless the jury was satisfied beyond a reasonable doubt of his guilt "from the evidence or the lack of evidence in the case." The defendant's contention that by this instruction the court imposed upon the defendant the burden to establish his alibi by his evidence cannot be sustained. Conceding that the instruction standing alone is erroneous, when considered in connection with the entire instruction as to the burden of proof in the case, it cannot be held that it was prejudicial to the defendant. In *S. v. Freeman,* 100 N. C., 429, 5 S. E., 921, it is said:

"While we do not assent to what is said about the shifting of the burden of proof, when the proof offered by the prisoner tends to show his absence from the place where the offense was perpetrated, and his presence elsewhere at the time, yet the charge in general is so clear and explicit as to what is required of the State in order to a conviction, that it could not be misleading to the jury, fairly considered."

We find no error in the trial of this action. The judgment is affirmed.

No error.

BROGDEN, J., dissenting: The judge charged the jury as follows: "The court instructs you that you, under this evidence in the event you agree unanimously, can return one of two possible verdicts, and none other. You may, if you are satisfied beyond a reasonable doubt, return a verdict . . . of murder in the first degree. If not so satisfied, then you would return a verdict of not guilty. Those are the only two possible verdicts arising in this case. . . . The court instructs you as a matter of law from a careful inspection of the evidence as the court listened to it that there is no deduction therefrom which would warrant you beyond a reasonable doubt to convict the prisoner of any offense other than murder in the first degree. . . . The court instructs you, therefore, that there are only two verdicts that you can render."

C. S., 4640, provides: "Upon the trial of any indictment the prisoner may be convicted of crime charged therein or of a less degree of the same crime," etc. The pertinent doctrine now prevailing and fortified by a host of decisions is as follows: "Where the evidence tends to prove that a murder was done, and that it was done by means of poison, lying in wait, imprisonment, starving, torture, or which has been committed

in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary, or other felony, and where there is no evidence and where no inference can be fairly deduced from the evidence of or tending to prove a murder in the second degree or manslaughter, the trial judge should instruct the jury that it is their duty to render a verdict of 'guilty of murder in the first degree,' if they are satisfied beyond a reasonable doubt. . . . If, however, there is any evidence, or if any inference can be fairly deduced therefrom tending to show one of the lower grades of murder, it is then the duty of the trial judge, under appropriate instructions, to submit that view to the jury. . . . When, however, the State relies upon evidence tending to show not only that the murder was perpetrated by one of the means specified in the statute, or that it was committed in the perpetration of or attempt to perpetrate a felony as defined in the statute, but also upon evidence tending to show deliberation and premeditation, the jury should be instructed that if they fail to find from the evidence, beyond a reasonable doubt, that the murder was perpetrated by one of the means specified in the statute, or that it was committed in the perpetration of or attempt to perpetrate a felony, and further fail to find from the evidence, beyond a reasonable doubt, that it was committed after deliberation and premeditation, they should return a verdict of guilty of murder in the second degree, provided, of course, they shall find from the evidence, beyond a reasonable doubt, that the defendant committed the murder. . . . In such case, under the statute as construed by this court, it is for the jury and not the judge to find the fact of deliberation and premeditation, from the evidence, and beyond a reasonable doubt." *S. v. Newsome,* 195 N. C., 552.

The wife of the deceased testified that she heard her husband drive his truck in the yard immediately before the killing. She said: "I listened for Gus to come in. He didn't, and I thought he had gone on back of the house. Still he didn't come in, and I heard voices shouting and holloing. I can't say how many voices I heard shouting, just like people shouting to each other—angry voices. They seemed to be like close to the house when I first heard them and they got like they were moving off. The next thing I heard was two shots."

The only eye-witness offered by the State was Felix Whitener. He was repairing his car in the moonlight near the house of the deceased and heard the defendant's voice. He said: "It seemed they were plumb together, kind of in a tussle. I stood there and watched. . . . The tallest and heaviest man walked off that way, and first thing I seen a man raise up there and the other man was close to the center of the road. . . . The man got up here at the mail box and the other man . . . was over the road moving toward Valdese, and then a

voice . . . said, 'Don't follow me,' and then looked like he might have been ten feet further, and he said, 'Don't follow me.' The third time he said, 'We told you not to follow us.' . . . Immediately after that a pistol fired twice," etc.

What was the tussle about? What was the occasion of the angry voices "shouting and holloing?" What was the meaning of the commands of one of the men present for three times: "Do not follow us, or stop following us?" To whom were these commands given? Was the party "following" armed or not? If the deceased was the party "following" and was shot by the defendant because of such pursuit, was the killing done with premeditation and deliberation? All of these matters are left in fog by the evidence. In the *Newsome case, supra,* when the defendant killed the girl to keep her from telling her father, the question as to whether such killing was done with deliberation and premeditation was left to the jury and a new trial awarded. I am of the opinion that the evidence in the present case calls for the application of C. S., 4640, more loudly and with more insistent voice than in the *Newsome case.*

Manifestly, there was sufficient evidence of statutory murder in the first degree to be submitted to the jury; but an examination of the evidence leads me to the conclusion the trial judge should have submitted murder in the second degree also. I do not think it can be said as a cold matter of law that only one inference could be drawn from the evident struggling, shouting, holloing, and pursuit that took place at the time of the killing.

SCHENCK, J., dissenting: The trial judge charged the jury as follows: "The State must satisfy you by the evidence in this case, beyond a reasonable doubt, of the guilt of the defendant before you will be justified in returning a verdict of not guilty. As to the term 'reasonable doubt,' that does not mean that you must be satisfied beyond all doubt, nor beyond any doubt, nor satisfied beyond a doubt; it means that you must be satisfied beyond a reasonable doubt, or fully satisfied, satisfied to a moral certainty of the guilt of the defendant *from the evidence or lack of evidence in the case.*" I think this instruction was prejudicial error, especially so in the light of the fact that the principal defense relied upon by the defendant was that of an alibi.

The State's evidence tended to show the defendant at the scene at the time of the homicide, the defendant's evidence tended to show him elsewhere, and the jury, under the charge, might well have determined this vital issue of fact adverse to the defendant "for the lack of evidence," that is, for the lack of more convincing evidence of an alibi. The burden is never upon the defendant to establish an alibi. The burden,

even when an alibi is set up, remains upon the State, *S. v. Josey,* 64 N. C., 56, to establish by the evidence, not the lack of it, beyond a reasonable doubt that the defendant was present and perpetrated the crime.

Nor is this error cured, in my opinion, by considering the entire charge contextually. The instruction that the jury must be satisfied beyond a reasonable doubt of the defendant's guilt "from the evidence or lack of evidence" is incompatible with the instruction given elsewhere in the charge to the effect that the jury must be satisfied beyond a reasonable doubt from all of the evidence of such guilt, and the jury was not enlightened as to which instruction to follow.

I cannot get the consent of my mind to affirm a judgment of death pronounced upon a verdict that may have been reached "from the . . . lack of evidence."

I feel reasonably certain that the words "or lack of evidence" are due either to an inadvertence of the learned judge who tried the case or to a stenographic error, but since they appear in the case settled on appeal, "we are bound by the record; it imports verity." *S. v. Brown, ante,* 156.

MRS. ZOA L. HAYWOOD, MRS. ROSA FULFORD, ET AL., v. R. H. RIGSBEE, R. H. RIGSBEE, EXECUTOR, R. H. RIGSBEE, TRUSTEE, ET AL.

(Filed 28 January, 1935.)

1. Wills E a—

The intention of the testator as gathered from the entire instrument is controlling, and will prevail over particular expressions which, in their technical sense, are apparently inconsistent therewith.

2. Wills E f—Under provisions of will in this case funds held in trust should be distributed per stirpes upon termination of trust.

The will in this case devised to each of testator's children certain parcels of land in fee and certain parcels for life with remainder over to their children, and by later item created a trust with provision that each of the children should share equally in the income therefrom, and that the children of any deceased child should take the parent's share in the income, with further provision that upon the death of a child or his children without issue, the share of such child should be distributed among the other beneficiaries as designated. At the expiration of thirty years after testator's death the will provided that the trust should be terminated by "an equal division of the fund among my children and their issue." The will declared the testator's intention to treat his children equally. At the expiration of the trust two of testator's children had died without issue, but six children were living, some of whom had living children and grandchildren: *Held,* although a technical construction of the words

"equal division . . . among my children and their issue" might require the fund to be equally divided among the living children, grandchildren, and great-grandchildren of the testator upon the termination of the trust, construing the instrument as a whole the fund should be distributed equally among the six surviving children of testator to effectuate the testator's intent to treat his children equally, the beneficiaries taking *per stirpes*, the deceased children having left no issue.

3. Same—Intent to dispose of property per stirpes will prevail over words requiring per capita distribution when construed in technical sense.

Where a will bequeaths property to be equally divided among testator's "children and their issue," but it is apparent from the context of the will that testator intended a stirpital distribution of the funds, the language of the bequest will not be given a technical construction which would defeat the intent of the testator as gathered from the whole instrument, and the property will be distributed *per stirpes* among the lineal descendants, thereby precluding children taking with their living parents.

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

APPEAL by plaintiffs from *Cranmer, J.*, at November Term, 1934, of DURHAM. Affirmed.

This case was heard before a referee upon the following agreed statement of facts, to wit:

"1. That Atlas M. Rigsbee died a citizen and resident of the city and county of Durham, on 29 November, 1903.

"2. That Atlas M. Rigsbee left a last will and testament, dated 7 August, 1893, which is duly and regularly probated in the office of the clerk of the Superior Court of Durham County, in Book of Wills B, pages 35-44, which said will was duly probated on 7 December, 1903; that there was no codicil to the said will.

"3. That Atlas M. Rigsbee was the husband of Rowena Rigsbee, who died on 30 January, 1921.

"4. That on 7 August, 1893 (the date of the execution of the will in controversy), Atlas M. Rigsbee was the father of eight children, all of whom were then living, whose names were as follows: Cora Rigsbee Markham, wife of Hugh P. Markham; Robert H. Rigsbee; Mary E. Middleton, wife of Robert Lee Middleton; Zoa Rigsbee (now Zoa Rigsbee Haywood); Sallie A. Rigsbee; William T. Rigsbee; Mattie T. Rigsbee (now Mattie R. Bitting); Rosa Rigsbee (now Rosa Rigsbee Fulford).

"5. Cora Rigsbee Markham died intestate and without issue prior to the death of Atlas M. Rigsbee, deceased, and her husband, Hugh P. Markham, died after the death of A. M. Rigsbee, deceased, and prior to 29 November, 1933.

"6. That William T. Rigsbee died prior to 29 November, 1933, without ever having been married.

"7. That at the termination of the thirty (30) year period of the trust, to wit: on 29 November, 1933, Atlas M. Rigsbee had the following living descendants: Six children (naming them), twelve grandchildren (naming them), and seven great-grandchildren (naming them).

"8. That all proper parties necessary for a construction of the terms of said will have been made parties to this proceeding and are duly before the court.

"9. The will of Atlas M. Rigsbee was prepared by W. W. Fuller, Esq., an attorney at law of Durham, North Carolina, in his own handwriting.

"10. That the assets of the estate and trust of the late A. M. Rigsbee are considerably in excess of the liabilities of said estate and trust.

"11. That Exhibit 'A' attached hereto is an exact copy of the last will and testament of A. M. Rigsbee, deceased."

"EXHIBIT 'A.'

"WILL OF A. M. RIGSBEE.

"IN THE NAME OF GOD, AMEN!

"I, Atlas M. Rigsbee, of the Town of Durham and County of Durham in the State of North Carolina; being sound both in body and mind but being also mindful of the uncertainty of life, and desiring to direct the disposition of my estate, do make, declare and publish this my last will and testament, hereby annulling and revoking all former wills by me made, that is to say:

"I desire and direct that my body be decently buried in my section of the Cemetery of the Town of Durham, and that the stone or monument that shall mark my grave be selected by my wife and paid for by my executors.

"ITEM FIRST: I give, devise and bequeath unto my wife, Roena M. Rigsbee, my old home house on the corner of Green Street and Rigsbee Avenue, adjoining the lands of William Mangum, and one-half of the land from Green Street down Rigsbee Avenue to Watkins Street, that is to say from Green Street down to halfway between said Street and Watkins Street and so through the lot from Mangum's line to Rigsbee Avenue, and the dwelling house where I now live, on the North side of Corporation Street, and with said house, all the land together with all houses, fixtures, and improvements thereon, which I now own or may own at the time of my death, West of the line to be established as follows: Commencing at a point on the North side of Corporation Street in or near the bottom east of my garden, running North so as to strike the Southwest corner of a lot known as the Hunt Brick Yard lot on the Northern boundary of my land. All the above property in this item is to be held and owned by my wife Roena M. Rigsbee during her natural

life, and at her death, I give and devise all of it in fee to my son, William T. Rigsbee and his heirs.

"I devise and bequeath in fee to my wife, Roena M. Rigsbee, and her heirs all my plantations on the North Carolina Railroad near the cotton factory, and known as the 'Winnie or Albert Brassfield Place.' I also likewise give and bequeath to her absolutely, all my household and kitchen furniture, my bay horse Bob, and my clay bank horse with black mane and tail, my family carriage and my Tyson and Jones buggy. I also give and bequeath to her absolutely Ten Thousand Dollars in money, unless she realizes something from a policy of accident insurance which is by its term payable to her, in event of which such realization and recovery she is to have only so much of said Ten Thousand Dollars, added to what she receives under said policy the full sum of Ten Thousand Dollars, then this legacy is not to vest, but is to go as hereinafter provided for. I also bequeath and confirm to her such parts of two policies in the Brooklyn Life Insurance Company made partly payable to her, as she may be entitled to under the terms thereof.

"ITEM SECOND: I give, devise and bequeath to my daughter Cora F. Markham and her heirs in fee the house on the corner of Rigsbee Avenue and Watkins Street in Durham where she now lives, and all the land between Watkins Street and up Rigsbee Avenue halfway to Green Street where the line provided for in the First Item is to be established; and I give and devise to said Cora F. Markham and her heirs in fee my James Vickers Plantation, and I give and devise to my said daughter, Cora F. Markham, during her natural life, the house and lot on the West side of Rigsbee Avenue, north of John W. Carlton's where she once lived, together with all my land in the rear and South of John W. Carlton's to Hunt Street and at her death I give and devise said last mentioned house and lands to her children if any are living at her death.

"ITEM THIRD: I give and devise to my son Robert H. Rigsbee and his heirs in fee, all my land and houses lying North of Corporation Street and North of Garrard Alley, west of Strayhorn Alley and East of North Alley, and also a strip of land on the West side of North Alley North of Corporation Street from North Alley to a line to be established, commencing on Corporation Street East of my garden so as to strike the Southwest corner of the Hunt Brick Yard lot North of my land, said strip to run from Corporation Street to Hunt Brick yard lot.

"I also give and devise to my son Robert H. Rigsbee for and during his natural life time and at his death to his children if any living then, my three store houses and lots on the Northeast corner of Main and Mangum Streets in Durham, and the storehouses and lots on the East side of Mangum Street, South of the Parrish Building, also my storage house and lot in the rear of my Mangum Street stores, and half of the

vacant land between said storage house and my Parrish stores, and the vacant land in rear of my Stores on Main Street, and half of the strip of vacant land owned by me and used as a passway between my houses and the Parrish Building.

"ITEM FOURTH: I give, and bequeath unto my daughter, Mary E. Middleton and her heirs in fee the house and lot on the corner of Watkins Street and Rigsbee Avenue where she now lives. I also give and devise to my daughter, Mary E. Middleton for and during her natural life, and at her death to her children then living all the balance of my houses and lots on the West side of Rigsbee Avenue, South of Hunt Street on each side of the branch, and on Seminary Street West of Rigsbee Avenue.

"ITEM FIFTH: I give and devise unto my daughter Zoa Rigsbee and her heirs in fee, all my houses and lots lying East of Rigsbee Avenue and South of Seminary Street West of Mangum Street adjoining the lands of Thomas J. Rigsbee, and including the dwelling house and Baptist Female School house. I also give, and devise to my said daughter Zoa Rigsbee for and during her natural life and at her death to her children then living—I also give and devise (*sic*) all my houses and lots on the East side of Mangum Street and North of Green Street adjoining the lands of W. H. Holloway and the Misses Hutchins.

"ITEM SIXTH: I give and devise to my daughter, Sallie A. Rigsbee and her heirs in fee all my land on the West side of Rigsbee Avenue, South of Corporation Street including all the tenant houses and lots on the East side of the branch, West of Corbett Street and the corner lot on the Southwest corner of Rigsbee Avenue and Corporation Street back to a line as shown on a plat of said land and to the lot devised to Cora F. Markham by this will.

"I also give and devise to my said daughter Sallie A. Rigsbee for and during her natural life and at her death to her children then living, all my houses and lots East of Rigsbee Avenue and South of Hunt Street and North of Seminary Street on each side of the branch; and the store houses and lots South of the First Baptist Church, known as the Racket corner, on the West side of Mangum Street.

"ITEM SEVENTH: I give and devise unto my son, William T. Rigsbee, and his heirs in fee, after the death of his mother, my old house place on the corner of Rigsbee and Green Street and the lot laid off with it in the first item of this will, where I now live on the North side of Corporation St.

"I also give and devise to my son William T. Rigsbee for and during his natural life, and at his death to his children then living the store houses and lots on the West side of Mangum Street running through from Main to Parrish Street known as the Angier lot.

"ITEM EIGHTH: I give and devise to my daughter Mattie T. Rigsbee and her heirs in fee, my houses and lots on Broadway St. commencing at L. T. Buchanan's lot, and running thence back of the depth of Buchanan's lot, including all the lots up to North Alley on Broadway Street. I also give and devise to my daughter Mattie T. Rigsbee for and during her natural life, and at her death to her children then living the store houses and lots on the corner of Main and Church Street known as the Redmond corner or Kempner Corner, and all my houses and lots lying on the North side of Holloway Street East of Mangum Street, and South of Howerton and Bro. Carriage Shop.

"ITEM NINTH: I give and devise to my daughter Rosa Rigsbee and her heirs in fee, my houses and lots on the South East corner of Rigsbee Avenue and Corporation Street from the rear or North Corner of L. T. Buchanan's lot on Rigsbee Avenue East with his line, and in that direction with line of lots devised herein to Mattie T. Rigsbee to North Alley. I also give and devise to my said daughter Rosa Rigsbee, for and during her natural life and at her death to her children then living my store houses and vacant land on the South side of Parrish Street and East of Parrish Building now belonging to J. S. Carr, running back within twenty-two feet (22 ft.) of the rear of J. J. Rigsbee's store houses on Main Street, and one-half interest in the passway between the Parrish Building, and the store houses and storage house devised to Robt. H. Rigsbee hereinbefore with the express direction and charge that there must be kept open a passway to Parrish Street not less than ten feet in width; and all my houses and lots lying between Mangum Street and Rigsbee Avenue and South of Green Street.

"ITEM TENTH: I give and devise to my two nieces Mary and Martha Anderson, daughters of my sister Jane Anderson my entire interest in and to the dower or old homestead land of Jane Anderson their mother, after the death of their mother to hold the same to them and their heirs in fee.

"ITEM ELEVENTH: I give and devise to my brother Thomas J. Rigsbee and his heirs in fee a strip of land across and in the rear of his stores on Main Street twenty-two feet (22) deep, commencing at the east end of my storage room house and in the rear of the store houses on Mangum Street, and running to the rear end of the Glenn Store.

"ITEM TWELFTH: I direct and instruct my Executors, hereinafter named to sell public or private on such terms as they may think best and convey and to deliver to the purchaser, all my mules, horse, cattle, hogs, wagons, old buggies, Jerseys, farming utensils, threshing machines, cotton gins, presses and all other personal and real estate, property not otherwise disposed of in this will, and to collect all policies of Life Insurance, notes, accounts or other debts of any kind owing me.

"I direct my Executors to pay all my just debts, and if the amount received by them from the Brooklyn Life Insurance Company that is made applicable on its face to my debts is not sufficient for that purpose they shall then pay the balance out of collections, and other life policies.

"ITEM THIRTEENTH: I empower, instruct and direct my Executors, after paying my debts and pecuniary legacies, to deliver and pay to the Trustees hereinafter named, all County and other municipal bonds I may own and all moneys in their hands from any source which said bonds, and moneys said Trustees shall take and hold as a trust fund to be by them prudently kept invested in good and safe interest bearing United States, County, City, or Town bonds or loaned out at best rate of interest on notes, secured by real estate, at the discretion of my said Trustees. Out of the income from such funds, the Trustees shall receive as full compensation for their own labor and responsibility six per cent among or between them of the said income collected by them, but they have power and authority to employ such aid, help, counsel and assistance as they think necessary to serve them in executing said trust, and to pay for the same out of the income of said fund, and after paying such commissions and expenses, and the taxes on the fund and premiums on life policies of W. A. Jenkins and other such policies of like kind as I may hold at my death, or have an interest in, for I direct all such policies to be kept in force during the life of the insured and all collections from said policies to go into said trust fund, they shall pay such income semi-annually on the first days of January and July in each year in equal proportion to my wife and each of my children, or if any child be dead leaving children then alive, his or her parent's share shall be paid to him, her or them, but when the issue of any dead child becomes extinct before the final distribution of the trust, such share shall vest in and belong to the surviving members of the class equally as herein originally provided, that is to my children or their children. The said trust is to continue and exist for thirty years from the time of my death and is then to be closed by an equal distribution of the fund among my children and their issue. During the existence of said trust my Trustees must pay the expenses while at school of any minor child including board, raiment, tuition, books and other necessary expenditures, and charge all such expenses against the share of the income belonging to such child.

"But in no case shall any of the principal of said fund be used or diminished unless it becomes necessary to meet and pay the premium on the life insurance policies before referred to in this item. In case of the death, removal, resignation or disability of any Trustee, his place shall be filled by the remaining Trustees. I also give in charge and keeping to said Trustees all the property devised in this Will to my

minor children until said children shall have respectively reached the age of twenty-one years, whereupon such child is to take charge of his or her own property.

"But until such delivery of possession said trustees shall keep in repair and insure the property of each minor child; improve as they think prudent the vacant property of each and collect rents of such as can be rented and collected, and pay all taxes. These expenses, and repairs and improvements shall be paid out of each child's respective income or rents; and in no case shall any real estate of any minor be sold to meet such expenses, taxes or improvements or repairs.

"All surplus of rents or income of any minor child's property shall be treated as his or her part of the income from the trust fund all of which said income shall be paid to and invested by said Trustees as if they were duly appointed Guardians. As compensations for their services in connection with the management and care of the property of said infants said Trustees shall jointly receive ten per cent of the annual income from said property. If any of my children shall die leaving no issue at their death then the property and estate of such child either in the trust fund or devised specifically to them for life, shall go into the trust fund specifically or the proceeds thereof as my trustees think wisest and be treated, managed and finally divided as if originally a part of the trust fund.

"ITEM FOURTEENTH: I nominate, constitute and appoint my brother, Thomas J. Rigsbee, my son Robert H. Rigsbee and my son-in-law Hugh P. Markham as the Executors of this my last will and Testament; and I likewise nominate, constitute and appoint said Thomas J. Rigsbee, Robert H. Rigsbee and Hugh P. Markham, Trustees to execute the powers and perform the duties imposed herein on the Trustees.

"I declare that I consider my children as all, not liable to any other for any advancements, and I treat them as equal in my estate.

"In the construction of this Will I charge the Executors and Trustees with the duty of construing it as a whole.

"In Testimony Whereof and of all the foregoing I have hereunto set my hand and seal this the 7th day of August, 1893.

"ATLAS M. RIGSBEE. (SEAL.)"

Upon the agreed facts the referee reported his conclusions of law to the effect that the net proceeds of the trust fund should be equally divided per capita among the twenty-five children, grandchildren, and great-grandchildren of Atlas M. Rigsbee who were living at the expiration of the trust thirty years after the death of the testator. To this report the defendants filed exceptions, and appealed to the Superior Court. The case came on to be heard at term time, and the judge of

the Superior Court, upon the agreed facts, reversed the conclusions of law reached by the referee, and adjudged that the trust fund be equally distributed among the six children of Atlas M. Rigsbee, deceased, who were living at the expiration of the thirty-year trust on 29 November, 1933, namely: R. H. Rigsbee, Mary E. Middleton, Zoa L. Haywood, Sallie A. Rigsbee, Mattie R. Bitting, and Rosa A. Fulford. To this judgment the plaintiffs excepted and appealed to the Supreme Court, assigning errors.

Bryant & Jones and Egbert L. Haywood for appellants.

L. P. McLendon, Hedrick & Hall, Brawley & Gantt, and S. C. Brawley, Jr., for appellees.

SCHENCK, J. We are called upon to construe the following language: "The said trust is to continue and exist for thirty years from the time of my death, and is then to be closed by an equal distribution of the fund among my children and their issue." Item Thirteenth.

At the expiration of thirty years from the death of the testator, namely, on 29 November, 1933, there were living six children of the testator, and there were two deceased children who died without issue. Some of the now six living children of the testator have children, in all twelve and some of the now living children of the testator have grandchildren, in all seven. The appellants contend that the trust fund of the testator should be divided into twenty-five (25) equal shares and distributed share and share alike among the children, grandchildren, and great-grandchildren of the testator, and the appellees contend that the trust fund should be divided into six (6) equal shares and distributed share and share alike among the now living children of the testator.

In the construction of a will the predominant and controlling purpose of the testator must prevail when ascertained from the general provisions thereof over particular and apparently inconsistent expressions to which standing alone a technical force would be given. The intention of the testator is the paramount consideration, and we must look to the entire instrument for the indicia of this intention. Item Second to Item Ninth, inclusive, give to each of the testator's eight children certain parcels of real estate in fee and certain parcels for life, with remainder over to their children, and Item Thirteenth establishes a thirty-year trust and provides that the trustee "shall pay such income (from the trust) semi-annually on the first days of January and July in each year in equal proportion to my wife and each of my children, or if any child be dead leaving children then alive, his or her parent's share shall be paid to him, her or them, but when the issue of any dead child becomes extinct before the final distribution of the trust, such

share shall vest in and belong to the surviving members of the class equally as herein originally provided, that is to my children or their children"; and near the close of the will is the following: "I declare that I consider my children as all, not liable to any other for any advancement, and I treat them as equal in my estate." We think it is clear that the testator intended to make an equal division among his children of that portion of his estate given to them absolutely and of the income from the trust he established; and, unless the words "and their issue" be isolated and given a strict technical construction by interpreting them as meaning lineal descendants of any generation, it also appears that the testator intended that the equality among his children should be maintained not only before and during the existence of the trust, but also upon the close thereof, when the funds therein were to be distributed.

When the clause under consideration is construed in connection with the will as a whole, we think it is manifest that the intention of the testator was to divide his entire estate, real and personal, whether given absolutely or in trust, equally among his several children, and the issue of such children as may be dead at the expiration of the trust. It is in the character of issue of his deceased children that any others than the testator's children were made objects of his bounty. Since there are no children, or issue of such, of any deceased child of the testator, we are of the opinion that there should be an equal distribution among the children of the testator of the funds of the trust which was terminated 29 November, 1933.

To give the will the construction contended for by the appellants would place the children of the children of the testator in competition with their parents, and the grandchildren of such children in competition with their parents and grandparents, and would prevent equality of distribution among the children of the testator.

While it may be true that if the phrase "equal distribution" and the word "issue" be given their strict technical meanings, without reference to the will as a whole, they might sustain the contention of the appellants, yet it is well recognized that if certain phrases or words used in a will, taken in their technical sense, would dispose of property *per capita* when it is apparent from the context that the testator meant to provide for a stirpital disposition, the Court will so hold. If there is anything in the will indicative of the intention that the devisees or legatees shall take as families the property will be divided *per stirpes* and not *per capita*. *Lee v. Baird,* 132 N. C., 755 (766), and cases there cited.

In *Martin v. Gould,* 17 N. C., 305, where the testator gave his residuary estate "to be equally divided, between my son Daniel and three

grandsons (naming them), to them and their heirs forever," it was held that although, taking the residuary clause by itself, the grandsons would not take as a class but each an equal share with his uncle, yet, in view of a preceding clause of the will showing that the testator meant to deal equally between his two sons, and to make the children of his deceased son stand in their father's stead, the son took one-half the residue and the grandsons the other half. And since the context showed that the testator meant to deal equally between his son and the children of a deceased son, and to make such children stand in their father's stead, the force of the word "equally" in the residuary gift to the son and grandsons was overcome.

"The usual acceptance of the word 'issue' is 'an indefinite succession of lineal descendants who are to take by inheritance, and hence heirs of the body.' . . . But, when used in wills, it is, of course, subject to the rule of construction that the intention of the testator, as ascertained from the will, is to have effect, rather than the technical meaning of the language used by him; . . ." *Edmondson v. Leigh,* 189 N. C., 196 (201).

There is a clash among the decisions in the various jurisdictions as to the meaning to be given to the word "issue" or "descendants," some courts holding that the words include descendants of every degree, and are to be given that meaning in the absence of explanatory context, and thereby permit children or descendants of lower degree to share *per capita* with living parents; and some courts holding that in the absence of explanatory context a *per stirpes* division of property devised to issue or descendants should be directed, and thereby preclude children taking with their living parents. The two principles are in conflict and any attempt to reconcile them would be futile. (For an interesting discussion of these conflicting principles, with collection of authorities, see 83 A. L. R., 164.) However, we are not called upon at this time to choose, without precedent, between them, since in *James v. Hooker,* 172 N. C., 780, this Court is placed in accord with the latter principle. In that case the grantor conveyed land to Penelope E. Dancy, the wife of George A. Dancy, "for and during the period of her natural life, with remainder over after the expiration of her life estate to the children now or hereafter born of the intermarriage of the said George A. Dancy and Penelope and the lawful descendants of said children, their heirs or assigns, that are living at her death." In construing this language, *Mr. Justice Hoke* said: "The primary and linguistic definition of descendants refers to the lineal issue or heirs of the dead and not a living parent or ancestor, and when the term is used in reference to tenure of property and without anything to change or modify the ordinary meaning, authority is to the effect that it refers to persons upon whom the

law has cast the property by descent and includes only the lineal issue of a deceased ancestor." Not only do we have this authority of our own court but the authority of the courts of many other jurisdictions.

When we consider the expressed purpose of the testator, contained in the later clauses of his will, to treat all his children as equal in his estate, and to have his will construed as a whole, together with the scheme of parity among the testator's children that permeates the entire instrument, we are led to the conclusion that the construction placed upon the will by his Honor was a correct one.

The judgment of the Superior Court is

Affirmed.

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

MRS. ZOA L. HAYWOOD, MRS. ROSA FULFORD, ET AL., v. R. H. RIGSBEE, R. H. RIGSBEE, EXECUTOR AND TRUSTEE, AND THE FIDELITY BANK AND THE FIDELITY CENTRAL COMPANY.

(Filed 28 January, 1935.)

1. Mortgages H b—

Upon the termination of a receivership, foreclosure against property theretofore held by the receiver can no longer be resisted on the ground that it would unnecessarily interfere with the administration of the property by the receiver.

2. Estoppel C a—

Where it is judicially determined that the surviving children of testator are the sole beneficiaries under a trust established by the will, and it appears that each of the children joined in the execution of a ratification and confirmation of a deed of trust executed on trust property by the trustee, each of the children is estopped to attack the deed of trust for want of authority in the trustee to execute same.

3. Mortgages H b—

Foreclosure of a deed of trust may not be enjoined merely upon allegations of general financial depression or that the time is not auspicious for a sale.

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

APPEAL by the corporate defendants from *Cranmer, J.*, at Chambers in New Bern. From DURHAM. Reversed.

Fuller, Reade & Fuller for the Fidelity Central Company, trustee, and the Fidelity Bank, appellants.

Bryant & Jones and Egbert L. Haywood for plaintiffs appellees.

Hedrick & Hall and L. P. McLendon for R. H. Rigsbee and R. H. Rigsbee, executor and trustee.

Brawley & Gantt for Mrs. Mary E. Middleton, Miss Sallie Rigsbee, and Mrs. Mattie R. Bitting.

SCHENCK, J. This is an appeal by the defendants, the Fidelity Bank and the Fidelity Central Company, from an order disallowing their motion to dissolve a restraining order theretofore obtained by a temporary receiver appointed in the cause. The appellants are the *cestui que trust* and the trustee, respectively, in the deed of trust the foreclosure of which is restrained by the order which they seek to have dissolved.

The grounds alleged in the motion, upon which the receiver obtained the restraining order, were substantially that (1) if the deed of trust were foreclosed at this time the property would not bring its full and fair market value, and would be detrimental to all interested parties, and (2) would hinder and hamper the receiver in the performance of his duties and "constitute an unnecessary interference with the administration of the receivership," and (3) that the said R. H. Rigsbee was without authority to execute, or to give authority to anyone else to execute, the deed of trust sought to be foreclosed, and (4) that R. H. Rigsbee, executor and trustee under the will of the late Atlas M. Rigsbee, has not filed any final accounts, and that it would be harmful and illegal, and that the damage would be irreparable if the foreclosure sale were not restrained.

Since it appears on the record that the receivership was terminated (20 June, 1934) before the order disallowing the dissolution of the restraining order was made (23 November, 1934), it is apparent that the alleged "unnecessary interference with the administration of the receivership" could no longer be a cause for a continuance of the order.

Since this Court, under even date with this opinion, has rendered an opinion in another action (*Haywood et al. v. Rigsbee et al., ante,* 684), wherein some of the plaintiffs in this action are likewise plaintiffs, affirming the judgment of Cranmer, J., to the effect that the six (6) children of Atlas M. Rigsbee, living at the expiration of the trust, are the sole beneficiaries of any unadministered property or funds, in trust or otherwise, the right of any plaintiffs, except those who are children of Atlas M. Rigsbee, to maintain this action ceases.

Since the plaintiffs, who are children of Atlas M. Rigsbee, namely, Mrs. Zoa L. Haywood and Mrs. Rosa Fulford, joined with his four other living children in the execution of a ratification and confirmation

of the deed of trust now sought to be foreclosed, they are estopped to attack such deed of trust for the want of authority in the grantor to execute the same.

There is left only the allegation that if the deed of trust was foreclosed at this time the property would not bring its full and fair market value, and neither the legislation growing out of present financial emergency nor the decisions of this Court authorize or sustain injunctive relief for the reason that the time is not auspicious for a sale. To so hold would practically nullify the system of securing indebtedness by mortgages and deeds of trust on land now, and for many years past, in general and accepted use.

It appears from the record that the note secured by the deed of trust is past due and unpaid, that those who hold the equity of redemption have ratified and confirmed the execution of the said note and deed of trust, and that demand for payment has been made, and that there is no allegation of fraud, restraint, oppression, or usury in the transaction, or of insolvency of the *cestui que trust* or trustee.

We are constrained to hold, on the record, that the restraining order should be dissolved, and it is so ordered.

Reversed.

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

STATE OF NORTH CAROLINA, EX REL. STATE HOSPITAL AT RALEIGH, v. SECURITY NATIONAL BANK, GUARDIAN OF EARL N. BETTS, AN INSANE PERSON.

(Filed 28 January, 1935.)

1. Asylums A a—

The State Hospital at Raleigh is a public corporation, created as an agency of the State for the care of insane persons who are residents of the State, and the hospital is subject to the control of the General Assembly.

2. Asylums B a—Nonindigent insane may be treated at hospital, but must pay at least actual cost of maintenance.

Under constitutional authority and statutory provision, indigent insane who are residents of the State may be cared for in the State Hospital at Raleigh without charge, and are to be given preference in admission over nonindigent insane, while nonindigent insane may be admitted and cared for in the hospital under certain circumstances, but have always been required by statute to pay at least the actual cost of their care, treatment, and maintenance, Art. XI, sec. 10, C. S., 6162, 6186, but it is not required that the directors of the hospital finally determine the status of a patient at the time of his admission, the financial status of the patient being subject to the vicissitudes of fortune.

3. Asylums B d—

Where a patient admitted to the State Hospital at Raleigh as an indigent person thereafter becomes nonindigent, he thereupon has the same rights as other nonindigent persons, and is entitled to remain in the hospital upon the payment of the actual cost of his care and maintenance therein.

4. Same—Under provisions of statute indigent inmate upon becoming nonindigent is liable for cost of maintenance from date of admission.

Defendant's ward, a veteran of the World War, was admitted to the State Hospital at Raleigh as an indigent person, and at the time of his admission it was the settled policy of the State to care for indigent persons without charge, and to charge nonindigent persons at least the actual cost of their care. Several years thereafter the Federal Government began to make monthly payments from War Risk Insurance to defendant as guardian, and the funds were invested in securities. Upon learning of the estate several years after the payments began, the State Hospital demanded payment for the actual cost of maintenance of the ward in the institution, and thereafter the hospital instituted suit against the ward's estate to recover the cost of his maintenance from the date of his admission into the hospital: *Held*, under the provisions of ch. 120, Public Laws of 1925, ratified several years after the admission of the ward into the institution, the hospital was entitled to recover the actual cost of the ward's care and maintenance for the whole period the ward was an inmate of the hospital, including the time the ward was indigent as well as the time he was nonindigent, and including the period both before and after demand by the hospital for the cost of his maintenance, and by the provisions of the statute no plea of the statute of limitations is available to defeat recovery.

5. Constitutional Law E a—State has no contractual duty to care for insane, and change of regulations does not impair obligations of contract.

Chapter 120, Public Laws of 1925, providing that where a person admitted to the State Hospital at Raleigh as an indigent person thereafter becomes nonindigent, such person or his estate should be liable to the hospital for the actual cost of his care and maintenance in the hospital from the date of his admission, in accordance with the settled policy of the State in regard to nonindigent inmates, although such person may have been admitted prior to the effective date of the statute, is not unconstitutional upon the ground that it violates the obligations of a contract, there being no contractual duty on the part of the State to care for and maintain insane persons in such institution, the hospital being a charitable institution of the State, maintained voluntarily in recognition of Christian principles. Art. XI, sec. 7.

6. Insurance N a—

Where funds from War Risk Insurance have been invested in securities by the guardian of an insane veteran, such funds are subject to charges for the care and maintenance of the veteran in the State Hospital, sec. 454, Title 38, World War Veterans' Act of 1924, not applying to investments made with the proceeds of the insurance.

APPEAL by defendant from *Grady, J.*, at March Term, 1934, of WAKE. Affirmed.

This is an action to recover of the defendant the entire cost of the care, treatment, and maintenance of its ward, Earl N. Betts, from the date of his admission as a patient in the State Hospital at Raleigh until the commencement of this action.

When the action was called for trial, it was agreed by the plaintiff and the defendant:

"1. That on 3 February, 1919, Earl N. Betts, a veteran soldier, who had served in the military forces of the United States, was adjudicated *non compos mentis* by the clerk of the Superior Court of Harnett County, North Carolina, and was committed by an order of the said clerk to the State Hospital at Raleigh; that the said Earl N. Betts was admitted to the said hospital on 12 February, 1919, as an insane person, and has remained in said hospital as a patient from the date of his admission until the present time; and that at all times since his admission to said hospital its officials have known that the said Earl N. Betts is a veteran soldier of the United States Army.

"2. That at the time of his commitment and admission to the State Hospital at Raleigh the said Earl N. Betts was an indigent person, without funds or property with which to pay for his support and treatment in said hospital, and that he remained in said hospital as an indigent person until 16 October, 1928.

"3. That on 16 October, 1928, the Veterans' Bureau of the United States paid to the clerk of the Superior Court of Wake County, North Carolina, for the benefit of the said Earl N. Betts, the sum of $1,484, representing veteran's compensation awarded the said Earl N. Betts pursuant to the provisions of the World War Veterans' Act, U. S. C. A., Title 38, section 71, *et seq.*

"4. That on 16 October, 1928, the Commercial National Bank of Raleigh was appointed and qualified as guardian for the said Earl N. Betts; that on 22 March, 1932, the North Carolina Bank and Trust Company succeeded the said Commercial National Bank as guardian of the said Earl N. Betts, and the property belonging to his estate consisting of funds received from the Veterans' Bureau of the United States, together with securities purchased with said funds, was delivered to the said North Carolina Bank and Trust Company, successor guardian; and that on 24 October, 1933, the defendant Security National Bank was appointed and qualified as the successor guardian of the said Earl N. Betts, and assumed custody of his estate, which consists solely of funds received from the Veterans' Bureau of the United States, and securities purchased with said funds by the respective guardians as they received

the same, the said funds and securities now amounting to $5,293, as follows:

$2,050.00	Par value U. S. Government Bonds.
2,000.00	N. C. 4¼% Highway and General Fund Bonds.
1,200.00	Note, secured by deed of trust on real estate.
43.00	Cash.
$5,293.00	

"5. That from 16 October, 1928, to 30 September, 1933, the said Earl N. Betts received by his respective guardians, above named, the sum of $100.00 per month from the Veterans' Bureau of the United States, pursuant to the provisions of the World War Veterans' Act, U. S. C. A., Title 38, section 71, *et seq.;* that the said Earl N. Betts is unmarried and has dependent upon him for support his mother, who has been paid a monthly allowance of $35.00 by the respective guardians of the said Earl N. Betts out of his estate, since 16 October, 1928; and that payment of compensation to the said Earl N. Betts by the Veterans' Bureau of the United States was discontinued on 30 September, 1933, pursuant to the provisions of the World War Veterans' Act.

"6. That the first notice received by the officials of the State Hospital at Raleigh of the appointment of a guardian of Earl N. Betts, and of the payment to said guardian of funds by the Veterans' Bureau of the United States was by a letter dated 9 February, 1933, from the North Carolina Bank and Trust Company, guardian; that on 13 February, 1933, the superintendent of the State Hospital at Raleigh replied to said letter, advising the North Carolina Bank and Trust Company, guardian, that its ward, the said Earl N. Betts, then needed clothing, and requesting the said guardian to pay to said hospital for the care, treatment, and maintenance of its ward by said hospital the sum of $25.00 per month; that on 14 February, 1933, the North Carolina Bank and Trust Company, guardian, wrote to the superintendent of the State Hospital at Raleigh, enclosing a check for $50.00, in payment for the care, treatment, and maintenance of its ward, the said Earl N. Betts, for the months of January and February, 1933, and stating that if the court should so instruct it, the said guardian would issue a voucher each month for the sum of $25.00 to the said State Hospital at Raleigh; that the said guardian, in said letter, further advised the superintendent of said hospital that the estate of its ward, which it then had in its possession, consisted of funds which it had received for its ward from the Veterans' Bureau of the United States, and that if the said hospital wished to make a demand on it for payment for the care, treatment, and maintenance of its ward prior to 1 January, 1935, the

said Hospital should file a petition with the clerk of the Superior Court of Wake County for an order directing the guardian in the matter, and that the said guardian would gladly comply with any order which the said clerk should make; that thereafter, on 16 February, 1933, the superintendent of the State Hospital at Raleigh mailed to the North Carolina Bank and Trust Company, guardian of Earl N. Betts, a statement of the amount which the said hospital demanded that the said guardian pay to said hospital for the care, treatment, and maintenance of its ward from the date of his admission into said hospital to the date of said statement, said amount being $4,125; that thereafter, on the 12th day of each month until 12 August, 1933, the said guardian paid to said hospital the sum of $25.00, making a total paid by the North Carolina Bank and Trust Company, guardian, to the said hospital of $200.00; and that on 20 December, 1933, the superintendent of the State Hospital at Raleigh mailed to the defendant Security National Bank, guardian, a statement of the amount which the said hospital then claimed as due to it for the care, treatment, and maintenance of its ward, Earl N. Betts, from the date of his admission to said hospital, to wit, 12 February, 1919, to 12 January, 1934, less the sum of $200.00, paid by his former guardian. The defendant refused to pay said amount.

"7. That the actual cost of the care, treatment, and maintenance of Earl N. Betts by the State Hospital at Raleigh during the period hereinabove referred to, as fixed and determined by the board of directors of said hospital, was $20.00 per month from 4 March, 1922, to 4 July, 1923, and $25.00 per month from 4 July, 1923, to 4 January, 1934.

"8. That no notice was given by the board of directors or by any official of the State Hospital at Raleigh to any legal representative of Earl N. Betts of a demand for the payment of any amount for the expense incurred by said hospital in the care, treatment, or maintenance of the said Earl N. Betts as a patient in said hospital prior to 16 February, 1933, when the said hospital presented to the North Carolina Bank and Trust Company, guardian of Earl N. Betts, a statement of said amount; nor has any demand been made by the said hospital upon any legal representative of the said Earl N. Betts for his removal from said hospital."

On the foregoing facts, the plaintiff contended that under the provisions of section 6186 of the Consolidated Statutes of North Carolina, and of chapter 120 of the Public Laws of North Carolina, 1925, the plaintiff is entitled to recover of the defendant the sum of $20.00 per month for sixteen months from 4 March, 1922, to 4 July, 1923, and the sum of $25.00 per month for 126 months, from 4 July, 1923, to 4 January, 1934, less the sum of $200.00, or the aggregate amount of $3,270.

On the other hand, the contentions of the defendant, as they appear in the record, are as follows:

"1. That the estate of Earl N. Betts in the custody of the defendant guardian consists solely of funds paid the said Earl N. Betts by the Veterans' Bureau of the United States, pursuant to the act of Congress known as the World War Veterans' Act, or securities purchased with said funds, and that the said estate and funds are, therefore, exempt from claims of any and all creditors of the said Earl N. Betts, including the plaintiff herein, pursuant to the said World War Veterans' Act, Title 38, U. S. C. A., section 454.

"2. That the defendant guardian of Earl N. Betts is not liable for the costs of his treatment or maintenance by the State Hospital at Raleigh after 4 March, 1925, and that after that date the said State Hospital was directed by law to discharge the said Earl N. Betts, and to deliver him to the United States Veterans' Administration, pursuant to the provisions of section 1, chapter 51, Public Laws of North Carolina, 1925.

"3. That the defendant guardian is not liable for the costs of the maintenance of the said Earl N. Betts by the State Hospital at Raleigh prior to the date the said guardian first received notice from said hospital of its demand that the said guardian either pay the costs of the maintenance of its ward or remove him from said hospital, to wit: 20 December, 1933, as required by section 4 of chapter 120, Public Laws of North Carolina, 1925.

"4. That prior to 16 October, 1928, the said Earl N. Betts had no estate or property whatever belonging to him, and was an indigent patient in the State Hospital at Raleigh, and as such was entitled by law to receive treatment in said hospital free of charge, and that prior to said date the said Earl N. Betts was not liable for any part of the costs of his maintenance and treatment by the said hospital; that chapter 120, Public Laws of North Carolina, 1925, is retroactive in its operation, and cannot be interpreted as retroactive in its effect, for that such retroactive effect would render the statute unconstitutional and void, as a violation of the Fourteenth Amendment to the Constitution of the United States; and that therefore the defendant guardian of Earl N. Betts cannot be held liable for the cost of the treatment and maintenance of its ward by the State Hospital at Raleigh, prior to 16 October, 1928.

"5. That all claims or causes of action of the State Hospital of Raleigh for the cost of its care, treatment, and maintenance of the said Earl N. Betts, arising prior to 4 March, 1925, are barred by the three-year statute of limitations of North Carolina."

Upon its consideration of the facts agreed, and of the law applicable to these facts, the court was of opinion that the contention of the plain-

tiff should be sustained, and that each and all of the contentions of the defendant should be rejected.

It was accordingly ordered and adjudged by the court that the plaintiff recover of the defendant the sum of $3,270, with interest and costs.

From this judgment the defendant appealed to the Supreme Court.

Attorney-General Brummitt and R. C. Maxwell for plaintiff.

Willis Smith and John H. Anderson, Jr., for defendant.

J. D. DeRamus and J. H. Whittington for U. S. Veterans' Administration, amicus curiæ.

CONNOR, J. There is no error in the judgment in this action. The judgment is in accordance with the contentions of the plaintiff that on the facts agreed, and under the law applicable to these facts, the plaintiff is entitled to recover of the defendant the sum of $3,270. It appears on the face of the judgment that each and all of the contentions of the defendant were carefully considered by the court, and upon such consideration were not sustained. In this there was no error.

The State Hospital at Raleigh is a public corporation, created by the General Assembly of North Carolina as an agency of the State for the care, treatment, and maintenance of insane persons who are residents of this State. It is supported primarily by funds appropriated from time to time by the General Assembly out of the revenues of the State derived from taxes paid into the State Treasury. It is under the management of a board of directors, whose members are appointed by the Governor of the State, and whose appointments are subject to confirmation by the State Senate. The corporation is at all times and in all respects subject to the control of the General Assembly of North Carolina.

The State Hospital at Raleigh, as a public corporation, owns and operates a hospital, which is located on Dix Hill near the city of Raleigh. This hospital is one of the charitable institutions of the State of North Carolina and is maintained by the State in recognition of the principle that "beneficent provision for the poor, the unfortunate, and orphans is one of the first duties of a civilized and Christian State." Const. of N. C., Art. XI, sec. 7.

It is provided by statute that the board of directors of the State Hospital at Raleigh shall make such rules and regulations for the operation of the hospital owned by said corporation as shall make said hospital as nearly self-supporting as is consistent with the purpose for which it was established. C. S., 6162. This statute was in force on 12 February, 1919, when Earl N. Betts was admitted as a patient in said hospital. It declares the policy of the State with respect to the opera-

tion of the State Hospital for the Insane at Raleigh as well as for the operation of similar institutions.

It is further provided by statute that in the admission of patients to the State Hospital at Raleigh "priority of admission shall be given to the indigent insane, but the board of directors may regulate admissions, having in view the curability of patients, the welfare of the hospital, and the exigency of particular cases. The board of directors may, if there be sufficient room, admit other than indigent patients upon the payment of proper compensation." C. S., 6186. This statute, which was also in force on 12 February, 1919, shows that it was contemplated by the General Assembly that a distinction should be made by the board of directors of the State Hospital at Raleigh between patients who were indigent and patients who were nonindigent, and that the latter would be required to pay the costs of their care, treatment, and maintenance by the hospital, while no charge would be made by the hospital for the care, treatment, or maintenance of the former. There is nothing in this statute, however, or in any other pertinent statute, which shows that the status of a patient, with respect to his financial condition, shall be finally determined as of the date of his admission to the hospital. It would be manifestly unjust to the State and its taxpayers, and in some cases to patients of the hospital, if the statute so required. Experience shows that the financial condition of persons, whether sane or insane, is subject to frequent changes, and that patients who are indigent at the date of their admission, as defined by this Court in *In re Hybart,* 119 N. C., 359, may subsequently become nonindigent, and *vice versa.* The Constitution of North Carolina empowers the General Assembly to provide that indigent insane persons shall be cared for at the charge of the State. Const. of N. C., Art. XI, sec. 10. There is no provision in the Constitution requiring or authorizing the General Assembly to provide for the care, treatment, or maintenance of nonindigent insane persons at the expense of the State. The General Assembly has at all times by appropriate statutes required such persons to pay at least the actual cost of their care, treatment, and maintenance, while they are patients in State institutions.

Chapter 120, Public Laws of North Carolina, 1925, was ratified on 4 March, 1925, and has been in full force and effect since said date.

This statute provides, among other things, that all persons admitted to the State Hospital at Raleigh or to any of the other charitable institutions of this State named in the act, "be and they are hereby required to pay the actual cost of their care, treatment, training, and maintenance at such institution," and that such actual cost shall be determined from time to time by the board of directors of such institution.

The sections of the act which are applicable to the instant case are as follows:

"SEC. 4. From and after the passage of this act the respective boards of trustees or directors of each institution shall ascertain which of the various patients, pupils, or inmates thereof, or which of the patients, guardians, trustees, or other persons legally responsible therefor, are financially able to pay the cost to be fixed and determined by this act, and, so soon as it shall be ascertained, such patient, pupil, inmate, parent, guardian, trustee, or other person legally responsible therefor shall be notified of such cost, and in general of the provisions of this act, and such patient, pupil, inmate, or the parent, guardian, trustee, or other person legally responsible therefor shall have the option to pay the same or to remove the patient, pupil, or inmate from such institution, unless such person was committed by an order of a court of competent jurisdiction, in which event the liability for the cost as fixed by this act shall be fixed or determined and payment shall be made in accordance with the terms of this act."

"SEC. 5. That immediately upon the fixing of the amount of such actual cost, as herein provided, a cause of action shall accrue therefor in favor of the State for the use of the institution in which such patient, pupil, or inmate is receiving training, treatment, maintenance, or care, and the State, for the use of such institution, may sue upon such cause of action in the courts of Wake County, or in the courts of the county in which such institution is located, against said patient, pupil, or inmate, or his parents, or either of them, or guardian, trustee, committee, or other person legally responsible therefor, or in whose possession and control there may be any funds or property belonging to either the said pupil, patient, or inmate, or to any person upon whom the said patient, pupil, or inmate may be legally dependent, including both parents."

"SEC. 6. That no statute of limitations shall apply to or constitute a defense to any cause of action asserted by any of the above-named institutions for the collection of the cost of care, treatment, training, or maintenance, or any or all of these, against any person liable therefor, as herein provided, and all statutes containing limitations which might apply to the same are hereby *pro tanto* repealed, as to all such causes of action or claims and this section shall apply to all claims and causes of action for like cost heretofore incurred with such institutions and now remaining unpaid."

"SEC. 7. That this act shall not be held or construed to interfere with or to limit the authority and power of the management of the boards of trustees or directors of any of the institutions named herein, to make provision for the care, custody, treatment, and maintenance of all indigent persons who may be otherwise entitled to admission in any of the said institutions, and as to indigent pupils, inmates, and patients, the same provisions now contained in the several statutes relat-

ing thereto shall continue in force, but if at any time any of the said indigent patients, pupils, or inmates shall succeed to or inherit or acquire, in any manner, property, or any of the persons named above as legally responsible for the cost of care, treatment, and maintenance of the pupil, inmate, and patient at the above-named institutions shall acquire property, or shall otherwise be reputed to be solvent, then each of said institutions shall have the full right and authority to collect and sue for the entire cost and maintenance of such inmate, pupil, or patient, without let or hindrance on account of any statute of limitations whatsoever."

Under the foregoing statutory provisions, the plaintiff is entitled to recover in this action the entire cost of the care, treatment, and maintenance of Earl N. Betts by the State Hospital at Raleigh, as determined by the board of directors of said hospital, unless, as contended by the defendant, such of said statutory provisions as are applicable to this case are void.

It must be conceded, we think, that the plaintiff is entitled to recover the actual cost of the care, treatment, and maintenance of Earl N. Betts by the State Hospital at Raleigh, since he ceased to be an indigent patient of said hospital. When he became a nonindigent patient of the hospital, he had no further right to its care, treatment, and maintenance at the expense of the State, because he had been admitted to the hospital as an indigent patient. After he became nonindigent, he had the same right as other nonindigent patients—that is, the right to remain in said hospital as a patient only so long as he or his guardian paid the actual cost of his care, treatment, and maintenance, or until he had been lawfully discharged or removed from the hospital. The statutory provisions to that effect are manifestly not void. The provisions of the statute which confer upon the State the right to recover for the use of the State Hospital at Raleigh the entire cost of the care, treatment, and maintenance of a patient in said hospital who, although he was indigent at the date of his admission, thereafter has become nonindigent, are not void, because such provisions are retroactive in purpose and effect. Neither the State nor the State Hospital at Raleigh is under any contractual obligation to a patient in said hospital who was indigent at the date of his admission, and for that reason as a matter of State policy is cared for, treated, and maintained at the expense of the State, or of the said hospital, to continue such care, treatment, and maintenance after such patient has ceased to be indigent. See *Hospital v. Fountain*, 129 N. C., 90, 39 S. E., 734, and 128 N. C., 23, 38 S. E., 34. In that case it was held that the guardian of an insane person who was indigent when she was admitted as a patient in the State Hospital at Raleigh, but who thereafter became nonindigent, was liable for the cost

of her care, treatment, and maintenance by the hospital, both before and since she became nonindigent. See, also, *S. v. Rommee,* 93 Conn., 571, 107 Atl., 519, where it is said by the Court: "The State, in making expenditures for the care and support of an insane person committed to an institution designed to provide the support and attention which he needs enters into no contract relation with that person. It simply acts of its own volition, in response to the dictates of humanity, in the performance of a governmental duty now recognized as resting upon a modern State, and for the good of the individual concerned. There is not only no promise on the part of the State to the unfortunate, or his personal representatives, but no legal consideration for one. The burden which the State assumes and bears is assumed and borne as its purely voluntary undertaking, and not as a result of a contract obligation to that end entered into with him, or other person representing him."

The contention of the defendant in this action that the estate of its ward now in its hands as his guardian is not subject to the claim of the plaintiff because such estate consists of securities purchased from time to time by his successive guardians with funds paid to them by the United States Government as compensation awarded to Earl N. Betts as a veteran of the United States Army, under the provisions of the act of Congress, involves a construction of section 454 of Title 38 of the World War Veterans' Act, 1924. This section is as follows:

"SEC. 454. The compensation, insurance, and maintenance and support allowance payable under Parts II, III, and IV, respectively, shall not be assignable; shall not be subject to the claims of creditors of any person to whom an award is made under Parts II, III, or IV; and shall be exempt from all taxation. Such compensation, insurance, and maintenance and support allowance shall be subject to any claims which the United States may have, under Parts II, III, IV, and V, against the person on whose account the compensation, insurance, or maintenance and support allowance is payable."

This section was construed by this Court in *Martin v. Guilford County,* 201 N. C., 63, 158 S. E., 847. It was held in that case that where money which had been awarded to a veteran of the United States Army under the act of Congress as compensation has been paid to him, and has been invested by him in the purchase of property in this State, such property is not subject to the provisions of said section, and is therefore not exempt from taxation by the State. The section was so construed by the Supreme Court of the United States in *Trotter v. Tennessee,* decided on 4 December, 1933, and reported in 290 U. S., 354, 78 L. Ed., 358. *Justice Cardozo,* writing the opinion in that case, and speaking for the Court, says:

"We think it very clear that there was an end to the exemption when they (the moneys paid as compensation) lost the quality of moneys and were converted into land and buildings. The statute speaks of 'compensation, insurance, and maintenance and support allowance payable' to the veteran, and declares that these shall be exempt. We see no token of a purpose to extend a like immunity to permanent investments, or fruits of business enterprises. Veterans who choose to trade in land, or in merchandise, in bonds, or in shares of stock, must pay their tribute to the State. If immunity is to be theirs, the statute conceding it must speak in clearer terms than the one before us here."

Under the statute as construed by the Supreme Court of the United States and by this Court, the contention of the defendant cannot be sustained. The estate of Earl N. Betts, consisting of securities now held by his guardian, is subject to the claim of the plaintiff in this action, notwithstanding the fact that such securities were purchased by his guardians with moneys paid to them by the United States Government as compensation awarded under the act of Congress to the said Earl N. Betts as a veteran of the Army of the United States.

We find no error in the judgment in this action. It is

Affirmed.

GIDEON HINTON AND WIFE, MARY HARRIS HINTON, v. PAUL C. WEST AND SAUL WEST.

(Filed 28 January, 1935.)

1. Mortgages F c—Transfer of equity to cestui que trust held to raise presumption of fraud under evidence indicating that trustee acted as agent of cestui que trust and was primary party to the purchase.

Plaintiff's evidence tended to show that he executed a deed of trust on his 48-acre tract of land to secure money borrowed, that the trustee and *cestui que trust* therein were brothers, that plaintiff, a colored man with impaired vision, did not know the difference between a mortgage and deed of trust, and carried on all transactions with the trustee without knowing the interest of the *cestui que trust*, that the trustee threatened foreclosure and advertised the land under the power of sale contained in the instrument, and that in order to prevent foreclosure, plaintiff, at the insistence of the trustee, executed a deed in fee to the *cestui que trust*, and that thereupon the trustee canceled the deed of trust of record, together with evidence of inadequacy of purchase price, and that the trustee had purchased notes secured by mortgages on contiguous tracts owned by third persons, and had attempted to purchase contiguous tracts of land *is held* sufficient to be submitted to the jury in plaintiff's action to cancel the conveyance of his equity to the *cestui que trust* on the ground of fraud,

the evidence indicating that the trustee was acting in the dual capacity of trustee and agent for the *cestui que trust,* and was the primary party in the purchase of the equity of redemption, which raises the presumption of fraud and places the burden of proving the transaction fair and free from oppression on defendants.

2. Same: Estoppel C a—

Evidence that plaintiff mortgagor ratified his conveyance of his equity of redemption to the *cestui que trust* and was thereby estopped to attack his deed for fraud *is held* for jury under proper issue and instructions.

CONNOR, J., dissents.

APPEAL by plaintiffs from *Moore, Special Judge,* at March-April Term, 1934, of WAKE. Reversed.

The testimony of plaintiff Gideon Hinton was to the effect: That he was a colored man, and inherited from his father some fifty-nine acres of land on the Leesville Road, about one and a quarter miles from Raleigh. The home he lives in is up on a hill two hundred to three hundred feet from the Leesville Road, with a view of the Country Club property, golf course, etc. His father owed for the land, and after his death Hinton finished paying for it. He has been living on the land fifty-one years. He has had cataracts on his eyes about six years and has lost a clear vision—he has only half vision. He could read and write a little, but not much. He sold off part of the land and had about 48 acres left. For the land he sold off, he received $75.00 an acre; $250.00 for a half acre; $125.00 for a half acre; $200.00 for two acres, and $200.00 for an acre. Parties who knew the land, in January, 1932, testified that it was located higher than the property adjacent and the reasonable worth was about $75.00 to $100.00 an acre and between $150.00 and $200.00 an acre, although there was no market for land then. Briggs & West is a law firm, practicing in the city of Raleigh. Hinton became acquainted with Briggs about the time of the World War. Briggs attended to some of his business. He met Paul West in the office and he drew a deed for him. Frequently West came on the property visiting, and at that time he did not own any of it, and Hinton owed him nothing. Paul C. West took out different things to Hinton—old clothes, a finger ring, and a 20-gallon soft-drink jar. He borrowed $300.00 and Briggs stood for him. A mortgage was executed to secure same on one-half acre with a two-room house on it. West sold him a Ford automobile owned by him for $475.00 and took a mortgage on the 48 acres of land, and he made a note for same, and West took up the Briggs debts and paid some taxes, etc. At the time he had never seen defendant Saul West. Paul C. West kept coming out to the place afterwards. West said: "If you are going to pay it, just put it all up."

The note and deed of trust to Paul C. West was made 15 November,

1930, and came due 15 November, 1931. It was for $1,020. He was dealing with Paul C. West, did not know the difference between a mortgage and a deed of trust. He was not dealing with Saul West, never knew he was getting money from him. When the note became due, Paul C. West came out to see him. After a while he told him he was going to foreclose, he could not carry it on. The Commercial Bank had been closed and caught him with his money tied up. He could not get the money "just laid off from him for awhile." Paul C. West made the matter known that he was going to make a foreclosure, provided he could not get the money. Later, unexpectedly, he came out and said the land was advertised for sale. The notice is dated 21 December, 1931. Sale date, Monday, 25 January, 1932. Signed, Paul C. West, Trustee; Briggs & West, Attorneys. It was advertised in the *Union Herald*, on 24 December, 1931, and on 31 December, 1931, and no more thereafter.

After frequent conferences during the period the land was advertised, Hinton, on account of the situation and provided the land was not foreclosed, made a deed for some forty-two acres to Saul West at the insistence of Paul C. West, leaving plaintiff Gideon Hinton some six acres. He delayed signing the deed, thinking there might be some hopes still to get the money or something to satisfy Paul C. West, who told him that he was not going out there any more. The time had very nearly expired, and perhaps the next day he would make a foreclosure, if the deed was not signed. Paul C. West had a paper with him and a lady from his office with him. After he could not borrow the money, he went up and signed the deed in Briggs & West's office. At the time West showed an advertisement, saying it was a clipping from where the land was being advertised, he said the time was nearly out. The deed was signed 20 January, 1932.

The deed of trust was marked "Satisfied" in the register of deeds' office on 21 January, 1932, "Paul C. West, Trustee." Four days before the advertisement expired for the sale of the land under the original advertisement, also on 21 January, 1932, there was a letter from Paul C. West confirming the sale, representing his brother, Saul West. Hinton had no lawyer representing him. A deed was made to him by Saul West for the six acres of land. He never saw Saul West on the land, but saw Paul C. West at different times. Paul C. West said he was going to build a house out there and do other things. He planted some fruit trees and made a vineyard. He built a barn and stables and had a fence built around it.

Paul C. West made certain propositions to get the six acres of land, which Hinton did not accept. On cross-examination: "No, I don't know Mr. Saul West, I never saw him. If I did, I didn't know him. I know Mr. Paul West. I have been knowing him as much as eight

years. I am near-sighted, Judge. Will you let me get down there a little closer? There he is right there. (Witness identified Paul C. West.) I have been knowing Mr. Willis Briggs ever since the World War was on hand. I will have to get a little closer to see Mr. Briggs. My eyes are in bad condition. . . . No, sir, I wasn't perfectly satisfied. I made the proposition because I had to do something, but I wasn't satisfied; I did not have what I felt like was justified. I accepted of the plan of six acres, but inside I wasn't satisfied. . . . I accepted of it, but I wasn't enjoying it so well. It is not so much what I wanted to do, but what I did. I wasn't so well qualified at it. That was what I did under some circumstances. I wasn't enjoying it so well. I knew what I was doing. . . . Yes, sir, he gave me a finger ring. I don't know what went with it. I didn't think it was very much. It was not a diamond ring. I don't think it was a diamond ring. It don't look like a diamond to me. It changed colors; it changed to a dim color. It shined when I got it, but it got dim-looking. He gave it to me. . . . What I received for the value of the place, I ain't been satisfied with, but I do not make much rumor about dissatisfaction in that way. I didn't make much rumor about it, but I wasn't satisfied. I hadn't said anything to him about it, but I wasn't satisfied about it, because I didn't think it was right. I have been all the while dissatisfied. . . . It was around the 15th, or somewhere in that neighborhood, about the 15th of January. Then he told me that it had been advertised in the newspaper and showed me the clipping of it. He told me that the property would have to be sold under the mortgage if I could not make some arrangements to take it up. . . . I think, if I can get a chance, I can get it. I think I can arrange for it. I have not arranged for it as yet. A stool pigeon—I would accept it as something of a deceiver."

J. P. Hill, a real estate dealer, testified in part: "I saw the property in January, 1932. I have been to see it to try to buy it, but he did not want to sell it. My opinion of the fair and reasonable market value of that property in January of 1932 is that it should be worth $150 an acre, between that and $200.00 an acre. I tried to buy it from Hinton. I went up there in the spring of 1932 to buy it. I did not know anything at all about this transaction between Messrs. West and Gideon Hinton at that time. I have no interest in this matter."

J. R. Dodge, a claim adjuster for the State Highway Commission, testified in part that Paul C. West, on 4 January, 1934, filed claim for damage for top soil taken off the Hinton place prior to July, 1933. He referred to the property as his. About 1 December, 1932, he made a request to build a short connection between the new road and the beginning of his farm road.

The testimony of Collins Foster, a colored man, was to the effect: That he had bought two acres of the Gideon Hinton tract about five years ago for $400.00. Paul C. West told him that he owned the Hinton property. Foster owed the Morris Plan Industrial Bank. West, without his request, purchased this note. When he heard about it, he went to see West. "I told him what I would take, $600.00, and he said that he couldn't pay that much for it; that he had just paid the mortgage that I owed the Morris Plan Bank of about $208.00, and he said he would pay that much, which was as much as he could pay. I hadn't had no agreement with him before that, not before he went up there to take up this note. Mr. West got a deed from me to my property. He paid me $20.00—$2.00 at one time and $18.00 another time."

The testimony of John Thompson, a colored man, was to the effect: That he owned twenty-six and a quarter (26¼) acres of land which joined Gideon Hinton's land. It was left by his father and mother to him. He lived there about 35 years. He owed some $400.00 mortgage to Mr. Montague. "Mr. West came out and said, 'John, do you want to sell your land?' I told him yes, but I couldn't sell it because it was mortgaged on down here to Mr. Montague's. He said, 'I'll come out again Tuesday and bring you some money.' He came out late Tuesday evening. A lady was with him. I don't know who she was. On Tuesday evening he said, 'John, I brought you $10.00.' I told him I couldn't take $10.00 for it. He said, 'If you don't take that, you'll take nothing.' I said, 'All right, I believe I'll take $10.00.' He wanted me to sign a paper. I made a cross-mark on it. I can't write. I can't read either. No, sir, I did not know what the paper was I signed. I didn't know whether it was a mortgage paper or not. Mr. West didn't tell me nothing. He just told me to sign the paper. I did not sign any paper for Mr. West except this one. That is all."

The testimony of Jenny Lipscombe, a colored woman, was to the effect: She bought one-half acre from Gideon, four or five years ago. She paid him $185.00 cash for it. Her husband got disabled to work and she moved there. "I know Mr. Paul West when I see him. The first time I saw him to know him he came up in my yard. He told me who he was. I think that was just before this past Christmas, if I make no mistake. He told me something about the Hinton land. He asked me if I wanted to sell that corner there, that half acre. I told him 'No, sir.' He said, 'Well, I have a note of yours and I would like to have this strip of yours to straighten mine out.' He said, 'I bought Gid Hinton's place up here and I am going to build and want to fill in this old road and want this half-acre to straighten out mine'—straighten out his land, I guess. I have never borrowed any money from Mr. West. He did have my note. It was for $175.00. He got it from Mr. Craw-

ley. I did not ask him to buy my note—I didn't even know he had it. The first time I knew he had bought my note was when Mr. Burke Lynn told my husband about it. The first time I actually knew he had it, he come and told me he had it. He made me a proposition. He asked me did that land belong to me. I told him really no. My cousin bought the place, and I didn't decide to buy it, I told him, for I had not finished paying for it. He said, 'How much do you owe on it?' I said, 'Around $175.00.' He said, 'I'll give you this note and pay this $75.00 and all your back taxes.' I finally got Mr. Moore to pay off my note and take it in. I did that because I wanted it. I did not aim for Mr. West to keep it if it could possibly be got away from him."

The testimony of Burke Hinton, a colored man, was to the effect: "I have six acres of land out there and a house on it. I bought the land from Uncle Gid. I think it was in 1926. I know Mr. Paul West. I have seen him out there on the Hinton property. He went to see me with respect to buying my land. He said something to me about owning the Gid Hinton property. He told me that he owned the Hinton property. I can't remember all that he told me. He said he owned the Hinton property and wanted to get mine to straighten the line out. He did not tell me about any plans which he had out there that I remember. The first time that I remember that he came to see me was when they first began construction of the new road along by my house. I believe it was a year last fall. Mr. West and I did not trade. I did not want to trade. He made me an offer for it. He offered me some other property he had some place. He came there more than once. I don't remember how many times—to the best of my recollection two or three times. I don't remember what he offered me the second time. I don't know what place he offered me. He offered me so many different places. He would come there wanting to trade me. He told me that he had the John Thompson property—some time here last fall, just a little while before Christmas. He said he had a note on the Jennie Lipscombe property. I don't remember whether he said anything else about the note or not. He offered to trade me some place up in the country beyond me—away up in the country somewhere."

A map offered in evidence by plaintiff, and on the lower right-hand corner was the following: "Plat of Gideon Hinton property, owned by Paul C. West, Wake County, North Carolina, January 27, 1932—Scale, one inch to 200, C. M. Lamb, Civil Engineer." On this map there are shown several tracts of land fronting on the Leesville Road and the tract embraced within three straight lines and the Leesville Road. On the north line there is the name "Lynn." Beyond the west line is the name "Thompson." Below the south line is the name "Boone." This paper shows one large tract 42.4 acres and, in addition, shows a small

lot with the name thereon "Jennie Lipscombe"; a small lot with the name thereon "Will Harris"; a subdivision marked "Gideon Hinton," six acres; a subdivision marked "Burke Hinton"; and three small subdivisions marked "Carolina Foster, Mary Lipscombe, and David Hinton, respectively." By the court: "The court finds as a fact that Mr. Lamb, the engineer who made the map sought to be introduced into evidence, is in the courtroom and was not sworn and offered as a witness in order to prove the map the plaintiffs desired to offer in evidence, and, therefore, the court declines to permit the plaintiffs to introduce the map."

By Mr. Smith: "The plaintiffs wish to tender to the defendants a sum of money, in United States currency, which is in excess of the amount of the principal, interest, and taxes on the property, and now tender this to the defendants and request from the defendants a reconveyance of the property to the plaintiffs. The sum of $1,300 is hereby tendered. The plaintiffs also move the court for an accounting between the plaintiffs and the defendant to the end that the correct amount may be tendered and paid to the defendants upon recovery upon this property in dispute from the defendants to the plaintiffs." By the court: "Let the record show that the defendants decline to accept the tender of money made by the plaintiffs to the defendants." Numerous witnesses testified to the general reputation of Gideon Hinton as being good.

At the close of plaintiffs' evidence, the defendants made a motion for judgment as in case of nonsuit, C. S., 567, which the court sustained, and gave judgment accordingly. The plaintiffs made numerous exceptions and assignments of error, and appealed to the Supreme Court.

Willis Smith, John H. Anderson, Jr., and W. C. Lassiter for plaintiffs.

J. C. Little, Douglass & Douglass, and Clem B. Holding for defendants.

CLARKSON, J. Was the court below correct in sustaining the judgment of nonsuit? We think not. We do not pass on the truth or falsity of the evidence. Our province here is to determine if there is sufficient evidence to be submitted to the jury, more than a scintilla. The deed of trust from Hinton and his wife was made to Paul C. West, trustee, for his brother, Saul West. The plaintiffs' evidence indicates that he was dealing with Paul C. West in the negotiations for the loan and Paul C. West, trustee, for the sale; that Paul C. West was acting in a dual capacity as trustee and agent for Saul West, and was the primary party to the purchase. We think that there was sufficient evidence to be submitted to a jury and a presumption arose from the evidence, if believed by them, which would require the defendants to show that the transaction was fair and free from oppression.

In *Whitehead v. Hellen*, 76 N. C., 99 (100), *Pearson, C. J.*, said: "Courts of equity look with jealousy upon all dealings between trustees and their *cestuis que trustent;* and if this mortgagor had by deed released his equity of redemption, we should have required the plaintiff to take the burden of proof and satisfy us that the man, whom he had in his power, manacled and fettered by a mortgage and a peremptory power of sale, had, without undue influence and for fair consideration, executed a release of his right to redeem the land." . . . At page 101: "Courts endeavor to take hold of the substance and not the shadow, and will not allow the administration of justice to be evaded by forms, deeds, or 'men of straw.' By way of illustration, in our case, the plaintiff, feeling oppressed by the absurdity of a man's buying at his own sale, gets one Bernard to buy the land for him. He and May, the original mortgagee, convey to Bernard and he conveys to plaintiff. Bernard is 'a man of straw.'

"But the plaintiff says, 'I am no man of straw, I paid money for this mortgage debt, and bought the land at public sale.' 'True,' say the court, 'but did you thereby relieve yourself from the equity of redemption? "Once a mortgage, always a mortgage," is a trite maxim of courts of equity. By your purchase of the notes secured by the mortgage, you acquired all of the rights of May, and put yourself in his place—he could not have bought at his own sale—and it follows that you could not buy at a sale which was made by you, and of which you had the entire control.' "

Ruffin, J., in *McLeod v. Bullard*, 84 N. C., 515 (531-2), quoting from *Whitehead case*, continues: "Bigelow, in his work on Fraud, page 160, says, there are certain relations, termed relations of confidence, from the existence of which the law raises a presumption of fraud, in any dealings that may take place between the parties, because of the undue advantage which the situation itself gives to one over the other. Of these 'relations of confidence,' he enumerates eight in number, and in the following order: Attorney and client; principal and agent; partners; trustees and *cestuis que trustent;* guardian and ward; executors and administrators; mortgagor and mortgagee; parent and child. Thus, he places the relation of mortgagor and mortgagee with the other well-defined and universally acknowledged fiduciary relations. Upon principle this should be so. It is due to good faith and common honesty that such a presumption should arise in every case where confidence is reposed, and the property and interest of one person are committed to another. To every such person, his trust should be a sacred charge—not to be regarded with a covetous eye." Rehearing, 86 N. C., 210; *Harrelson v. Cox, ante*, 651.

In *Abbitt v. Gregory,* 201 N. C., 577 (598), it is said: "The relation may exist under a variety of circumstances; it exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence. 'It not only includes all legal relations, such as attorney and client, broker and principal, guardian and ward, partners, principal and agent, trustee and *cestui que trust,* but it extends to any possible case in which a fiduciary relation exists in fact and in which there is confidence reposed on one side, and resulting domination and influence on the other.' 25 C. J., 1119. In Pomeroy's Equity Jurisprudence, Vol. 2, sec. 956 (3d Ed.), it is said: 'Courts of equity have carefully refrained from defining the particular instances of fiduciary relations in such a manner that other and perhaps new cases might be excluded. It is settled by an overwhelming weight of authority that the principle extends to every possible case in which a fiduciary relation exists as a fact, in which there is confidence reposed on one side and the resulting superiority and influence on the other. The relation and the duties involved in it need not be legal; it may be moral, social, domestic, or merely personal.'" *Lee v. Pearce,* 68 N. C., 76 (79); *Puckett v. Dyer,* 203 N. C., 684 (690-1); *Bolich v. Ins. Co.,* 206 N. C., 144 (151-2); *Lockridge v. Smith,* 206 N. C., 174 (178-9).

We think the case of *Simpson v. Fry,* 194 N. C., 623, is distinguishable from the facts in the present case. In that case it is said, at page 627: "The grantee in the deed of trust is a trustee for both debtor and the creditor, with respect to the property conveyed. The creditor can exercise no power over his debtor, with respect to said property, because of its conveyance to the trustee, with power to sell, upon default of the debtor."

In the present case the evidence indicated that the trustee acted for himself or for the creditor, or acted together. He obtained a conveyance of the equity of redemption from the debtor. We think such power was exercised over the debtor that would require the defendants to show the transaction was fair and free from oppression. The capacity was dual. In the present case the evidence indicates inadequacy of consideration.

In *Leonard v. Power Co.,* 155 N. C., 10 (16), it is said: "Where there is inadequacy of consideration, but it is not gross, it may be considered in connection with other evidence upon the issue of fraud, but will not, standing alone, justify setting aside a contract or other paper-writing on the ground of fraud."

In *King v. R. R.,* 157 N. C., 44 (65), it is said: "When due weight is given to these matters, and there is evidence that the consideration is inadequate, it is a circumstance which, in connection with other circum-

stances, may be submitted to the jury, and if grossly inadequate, it alone is sufficient to carry the question of fraud or undue influence to the jury. Pom. Eq. Jur., Vol. 2, sec. 926-7." *Hill v. Ins. Co.,* 200 N. C., 502 (509-10).

The defendants contend that there was evidence of ratification. The evidence so indicates. This is a matter for the jury to determine under a proper issue and instruction. The "plat of Gideon Hinton property owned by Paul C. West," when properly proved, is some evidence.

From the view we take of the evidence, the judgment of the court below is

Reversed.

CONNOR, J., dissents.

GENERAL MOTORS ACCEPTANCE CORPORATION v. GEORGE WAUGH AND G. A. BROWN.

(Filed 28 January, 1935.)

1. Claim and Delivery A a—

An action in claim and delivery, being for the possession of property, must be brought against the party in possession. N. C. Code, 830, 831 (2), 834, 836.

2. Same—

Upon the findings of fact by the court under agreement of the parties defendant *is held* estopped to deny that the property, the subject of the action in claim and delivery, was in possession of defendant at the time of the institution of the action.

3. Appeal and Error E g—

The record imports verity, and the Supreme Court is bound thereby.

APPEAL by plaintiff from *Alley, J.,* 7 September, 1934. From GUILFORD. Reversed.

This action was commenced and tried in the municipal court of the city of High Point. The judgment of that court is as follows: "This matter coming on to be heard, it was agreed by the parties that the same should be heard by the court without a jury, and the same having been called, the plaintiff offered the following evidence: George Waugh testified that on or about 27 June, 1931, that he lived in the city of Amarilla, Texas, and was the owner of one Chevrolet coach, the property described in the pleadings herein; that he purchased the same from the Plains Chevrolet Company, and gave them a conditional sales contract, and that the said contract was assigned to the plaintiff, and that it is now the owner of the same.

"The plaintiff introduced the sales contract, which is not recorded, and the defendant G. A. Brown objected to the introduction of the same for the reason that the same was not recorded. The plaintiff contended that the contract was a Texas contract, and that there was no evidence that the same was required to be recorded in the State of Texas, and the same was admitted.

"The witness Waugh further testified that after purchasing the said car in Texas, and executing the said conditional sales contract, which is now in the possession of the plaintiff, that he brought the said car to North Carolina, and that the same was stored in the garage of Jettie Garland, and that he had never sold the same, or authorized anyone to take possession of it.

"On cross-examination, he denied that he had any dealings with G. D. Quattlebaum, and that he was now the owner of the said car herein in question. It is found as a fact that this is a claim and delivery action, and that the defendant G. A. Brown file herein a replevy bond and retain the possession of the car herein. The defendant offered in evidence a title to the car in question to Mrs. G. B. Barnhart, of High Point, North Carolina. The defendant moved, at the conclusion of the plaintiff's evidence, for judgment of nonsuit, which was refused, and the defendant Brown excepted.

"From the foregoing evidence the court finds as facts that the defendant Waugh purchased the car in question in the State of Texas, and executed and delivered to the Plains Chevrolet Company of Texas a conditional sales contract, of which the plaintiff is now the owner, and that the same is a lien on the automobile herein in question, and that the plaintiff is entitled to the possession of the same.

"Now, therefore, upon the foregoing findings of facts and upon motion of Walser & Casey, attorneys for the plaintiff, it is ordered and adjudged that the plaintiff recover of the defendant G. A. Brown one Chevrolet coach, Motor No. 1990349, Serial No. 5AD3023; and that the case be retained on docket to ascertain any amount which may be due the plaintiff on account of the retention of this car from the time of the filing of the replevy bond having been filed and the taking of the same under this judgment. This 2 May, 1934. Lewis E. Teague, Judge Municipal Court."

The defendant's exceptions and assignments of error are as follows: "(1) The municipal court erred in allowing the plaintiff to introduce in evidence the conditional sales contract, marked 'Plaintiff's Exhibit No. 1.' (2) The municipal court erred in overruling defendant's motion for judgment as of nonsuit, at the close of the plaintiff's evidence. (3) The municipal court erred in overruling defendant's motion for judgment of nonsuit at the close of all the evidence. (4) The municipal court erred in signing the judgment as appears in the record."

The appeal was heard before Judge Felix Alley, in the Superior Court of Guilford County, and the following judgment rendered: "This cause coming on to be heard, and being heard before his Honor, Felix E. Alley, judge presiding in the Twelfth Judicial District, upon appeal of the defendant G. A. Brown from the judgment of the municipal court of the city of High Point, and the case on appeal having been presented, and the matter having been argued by counsel, and after argument and due consideration, the court rules as follows upon the defendant's (appellant's) exceptions and assignments of error: First, that Exception No. 1 be overruled. Second, that Exception No. 2 be sustained. Three, that Exception No. 3 be sustained, and that, therefore, Exception No. 4 should be sustained. Now, therefore, it is ordered, adjudged, and decreed that the judgment of the municipal court of the city of High Point in said cause be and the same is hereby reversed; and it is further ordered that this cause be remanded to said court and judgment of nonsuit entered therein. This Friday, 7 September, 1934. Felix Alley, Judge presiding."

The sole exception and assignment of error of plaintiff appellant is to the judgment of the Superior Court reversing the municipal court by nonsuiting the plaintiff.

Walser & Casey for plaintiff.

D. C. MacRae and Dalton & Pickens for defendant G. A. Brown.

PER CURIAM. N. C. Code, 1931 (Michie), sec. 830, is as follows: "The plaintiff in an action to recover the possession of personal property may, at the time of issuing the summons or at any time before answer, claim the immediate delivery of the property, as provided in this article."

An action for the possession of property must be brought against the party in possession. *Haughton v. Newberry,* 69 N. C., 456; *Webb v. Taylor,* 80 N. C., 305; *Moore v. Brady,* 125 N. C., 35 (37). Claim and delivery is not maintainable against one who has neither possession nor control of the property sought to be recovered, but who has sold and delivered it to another party. *Webb v. Taylor,* 80 N. C., 305.

The affidavit and requisites of claim and delivery are set forth in section 831 (2), which is as follows: "Where a delivery is claimed, an affidavit must be made before the clerk of the court in which the action is required to be tried or before some person competent to administer oaths, by the plaintiff, or someone in his behalf, showing—(2) that the property is wrongfully detained by the defendant."

Section 834 is as follows: "Upon the receipt of the order from the clerk with the plaintiff's undertaking the sheriff shall forthwith take the

property described in the affidavit, if it is in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit, notice, and undertaking, by delivering the same to him personally, if he can be found, or to his agent, from whose possession the property is taken; or, if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion."

Section 836 is as follows: "At any time before the delivery of the property to the plaintiff, the defendant may, if he does not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, payable to the plaintiff, executed by one or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, with damages for its deterioration and detention, and the costs, if delivery can be had, and if delivery cannot be had, for the payment to him of such sum as may be recovered against the defendant for the value of the property at the time of the wrongful taking or detention, with interest thereon, as damages for such taking and detention, together with the costs of the action. If a return of the property is not so required, within three days after the taking and service of notice to the defendant, it must be delivered to the plaintiff, unless it is claimed by an interpleader. The defendant's undertaking shall include liability for costs, as provided in this section, only where the undertaking is given in actions instituted in the Superior Court."

C. S., 840, sets forth proceeding when property is claimed by a third person. On the argument of this case, we were under the impression that the nonsuit in the court below was correct. The defendant in his brief says: "Therefore, possession not having been shown in the defendant Brown at any time, and it positively appearing that other named persons actually had possession, nonsuit should have been entered as to him. Hence, the Superior Court's reversal of the municipal court of High Point should be affirmed."

We are bound by the record here, it imports verity. It appears in the judgment in the municipal court "it was agreed by the parties that the same should be heard by the court without a jury." It further appears: "It is found as a fact that this is a claim and delivery action, and that the defendant G. A. Brown file herein a replevy bond and retain the possession of the car herein."

Under this finding of fact, it is presumed that the parties complied with the law above set forth, that the sheriff took the property which was in the possession of the defendant Brown, C. S., 834, and the defendant Brown gave the undertaking, as required by C. S., 836.

It is well settled that the record in regard to these matters cannot be considered in evidence unless admitted or introduced on the trial. In the findings of facts in this case by the municipal court, we think that the defendant Brown is estopped to make the contentions that the property, when seized, was not in his possession.

Mrs. G. B. Barnhart did not interplead, as she had a right to do under C. S., 840, *supra.*

For the reasons given, the judgment must be

Reversed.

J. R. WHITE, ADMINISTRATOR, v. THE CITY OF CHARLOTTE AND THE CHARLOTTE PARK COMMISSION.

(Filed 28 January, 1935.)

1. Negligence D a—

Where it is not alleged in the complaint that the negligence complained of was the proximate cause of the injury in suit, the complaint is subject to demurrer for failure to state a cause of action.

2. Appeal and Error A c—

Where a complaint fails to state a cause of action a demurrer *ore tenus*, although first interposed in the Supreme Court, will be sustained.

3. Appeal and Error J g—

Where a demurrer *ore tenus* interposed in the Supreme Court is sustained, questions of law presented by appellant's exception to the overruling of his written demurrers by the lower court need not be considered, and the case will be remanded with direction that it be dismissed, unless in apt time plaintiff moves for leave to amend. C. S., 515.

APPEAL by defendants from *Hill, Special Judge,* at June Special Term, 1934, of MECKLENBURG. Reversed.

This is an action to recover damages for the death of plaintiff's intestate.

The defendants demurred in writing to the complaint on the grounds set out in their demurrer. The demurrer was overruled, and the defendants appealed to the Supreme Court.

John Newitt for plaintiff.

Bridgers & Orr and W. S. Blackeney for defendants.

PER CURIAM. When this appeal was called for hearing in this Court, 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. This demurrer is sustained.

It does not appear from the complaint that the negligence of the defendants, as alleged therein, was the proximate cause of the death of plaintiff's intestate. The negligent construction or operation of the swing in Independence Park by the defendants furnishes no cause of action on which the plaintiff is entitled to recover damages for the death of his intestate, unless such construction or operation was the proximate cause of the death. There are no allegations in the complaint from which it appears that there was a causal connection between the constructon or operation of the swing and the death of plaintiff's intestate. For this reason, no cause of action for actionable negligence is alleged in the complaint, and the demurrer *ore tenus,* although first interposed in this Court, must be sustained.

The questions of law presented by the written demurrer, and discussed in the briefs filed in this Court, have not been considered. The action is remanded to the Superior Court of Mecklenburg County, with direction that same be dismissed, unless within apt time the plaintiff moves for leave to amend his complaint. C. S., 515.

Reversed.

DOROTHY RICKMAN BROWN, BY HER NEXT FRIEND, GEORGE C. BROWN, v. S. H. KRESS & COMPANY AND B. A. MARSHALL.

(Filed 28 January, 1935.)

Appeal and Error C e—Requisites of appeals in forma pauperis.

In pauper appeals it is required that appellant file the statutory affidavit in order to confer jurisdiction on the Supreme Court, C. S., 649, and a provision in the judgment allowing plaintiff to appeal *in forma pauperis* does not relieve plaintiff of the necessity of filing the jurisdictional affidavit or the twenty-five printed or mimeographed copies of her brief required by the Rules.

APPEAL from *Alley, J.,* at September Term, 1934, of GUILFORD. Appeal dismissed.

This action was instituted by the plaintiff in the municipal court of the city of High Point against the corporate defendant and its employee to recover damages in the sum of twenty thousand dollars, alleged to have been caused by defamation of her character and false imprisonment of her person. The corporate defendant duly filed a petition for removal of the cause from the State Court to the Federal Court, grounded upon diversity of citizenship and fraudulent joinder of parties defendant. The clerk and the judge, respectively, of the court of first instance denied the petition, which in due course upon appeal was

heard in the Superior Court, where the petition was granted, and the case ordered removed to the Federal Court. To the order of removal the plaintiff excepted and appealed to the Supreme Court, assigning errors.

York & York for plaintiff appellant.
Dalton & Pickens and Byron Hayworth for appellees.

PER CURIAM. The appellant failed to file any appeal bond, and also failed to file twenty-five printed or mimeographed copies of her brief, but did file seven typewritten copies thereof.

While the judgment appealed from contains the following: "It further appearing to the court that the plaintiff is without property or other means of giving security for costs on appeal, . . . it is further ordered that the plaintiff be and she is hereby allowed to appeal *in forma pauperis,*" it appears that appellant failed to "make affidavit that he (she) is unable by reason of his (her) poverty to give the security required by law, and that he (she) is advised by counsel learned in the law that there is error in matter of law in the decision of the Superior Court in said action," as required by C. S., 649, for appeals *in forma pauperis.* The requirements of the statute being jurisdictional, the appellant was not relieved by the provision in the judgment of the court from filing the undertaking made necessary by C. S., 646, to render an appeal effectual, or from filing the twenty-five printed or mimeographed copies of her brief required by Rule 22 of this Court. "Giving bond on appeal, or the granting leave to appeal without bond, are jurisdictional, and, unless the statute is complied with, the appeal is not in this Court, and we can take no cognizance of the case, except to dismiss it from our docket." *Honeycutt v. Watkins,* 151 N. C., 652. In *Waller v. Dudley,* 193 N. C., 354, we found it necessary to say: "We again call the attention of the profession to the fact that the rules governing appeals are mandatory and not directory. The Court has not only found it necessary to adopt them, but equally necessary to enforce them and to enforce them uniformly."

However, a perusal of the record filed here leaves with us the impression that this case is governed by *Rea v. Mirror Co.,* 158 N. C., 24, and that his Honor was correct in holding, upon the defendant's petition, that it should be removed to the Federal Court, where, of course, the plaintiff would have the right to traverse the petition upon a motion to remand.

Appeal dismissed.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1935

STATE OF NORTH CAROLINA AND NORTH CAROLINA PARK COMMISSION v. UNITED STATES GUARANTEE COMPANY, THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, AND CENTURY INDEMNITY COMPANY.

(Filed 27 February, 1935.)

1. Principal and Surety B e—Where principal is not liable for interest surety may not be held liable therefor.

The measure of the surety's liability is that of the principal, provided such liability does not exceed the penal sum of the bond, and where a bank gives a bond to an agency of the State to protect such agency's deposit, upon the insolvency of the bank with assets insufficient to pay depositors in full, the State agency may not hold the surety liable for interest from the time action on the bond is instituted, since in such circumstances the bank is not liable for interest, but the surety is liable for interest only from date of judgment against it on the bond, C. S., 2309, on the amount for which the bank is liable to the State agency as of that date.

2. Principal and Surety B f—

Where, in an action on a surety bond, the surety sets up the defense that the bond had been canceled by mutual consent of the parties, the burden on the issue of cancellation is upon the surety.

3. Same—Preemptory instruction in favor of obligee in surety bond on issue of cancellation by mutual consent held correct in this case.

In this action against the surety on a bond given a State agency to protect the agency's deposit in a bank, the surety contended that the bond had been canceled, and introduced evidence that it had requested the bank,

the principal on the bond, to return the bond for cancellation, that the bank obtained the bond from the officer in charge of the State agency and sent it to the surety, that the surety wrote the State officer stating that the bond had been returned for cancellation and requesting confirmation of the cancellation, and that the letter was received by the State agency, but there was no evidence that the State officer was authorized to consent to cancellation of the bond or that he did consent to its cancellation, there being no evidence of such consent at the time he surrendered the bond to the bank, or that he replied to the surety's request for confirmation of cancellation, or that defendant surety company advised him at any time that it wished to be relieved of liability on the bond: *Held*, an instruction to the jury that if they believed the evidence to answer the issue of cancellation of the bond by the mutual consent of the parties in the negative is not error.

APPEAL by plaintiff and by the defendant Century Indemnity Company from *Cowper, Special Judge*, at January Special Term, 1934, of WAKE. No error in either appeal.

This is an action to recover on certain bonds executed by the Central Bank and Trust Company of Asheville, N. C., as principal, and by the defendants, severally, as sureties. By the terms of each of said bonds the principal and the surety named therein became bound unto Plato Ebbs, treasurer of the North Carolina Park Commission, an agency of the State of North Carolina, or his successors, in the penal sum of said bond. Each of the bonds sued on in this action was conditioned as follows:

"Whereas the above bound Central Bank and Trust Company was designated by the North Carolina Park Commission as a depository of funds belonging to the North Carolina Park Commission;

"Now, the condition of the above obligation is such that if the above bound Central Bank and Trust Company shall well and faithfully pay over and upon demand of said Plato Ebbs, treasurer of the North Carolina Park Commission, or his successors, all moneys belonging to said Plato D. Ebbs, treasurer of the North Carolina Park Commission, or to those to whom he may from time to time, personally or as treasurer of the North Carolina Park Commission, by check or draft, or bill of exchange, direct payment to be made, all moneys which the said Plato D. Ebbs, as treasurer of the North Carolina Park Commission, may deposit with said Central Bank and Trust Company, or which may in any manner come into its custody or possession while acting as said depository, or which may be received by it by virtue of its being said depository, then this obligation to be void; otherwise to remain in full force and effect."

The following stipulation with respect to its cancellation appears in each of said bonds:

"It is mutually agreed and understood between all parties hereto that if the principal or surety hereto shall so elect, this bond may be cancelled at any time by giving thirty days' notice, in writing, to the said Plato D. Ebbs, treasurer of the North Carolina Park Commission, or his successors, and to the other party hereto, and this bond shall be deemed canceled at the expiration of said thirty days, the surety remaining liable for all and any act covered by this bond which may have been committed by the Central Bank and Trust Company up to the date of said cancellation, under the terms, conditions, and provisions of this bond, and the surety shall, upon its release from all liability hereunder, refund the premium paid, less a pro rata part thereof for the time this bond shall have been in force."

The issues submitted to the jury were answered as follows:

"(1) Did the Central Bank and Trust Company of Asheville, as principal, and the defendant United States Guarantee Company, as surety, execute and deliver to Plato D. Ebbs, treasurer, North Carolina Park Commission, their bond in the sum of $25,000 to secure deposit of funds of plaintiffs in the said Central Bank and Trust Company of Asheville, as alleged in the complaint? Answer: 'Yes.'

"(2) Did the Central Bank and Trust Company of Asheville, as principal, and the defendant United States Guarantee Company, as surety, execute and deliver to Plato D. Ebbs, treasurer of North Carolina Park Commission, their bond in the sum of $150,000, as alleged in the further and second answer, cross-bill, and counterclaim of the defendant, United States Guarantee Company, to secure deposits of funds of plaintiffs in the said Central Bank and Trust Company of Asheville, N. C.? Answer: 'Yes.'

"(3) Did the Central Bank and Trust Company of Asheville, as principal, and the defendant the Metropolitan Casualty Insurance Company of New York, as surety, execute and deliver to Plato D. Ebbs, treasurer of North Carolina Park Commission, their bond in the sum of $50,000 to secure deposits of funds of plaintiffs in the said Central Bank and Trust Company of Asheville, as alleged in the complaint? Answer: 'Yes.'

"(4) Did the Central Bank and Trust Company of Asheville, as principal, and the defendant the Century Indemnity Company, as surety, execute and deliver to Plato D. Ebbs, treasurer of North Carolina Park Commission, their bond in the sum of $100,000 to secure deposits of funds of plaintiffs in the said Central Bank and Trust Company of Asheville, as alleged in the complaint? Answer: 'Yes.'

"(5) Were the several bonds aforesaid, executed and delivered by the defendants herein as sureties, to secure a common fund in the Central Bank and Trust Company of Asheville, N. C., deposited in said bank

by Plato D. Ebbs, treasurer of North Carolina Park Commission? Answer: 'Yes.'

"(6) What sum, if any, of the said funds of the plaintiffs were on deposit in the Central Bank and Trust Company in the name of Plato D. Ebbs, treasurer of North Carolina Park Commission, on 19 November, 1930, at the time the Central Bank and Trust Company closed its doors for the transaction of business, and placed its affairs with the North Carolina Corporation Commission for liquidation? Answer: '$326,106.70.'

"(7) By what amount, if any, has said sum been reduced by the application of collateral other than the depository bonds aforesaid? Answer: '$53,300.55.'

"(8) What amount, if any, has been paid by the United States Guarantee Company on account of the depository bonds executed by the Central Bank and Trust Company as principal, and the said United States Guarantee Company as surety, securing said deposits of the funds of the plaintiffs deposited in the name of Plato D. Ebbs, treasurer of North Carolina Park Commission, in the Central Bank and Trust Company, Asheville, N. C., and on what date was said payment made? Answer: '$150,000. Paid 19 May, 1931.'

"(9) Was the condition of the bond of the Century Indemnity Company breached by the failure of the Central Bank and Trust Company to account for and pay over the funds of the plaintiffs deposited therein in the name of Plato D. Ebbs, treasurer of North Carolina Park Commission, as alleged in the complaint? Answer: 'Yes.'

"(10) Were the conditions of the several bonds of the other defendants, as above set forth, breached by the failure of the Central Bank and Trust Company to account for and pay over the funds of the plaintiffs deposited therein in the name of Plato D. Ebbs, treasurer of North Carolina Park Commission, as alleged in the complaint, and in the further answer, cross-bill, and counterclaim of the defendant United States Guarantee Company? Answer: 'Yes.'

"(11) What amount, if any, of the said funds of the plaintiffs on deposit in the Central Bank and Trust Company of Asheville, at the time of its closing on 19 November, 1930, remains due and unpaid to the plaintiffs? Answer: '$122,716.35.'

"(12) Was the said bond of the defendant Century Indemnity Company canceled by mutual consent, as alleged in the answer of the said defendant? Answer: 'No.' "

On the verdict judgment was rendered as follows:

"This cause coming on to be heard, and being heard at the January Special Term, 1934, of the Superior Court of Wake Superior Court, before his Honor, G. Vernon Cowper, judge duly commissioned to hold said

court, and duly presiding and holding said court, and a jury, and a jury having answered the issues submitted to them as set out in the record;

"And it appearing to the court from the allegations and admissions in the pleadings, and the verdict of the jury, that there was on deposit in the Central Bank and Trust Company of Asheville, N. C., on 19 November, 1930, when said bank discontinued its business, and was taken over for liquidation by the North Carolina Corporation Commission, to the credit of Plato D. Ebbs, treasurer of the North Carolina Park Commission, of the funds of the plaintiffs, a balance of $326,016.70, the same being the fund secured by the depository bonds hereinafter referred to, and the collateral security hereinafter referred to, which said sum was later reduced by the sale of certain collateral securing the same to $272,716.35;

"And it further so appearing to the court that at the time said bank closed, 19 November, 1930, there were in effect, securing said deposit, depository bonds, with said bank as principal and the defendants, respectively, as sureties on their respective bonds, as follows:

Bond of the Century Indemnity Company	$100,000.00
Bond of United States Guarantee Company	150,000.00
Bond of United States Guarantee Company	25,000.00
Bond of Metropolitan Casualty Ins. Co. of N. Y.	50,000.00
Total	$325,000.00

"And it further so appearing to the court that on 19 May, 1931, the defendant United States Guarantee Company paid to the North Carolina Park Commission the sum of $150,000, in full satisfaction and discharge of its liability under its said bond of $150,000;

"Now, therefore, it is considered, ordered, and adjudged:

"That the plaintiffs State of North Carolina and North Carolina Park Commission have and recover of the several defendants, respectively, the amounts of their respective unsatisfied bonds, to wit: that the plaintiffs have and recover of the defendant the Century Indemnity Company the sum of $100,000; that the plaintiffs have and recover of the defendant United States Guarantee Company the sum of $25,000; and that the plaintiffs have and recover of the defendant the Metropolitan Casualty Insurance Company of New York the sum of $50,000, all to be discharged, however, upon the payment to the plaintiffs of the sum of $122,716.55, the recovery of the plaintiffs as herein adjudged, not to be in any way affected by the provisions of this judgment, as hereinafter set forth, as to the rights and liabilities of the several codefendants among themselves.

"Of such last-named sum, as between the several defendants, the defendants the Century Indemnity Company and the Metropolitan Casualty Insurance Company of New York are liable for the payment of aliquot parts, respectively, the liability of each of the defendants the Century Indemnity Company and the Metropolitan Casualty Insurance Company, respectively, being a sum equal to the proportion of $272,716.35 that each of said bonds in effect at the time said bank closed, including the $150,000 bond of the United States Guarantee Company, bears to the aggregate amount of all of said bonds, to wit: $325,000; so that the aliquot part for which the said Century Indemnity Company is liable is 100,000/325,000 of $272,716.35, which is $83,912.72; and the aliquot part for which said Metropolitan Casualty Insurance Company is liable is 50,000/325,000 of $272,716.35, which is $41,956.36, and the United States Guarantee Company is liable for nothing to its co-defendants, having paid to the plaintiffs $3,152.73 more than the amount which was its aliquot share.

"It is further considered, ordered, and adjudged that the defendant United States Guarantee Company have and recover of the defendants the Century Indemnity Company and the Metropolitan Casualty Insurance Company of New York the sum of $3,152.73, and any amount paid to the plaintiffs or received by the plaintiffs in excess of the amount herein recovered by them and due therein upon this judgment shall be held in trust by the said plaintiffs, and shall be by said plaintiffs paid over to said defendant United States Guarantee Company, not exceeding, however, the sum of $3,152.73.

"It is further considered, ordered, and adjudged that any one of the defendants which shall have paid, or shall pay, any sum in excess of its aliquot part for which it is liable, as between the defendants, as hereinabove provided, shall have and recover of any and all defendants which shall have failed, or shall fail, to pay its or their said respective aliquot parts, the amount of such excess payment, provided that no defendant shall be liable to any other defendant for any sum in excess of its aliquot part as hereinabove provided; and

"It is further considered, ordered, and adjudged by the court that the said sum of $122,716.35 above named, the payment whereof is required as a condition for the discharge of the sum recovered upon the bonds of the defendants, shall bear interest from date of this judgment (6 January, 1934) at the rate of six per centum per annum until paid; and

"It is further considered, ordered, and adjudged that the plaintiffs have and recover of the defendants the costs of this action, to be taxed by the clerk."

From the foregoing judgment both the plaintiffs and the defendant the Century Indemnity Company appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorneys-General Seawell and Bruton, and J. M. Broughton for plaintiffs.

Heazel, Shuford & Hartshorn for defendants U. S. Guarantee Company and Metropolitan Casualty Insurance Company.

A. J. Fletcher, Murray Allen, Sale, Pennell & Pennell, and Harkins, Van Winkle & Walton for defendant Century Indemnity Company.

CONNOR, J. The contentions of the plaintiffs on their appeal to this Court (1) that there was error in the refusal of the judge of the Superior Court to sign the judgment tendered by the plaintiffs at the trial of this action, providing that the sum of $122,716.35 shall bear interest from the date of the commencement of the action, to wit: 23 December, 1931; and (2) that there is error in the judgment as signed providing that said sum shall bear interest from the date of the judgment, to wit: 6 January, 1934, cannot be sustained.

The jury, under instructions by the court, to which the plaintiffs did not except, in answer to the 11th issue, found that the amount now due by the Central Bank and Trust Company to the plaintiffs, on account of deposits made in said Bank and Trust Company of money belonging to the plaintiffs, is $122,716.35. The Central Bank and Trust Company was declared insolvent on 19 November, 1930. Its assets, now in the possession of the Commissioner of Banks for liquidation, are not sufficient to pay its liabilities in full. For this reason, none of its creditors are entitled to recover interest on their claims since 19 November, 1930. *In re Trust Company,* 206 N. C., 251, 173 S. E., 340. The defendants, as sureties of the Central Bank and Trust Company, under their several bonds, are liable to the plaintiffs only for the amount for which the Central Bank and Trust Company is liable to them. This amount as found by the jury is $122,716.35. The plaintiffs are entitled to recover interest on this amount only from the date of the judgment, C. S., 2309. If the Central Bank and Trust Company, the principal in the bonds sued on, was liable for interest on the amount now due to the plaintiffs, then the defendants, as sureties on the several bonds sued on in this action, would also be liable for interest: Provided, however, the amount due, plus interest, did not exceed the penal sum of the bond in which the defendants are severally sureties. The measure of the surety's liability is the liability of the principal, provided such liability does not exceed the penal sum of the bond. *S. v. Martin,* 188 N. C., 119, 123 S. E., 631.

The contention of the defendant Century Indemnity Company on its appeal to this Court that there was error in the instruction of the trial

court to the jury with respect to the 12th issue cannot be sustained. The burden of this issue was on the defendant Century Indemnity Company. The trial court instructed the jury that if they believed all the evidence and found the facts to be as all the evidence tended to show, they would answer the 12th issue "No."

There was no evidence at the trial tending to show that Plato D. Ebbs, treasurer of the North Carolina Park Commission, was authorized to consent on behalf of the plaintiffs to the cancellation of the bond executed by the Century Indemnity Company, or that he did consent to such cancellation.

The evidence offered by the defendant Century Indemnity Company tended to show that the bond which it had executed as surety for the Central Bank and Trust Company, on 22 July, 1929, was returned to said defendant at its home office in Hartford, Connecticut, through the mail, on or about 15 July, 1930, by the Central Bank and Trust Company, and that said bond had been delivered to the Central Bank and Trust Company by Plato D. Ebbs on 15 July, 1930. There was no evidence tending to show that when the bond was delivered to the Central Bank and Trust Company, at its request, by Plato D. Ebbs, he consented to its cancellation by the defendant Century Indemnity Company. There was evidence tending to show that on or about 24 May, 1930, the defendant requested the Central Bank and Trust Company to return the bond for cancellation, but there was no evidence tending to show that the defendant at any time advised Plato D. Ebbs, personally or as treasurer of the North Carolina Park Commission, that it wished to be relieved of its liability on account of the bond. After the bond had been returned to the defendant by the Central Bank and Trust Company, the defendant mailed a letter addressed to Plato D. Ebbs, treasurer of the North Carolina Park Commission, at Raleigh, N. C., advising him that the bond had been returned to the defendant for cancellation, and requesting him to confirm its cancellation. The defendant received no reply to this letter, although there was evidence tending to show that the letter was received by Plato D. Ebbs. The defendant then, without further action, placed the bond in its file for canceled bonds, where it remained until the trial of this action.

Other assignments of error relied on by the defendant on its appeal have been considered. None of them can be sustained. In view of the answer of the jury to the 12th issue, we do not deem it necessary to discuss these assignments of error. The judgment is affirmed.

No error in either appeal.

MRS. MINNIE C. KEIGER v. L. E. SPRINKLE, J. A. SPRINKLE, AND J. H. SPRINKLE, ADMINISTRATORS OF J. B. SPRINKLE.

(Filed 27 February, 1935.)

1. Executors and Administrators D b—Under evidence in this case there was no presumption that services rendered father by daughter were gratuitous.

The evidence in this case, considered in the light most favorable to plaintiff upon defendant's motion as of nonsuit, tended to show that plaintiff was married and lived with her family, that her father visited her in her home for several months each year during the last years of his life, that her father was old, and that plaintiff nursed him, washed his linen, cared for him and bought medicine and special food for him, and that her father stated to third persons that he wished to pay plaintiff for her services. After her father's death plaintiff brought this action against his administrators to recover the value of the services: *Held*, under the evidence the relationship between plaintiff and her father did not raise the presumption that the services rendered by plaintiff were gratuitous.

2. Appeal and Error G c—

Exceptions in the record which are not set out in appellant's brief, or in support of which no argument is stated or authority cited, will be taken as abandoned. Rule 28.

3. Appeal and Error J e—

Error in the charge of the court in this case *is held* cured, or at least rendered not prejudicial, by other portions of the charge on the same aspect of the case and the final instructions of the court.

4. Trial E f—

A slight oversight of the court in calculating the length of time for which plaintiff was entitled to compensation for services rendered will not be held for prejudicial or reversible error when the oversight was not called to the court's attention so that it could be corrected, and it appears from the verdict of the jury that no harm resulted therefrom.

5. Trial I a—

In this action to recover for services rendered deceased, an exception that recovery should have been based upon the claim filed with the administrators is not sustained in view of the verdict of the jury, the claim filed with the administrators being in evidence.

APPEAL by defendants from *Hill, J.*, and a jury, at 23 July, 1934, Special Term. From FORSYTH. No error.

This is an action brought by plaintiff against the defendants, administrators of J. B. Sprinkle, to recover $2,500 for services rendered by plaintiff to J. B. Sprinkle, and expenditures which she made on behalf of the said J. B. Sprinkle, deceased.

The judgment in the court below is as follows: "This cause coming on to be heard and being heard before his Honor, Frank S. Hill, judge

presiding at the 23 July, 1934, Special Term of Superior Court for Forsyth County, and a jury, and the jury having answered the issues as hereinafter set out, as follows: (1) Did plaintiff render personal services to defendant's intestate, as alleged in the complaint? A. 'Yes.' (2) Did defendants' intestate pay for such services during his lifetime, as alleged in the answer and further defense? A. 'No.' (3) What amount, if any, is the plaintiff entitled to recover of the defendants? A. '$1,920.' It is therefore ordered, adjudged, and decreed that the plaintiff recover of the defendants the sum of one thousand nine hundred and twenty dollars ($1,920); and that the costs of this action be taxed against the defendants. This 3 August, 1934. Frank S. Hill, Judge presiding."

The 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.

Jackson & Swain and Wm. H. Boyer for plaintiff.
Slawter & Wall and O. L. Snow 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. The court below overruled these motions, and in this we can see no error.

The evidence on the part of the plaintiff, taken in the light most favorable to plaintiff with all reasonable inferences, was to the effect that the defendants' intestate, J. B. Sprinkle, was 86 years of age when he died. His death occurred at the home of plaintiff, where he had been in declining health for several years prior to his death, and had been in bed 30 or 35 days before he died. He died on 13 February, 1933. The plaintiff was a daughter of J. B. Sprinkle, married and had her own home and family, and was living separate and apart from her father, J. B. Sprinkle. For about six years before his death he lived nearly half of each year with plaintiff, who took care of him and spent several hundred dollars for extra food, medicine, etc. The defendants denied the material allegations of the complaint, pleaded payment and the statutes of limitation.

Beulah Keiger testified, in part: "I am a daughter of Mrs. Minnie C. Keiger and Mr. J. B. Sprinkle was my grandfather. Mr. Sprinkle was there in our home during the winter months all the time for the last three years I know of. My mother waited on him some and so did I. My mother just looked after him like a nurse would, cleaned his clothes and his bed for him and never would let him go out by himself unless one of us went with him, because he wasn't able. I have heard my

mother up at nights attending to Grandpa. She would clean his bed. . . . My mother gave him the front bedroom, which was my mother's and father's room. My mother furnished the coal. She bought him lettuce and fish and other vegetables that he could eat. He couldn't eat the same things we did. I saw my mother purchase those things and I bought some myself. My mother paid for those she bought. Sometimes I would give my mother money, and my brother, J. Lee Keiger, gave her money. He works at the Indera Mills, is secretary and treasurer. I have seen my other brother give my mother money also. My mother laundered my grandfather's clothing and bed linen," etc.

The testimony of other witnesses was to the same effect. There was evidence that the value of the services rendered was as much as $25.00 a week other than extra food, medicine, etc.; that J. B. Sprinkle, several years before he died, in talking about his feebleness, told Mrs. A. J. Duke "that he had made arrangements with Mrs. Keiger (the plaintiff) —Minnie he called her—for her to have pay, and be well paid for what she had done for him and was doing on. . . . He would rather stay there with Mrs. Keiger for she was good and kind to him; that she had been better to him and done more for him than all the rest."

C. L. Loflin testified, in part: "Mrs. Keiger gave up her room to him when he was so he couldn't be up and about, and she did the most of the washing of his bed linen, which was in very bad condition, etc. It was in the last three years she waited on him like that, anywhere from five to seven months in the year, when he would be in and out from there. The best I remember, the last time I had a conversation with him relative to seeing Mrs. Keiger repaid was in the fall, some time not far from the time he attended that corn shucking, the fall before he died. I know they had to buy some things for him to eat. He couldn't eat things like the others in the family. I have never seen anyone attending on Mr. Sprinkle in her home but Mrs. Keiger. Mrs. Keiger bought medicines for him. In my opinion, the value of the special diet and medicines would be from six to eight dollars a week, and for her services from fifteen to twenty dollars a week. I have no interest in this case."

In *Hauser v. Sain, Admrs.*, 74 N. C., 552 (555-6), the trial court charged the jury: "That if there was no special contract as to the services, that as the plaintiff was some twenty-six or twenty-seven years old when the last services within the statute of limitations were rendered, the law raised a presumption of a promise to pay what the plaintiff's services were worth, and that this presumption was not rebutted by the relations of the parties or the circumstances of the case."

This Court said (at p. 556): "In regard to an implied contract, we see no error in the charge. When one person renders service to another, the law implies a promise to pay what the services are reasonably worth.

This is admitted to be the general rule, but it is insisted for the defendant that the relation of granddaughter and grandfather rebutted this implication and imposed on the plaintiff the burden of proving an express contract; otherwise, it will be presumed that the services were rendered gratuitously. We can see no reason for this doctrine." *Wood v. Wood,* 186 N. C., 559; *Brown v. Williams,* 196 N. C., 247; *Lipe v. Trust Co., post,* 794. Under the facts and circumstances of this case, there is no presumption of gratuity.

Rule 28 (200 N. C., 831), in part, is as follows: "Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him."

Many exceptions and assignments of error made by defendants, in accordance with the above rule, are abandoned. The court below charged the jury as follows: "Now, gentlemen, if upon all the evidence the plaintiff has satisfied you by the greater weight of the evidence, giving due heed to the presumption heretofore called to your attention by the court, if the plaintiff has satisfied you from the evidence, and by its greater weight, that she rendered valuable services and services of any considerable magnitude to her father during the last years of his life, while he was in her home, and he received those services voluntarily, accepted them knowingly, then the court instructs you that, nothing else appearing, a presumption would arise that he intended to pay, and that the plaintiff performed the services with the expectation of receiving pay for those services, and that an implied contract would arise in favor of the plaintiff and against the administrators of the estate of J. B. Sprinkle, deceased (and unless you should further find from the evidence, and by its greater weight, or from circumstances, that the presumption has been overcome and that there was no intent to pay on the part of the deceased, or you should find that there was no expectation of payment, then the court instructs you that you would be authorized in answering the first issue 'Yes')." To the above in parentheses, defendants excepted and assigned error. All through the charge many times the court placed the burden of the issue on plaintiff.

Later the court charged the jury: "The court has heretofore instructed you—*and you will consider this as the final instruction with reference to this first issue*—if you find from the evidence, and by its greater weight, the burden being upon the plaintiff, that she in her own home rendered services of considerable magnitude to her father, and that he knowingly received those services and knowingly accepted those services, then the court instructs you there would be a presumption of an implied contract, that is, there would be a presumption that he intended to pay, and that she intended to charge for the services that she

rendered and, nothing else appearing, she would be entitled to recover the reasonable value of those services such as she rendered within the time heretofore specified and referred to by the court, provided such services had not been paid for."

We think that "and by its greater weight" an inadvertence, and cured by the "final instruction" on the issue; at least, there is no prejudicial or reversible error.

The exception and assignment of error as to the time which plaintiff was entitled to recover cannot be sustained. The slight mathematical calculation made by the court below as to the length of time for which plaintiff was entitled to recover was not called to the attention of the court, so the oversight could be corrected. *Davis v. Keen,* 142 N. C., 496 (502); *Sears v. R. R.,* 178 N. C., 285 (287). If error, we do not think it prejudicial or reversible.

The last exception and assignment of error was to the effect that the amount of recovery should be based on the claim filed with the administrators. We do not think this exception and assignment of error can be sustained. The plaintiff sued for $2,500, but had rendered an itemized bill to defendants for $2,550. This bill was in evidence for the jury to consider. Taking the verdict based on the evidence as to the value of services rendered and money spent for extra food, medicine, etc., furnished for the period recovery was allowed, we think there is no prejudicial or reversible error.

For the reasons given, in the judgment of the court below we find

No error.

LILLIAN E. WILLIAMS v. GURNEY P. HOOD, COMMISSIONER OF BANKS, EX REL. NORTH CAROLINA BANK AND TRUST COMPANY, AND E. C. McLEAN, AGENT AND CONSERVATOR.

(Filed 27 February, 1935.)

1. Banks and Banking H e—Evidence held sufficient to be submitted to jury on question of plaintiff's right to statutory preference.

Evidence tending to show that plaintiff's agent, under agreement with officials of a bank, surrendered checks to the bank for collection and took a certificate of deposit therefor which the parties agreed should be treated as a receipt for the checks and agreed that the bank be given thirty days to collect the checks *is held* sufficient to be submitted to the jury on the issue of plaintiff's right to a statutory preference in her action therefor after receivership of the bank, it appearing that the checks had been collected by the bank and had augmented its assets prior to its receivership. N. C. Code, 218 (c) (14).

2. Same—Evidence held insufficient to be submitted to jury on question of plaintiff's right to preference under trust fund theory.

Evidence that at the time of surrendering checks to a bank, plaintiff's agent told the officers of the bank that he needed the cash from the checks for certain business transactions contemplated by him is insufficient to entitle plaintiff to a preference in the bank's assets under the trust fund theory upon the receivership of the bank after it had collected the checks so surrendered to it.

CIVIL ACTION, before *Alley, J.*, at August Term, 1934, of GUILFORD.

James M. Williams, husband of plaintiff, and a resident of Asheville, was in Greensboro on 5 January, 1933, and had in his possession certain checks, to wit: one check from Pilot Life Insurance Company for $1,721.72, one from New York Life Insurance Company for $266.49, another from the same company for $266.66, and another from the National Life Insurance Company for $596.58. All of these checks were payable to James M. Williams and represented proceeds of loans on life insurance policies upon his life, in which policies his wife, the plaintiff, was beneficiary. The aggregate amount of these checks was $2,850.45. The said Williams went to the North Carolina Bank and Trust Company in Greensboro, upon which the check from the Pilot Life Insurance Company for $1,721.72 had been drawn.

The story of the transaction as related by the said Williams is substantially as follows: "I went to the bank and saw a young lady who was there in the lobby. I told her what I wanted and she directed me to Mr. E. C. McLean. I went to see Mr. McLean and told him what I wanted. I showed him the check I had, telling him I wanted to get the money for the check I had from the Pilot Life Insurance Company. . . . Mr. McLean said I would have to be identified in order to get the check cashed, and he then directed me to Mr. R. L. Clarke, who was in the bank. . . . I then showed Mr. Clarke the check I had and told him I wanted to get it cashed—the money on it. Mr. Clarke said the check was all right—the Pilot Life Insurance Company had the money there, but I would have to be identified before he could pay it. . . . I showed Mr. Clarke a letterhead with the Pisgah Lumber Company that I was an officer of, . . . and my name was on it as the president of the company. I showed him the courtesy chart of the Gulf Refining Company. . . . It had my name on it. . . . I also showed him some other checks I had. . . . I did not get that check cashed. . . . Mr. Clarke still would not cash the check. . . . I had never before this time dealt with the North Carolina Bank and Trust Company. . . . Mr. Clarke then suggested that I deposit the check. I had had it for some time. . . . I told Mr. Clarke I did not want to deposit it anywhere, that I could have de-

posited it before that; that I wanted the money for a special purpose that I had in view—a deal I had in view to make; that I did not want to deposit it anywhere, I just wanted to get the money. . . . We kept talking about the Pilot Life Insurance Company check, and finally Mr. Clarke said he would take the check for collection, and with my name on the check and my name with the Life Insurance Company, that is, my signature, and he would see some of the officers and thought that was going to make it all right. . . . I then asked him if, since you agree to that, . . . will you take some other checks, these other checks that I have and collect along with that, and he said he would. . . . After Mr. Clarke said he would take those other three checks along with the Pilot Life Insurance check for collection, I endorsed the checks and gave them to Mr. Clarke and asked him to give me a receipt for them. . . . After I asked Mr. Clarke for a receipt he brought a writing . . . and handed it to me. I objected to it on several grounds. . . . I did not ask for a certificate of deposit. I did not know there was any such thing as a certificate of deposit. In all my dealings with banks I had not seen one. . . . When I left those checks with Mr. Clarke in the North Carolina Bank and Trust Company, . . . I told him I wanted it for a special purpose in a trade. I had a transaction I had expected to close up in Virginia when it came time to close it. I did not tell him all the details of the transaction. . . . I objected to taking that first because it required legal notice. . . . It appeared to be negotiable, and yet on its face it said it was not subject to checking. I could not make that out and Mr. Clarke said, 'We will just treat that same as a receipt'; that if the whole amount was not collected that we would adjust it then, and whether it was collected or not, he would notify me and I did not use it, did not use it anywhere, but he said it was negotiable. I did not want to keep that that way. I was not to use it anywhere until he notified me of a certain whether the money was collected or not collected. Now, that is just the way I understood. I have the certificate of deposit that he gave me and I do not mind letting you see it, not a bit in the world. . . . I told Mr. Clarke I did not want it and Mr. Clarke said it would not require any notice, I could come back when the money was collected and get it any time afterwards without giving notice of any kind. . . . I took it under those conditions. . . . He told me to hold it for thirty days. I agreed to hold it for thirty days until he notified me whether it was paid or not, and if any of the checks were not paid, then we would adjust the matter according to the amount we had. . . . The bank did not notify me at all before I went to the bank on 3 March whether the four checks had been collected by them or whether they had not been collected by them. . . . I asked Mr. Clarke to make the

receipt in the name of Mrs. Lillian E. Williams. . . . After Mr. Clarke left me and took those four checks with him and came back to me and handed me a paper-writing, Mr. Clarke agreed with me that it should be treated as a receipt. . . . I did not make any attempt to get the money out of the bank or to realize on the certificate of deposit from the time I left the checks in the bank until 3 March."

On 10 January, 1933, James M. Williams, as agent for his wife, the plaintiff, wrote a letter to the defendant bank, in reply to a letter from said bank to the plaintiff, "thanking her for the certificates of deposit account you have opened with us." This letter stated: "While the face of the paper you both refer to reads certificate of deposit, it is really in fact a receipt offered to me and accepted by me as such for checks left with you for collection, totaling the amount $2,851.45. . . . I presented this check to you for payment. You refused payment, saying that you did not know me. . . . I endorsed the checks and handed them to you, asking for a receipt. You handed me what you now call a certificate of deposit. I demurred, saying this was negotiable, and was told it should be regarded as a receipt, and that I should so treat and hold it, subject to the collection of all the checks, which I agreed to do." Williams testified that during the period from 5 January until 3 March that he did not have any direct notice that the checks were all cashed, and that he did not write the bank as to whether the checks had been collected. On 3 March Williams presented himself to the bank for the money.

It was admitted that all of the checks "were duly collected by said North Carolina Bank and Trust Company and augmented the assets of said bank."

It was alleged that on the morning of 3 March, 1933, the plaintiff, through her agent, J. M. Williams, demanded payment in full of the proceeds of said checks, and that payment was refused. The defendant admitted in the answer that upon the opening for business on 3 March, 1933, the North Carolina Bank and Trust Company limited withdrawals by any depositor to five per cent of depositor's balance as shown by the books at the close of business on the previous day.

On 20 May, 1933, the North Carolina Bank and Trust Company, together with all of its assets, passed into the hands of the defendant Gurney P. Hood, Commissioner of Banks, for purpose of liquidation according to law. The plaintiff filed a claim for preference and the preference was denied. Thereupon this suit was brought to recover the proceeds of said checks as a preference. A motion of nonsuit was made by the defendant, and such motion was granted by the trial judge. From said judgment of nonsuit the plaintiff appealed.

Edward N. Wright for plaintiff.
Brooks, McLendon & Holderness for defendant.

BROGDEN, J. Was there sufficient evidence of statutory preference to be submitted to the jury?

C. S., 218 (c) (14), prescribes the order of preference in the distribution of assets of insolvent banks. Subsection 4 thereof in part specifies as a preference "amounts due on collections made and unremitted for or for which final actual payment has not been made by the bank."

The evidence offered in behalf of plaintiff tended to show that the checks were deposited in the bank for collection, and a receipt demanded. There was also evidence tending to show that it was agreed between the parties that the bank was to have thirty days in which to make the collection. It seems that a certificate of deposit was given the plaintiff at the time the bank took the checks. The plaintiff, however, insists that the evidence showed that this so-called certificate of deposit was intended as a receipt for the reason that the bank had positively refused to cash the checks, and it would hardly be supposed that the money would be put to the plaintiff's credit at the very instant the bank was declining to pay it to Williams. If a jury should find, upon proper instructions by the trial judge, that the plaintiff, through her agent, deposited these checks for collection, and they were so accepted by the bank at the time, and should further find that although a certificate of deposit was issued, it was understood and agreed between the parties that this should be treated as a receipt and to be held as such for a period of thirty days in order to give the bank an opportunity to collect the checks and notify the plaintiff of such collection when made, then upon such finding the plaintiff would be entitled to a statutory preference.

The plaintiff insisted that there was sufficient evidence of a special deposit for a special purpose warranting the application of the trust fund theory of preference. This Court, however, does not concur in this view upon the evidence appearing in the record.

The defendant relied upon the case of *Morecock v. Hood,* 202 N. C., 321, 162 S. E., 730. This case deals with an interpretation of the proviso in section 218 (c) (14). The reasoning and scope of the *Morecock case, supra,* is not decisive of the question presented by the present appeal. The *Morecock case* did not involve a collection at all, but undertook to deal with a series of transactions by means of which a depositor was undertaking to withdraw his own money from a bank.

Reversed.

PERCY L. JAMES v. CAROLINA COACH COMPANY.

(Filed 27 February, 1935.)

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, 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. Automobiles C m—Evidence held sufficient to overrule motion of nonsuit in this action for personal injuries sustained in auto collision.

The evidence in this case, considered in the light most favorable to plaintiff, tended to show that plaintiff was driving his coupe well on the right side of a highway within the corporate limits of a city, that another adult and four children were riding in the coupe, that plaintiff's left arm was hanging outside the car, and that defendant's bus, driven at an excessive speed, approached from the opposite direction in the middle of the highway, that the bus had just passed another car going in the same direction and was being driven back to the bus driver's right of the highway, that as the driver turned the bus to the right the back of the bus swung over the middle of the highway and hit plaintiff's arm and the back of his car, causing the injury in suit: *Held*, defendant's motion as of nonsuit, based upon plaintiff's failure to slacken his speed, was properly refused, plaintiff having the right to assume that the approaching bus would be driven to its right side of the road so that the bus and car could pass each other in safety. N. C. Code, 2621 (53).

3. Automobiles C g—Violation of statutory speed limit is negligence per se and not merely evidence of negligence.

The violation of the statutory speed limit is negligence *per se*, and an instruction that it is only evidence of negligence entitles defendant to a new trial on its exception based upon plaintiff's contributory negligence in exceeding the speed limit, but such violation must be a proximate cause of the injury in suit in order to constitute a defense to the action.

APPEAL by defendant from *Shaw, J.*, and a jury, at April Term, 1934, of DURHAM. New trial.

This is an action for actionable negligence brought by plaintiff against the defendant. The defendant denied the material allegations of the complaint and set up the plea of contributory negligence. The issues submitted to the jury and their answers thereto are as follows: "(1) Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? A. 'Yes.' (2) Was the plaintiff guilty of contributory negligence, as alleged by the defendant? A. 'No.' (3) What amount of damages, if any, is the plaintiff entitled to recover? A. '$12,500.'"

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 will be set forth in the opinion.

Bryant & Jones for plaintiff.
Smith, Leach & Anderson and Hedrick & Hall for defendant.

CLARKSON, J. At the close of plaintiff's evidence and at the close of all the evidence the defendant made motions in the 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.

It is the settled rule of practice and the accepted position in this jurisdiction that on a motion to nonsuit the evidence which makes for the plaintiff's claim, and which tends to support his cause of action, whether offered by the plaintiff or elicited from the defendant's witnesses, will be taken and considered in its most favorable light for the plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.

In *Moseley v. R. R.*, 197 N. C., 628 (635-6), it is said: "A serious and troublesome question is continually arising as to how far a court will declare certain conduct of a defendant negligence and certain conduct of a plaintiff contributory negligence, and take away the question of negligence and contributory negligence from the jury. The right of trial by jury should be carefully preserved, and if there is any evidence, more than a scintilla, it is a matter for the jury and not the court."

Taking the evidence in the light most favorable for plaintiff, and with the reasonable inference to be drawn therefrom, we think the evidence sufficient to have been submitted to the jury. The evidence on the part of the plaintiff was to the effect: That plaintiff and his neighbor, Ralph L. Evans, were taking their "kids" to the circus, on 2 August, 1932. The plaintiff was driving a '29 Model Pontiac Coupe. Evans had three children and plaintiff one. Plaintiff's and one of Evans' were about two years old, and the other two were about four and six years old. Plaintiff was driving on Hillsboro Road, in West Durham, in a westerly direction. Traffic was heavy. 15th and 16th streets run into Hillsboro Road at an angle, but they do not cross it. Plaintiff was driving his car on the north side of the Hillsboro Road on the right-hand side, about three feet from the curb. He had gotten beyond the curve and the road was straight. The road was thirty feet wide where the collision took place. Plaintiff's car was between 5½ and 6 feet wide. Half of the street would be 15 feet. On the opposite side of the road was Garrad's Store and a barber shop. Cars were parked next to the barber shop. Plaintiff was driving between 20 and

25 miles an hour. He had his left arm out to give traffic signals. Plaintiff testified: "Two of Mr. Evans' children were standing down to the foot of the car, in front of his feet, between his feet and the dash board. And he had the other one in his lap. I think he had the baby one in his lap. I didn't have a kid in my lap at all. With all those children in the car with me and Mr. Evans, I could have driven the car with both hands in a normal way. I don't think it was more convenient for me to drive along there with my arm hanging out the window. I can drive a car pretty good with one hand. . . . Q. You saw that car driving along in the middle of the road for a distance of more than 100 feet coming straight toward you, didn't you? A. Yes, sir. Q. Why didn't you slow down your automobile? A. Well, I thought he was going to get back on his side of the road. . . . I could have run out through the field if I knew the bus was going to hit me. Q. If you had applied your brakes and driven with reference to the conditions that existed in front of you, you would have never collided with the bus, would you? A. Yes, if I had set where the car was and applied my brakes and stayed right where the car was at, he would have hit me. . . . A. Well, I was already a way over on my side of the street, not farther than three feet from the curb. The bus was coming, and there was no reason why he couldn't get back on his side of the road. I thought he was going to until it was too late; after he had done hit me, it was too late then. There was not any reason why he couldn't pull back on his side of the road. I expected him to."

R. L. Lake was driving defendant's bus, headed toward Durham, in an easterly direction, going at least 40 miles an hour. The bus passed around the car of Mrs. H. W. Knight and two parked cars on the south side of the street, about 50 feet west of where the collision occurred, and traveling in the center of the highway and on plaintiff's side of the road.

Plaintiff testified: "When he got right there, right at the curve, he was trying to cut the bus back, he was already over on my side of the road. That pushed the back end of the bus around; when he cut it back around, the back end of it come around, and the very back of it crashed right by my car and hit the front of the car just a little bit, hooked up the front fender just a little, and then it got my elbow. I had my arm hanging out the door, like that, and it caught my elbow there between the two cars and mashed that all to pieces, and tore my running board and fender all to pieces. It hit the back of the car more than it did the front of it."

The collision took place about 2 o'clock in the day in the residential section of the city of Durham. The bus was about 30 feet long and 86 inches wide. The testimony of Mrs. H. W. Knight was to the effect

that she had taken her boys to the circus grounds and was returning, going back to Durham in an easterly direction, on Hillsboro Road. "He (speaking of Lake) kept on blowing, and I kind of switched over to one side and gave him a chance to go by, and he swung around me. . . . Bus was going forty miles an hour. . . . When he went around me that throwed him over on the left-hand side of the street. He had not had time with the rate we were going to get back on his side of the highway and to avoid hitting these cars. I saw the collision between Mr. James' automobile and the bus. Mr. James' car was well over on his side, on the right-hand side of the street at the time of the collision. I would say the rear end of the bus was at least four feet over the center of the highway leading back, with the front end of the bus coming back over to his right, to the bus driver's right." There was other evidence on the part of plaintiff to like effect.

In *Shirley v. Ayers,* 201 N. C., 51 (53-4), it is said: "The rule to be observed by the driver of an automobile, when he approaches another automobile, coming from the opposite direction, on a public highway in this State, in order that the automobiles may pass each other in safety, is prescribed by statute, section 10, chapter 148, Public Laws 1927, N. C. Code 1927, sec. 2621 (53). The rule is as follows: 'Drivers of vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other at least one-half of the main traveled portion of the roadway as nearly as possible.'

"The driver of each automobile, who is himself observing the rule, has the right, ordinarily, to assume that the driver of the other automobile will also observe the rule, and thus avoid a collision between the two automobiles when they meet each other. Neither is under a duty to the other to anticipate a violation of the rule by him. When the driver of one of the automobiles is not observing the rule, as the automobiles approach each other, the other may assume that before the automobiles meet the driver of the approaching automobile will turn to his right, so that the two automobiles may pass each other in safety. 'One is not under a duty of anticipating negligence on the part of others, but in the absence of anything which gives or should give notice to the contrary, a person is entitled to assume, and to act on the assumption, that others will exercise ordinary care for their own safety.' 45 C. J., 705." *Cory v. Cory,* 205 N. C., 205.

The defendant contends: The court erred in charging the jury that exceeding the speed limit prescribed by statute is merely evidence from which the jury may find that a party is negligent, rather than that exceeding the statutory speed limit is negligence *per se.*

"In *Hendrix v. R. R.,* 198 N. C., 142 (144), is the following: 'It is well settled in this jurisdiction that the violation of a town or city ordi-

nance, or State statute, is negligence *per se,* but the violation must be the proximate cause of the injury. Ordinarily this is a question for the jury, if there is any evidence, but, if there is no evidence that the violation of the ordinance or statute is the proximate cause of the injury, this is for the court to determine.' There must be a causal connection between the violation of the statute and the injury inflicted. *Burke v. Coach Co.,* 198 N. C., 8 (13)." *Jones v. Bagwell, ante,* 378 (382). We think the contention of defendant must be sustained.

In *Taylor v. Stewart,* 172 N. C., 203 (204-5), speaking to the subject, is the following: "His Honor charged the jury that under the laws of North Carolina it was a misdemeanor for a person under the age of 16 to drive an automobile upon any highway or public street, and that it is a circumstance from which the jury may infer negligence, and that it does not necessarily follow that the jury shall conclude it was negligence, but that it is a circumstance to go to the jury. In this his Honor erred. He should have instructed the jury that it is negligence *per se* for the defendant James Stewart to have driven the machine in violation of the statute law of the State. *Zogier v. Southern Express Co.,* 89 S. E., 44; *Paul v. R. R.,* 170 N. C., 231; *Ledbetter v. English,* 166 N. C., 125. It does not follow, however, that the defendant is liable in damages, for the plaintiff must go further and satisfy the jury by a preponderance of the evidence of the fact that such negligence was the proximate cause of the death of the child." *Ledbetter v. English,* 166 N. C., 125; *Graham v. City of Charlotte,* 186 N. C., 649 (666); *Godfrey v. Coach Co.,* 201 N. C., 264 (267); *Norfleet v. Hall,* 204 N. C., 573 (577); *Jones v. Bagwell, ante, supra.*

We are not unmindful of the language used in N. C. Code 1931 (Michie), sec. 2621 (46), subsec. (6).

For the reasons given, there must be a

New trial.

ATLANTIC COAST LINE RAILROAD COMPANY v. A. J. MAXWELL, COMMISSIONER OF REVENUE OF NORTH CAROLINA.

(Filed 27 February, 1935.)

1. Taxation B d—Provision in Revenue Act exempting from income tax compensation from Federal Government applies only to individuals.

Plaintiff railroad company paid under protest that part of its income tax to the State that was based upon its compensation from the Federal Government for carrying United States mail, plaintiff claiming that its income from that source was exempt from taxation under the Revenue Act of 1931, ch. 427, sec. 317 (2) (e): *Held,* plaintiff was not entitled to

the exemption claimed, since the provision of the act exempting from income tax that part of gross income received from salaries, wages, or other compensation from the Federal Government applies to individuals only and not to corporations, foreign or domestic.

2. Same—Principle that State may not tax Federal agency does not apply to exempt from income tax railroad's compensation for carrying mail.

The principle that the State cannot tax a public agency of the United States Government in the performance of a governmental function does not apply to exempt from State income tax compensation paid a railroad company by the Government for carrying United States mail, the railroad being a corporation engaged in business as a common carrier and not being an instrumentality of the Federal Government in carrying the mail, its relation to the Government in respect to the mail being that of an independent contractor, and the tax on its income derived from carrying the mail not interfering or burdening the Federal Government in the performance of its governmental function with respect to the mails.

APPEAL by plaintiff from *Grady, J.*, at June Term, 1934, of WAKE. Affirmed.

This is an action to recover a sum of money paid by the plaintiff to the defendant on account of the tax assessed by defendant on the net income of the plaintiff for the year 1931, under and pursuant to the provisions of Article IV, chapter 427, Public Laws of North Carolina, 1931.

When the action was called for trial it was agreed by and between counsel for the plaintiff and the defendant that a trial by jury should be waived, and that the court should hear the evidence, find the facts, and render judgment accordingly.

After hearing the evidence, the court found the following facts:

"1. At the times referred to in the pleadings the plaintiff was and is now a corporation, organized and existing under and by virtue of the laws of the State of Virginia, and was and is engaged in the operation of railroad trains for the transportation of freight and passengers for compensation in the State of North Carolina and elsewhere.

"2. On such trains as are designated as mail carriers by the Postmaster General of the United States, and in the manner required by said Postmaster General, the plaintiff at the time hereinafter mentioned, transported mail for the United States, and for such service received from the United States Government compensation known as mail pay.

"3. The defendant is Commissioner of Revenue of the State of North Carolina and as such was and is charged, under the law, with the collection of all taxes imposed by the tax laws of the State of North Carolina.

"4. When the plaintiff filed its income tax return to the State of North Carolina for the year 1931, it did not include in the computation

of gross or net income any of the moneys received by it from the United States Government as mail pay; and the defendant, acting under Revenue Act of 1931, assessed an additional income tax against the plaintiff for the year 1931 in the sum of $4,077.76, with interest thereon in the sum of $326.22, making a total of $4,403.98, on account of the revenue received by the plaintiff from the United States of America as compensation for carrying the mail, and known as mail pay.

"5. On 14 July, 1933, the plaintiff paid to the defendant the amount assessed, with interest, to wit: $4,403.98, which payment was made under written protest, said protest being in the manner required by law, and on 15 July, 1933, within thirty days after said payment, the plaintiff made due demand upon the defendant in writing for the repayment to it of the amount so paid, and the defendant failed and refused for a period of ninety days from the date of such demand to repay said sum and interest, and still refuses to repay the same, and this action was thereupon instituted by the plaintiff for the recovery of the said sum of $4,403.98, interest and costs.

"6. The court finds as a fact that there is no written contract between the plaintiff and the United States Government for the carrying of the United States mail; but that the Postmaster General is authorized and directed, under the law, to adjust the compensation to be paid to railroad companies for the transportation and handling of the mails, and furnishing facilities and services in connection therewith upon the conditions and at the rates provided by the postal laws and regulations; that the Postmaster General decides upon what trains and in what manner the mail shall be conveyed; and every railroad company carrying the mails shall carry in any train it operates, and with due speed, all mailable matter, equipment, and supplies directed to be carried thereon. If any such railroad company shall fail or refuse to transport the mails, equipment, and supplies when required by the Postmaster General on any train or trains it operates, such company shall be fined such reasonable amount as may, in the discretion of the Postmaster General, be deemed proper. The court further finds that the Interstate Commerce Commission has authority and is empowered and directed to fix and determine from time to time the fair and reasonable rates and compensation for the transportation of such mail matter by railway common carriers, prescribing the method or methods by weights, space, or both, or otherwise, for ascertaining such rate or compensation, and to publish the same, and the order so made and published shall continue in force until changed by the Commission after due notice and hearing; and it is further provided in paragraph 37, 39 U. S. C. A., 543, p. 220, that 'in fixing and determining the fair and reasonable rates for such service the Commission shall consider the relation existing be-

tween the railroad as a public-service corporation and the Government, and the nature of such service as distinguished, if there be a distinction, from the ordinary transportation business of the railroads'; and paragraph 38, 39 U. S. C. A., 544, p. 220, provides that the procedure for the ascertaining of said rates and compensation shall be as provided in section 545 to 554 of this title. It is provided on page 223 that for the purpose of sections 524 to 568 of this title the Interstate Commerce Commission is hereby vested with all the powers which it is authorized by law to exercise in the investigation and ascertainment of the justness and reasonableness of freight, passenger, and express rates to be paid by private shippers.

"7. The court finds as a fact that the carrying of the United States mails by the plaintiff corporation is compulsory, and that the plaintiff itself has nothing to do with the fixing of compensation, known as mail pay, for the carrying of said mails; but that compensation is fixed under the rules and regulations hereinbefore referred to, in the same manner as freight rates are fixed by the Interstate Commerce Commission.

"8. Subsection 2 (e) of section 317 of Chapter 427, Public Laws of North Carolina, 1931, known as the Revenue Act, under which taxes on incomes for the year 1931 were assessed and levied by the State of North Carolina, provides as follows:

" '2. The words "gross income" do not include the following items, which shall be exempt from taxation under this act:

" '(e) Salaries, wages, or other compensation received from the United States by officials or employees thereof, including persons in the military or naval forces of the United States.' "

On the foregoing facts the plaintiff contended:

1. That the compensation or mail pay which the plaintiff received from the United States Government for transporting the mails during the year 1931 was exempt from taxation by the State of North Carolina under the provisions of subsection 2 (e) of section 317, of Chapter 427, Public Laws of North Carolina, 1931, and that for this reason the assessment and levying by the defendant of a tax on its income derived from that source was unlawful.

2. That in transporting the mails during the year 1931 the plaintiff was a public agent of the United States Government, engaged in the performance of a function of said Government, and that for this reason the compensation or mail pay which the plaintiff received from the said Government was not subject to taxation by the State of North Carolina as income.

On the facts found by it, the court was of opinion that the plaintiff is not entitled to recover in this action, and so adjudged.

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

Thos. W. Davis and Murray Allen for plaintiff.

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

CONNOR, J. The contention of the plaintiff that the sum of money which the plaintiff received from the United States Government during the year 1931, for transporting the mail during said year under the direction of the Postmaster General, was exempt from taxation as income for said year by the State of North Carolina, under the provisions of subsection 2 (e) of section 317 of chapter 427, Public Laws of North Carolina, 1931, cannot be sustained. There is no error in the judgment of the Superior Court in this action overruling this contention.

The provisions of subsection 2 (e) of section 317 of Chapter 427, Public Laws of North Carolina, 1931, are applicable to individuals whose taxable incomes are ascertained by deducting from their gross incomes as defined in subsection 1 of said section, the items mentioned in subsection 2. These provisions are not applicable to corporations, either domestic or foreign. This is manifest not only from the language used in section 317, but also from the provisions of Article IV, of chapter 427, Public Laws of North Carolina, 1931, which includes section 317, and is known as the Income Tax Act of 1931. Provision is made in the act for ascertaining the taxable incomes of corporations as distinguished from the taxable incomes of individuals. The basis for ascertaining the net income of corporations engaged in the business of operating railroads, as common carriers, is fully set out in section 312. The provisions of this section are valid. It was so decided by the Supreme Court of the United States in *Atlantic Coast Line Railroad Company v. Doughton*, 262 U. S., 411, 67 L. Ed., 1051.

Nor can the contention of the plaintiff that, in transporting the mails under the direction of the Postmaster General during the year 1931, the plaintiff was a public agent of the United States Government, and as such was performing a governmental function, and that for this reason the compensation which the plaintiff received from the United States Government for transporting the mail was not subject to taxation as income by the State of North Carolina, be sustained. There is no error in the judgment of the Superior Court in this action overruling this contention.

The principle on which the plaintiff relies in support of its contention is well settled, and is essential to the preservation of an indestructible union of indestructible States. It is not controverted by the defendant in this action. This principle, however, is not applicable to the plaintiff. The plaintiff is not an instrumentality of the Government of the United States, created by said Government to perform a governmental

function. It is a corporation created by the State of Virginia, and engaged in the business of a common carrier in the State of North Carolina and elsewhere. Its relation to the Government of the United States with respect to the transportation of the mail is that of an independent contractor. Its income derived from compensation for carrying the mail is subject to taxation by the State of North Carolina. Such taxation does not interfere with and is not a burden on the United States Government in performing its governmental function with respect to the mails, and therefore does not contravene the principle on which *McCulloch v. Maryland,* 4 Wheat., 316, 4 L. Ed., 579, was decided.

In *Metcalf v. Mitchell,* 269 U. S., 513, 70 L. Ed., 585, it is said:

"Just what instrumentalities of either a State or the Federal Government are exempt from taxation by the other cannot be stated in terms of universal application."

It is sufficient to say that we find no evidence in the record in this appeal from which it could be held that the plaintiff is an instrumentality of the Federal Government within the principle relied on by the plaintiff. The judgment is

Affirmed.

NANTAHALA POWER AND LIGHT COMPANY v. R. F. ROGERS AND WIFE, HATTIE ROGERS.

(Filed 27 February, 1935.)

1. Appeal and Error J e—

The admission of testimony over objection cannot be held prejudicial where similar testimony is admitted without objection.

2. Eminent Domain D c—Witness familiar wih land in question may give his opinion of value of land taken and damage to contiguous land.

In proceedings to assess compensation in condemnation proceedings it is competent for the owner of the land in controversy and other witnesses familiar with the land to testify as to their opinion of the value of the land taken, and as to the value of respondent's contiguous lands before and after the taking, and as to the reasonable uses and capabilities of the land.

3. Appeal and Error J e—

Where a witness answers a question propounded notwithstanding appellant's sustained objection thereto, but the witness' answer to the question is favorable to appellant, appellant is not in a position to complain.

4. Eminent Domain C e—Respondent may recover value of easement taken plus damage to contiguous land resulting from such taking.

In proceedings to assess compensation in condemnation proceedings an instruction to the jury, supported by the evidence, that respondent is en-

titled to recover the actual market value of the easement taken plus the injury to respondent's contiguous lands resulting from such taking, measured by the actual market value of the contiguous lands immediately before and after the taking, is without error.

APPEAL by plaintiff from *Hill, J.*, and a jury, at August Regular Term, 1934, of MACON. No error.

This was a petition brought by the plaintiff, a public-service corporation, against defendants to condemn a right of way over defendants' land, and on exceptions filed by the defendants to the report of the jury appointed by the clerk of the Superior Court of Macon County, North Carolina, the case was tried at August Term, 1934, before his Honor, Frank S. Hill, judge, and a jury, in the Superior Court of Macon County, N. C., solely on the issue of damages. The issue submitted to the jury and their answer thereto is as follows: "What amount, if any, are the defendants entitled to recover of the plaintiff as compensation on account of the easement for the location and construction of plaintiff's transmission line across defendants' land? A. '$300.00.'"

The court below rendered judgment on the verdict. The plaintiff 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.

Geo. B. Patton for plaintiff.
J. Frank Ray for defendants.

CLARKSON, J. The plaintiff in its petition to condemn the land of defendants alleges: "That in order to construct, maintain, and use its electric transmission line, it is necessary for petitioner to acquire from defendants a right of way or easement over, through, and across the above-described tract of land the following-described parcel of land, to wit: Being a strip of land 100 feet in width, extending across a portion of the tracts of land hereinbefore described for a distance of 1,262 feet, said strip of land 100 feet in width having heretofore been staked out and laid off by petitioner."

The plaintiff petitioner prays for the condemnation of defendants' land—a strip 100 feet wide and 1,262 feet long, which has "been staked out and laid off by petitioner." The land staked out and laid off is about three acres. The defendants claim that seventeen acres of their remaining land is damaged by the actual taking of the three acres.

J. F. Browning testified for defendants, unobjected to, as follows: "That witness lived in lower end of county, at Oak Grove; is acquainted with lands owned by R. F. Rogers and his wife; has seen the land across which the transmission line has been constructed. It is 100 feet wide

and about 1,262 feet long, but does not know whether you could say as to market value it has or not; land moved so slow on 3 May, 1933; would think around $100.00 to $150.00 an acre; it could be farmed and could be used for various other things, building purposes, filling station, golf course, summer cabins. Nicely located on the highway and nice background upon the hill and frontage with the highway all the way around. Could not altogether be used for those purposes now. Is acquainted with 17 acres of land immediately surrounding it; could be used for farming mostly; that the reasonable market value of the remaining 17 acres immediately to 3 May, 1933, was $100.00, and immediately after 3 May, 1933, was worth $50.00; that was witness' opinion as to the whole 17 acres."

In *Colvard v. Light Co.*, 204 N. C., 97 (101), citing authorities, it is said: "It is well settled that the testimony is harmless where similar testimony is admitted without objection."

Notwithstanding this well-settled law, we will consider the plaintiff's objections and assignments of error to the following questions, propounded to the defendant, R. F. Rogers: "Q. Do you have an opinion satisfactory to yourself as to the reasonable market value of this land actually taken for the transmission line at the time the proceeding was instituted on 3 May, 1933? A. $200.00." . . . "Q. This property adjoining where the easement is, do you have an opinion satisfactory to yourself as to the reasonable market value of the remaining land at the time of the institution of this action on 3 May, 1933? A. All the tract they run over, you mean? Q. Yes. A. Before they put that line up over it, in my opinion it was worth $200.00 per acre. Q. What is your opinion as to the reasonable market value of this other 17 acres of land immediately after the taking? A. It would not be worth as much as it was before. Q. How much? A. About $50.00 an acre after this was left."

Evidence of the defendant Rogers was to the effect that he had owned the property some six or seven years. He testified: "That the property was near the highway, school, and churches; that it all lay well, practically level, and is on the Bryson City-Franklin highway. . . . The property was suitable for building, could use it for golf course, airplanes, and filling stations." The defendant Rogers had the opportunity for observation and his testimony was competent.

In *Crisp v. Light Co.*, 201 N. C., 46 (49), it is said: "The defendant contends that several witnesses were allowed to give their opinion as to the purpose for which the lands are adapted or suitable and to give an opinion of its decreased value. We see no objection to the competency of this character of evidence." *Colvard v. Light Co., supra.*

The plaintiff made the same objection and assignment of error as to the testimony of F. D. Morrison, a witness for defendants, which cannot be sustained. This witness Morrison had lived nearly all his life near the land and was acquainted and familiar with the land in controversy and its uses and capabilities.

Plaintiff's witness, J. R. Morrison, one of the commissioners appointed to appraise the damage to the strip of land 100 feet by 1,262 feet, testified that it was worth $25.00 per acre in fee simple: "Q. What, in your opinion, was the reasonable market value of that strip of land just after the transmission line was placed on it?" Defendants object; objection sustained. "Does not have an opinion as to the reasonable market value of the 17 acres adjoining this strip. In witness' opinion, the power line does not diminish the value of Rogers' other property." The witness answered the question notwithstanding defendants' objection, favorable to plaintiff—of course, plaintiff cannot complain about this. The other exceptions and assignments of error made by plaintiff as to the exclusion of evidence, are not material or prejudicial and present no new or novel proposition of law.

The court below instructed the jury, to which exception and assignment of error was made and which cannot be sustained, as follows: "The court instructs you that the damages are to be governed by the following rule of law: If the respondents are entitled to recover at all, they are entitled to recover such sum as you find the fair market value of the real estate included in the right of way referred to in the petition, that is, 1,262 feet in length and 100 feet in width, the reasonable market value of that land as of 3 May, 1933, plus such additional damages as the defendants' or respondents' other property may have sustained because of the construction of the electric power line through, over, and across their property. This latter element of damages to be determined by the reasonable market value of such additional land as of 3 May, 1933, immediately before the power line was constructed, and the reasonable market value of such property immediately after the power line was constructed, and the difference in value would be the amount the defendant would be entitled to recover, if there has been any depreciation in the value of the land." We can see no error in this charge as applicable to the facts in evidence in this action.

In *Power Co. v. Hayes,* 193 N. C., 104 (107), speaking to the subject, we find: "Authoritative decisions of this and other courts are to the effect that the owner of land, a part of which is taken under the right of eminent domain, may recover as compensation not only the value of the land taken, but also the damages thereby caused, if any, to the remaining land. *R. R. v. Land Co.,* 137 N. C., 330; 68 L. R. A., 333; *United States v. Grizzard,* 219 U. S., 180; 55 L. Ed., 165. In the

opinion in the last cited case, *Lurton, J.*, says: 'Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from that taking, embracing, of course, the injury due to the use to which the part appropriated is to be devoted.'" *Colvard v. Light Co., supra; Mfg. Co. v. Aluminum Co., ante,* 52 (62).

Power Co. v. Russell, 188 N. C., 725, when properly interpreted, accords with the position here taken. We see no error in the other exceptions and assignments of error made by plaintiff to the charge of the court below.

In the judgment of the court below there is

No error.

COY SWAIN v. TWIN CITY MOTOR COMPANY, INC.

(Filed 27 February, 1935.)

Bailment B b—Evidence held insufficient for jury on issue of garage's failure to use due care to prevent theft of auto entrusted to it.

While evidence that plaintiff delivered his car to a garage for service furnished by such garage, and that the car was stolen from the garage, makes out a *prima facie* case against the bailee, nothing else appearing, where the bailee's evidence in rebuttal is uncontradicted and shows that at the time of the theft the car was parked inside the garage, that attendants were about, and that it was stolen by a stranger, whose presence in the garage would not necessarily excite suspicion, and that the keys were in the car in order to move it about in the performance of the service required, it also appearing that all parties expected plaintiff to return for the car in a short period of time, the evidence fails to show failure on the part of the bailee to use reasonable care for the preservation and protection of the automobile, and his motion as of nonsuit in the bailor's action should be allowed.

CLARKSON, J., dissenting.

CIVIL ACTION, before *McElroy, J.*, at May Term, 1934, of FORSYTH.

The plaintiff was the owner of a Ford automobile which he had purchased from the defendant. The pertinent facts disclosed by plaintiff's testimony are as follows: "I traded for the car with Mr. DeTamble, personally, out at his home on Tuesday night, and he told me to bring it back the next day that they would wash it, grease it and fix it up for me. . . . I took it back Saturday morning and left it at the defendant's place of business to have it washed and greased. I drove the

car in their place of business and asked Mr. Hunter, the man who checks cars in and checks them out, where to put it. He told me to drive it back inside and leave the keys in it, for he had to take it up on the next floor to the wash-pit. I did leave the keys in the car. . . . About eleven o'clock on the Saturday that I left the car there, Mr. Hunter called me on the phone and said somebody had stolen my car. . . . It was about eight o'clock on Saturday morning that I left my car at the Twin City Motor Company, and they notified me it was stolen about eleven o'clock that morning, about three hours after I had left it there. . . . The Twin City Motor Company building has three floors, including the basement, and I left my car on the first floor, with the garage. . . . When Mr. Hunter called me to tell me my car had been stolen, he said he saw a fellow standing out there looking at the cars, leaning up against the wall. . . . He said he took notice of him and then went on to doing something to another car, and saw him go out the door; that he like to hit a fellow, he went out the door so fast. . . . Mr. Hunter told me he saw a fellow with a light overcoat on, well dressed, leaning up against the wall, looking at the cars, and said when he went to turn his back to him and do something else, he saw him go out with my car." There was further evidence that the doors of the garage were open for patrons to come in, and that no special employees or watchmen were placed at the entrance.

Hunter, a witness for defendant, testified that when plaintiff left his car in the garage "we greased the car and sent it upstairs to have it washed. The boy washed it and brought it downstairs about a quarter to eleven, or something like that. I was busy around there waiting on people and I saw a man standing there, a little larger than I am, a nice-looking fellow. I told him I would wait on him in just a few minutes and went ahead doing what I was doing, and the next thing I knew . . . I heard a noise going out the door. I looked up and the car was going out as fast as it could go. . . . There were five or six people in the department where Mr. Swain's car was stored at the time it was taken out and there were a number of other cars in there. The place was full, six or eight cars in front, and the man just had room to drive Mr. Swain's car out. Mr. Swain's car was parked about 100 feet from the door, about the center of the building. . . . There was nothing unusual about the conduct or appearance of the person whom I had seen standing in the garage and who drove Mr. Swain's car out. . . . He was nice looking, well dressed, seemed to be about twenty-eight years old. Strangers frequently come in the garage to have work done on cars. . . . I often have to let people wait while I wait on other customers. . . . There was nothing said about leaving the keys, but he had to leave the keys in the car or we couldn't move it up

to the next floor to wash and grease it. . . . The car was left with the keys in it. It was between ten-thirty and eleven o'clock that the man whom I have described came in. . . . The car was backed up against the wall with the side towards the doors of the building."

The following issues were submitted to the jury:

1. "Did the plaintiff deliver to the defendant the automobile described in the complaint on or about 20 January, 1934, for the purpose of having same serviced by the defendant, as alleged in the complaint?"

2. "Was the automobile described in the complaint stolen from the place of business of the defendant, as alleged in the complaint?"

3. "Did the defendant exercise reasonable care for the preservation and protection of the automobile described in the complaint?"

4. "What amount of damage, if any, is the plaintiff entitled to recover of the defendant?"

The parties consented that the first and second issues should be answered "Yes." The jury answered the third issue "No," and the fourth issue "$250.00."

Slawter & Wall for plaintiff.
Parrish & Deal and Calvin Graves, Jr., for defendant.

BROGDEN, J. The parties having agreed that the car of plaintiff was left in the garage of defendant for washing and greasing, and that the same was stolen, the question of law to be considered is: What duty does the owner and operator of a garage owe to a customer with reference to the theft of the property by a third party while in the possession and under the control of such garage owner?

The various aspects of the liability of garage owners for theft of automobiles of customers may be found in 15 A. L. R., 681; 65 A. L. R., 431, *et seq.* The general principle governing liability as pronounced in this State is contained in *Beck v. Wilkins-Ricks Company,* 179 N. C., 231, 102 S. E., 313, as follows: "The defendant, as bailee, assumed liability of ordinary care for the safe-keeping and the return of the machine to the bailor in good condition. The bailee did not assume liability as insurer, and therefore did not become liable for the non-return of the property in good condition, if he observed the ordinary care devolved upon him by reason of the bailment. If the machine had been injured, or stolen, or destroyed by fire while in his custody, the defendant would not be liable if such care had been observed. On the other hand, the mere fact that the property had been destroyed by fire or stolen did not absolve him from responsibility, any more than he would have been absolved if it had been injured in his custody, unless he had shown that he had used the care required of him by virtue of his bailment.

. . . The rule adopted in the more modern decisions is that the proof of loss or injury established a sufficient *prima facie* case against the bailee to put him upon his defense. Where chattels are delivered to a bailee in good condition and are returned in a damaged state, or are lost or not returned at all, the law presumes negligence to be the cause, and casts upon the bailee the burden of showing that the loss is due to other causes consistent with due care on his part." See *Hanes v. Shapiro*, 168 N. C., 24, 84 S. E., 33; *Hutchins v. Taylor-Buick Company*, 198 N. C., 777, 153 S. E., 397.

Practically all courts are in accord upon the proposition that if the owner of an automobile carries it to a garage in good condition, for service furnished by such garage, and thereafter such bailee fails to return it, or returns it in a damaged condition, he makes out a *prima facie* case, nothing else appearing, and is therefore entitled to have the jury determine the proper issues. But, suppose it should appear from the plaintiff's evidence, or if the fact was uncontroverted, that while in such garage the car was struck by lightning or the employees of the garage were held up by an armed highwayman and the car was taken from the custody of the bailee, who was otherwise exercising ordinary care, it would hardly be supposed that under such circumstances the law required the solemn formality of submitting issues upon such admitted facts.

In the case at bar there is no dispute as to the fact of theft. It is not controverted that the car was parked within the garage, 100 feet from the door, and that there were attendants in and about the garage at the time. Consequently, the only fact upon which negligence could be based was the leaving of the keys in the car. In this connection it must be observed that the car could not be moved without the keys, and that the leaving of the keys was not only essential to rendering the service requested, but for moving the car in case of fire and other emergency in the garage. Furthermore, it was known by all parties that the car was to remain in the garage for a short period of time.

Interpreting the evidence with that degree of liberality required in motions of nonsuit, no evidence of actionable negligence appears in the record, and the motion for nonsuit should have been granted.

Reversed.

CLARKSON, J., dissents.

J. I. CASE COMPANY v. T. L. COX.

(Filed 27 February, 1935.)

1. Bills and Notes H c—Conditional sales contract, which with note, is component part of one transaction, held competent in action on note.

Plaintiff manufacturer brought suit on a promissory note made payable to its dealer, which note provided that transfer of the note should operate to transfer title to property described in a conditional sales contract between the parties of even date. Defendant offered in evidence the conditional sales contract which contained certain warranties of the property, setting up breach of the warranties by the manufacturer: *Held*, the conditional sales contract was competent in evidence, the note and contract being component parts of one completed transaction.

2. Sales H c—Evidence of breach of warranty held sufficient for jury in this action on note given for purchase price of machinery.

Plaintiff manufacturer brought suit on a promissory note made payable to its dealer, which note provided that transfer of the note should operate to transfer title to property described in a conditional sales contract between the parties of even date. The conditional sales contract contained a warranty by the manufacturer that the machinery was well made, of good material, and capable under proper conditions of doing the work for which it was designed. Defendant offered evidence that the machinery failed to satisfy the warranties contained in the conditional sales contract: *Held*, the note and conditional sales contract, being component parts of a single transaction, are to be construed together, and the evidence of breach of warranty was properly submitted to the jury.

3. Same—Testimony held competent to show place of delivery of machinery under provision of warranty that it be returned to place of delivery.

Where a warranty provides that in case of claim thereunder the machinery should be returned free of charge to the place of delivery, it is competent for the purchaser to testify that the machinery was delivered to him in his yard, and that upon discovery of its uselessness he disconnected it and pushed it to the edge of the yard.

CIVIL ACTION, before *Cranmer, J.*, at May Term, 1934, of GUILFORD.

On or about 13 July, 1933, the defendant purchased from the Carolina Feed and Machinery Company of Greensboro one Case T. E. 45 H. P. Skid Motor, for the sum of $900.00. This motor was to be used by the defendant in his ice plant in Randolph County. He paid $600.00 in cash and executed a note for $300.00 for the balance of the purchase money. The note for said sum of $300.00 was dated 13 July, 1933, and was due on or before 12 August, 1933. The payee in the note was the Carolina Feed and Machinery Company, which corporation was a dealer in Case machinery. The said note was an ordinary promissory note, but contained the following stipulation: "The transfer of this note shall

operate to pass title to the property described in a conditional sales contract between the parties of even date herewith to secure the payment of this note." At the time of executing the note the defendant also executed a conditional sales contract. This conditional sales contract specified that $600.00 was to be paid cash on delivery of the motor and the balance of the purchase money, amounting to $300.00, was to be evidenced by a note for $300.00, due 12 August, 1933. The said conditional sales contract contained the following warranty: "J. I. Case Company warrants each Case product (excepting attachments, devices, or equipment not made by it, which may be warranted by their respective makers but are not warranted by the company) to be well made, of good material, durable with good care, and, if properly set up, adjusted, and operated by competent persons, to be capable, under ordinary conditions, of doing the work for which it is designed." There was further stipulation in the contract to the effect that if the purchaser operated any Case product for two days, and such machinery "shall fail to fulfill such warranty, written notice thereof shall be given at once to the dealer from or through whom the same was purchased. If the dealer does not remedy the defect within two days after notification, then immediate written notice of the defect, particularly describing the same, specifying the time of discovery thereof and the time of notification to the dealer, shall be given by registered letter to J. I. Case Company. . . . If, after such notice and opportunity to remedy the difficulty, J. I. Case Company fails to make the product fulfill the warranty, the part that fails shall be returned immediately by the purchaser, free of charge, to the place from whence it was received, and J. I. Case Company notified thereof at its branch house aforesaid, whereupon J. I. Case Company shall have the option to furnish another machine, implement, or part in place of the one so returned, which shall fulfill the warranty, or to cause to be returned the money and notes or proportionate part thereof received for such machine, implement, or part, and no further claim shall be made. . . . J. I. Case Company's liability for any breach of this warranty is limited to the return of cash or notes actually received by it on account of the purchase price of said implement, machine, part, or attachment."

On 15 August, 1933, the plaintiff instituted suit against the defendant on the note to recover the sum of $300.00. The defendant admitted the execution of the note and set up a counterclaim for damages in the sum of $600.00 for breach of the warranty, alleging that when the machine was delivered to him at his ice plant it was defective, wasteful in operation, and was not capable under ordinary conditions of "doing the work for which it is designed."

At the trial the plaintiff offered the note in evidence, and rested.

Thereupon the defendant offered various witnesses who testified generally that the machine had an oil leak, resulting in fuel waste; that the rings and pistons were defective, and that the engine was out of balance and did not run true, and that as a result of these defects the engine was wholly worthless and had no value at all. There was further evidence offered by the defendant that on 28 July, 1933, he notified the plaintiff at its office in Atlanta, Georgia, calling attention to the fact that the engine was "entirely unsatisfactory. It has given trouble from the start and has not been as warranted." There was evidence that no reply was received to this notice, and that thereafter, on 12 August, 1933, the defendant again notified the plaintiff by letter at its office in Racine, Wisconsin, that "this engine is absolutely unsatisfactory and does not come up to the warranty and Mr. Cox is now forced to use the old tractor he formerly used. Unless this engine is made satisfactory within ten days we are going to be forced to go into court and sue for the recovery of the amount paid and the cancellation of the note you hold and for the damages growing out of your breach of warranty," etc.

On 16 August, 1933, the plaintiff replied to the letter of 12 August, stating, "We see no reason why this Skid motor should not give satisfaction if properly operated. There are thousands of them in use in the hands of satisfied customers. You may no doubt expect to hear from our Atlanta branch within the next few days."

There was testimony to the effect that various mechanics had worked upon the machine and were unable to repair it.

The following issues were submitted to the jury:

1. "Did the plaintiff warrant the engine to be well made, of good material, durable with good care, and, if properly set up, adjusted, and operated by a competent person, to be capable, under ordinary conditions, of doing the work for which it is designed?"

2. "Did the plaintiff breach said warranty?"

3. "What amount, if any, is the plaintiff entitled to recover of the defendant?"

4. "What amount, if any, is the defendant entitled to recover of the plaintiff on his counterclaim?"

The jury answered the first issue "Yes"; the second issue "Yes"; the third issue "Nothing"; and the fourth issue "$600.00."

From judgment upon the verdict the plaintiff appealed.

Frazier & Frazier for plaintiff.

Cox & Prevette for defendant.

BROGDEN, J. The note upon which the plaintiff brought suit was executed by the defendant and payable to the Carolina Feed and Ma-

chinery Company of Greensboro, North Carolina. This corporation was a dealer engaged in the sale of machinery manufactured by the plaintiff J. I. Case Company. Hence, the plaintiff was the manufacturer.

The paramount question presented is whether there was sufficient evidence of an express warranty made by the plaintiff.

The plaintiff brought suit upon a note which upon its face declared that "the transfer of this note shall operate to pass title to the property described in the conditional sales contract between the parties of even date herewith," etc. The sales contract of even date referred to the note of $300.00, and contained express warranties disclosed by the record. Indeed, Mr. Smithey, a witness for the plaintiff, said: "I had the blank contract there that the Case Company uses. It is a Case contract. They furnish them for engines." It is manifest, therefore, that the note and the conditional sales contract containing the express warranty were not only contemporaneous writings, but in fact component parts of one completed transaction. The applicable principle of law was stated in *Perry v. Surety Company,* 190 N. C., 284, 129 S. E., 721, in these words: "When two or more papers are executed by the same parties at the same time, or at different times, and show on their face that each was executed to carry out the common intent, they should be construed together."

The plaintiff objected to the introduction of the conditional sales contract by the defendant. Manifestly, this objection cannot be sustained in view of the particular facts disclosed by the record.

Plaintiff also contended that the defendant had failed to comply with the warranty in that it had not returned the machine "free of charge to the place from whence it was received." The defendant, however, said: "The machine was delivered to me on the yard in front of my place. When I disconnected it I just pushed it out to the edge of the yard. It was delivered to me on the platform where it was run. I slid it off the platform. We notified them." Obviously, this evidence was competent to show the place of delivery.

The record discloses no error of law warranting the overthrow of judgment, and it is approved.

Affirmed.

DR. RALPH E. DEES v. G. P. APPLE.

(Filed 27 February, 1935.)

1. Ejectment B d—Issue of fraud is improperly submitted in action in summary ejectment.

Where a verbal lease does not provide for its termination or reserve the right of reëntry for breach by the tenant of stipulated conditions in regard to maintenance and operation of the property, breach of such conditions cannot be made the basis for summary ejectment, C. S., 2365, and issues of fraud in procuring the lease and wilful breach of the conditions are erroneously submitted in the Superior Court upon appeal in such action, the action upon such issues being for the equitable relief of recision, and it not being permissible for a party to institute suit in summary ejectment and substitute therefor on appeal to the Superior Court a suit for recision.

2. Fraud A b—

Breach of conditions relating to maintenance and operation of the property by the tenant after he had gone into possession is no evidence of fraud in procuring the lease contract.

3. Courts A c—

While the jurisdiction of the Superior Court upon appeal from a municipal court which does not require written pleadings is derivative, where equitable relief is demanded in the Superior Court written pleadings are required.

4. Same—

Upon appeal from a municipal court to the Superior Court the case must be tried in the Superior Court as instituted in the municipal court, and appellant may not change his cause of action upon appeal.

5. Pleadings D a—

Jurisdiction over the subject-matter of an action cannot be waived or conferred by consent, and objection to such jurisdiction may be made at any time during the trial, or even in the Supreme Court upon appeal.

6. Courts B b: Ejectment B a—

The civil division of the municipal court of Greensboro *is held* to have jurisdiction of suits in summary ejectment.

CIVIL ACTION, before *Clement, J.*, at March Term, 1934, of GUILFORD.

The plaintiff brought an action against the defendant in summary ejectment in the civil division of the municipal court of the city of Greensboro. On the return day both parties appeared in said court. There were no written pleadings, but the plaintiff claimed "$200.00 for damages by reason of breach of contract and neglect of duties by tenant." The defendant "denied liability." "Judgment was rendered in favor of the plaintiff and against the defendant on 2 February, 1934,

for possession of the premises and for costs." The defendant appealed to the Superior Court.

The evidence tended to show that the plaintiff is the owner of a farm in Guilford County, and that on or about 1 September, 1933, the defendant came to see him about renting the farm. Thereafter, on 4 October, 1933, the plaintiff rented the farm to the defendant. The rental agreement as narrated by the plaintiff was substantially as follows: "Our agreement was that he must run himself. . . . I told him I would not take him out there unless he could run himself; . . . that I would expect him to work, . . . and that the only way we could ever do anything was for him to put all his time out there on my farm, . . . that he was going there on a fifty-fifty basis, and that he was to return the work to me that I had already put out in making it possible to get the crop in. . . . He was to pay half the fertilizer bill. He was to pay half the oil and gas bill, that is, when he used the tractor. He was to keep up the machinery, and if there were any broken portions I was to replace them, but he was to do the labor and he was to put out the labor for the crop, and we were to go on a fifty-fifty basis of what we make. In further consideration for his coming there he was to take care of the stock, . . . which he agreed to do just like he would if they were his own. I was to furnish the stock, but he was to take care of them and feed them. . . . We were to feed this stock out of common feeds we made on the farm, his and mine, and then any increase, like calves and pigs, he was to share on a fifty-fifty basis. . . . All the proceeds were to be on a fifty-fifty basis. I had about forty-five acres tillable land. . . . He was to take orders how those things were to be put in, what should be put in, and how it should be put in, and where it should be put in, and what and how much should be put in was to be ordered by me. . . . I instructed him to put 200 pounds to the acre for all grains that he put in with the drill. . . . I went out there and he said: 'I got in that piece of rye.' I said: 'Where did you get your fertilizer from?' 'Well,' he said, 'I didn't use any, you had such a good growth of peas on it.' . . . He failed to feed the stock. He won't take the grain there and feed them, . . . and he has not watered them properly. He has torn down the horse trough. . . . My mules have lost a great deal of flesh, have fallen off from what I would say 100 to 200 pounds. He continued to run the tractor until he broke every sprocket and the drive chain was pulled off." . . . The plaintiff further testified that the defendant had wasted and sold certain sweet potatoes that he had on the premises, and that he had needlessly cut down cedars and other valuable timber for wood, and failed to breed certain stock.

There was further evidence that the defendant worked for the CWA, and thus failed to give his entire attention and time to the farm of the

plaintiff. There was other testimony offered by the plaintiff as to the failure of defendant to build certain fences on the premises.

The defendant denied that he had breached the rental contract, and testified that he worked diligently on the farm, and that his wife and "two boys big enough to work helped me. We prepared a lot of oats ground, twenty-two to twenty-four acres, and . . . ten acres of wheat ground." The defendant admitted that he did do some work with the CWA, because he had to have food and shoes for his family, but that he had never abandoned the farm, and had otherwise performed his agreement.

The summons in ejectment was issued on 29 January, 1934, and judgment of the civil division of the municipal court of the city of Greensboro was entered on 2 February, 1934.

When the cause reached the Superior Court the following issues were submitted:

1. "Did the plaintiff and the defendant enter into a contract, as alleged by the plaintiff?"

2. "Was the execution of the said contract of the plaintiff with the defendant procured by the fraudulent misrepresentations of the defendant, as alleged by the plaintiff?"

3. "If not, then did the defendant wilfully breach the contract with the plaintiff, as alleged by the plaintiff?"

4. "Is the plaintiff the owner of and entitled to the immediate possession of the land described, as alleged by the plaintiff?"

The jury answered all the issues "Yes," and from judgment that the plaintiff "is hereby given the right of immediate possession of his premises, and he shall recover of defendant the cost of this action," the defendant appealed.

L. Herbin and Younce & Younce for plaintiff.
Thos. J. Hill for defendant.

BROGDEN, J. A landlord makes a verbal contract with a tenant to lease a tract of land for agricultural purposes. The lease reserves no right of reëntry for condition broken and contains no provision to the effect that failure to perform covenants therein binding upon the lessee shall work a forfeiture of the lease. Before the term of the lease expires the landlord brings an action in summary ejectment in the civil division of the municipal court of the city of Greensboro. No written pleadings were filed and there was judgment "for possession of the premises, and for costs." The defendant appealed to the Superior Court, and the return to the notice of appeal shows that "the plaintiff claimed $200.00 for damages by reason of breach of contract and negligence of duties by tenant." The defendant "denied liability." In the Superior Court

issues as hereinbefore set out were submitted to a jury and answered as indicated. No written pleadings were filed in the Superior Court.

Upon the foregoing epitome of facts the following questions of law arise:

1. In such action of summary ejectment, was it proper to submit an issue of fraud?

2. Did the civil division of the municipal court of the city of Greensboro have jurisdiction of the action?

The basis and scope of summary ejectment in actions between landlord and tenant are established by C. S., 2365. The only section of said statute which could possibly fit the facts in the case at bar is subsection 2, which provided: "When the tenant . . . has done or omitted any act by which, according to the stipulation of the lease, his estate has ceased." The lease or contract of rental disclosed by the record contains no stipulation automatically terminating the estate, for breach thereof, nor did such contract or lease reserve the right of reëntry. See *Meroney v. Wright,* 81 N. C., 390; *Simmons v. Jarman,* 122 N. C., 195, 29 S. E., 332; *Product Co. v. Dunn,* 142 N. C., 471, 55 S. E., 299.

When the case reached the Superior Court by appeal, the trial judge submitted issues of fraud and wilful breach of contract over the objection of defendant. Manifestly, at this point the cause of action was immediately transformed into an action to rescind the contract. In the Superior Court issues arise upon the pleadings. C. S., 580. Furthermore, there was no evidence of fraud in the procurement of the contract. According to the evidence, the defendant failed to do many things he had promised to do, but such delinquencies occurred after he went into possession of the land.

Written pleadings are not required in the civil division of the municipal court of Greensboro, and of course the jurisdiction of the Superior Court was derivative. Nevertheless, when the plaintiff undertook in the Superior Court to ask for equitable relief, pleadings were necessary. Moreover, the result is that an action of summary ejectment in the civil division court becomes an action for recision, upon appeal, in the Superior Court. Such procedure is not sanctioned by law. Therefore, the first question of law must be answered "No."

Jurisdiction over the subject-matter of an action cannot be waived or conferred by consent, and hence objection to such jurisdiction may be made at any time during the progress of the trial, and even for the first time in the Supreme Court. *Realty Co. v. Corpening,* 147 N. C., 613, 61 S. E., 528; *Provision Co. v. Daves,* 190 N. C., 7, 128 S. E., 593.

An examination of the statute and amendments thereto, creating the civil division of the municipal court of Greensboro, leads this Court to the conclusion that said court has jurisdiction of summary ejectment, and therefore the second question of law is answered "Yes."

The analysis of the case reveals that the plaintiff instituted an action of summary ejectment in a court of competent jurisdiction. Upon appeal, the action of summary ejectment disappeared and a suit for recision was substituted.

This cannot be done. The plaintiff must try the case he instituted.

New trial.

D. O. MOORE v. J. BRYAN WINFIELD.

(Filed 27 February, 1935.)

Malicious Prosecution A c—Conviction obtained by fraud in lower court is not conclusive evidence of probable cause.

Plaintiff was convicted in the recorder's court of larceny. On appeal to the Superior Court a *nolle prosequi* was entered. Plaintiff then instituted this action for malicious prosecution in the Superior Court against the prosecuting witness in the criminal action, and introduced plenary evidence that the conviction in the recorder's court was obtained by fraud upon false and perjured testimony secured by threats and promises of reward: *Held*, the conviction in the recorder's court was not conclusive evidence of probable cause, and the question of whether defendant had probable cause to believe plaintiff guilty of the larceny as charged in the warrant sworn out by defendant was properly submitted to the jury under correct instructions from the court, and testimony of a witness tending to show that the witness' testimony in the trial in the recorder's court was procured by intimidation is competent.

APPEAL by defendant from *Sinclair, J.*, and a jury, at October Term, 1934, of BEAUFORT. No error.

This is an action for malicious prosecution, brought by plaintiff against defendant. The following issues were submitted to the jury, and their answers thereto: "(1) Was the warrant offered in evidence, dated 23 June, 1923, maliciously sworn out by the defendant against the plaintiff, as alleged in the complaint? A. 'Yes.' (2) Was said warrant issued and sworn out by the defendant without probable cause of plaintiff's guilt of the charge therein contained? A. 'Yes.' (3) Has the action therein been terminated by a *nolle pros.* having been entered in the cause? A. 'Yes.' (4) What actual damages, if any, is plaintiff entitled to recover? A. '$500.00.' (5) What punitive damages, if any, is plaintiff entitled to recover? A. ....."

Judgment was rendered on the verdict in the court below. Defendant 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.

H. C. Carter for plaintiff.
Ward & Grimes for defendant.

CLARKSON, J. At the close of plaintiff's evidence and at the close of all the evidence the defendant, in the court below, made motions for judgment as in case of nonsuit. C. S., 567. The court below overruled these motions, and in this we can see no error. The question presented: Is the conviction of the defendant in a criminal action in a lower court procured by the prosecuting witness upon evidence known to him to be perjured conclusive evidence of probable cause? We think not, under the facts and circumstances of this case.

The plaintiff in his complaint alleges: "That not only was said warrant sworn out maliciously and without probable cause of plaintiff's guilt, but such evidence against plaintiff as was produced in the trial of the cause in said recorder's court was untrue, and was secured by the defendant herein by threats, intimidations, and promises of rewards to the witnesses so testifying, as plaintiff is advised, believes, and alleges."

The plaintiff was tried in the recorder's court for Washington, Long Acre, Chocowinity, and part of Bath townships, in Beaufort, North Carolina (chapter 74, Public-Local Laws of North Carolina, 1911, subsection D of section 7), for the larceny of about two bags of oats (in the warrant it was alleged two tons). Defendant employed counsel to prosecute plaintiff in the recorder's court.

On the trial plaintiff was found guilty, and it was ordered and adjudged that he be confined in the common jail of Beaufort County for sixty days, to be assigned to work the roads; judgment to be suspended upon $25.00 fine, and costs.

The recorder's court had final jurisdiction of the action. Plaintiff appealed to the Superior Court, and when the action was called for trial at the April (Special) Term, 1933, of the Superior Court of Beaufort County, the State, through its solicitor and counsel representing the defendant, stated in open court that the prosecution was unable to make out a case against the defendant upon the charge laid against him, and thereupon the State took a *nolle prosequi* in said action, and the same has been terminated.

The main question on this appeal is the exception and assignment of error made by defendant, which cannot be sustained, to the charge of the court below, as follows, in parentheses: "I charge you further, if you believe from the evidence that the defendant caused the warrant mentioned in the complaint to be issued against the plaintiff, and that plaintiff upon his trial before the recorder on said warrant was convicted in the recorder's court, such conviction is conclusive evidence of probable cause, and you would answer the second issue 'No' (unless you

further find from the evidence that the defendant procured the conviction of the plaintiff in said recorder's court by means of evidence known to said defendant to be false, or that such conviction was procured through fraud of the defendant; and, if you find that plaintiff's conviction was procured by means of evidence known to the defendant to be false, then it is for the jury to say upon all the evidence whether the defendant had probable cause to believe plaintiff guilty of the larceny of the oats, as charged in the warrant sworn out by the defendant)."

In *Williams v. Woodhouse,* 14 N. C., 257 (259), we find: "When an action is brought for a malicious prosecution, it is indispensable that the plaintiff should not only show forth the record of the prosecution, but also, by the same record, his acquittal of the charge made against him. 2 Stark. on Evidence, 906. If he cannot do this, he must fail in his action. So, likewise, must he fail if he shows forth a record which shows a verdict and judgment of conviction. *That judgment is evidence of his guilt whilst it is in force. . . . The plaintiff certainly confines himself to very narrow limits. He suffered under that judgment, but he admits its legality."* (Italics ours.) *Spillman v. Williams,* 91 N. C., 483 (487); *Sledge v. Elliott,* 116 N. C., 712 (716).

In *Overton v. Combs,* 182 N. C., 4 (8-9), the following observations are made: "This, however, was because of alleged irregularity, and in neither of these subsequent orders nor in other portions of the record is there an entry or ruling that challenges or purports to challenge the facts established by the verdict, or which militates or weakens its force and effect on the question of probable cause. There are courts of the highest respectability and learning which hold that where a verdict and judgment has been set aside for fraud, collateral to the principal cause of action, and more especially where it is of such a nature as to have deprived the original defendant of his opportunity to disclose his case, such an action will prevent the operation of the principle to which we have adverted. See a learned discussion of this subject in *Crescent City Livestock v. Butchers' Union,* 120 U. S., 141-149, *et seq.;* 18 R. C. L., title, Malicious Prosecutions, secs. 21 and 27. Others, going further, have held that the position may be made available on allegations of such fraud with adequate proof to support them. But neither of these positions are open to plaintiff on the present record where, as stated, the former judgment was disturbed on the ground of irregularity only."

In the present action the plaintiff appealed from the conviction in the recorder's court to the Superior Court, and a *nolle prosequi* was entered in that court, and the action terminated.

In 2 Freeman on Judgments (5th Ed.), part sec. 655, p. 1381, speaking to the subject: "And the record of plaintiff's conviction is doubtless conclusive evidence against him, in an action for malicious prosecu-

tion resulting in probable cause, particularly where it was based upon a plea of guilty. This effect of such conviction continues in some of the states, though a new trial has been granted or the judgment reversed upon appeal; in others, such conviction, after being set aside upon appeal, or by the granting of a new trial, is *prima facie* evidence only of the existence of probable cause; while in others it remains conclusive evidence, unless shown to have been procured by artifice or fraud."

We think the great weight of authority is to the effect that a conviction and judgment in a lower court is conclusive, but if not sustained on appeal, it can be impeached for fraud or other unfair means in its procurement.

In *Haddad v. Chesapeake & O. Ry. Co.*, 77 West Va., 710, the matter is carefully considered, citing a wealth of authorities, it is there held, in substance: A judgment of conviction for larceny, although reversed on writ of error, and the accused discharged from further prosecution on remand of the case, is conclusive evidence of probable cause for believing the accused guilty of the offense charged to him, unless the conviction was procured by fraud; and on plaintiff in an action for malicious prosecution devolves the duty of averring and by convincing proof showing such fraud or other undue means.

We think the allegation in the complaint and the evidence fully sufficient to support the charge of the court below. We see no error in the court below refusing defendant's prayer for special instruction.

From the view we take of the law in this action, the following exception and assignment of error made by defendant cannot be sustained: "Error is assigned to the admission of the testimony of W. A. Smith, where he said that defendant told him if Moore beat him in the recorder trial, it would ruin him, and, 'I can't make you go before the court and do that, but I can make you wish you had done it,' and where he, therefore, said that he was induced by Winfield to swear to a lie in the recorder's court."

The judge of the recorder's court was the trier of the facts. It is not a question "that the court was controlled by that false testimony." The question before the court was whether the evidence was true or false. The recorder found the evidence true, and convicted and pronounced judgment on the defendant, and on appeal there was a *nolle prosequi* taken in the Superior Court. In this case it was shown by plenary evidence that the evidence upon which plaintiff was convicted in the recorder's court was false and perjured, and secured by threats, intimidations, and promises of reward—or otherwise through fraud.

We see no prejudicial or reversible error in the trial of the court below.

No error.

FLORENCE GRAY BLADES v. WILMINGTON TRUST COMPANY, EXECUTOR AND TRUSTEE UNDER THE WILL OF CHARLES G. BLADES, DECEASED, AND EZEKIEL BLADES ET AL., BENEFICIARIES UNDER SAID WILL.

(Filed 27 February, 1935.)

1. Appeal and Error F a—

Findings of fact by the court under agreement may be challenged by exceptions to the evidence upon which such facts were found.

2. Evidence H b—Testimony objected to in this case held competent as a part of the res gestae.

Testimony of disinterested witnesses as to statements made by the grantee at the time of the preparation of the deed, relating to the intent of the parties in respect thereto, *is held* competent as a part of the *res gestæ* in this action to set aside the deed, for that it was never delivered with intent to pass title, the grantee having died prior to the institution of the action.

3. Evidence H c—

Testimony of disinterested witnesses as to declarations made by decedent against his interest while in possession of the land in controversy is competent as against those claiming under decedent.

4. Appeal and Error F a—

An exception to the judgment as rendered presents the single question of whether the facts found support the judgment.

5. Deeds and Conveyances A e—Delivery of deed to grantee must be made with intent to pass title in order to be effective.

The trial court found upon competent supporting evidence that grantor executed the deed in question to her husband upon a nominal consideration, that the deed was found among the husband's papers after his death in a sealed envelope with a notation thereon in his handwriting that it was not to be used unless he survived his wife, the grantor, and that the deed was not filed for registration until more than four years after its execution, that the husband and wife moved into the dwelling-house on the land and remained there until his death, that the wife, the grantor, listed the land for taxes the first year, and that thereafter the husband, the grantee, listed the land in his wife's name, and that the wife paid the taxes for each year, and that on numerous occasions after the execution of the deed the husband stated the land belonged to his wife: *Held*, the findings of fact support the judgment of the court setting aside the deed in the wife's action for this relief, it being necessary for a valid delivery of a deed to the grantee that the delivery be made with the present intention of passing title to the grantee.

6. Appeal and Error J g—

Where a judgment declaring a deed invalid is sustained on appeal on one theory, another theory of invalidity advanced by plaintiff need not be considered.

APPEAL from *Moore, Special Judge,* at October Term, 1934, of PASQUOTANK. Affirmed.

This is a civil action to remove a cloud from the title of the plaintiff to certain lots and parcels of land in Elizabeth City by having an alleged deed from the plaintiff to her late husband declared null and void. The case came on to be heard at term time, when and where trial by jury was waived by the parties, and the court heard the evidence, found the facts, reached conclusions of law (C. S., 568-569), and rendered judgment in favor of the plaintiff, from which the corporate defendant appealed to the Supreme Court, assigning errors.

J. M. Broughton for Wilmington Trust Company, defendant appellant.

Thompson & Wilson for plaintiff appellee.

SCHENCK, J. The plaintiff in this action, while admitting that the alleged deed, which she introduced for the purpose of attack, was regular in form, signed by her, and physically passed to the grantee therein, contends that there was never such a delivery of said alleged deed as was necessary to a transmutation of title. The defendant, on the contrary, contends that there was a valid delivery of said alleged deed, and that by reason thereof title to the land described therein is now vested in it, as trustee under the will of the grantee.

Upon these adverse contentions, there arises the following question: Did the alleged deed pass from the possession and control of the grantor (the plaintiff) to that of the grantee (the defendant's testator) with the intent at the time that the title should pass, or that the instrument should become effective as a conveyance?

The court found substantially the following facts: (1) That H. C. Foreman and wife, on 12 September, 1929, conveyed the property involved to the plaintiff, and she, simultaneously therewith, executed the alleged deed; (2) that the land described therein was worth from eight to ten thousand dollars at the time said alleged deed was executed, and if any consideration passed from the grantee to the grantor at the time it was nominal and very inadequate; (3) that said alleged deed was dated 12 September, 1929, and was not filed for registration till 5 December, 1933; (4) that subsequent to the death of the grantee, the defendant's testator, the said alleged deed was found by the defendant in a sealed envelope in the safe deposit box of the testator, with the following notation, in the handwriting of the testator, on said envelope: "Deed from Florence to me, to be used should I survive her. Should I die first, it remains hers to do as she desires, to sell it if she desires. C. G. Blades"; (5) that the plaintiff and her husband moved into the dwelling-house on

the land described in said alleged deed on 8 October, 1929, and lived there till the death of her husband, C. G. Blades, on 19 December, 1932; (6) that the plaintiff listed the land described in said alleged deed in her name for the year 1930; and during the years 1931 and 1932 the testator listed said land in the name of his wife, the plaintiff, and he himself signed the tax abstracts; (7) that at all times after the execution of said alleged deed the plaintiff has paid the city and county taxes on said land, namely, for the years 1929, 1930, 1931, and 1932; and (8) that after the execution of said alleged deed the defendant's testator, on numerous occasions, made the statement that the land described therein belonged to and was owned by his wife.

Upon the foregoing findings of fact, the court adjudged that the paper-writing alleged to be a deed from Florence Gray Blades to C. G. Blades, dated 12 September, 1929, and recorded on 5 December, 1933, in Deed Book 82, page 564, of the records of Pasquotank County, be set aside and canceled, and that the claims of the defendant be declared null and void.

To the judgment as rendered the defendant in apt time noted an exception, and aside from several exceptions to the admission of and failure to strike out certain evidence, no other exceptions appear in the record. Since there are no exceptions to the findings of fact, the judgment must be affirmed, if it is supported by such findings, *Wilson v. Charlotte,* 206 N. C., 856; unless the exceptions to the evidence upon which said facts were found were well taken.

Defendant's Exceptions 1 to 13 relate to testimony of witnesses as to statements alleged to have been made by the deceased, the grantee in the alleged deed, at the time of the preparation thereof and at various times subsequent thereto. All of the testimony made the bases of exceptive assignments of error was elicited from disinterested witnesses. That portion of such testimony relating to statements made by the grantee at the time of the preparation of said alleged deed was competent as a part of the *res gestæ.* "Declarations, to become part of *res gestæ,* must be made at the time of the act done, and must be such as are calculated to unfold the nature and quality of the facts they are intended to explain, and so to harmonize with them as obviously to constitute one transaction. In other words, they must be contemporaneous with the act and must be consistent with the obvious character of the act. 1 Greenleaf Evidence, sec. 108, note 1." *Harper v. Dail,* 92 N. C., 394. That portion of such testimony relating to statements made by the grantee subsequent to execution of said alleged deed was competent against the defendant, since it claims under said grantee, who was in possession when he made the declarations against his interest and in disparagement of his title. "It has been frequently held, too, that where declarations are made by one in possession of land, characterizing

or explaining his claim of ownership or in disparagement of his own title, they are competent as evidence not only against the declarant, but against all claiming under him." *Shaffer v. Gaynor,* 117 N. C., 15.

The sole remaining exception, No. 14, is to the judgment as rendered, and raises the single question as to whether the facts as found support the judgment of the court. We hold that these facts do sustain the conclusion of law that there was never a delivery by the grantor (the plaintiff) to the grantee (the defendant's intestate) of the alleged deed with the intent at the time that the title should pass, or that the instrument should become effective as a conveyance. The law apposite to this case is clearly set forth by *Mr. Justice Hoke* in the often cited case of *Gaylord v. Gaylord,* 150 N. C., 222, in the following words: "It is a familiar principle that the question of the delivery of a deed or other written instrument is very largely dependent on the intent of the parties at the time, and is not at all conclusively established by the manual or physical passing of the deed from the grantor to the grantee. As said by this Court in *Waters v. Annuity Co.,* 144 N. C., 670, 'The fact that a policy in a given case has been turned over to the insured is not conclusive on the question of delivery. This matter of delivery is very largely one of intent, and the physical act of turning over a policy is open to explanation by parol evidence.' And the authorities are uniformly to the effect that, in order to be a valid delivery, the deed must pass from the possession and control of the grantor to that of the grantee, or to someone for the grantee's use and benefit, with the intent at the time that the title should pass or the instrument become effective as a conveyance."

As we sustain the judgment of the Superior Court upon the theory that there was never a valid delivery of the alleged deed, it would be a work of supererogation to discuss whether the paper-writing, if it had been delivered, would have been void as a deed of gift, since it was not registered within two years after the making thereof. C. S., 3315.

Affirmed.

CITY OF LEXINGTON v. HOME INDEMNITY COMPANY.

(Filed 27 February, 1935.)

1. Insurance S a—Policy held to cover injuries to third persons in prosecution of business operations and not in maintenance of property.

Plaintiff municipality was covered by a policy of indemnity insurance against injuries to third persons during the progress of business operations of the municipality in connection with its water-works and other municipal activities. A third person was injured when he stepped on a

storm sewer near a sidewalk in the city, and the city paid him damages under a consent judgment, and sought to recover the amount thereof from the insurer. There was no evidence that at the time of the accident the city was engaged in any business operations at the storm sewer: *Held*, the injury was not covered by the policy, maintenance of equipment and structures of the city not being covered by the policy, either by express language or by reasonable implication.

2. Insurance E b—

While a policy of insurance will be construed liberally in favor of insured, it cannot be enlarged beyond its plain provisions and reasonable implications.

3. Insurance S c—Insurer's request for extension of time to file answer held not to bind insurer to pay judgment against insured.

Insurer in a policy of indemnity insurance was advised by insured of an action for personal injury brought against insured. Insurer requested and obtained an extension of time for filing answer, but thereafter denied liability under the policy, and insured defended the suit and thereafter entered a consent judgment therein: *Held*, the request for an extension of time did not bind insurer to the payment of the judgment rendered against insured, insurer not being a party to the suit, and the request for extension of time having been made on behalf of insured.

CIVIL ACTION, before *Clement, J.*, at May Civil Term, 1934, of DAVIDSON.

On or about 11 March, 1932, R. L. Green brought suit against the city of Lexington, alleging that on 18 November, 1931, while walking along First Avenue in said city, on his way to his office, he stepped off the sidewalk to examine some maple trees growing and being about eight feet from the sidewalk. His purpose was to examine these trees to ascertain if there were any borers or bugs thereon. The line of maple trees extended for some distance along the avenue and there was a space of about eight feet between the trees and the sidewalk on which plaintiff was walking. When plaintiff stepped off the sidewalk into this space to examine the trees he stepped upon a storm sewer or basin, which he alleged was defective, causing him to fall and sustain serious and permanent injuries.

At the time the city had a policy of indemnity issued by the defendant in this action, indemnifying the municipality for damages for bodily injuries. A copy of the summons and complaint in the action was sent to the defendant. Thereafter, the attorneys for the indemnity company requested the attorney for the plaintiff Green an extension of time "of thirty days to file an answer to the complaint of plaintiff." This extension of time was granted. Thereafter, on 31 March, 1932, the indemnity company notified the city of Lexington that it would not defend the Green suit for the reason that the indemnity policy did not cover the injury.

The city of Lexington filed an answer in the cause, and the case proceeded to trial. At the February Term, 1934, a judgment was entered by consent, in which it was decreed that the plaintiff recover judgment against the defendant city of Lexington for the sum of $1,000, and the costs of this case, etc. The attorneys for both parties assented in writing to the judgment.

Thereafter, on 30 March, 1934, the city of Lexington instituted the present action against the indemnity company to recover $1,000 it had paid by virtue of the judgment to Green, and also to recover counsel fees paid in defending the Green litigation. The indemnity company filed an answer denying liability to the plaintiff upon the following grounds:

1. That no written notice had been given, as required by the policy of indemnity.

2. That the policy of indemnity did not cover the injury sustained by Green.

3. The policy provided that no action would lie against the company unless brought within two years after the ascertainment of the loss by agreement of the parties or "by judgment against the assured after a trial of the issues."

The policy was introduced in evidence, and it provides for payment of damages resulting from bodily injuries "by any person or persons not employed by the assured while within or upon the premises described in Special Condition 4, . . . or while otherwise about the work of the assured, and caused by reason of and during the progress of business operations described in Special Condition 4." Special Condition 4 referred to is substantially as follows:

(a) "Electric light and power companies—all operations," etc.

(b) "Water works—all operations," etc.

(c) "Street cleaning—including drivers' helpers and chauffeurs' helpers."

(d) "Garbage collecting—refuse and ashes," etc.

The evidence tended to show that the catch basin causing the injury to Green was designed to catch rain water falling on the street, and "to keep big trash from going in." It was cleaned out when trash had accumulated by the street force of the city, and is situated two or three feet from the sidewalk. It was maintained and operated by the city and the street-cleaning and garbage-collecting departments were charged with the duty of cleaning the streets and carrying away accumulated trash. The catch basin had been installed for a substantial period of time before the injury to Green, and was also used by the water and light department of the city for draining hydrants. The plaintiff Green in his testimony said: "I settled with the city of Lexington. I

received $1,000 in that, and that provision was that if the city was not covered by this policy, I was to reimburse them with $350. That was my offer to the city of Lexington, and they accepted it. . . . I got $1,000 and paid my attorney, but I was to get $500 in the event the insurance company did not have to pay."

At the conclusion of the evidence the trial judge sustained the motion of nonsuit, and the plaintiff appealed.

P. V. Critcher and D. L. Pickard for plaintiff.
Don A. Walser for defendant.

BROGDEN, J. The determinative questions of law are:

1. Does the indemnity policy cover the injury sustained by R. L. Green?

2. Did the request of defendant's attorney for an extension of time to file answer in the Green suit constitute a general appearance in the litigation, and thus bind the defendant to the payment of the judgment rendered?

The policy of indemnity covered bodily injuries "by any person or persons not employed by the assured while within or upon the premises described in Special Condition 4, . . . or while otherwise about the work of assured, and considered by reason of and during the progress of business operations described in Special Condition 4." Special Condition 4 covered: (a) "Electric light and power companies—all operations," etc.; (b) "water works—all operations," etc. The coverage for bodily injury to one not employed by the city was limited to such persons as were "about the work of the assured and caused by reason of and during the progress of business," etc. The evidence disclosed that neither the water works department nor light department of the city was engaged in any "business operation" at the time Green was injured. An examination of the wording of the policy does not lead this Court to the conclusion that said policy, either by express language or by reasonable implication, undertook to cover the maintenance of the equipment and structures of the city. While, of course, policies of insurance must be construed liberally in favor of coverage, the law does not permit a new contract to be made for parties in the guise of liberal construction. Therefore, the first question of law is answered in the negative.

In considering the second question of law, it is well settled that a request for time, made by a party to an action, nothing else appearing, constitutes a general appearance and waives irregularity or lack of service of process. Moreover, if a party makes a general appearance in a cause, he will be bound by the orders and decrees of the court duly

made therein. *Cook v. Bank*, 129 N. C., 149, 39 S. E., 746; *Scott v. Life Association*, 137 N. C., 515, 50 S. E., 221.

In the case at bar, however, the indemnity company was not a party to the suit of *R. L. Green v. City of Lexington*. It was not named in the summons. The policy of insurance stipulated that the defendant would make investigations and defend actions brought against the assured, the city of Lexington. Manifestly, when the attorneys for the defendant requested an extension of time to file answer to the complaint, such request was made for and in behalf of the city of Lexington. Moreover, as the defendant was not a party to the suit, the principles of law applicable to parties would not be available as a means of imposing liability upon the defendant for failure to pay the Green judgment.

Affirmed.

J. C. GRIMES ET AL. v. LIZZIE GRIMES, ANNIE G. GRIMES, GUARDIAN OF WILLIAM PALMER GRIMES, MINOR, ET AL.

(Filed 27 February, 1935.)

1. Descent and Distribution B g—Adopted child may inherit only from adoptive parent, and may not inherit through such parent from such parent's ancestors.

A child, upon the death of his mother, was adopted for life by his mother's brother. Thereafter the child's maternal grandfather died intestate, but the child's adoptive father predeceased his grandfather: *Held*, the child is not entitled to represent his adoptive father as an heir at law in the distribution of his grandfather's estate, since such inheritance would depend upon Public Laws 1933, ch. 207, sec. 5, amending C. S., 185, and the statute gives the adopted child the right to inherit only from the adoptive parent and does not give him the right of representation in inheriting through such adoptive parent as an heir general, nor is this result effected in the instant case by the fact that the child is of the blood of the grandfather, since his right of inheritance by virtue of his blood relationship with the grandfather is fulfilled by his inheritance of his proportionate share with his other brothers and sisters as a representative of his deceased mother.

2. Same—

Public Laws 1933, ch. 207, sec. 5, amending C. S., 185, providing that an adopted child may inherit from its adoptive parent, being in derogation of the common-law canons of descent, must be strictly construed so as not to confer any right not clearly given.

THIS is a special proceeding begun before the clerk of the Superior Court of Davidson County for the purpose of allotting dower. Upon answers duly filed certain issues were raised, and from judgment rendered by the clerk the defendant Annie G. Grimes, as guardian of

William Palmer Grimes, appealed to the Superior Court, and the cause came on to be heard at the September Term, 1934, of DAVIDSON, before *Alley, J.*

The agreed facts are substantially as follows:

T. J. Grimes died intestate, 7 August, 1933. There was born to him by his first marriage five (5) children, namely, J. C. Grimes, W. T. Grimes, Paul I. Grimes, Mrs. Lena Grimes Palmer, and Mrs. W. L. Cripliver. Mrs. Palmer died prior to her father, the intestate, and left surviving her six (6) children, as follows, Thomas Palmer, Elizabeth Palmer, J. B. Palmer, Jr., Albert Palmer, Sarah Palmer, and William Palmer (Grimes).

W. T. Grimes died intestate and without issue on 4 July, 1931. Prior to his death, to wit, on 16 August, 1924, he, along with his wife, Annie G. Grimes, adopted for life William Palmer, infant son of his deceased sister, Mrs. Lena Grimes Palmer, and a grandson of T. J. Grimes.

At the time of the death of T. J. Grimes he was survived by his children: J. C. Grimes, Paul I. Grimes, Mrs. W. L. Cripliver, and by the heirs at law (children) of Mrs. Lena Grimes Palmer, his deceased daughter, and by his second wife, Lizzie Grimes.

The judgment of the Superior Court adjudged that William Palmer Grimes, minor, is not entitled to inherit or share in the estate of T. J. Grimes, deceased, as the adopted son of W. T. Grimes, deceased, and that the only interest and share of the said William Palmer Grimes in the estate of T. J. Grimes is the interest and share to which the said William Palmer Grimes is entitled as one of the grandchildren of the said T. J. Grimes, deceased, which share is by descent through Lena Grimes Palmer, mother of the said William Palmer Grimes and daughter of T. J. Grimes, deceased. To this judgment Annie G. Grimes, the guardian of William Palmer Grimes, appealed to the Supreme Court, assigning errors.

Don A. Walser and Stahle Lynn for Annie G. Grimes, guardian of William Palmer Grimes, appellant.

Martin & Brinkley for J. C. Grimes, Paul I. Grimes, and Mrs. W. L. Cripliver, appellees.

Phillips & Bower for Lizzie Grimes, appellee.

W. L. Mann for J. B. Palmer, guardian of Thomas Palmer, Elizabeth Palmer, J. B. Palmer, Jr., Albert Palmer, and Sarah Palmer, appellees.

SCHENCK, J. This appeal presents the following question: Does an adopted child for life inherit that portion of the estate of his natural grandfather which his adoptive father, who died intestate, would have inherited as a son had he not predeceased said grandfather? We think

a negative answer is found in the construction of Public Laws 1933, ch. 207, sec. 5, amending C. S., 185, the pertinent portion of which is as follows: "Such order granting letters of adoption, when made, shall have the effect forthwith to establish the relation of parent and child between the petitioner and the child during the minority, or for the life of such child, according to the prayer of the petition, with all the duties, powers, and rights belonging to the relationship of parent and child, and in case the adoption be for the life of the child, and the petitioner die intestate, such order shall have the further effect to enable such child to inherit the real estate and entitle it to the personal estate *of the petitioner* in the same manner and to the same extent such child would have been entitled to if such child had been the actual child of the person adopting it. . . ."

The adoption of William Palmer Grimes by W. T. Grimes, now deceased, and his wife, Annie G. Grimes, was for life, and the relationship of parents and child was established. Under this relationship the adopted child inherited the real estate and was entitled to the personal estate of W. T. Grimes upon his death, in the same manner and to the same extent as he would if he had been the actual child of the adoptive father.

However, since the statute is in derogation of the common law and works a change in the canons of descent, it must be construed strictly and not so as to enlarge or confer any rights not clearly given. The statute gives no power to the adopted child to inherit through the adoptive parent, or from any source other than the "estate of the petitioner." The statute limits the right to inherit to the property of the adoptive parent, and it cannot be construed to give the adopted child the right to inherit from his father's ancestors or other kindred, or to be a representative of them. By the adoption the child is not made issue or heir general, nor is he made the kin of the kindred of the adoptive parent. The effect of the adoption is simply to create a personal status between the adoptive parent and the child adopted, so that the adopted child may inherit from the adoptive parent such estate of the adoptive parent as such parent, during his lifetime, might voluntarily have given to such child.

The right to inherit property by reason of blood kinship is a natural one. The right to inherit property created by adoption is an artificial one. The status established by adoption proceedings is a contractual status, and while one may assume the status of a father to a stranger if he so desires, he cannot impose upon his kindred the status of kinship to such stranger. Adoption is "a judicial act, creating between *two persons* certain relations, purely civil, of paternity and filiation." Black's Law Dictionary.

The act of adopting a child is a contract into which one may enter with those having the lawful custody of a child, and is an agreement personal to him who assumes its liabilities, and while he may have a perfect right to bind or obligate himself to make a child his heir, he has no power, in law or in morals, to extend this right so as to effect the estate of strangers who are not parties to the contract, and who never in any way consented that their property might be diverted from the natural course of descent. While the statute gives to the adopted child the right to inherit the real estate and to share in the personal estate of the adoptive parent, it leaves the adopted child in the same relationship to all others as he occupied before the adoption. "The law cannot, and does not purport to, do the work of nature and create one a child who by nature is a stranger." Tiffany's Persons & Domestic Relations (2d Ed.), p. 244.

We think the reasoning in *Edwards v. Yearby,* 168 N. C., 663, and in *Love v. Love,* 179 N. C., 115, is apposite to this case, and that the weight of authority in other jurisdictions supports our conclusions.

We have given due consideration to but cannot concur in the argument advanced by his counsel that the appellant, William Palmer Grimes, being a natural grandson of the intestate, T. J. Grimes, and therefore of the same blood, has a right to inherit as an adopted son of the intestate's deceased son that he would not have possessed had he been a stranger to the blood. Any right to inherit which the appellant has by virtue of being of the same blood of the intestate is fulfilled when he inherits, with his brothers and sisters, his proportionate share of the interest his mother would have inherited from the intestate had she not predeceased him. When the appellant asserts his right to inherit as a natural child of his mother he does so by virtue of the blood and the canons of descent, but when he asserts his right as an adopted child of his uncle he does so, not by virtue of the blood, but solely by virtue of the statute. The statute makes no distinction between adopted children who are of the same blood and adopted children who are strangers to the blood, and, therefore, the fact that the appellant is of the same blood as the intestate gives to him as an adopted child no right to inherit not possessed by any other adopted child.

We conclude that the appellant, by virtue of his adoption, inherits no interest in the estate of his intestate grandfather, but inherits only his proportionate share of the interest his mother would have inherited had she not predeceased said intestate, and, therefore, the judgment of the Superior Court should be

Affirmed.

T. B. KING v. G. W. WARD, TRADING AS PITT GIN COMPANY, ET AL.

(Filed 27 February, 1935.)

Nuisance A b—Judgment for plaintiff in this action for private nuisance in operation of cotton gin is upheld.

Plaintiff brought suit alleging defendant maintained a private nuisance in the operation by defendant of a cotton gin on property near plaintiff's dwelling. The trial court charged the jury, upon competent evidence, in effect that the ordinary, careful, and reasonable operation of a business which is not in itself a nuisance creates no liability to adjacent property owners, but that liability would attach only upon its negligent and unreasonable operation and maintenance: *Held*, the judgment upon the jury's verdict in plaintiff's favor must be affirmed on appeal.

CIVIL ACTION, before *Daniels, J.*, at February Term, 1934, of PITT.

The plaintiff lives in the town of Farmville, at the corner of Horne Avenue and Moore's Lane. Across the street, about 50 feet from plaintiff's residence, the defendant constructed a cotton gin. The plaintiff offered evidence tending to show that during the ginning season crowds of customers of the gin began to gather in and about the premises and upon the street; that teams stood in the street from about three o'clock in the morning until as late as one o'clock at night, and that the droppings from these teams created noisome odors, and that the teams were fed in the street, and as a result hay and fodder were continually blown across his premises. There was further evidence to the effect that the defendant at the time complained of had no toilets upon the premises, and that his customers used plaintiff's "back yard and woodpile to dump their refuse." Flies accumulated and the constant flow of lint and dust from the cotton gin covered plaintiff's house and furniture and furnishings. There was further evidence that the gin caused a vibration which affected plaintiff's house. There was other evidence of annoyance and inconvenience.

The following issues were submitted to the jury:

1. "Did the manner in which the defendant's gin was operated, its location, and environment constitute a nuisance, as alleged in the complaint?"

2. "If so, has the plaintiff been damaged by reason of said nuisance, as alleged in the complaint?"

3. "What damages, if any, is the plaintiff entitled to recover of the defendant?"

4. "Has the defendant continued to operate said cotton gin in such a manner as to constitute a nuisance from the date alleged up to the present time, as alleged in the complaint?"

From judgment upon the verdict the defendant appealed.

Harding & Lee and John Hill Paylor for plaintiff.
R. T. Martin and J. B. James for defendant.

BROGDEN, J. What liability does the law impose upon the owner and operator of a private business with respect to the rights of others in the vicinity, and affected by such operation?

The trial judge instructed the jury in part as follows:

"A private nuisance is an act done unaccompanied by an act of trespass, which causes a substantial prejudice to the hereditaments, corporeal or incorporeal, of another; that is, to its proper rights and to its enjoyment. The term nuisance, in law, means annoyance, anything that works hardship, inconvenience, or damage, or which essentially interferes with the enjoyment of life or property. . . . It was the duty of defendant in putting up a gin there to put up a gin that would not be likely in its operations to injure his neighbors or to constitute a nuisance, and he testifies that that is what he did, and he and his witnesses testify that it has not constituted a nuisance. . . . So, then, you have a clear-cut idea here as to whether or not the operation of the gin as constructed by the defendant has constituted a nuisance of which the plaintiff may especially complain. . . . If the evidence satisfies you by its greater weight that during the ginning season the defendant encouraged and permitted persons bringing cotton to be ginned at his gin to park their wagons, carts, and teams in the street in front of plaintiff's home, for the defendant's convenience in operating his gin, and to remain in said street long hours, day and night, during said ginning season, for said purposes, littering the street with droppings from the team and drivers, permitted by the defendant to remain an unreasonable time in the street, emitting odors which impaired the comfortable occupancy of the plaintiff's home, then that would constitute a nuisance. . . . The location and the building of the gin on a lot opposite the plaintiff's lot cannot be considered by you as constituting a nuisance. It is a usual and necessary establishment and one quite necessary in a cotton country like ours, for the purpose of ginning one of the principal crops of this country, and the mere fact that the defendant built his gin across the street only 50 feet from the plaintiff's home cannot of itself constitute a nuisance, because it was a legitimate thing for the defendant to do. . . . The law does not recognize every business or use of property as a nuisance that imparts a degree of impurity to the air, for if such were the case towns could not be built or life in compact communities tolerated, and even the ordinary uses of property would certainly be interfered with, for in proportion to the sparseness or compactness of a population the air is pure or impure. One cannot reasonably occupy a dwelling-house or place of business and use any kind

of fuel therein without imparting more or less of impurity to the atmosphere, and in proportion as these are aggregated in one locality are these impurities increased, but as these are among the common necessities of life, and absolutely indispensable to its reasonable enjoyment, the law does not recognize them as being actionable interference with the rights of others, unless exercised in an unreasonable manner, so as to inflict injury on another unnecessarily. . . . I charge you, gentlemen, that even if the building of the gin in that locality diminished the value of the plaintiff's . . . property, you could not consider that, because the defendant had a right to build it there, and if . . . the erection of any business building affected the property, residential property, near that; that, even if that were so, you could not consider that as an element of damage, that is the damage a man has to take who owns a residence, and as the gin was a business house next to him, that is a risk he takes in living in town. . . . The damages . . . that plaintiff is entitled to recover . . . must be damages which come directly and immediately from the nuisance caused by the defendant, and from nothing else. Any dust that came from the street, any dust that came from the coal yard, any lint cotton that came from the cotton platform, must be eliminated. No damage can be charged against the defendant on account of any of these matters. . . . You must be very careful to eliminate these, and you must be very careful to eliminate from any damage that you may give to the plaintiff any depreciation in the value of its property, brought about by the building of this gin on the street opposite him, because he had a right to build it there."

The foregoing instructions of the trial judge state substantially the applicable rules of law as heretofore established by the decisions of this Court. *Duffy v. Meadows,* 131 N. C., 31, 42 S. E., 460; *Lawrence v. Nissen,* 173 N. C., 359, 91 S. E., 1036; *Cook v. Mebane,* 191 N. C., 1, 131 S. E., 407; *Holton v. Oil Co.,* 201 N. C., 744. The prevailing idea in these cases, and others of like import in other jurisdictions, is that a legitimate and proper business enterprise located in a town, which enterprise is not in itself a nuisance, is subject to no liability to adjacent property owners, or others in the vicinity, for the ordinary, careful, and reasonable operation of the business. It is the negligent and unreasonable operation and maintenance that produces the nuisance, and the nuisance thus created imposes liability.

The jury, upon competent evidence and correct instructions of law, found the nuisance and awarded compensation. Hence, the judgment upon the verdict is approved.

Affirmed.

MRS. RUTH HOWELL HOLMES, WIDOW OF S. T. HOLMES, DECEASED, v. M. G. BROWN COMPANY, INC., EMPLOYER, AND LUMBER MUTUAL CASUALTY COMPANY OF NEW YORK, CARRIER.

(Filed 27 February, 1935.)

1. Master and Servant F b—

Each of the antecedent elements of an injury by accident, which arises out of and in the course of employment, is necessary to an award of compensation under the Workmen's Compensation Act.

2. Master and Servant F i—Findings of Industrial Commission supported by competent evidence are binding upon courts upon appeal.

The Industrial Commission found upon competent supporting evidence that claimant's injury did not arise out of his employment. Upon appeal the Superior Court interpreted this finding in the light of the evidence before the Commission, but reached the same conclusion: *Held*, the finding of the Commission was binding on the court, and it was without authority to interpret the finding in the light of the evidence, but as the same result was reached the error was harmless.

APPEAL by plaintiff from *Moore, Special Judge,* at December Term, 1934, of CHOWAN. Affirmed.

This was a proceeding brought under the Workmen's Compensation Act by the dependent widow of S. T. Holmes to determine the liability of employer and carrier for the death of her husband.

The evidence tends to show that the deceased, an employee, suffered fatal injury while in the course of his employment; that said fatal injury was inflicted by a pistol in the hands of one Short, who immediately killed himself with the same pistol. From the evidence more than one inference might reasonably have been drawn, and the hearing Commissioner found "as a fact that the death of the deceased was not the result of an accident which arose out of and in the course of his employment," and issued an award denying compensation and dismissing the claim.

From the award by the hearing Commissioner the plaintiff appealed to the full Commission, which found as a fact "that the murder of the deceased did not arise out of his employment," and concluded that "compensation was properly denied."

From the full Commission the plaintiff appealed to the Superior Court. The judgment of the Superior Court contains the following: ". . . It being conceded by the plaintiff and the defendants that the evidence before the hearing Commissioner and before the Industrial Commission was uncontradicted and undisputed, and that the facts are as the evidence tends to show, and that the findings of the hearing Commissioner and the Industrial Commission should be interpreted in con-

nection with said undisputed evidence and, so interpreted, mean that in the mind of J. J. Short, murderer of S. T. Holmes, deceased, there was a connection between the murder and the employment, growing out of the fact that Holmes had spoken to Short about taking too long on trips to Norfolk for his employer, and out of the fact that Short erroneously and irrationally thought that Holmes was responsible for reductions in Short's earnings and for the conditions under which Short was working, but that such connection was an irrational one, and due to the abnormal and disordered condition of Short's mind, and further that there was no personal grievance on the part of Short against Holmes disconnected with the employment, and further, the murder was committed in the course of the employment." It is then adjudged, "upon consideration of the above and of the evidence offered before the hearing Commissioner and the Industrial Commission, and of the findings of the hearing Commissioner and the Industrial Commission, as herein conceded and interpreted, . . ." that the award be affirmed and the claim dismissed.

From the judgment of the Superior Court the plaintiff appealed to the Supreme Court, assigning error.

Herbert Leary and McMullan & McMullan for appellant.
Walter Hoyle and W. D. Pruden for appellees.

SCHENCK, J. "The condition antecedent to compensation is the occurrence of an (1) injury by accident (2) arising out of and (3) in the course of employment." *Conrad v. Foundry Co.*, 198 N. C., 723. The first and third antecedent occurrences are found for the plaintiff, but both the hearing Commissioner and the Industrial Commission found that the death of the deceased did not arise out of his employment, which finding, since it is supported by competent evidence, was binding upon the Superior Court and is binding upon us. *Winberry v. Farley Stores, Inc.*, 204 N. C., 79; *Webb v. Tomlinson*, 202 N. C., 860, and cases there cited.

The judge of the Superior Court was bound by the findings of fact of the Commission, and was without authority to add thereto or to take therefrom, by reason of any concession made by the parties as to the meaning of such findings interpreted in the light of the evidence. However, if his Honor predicated his judgment upon any conception that such concession in any way effected the findings of fact it was harmless error, since the same result, namely, an affirmation of the judgment of the Commission, should have been reached upon the facts found, which were conclusive.

Affirmed.

NELLIE MAY LINCOLN, ADMINISTRATRIX, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 27 February, 1935.)

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

Upon a motion as of nonsuit all the evidence which makes for plaintiff's claim or tends to support his cause of action is to be considered in its most favorable light for plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567.

2. Same—Sufficiency of evidence upon motion of nonsuit.

A showing sufficient to support plaintiff's claim carries the case to the jury over defendant's motion as of nonsuit, and plaintiff's case may be established by circumstantial evidence, and mere discrepancies and contradictions, even in plaintiff's evidence, are not sufficient to warrant the withdrawal of the case from the jury, since the weight and credibility of the testimony is for the jury, but where the evidence is so slight as not reasonably to warrant the inference of the fact in issue the motion should be allowed.

3. Trial D d—

The competency of evidence and witnesses is for the court, while their credibility is for the jury.

4. Negligence D c—

When more than one legitimate inference can be drawn from the evidence the question of proximate cause is for the jury.

5. Same—

The issue of contributory negligence is ordinarily for the jury, and it is only when the plaintiff proves himself out of court that a nonsuit for contributory negligence should be allowed, and even then, in proper instances and upon sufficient showing, plaintiff may be entitled to go to the jury on the doctrine of last clear chance.

6. Railroads D b—Held, railroad's motion of nonsuit in this action for death of intestate killed at crossing, should have been denied.

In this action to recover for intestate's death resulting from a collision of intestate's car with a train at a railroad crossing, defendant railroad company moved for nonsuit on the ground of contributory negligence for that intestate did not stop the car before driving upon the tracks: *Held*, the motion should have been denied under the evidence, considered in the light most favorable to plaintiff.

APPEAL by plaintiff from *Sinclair, J.*, at October Term, 1934, of BEAUFORT.

Civil action to recover damages for the death of plaintiff's intestate, alleged to have been caused by the wrongful act, neglect, or default of the defendant, instituted under section 11 of the North Carolina Work-

men's Compensation Act on behalf of the insurance carrier, and prosecuted as provided by the statute in the name of the personal representative. *Brown v. R. R.*, 202 N. C., 256, 162 S. E., 613; *S. c.*, 204 N. C., 668, 169 S. E., 419.

The facts are these: Plaintiff's intestate was killed 10 January, 1933, at a railroad crossing near Washington, N. C., in a collision between the automobile or truck in which he was riding and a train operated by the defendant. It appears from the plaintiff's evidence that the train approached the crossing at a speed of 45 or 50 miles an hour without signals or warning of any kind; and that plaintiff's intestate's view was obstructed so that he could not see the oncoming train until he was within 3 or 4 or 5 feet of the track. Other witnesses said he could have seen the train 20 or 25 feet from the track. He drove upon the track and was hit by the train.

It is conceded by defendant that plaintiff's evidence is sufficient to carry the case to the jury on the issue of negligence, but defendant contends the evidence of contributory negligence is such as to bar a recovery, and that the judgment of nonsuit should be sustained.

From a judgment dismissing the action at the close of all the evidence the plaintiff appeals, assigning error.

Ruark & Ruark for plaintiff.

Thomas W. Davis and MacLean & Rodman for defendant.

STACY, C. J. On considering a motion to nonsuit under the Hinsdale Act, C. S., 567, or a demurrer to the evidence, it is established by numerous decisions:

1. That the evidence which makes for plaintiff's claim, or tends to support his cause of action, is to be taken in its most favorable light for the plaintiff, and he is "entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom." *Dickerson v. Reynolds*, 205 N. C., 770, 172 S. E., 402; *Jones v. Bagwell, ante*, 378; *Nash v. Royster*, 189 N. C., 408, 127 S. E., 356.

2. That mere discrepancies and contradictions, even in the plaintiff's evidence, are matters for the jury and not for the court. *Newby v. Realty Co.*, 182 N. C., 34, 108 S. E., 323; *Shell v. Roseman*, 155 N. C., 90, 71 S. E., 86.

3. That the facts in issue may be established by circumstantial evidence as well as by direct proof. *Lynch v. Tel. Co.*, 204 N. C., 252, 167 S. E., 847; *Fitzgerald v. R. R.*, 141 N. C., 530, 54 S. E., 391.

4. That the competency of evidence and witnesses is for the court, while their credibility is for the twelve. *S. v. Beal*, 199 N. C., 278, 154 S. E., 604; *Cogdell v. R. R.*, 129 N. C., 398, 40 S. E., 202.

5. That a showing sufficient to support the plaintiff's claim carries the case to the jury. *Brown v. R. R.*, 195 N. C., 699, 143 S. E., 536; *Cox v. R. R.*, 123 N. C., 604, 31 S. E., 848.

6. That if the evidence be so slight as not reasonably to warrant the inference of the fact in issue, the court will not leave the matter to the speculation of the jury. *Eller v. R. R.*, 200 N. C., 527, 157 S. E., 800; *Poovey v. Sugar Co.*, 191 N. C., 722, 133 S. E., 12; *Brown v. Kinsey*, 81 N. C., 245.

7. That when more than one legitimate inference can be drawn from the evidence, the question of proximate cause is to be determined by the jury. *Wadsworth v. Trucking Co.*, 203 N. C., 730, 166 S. E., 898; *Stultz v. Thomas*, 182 N. C., 470, 109 S. E., 361.

8. That in negligence cases the issue of contributory negligence is ordinarily for the twelve. *Butner v. R. R.*, 199 N. C., 695, 155 S. E., 601; *Smith v. R. R.*, 200 N. C., 177, 156 S. E., 508.

9. That only when plaintiff proves himself out of court is he to be nonsuited on the evidence of contributory negligence. *Baker v. R. R.*, 205 N. C., 329, 171 S. E., 342; *Harrison v. R. R.*, 194 N. C., 656, 140 S. E., 598.

10. That notwithstanding the contributory negligence of the plaintiff, he may still recover, in proper instances and upon sufficient showing, under the doctrine of the last clear chance. *Jenkins v. R. R.*, 196 N. C., 466, 146 S. E., 83; *Redmon v. R. R.*, 195 N. C., 764, 143 S. E., 829.

Applying these principles to the facts of the instant case, it would seem that the motion to nonsuit should have been overruled. There was error in sustaining it. Speaking to a similar situation in *Harris v. R. R.*, 199 N. C., 798, 156 S. E., 102, it was said: "That law in this State does not impose upon the driver of a motor vehicle, on his approach to a public crossing, the duty, under all circumstances, to stop his vehicle before driving on the crossing. Whether under all the circumstances, as the evidence tends to show, and as the jury may find from the evidence, the failure of the driver to stop, as well as to look and listen for an approaching train at a railroad crossing, was negligence on his part, is ordinarily a question involving matters of fact as well as of law, and must be determined by the jury under proper instructions from the court. This principle has statutory recognition in this State." See, also, *Keller v. R. R. and Davis v. R. R.*, 205 N. C., 269, 171 S. E., 73, and cases there cited.

Reversed.

MARTHA ELIZABETH DAVIDSON, BY HER NEXT FRIEND, C. R. DAVIDSON, v. WESTERN UNION TELEGRAPH COMPANY ET AL.

(Filed 27 February, 1935.)

1. Trial D a—

Where the evidence is sufficient to support a verdict in plaintiff's favor, defendant's motion as of nonsuit is properly overruled. C. S., 567.

2. Automobiles D b — Evidence held sufficient for jury on issue of whether employee was acting in scope of authority at time of injury.

Where there is evidence that defendant telegraph company knew or should have known that its employee, hired to deliver messages by bicycle, was in the habit of using his automobile to deliver messages, and that the employee, while driving the car in delivering telegrams, negligently injured plaintiff, the evidence is sufficient to overrule defendant's motion of nonsuit, based upon the defense that the employee was not acting within the scope of his authority at the time of the injury.

3. Trial D a—

Defendant's evidence, which conflicts with that tending to support plaintiff's claim, is not to be considered on motion to nonsuit.

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

APPEAL by defendants from *Finley, J.*, at August Term, 1934, of BUNCOMBE.

Civil action to recover damages for alleged negligent injury.

The facts are these: On Saturday evening, 11 June, 1932, Pearl M. Brank started with two children, each about five years of age, to see a ball game. They rode to the ball park on a street car. Upon alighting at the intersection of Southside and Biltmore avenues (Asheville), they passed in front of the street car in order to reach the left curb. An automobile was seen approaching the intersection at a high rate of speed, 30 to 45 miles per hour. They stopped in front of the street car and just left of the track to allow this automobile to pass. Miss Brank testified: I was holding the little boy with my right hand and the little girl with my left. We were all in a row. I said look there is a car coming. Elizabeth looked around, just turned her head like this, not her body, put out her head to see the car, when it hit her. It brushed my clothes across my knees and I jerked my head back to keep it from hitting my face.

The automobile that hit the plaintiff was owned and operated by Woodrow Mills. He was a Western Union messenger boy. He had on his uniform at the time. He was seen leaving the office of the defendant with some messages 25 or 30 minutes before the accident. Telegraph blanks were also in the car. He had been using his automobile in deliv-

ering messages for a couple of months or longer. "It was generally locked back behind the office; sometimes out in the field. . . . He would get in it, go off delivering messages, and come back."

Woodrow Mills testified: The little girl jerked loose from her aunt's hand and ran into my left fender. . . . I was hired as a bicycle messenger. . . . I usually use the car for going between home and work to keep from riding the bicycle. The reason I used it this particular day it had been raining and the street were pretty slick and I was tired, and I just decided to use my automobile instead of the bicycle. . . . I did not have permission from any officer of the Western Union Telegraph Company to use the car on this occasion, and no one knew I used it but myself.

The manager of the Asheville office of the corporate defendant testified that he had no idea Woodrow Mills owned an automobile, or was using one to deliver messages.

The jury returned the following verdict:

"1. Was the plaintiff injured by the negligence of the defendant Woodrow Mills, as alleged in the complaint? A. 'Yes.'

"2. Was the said Woodrow Mills at the time of such injury employed by the defendant Western Union Telegraph Company, and acting within the scope of his authority, as alleged in the complaint? A. 'Yes.'

"3. What damage, if any, has the plaintiff sustained? A. '$5,000.'"

Judgment on the verdict for plaintiff, from which the defendants appeal, assigning as error the refusal of the court to dismiss the action as in case of nonsuit.

Carl W. Greene and J. W. Pless for plaintiff.

Francis R. Stark, Alfred S. Barnard, and E. Loftin for defendants.

STACY, C. J. The case is here on demurrer to the evidence, which amply supports the verdict. This is sufficient on motion to nonsuit. C. S., 567; *Lincoln v. R. R., ante,* 787; *Brunswick County v. Trust Co.,* 206 N. C., 127, 173 S. E., 327; *Lumber Co. v. Power Co.,* 206 N. C., 515, 174 S. E., 427.

It is established by the second issue, under presumably correct instructions, as the charge is not in the record, that Woodrow Mills was acting within the scope of his authority as an employee of the corporate defendant when the injury occurred. It is likewise in evidence that the defendant knew, or should have known, that Mills was in the habit of using his automobile to deliver messages. This distinguishes the case from *Hughes v. Tel. Co.,* 211 Iowa, 1391, 236 N. W., 8, and *Kennedy v. Union Charcoal & Chem. Co.,* 156 Tenn., 666, 57 A. L. R., 733, cited and relied upon by appellants.

The defendant's evidence, which conflicts with that tending to support the plaintiff's claim, is not to be considered on demurrer or motion to nonsuit. *Harrison v. R. R.*, 194 N. C., 656, 140 S. E., 598.

The case was properly submitted to the jury.

No error.

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

MRS. ETHEL LONG BUNTING v. JOHN OLEN BUNTING.

(Filed 27 February, 1935.)

Mortgages H j—Purchase of property at foreclosure sale by wife of mortgagee upheld as between the parties upon the facts of this case.

Defendant executed a mortgage to his half-brother to secure payment of a note, and within four months thereafter defendant went into bankruptcy. The bankruptcy court adjudged the mortgage valid and not a voidable preference and approved and confirmed the order of the referee which did not find that there was any equity over and above the mortgage debt, and which did not restrain the mortgagee from exercising the power of sale contained in the instrument. Thereafter the mortgagee foreclosed under the instrument and the mortgagee's wife bid in the property at the sale and instituted this action in ejectment against the mortgagor: *Held*, the evidence tended to show that the trustee in bankruptcy saw no equity and abandoned any claim he might have, or at least asserted none, in favor of the mortgagor's creditors, and upon the record the foreclosure was valid as between the parties, and plaintiff was entitled to the relief prayed for.

APPEAL by defendant from *Devin, J.*, and a jury, at November Term, 1934, of EDGECOMBE. No error.

This is an action in ejectment, brought by the plaintiff against defendant to recover the possession of a tract of land described in the complaint, containing about fifty-seven acres. The case was tried before Hon. W. A. Devin, judge presiding, and a jury, at the November Term, 1934, of the Superior Court of Edgecombe County.

Plaintiff introduced in evidence a mortgage deed from J. O. Bunting to J. A. Bunting, dated 19 January, 1932, and registered in Book 317, at page 111, Edgecombe County registry. The plaintiff introduced in evidence a deed from J. A. Bunting, mortgagee, to Ethel Long Bunting, dated 17 November, 1933, registered in Book 324, at page 547, Edgecombe County registry. The plaintiff offered in evidence the findings of facts and order upon the claims of J. A. Bunting by R. W. Herring,

referee in bankruptcy, said order being dated 30 June, 1933, which is admitted by defendant to be a true copy. Plaintiff offered in evidence order of Judge I. M. Meekins confirming the report or order of the referee, dated 30 September, 1933, which is admitted by defendant to be a true copy. In this order there is no finding that any equity exists over and above the mortgage debt, nor is the mortgagee restrained from exercising the power of sale contained in the mortgage. J. O. Bunting, within four months after giving the mortgage above mentioned, filed a voluntary petition in bankruptcy.

The judgment of Judge Meekins, judge of the United States District Court in the Eastern District of North Carolina, dated 30 September, 1933, in part, is as follows: "It is now therefore ordered, adjudged, and decreed that the findings of fact by Hon. R. W. Herring, referee in bankruptcy, to the aforesaid effect and tenor be and the same are hereby approved, and said findings are hereby adopted, reiterated, and reconfirmed by the undersigned judge: It is now therefore still further ordered, adjudged, and decreed that the aforesaid mortgage deed executed by John Olen Bunting and wife, Fannie Bunting, securing a note of thirty-three hundred and fifty dollars ($3,350), is hereby held to be a valid and subsisting lien on the property conveyed in said mortgage, and not a voidable preference."

The issues submitted to the jury, and their answers thereto, are as follows: "(1) Is the plaintiff entitled to the possession of the land described in the complaint, designated as first tract? A. 'Yes.' (2) Does the defendant wrongfully withhold possession of same? A. 'Yes.' (3) What was the rental value of said land for the year 1934? A. '$150.00.' "

On the first and second issues, the court below charged the jury, if they found the facts to be true as testified, and as the evidence tended to show, that they would answer the issues "Yes," and on the third issue, on the disputed facts, the jury answered "$150.00."

The defendant made several exceptions and assignments of error, and appealed to the Supreme Court.

M. C. Staton and Gilliam & Bond for plaintiff.
Henry C. Bourne and E. L. Travis for defendant.

CLARKSON, J. The defendant gave his half brother, J. A. Bunting, a mortgage, on 19 January, 1932, securing a bond for $3,350, for the land in controversy. In default of the payments and in accordance with the provision of the mortgage, the land was sold and purchased by the plaintiff, the wife of J. A. Bunting. This is an action in ejectment for the possession of the land. On this record, the trustee in bankruptcy is

not a party and is making no claim to the land. It is contended by plaintiff that the entire evidence shows that the bankruptcy court and the trustee in bankruptcy has abandoned the property to the bankrupt and his mortgagee. We think, from the present record, the foreclosure was valid between the parties. The evidence tends to show that the trustee in bankruptcy saw no equity and abandoned any claim he might have, at least asserted none. No doubt he saw that the value of the property was less than the lien. *Cunningham v. Long,* 188 N. C., 613, and *Irvin v. Harris,* 189 N. C., 465.

The case of *Isaacs v. Hobbs Tie & Timber Co.,* 75 Law Ed., p. 645 (282 U. S., 734-739), cited by defendant, is not applicable to the facts in the present action.

For the reasons given, there is

No error.

CHARLES H. LIPE v. CITIZENS BANK AND TRUST COMPANY ET AL.

(Filed 27 February, 1935.)

1. Wills B b—Executors and Administrators D b—

When a person performs services under an oral agreement, express or implied, that compensation therefor should be provided in the will of the person receiving the services, and no such testamentary provision is made, a cause of action accrues against the estate for breach of the contract or for the value of the services rendered.

2. Limitations of Actions B a—

A cause of action for breach of a contract to devise or for the value of services rendered in reliance upon such agreement accrues upon default, which may arise from abandonment or anticipatory breach, but which usually arises upon failure to make testamentary provision as promised.

3. Wills B c—

Plaintiff alleged that he performed services in reliance upon testatrix' oral agreement to will him all of her property. Testatrix' estate consisted largely of real estate: *Held,* upon the facts disclosed by the record, plaintiff's recovery was properly limited to the reasonable value of the services rendered.

APPEAL by defendants from *Harding, J.,* at June Term, 1934, of CABARRUS.

Civil action to recover for services rendered by plaintiff to Alice J. Bost during the last nineteen years of her life, it being alleged that in 1910 the said Alice J. Bost "asked the plaintiff to look after and manage her affairs in general and render such other services, 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."

Alice J. Bost died in 1929, leaving a will in which she bequeathed to the plaintiff the sum of $3,000. She left an estate, consisting largely of real property, valued at approximately $16,000. Among the assets was a note of $250, executed by the plaintiff to the deceased, and upon which interest had been paid up to 26 March, 1928.

Upon denial of liability and issues joined, the jury returned the following verdict:

"1. Did defendant's testate, Alice J. Bost, and Chas. H. Lipe enter into a contract, as alleged in the complaint? Answer: 'Yes.'

"2. Did defendant's testate, Alice J. Bost, breach said contract? Answer: 'Yes.'

"3. Did the plaintiff Chas. H. Lipe render services to said Alice J. Bost in good faith, relying on her contract and agreement with him, as alleged in the complaint? Answer: 'Yes.'

"4. What amount, if any, is plaintiff entitled to recover? Answer: '$3,875.'

"5. Is the plaintiff's action barred by the three-year statute of limitations, as alleged in the answer? Answer: 'No.'

"6. What sum, if any, is the plaintiff indebted to the defendants by reason of the note set up in the counterclaim? Answer: '$250.00, with interest at 6 per cent from 26 March, 1928.' "

The court instructed the jury that the plaintiff was not seeking to recover damages for breach of the alleged contract, but for the reasonable value of the services rendered by him to the said Alice J. Bost under the contract during the last nineteen years of her life. Exception.

Upon the 5th issue, relating to the statute of limitations, the jury was instructed as follows: "The court charges you, gentlemen, upon all the evidence, if you believe it to be true, it would be your duty to answer the fifth issue 'No'; and the court has already answered it 'No' for you." Exception.

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

Hartsell & Hartsell and Crowell & Crowell for plaintiff.

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

STACY, C. J. This is the same case that was before us at the Fall Term, 1933, opinion filed 28 February, 1934, and reported in 206 N. C., 24, 173 S. E., 316.

It is established by the decisions in this jurisdiction:

1. That when services are performed under an oral agreement, express or implied, that compensation is to be provided therefor in the will of the party receiving the benefit, and no such provision is made, an action will lie to recover for the breach, or to prevent an unjust enrichment, if

need be, on the part of the recipient of such services. *Grantham v. Grantham,* 205 N. C., 363, 171 S. E., 331; *Hager v. Whitener,* 204 N. C., 747, 169 S. E., 645; *Redmon v. Roberts,* 198 N. C., 161, 150 S. E., 881; *Brown v. Williams,* 196 N. C., 247, 145 S. E., 233; *Deal v. Wilson,* 178 N. C., 600, 101 S. E., 205; *Patterson v. Franklin,* 168 N. C., 75, 84 S. E., 18; *Whetstine v. Wilson,* 104 N. C., 385, 10 S. E., 471; *Miller v. Lash,* 85 N. C., 52.

2. That the cause of action accrues at the time of default, which may arise from abandonment or anticipatory breach (*Shore v. Holt,* 185 N. C., 312, 117 S. E., 165), but which usually results from failure to make testamentary provision as promised. *Harrison v. Sluder,* 197 N. C., 76, 147 S. E., 684; *Fertilizer Co. v. Eason,* 194 N. C., 244, 139 S. E., 376; *Brown v. Williams, supra; Patterson v. Franklin, supra; Helsabeck v. Doub,* 167 N. C., 205, 83 S. E., 241; *Freeman v. Brown,* 151 N. C., 111, 65 S. E., 743; *Whetstine v. Wilson, supra; Miller v. Lash, supra.*

3. That the measure of damages, or recoverable compensation, on facts such as disclosed by the present record, is the reasonable value of the services rendered. *Grantham v. Grantham, supra; Nesbitt v. Donoho,* 198 N. C., 147, 150 S. E., 875; *Patterson v. Franklin, supra; Faircloth v. Kenlaw,* 165 N. C., 228, 81 S. E., 299; 25 R. C. L., 307.

Applying these principles, as gleaned from the authorities, to the facts of the instant case, it would seem that the rulings, both as to the measure of recovery and the statute of limitations, are amply supported by the decisions. Nothing was said in *Hayman v. Davis,* 182 N. C., 563, 109 S. E., 554, or in *McCurry v. Purgason,* 170 N. C., 463, 87 S. E. 244, which militates against any of the conclusions above stated, but, in reality, all that was said in these cases, when properly interpreted, fully accords with said conclusions. The verdict and judgment will be upheld.

No error.

J. R. PRICE v. ASHEVILLE GAS COMPANY; R. P. COBB v. ASHEVILLE GAS COMPANY; AND LONNIE BUCKNER v. ASHEVILLE GAS COMPANY.

(Filed 27 February, 1935.)

Laborers' and Materialmen's Liens B c—

Persons employed by an agent of the principal contractor to perform certain work on the premises may not recover of the owner for the value of such labor merely upon a showing that they performed the work and that the owner received the benefit thereof. C. S., 2437.

PRICE *v.* GAS CO.

APPEAL by defendant from *Finley, J.,* at October Term, 1934, of BUNCOMBE.

Civil actions, instituted in a court of a justice of the peace to recover for services rendered and to enforce laborers' liens, consolidated on appeal in the Superior Court and tried together, as all three cases rest upon the same fact situation. *Fleming v. Holleman,* 190 N. C., 449, 130 S. E., 171.

On 26 June, 1933, Vernon Moore agreed with the Asheville Gas Company to wire, brush, scrape, and paint certain gas holders, tanks, steam boxes, including structural work and smokestack, for the sum of $235.00.

The plaintiffs were employed by an agent of the contractor to do the painting on said job. They seek to recover of the defendant and to enforce laborers' liens in the following amounts: J. R. Price, $7.35; R. P. Cobb, $14.10; Lonnie Buckner, $13.90.

The jury answered the simple issues of debt (no others were submitted) in favor of the plaintiffs in the amounts claimed. Judgments on the verdicts, from which the defendant appeals, assigning errors.

Sanford W. Brown for plaintiffs.
Jones & Ward for defendant.

STACY, C. J. The following instruction, assigned by the defendant as error, discloses the theory upon which the cases were tried:

"The plaintiffs claim that they went there and did some work on the property of the defendant in the way of painting, and that the defendant got the benefit of this work, and, nothing else appearing, they ought to be entitled to the value of the work by reason of the fact that it was done and accepted by the defendant on the *quantum meruit* idea."

The law is otherwise with respect to subcontractors who seek to recover, not of the contractor, their principal debtor, but of the owner, and to enforce laborers' liens. C. S., 2437; *Rose v. Davis,* 188 N. C., 355, 124 S. E., 576; *Foundry Co. v. Aluminum Co.,* 172 N. C., 704, 90 S. E., 923. Thus, it would seem, the theory of the trial, upon the facts developed, was not accordant with the rights of the parties.

It follows, therefore, that a new trial must be awarded. It is so ordered.

New trial.

W. REESE SHORE ET AL. v. NORFOLK NATIONAL BANK OF COMMERCE AND STATE PLANTERS BANK AND TRUST COMPANY ET AL.

(Filed 27 February, 1935.)

Trial H b—

Where the parties waive a jury trial and agree that the court should find the facts, and the court fails to find the material facts, the case may be remanded for sufficient and definite findings of fact upon appeal from the judgment rendered therein. C. S., 569.

APPEAL from *Devin, J.*, at Special December Term, 1934, of NASH. Remanded.

This is an action primarily by the beneficiaries under the will of the late A. E. Shore, asking that it be decreed that two certain judgments held by the respective corporate defendants did not constitute liens upon a certain lot of land in the town of Rocky Mount, and do not now constitute liens upon a certain trust fund derived from the sale of said lot. The plaintiffs allege and contend that A. E. Shore was the owner of said lot at the time of his death, and that they are now, by virtue of his will, the owners thereof. The defendants allege and contend that P. C. Shore was the owner of an undivided one-half interest in said lot, and that the judgments held by them against P. C. Shore were liens against said interest, and are now liens against the trust fund derived from the sale thereof. The plaintiffs' claim is based upon the allegation that P. C. Shore took title in his name to various tracts of land which were bought with joint funds of a partnership composed of P. C. Shore and A. E. Shore, and subsequently, when it was the purpose to make a division between the partners of said tracts of land, by reason of a mistake in a certain deed only a one-half interest instead of the whole interest in said lot was conveyed to A. E. Shore, and that while the bare legal title to one-half interest in said lot at the time said judgments were docketed was in P. C. Shore, the equitable title to said one-half interest was in A. E. Shore, where likewise was vested the legal title to the other one-half interest.

The case came on to be heard at term time and, by consent of the parties, trial by jury was waived and agreement entered into that the court might find the facts and render judgment based upon its conclusions of law, as provided by sections 568 and 569 of Consolidated Statutes.

From judgment adverse to them, the corporate defendants appealed to the Supreme Court, assigning error.

Spruill & Spruill and S. L. Arrington for defendant Norfolk National Bank of Commerce, appellant.

J. P. Bunn and Cooley & Bone for plaintiffs appellees.

SCHENCK, J. Section 569 of the Consolidated Statutes provides: "Upon trial of an issue of fact by the court, its decision shall be given in writing, and shall contain a statement of the facts found, and the conclusions of law separately."

The decision of the court as it relates to "the facts found" contains only the following: "The court finds the facts to be as testified to by P. C. Shore, the only witness at the trial, both as to his direct and cross-examination, and as shown by the written and record evidence introduced, and the admissions in the pleadings." We do not think this is a compliance with the requirements of the statute that the court's decision "shall contain a statement of the facts found." It does nothing more than indicate from what source the facts may be gleaned.

Where a case is left by consent to be tried both as to the facts and the law by the court, and it fails to find the material facts, the case may be remanded in order that such facts may be so found. *Knott v. Taylor*, 96 N. C., 553; *Trust Co. v. Transit Lines*, 198 N. C., 675.

In the absence of sufficient and definite findings of fact, we are minded to remand the case to the Superior Court to the end that the facts may be sufficiently and definitely found, that we may more accurately and safely pass upon the conclusions of law. It is accordingly so ordered.

Remanded.

J. E. WAY, ADMINISTRATOR OF THE ESTATE OF O. W. WAY, DECEASED, v. HIGH POINT, THOMASVILLE, AND DENTON RAILROAD COMPANY.

(Filed 27 February, 1935.)

Railroads D b—Nonsuit held proper in this action to recover for death of intestate killed while walking on track.

The evidence tended to show that defendant railroad maintained two tracks at the scene of the accident, that it was customary for trains going east to use one track and trains going west to use the other, and that plaintiff's intestate was walking west on one track towards a crossing and was struck and killed by a train going in the same direction which was running on that track contrary to custom, and which failed to give signals or warning. There was no evidence that plaintiff's intestate was not in full possession of his faculties: *Held*, defendant's motion as of nonsuit was properly allowed.

CIVIL ACTION, before *Clement, J.*, at May Civil Term, of GUILFORD.

The evidence tended to show that on or about 24 November, 1933, plaintiff's intestate was walking on the track of defendant, approaching a crossing in the city of High Point. The defendant maintained two tracks, one known as the northbound track and the other as the southbound track. There was evidence that the tracks and the space between the tracks had been used by the public as a walkway for a substantial period of time. The plaintiff's intestate was struck near the crossing by a train traveling in the same direction.

The evidence also tended to show that usually trains going westward used the right-hand or north track, and trains traveling eastward used the left-hand or south track. However, at the time plaintiff's intestate was killed the north track was blocked by reason of the construction of a bridge and the train was moving westward on the south track. There was evidence that no signals were given by the train for the crossing. The killing occurred at five o'clock p.m., on a clear day.

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

Walser & Casey for plaintiff.
Lovelace & Kirkman for defendant.

BROGDEN, J. A pedestrian in the daytime is walking on a live track of a railroad approaching a crossing. An engine traveling in the same direction as the pedestrian runs upon him without signal, and death results from the impact. At the time the train was running contrary to its usual custom upon the south track. There was no evidence that the pedestrian was not in full possession of all of his faculties.

The question of law presented is whether plaintiff's intestate was entitled to recover. The law answers the question in the negative. The applicable principle was stated in *High v. R. R.,* 112 N. C., 385, 17 S. E., 79, as follows: "Where an engineer sees, on the track in front of the engine which he is moving, a person walking or standing, whom he does not know at all, or who is known by him to be in full possession of his senses and faculties, the former is justified in assuming, up to the last moment, that the latter will step off the track in time to avoid injury, and if such person is injured the law imputes it to his own negligence, and holds the railroad company blameless. . . .

"If the plaintiff had looked and listened for approaching trains, as a person using a track for a footway should in the exercise of ordinary care always do, she would have seen that the train, contrary to the usual custom, was moving on the siding," etc. The same principle was tersely expressed in *Neal v. R. R.,* 126 N. C., 634, 36 S. E., 117, as follows: "These cases hold that it is not negligence in a railroad company where

its train runs over a man walking on the railroad track, apparently in possession of his faculties, and in the absence of any reason to suppose that he was not. This is put upon the ground that the engineer may reasonably suppose that the man will step off in time to prevent injury." See, also, *Davis v. R. R.*, 187 N. C., 147, 120 S. E., 827; *Thompson v. R. R.*, 199 N. C., 409, 154 S. E., 630; *Dix v. R. R.*, 199 N. C., 651, 155 S. E., 448.

Affirmed.

STATE v. SIDNEY ETHERIDGE.

(Filed 27 February, 1935.)

1. **Criminal Law L a—When case on appeal is not served within time allowed the appeal must be dismissed on motion of Attorney-General.**

When appellant in a criminal case fails to make out and serve his statement of case on appeal within the time allowed he loses his right to do so, and the appeal must be dismissed on motion of the Attorney-General, but where the life of the prisoner is involved this will be done only after an inspection of the record for errors appearing upon its face.

2. **Same—Clerk of Superior Court should notify Attorney-General of appeal and of any extension of time for perfecting same.**

When an appeal is taken in a criminal case and the execution of the judgment stayed under C. S., 4654, the clerk of the Superior Court is required to notify the Attorney-General of the appeal, and, if the statutory time for perfecting the appeal is extended, he should notify him of such extension.

MOTION by the State to docket and dismiss appeal.

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

STACY, C. J. At the July Term, 1934, of Onslow Superior Court, the defendant herein, Sidney Etheridge, was tried upon indictment charging him, pursuant to conspiracy with another, with the murder of one Mamie Moore, which resulted in a conviction of "First Degree Murder" and sentence of death. From the judgment thus entered, the defendant gave notice of appeal to the Supreme Court, and was allowed thirty days to prepare and serve statement of case on appeal, and the solicitor was given fifteen days thereafter to serve exceptions or countercase, but nothing has been done towards perfecting the appeal, and the time for serving statement of case has expired. *S. v. Brown,* 206 N. C., 747, 175 S. E., 116. No appeal bond was required, as the defendant was granted the privilege of appealing *in forma pauperis. S. v. Stafford,* 203 N. C., 601, 166 S. E., 734.

The prisoner, having neglected 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, 172 S. E., 219), 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. Hamlet,* 206 N. C., 568, 174 S. E., 451; *S. v. Edney,* 202 N. C., 706, 164 S. E., 23. The time for bringing up the appeal has passed. *S. v. Hooker, ante,* 648.

When an appeal is taken in a criminal case and execution of the judgment stayed, as provided by C. S., 4654, it is required of the clerk of the Superior Court that he notify the Attorney-General of the appeal; and, if the statutory time for perfecting the appeal has been extended, this fact should also be brought to his attention. Observance of these requirements would expedite the handling of cases on appeal. *S. v. Casey,* 201 N. C., 620, 161 S. E., 81.

Appeal dismissed.

IN RE CHAMPION BANK AND TRUST COMPANY, CANTON, N. C.

(Filed 27 February, 1935.)

1. Banks and Banking H e—

Where a petition to establish creditor's claim against an insolvent bank also alleges a right to preference in payment, and the allegations are sufficient to state a claim of commonalty at least, a demurrer to the petition is improperly allowed.

2. Pleadings D a—

A demurrer for failure of a pleading to state a cause of action should be denied unless the pleading is wholly insufficient for any cause, since a demurrer goes to the heart of a pleading and challenges the right of the pleader to maintain his position in any view of the matter.

APPEAL by petitioner from *Rousseau, J.,* at January Term, 1935, of HAYWOOD.

Petition in the cause to establish creditor's claim, also alleging a preference.

The petition alleges:

1. That the Champion Bank and Trust Company, Canton, N. C., ceased to do business and closed its doors, because of insolvency, on 6 March, 1933.

2. That for many months prior thereto petitioner, a resident of Lakeland, Fla., had on deposit in said bank the sum of $1,192.80, evidenced by time certificate of deposit.

3. That due notice was given, in accordance with the terms of said certificate, that petitioner wished to withdraw her deposit. This notice was given 30 January, 1933, and the certificate forwarded to the bank on 20 February, with request that prompt remittance be made therefor.

4. That said certificate was in the hands of the bank, properly endorsed, with request for prompt remittance, more than five days prior to the closing of the bank.

Wherefore, petitioner claims a preference under C. S., 218 (c) (14).

To this petition the Commissioner of Banks demurred *ore tenus* on the ground that the petition does not state facts sufficient to constitute a cause of action.

From a judgment sustaining the demurrer and dismissing the petition the petitioner appeals, assigning error.

Jones & Ward for petitioner.

F. E. Alley, Jr., for Hood, Comr. of Banks.

STACY, C. J. The demurrer was sustained on the ground that the facts alleged do not constitute a preference under C. S., 218 (c) (14). *Lamb v. Hood, Comr.*, 205 N. C., 409, 171 S. E., 359. But this is not all the petition alleges. It undoubtedly states a valid claim of commonalty, if not one of preference. *Trust Co. v. Hood, Comr.*, 206 N. C., 268, 173 S. E., 601; *Flack v. Hood, Comr.*, 204 N. C., 337, 168 S. E., 520.

A demurrer goes to the heart of a pleading and challenges the right of the pleader to maintain his position in any view of the matter, admitting for the purpose the truth of the allegations of fact contained therein. *Glass Co. v. Hotel Corp.*, 197 N. C., 10, 147 S. E., 681; *Ellis v. Perley*, 200 N. C., 403, 157 S. E., 29. Accordingly, it has been said in a number of cases that a pleading is not demurrable, unless wholly insufficient for any cause. *Meyer v. Fenner*, 196 N. C., 476, 146 S. E., 82. "If in any portion of it, or to any extent, it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading will stand, however inartificially it may have been drawn, or however uncertain, defective, or redundant may be its statements, for, contrary to the common-law rule, every reasonable intendment and presumption must be made in favor of the pleader. It must be fatally defective before it will be rejected as insufficient"—*Walker, J.*, in *Blackmore v. Winders*, 144 N. C., 212, 56 S. E., 874.

The question of preference is not raised by the demurrer. Hence, it follows that the demurrer should have been overruled.

Reversed.

STATE v. JIM (J. W.) MORRISON AND JESSE ROBINSON.

(Filed 27 February, 1935.)

1. Receiving Stolen Goods A b—

Felonious intent in receiving stolen goods with knowledge at the time that they had been stolen is necessary to a conviction under C. S., 4250, and a charge which fails to submit the question of such intent to the jury entitles defendant to a new trial.

2. Receiving Stolen Goods B d—

In a prosecution under C. S., 4250, it is not required that the jury should determine the value of the goods in its verdict.

APPEAL by defendant from *Sink, J.*, at July Term, 1934, of MECKLENBURG.

Criminal prosecution, tried upon indictment charging the defendants Jim Morrison and Jesse Robinson (1) with the larceny of 65 chickens and 5 turkeys, of the value of $25, the property of Caldwell Bradford, and (2) with feloniously receiving said chickens and turkeys, etc., knowing them to have been feloniously stolen or taken in violation of C. S., 4250.

The State's evidence tends to show that by arrangement with Jesse Robinson, Dewey Allison and Alf Sloan, on the night of 9 November, 1933, raided the poultry yard of Caldwell Bradford, stole four sacks of chickens and five turkeys, carried them to Highway No. 74 and there delivered them to Jim Morrison and Jesse Robinson, a white man and colored man, who were waiting with a Chevrolet truck. There were no lights on the truck. Allison and Sloan were to get 30 cents each for the chickens and 50 cents for the turkeys. Jesse Robinson promised to pay for them the next day, but he never did.

In the course of the trial Jesse Robinson fled the jurisdiction, and a mistrial was ordered as to him. The case proceeded against Jim Morrison.

Verdict: Guilty.

Judgment: Imprisonment in the State's prison at hard labor for not less than 3½ years nor more than 7 years.

Defendant appeals, assigning errors.

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

Armfield, Sherrin & Barnhardt for defendant.

STACY, C. J. The following excerpt taken from the charge forms the basis of one of the defendant's exceptive assignments of error:

"The court tells you that receiving stolen goods, knowing them to have been stolen, means exactly what the language implies; taking into one's possession the goods, wares, and chattels of another, knowing at the time of such taking that the goods were stolen, or under such circumstances as would put a reasonably prudent man on notice that such goods are stolen."

It will be observed the indictment charges the defendant with "feloniously" receiving stolen goods, knowing them to have been feloniously stolen or taken, and he has been "punished as one convicted of larceny." C. S., 4250. Thus, it would seem, under the indictment as drawn, the intent with which the defendant received the stolen goods, knowing at the time that they had been feloniously stolen or taken, was inadequately submitted to the jury. *S. v. Caveness,* 78 N. C., 484; *S. v. Rushing,* 69 N. C., 29; *S. v. Dail,* 191 N. C., 231, 131 S. E., 573; *S. v. Bethel,* 97 N. C., 459, 1 S. E., 551; *S. v. Eunice,* 194 N. C., 409, 139 S. E., 774.

Personal-profit motive is not essential. It was said in *S. v. Rushing, supra,* that intent to aid the thief, with the other elements present, would render the receiver guilty. But, of course, one who receives stolen goods for a lawful purpose, *i.e.,* an officer making arrest, incurs no criminal responsibility by taking such goods into his possession. The law does not condemn where the heart is free from guilt.

The indictment is under C. S., 4250, and not under C. S., 4251. It is provided in the latter statute that if the value of the stolen property be in doubt, "the jury shall, in the verdict, fix the value of the property stolen." *S. v. Spain,* 201 N. C., 571, 160 S. E., 825.

For the error as indicated, the defendant is entitled to a new trial, and it is so ordered.

New trial.

STATE v. DERO CORPENING.

(Filed 27 February, 1935.)

Constables B a: Arrest B d—Constable's powers and duties are coextensive with the limits of the county within which he is appointed.

A constable has authority to make an arrest anywhere in the county within which he is appointed, and in a prosecution for resisting arrest, C. S., 4378, a defense that the arrest was made by a constable outside of his township and that therefore defendant did not resist an officer in the performance of his duty is unavailing. C. S., 976; Const., Art. IV, sec. 24.

APPEAL from *Hill, Special Judge,* at May Term, 1934, of FORSYTH. Affirmed.

STATE *v.* CORPENING.

On appeal from the municipal court of Winston-Salem, the defendant was convicted upon a warrant charging him with wilfully and unlawfully resisting a public officer in the discharge of a duty of his office, in violation of C. S., 4378. From judgment pronounced on the verdict, the defendant appealed to the Supreme Court, assigning error.

James M. Little, Jr., for defendant appellant.

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

SCHENCK, J. The prosecuting witness, M. W. Morris, was a constable of Middle Fork Township in Forsyth County and attempted to arrest the defendant Dero Corpening in the city of Winston-Salem, outside of said township but inside of said county. The attempted arrest was made without a warrant for an assault committed in the presence of the constable, and was violently resisted by the defendant.

The defendant states in his brief that he abandons all other exceptions and rests his appeal "on the ground that the constable, being out of his township, did not have power or authority to arrest the defendant, and hence that defendant could not be guilty of resisting an officer in the performance of his duty." The position of the defendant cannot be sustained. "The powers and duties of constables are coextensive with the limits of the county within which they are appointed." *Dade v. Morris*, 7 N. C., 146. See, also, *Dunton v. Doxey*, 52 N. C., 222.

In *Dade's case, supra*, while it was held that the constable was not liable for a breach outside of his district of a bond, "the words of which are that he shall discharge his duty as constable within the district of New Bern," it was said "that he (the constable) is liable in an action on the case for the breach of duty anywhere in the county of Craven." This case was decided in 1819, and C. S., 976, which has been successively brought forward from R. C., c. 24, s. 9, Code, s. 643, and Rev., s. 937, reads as follows: "Constables are hereby invested with and may execute the same power and authority as they have been by law heretofore vested with, and have executed; . . . ."

The intention of those who drafted section 24, Article IV, of the Constitution of North Carolina, when they wrote, "In each township there shall be a constable elected in like manner by the voters thereof, who shall hold his office for two years," was not to restrict the powers and duties of the constables to the township in which they were elected, but to intersperse the constables throughout every part of the county.

Affirmed.

MARY BELLE BROWN v. S. A. JOHNSON.

(Filed 27 February, 1935.)

1. Judgments L a—Judgment of nonsuit is bar to second action upon substantially identical allegations and evidence.

Judgment dismissing an action instituted after judgment of nonsuit in a prior action between the same parties is properly allowed upon the plea of *res judicata* where it appears that the allegations and evidence in both actions are substantially identical, and that the only variance is that the allegations and evidence in the second action are more elaborate and cumulative.

2. Appeal and Error E a—

Where no summons appears in the record and there is nothing to show that the term of court was regularly held, or that the cause was properly constituted in court, the appeal is subject to dismissal under Rule 19.

APPEAL from *Sinclair, J.*, at June Term, 1934, of ORANGE. Affirmed.

This is an appeal by the plaintiff, in a civil action to recover a penalty of $1,550 for the collection of usury, from a judgment rendered upon motion of the defendant to dismiss the action for that the merits thereof had been determined adversely to the plaintiff by a judgment of nonsuit granted in a former action based upon substantially the same allegations and evidence, which judgment was an estoppel by way of *res adjudicata* in this action.

R. T. Giles for plaintiff appellant.
Graham & Sawyer for defendant appellee.

SCHENCK, J. A perusal of the pleadings and of the evidence in the former case and in the instant case leads us to the conclusion that identically the same issues arise upon the pleadings in the respective actions. The parties are the same. The allegations and evidence are substantially the same, the only variance being that in the instant case they are more elaborate and cumulative. The variance is of degree rather than of substance, there being no material facts that were provable under the instant pleadings that were not provable under the former, and no material facts supported by evidence in the instant case that were not supported by evidence in the former case. His Honor, therefore, was correct in holding that the judgment in the former case, from which no appeal was taken and which remains unimpeached, was *res adjudicata,* and that the plaintiff was estopped thereby to prosecute this action. *Hampton v. Spinning Co.,* 198 N. C., 235; *Ferguson v. Spinning Co., ante,* 496, and cases there cited.

While we have considered this case upon its merits, we are constrained to call attention to the fact that the appeal might well have been dismissed under Rule 19 of this Court, since no summons appears in the record of the case on appeal, and there is nothing to show that the term of court was regularly held, or that the cause was properly constituted in court. *Sanders v. Sanders,* 201 N. C., 350; *Pruitt v. Wood,* 199 N. C., 788.

Affirmed.

TOWN OF WAKE FOREST v. MINTA R. HOLDING.

(Filed 27 February, 1935.)

1. **Statutes C a—Proviso exempting from operation of repealing statute a designated county held not to apply to municipalities in the county.**

An act relating to establishment and collection of tax liens was thereafter amended by exempting from its provisions certain "counties and each municipality therein." Thereafter the act was repealed, but the repealing act provided that nothing therein should affect one designated county of the State: *Held,* the proviso in the repealing act exempting from its operation the designated county does not apply to municipalities within such county, and as to municipalities in such county the original act is repealed in accordance with the legislative intent.

2. **Statutes A b—Act relating to tax liens and collection of taxes which applies to one county only held void.**

An act relating to establishment and collection of tax liens was thereafter repealed by a subsequent act of the same Legislature, but the repealing act exempted from its operation one designated county of the State: *Held,* the original act is void as a violation of Art. II, sec. 29, of the State Constitution, since it is applicable to only one county of the State.

APPEAL by plaintiff from *Moore, Special Judge,* at March Term, 1934, of WAKE.

Civil action instituted under chapter 148, Public Laws 1933, to collect street assessments in the town of Wake Forest, a municipality located in Wake County.

From a judgment dismissing the action plaintiff appeals.

Wilson & Green and Morehead & Murdock for plaintiff.
Clem B. Holding and John G. Mills, Jr., for defendant.

STACY, C. J. It is conceded, for the purposes of the appeal, that the provisions of chapter 148, Public Laws 1933, have been observed in regard to establishing liens for the nonpayment of past-due assessments and taxes, but it is denied by the defendant that said act is applicable to the collection of street assessments in the town of Wake Forest.

The act in question was ratified 13 March, 1933. Thereafter, at the same session of the General Assembly, between the dates of 20 April and 12 May, the act was amended nine times by exempting from its provisions certain "counties and each municipality therein."

Finally, on 15 May, the said act was repealed by chapter 560, Public Laws 1933, but the repealing act contains the provision: "Nothing in this act shall be construed as affecting Wake County."

The question then arises: Does the exemption of Wake County from the operation of the repealing act leave the provisions of the original act in effect as to a municipality located in Wake County? The answer is, No, whether viewed from the standpoint of legislative intent (*Trust Co. v. Hood,* 206 N. C., 268, 173 S. E., 601), or as violative of Art. II, sec. 29, of the Constitution.

It follows, therefore, that the judgment is correct.

Affirmed.

SARAH AGNES SIMS AND HUSBAND, JAMES SUMPTER SIMS, v. HOME BUILDING AND LOAN ASSOCIATION AND CHAS. G. LEE, JR., TRUSTEE.

(Filed 27 February, 1935.)

Injunctions D c—Upon appeal to Superior Court from continuance of restraining order, court may not find facts determinative of controversy.

Upon appeal from a county court to the Superior Court from a judgment continuing a temporary restraining order to the hearing, the sole question to be determined by the Superior Court is whether there was error in continuing the restraining order, and it is error for the Superior Court to find facts which in effect determine the controversy and to adjudge that the trial court should be bound thereby, and upon further appeal to the Supreme Court the case will be remanded to the end that such erroneous portion of the judgment be stricken out and the case remanded to the county court for trial in accordance with the correct portion of the judgment of the Superior Court continuing the restraining order to the hearing.

APPEAL by the plaintiffs from *Finley, J.,* at October Term, 1934, of BUNCOMBE.

This was an action to restrain the foreclosure of a deed of trust given by the plaintiffs to the defendant trustee to secure the defendant building and loan association. The action was instituted in the general county court of Buncombe, where, upon an allegation *inter alia* that the debt had been paid and the cancellation of the deed of trust demanded before the insolvency and the commencement of the liquidation of the corporate defendant, a restraining order was granted till the final hearing. From

this order the defendants appealed to the Superior Court and the case came on to be heard at term time, when and where his Honor found as facts, substantially, that the defendant building and loan association is insolvent, and that its affairs are being liquidated by a liquidating agent appointed by its directors, and that the plaintiffs have made certain payments to the association, beginning 1 April, 1925, and extending over a period of years up to and including 16 December, 1931, and that subsequent to that date plaintiffs have paid to the liquidating agent sums aggregating $88.50, and adjudged that "the order of the general county court is hereby modified to the extent that the temporary restraining order issued by the general county court is continued to the final hearing, and that the payments made up to and including 16 December, 1931, be credited on the stock purchased by the plaintiffs from the defendant Home Building and Loan Association, and that all payments made subsequent to 16 December, 1931, be credited on the note secured by the deed of trust," and remanded the case to the general county court "for further proceedings in accord with this judgment." From the judgment of the Superior Court the plaintiffs appealed to the Supreme Court, assigning errors.

Vonno L. Gudger for plaintiffs appellants.
Ford, Coxe & Carter for defendants appellees.

SCHENCK, J. We hold it was error prejudicial to the plaintiffs for the judge of the Superior Court, upon an appeal from an interlocutory and discretionary order made after pleadings had been filed and issue joined, but before any evidence had been heard, to make findings of fact which were in effect determinative of the controversy, and to virtually adjudge that the trial court should be bound thereby.

We think that so much of the judgment as continues the restraining order and remands the case to the general county court is correct, but that portion thereof which finds facts and directs how application of credits are to be made in the general county court is erroneous. The question presented by the appeal to the Superior Court was whether there was error committed by the general county court in continuing the restraining order to the final hearing, and the final merits of the controversy were not then before the court.

The restraining order is continued to the final hearing and the case is remanded to the Superior Court that it may be there remanded to the general county court for determination upon such issues of fact and questions of law as may there arise upon the trial of the cause.

Error and remanded.

SECURITY NATIONAL BANK, ADMINISTRATOR C. T. A. OF THE ESTATE OF SARA STERNBERGER MARGOLIUS, DAVID MARGOLIUS, AND MEYER STERNBERGER, v. SIGMUND STERNBERGER, TRUSTEE AND INDIVIDUALLY; ROSA STERNBERGER, AND JEANETTE STERNBERGER BAACH.

(Filed 27 February, 1935.)

1. Trusts D a—Trust in this case held passive trust and beneficiaries were entitled to demand possession from trustee at any time.

The owner of stock in a corporation transferred certain numbers of shares to each of his children. After his death the children entered into a written agreement which provided that, in order to keep the stock intact and in the immediate family in accordance with their father's wish, a trustee should hold the stock intact, and that none of it should be sold or hypothecated without the written consent of all. Possession of the stock was given the trustee, but the stock remained in the names of the individual owners upon the books of the corporation, and each of them received the dividends from and voted his respective stock: *Held*, as no duties were imposed upon the trustee in respect to the stock except to hold same, and as the individuals were the sole beneficiaries of their respective shares without limitation over, the trust was a simple, passive or dry trust, and the trustee was bound to deliver possession and legal title to a beneficiary demanding his respective share, and to the administrator *c. t. a.* of another beneficiary demanding his testatrix' share in order to carry out the terms of her will bequeathing her share to her husband.

2. Evidence J a—

Evidence of a contemporaneous parol agreement is held incompetent in this case as being in contradiction of the written trust agreement between the parties.

APPEAL by defendants from *Clement, J.*, at June, 1934, Civil Term, of GUILFORD. Affirmed.

This was a civil action, brought by the plaintiff Security National Bank, administrator *c. t. a.* of the estate of Sara Sternberger Margolius, upon issuing summons and filing a complaint against Sigmund Sternberger, claiming it was the owner and entitled to the immediate possession of 1,680 shares of stock in the Revolution Cotton Mills, and before the time for answering had expired the said defendant made a motion that David Margolius, Meyer Sternberger, Rosa Sternberger, and Jeanette Sternberger Baach be made parties plaintiff or defendant, so that the rights of all interested parties might be fully determined. Upon hearing of said motion before the clerk, and upon agreement of attorneys representing all parties, the court ordered that David Margolius and Meyer Sternberger be permitted to make themselves parties plaintiff, and that Rosa Sternberger and Jeanette Sternberger Baach be made parties defendant.

The plaintiffs then filed an amended complaint, adopting the complaint originally filed and, in addition thereto, alleging that Meyer Sternberger was the owner and entitled to the immediate possession of 1,680 shares of stock in the Revolution Cotton Mills. The defendants Sigmund Sternberger, trustee and individually, Rosa Sternberger, and Jeanette Sternberger Baach, filed an answer and cross-action denying that the Security National Bank, administrator *c. t. a.* of the estate of Sara Sternberger Margolius, and David Margolius had any right, title, or interest in and to said stock, and that Meyer Sternberger was not entitled to the immediate possession of the 1,680 shares of stock, as alleged, and the defendants asked for affirmative relief, alleging that the 3,360 shares of stock claimed to be owned by the plaintiffs was included in a block of stock consisting of 8,790 shares owned by the members of the immediate family of H. Sternberger, deceased, and asked that $25,200 cash dividend paid to the Security National Bank, administrator *c. t. a.* of the estate of Sara Sternberger Margolius, be declared to be the property of the immediate family of H. Sternberger, deceased.

The plaintiffs in due time filed an answer to the cross-action, denying the allegations of the defendants in their answer and cross-action, and prayed for relief as contained in the original and amended complaints. On the call of the case for trial both plaintiffs and defendants moved the court for judgment upon the pleadings. After hearing argument upon the motions, the court overruled the defendants' motion and sustained plaintiffs' motion for judgment on the pleadings. Judgment was accordingly signed, from which defendants appealed to the Supreme Court.

The plaintiff, in the original complaint, alleges: "That the plaintiff Security National Bank is authorized and empowered by law to act as administrator, executor, and in other fiduciary capacities. That on or about 19 October, 1933, the plaintiff Security National Bank was duly appointed by the clerk of the Superior Court of Guilford County as administrator *c. t. a.* of the estate of Sara Sternberger Margolius, who died testate on or about 15 October, 1933. That the said Sara Sternberger Margolius left a last will and testament, which has been duly probated in common form in the Superior Court of Guilford County, a copy of the same being attached hereto, marked 'Exhibit A,' and asked to be read as a part of this complaint. That the plaintiff is advised, informed, and alleges that the said Sara Sternberger Margolius was at the time of her death the owner of 1,680 shares of the capital stock of the Revolution Cotton Mills, a corporation organized under the laws of the State of North Carolina, with its principal office in the county of Guilford in said State. That the plaintiff is advised, informed, and alleges that the defendant is now in possession of the certificates representing the aforesaid 1,680 shares of the capital stock of the Revolution

Cotton Mills, and although the plaintiff has demanded that said certificates of stock be delivered to it as administrator of said estate, the defendant has wrongfully declined and refused to deliver the same. That the plaintiff is entitled to the immediate possession of stock, to the end that it may administer said estate as it is by law required to do.

"Wherefore, the plaintiff prays that the estate of Sara Sternberger Margolius be adjudged the owner of the aforesaid 1,680 shares of the capital stock of the Revolution Cotton Mills, and that judgment be entered in this cause directing the defendant to surrender to it the immediate possession of the certificates for said 1,680 shares of the capital stock of the Revolution Cotton Mills now in his possession, and that the plaintiff be granted such other and further relief as to this court may seem just and proper."

In the amended complaint (after other parties were made plaintiffs, by consent) the plaintiffs allege: "That David Margolius is the husband of Sara Sternberger Margolius, and the sole legatee and devisee of her last will and testament. That the said David Margolius is the beneficial owner of the 1,680 shares of the capital stock of Revolution Cotton Mills described and referred to in the original complaint in this cause, subject to the administration of the estate of the said Sara Sternberger Margolius. That the plaintiff Security National Bank, administrator, is entitled to immediate possession of said stock, and that none of the defendants has any interest, legal or equitable, therein. That the plaintiff Meyer Sternberger is the owner of 1,680 shares of capital stock of the Revolution Cotton Mills, which is now in possession of the defendant Sigmund Sternberger. That the plaintiff Meyer Sternberger has demanded the surrender and delivery of said stock to him by the defendant Sigmund Sternberger, and the said defendant has wrongfully refused to deliver the same to said plaintiff. That the said Meyer Sternberger is the sole and exclusive owner of said stock, and that none of the defendants has any legal or equitable interest therein. Wherefore, these plaintiffs pray: (1) That the relief prayed for in the original complaint be granted. (2) That the plaintiff Meyer Sternberger be adjudged the owner of 1,680 shares of the capital stock of the Revolution Cotton Mills, the certificates for which are in the possession of the defendant Sigmund Sternberger, and that judgment be entered in this cause directing said defendant to surrender to the said plaintiff immediate possession of the certificates for said stock. (3) That the plaintiffs be granted such other and further relief as to the court may seem just and proper."

The will of Sara Sternberger Margolius is dated 28 January, 1933, and after her death duly admitted to probate. The material Item 2 is as follows: "All the rest and residue of my estate of whatsoever kind

and wheresoever found (including all my stock, and all my interest in stock, in Revolution Cotton Mills, whether standing in my name or held by me personally or not) I give, devise, and bequeath absolutely and in fee simple to my husband, David Margolius."

The defendants in their answer allege, among other things: "That on or about 5 January, 1923, for a valuable consideration, Meyer Sternberger, Sigmund Sternberger, Jeanette Sternberger, and Sigmund Sternberger, trustee, entered into a written agreement, same being duly signed by all of the parties thereto, in words and figures as follows: 'North Carolina—Guilford County. Whereas our Father, H. Sternberger, whom we all loved and adored, did, on or about 1 June, 1915, in consideration of the sum of one dollar ($1.00), and in the further consideration of mutual love and affection, sell, transfer, and assign unto each of us one hundred and sixty-eight (168) shares of stock in the Revolution Cotton Mills; and whereas, it being the desire of each and all of us to keep said stock intact and within our immediate family, in accordance with the known wish of our beloved father, we did enter into a written agreement on or about 28 December, 1918, wherein and whereby all of the aforesaid stock belonging to each and all of us was placed with Sigmund Sternberger, trustee, as was and is evidenced by a certain written agreement made and entered into by and between each of us on aforesaid date, to wit, 28 December, 1918; and

" 'Whereas Sigmund Sternberger owned thirty-nine (39) shares of said stock in addition to the aforementioned 168 shares; and whereas a certain stock dividend has been declared by the Revolution Cotton Mills; and whereas Sigmund Sternberger is now the owner of 2,070 shares of said stock; Meyer Sternberger is the owner of 1,680 shares of said stock; Jeanette Baach is the owner of 1,680 shares of said stock; Rosa Sternberger is the owner of 1,680 shares of said stock; and Sara Margolius is the owner of 1,680 shares of said stock; and whereas it is the desire of each and all of us to keep all of said stock, to wit, eight thousand seven hundred and ninety (8,790) shares of stock in the Revolution Cotton Mills intact and within our immediate family, in accordance with the known wish of our beloved father:

" 'Now, therefore, this agreement, made and entered into this 5 January, 1923, by and between Jeanette Baach, of Pocahontas, Virginia; Sara Margolius, of Spartanburg, South Carolina; Meyer Sternberger, Sigmund Sternberger, and Rosa Sternberger, of Greensboro, North Carolina, parties of the first part, and Sigmund Sternberger, trustee, party of the second part,

" 'Witnesseth, that for and in consideration of the sum of $1.00 paid to each of the parties of the first part by the party of the second part, the receipt of which is hereby acknowledged, and in the further con-

sideration of love and affection passing between each and all of the parties hereto, it is mutually understood and agreed by the parties hereto that all of the aforesaid stock, to wit, 8,790 shares in the Revolution Cotton Mills, belonging to the parties of the first part, as heretofore mentioned, be placed, and by these presents it is hereby delivered and placed with the party of the second part in trust to be held intact by the said party of the second part upon the following terms and conditions: That the aforesaid stock and all of it is to be held intact, and that none of said stock, or any part of same, is to be sold, transferred, assigned, hypothecated either directly or indirectly by any of the parties hereto, their heirs, assigns, executors, or administrators, without first obtaining the written consent of all the parties to this agreement, or their heirs, assigns, executors, or administrators.

" 'This agreement is to be irrevocable and is to remain in full force and effect until it is mutually annulled jointly by all of the parties hereto, or their respective heirs, assigns, executors, or administrators, and to the faithful performance of the above-mentioned covenants each of us do hereby bind ourselves, our heirs, assigns, executors, or administrators, each to the other. In testimony whereof, we have hereunto set our hands and affixed our seals and signed in sextette, each and all being originals, this being the day and year first above written. Sigmund Sternberger (Seal), Meyer Sternberger (Seal), Jeanette Baach (Seal), Sara Margolius (Seal), Rosa Sternberger (Seal). I do hereby accept the aforementioned stock in the Revolution Cotton Mills upon the terms and conditions stated herein. Sigmund Sternberger, Trustee (Seal).'

"That at the time of the execution of the written agreement referred to in the preceding paragraphs, and also at the time of the delivery of the 8,790 shares of stock in the Revolution Cotton Mills to Sigmund Sternberger, trustee, there was a contemporaneous oral contract and agreement by and among Sigmund Sternberger, Meyer Sternberger, Jeanette Sternberger Baach, Sara Sternberger Margolius, Rosa Sternberger, and Sigmund Sternberger, trustee, and a distinct understanding among all of them that the entire block of 8,790 shares of stock should be kept intact, held by the trustee and beneficially owned as a unit by the immediate family of H. Sternberger, deceased, until such time as said members of said family should unanimously elect to change said understanding and agreement; that said understanding and agreement also included the provision that said Sigmund Sternberger, as trustee, should hold and keep said stock intact for said purpose; that said stock was actually delivered by them to said trustee; that it was, however, agreed that, until modified by the unanimous agreement of said parties, said stock was to remain in the names of the respective parties on the stock book of Revolution Cotton Mills; that each of the respective par-

ties was to vote the stock so standing in his or her name, and was to receive the dividends thereon during his or her life as a member of the immediate family of H. Sternberger, deceased; but that at the death of any one of said parties, the stock upon which the deceased had been receiving dividends should be considered as being and should continue to be the property of the immediate members of the family of H. Sternberger, deceased; that said agreement was to be binding upon all of the parties thereto unless and until it was mutually annulled, jointly and unanimously by all of said parties; that one of the plaintiffs, to wit, David Margolius, husband of Sara Sternberger Margolius, deceased, was present when said contract and agreement was made; that he understood the terms and conditions thereof, discussed the same fully with parties to said agreement, including his said wife, advised his wife to agree thereto; and that she did agree thereto with his full knowledge and consent." The written instrument of 28 December, 1918, is omitted as it is of similar import as above written instrument set forth in the answer of defendants.

The court below entered the following judgment: "This cause coming on to be heard before Hon. John H. Clement, judge presiding, and the plaintiffs having moved the court for judgment upon the pleadings, and after considering the said motion and hearing the argument of counsel, and the court being of the opinion that the plaintiff's motion for judgment upon the pleadings should be allowed: It is therefore ordered, adjudged, and decreed that the plaintiff Security National Bank, administrator *c. t. a.* of the estate of Sara Sternberger Margolius, is the owner of and entitled to the immediate possession of 1,680 shares of the capital stock of the Revolution Cotton Mills, represented by certificates registered upon the books of said corporation in the name of Sara Sternberger Margolius, and now in the possession of the defendant Sigmund Sternberger, and that the plaintiff administrator is also the owner of the cash dividend amounting to $25,200.00 heretofore received by it as alleged in the pleadings, and paid by the Revolution Cotton Mills upon the aforesaid 1,680 shares of stock registered in the name of Sara Sternberger Margolius; that the plaintiff Meyer Sternberger is the owner of and entitled to the immediate possession of 1,680 shares of the capital stock of the Revolution Cotton Mills, and represented by certificates registered upon the books of said corporation in his name, and now in the possession of the defendant Sigmund Sternberger; that the defendant Sigmund Sternberger is the owner of 2,070 shares of the capital stock of the Revolution Cotton Mills, represented by certificates registered on the books of said corporation in his name; that Jeanette Sternberger Baach is the owner of 1,680 shares of the stock of the Revolution Cotton Mills, represented by certificates registered upon the

books of said corporation in her name, and Rosa Sternberger is the owner of 1,680 shares of the capital stock of Revolution Cotton Mills, represented by certificates registered upon the books of the corporation in her name.

"It is further ordered, adjudged, and decreed that the defendant Sigmund Sternberger forthwith deliver to the plaintiff Security National Bank, administrator *c. t. a.* of the estate of Sara Sternberger Margolius, the said certificates of the capital stock of Revolution Cotton Mills for 1,680 shares registered upon the books of said corporation in the name of Sara Sternberger Margolius, and that he likewise deliver to the plaintiff Meyer Sternberger the certificates for 1,680 shares of the capital stock of the Revolution Cotton Mills registered upon the books of said corporation in the name of Meyer Sternberger.

"It is further ordered, adjudged, and decreed that the defendants take nothing by their cross-action, and the same is hereby dismissed. The defendants will pay the cost of this action, to be taxed by the clerk. J. H. Clement, Judge presiding."

The exceptions and assignments of error of the defendants are as follows: "(1) The court erred in refusing to allow the defendants' motion for judgment upon the pleadings. (2) The court erred in allowing the motion of the plaintiffs for judgment upon the pleadings. (3) The court erred in signing the judgment tendered by the plaintiffs."

Brooks, McLendon & Holderness for plaintiffs.
Sidney J. Stern and Beverly C. Moore for defendants.

CLARKSON, J. The main question involved: Is the written instrument in controversy, admitted to be executed by all of the members of the family in reference to the 8,790 shares of stock in the Revolution Cotton Mills, such a contract as to entitle the trustee to hold the certificates of stock against the demands of plaintiffs? We think not.

The written instrument is a simple, passive or dry trust, not an active or special trust. The distinction between simple, passive or dry trusts and special or active trusts is pointed out succinctly in Perry on Trusts and Trustees (7th Ed.), Vol. 1, sec. 18, p. 14, which is as follows: "Trusts are divided into simple and special trusts. A simple trust is a simple conveyance of property to one upon trust, for another, without further specifications or directions. In such case, the law regulates the trust, and the *cestui que trust* has the right of possession and of disposing of the property, and he may call upon the trustee to execute such conveyances of the legal estate as may be necessary. A special trust is where special and particular duties are pointed out to be performed by the trustee. In such cases he is not a mere passive agent,

but has active duties to perform, as when an estate is given to a person to sell, and from the proceeds to pay the debts of the settler."

In Lewin on Trusts, Vol. 1, the same classification of simple and special trusts is made, the author saying, at page 18: "The simple trust is where property is vested in one person upon trust for another, and the nature of the trust not being prescribed by the settler, is left to the construction of law. In this case the *cestui que trust* has *jus habendi,* or the right to be put into actual possession of the property, and *jus disponendi,* or the right to call upon the trustee to execute conveyance of the legal estate as the *cestui que trust* directs."

The distinction between active, passive, and dry trusts has been observed and carefully pointed out in a number of decisions by the Supreme Court of this State.

In *Jasper v. Maxwell,* 16 N. C., 357 (359), *Ruffin, J.,* said: "The question made upon the will has no difficulty. The bank stock is bequeathed to the executors, in trust, to receive the dividends as declared and pay them over to the testator's daughter during her life, or until the charters expire, and upon that event, unless the charters be renewed, the stock itself is given to the daughter. In her, then, are united the present right to the whole profits, and the absolute ultimate dominion—which gives as perfect a property as is known to the law. The *cestui que trust* can call for the legal estate at her will. It is not like the case of a bequest in trust for the maintenance of another. There the trustee must retain the property in order to provide out of the profits for the support of the object of the testator's bounty. He must keep the fund in his own hands, lest it be wasted. But here the fund is to go (eventually) directly to the daughter, and in the meanwhile the whole profits, not as a maintenance to be provided by the executor, but as a general pecuniary legacy."

Again it was declared in *Turnage v. Greene,* 55 N. C., 63 (headnote), that: "Where the right of a *cestui que trust* to a trust is immediate and absolute, there being no ulterior limitation, and no continuing duty to be performed with it by the trustee, the Court will decree the legal estate to be conveyed to those entitled." This case involved bank stock, the trustee seeking to collect commissions for the payment of dividends to the *cestui que trust,* but this was denied, this Court holding that the legatees were entitled to have a transfer of stock made to them.

In *McKenzie v. Sumner,* 114 N. C., 425 (427-8), the will of Thomas J. Sumner devised to Julian E. Sumner in trust for the plaintiff an undivided third part of certain land, and also bequeathed certain corporation stock. It was alleged that the trust being passive and naked, the beneficiary was entitled to a transfer of the property. *Chief Justice Shepherd* said: "As to the real estate devised to the defendant for the

benefit of the plaintiff, there is no reason why the legal title is not vested in the plaintiff by the statute of uses, as the land is not conveyed to her 'sole and separate use,' nor is the trustee charged in any manner whatever with any special duties with respect to the same. . . . The statute, however, does not apply to personal property, such as notes and bank stock, and the legal title remains in the trustee until it is in some way transferred to the equitable owner. Is there any reason why the court, exercising its equitable jurisdiction, should not have directed the assignment of the legal title in this instance? We can see none. The plaintiff being the absolute, equitable owner, there are no ulterior limitations to be protected and, under the terms of the will, the trustee has nothing but a bare, naked legal estate, unaccompanied, as we have remarked, with a single specified duty."

It is generally held that an attempt to create a passive or dry trust in reality, under the statute of uses (C. S., 1740), results in the passage of the legal estate to the *cestui que trust. Gold Mining Co. v. Lumber Co.*, 170 N. C., 273; *Springs v. Hopkins,* 171 N. C., 486; *Lee v. Oates,* 171 N. C., 717; *Hardware Co. v. Lewis,* 173 N. C., 290; *Patrick v. Beatty,* 202 N. C., 454.

The case of *Kirkman v. Holland,* 139 N. C., 185, cited by defendants, is distinguishable. In that case it was held to be an active trust. *Hospital v. Crow,* 186 N. C., 741 (743). The case also of *Egerton, Administrator, v. Carr,* 94 N. C., 648, is not in point.

In *Gold Mining Co. v. Lumber Co.,* 170 N. C., 273, at p. 277, it is said: "As the deed created a passive as distinguished from an active trust, there being nothing for the trustee to do but to hold the legal title for the corporation, the use was executed by the statute, or, in other words, possession was transferred to the use, and the corporation thereby acquired the entire estate. *Johnson v. Prairie,* 91 N. C., 159; *Hallyburton v. Slagle,* 130 N. C., 482; *Cameron v. Hicks,* 141 N. C., 21."

In the instant case the written instrument, among other things, has this in it: "Whereas, it being the desire of each and all of us to keep said stock intact and within our immediate family, in accordance with the known wish of our beloved father," etc. Further, "That the aforesaid stock, or any part of same, and all of it is to be held intact and none of said stock is to be sold, transferred, assigned, hypothecated either directly or indirectly or by any of the parties hereto, their heirs, assigns, executors, or administrators, without first obtaining the written consent of all the parties to this agreement, or their heirs, assigns, executors, or administrators." It would seem these additional words—"none of said stock, or any part of same, is to be sold," etc.—were merely explanatory to the trustee, to hold the "stock intact."

It appears from the record that since the original written instrument of 28 December, 1918, the certificates representing the stock ownership of the parties have been actually deposited with and in the possession of Sigmund Sternberger, trustee. The owners of the stock have voted their respective stock at stockholders' meetings and have at all times received and used all dividends paid by the corporation upon their respective shares as their own individual property, and the trustee has had nothing to do with the collection or disbursement of said dividends, or the voting of said stock. Since 11 April, 1919, all of the stock certificates have been issued and registered on the books of the corporation in the name of the individual owners, except the certificates owned by Meyer Sternberger have been issued and registered in his name since 18 April, 1919.

The plaintiffs in this action pray that the trustee surrender to them the certificates of stock which they contend they own, now in his possession, and they be adjudged the owners of same. From the written instrument the trustee has no duty to perform other than to hold the certificates of "stock intact," etc. The trustee has no active duty to perform, he was to refrain from doing anything. This did not make him an active trustee.

The written instrument was a kindly family arrangement consonant with their father's wishes, but it gave the trustee no special or active duties to perform. Was the stock to be held "intact" forever and forever? Who could ultimately get it? Could it never be alienated? If one died, who got the share? The written instrument is uncertain and indefinite as to the ultimate ownership of the certificates of stock, and in other respects. *Bridges v. Pleasants,* 39 N. C., 26; *Weaver v. Kirby,* 186 N. C., 387; 26 R. C. L., "Trusts," sec. 20, p. 1183; 7 Pomeroy's Equity Jurisprudence, 4th Ed., secs. 997 and 998.

The stock was never transferred to the trustee on the books of the corporation. The individual members voted the stock and received the dividends. We think under the facts and circumstances of this case that it is manifestly the duty of the court to direct that the prayer of the plaintiffs be granted. We think this is in accord with the generally accepted doctrine of trusts and the decisions of this Court.

The Constitution of North Carolina, Art. I, sec. 31, is as follows: "Perpetuities, etc.—Perpetuities and monopolies are contrary to the genius of a free state and ought not be allowed."

Whether the written instrument is void because it imposes an unreasonable restraint upon alienation, and thus violates the rule against perpetuities, need not be decided in the instant case. Even if it be conceded that the written instrument is sufficient and valid to create a trust, and is a reasonable restraint upon alienation, it is a simple, passive or dry trust.

Do the alleged contemporaneous oral contracts and agreements set forth in the defendants' answer and cross-action contradict and vary with the written instrument? We think so.

We think this is so obvious that it is hardly necessary to cite authorities. *Roebuck v. Carson,* 196 N. C., 672. The matter is recently set forth in *Winstead v. Mfg. Co., ante,* 110. The case of *Grissom v. Sternberger,* 10 Fed., 2d Series, 764, has no bearing on this controversy. There are various other matters discussed by the litigants in their able briefs that we do not think necessary to discuss, as there are no new or novel propositions of law involved.

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

Affirmed.

J. S. GASQUE v. CITY OF ASHEVILLE.

(Filed 27 February, 1935.)

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

Upon a motion as of nonsuit 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 denied if there is any sufficient evidence on the whole record of defendant's liability. C. S., 567.

2. Evidence K a—

Testimony of plaintiff's wife that the condition of plaintiff's health after the injury in suit had been bad *is held* competent, the testimony being based upon the witness' observation of plaintiff's general bodily condition.

3. Trial F a—Form and sufficiency of issues.

Where questions sought to be presented by issues tendered are submitted to the jury by the court under one issue, and the issues submitted encompass all material phases of the evidence, the refusal to submit the issues tendered will not be held for error, the form of the issues being largely in the court's discretion and not being the proper basis for exception unless prejudicial or affecting substantial rights.

4. Municipal Corporations E c—

In an action against a city to recover for personal injury resulting from the negligent condition of its streets or sidewalks, the burden is on plaintiff to prove the alleged negligence and proximate cause by the greater weight of the evidence.

5. Same—Duty of city to keep its streets and sidewalks in reasonably safe condition.

The evidence in this case tended to show that the lid of a city's water meter adjacent to its sidewalk had become insecure by reason of dirt

washing down and caking around the inner rim, that the meter was read by the city's employee each month, who did or by the exercise of due care could have seen the situation, and that the type of lid in use at the place of the accident was considered unsafe, and that this type of lid had been replaced by the city in other places by a safe type, and that plaintiff, while walking along the sidewalk at night, stepped on the insecure lid, which tilted, causing his foot to slip into the hole of the meter box, throwing plaintiff and causing serious injury. The court charged the jury that the city was not an insurer of the safety of its streets and sidewalks, but that it was under duty to exercise due diligence to keep its streets and sidewalks, including meter boxes, in a reasonably safe condition by reasonable inspection and supervision, and that it would not be liable for injury from a defect of which it had no notice, but that actual notice was not required, but that notice would be implied if the defect should have been discovered by the city in the exercise of ordinary care in maintaining reasonable inspection and supervision: *Held*, the charge correctly applied the law to the facts of the case, and was without error.

6. Damages F a — Where evidence shows permanent personal injury, plaintiff may recover, also, present cash worth of prospective future earnings.

In this personal injury action the evidence tended to show that plaintiff had been seriously and painfully injured, and that his injury was disabling and permanent: *Held*, a charge that plaintiff was entitled to recover past, present, and future damages, based upon plaintiff's age and earning capacity, but limiting the recovery of future damages to their present cash worth, is without error.

7. Trial E e—

The refusal of the court to give requested instructions will not be held for error where such requested instructions are not supported by the evidence, or where the requested instructions are substantially given in the charge.

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

APPEAL by defendant from *Schenck, J.*, and a jury, at April Term, 1934, of BUNCOMBE. No error.

This was an action for actionable negligence, brought by plaintiff against defendant, alleging damage. Plaintiff alleged that by reason of stepping into a water meter on the street, and it belonging to defendant, he had been injured by the negligence of the defendant. The defendant denied the material allegations of the complaint and set up the plea of contributory negligence. Notice of the claim of plaintiff against defendant was duly filed as required by the statute.

The evidence on the part of plaintiff was to the effect: That in the city of West Asheville, about 9 o'clock on the evening of 7 April, 1933, he had tire trouble and started to a filling station with tubes to have them fixed. He was proceeding on the north side of Haywood Road. There was a water meter in front of 841 Haywood Road. Plaintiff

testified, in part: "When I stepped on the lid of a partly covered water meter box—when I did, my left foot and leg went down in the hole and in some way it turned the lid in a vertical position. I don't know whether exactly straight or not, but I fell, and as I did the edge of the lid caught me between my legs on the point of my spine and on my right testicle. That was right in the crotch. I gave a powerful lunge to come out. It was instant pain. In doing so, I tripped in some way and fell again. I fell in sort of a sitting position. I don't know whether a rock, brick, or edge of the rim, but I struck my back a little higher up on some blunt object. Then I got to my feet. I was experiencing the most excruciating pain of my life, and the last I remember I grabbed myself in the crotch and was drawn double, everything turned dark to me. . . . I don't believe I could have seen the condition of the meter box. I did not see it. There was a hedge there and no lights. The nearest light was 202½ feet from the meter box. I don't know how dark it was. I could not see that box or that lid there, partly covered, or I would not have stepped on it. I know it was not fully covered or my leg would not have gone in. I cannot swear exactly what position it was laying in for I did not see it prior to the time I stepped on it. I don't know what condition it was in, except that it, the lid, turned and caught me between the crotch. One caught me in the crotch and I am sure the other was in the hole, somewhere around the hole, bound to be. It was unexpected and I was hurt so bad I cannot give a detailed description of it. I don't know how deep the meter box was."

Plaintiff was at once taken to a hospital and was unconscious for four or five days, and he stayed in the hospital thirty days. The first six months of his injury he spent the greater part of the time in bed, except to go up and visit the doctors.

Dr. J. W. Deyton testified, in part: "The injury will be permanent. In my opinion, he will never be able to perform heavy manual labor or an undue amount of exercise, whether in sports or labor."

Edna Kitchin, a graduate nurse in the hospital, testified, in part: "Mr. Gasque was brought into the hospital, I think, around 9 o'clock, or a few minutes past 9, it was not earlier than 9 at night. The man seemed totally unconscious. I nursed him 30 days, devoting my entire attention to him. Twenty-hour duty, with four hours off during the day or night, when it was convenient for another nurse to look after him, and he was resting so that I could be away. I cannot say how long he remained unconscious, but I would say around four or five days. His right eye was swollen and closed entirely and, of course, he was lifeless, and he was bleeding from his nose and mouth, and also from his pelvic region. He bled from his pelvic region every day the

entire time he was in the hospital. The bleeding came from the inside. There was no indication on the outside. . . . I was present at the operation on his back or spinal puncture. There was an attempt made to do a lumbar puncture, but the doctors were not successful, due to the nervous condition of the patient. That was while he was in the hospital. I think they tried it twice, but I cannot say exactly. It was more than once." The plaintiff was thirty-one years of age, weighed 168 pounds and, prior to the injury, a strong and healthy man.

M. E. Fox testified, in part: "I was hailed by someone and found him (J. S. Gasque) in a water meter. I learned later it was Mr. Johnson. . . . I got out. I saw Mr. Gasque with one leg in the water meter, down in the water meter box, and the lid of the water meter box and side of his head on the sidewalk. The side of his head was laying over on the sidewalk and his leg down in there. It was on my right-hand side going west, the north side. It was on the sidewalk. I think a little to the right-hand side, the north side. There was a kind of sloped bank by the sidewalk. The meter box was close to that, a dirt bank. Gasque was just laying there like a dead man, so I picked him up out of the meter box and I told Mr. Johnson to let's carry him to the hospital. I picked him up, Johnson seemed to be just scared. I picked him up and put him in my car and carried him to Dr. Gardner's Hospital. . . . I picked him up in my arms and kicked the lid up over there, but it did not seem to fit so well, and I told the policeman he better go see about it. When I stepped on the lid it kind of tilted. . . . It was so dark I could not see whether dirt was on the meter box."

Howard Johnson testified, in part: "I don't know how much it would weigh. It was lighter than the ones on the meter right below there, in front of the house just below this meter, in front of 841. . . . The old meter lids rested on a rim and a flange that was set in the concrete in the sidewalk. That was in 1933. It did not sit there hardly at all because there was too much dirt all around it. Dirt in the flange. It did not rest flat. One side might have been higher than the other. I don't say that it did. I cut the dirt down, but I did not notice whether one side was higher or lower than the other. I don't know whether one was higher or not. It was an ordinary meter lid like the city has used for a long time until Mr. Israel put the new ones on that has a wide flange that sits down on the lid. This was one of the old-style lids."

James G. Hyde testified, in part: "We went there and Johnson turned the spot light on the box that you can shine, he got on his knees and stood up. I noticed him cleaning it out, and that is about all that I know about it. The box is about six inches from the bank outside—the nearest point of the box from the outside of the street. There is a

small bank. It was six inches from the bank. The right-hand side. . . . The dirt bank seemed to be evidently very hard, because Mr. Johnson took some time to get it out. Evidently back in there hard because he had a knife cleaning it out. Before he cleaned it out he pushed it over to the proper place and moved it. It evidently had some at different points because it had a tendency to rock, and that is when he took it up and cleaned it. He tried to fit it in first. It tilted back and forth. He then took a knife and tried to remove the dirt. The dirt bank was fourteen inches high, maybe a little higher, and there is a hedge on top of that. It was a privet hedge. I don't know hardly how to describe the lid. It was one of those regular little lids with checked top. There were not any flanges on the top piece, I don't think."

H. C. Smith testified, in part: "I went up there to the water meter hole at 841 Haywood Road. I have my car and Mr. Gasque's younger brother was with me. I drove my car and Mr. Gasque's younger brother was with me, and Mr. Robinson and two or three other parties went in another car. We went to this hole, and I was one of the first there. I observed the lid on the hole at that time. I first stepped on the edge of the lid, and it would rock, the side I would step on. I would go down in the hole and the other end on the other side would tilt up. I lifted the lid out of the hole. I noticed that there was dirt caked around inside rim of this meter box and the lid would not fit down in the hole.

"I took the lid out without any kind of instrument. I took it out with my hand. There was dirt caked around this inner rim and there was one of the men in the party had a flashlight that was turned on this hole, and either Mr. Robinson or Mr. Johnson, who was up there by that time, tried to scrape out the dirt with a coin and could not do it with that. Mr. Johnson was there. It was either him or one of the other parties. They did not have any luck with the coin, so a knife was used to cut the dirt around the inside of the ring. The lid did not hit by then. It would rattle when you would press on it with your foot. It would not fit at all. It was raised above the level of the rim, and I just picked it up with my fingers."

E. M. Israel testified, in part: "I was born and raised in Asheville, a little over 62 years ago. I was an official of the city of Asheville for a little over 30½ years, having maintenance of water and sewer, making connections and setting meters and gravity mains coming in. I was so engaged when the town of West Asheville was taken into the city. While an official of the city of Asheville, I caused water meter lids for water meter boxes to be changed. We had a lid with a ring on the under side to fit around the box to keep the lid, and also had a catch that you

could run it around and lock it, to keep it from kicking out. I resigned 3 July, 1931. I know the type of water meter lid in general and approved use in April, 1933. It was a lid with a ring that goes down inside the rim that sits on the meter box and the ring type, you might call it.

"Q. Does that have any facilities for locking or securing it? A. 'Yes, well, this ring that goes down through the base of the box an inch or an inch and a half, you have to raise it up to get it out. There is no way to push it out. You cannot push it out with your foot. . . . If you will allow me, I will explain the trouble with the lightweight lid without a ring. There is naturally a space where they sit in the base of the meter box in which dirt accumulates. It is possible it will go under one side and not on the other, and out she goes. Any little jar will throw it out. Yes, but with the flange that comes down on the rim an inch or better, it cannot pick it up. It just settles in there. It is different from the flange, from the meter lid without the ring. Just a little groove. There are different types of boxes. The one in Asheville and the county, I think the county uses practically the same as we do in Asheville, the one with the ring is safe. *The one without the ring is absolutely unsafe. I venture to say there are mighty few, if any, safe without the ring to hold them.*'"

Viola Gasque, plaintiff's wife's testimony was to the effect: That she immediately went to the hospital the night of the injury; saw his condition—described his condition in detail, and testified as follows: "He suffered pain and his condition was nervous. He and I occupy the same room and same bed at night. He has taken drugs to alleviate his pain. He suffered such intense pain when he first came home that he was given drugs to ease this pain. I believe he took those drugs two to four hours, according to the severity of the pain. I met Mr. Gasque 18 May, 1925. I believe that it is almost 9 years. I never knew of his being sick from the time that we were married, 4 years before this accident. He never had been confined to bed or complained of any illness. Q. What has been the condition of his health since 7 April, 1933? A. 'It has been bad.'" The defendant excepted and assigned error to the above question.

The defendant had meter readers to read the city water meters.

The issues submitted to the jury and their answers thereto were as follows: "(1) Was injury to the plaintiff J. S. Gasque caused by the negligence of the defendant city of Asheville, as alleged in the complaint? A. 'Yes.' (2) What damage, if any, is the plaintiff J. S. Gasque entitled to recover of the defendant city of Asheville? A. '$7,500.'"

Judgment was rendered in the court below 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.

R. R. Williams, William J. Cocke, Jr., and J. Y. Jordan, Jr., for plaintiff.

C. E. Blackstock 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 in the court below. C. S., 567. The court below overruled these motions, and in this we can see no error.

On motion to dismiss, or judgment of nonsuit, the evidence is to be taken in the light most favorable to the 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 in a civil action taken after the close of the 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 under the second exception if there is any evidence on the whole record of the defendant's liability.

The defendant excepted and assigned as error the question propounded to Viola Gasque, wife of plaintiff: "Q. What has been the condition of his health since 7 April, 1933? A. 'It has been bad.'" We do not think this exception and assignment of error can be sustained. The wife, Viola Gasque, from her testimony, had every opportunity for observation.

In *Sherrill v. Telegraph Co.*, 117 N. C., 352 (363), we find: "The mental state or appearance of a person, or his manner, habit, conduct, or bodily condition, as far as they can be derived from mere observation as distinguished from medical examination, may be proved by the opinion of one who has had opportunities to form it."

In *S. v. Brodie*, 190 N. C., 554 (555), citing McKelvey on Evidence, 172, 231, and other authorities, we find: "It is a familiar principle that one who is called to testify is usually restricted to facts within his knowledge; but if by reason of opportunities for observation he is in a position to judge of the acts more accurately than those who have not had such opportunities, his testimony will not be excluded on the ground that it is a mere expression of opinion."

In Wigmore on Evidence, Vol. 1 (2d Ed.), ch. 22, sec. 568 (1), p. 974, speaking to the subject, we find: "While on matters strictly involving medical science, as such, some special skill is needed, yet there are

numerous related matters, involving health and bodily soundness, upon which the ordinary experience of everyday life is entirely sufficient. The line may sometimes be difficult to draw; but there can be no difficulty in determining that a layman may be received to state (for example) that a person was or was not apparently ill. Great liberality should be shown by the courts in applying this principle, so that the cause of justice may not be obstructed by narrow and finical rulings." In the note to the above there are abundant authorities cited showing that the testimony of laymen in matters of this kind is admissible.

From the other evidence in the case, the question is at least not prejudicial. The defendant tendered certain issues to be submitted to the jury. As there was no evidence of contributory negligence, no issue was tendered on that defense set up in the answer of defendant. The matter set forth in the issues tendered by defendant were considered under the first issue, and we see no error in not submitting the issues tendered by defendant. The charge of the court below on the first issue took into consideration the facts involved in the other issues tendered by defendant. The issues submitted afforded the parties an opportunity to introduce all pertinent evidence and apply it fairly.

Issues submitted are largely in trial court's discretion, and if not prejudicial or affecting substantial rights, will ordinarily not be held error. *Grier v. Weldon,* 205 N. C., 575.

"The duty of the municipal corporation in reference to streets is stated as follows in *Bailey v. Winston,* 157 N. C., 259: 'A city or town or village must keep its streets in good condition and repair, so that they will be safe for the use of its inhabitants or of those entitled and having occasion to use them. If they become unfit for use by reason of defects which could not be anticipated and consequently guarded against, under ordinary circumstances, the municipality should have some notice of the defect, either actual or else implied from the circumstances; and in this connection it must be said that it is the duty of the city (and, of course, these principles apply generally to all forms of municipalities) to exercise a reasonable and continuing supervision over its streets, in order that it may know they are kept in a safe and sound condition for use. Sometimes notice of their defective condition is actual or express, again it is constructive or implied, where, for instance, the defect has existed for such a length of time as to show that the city has omitted or neglected its plain duty of supervision; and still again, it may be inferred by the jury from the facts in evidence. This principle is illustrated and was applied in *Fitzgerald v. Concord, supra* (140 N. C., 110), where it is said, approving 1 Sh. and Red. on Negligence, sec. 369: "Unless some statute requires it, actual notice is not a necessary condition of corporate liability for the defect which caused the injury. Under its duty of

active vigilance, a municipal corporation is bound to knew the condition of its highways, and for practical purposes the opportunity of knowing must stand for actual knowledge. Hence, when observable defects in a highway have existed for a time so long that they ought to have been seen, notice of them is implied, and is imputed to those whose duty it is to repair them; in other words, they are presumed to have been discovered by the exercise of reasonable diligence." . . . "On the question of notice implied from the continued existence of a defect, no definite or fixed rule can be laid down as to the time required, and it is usually a question for the jury on the facts and circumstances of each particular case, giving proper consideration to the character of the structure, its material, the time it has been in existence and use, the nature of the defect, its placing," and in other considerations not necessary to be stated.'" *Bailey v. Asheville,* 180 N. C., 645 (657-8); *Michaux v. Rocky Mount,* 193 N. C., 550; *Markham v. Improvement Co.,* 201 N. C., 117 (120); *Speas v. Greensboro,* 204 N. C., 239.

The court below charged fully and accurately as to the burden of the issue by the greater weight of the evidence being on plaintiff, also negligence and proximate cause. The court below charged the jury to which no exception was taken: "The governing authorities of a city are charged with the duty of keeping their streets and sidewalks and water meter boxes in a reasonably safe condition; and their duty does not end with putting them in a safe and sound condition originally, but they are required to keep them so to the extent that this can be accomplished by proper and reasonable care and continuing supervision.

"It is the duty of the city of Asheville to keep the streets, including the sidewalks and meter boxes thereon and nearby, in proper repair; that is, in such condition as that the people passing and repassing over them might at all times do so with reasonable ease, speed, and safety.

"It is not the duty of the city, however, to warrant that the condition of its streets and sidewalks and meter boxes shall be at all times absolutely safe. The city is not an insurer of their safety; the city is only required to exercise ordinary or reasonable care to make them safe. The city is only responsible for negligent breach of duty and to establish such responsibility it is not sufficient to show that a defect existed and an injury has been caused thereby. It must be further shown that the officers of the city knew or by the exercise of due care might have known of the defect, and that the character of the defect was such that injury to travellers therefrom might be reasonably anticipated.

"It will be observed that actual notice of a dangerous condition or defective structure is not required, but notice may be implied from circumstances, and will be imputed to the city if its officers could have discovered the defect by the exercise of due care or proper diligence.

Actual notice is not a necessary condition to render the city liable for a defect which causes an injury. Under its duty of actual diligence, a municipal corporation is bound to know the condition of its sidewalks and meter boxes, where the opportunity of such knowledge exists; the opportunity of knowing stands for actual knowledge. A city is presumed to have notice of such defects as it might have discovered by due care or reasonable diligence, but the most that is required of a city is the use of ordinary diligence by making inspections and examinations with reasonable frequency and due care to ascertain and remedy them.

"It is the duty of a city to exercise due care to keep its streets and sidewalks and meter boxes in good condition and repair, so that they will be safe for the use of its inhabitants, or those entitled and having occasion to use them. If they become unfit for use by reason of defects which could not be anticipated, and consequently guarded against, the municipality must have some notice of the defect before it can be held liable for any injury proximately caused thereby. Sometimes notice of such defects is actual or express, and, again, sometimes such notice is constructive or implied. It is the duty of a city to exercise a reasonable and continuing supervision over its streets and sidewalks in order that it may know they are kept in safe condition."

The evidence was to the effect that the water meter was so located that dirt washed down and caked around the inner rim which prevented it from fitting and it would tilt up. There was evidence that those who read the meter each month saw or in the exercise of due care could have seen this situation. The water meter was an old kind and had been there many years. Israel testified unobjected to: "The one with the ring is safe. The one without the ring is absolutely unsafe."

Smith testified: "I first stepped on the edge of the lid and it would rock the side I would step on. I would go down in the hole and the other end on the other side would tilt up. I lifted the lid out of the hole. I noticed that there was dirt caked around the inside rim of this meter box and the lid would not fit down in the hole."

We think the charge fully supported by the authorities in this jurisdiction and applicable to the facts in this case. We have examined the exceptions and assignments of error to the charge and do not think they can be sustained. On the question of damage, the court below charged the jury: "It is for the jury to say, under all the circumstances established by the evidence, what is a fair and reasonable sum which the defendant should pay to the plaintiff by way of compensation for injury sustained. The age and occupation of the injured party, the nature and extent of his business, the value of his services, the amount that he was earning at the time of his injury, or whether he was employed at the time, are all matters to be considered. The award is to be made, if

made at all, on the basis of a cash settlement now for plaintiff's injuries, past, present, and prospective. Where future payments for loss of earning power are to be anticipated by the jury and capitalized into the verdict the plaintiff is entitled only to their present worth."

The evidence as to damage supported the charge. This charge is fully approved by the authorities. *Campbell v. R. R.*, 201 N. C., 102 (108). The defendant submitted four prayers for special instructions. We see no error in refusing the first three, the fourth, which is as follows, was given substantially in the general charge: "The city, however, is not held to warrant that the condition of its streets shall be at all times absolutely safe; it is only responsible for a negligent breach of duty, and to establish such responsibility, it is not sufficient to show that a defect existed and an injury has been caused thereby. It must be further shown that the officers of the city knew, or by ordinary diligence might have discovered, the defect, and the character of the defect was such that injuries to travelers therefrom might reasonably be anticipated."

The first three prayers were not entirely supported by the facts in evidence. We think the charge of the court below covered the law applicable to the facts. The court below gave the contentions accurately and fairly to both litigants and set forth the law applicable to the facts in an able and careful charge. We can see no error. The other exceptions and assignments of error are immaterial and present no new or novel propositions of law.

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

No error.

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

INA E. JERNIGAN v. ALBERT M. JERNIGAN.

(Filed 27 February, 1935.)

1. Appeal and Error L d—

Where the Supreme Court has ruled on a former appeal that the evidence was sufficient to overrule defendant's motion as of nonsuit, C. S., 567, and the evidence upon the second trial is substantially the same, the question of the sufficiency of the evidence is *res judicata* and will not be considered on the second appeal.

2. Appeal and Error J e—

The admission of evidence over defendant's objection cannot be held harmful where evidence of the same import as that objected to is admitted without objection.

3. Automobiles C j—

What a joint enterprise is within the meaning of the doctrine of imputed negligence must be determined to a great extent from the facts of the particular case.

4. Same—Preemptory instruction in plaintiff's favor on issue of imputed negligence held not error under evidence in this case.

The uncontradicted evidence disclosed that defendant and his wife were taking a long trip in defendant's car to visit their daughter, that defendant's wife, in order to give defendant a rest, at his request, was driving the car at the time of the accident in suit, that defendant was sleeping or dozing and suddenly awoke as the car passed a truck on a fill just before a railroad overpass, and that defendant, thinking the car in imminent danger of being wrecked, grabbed the wheel and swerved the car to the right, resulting in the car being driven over the embankment: *Held*, in the wife's action against her husband to recover for her resulting injuries, a charge that if the jury should find the facts to be as testified and shown by all the evidence they should answer the issue of imputed negligence in the wife's favor is not error.

5. Negligence A b—Instruction on doctrine of imminent peril held without error in this case.

The court's charge to the jury on the doctrine of sudden peril to the effect that a person confronted with a sudden and unexpected emergency is not required to exercise the same presence of mind and judgment as in ordinary circumstances, and that defendant would not be liable if the jury should find that he acted as an ordinary prudent man would have acted under the circumstances, *is held* without error, and defendant's objection on the ground that the court should have charged that defendant would not be liable if he acted as an ordinary prudent man might have acted under the circumstances, instead of as an ordinary prudent man would have acted, cannot be sustained, "would" and "might" having no substantial difference under the facts and circumstances of the case, and the charge containing no prejudicial error when construed as a whole.

6. Appeal and Error E b—

Where the charge of the court on an aspect of the case is not in the record it will be presumed that the court correctly charged the law applicable to the evidence.

APPEAL by defendant from *Devin, J.*, and a jury, at November Term, 1934, of EDGECOMBE. No error.

This is an action for actionable negligence, brought by plaintiff against defendant. The defendant in his answer denied negligence, and set up the defense of sudden emergency, joint enterprise, and contributory negligence. The evidence on the part of plaintiff was to the effect that she was the wife of defendant and was injured in an accident on 16 April, 1932, while traveling in defendant's car from Norfolk to California. Defendant drove the car from Norfolk to Weldon and asked the plaintiff to take the wheel, and they headed towards Rocky Mount.

The plaintiff testified, in part: "The road between Enfield and Whitakers passed over the railroad, the road being elevated by an overhead bridge where it crosses over the track. We reached the overhead bridge about 4 o'clock in the afternoon. The weather was fair. The road was dry and in good condition. The road was paved with cement to the bridge and with tarvia over the overpass. I was driving about 30 miles per hour. I had driven a car for several years and had never had an accident. Just before we got to the bridge there was a truck in front of me and I blew for the truck and passed around it. I was leaving the cement part of the road and entering upon the part paved with tarvia when I blew my horn. I passed the truck and, after passing it, I was getting back on the right side of the road and my husband grabbed the steering wheel and I don't remember anything else. At and about the time I was passing the truck I did not see any other vehicles coming in the opposite direction. I was about one-fourth up the incline when I passed the truck, and it was after that my husband grabbed the wheel. When he grabbed the wheel the car went to the right and over the embankment and I do not remember anything further. Before he grabbed the wheel the car had not slipped over the pavement. We were not meeting anybody, I was not nervous or frightened, and did not think I was in any danger. The embankment is about eight feet above the surrounding country about one-fourth of the way up where we passed the truck and about twelve feet above the surrounding country about one-half way up the incline where the car went over. . . . Just before my husband grabbed the wheel I was in the center of the road and had passed the truck. I had started back to the right-hand side and had gotten in about the middle of the highway. I do not remember anything further until I awoke in the hospital the next morning. . . . My husband was, at the time of the accident, a police officer of the city of Norfolk, and had been for about fifteen years. I have no other income except his salary and no property except property that he gave me or property that we accumulated together. . . . We had saved enough with what my daughter had given me to take a trip to California. . . . On our trip to California we had planned that I would drive awhile and he would drive awhile. He had worked all night the night before the accident. When we got to Weldon he said he was tired and sleepy and wanted to take a nap, and I took the wheel so he could sleep and drove from Weldon to the overhead bridge where the accident occurred. . . . As I was going around the truck my car was headed to the left. I don't know when my husband, who was sitting beside me in the front seat, awoke, but if he awoke at that moment I guess he looked right out into space with the ground 12 feet or more below him. It was not at that point that he took hold of the wheel.

He took hold of the steering wheel as I went to get back on the right side of the road after going around the truck. . . . My husband took hold of the steering wheel and tried to pull the car back into the road. I was not in any danger. The car was not facing to the left when he took hold of the wheel. It was facing straight up the road and I was getting it back on the right side of the road. I had gotten around the truck, then he took hold of the steering wheel. . . . I do not know when my husband woke up. He was asleep some time before we got to the bridge and the first thing I knew he had grabbed the wheel. He had not spoken to me. I don't know what he thought or what he saw or when he woke up. The first thing I knew he just grabbed the wheel. . . . Before passing the truck I looked to see whether there were any cars between me and the bridge, and did not see any cars coming."

Wyatt Fountain, who was driving the truck about 20 miles an hour, which plaintiff passed, testified, in part: "I should say Mrs. Jernigan passed me about a fourth of the way up the incline and the car made the leap from a point about halfway up the incline. There was no other traffic on the road. It is about 500 feet from the beginning of the incline to the bridge. At that time there was no railing on the road. The highway, including the shoulders, was about 30 feet wide. An automobile is about 5 feet wide, and will take up about 8 feet. When the car cut I stopped my truck and watched to see what was going to take place. I was thunderstruck at it making those turns and the car sailed off and landed on all four wheels and went across the field and dropped in a ditch on the side of the railroad. It looked like it was going over, but it did not have momentum enough, and dropped against the bank, its rear end standing up and its front end in a ditch. . . . I did not see anything unusual about the car passing me on the road just before the accident. After she passed I did not see that it got off the pavement. It went to the left and then back. I did not see anything unusual before it began switching back and forth across the road. There was plenty of room to pass, and she passed me all right."

In many respects the defendant's testimony tended to corroborate that of the plaintiff. He heard the horn blow, and saw the road, the truck, and the bridge, and he did not think it was a dangerous road, and his wife was in control of the car, driving at a moderate rate of speed. "My wife and I have talked about the accident very little in the last two years. While we were talking about it, she said that if I had not grabbed the wheel she would have righted the car up and the accident would not have happened, or substantially that. . . . I do not say now she failed to operate the automobile in a careful and lawful manner, or that she failed to have it under proper control."

The issues submitted to the jury and their answers thereto are as follows: "(1) Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? A. 'Yes.' (2) Were the plaintiff and defendant engaged in a joint enterprise, so as to bar the plaintiff's action, as alleged in the answer? A. 'No.' (3) Did the plaintiff, by her own negligence, contribute to her injury, as alleged in the answer? A. 'No.' (4) What damages, if any, is the plaintiff entitled to recover? A. '$7,500.' "

The defendant made numerous exceptions and assignments of error. The material ones will be considered in the opinion.

Battle & Winslow for plaintiff.
Willcox, Cooke & Willcox and Thorp & Thorp for defendant.

CLARKSON, J. This action has heretofore been before this Court and a *Per Curiam* opinion was filed 19 September, 1934, *post,* 851. This Court reversed the judgment of nonsuit, and said: "While the defenses of joint enterprise, sudden emergency, unconsciousness of the defendant, and contributory negligence raise very interesting questions, we think they should have been submitted to the jury under proper instructions, since we are of the opinion that there was sufficient evidence of the alleged negligence of the defendant to carry the case to the jury."

At the close of plaintiff's evidence, and at the close of all the evidence, the defendant made motions in the court below for judgment as in case of nonsuit. C. S., 567. The court below overruled these motions, and in this we can see no error. This Court passed on the evidence in this case when it was here before. There is no material difference in the evidence on the former and this appeal. On this aspect, the matter is *res judicata.* The defendant presents other questions for our consideration. First: "Did the court err in permitting the defendant to testify that the taking hold of the wheel by him was the sole cause of the accident?" We think not, on this record.

On cross-examination the defendant testified: "Some while after the accident my wife told me that my grabbing the wheel put the car out of control. To think about it now, I don't see why she could not have straightened it up, and I say she could have avoided the accident if I had left the wheel alone. If I had left the wheel alone, there was nothing to have caused the accident. Q. So, as you see it now, your grabbing the wheel was the sole cause of the accident? A. Well, I pulled it off to the right, yes, sir." The defendant objected to the above question and moved that the answer be stricken out; the motion was denied, and defendant excepted.

We see nothing harmful in the question and answer from defendant's testimony that was given. Without prior objection, defendant had sub-

stantially made the same statement: "I say she could have avoided the accident if I had left the wheel alone. If I had left the wheel alone there was nothing to have caused the accident."

In *Colvard v. Light Co.*, 204 N. C., 97 (101), citing authorities, it is said: "It is well settled that the testimony is harmless where similar testimony is admitted without objection."

Second: "Did the court err in refusing to permit the jury to pass upon the question as to whether or not the plaintiff and the defendant were engaged in a joint enterprise?" We think not. On this aspect, the second issue, the court below charged the jury as follows: "The court charges you if you should come to the consideration of the second issue, that if you find the facts to be as testified and as shown by all the evidence, that you would answer the second issue 'No.'"

What is a joint enterprise has to be determined to a great extent from the facts in the particular case. In Babbitt Motor Vehicle Law, 4th Ed., sec. 1719, pp. 1229-30: "To constitute a 'joint enterprise' between the passenger in an automobile and the driver, the passenger must have some control or right of control over the vehicle; otherwise, he may not be held a joint adventurer, or engaged in a common enterprise, and ordinarily the relation between the automobile driver and one invited to ride with him is that of a guest and host, and not that of joint enterprise, or joint venture, where the occupant has no responsibility for or share in the control of the car. This rule is applied to an occupant riding with the driver to see a fire, to one riding from a dance to get refreshments, to one riding with her daughter to visit her son, to a minor accompanying the driver on a picnic."

In *Pusey v. R. R.*, 181 N. C., 137 (141-2), is the following: "The courts recognize the doctrine included in the second prayer for instruction, but as it is said in *Withey v. Fowler Co.*, 164 Iowa, 377: 'It is somewhat difficult to state a comprehensive definition of what constitutes a joint enterprise as applied to this class of cases, but it is perhaps sufficiently accurate for present purposes to say that to impute a driver's negligence to another occupant of his carriage, the relation between them must be shown to be something more than that of host or guest, and the mere fact that both have engaged in the drive because of the mutual pleasure to be derived does not materially alter the situation.' The rule seems to be: 'That the occupant of the automobile must be in a position to assume the control or control in some manner the means of locomotion. *Lawrence v. Sioux City* (Ia.), 154 N. W., 494, and it has been held that the fact the driver and the occupant were mutually engaged in a pleasure ride did not create a joint enterprise. *Withey v. Fowler Co.*, 164 Ia., 377; *Beard v. Klusmeier*, 158 Ky., 153; Ann. Cas., 1915 D, 342.'"

In *Charnock v. Reusing Light & Refrigerating Co.*, 202 N. C., 105 (106), it is said: "Nor is there sufficient evidence that the plaintiff and the defendants were engaged in a joint enterprise. A common enterprise in riding is not enough; the circumstances must be such as to show that the plaintiff and the driver had such control over the car as to be substantially in the joint possession of it. *Albritton v. Hill*, 190 N. C., 429."

In Anderson's An Automobile Accident Suit, part sec. 582, pp. 718-719, speaking to the subject, is the following: "In order to constitute a joint venture, a joint enterprise, or common purpose there must be an agreement to enter into an undertaking in respect of which the parties have a community of interest and a common purpose in its performance. Generally, the test of whether or not a joint venture, joint enterprise, or common purpose exists between the parties in connection with the operation of a motor vehicle is whether or not there is a joint control. There is no legal distinction between the phrases 'joint enterprise' and 'prosecution of a common purpose.' The effect of the formation of a joint enterprise is to make all members responsible for the negligence of any member who injures a third person and to make the negligence of any member available as a defense by a third person to a recovery by another member. In order to fix responsibility on a passenger as a joint adventurer, not only must there exist between the passenger and the participant alleged to be responsible for the accident a common purpose to be served in the use of the car, but there must also be evidence that would warrant a finding that the passenger had the same right as the other to a voice in the management or direction of the vehicle."

In the present case the defendant owned the car and was taking the plaintiff, his wife, to visit their daughter in California. The defendant was the bread-winner and head of the household, a policeman in Norfolk, Va., and had worked all night before the accident. He had driven the car to Weldon, N. C., and was tired and sleepy—wanted to take a nap—and at his request plaintiff took the wheel. We think, from all the evidence under the facts and circumstances of this case, that there is no error in the charge.

Third: "Is the test to be applied in determining the negligence of a defendant when confronted by a sudden and unexpected emergency what a reasonably prudent man would have done under the same or similar circumstances, or what a reasonably prudent man might have done under the same or similar circumstances?" We think, under the facts and circumstances of this case, the use of the words "would" and "might" is practically a distinction without a difference, and not prejudicial.

The court below charged the jury, in part, as follows: "That the defendant was in the car with her and apparently asleep or dozing, and you find that passing the said truck and turning back to the right side

of the road when about the center of the road the defendant Albert M. Jernigan suddenly grasped the steering wheel and turned it to the right and caused the automobile to run off of the embankment and injured the plaintiff, and (you find that the defendant in so turning the steering wheel and causing the car to run off of the embankment failed to act as a reasonably prudent person would have acted or acted as a reasonably prudent person under the same or similar circumstances would not have acted, and further find that such negligent act on the part of the defendant was the proximate cause of plaintiff's injury, you would answer this first issue 'Yes'; otherwise, you would answer it 'No')." Exception and assignment of error.

"That the defendant did grasp the wheel and turn it to the right, that he was acting under a sudden emergency and apparent peril, and that his conduct is to be judged in the light of the circumstances as they then appeared. (The law is that where a person is confronted by an emergency or a sudden peril, although he may not take the safest course or act with the best judgment, he should not be held liable if he acted in the light of all the surrounding circumstances as a careful and prudent man would reasonably act under like circumstances and confronted by like or similar emergency.)" Exception and assignment of error.

"If a person be placed in such a position that he is compelled to choose instantly in the face of grave or apparent imminent peril means of averting the peril, the law does not require the exercise of all the presence of mind and careful judgment that would be required where there is opportunity to weigh and determine the wisest course to pursue. (So, if you find from this evidence that the defendant was suddenly confronted by apparent peril, and that the defendant acted under the reasonable apprehension that the car would run off of the embankment if he did not instantly turn off to the right, and you find that he acted as a reasonably prudent person would have acted under the same or similar conditions in an effort to avert the apparent danger or peril, he could not be held responsible, and you would answer this first issue 'No.')" Exception and assignment of error.

"Defendant calls attention to his own testimony and the surrounding circumstances, and contends that even though he says now, after thinking about it, she would have gotten along all right if he had not interfered when the car began to swerve, woke him up and it looked as if the car was going off the embankment and he acted in sudden emergency, apparent peril and his instinct was to turn the wheel, and turned it too far, or caused it to go off the embankment. He contends she was going too fast; that she herself had created an emergency, and that her act had brought about the confrontation of a sudden peril, and that he acted in the light as it then appeared to him and with such judgment as he

could instantly give to it; that instinctively he tried to turn the wheel to avert danger, that though it must have resulted that he caused it to go off, yet (he was acting as he contends you should find, as a reasonably prudent person under like or similar circumstances would have acted, and that you should answer the issue 'No')." Exception and assignment of error.

To the above, in parentheses, the defendant made exceptions and assignments of error. Taking the charge as a whole, we think the exceptions and assignments of error cannot be sustained.

In 20 R. C. L. (Negligence), part sec. 111, p. 135, is the following: "Of course, the presence of sudden peril will not excuse all errors of judgment and all omissions to act; such diligence must be exercised as the circumstances permit, the standard of care being that of a person of ordinary prudence when confronted with the same situation. There is no rule of law which prescribes any particular act to be done or omitted by a person who finds himself in a place of danger. In the variety of circumstances which constantly arise it is impossible to announce such a rule. The only requirement of the law is that the conduct of the person involved shall be consistent with what a man of ordinary prudence would do under like circumstances. And whether the plaintiff exercised such care is for the jury's determination."

"Whether the degree of care actually exercised (in a sudden emergency), or the course actually adopted, was that imposed by law, is to be determined under all the circumstances of the case by the standard of what a prudent person would have been likely to do *under the same circumstances.*" Vartanian on the Law of Automobiles (N. C. Text), sec. 6, p. 10.

"If he (the driver of an automobile confronted with a sudden emergency) acted, in the light of all the surrounding circumstances, as a careful and prudent man *would* reasonably act under like circumstances, he did all the law required of him." *Luttrell v. Hardin,* 193 N. C., 266 (273), quoting with approval from *Lee v. Donnelly,* 96 Vt., 121.

We see no error in submitting to the jury the second issue in the form submitted, and refusing to submit the issue in the form tendered by defendant. On the issues of contributory negligence and damage, the charge of the court below is not in the record. The presumption of law is that the court below charged the law applicable to the facts on these issues.

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

No error.

WILMINGTON FURNITURE COMPANY v. MAGGIE B. COLE, WIDOW, AND ELSIE COLE JONES, ESTHER SCHNIBBEN, ET AL., HEIRS AT LAW OF H. COLE, DECEASED; MAGGIE B. COLE, ADMINISTRATRIX, ROYAL INDEMNITY COMPANY AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND, AND J. A. GAMBLE, RECEIVER OF COMMERCIAL NATIONAL BANK.

(Filed 27 February, 1935.)

1. Evidence J b—Testimony of statements of purchaser at time of buying property are competent to establish parol trust.

In an action to establish a parol trust it is competent for plaintiff to introduce evidence that at the time of the purchase of the property the purchaser declared he was buying it for plaintiff, and objection to the testimony in this case for that the witness testified that the purchaser stated that it was his purpose to acquire the property for plaintiff is untenable, it being obvious from the record that the word "purpose" was used to designate for whom the purchaser was acting in buying the property.

2. Trusts A b—

A resulting trust arises in favor of the party paying the purchase money for property, although legal title is conveyed to a third person, unless a contrary intention or contrary presumption of law prevents.

3. Same—Evidence of parol trust held sufficient to be submitted to the jury.

Evidence that the purchaser of property stated at the time of the purchase that he was buying the property for plaintiff, with evidence that thereafter the property was treated as belonging to plaintiff, and that plaintiff furnished the money for the purchase price of the property, *is held* sufficient to sustain the jury's finding that a parol trust was created in plaintiff's favor, although there was abundant evidence from which the jury could have found *contra*.

4. Abandonment B b—Conflicting evidence on issue of abandonment of parol trust held for jury.

Interveners contended that plaintiff abandoned its claimed parol trust in lands by payment of rent for the property to the person to whom legal title was conveyed, by allowing the holder of the legal title to refund to plaintiff a sum paid by plaintiff on a mortgage on the property, and by other financial transactions between plaintiff and the holder of the legal title. Plaintiff introduced evidence of other financial transactions between it and the holder of the legal title inconsistent with an intention on its part to abandon its claim against the property: *Held*, the conflicting evidence was sufficient to raise more than one inference as to plaintiff's intention to abandon its rights, and the evidence does not establish abandonment as a matter of law.

5. Estoppel C a—Plaintiff held not precluded by principle of estoppel from claiming land in controversy.

Plaintiff corporation sought to set up a parol trust in its favor in land conveyed to its president and owner of practically all of its stock, alleg-

ing the land was bought for it by its president and that it paid the purchase price. Interveners, creditors of the president of the corporation, contended that the corporation was estopped from setting up the parol trust by certain financial transactions and bookkeeping entries between it and its president, which were based upon the ownership of the land by the president of the corporation. The transactions relied upon transpired subsequent to the creation of the liability by the president of the corporation to the interveners. Plaintiff corporation was not indebted to interveners, and no question of fraud was raised: *Held*, the evidence is insufficient to preclude plaintiff corporation, as a matter of law, from claiming the land as against the interveners, since interveners could not have been misled by the transactions or induced thereby to alter their position to their damage.

CIVIL ACTION, before *Cranmer, J.*, at December Term, 1933, of NEW HANOVER.

The Wilmington Furniture Company is a corporation of North Carolina, and was organized in 1905, and since the date of organization engaged in the retail furniture business in Wilmington, North Carolina. The capital stock was $14,000, represented by one hundred and forty shares of the par value of $100.00 per share. Henderson Cole, prior to February, 1916, had acquired one hundred and thirty-seven of said shares, and on said date caused to be issued to his wife, Maggie B. Cole, forty-one shares, and ten shares each to eight of his children, and fifteen shares to a son, Henderson Cole, Jr.

Prior to 17 May, 1916, the American Bank and Trust Company of Wilmington was the owner of certain property known as 208 North Front Street, and at said time the said property was subject to the lien of a certain mortgage deed, dated 27 August, 1915, and duly recorded. Said mortgage deed was made by the Hanover Trust Company to the Massachusetts Mutual Life Insurance Company to secure an indebtedness of $20,000, evidenced by a note of said Hanover Trust Company. Thomas E. Cooper, president of the American Bank and Trust Company, testified at the trial: "If my memory serves me correctly, Mr. Cole, I believe, was secretary and treasurer or president of the Wilmington Furniture Company and the dominating factor. I sold him the property, as president of the bank, for $40,000. He was to pay $20,000 and assume responsibility for a mortgage which was given to some life insurance company. He was to pay $2,500 in cash and give a second mortgage for $17,500. (Q.) Did he tell you at the time for what purpose he was purchasing the property? (A.) Yes, sir. (Q.) What? (A) For the Wilmington Furniture Company. In pursuance to our agreement, Mr. Cole paid the $2,500 which he was to pay in cash and executed the deed of trust for $17,500. I think he paid $500 cash the day we agreed to sell it to him and paid $2,000 some days later. The

check you hand me, being No. 6377, amount $500.00, on the Wilmington Furniture Company, H. Cole, Secretary and Treasurer, dated 5 June, 1916, payable to the order of American Bank and Trust Company, was for the initial $500.00 payment to close the transaction. . . . The check which you hand me for $2,000.00, signed by the Wilmington Furniture Company, H. Cole, Secretary and Treasurer, . . . completed the $2,500 to be paid on the deal. . . . If he had requested me to give the deed to the Wilmington Furniture Company and take the deed of trust back, I don't think I would have had the deed of trust drawn that way. . . . I don't think I would have accepted it. I probably would have done it if he had demanded and insisted upon it, because, if we had deeded the property to the Wilmington Furniture Company and they had executed a mortgage it would have been given to the commercial agencies, and in that way it would probably have caused them to lose their rating in Bradstreet and Dun; and it was to my interest and the bank's interest that Mr. Cole keep up his credit, and so Mr. Cole could give a mortgage and it would not impair the furniture company."

There was evidence tending to show that the notes for $17,500, evidencing the balance of the purchase prise to be paid to the American Bank and Trust Company, "were charged to the Wilmington Furniture account and carried as a liability against them and not as against Mr. Cole. In other words, the entire transaction was handled as the Wilmington Furniture Company, with the approval of Mr. Cole."

Henderson Cole was a director of the American Bank and Trust Company of Wilmington, which was afterwards merged into the Commercial National Bank. Said Cole, together with other directors of said bank, on 18 October, 1922, procured the intervener, Royal Indemnity Company, to execute a depository bond to the Treasurer of North Carolina in the sum of $25,000. These directors also executed an indemnity agreement to protect said bondsman. As an inducement to the surety company Cole signed a financial statement representing that his net worth was $104,000, and including in his list of assets the equity in a store building known as No. 208 N. Front Street. In like manner Cole and the other directors signed an indemnity agreement indemnifying the intervener, Fidelity and Deposit Company of Maryland, in executing a depository bond of $15,000 with the Federal Land Bank of Columbia. The interveners, representing the Commercial National Bank, set up claims upon notes of $4,200, and $2,443.74, and $5,000.

Henderson Cole died on 15 December, 1922. After his death the plaintiff procured a public accountant to audit the business in the year 1922, and this audit tended to show that the property in controversy belonged to the estate of Cole, and an item of rent for the property

amounting to $5,000 a year was set up in the statement. The said auditor also installed a new set of books for the plaintiff and made an entry on the general ledger as of 1 January, 1923, showing a credit balance in favor of the Cole estate in the amount of $1,004.14.

Thereafter certain income tax reports were made by different field agents of the Government and the Craft report tended to show that the property in controversy was treated by the plaintiff as belonging to the estate of Henderson Cole, and this report was approved by the president of the plaintiff company.

Subsequent reports for the years 1919 to 1922 disclose that the said brick store building was listed as an asset of the company, and there was evidence that income taxes were finally paid on the basis that the plaintiff corporation owned the store building.

Thereafter Maggie B. Cole, administratrix, filed an inventory with the clerk as required by statute and included in such inventory as an asset of the estate of Henderson Cole one lot and store at 208 N. Front Street. Subsequent reports of the administratrix contain the same declaration.

In November, 1924, Maggie B. Cole, widow of the deceased, filed a petition for dower, alleging that at the time of his death her husband, Henderson Cole, owned a store building known as 208 N. Front Street. This dower proceeding was never completed.

On 7 June, 1923, the plaintiff instituted this suit against the defendants, alleging in substance that it had paid the entire purchase price of the property, and at the time the property was bought Henderson Cole created, by agreement with the owners of the property, a trust whereby the plaintiff was to become the beneficial owner of the property. Voluminous pleadings were filed by all parties and the matter was heard by a referee. Much evidence was offered before the referee, who conducted a number of hearings and who afterwards submitted a clear and comprehensive report containing detailed findings of fact and his conclusions of law thereon. The parties filed exceptions to the report, proffering pertinent issues and demanding a jury trial.

The cause came to trial at the December Term, 1933, before Cranmer, J., who submitted the following issues:

1. "Was the real property described in the pleadings as '208 North Front Street' purchased by Henderson Cole, with the understanding and agreement that he would buy the same for the Wilmington Furniture Company, and hold same in trust for it?"

2. "Did plaintiff furnish the consideration for the conveyance to Henderson Cole of the property described in the pleadings?"

3. "Is the plaintiff estopped from claiming title to the said property as against the Royal Indemnity Company, the Fidelity and Deposit

Company, and Joseph A. Gamble, receiver of the Commercial National Bank, as alleged in the answer?"

The jury answered the first issue "Yes"; the second issue "Yes"; and the third issue "No."

From judgment upon the verdict the interveners appealed.

Rountree, Hackler & Rountree and Carr, Poisson & James for plaintiff.

Nathan Cole and Herbert McClammy for defendants Cole.

I. C. Wright, Bryan & Campbell and Rodgers & Rodgers for Royal Indemnity Company, Fidelity and Deposit Company of Maryland, and J. A. Gamble, receiver.

BROGDEN, J. The three primary and determinative questions of law presented by the appeal are:

1. Was there competent evidence of a parol trust?

2. Was such trust abandoned and the title to the property revested in Henderson Cole prior to his death?

3. Is the plaintiff precluded by the principle of estoppel from claiming title to the property?

The various methods of creating trusts were first epitomized in *Wood v. Cherry,* 73 N. C., 110. This case is the original ancestor of numerous offspring disclosed by subsequent decisions. However, the ancestor in clarity of concept and expression is still the peer of any of its legal children. It has been held that no particular form of words is necessary in order to create a parol trust, and that an oral declaration of trust, "made contemporaneously with the transmission of the title, may be established, even without a consideration." *Lefkowitz v. Silver,* 182 N. C., 339, 109 S. E., 56; *Williams v. Honeycutt,* 176 N. C., 102, 96 S. E., 730; *Blackburn v. Blackburn,* 109 N. C., 488, 13 S. E., 937; *Ferguson v. Haas,* 64 N. C., 772. In the *Ferguson case, supra,* this Court said: "Therefore, evidence of the acts, dealings, and declarations of the parties becomes competent to ascertain the nature and limits of the trust which is to be attached to the legal estate." It was also held in *Williams v. Honeycutt, supra,* that the declarations of a purchaser "made after the sale and transmission of legal title were competent to prove the previous agreement."

The chief evidence as to the declarations of Henderson Cole at the time of transmission of legal title to 208 N. Front Street was contained in the testimony of Thomas E. Cooper, president of the grantor bank. Mr. Cooper testified over objection that Henderson Cole told him at the time of acquiring the title that it was his purpose to purchase the property for the plaintiff Wilmington Furniture Company. The inter-

veners assert that the witness should not have been allowed to state the "purpose" of Cole in purchasing the property. Obviously, the word was used to designate for whom Cole was acting in the transaction, and hence the declaration was competent.

While there was abundant evidence upon which the jury might have found that no parol trust existed, nevertheless there was competent evidence of such existence, and the trial judge properly submitted the issue to the jury. Therefore, the first question must be answered "Yes."

The jury also found in response to the second issue, upon competent evidence, that the plaintiff furnished the consideration for the conveyance, and it is thoroughly settled that the payment of the purchase money raises a resulting trust in favor of him who furnishes or pays the purchase money, "unless a contrary intention or a contrary presumption of law prevents." *Tire Co. v. Lester,* 190 N. C., 411, 130 S. E., 45; *Wise v. Raynor,* 200 N. C., 567, 157 S. E., 853. There was abundant evidence, of course, upon which the jury could have answered the second issue "No."

The second question of law raises the question as to the evidence or means of proving or establishing the abandonment of a trust. The plaintiff corporation was owned and controlled by the family of Henderson Cole. He organized the corporation, managed it, directed its policy, financed its operations when necessary, and expanded it by wise management from its infancy until it became an important business concern. There is no evidence in the record that Henderson Cole was indebted to anybody at the time he acquired title to the property, nor was there evidence that the corporation was insolvent at that time, or at any subsequent time.

The interveners apparently proceeded upon the theory that Mr. Cole, during his lifetime, considered the property as his own and dealt with it accordingly, and that after his death, when it was discovered that he had signed indemnity agreements in the sum of $40,000 to protect the interveners in giving depository bonds, his heirs at law, who were the stockholders of the corporation, undertook "to get their fodder out of the rain" by setting up a parol trust, so as to wrench the title of the property out of Henderson Cole and put it in the corporation, where the interveners could not reach it. The jury could have inferred the facts to have been as the interveners contended, but it is apparent that in answering the first and second issues as shown by the record that it did not follow or adopt the theory of the interveners.

The interveners further contend that, even if the title was originally vested in the plaintiff corporation, it abandoned the title resulting in revesting the same in Henderson Cole. This idea of abandonment is based upon (a) payment of rent to Cole during his lifetime for five

months preceding his death in 1922; (b) a certain payment of $600.00 on the mortgage indebtedness of the property, which sum was apparently refunded to the plaintiff by Cole; (c) various checks for salary to Cole as an officer of the corporation; (d) various checks issued by the corporation and placed to the credit of Cole.

The pertinent decisions in this State are to the effect that an abandonment may be express or implied. Discussing the subject in *Banks v. Banks,* 77 N. C., 186, this Court said: "To constitute an abandonment or renunciation of claim there must be acts and conduct, positive, unequivocal, and inconsistent with their claim of title. Nor will mere lapse of time or other delay in asserting his claim unaccompanied by acts clearly inconsistent with his rights, amount to a waiver or abandonment." See, also, *Faw v. Whittington,* 72 N. C., 321; *Aiken v. Ins. Co.,* 173 N. C., 400, 92 S. E., 184; *R. R. v. McGuire,* 171 N. C., 277, 88 S. E., 337. The *McGuire case, supra,* states the principle as follows: "This brings us to consider the essential elements of an abandonment. It includes both the intention to abandon and the external act by which such intention is carried into effect. There must be a concurrence of the intention with the actual relinquishment of the property. It is well settled that to constitute an abandonment or renunciation of a claim to property there must be acts and conduct, positive, unequivocal, and inconsistent with the claim of title."

Did the corporation intend to abandon the title? Could more than one inference be drawn by reasonable minds from the various dealings between Cole and the corporation? Upon these questions the evidence was conflicting. Therefore, abandonment became an issue of fact to be determined by a jury. *Harper v. Battle,* 180 N. C., 375, 104 S. E., 658. While no issue as to abandonment was submitted to the jury, nevertheless, it cannot be said that the various items of evidence established abandonment of title as a matter of law.

The third proposition of law invoking the principle of estoppel stands practically upon the same footing as the contention with respect to abandonment. After the death of Mr. Cole a new system of bookkeeping was inaugurated by the plaintiff and a statement of the business dealings made, which did not include the land in controversy as an asset of the corporation, and which showed a balance due by the corporation to the estate of Cole in the sum of $1,004.14. There were also certain income tax reports submitted by the corporation, which tended to show that at one time the title to the property was deemed and considered as a part of the estate of Henderson Cole and at another time the property of the corporation. In interpreting such evidence it must be borne in mind that the plaintiff corporation was under no obligation to the interveners, and that these book entries and income tax reports were made

after the death of Mr. Cole and after the interveners had assumed liability on the depository bonds hereinbefore mentioned. There was no issue of fraud or bad faith, and the case was not tried upon such theory. Manifestly, the interveners were not misled nor induced to extend credit to Henderson Cole upon the strength and credibility of such entries and dealings. See *Wells v. Crumpler,* 182 N. C., 350, 109 S. E., 49, and *Boddie v. Bond,* 154 N. C., 359, 70 S. E., 824. The fourth, fifth, and sixth elements as therein classified are as follows:

(4) The party estopped "must intend or expect that his conduct or representations will be acted on by the party asserting the estoppel or by the public generally."

(5) "The representations or conduct must have been relied and acted on by the party claiming the benefit of estoppel."

(6) "The party claiming the benefit of estoppel must have so acted, because of such representations or conduct, that he would be prejudiced if the first party be permitted to deny the truth thereof."

The jury, in answer to the third issue upon a correct charge, found that the plaintiff was not estopped as against the interveners. Obviously, a different situation would be presented if the controversy was between the plaintiff and the heirs at law of the estate of Henderson Cole.

There are one hundred and thirteen exceptions and a voluminous record, and it would be wholly impossible to undertake to discuss all of these exceptions. A careful and patient examination of the entire record leads the Court to the conclusion that the question has been fairly tried, according to correct principles of law, and the jury, in the face of sharp divergence and irreconcilability of evidence, adopted the theory and contentions of the plaintiff.

Affirmed.

WILMINGTON FURNITURE COMPANY v. MAGGIE B. COLE, WIDOW, AND ELSIE COLE JONES, ESTHER SCHNIBBEN, ET AL., HEIRS AT LAW OF H. COLE, DECEASED; MAGGIE B. COLE, ADMINISTRATRIX, ROYAL INDEMNITY COMPANY AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND, AND J. A. GAMBLE, RECEIVER OF COMMERCIAL NATIONAL BANK.

(Filed 27 February, 1935.)

Appeal and Error K e—

A motion in the Supreme Court for a new trial for newly discovered evidence will not be granted where the evidence relied upon as a basis for the motion tends only to contradict and discredit evidence offered at the trial.

PETITION for new trial for newly discovered evidence.

Rountree, Hackler & Rountree and Carr, Poisson & James for plaintiff.

I. C. Wright, Bryan & Campbell, and Rodgers & Rodgers for Royal Indemnity Company, Fidelity Deposit Company, and J. A. Gamble, receiver.

Nathan Cole and Herbert McClammy for defendants Cole.

PER CURIAM. The interveners filed a petition for a new trial for newly discovered evidence. This petition is based primarily upon the following allegations:

1. That since the trial it has been discovered that on or about 7 August, 1922, H. Cole paid to the Wilmington Furniture Company $10,000, and that this $10,000 was used to make payment on the mortgage note, so that in effect this part of the consideration was paid by Cole and not by the plaintiff.

2. That Cole, in his lifetime, listed certain stocks and bonds, aggregating $45,000, and that proceeds from these stocks and bonds paid off the mortgage of $20,000 held by the Massachusetts Mutual Life Insurance Company.

3. That the income tax return of plaintiff for the year 1922 showed under the head of liabilities an item of $1,004.14 due by the plaintiff to the estate of Henderson Cole, and that rent from the very property in controversy was set up by the corporation as due or accruing to the estate of said Cole.

4. That certain checks for taxes were not introduced in evidence through inadvertence, and, therefore, petitioners were denied the right to argue to the jury the effect of such items of evidence.

The tests set up by law for determining the granting of a new trial for newly discovered evidence are capitulated in *Johnson v. R. R.*, 163 N. C., 431, 79 S. E., 690; *Brown v. Hillsboro,* 185 N. C., 368, 117 S. E., 41, and *S. v. Casey,* 201 N. C., 620.

At the trial the plaintiff offered evidence tending to show that the whole consideration for the property was paid by the plaintiff Wilmington Furniture Company. There are various references to such payments in the record. Copies of income tax returns were contained in the record and in the addenda thereto, and after a careful examination of the petition for a new trial the Court is of the opinion that the newly discovered evidence, as alleged, tends only to contradict and discredit evidence offered at the trial. Therefore, the Court is of the opinion that the interveners have not made such a showing as the law contemplates, and the petition is denied.

Petition denied.

B. C. HARE v. D. R. HARE, JOHN C. BADHAM, W. S. PRIVOTT, TRUSTEE, ET AL.

(Filed 27 February, 1935.)

Injunctions D b—

A temporary restraining order will ordinarily be continued to the hearing upon a *prima facie* showing for injunctive relief, especially when respondent is indemnified against loss from its continuance and injury might result to petitioner from its dissolution.

APPEAL by defendant Badham from *Small, J.,* at Chambers in Elizabeth City, 5 November, 1934. From CHOWAN.

This is a civil action, *inter alia,* to restrain the foreclosure of a deed of trust executed by plaintiff B. C. Hare to the defendant W. S. Privott, trustee, to secure payment of a note for $955.00, payable to the defendant D. R. Hare, and now held by his codefendant John C. Badham. The plaintiff alleged that there was an agreement between him and the payee in the note, D. R. Hare, who is the *cestui que trust* in said deed of trust, that the land conveyed by D. R. Hare to B. C. Hare, upon which said deed of trust was given, was to be released from another and prior deed of trust before B. C. Hare would be required to pay said note, and that the appealing defendant Badham had notice of this agreement at the time he took said note, and that such release has not been effected. The evidence showed, *prima facie,* and the court found, that the alleged agreement between the plaintiff B. C. Hare and the defendant D. R. Hare existed and that the appealing defendant took the said note after maturity and with constructive notice of all equities of the plaintiff, and that said agreement has not been fulfilled.

From a judgment continuing the restraining order till the final hearing, upon the plaintiff's giving sufficient bond to indemnify the defendants against loss therefrom, the defendant Badham appealed to the Supreme Court, assigning error.

R. C. Holland and Worth & Horner for plaintiff appellee.
W. D. Pruden for defendant appellant.

PER CURIAM. Equity will generally continue a temporary restraining order to the final hearing upon a *prima facie* showing for injunctive relief, especially when it appears that the respondent is indemnified against loss from its continuance and that injury might result to the petitioner from its dissolution. *Boushiar v. Willis, ante,* 511, and cases there cited.

Affirmed.

W. H. COOPER AND WIFE, LENA COOPER; VANNIE WARREN AND HUSBAND, BOB WARREN; AND HATTIE JENKINS AND HUSBAND, J. R. JENKINS, v. L. B. COOPER AND WIFE, ETHEL COOPER.

(Filed 19 September, 1934.)

APPEAL by plaintiffs from *Hill, Special Judge,* at January Term, 1934, of SWAIN. No error.

This is an action brought by plaintiffs against defendants to set aside a deed made by Laura Cooper to her son, L. B. Cooper, on 26 January, 1926 (1) on the ground of mental incapacity; (2) undue influence.

The issues submitted to the jury and their answers thereto are as follows: "(1) Did the said Laura Cooper have sufficient mental capacity to execute the deed referred to in the pleadings and recorded in Book 54, page 229? A. 'Yes.' (2) Was the execution of said deed procured and brought about by the undue influence of the grantee therein named, L. B. Cooper, as alleged in the complaint? A. 'No.'"

The court below rendered judgment in accordance with the verdict. The plaintiffs made numerous exceptions and assignments of error, and appealed to the Supreme Court.

A. Hall Johnston and R. L. Phillips for plaintiffs.
Edwards & Leatherwood for defendants.

PER CURIAM. We have read the record and briefs of the litigants with care and see no new or novel proposition of law presented on this appeal. We see no error as to the exceptions and assignments of error made by plaintiffs on the trial in the court below. The controversy hinged mainly on the facts to be determined by the jury. On the trial of the action in the court below, we see no prejudicial or reversible error.

No error.

WOODROW DONALD CASEY v. P. S. BELLAMY, TRADING UNDER THE FIRM NAME OF BELLAMY & COMPANY, PRINCIPAL; AND EXUM BELLAMY, AGENT.

(Filed 19 September, 1934.)

APPEAL by plaintiff from *Small, J.,* at April Term, 1934, of NASH. Affirmed.

J. W. Keel and T. T. Thorne for appellant.
Thorp & Thorp for appellees.

PER CURIAM. The plaintiff, a passenger, brought this action against P. S. Bellamy and Exum Bellamy for personal injury, alleged to have been suffered by him as the result of the negligence of the defendant Exum Bellamy in driving an automobile off of the highway and down an embankment in order to avoid a collision with a freight train of the A. C. L. Railroad Company, at a grade crossing; said automobile being owned by the defendant P. S. Bellamy.

In our opinion the record does not contain sufficient evidence of negligence on the part of the driver of the automobile to carry the case to the jury, and therefore the judgment of nonsuit should be sustained as to both defendants.

Affirmed.

INA E. JERNIGAN v. ALBERT M. JERNIGAN.

(Filed 19 September, 1934.)

APPEAL by plaintiff from *Small, J.*, at April Term, 1934, of EDGECOMBE. Reversed.

Battle & Winslow for appellant.
Willcox, Cooke & Willcox and Thorp & Thorp for appellee.

PER CURIAM. This was an action instituted by the plaintiff against the defendant, her husband, for damage alleged to have been proximately caused by the defendant's negligence in grabbing the steering wheel of the automobile driven by the plaintiff, in which they both were riding, and thereby causing the automobile to leave the highway with the resultant personal injuries.

Upon the conclusion of the plaintiff's evidence, the defendant moved the court to dismiss the action and for a judgment as of nonsuit, which motion was granted; and to judgment of nonsuit the plaintiff excepted and appealed to this Court.

While the defenses of joint enterprise, sudden emergency, unconsciousness of the defendant, and contributory negligence raise very interesting questions, we think that they should have been submitted to the jury under proper instructions, since we are of the opinion there was sufficient evidence of the alleged negligence of the defendant to carry the case to the jury.

Reversed.

W. E. BARKER AND WIFE, NANCY J. BARKER, v. ALARKA LUMBER COMPANY AND ALARKA VALLEY RAILWAY COMPANY.

(Filed 19 September, 1934.)

CIVIL ACTION, before *McElroy, J.*, at March Term, 1934, of SWAIN.

This was an action of ejectment, tried upon the following issues:

1. "Are the plaintiffs the owners of and entitled to the possession of the lands described in their complaint?"

2. "Did the defendant Alarka Lumber Company wilfully trespass upon said lands?"

3. "Did the defendant Alarka Valley Railway Company wilfully commit trespass upon said lands?"

4. "What amount of damages, if any, are the plaintiffs entitled to recover?"

The jury answered the first three issues "Yes," and the fourth issue "$75.00."

From judgment upon the verdict the defendants appealed.

Edwards & Leatherwood for plaintiffs.
Moody & Moody for defendants.

PER CURIAM. The evidence discloses issues of fact which have been determined by the jury adversely to the contentions of defendants. No prejudicial or reversible error is perceived.

No error.

C. S. LEWIS AND J. M. BROWN AND O. W. BROWN, ADMINISTRATOR OF THE ESTATE OF J. M. BROWN, DECEASED, DOING BUSINESS AS BROWN & LEWIS, v. C. C. FRYE AND C. F. GARNER, DOING BUSINESS AS FRYE & GARNER.

(Filed 19 September, 1934.)

Appeal and Error L d—

Where it is determined on appeal that a cause of action is stated and that the evidence should be submitted to the jury, the question is *res judicata* upon a subsequent appeal upon substantially similar evidence.

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

CIVIL ACTION, before *Stack, J.*, at September Term, 1933, of MOORE.

This action was originally tried in the Superior Court and nonsuited, as will appear by reference to *Lewis v. Archbell,* 199 N. C., 205, 154

S. E., 11, where the facts are set forth. The evidence in the present case was substantially similar to that adduced at the former hearing.

The trial judge submitted certain pertinent issues to the jury, and these were answered in favor of the plaintiffs. The verdict awarded to the plaintiffs the sum of $600.00 actual damages, and from judgment upon the verdict for treble damages for the sum of $1,800 the defendants appealed.

H. F. Seawell, Jr., and M. G. Boyette for plaintiffs.
L. B. Clegg, J. H. Scott, and W. R. Clegg for defendants.

PER CURIAM. When this cause was considered by the Court upon a former appeal in *Lewis v. Archbell,* 199 N. C., 205, it was held that a cause of action was alleged and that the case "should be submitted to a jury with proper instructions from the court." The evidence in the present case was substantially similar to that adduced at the former hearing. An examination of the exceptions relating to the competency of certain evidence discloses no reversible error. The contentions of the parties were fairly arrayed by the trial judge and the jury correctly instructed as to the rules of law governing liability. Indeed, the record presents a sharply controverted issue of fact, which the jury has determined.

Affirmed.

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

GEORGE McNABB v. F. G. MURPHY ET AL.

(Filed 19 September, 1934.)

APPEAL by defendants from *Devin, J.,* at May Term, 1934, of DARE.

Civil action for damages arising out of a collision between plaintiff's automobile and a Ford coach, owned by the defendant F. G. Murphy and operated at the time by his minor son, Darrell Murphy. The scene of the injury was Highway No. 34, three miles north of Elizabeth City; the time about 2:00 a.m., 25 December, 1931.

The liability of F. G. Murphy was made to turn on the "family-purpose" doctrine, which obtains in this jurisdiction. *Grier v. Woodside,* 200 N. C., 759, 158 S. E., 491.

Upon denial of liability and issues joined, there was a verdict and judgment for the plaintiff against both of the defendants, from which they appeal, assigning errors.

Thompson & Wilson for plaintiff.
Worth & Horner for defendants.

PER CURIAM. On trial, the case resolved itself into controverted issues of fact, which the jury found in favor of the plaintiff and against the defendants. The evidence supports the verdict, and no error has been made to appear in the trial of the cause. The judgment, therefore, will be upheld.

No error.

STATE v. BROWNLOW STAMEY AND BUD TRULL.

(Filed 19 September, 1934.)

CRIMINAL ACTION, before *Schenck, J.*, at April-May Term, 1934, of BUNCOMBE.

The defendants were indicted for burning a barn belonging to Will Goodson. They were convicted and sentenced to the State's Prison for a term of seven years.

The defendants offered no evidence.

The evidence for the State tended to show that the barn was burned about 1:30 at night. The evidence for the State further tended to show that a car stopped in the road about two or three hundred yards from the barn and in about five minutes after the car left the fire was discovered. The defendants live about two hundred yards from the house of Goodson, the prosecuting witness. There was evidence that in the forepart of the night upon which the fire occurred that the defendant Trull had said to his codefendant that "Will Goodson had better keep his mouth off him." There was evidence that the defendants went to the house of Miss Opal Trull, a school teacher, about 1:30 at night, and that the defendant Bud Trull asked her "to take him somewhere . . . down the road a little piece." This witness testified that she drove the defendants to their home, where they got out of the car and went in the house and sat by the fire and talked, and that fifteen or twenty minutes later they drove "back down the road to where it turns from Bud's house." She said: "We stopped a little below where the mark goes out to the road along about there. I don't know how far the road is from Mr. Goodson's barn. . . . When we stopped Bud and Brownlow got out and Bud asked me if I would stay until they came back. Brownlow didn't say anything to me. . . . They went out the road. We stayed in the car. We stayed in there about ten or fifteen minutes. I do not know from which direction they came back to the car. They were at the car the first time I saw them. Then we went straight to

Luther and from there to Asheville. Luther is where the Jugtown road hits the highway. . . . I cannot say exactly what time we got to the main highway. . . . There is a clock at Enka. We passed Enka about 1:30 on the Enka tower. I went out with Love Gudger and Mr. Roberts and pointed out to them where I parked my car that night when they got out. I pulled off the side of the road when I parked." Deputy Sheriff Gudger testified that the witness Opal Trull pointed out to him the place where the car stopped and that this point was about two hundred and fifty yards from the barn of Mr. Goodson. He further testified that he saw tracks leading from the direction of the barn to a point near where the car was parked. The sheriff of Buncombe County testified that on the night of the fire "I saw some tracks leading from where the barn burned out to where this automobile was parked on the Jugtown road. The ground was fresh and fresh tracks, two tracks, I mean the tracks of men about thirty-five or forty yards from Jugtown road where the car was parked. . . . There were fresh tracks looked like running. . . . I had to run in them. They went into that brush heap, and whoever was running had fallen down there. Bud Trull . . . was arrested the next day after the fire. His socks were torn around his ankles. I went to Bud Trull's house that night. . . . I found two pairs of shoes sitting by the bed in the back room. One of the shoes was a heavy pair of work shoes with iron plate around the heel, and inside that iron heel was fresh dirt packed in there. . . . When we took the shoes and put them in the tracks I would not say they fit perfectly. It was fresh ground and plowed in. It was the same size, but I would not swear positively as to them being the tracks because the dirt was rolled down in it. The dirt in the shoes was damp, wet at the time in one pair."

From the judgment pronounced the defendants appealed.

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

W. W. Candler and Jones & Ward for defendants.

PER CURIAM. The only exception in the record challenges the sufficiency of the evidence and the submittal of the case to the jury. The facts and circumstances bring the case within the principles heretofore applied in *S. v. Shines,* 125 N. C., 730, 34 S. E., 552; *S. v. Allen,* 149 N. C., 458, 62 S. E., 597; *S. v. King,* 162 N. C., 580, 77 S. E., 301; *S. v. Clark,* 173 N. C., 739, 91 S. E., 372.

No error.

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

J. A. DURNER v. GURNEY P. HOOD, COMMISSIONER, ET AL.

(Filed 19 September, 1934.)

APPEAL by defendant Phœnix Mutual Life Insurance Company, from *Schenck, J.*, at February Term, 1934, of BUNCOMBE.

Civil action to revoke gratuitous or voluntary trust, which, it is alleged, has proven to be ill-advised, improvident, and impossible of fulfillment.

From a decree terminating the trust, it appearing that the allegations of the petition are abundantly supported by the evidence and so found by the court, the Phœnix Mutual Life Insurance Company, as it feels in duty bound to do, appeals, assigning errors.

Harkins, Van Winkle & Walton for plaintiff.
Bourne, Parker, Bernard & DuBose for defendant appellant.

PER CURIAM. Affirmed on authority of *Bell v. McCoin,* 184 N. C., 117, 113 S. E., 561. The cases of *McRae v. Trust Co.,* 199 N. C., 714, 155 S. E., 614, *Stanback v. Bank,* 197 N. C., 292, 148 S. E., 313, and *Anderson v. Wilkins,* 142 N. C., 154, 55 S. E., 272, are also cited by petitioner as supporting in tendency the judgment.

Affirmed.

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

EDWARD L. OWENS v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 19 September, 1934.)

Railroads D d—

Driver's own evidence *held* to disclose contributory negligence on his part in running into center post supporting railroad overpass, and nonsuit was properly entered in his action against railroad.

APPEAL by plaintiff from *Devin, J.*, at July Term, 1934, of WASHINGTON.

Civil action by owner and driver of automobile to recover damages for personal injury sustained and damage to automobile, alleged to have been caused by the wrongful act, neglect, or default of the defendant.

The facts are almost identical with those appearing in the case of *Baker v. R. R.*, 205 N. C., 329, 171 S. E., 342, with the exception that, in the instant case, the plaintiff testified he was not asleep, but ran his car into the center post without seeing it. The scene of the accident is the same; the time 1:00 a.m., 3 June, 1931.

Plaintiff testified that when he first saw the reflector on the pier, or center post, he thought it was a bus or truck on the side of the road; that he turned suddenly and then, "upon seeing these oblique lines (indicating on map) I clipped her back, . . . and that threw me off the distance too far. I saw I was going to hit it (center post) one way or another, and I applied my brakes and hit it 20 or 25 miles an hour instead of hitting it 40 or 45 miles an hour."

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

Ward & Grimes for plaintiff.
Thomas W. Davis and McLean & Rodman for defendant.

PER CURIAM. That the plaintiff was contributorily negligent appears from his own testimony. Hence, the demurrer to the evidence was properly sustained. *S. v. Fulcher*, 184 N. C., 663, 113 S. E., 769; *Wright v. R. R.*, 155 N. C., 325, 71 S. E., 306; *Horne v. R. R.*, 170 N. C., 645, 87 S. E., 523.

Affirmed.

GURNEY P. HOOD, COMMISSIONER OF BANKS, ET AL. v. THE MACCLESFIELD COMPANY.

(Filed 10 October, 1934.)

CIVIL ACTION, before *Moore, Special Judge,* at June Term, 1934, of EDGECOMBE.

Certain facts were found by the court, which may be summarized as follows:

1. That the defendant is a corporation existing under the laws of North Carolina, owning real estate in Edgecombe, Pitt, and Greene counties, in said State, and owning personal property of little value, if any.

2. That the defendant is indebted to the plaintiff by virtue of a bank stock assessment in the sum of $9,060, a transcript of which judgment appears of record.

3. The plaintiff claims that the defendant is further indebted in the sum of $17,097 on account of a guarantee of the assets of the First National Bank of Tarboro.

4. The defendant is indebted to the plaintiff by virtue of a bank stock assessment in the sum of $14,300 on behalf of the Pinetops Banking Company.

5. That at the April Term, 1934, of the Edgecombe Superior Court, an order was entered authorizing the liquidating agent to accept an offer of Henry Clark Bridgers for the purchase of the judgment in favor of Pinetops Banking Company, said Bridgers being a stockholder and president of the defendant.

6. That the plaintiff caused execution to issue on its judgment and the property was sold on 9 April, 1934, and the plaintiff became the highest bidder for said property for the sum of $5,000, but said sale has not been closed.

7. That at an execution sale held 4 June, 1934, under an execution issued on a judgment in favor of the Pinetops Banking Company, Henry Clark Bridgers became the last and highest bidder for substantially all of the property of defendant for the sum of $14,000, and the said Henry Clark Bridgers is president of the defendant company.

8. That the defendant is engaged entirely in the business of owning and renting real estate and owned certain shares of stock which are of no substantial value, and for lack of funds has permitted the major portion of its property to be sold for taxes; that said corporation is unable to meet its obligations and is insolvent or in imminent danger of insolvency.

9. That the defendant is delinquent in payment of county and municipal taxes for two years, and now owes past-due taxes in the sum of approximately $2,000.

Upon the foregoing facts the trial judge appointed a receiver for the defendant corporation and restrained the sale of the property under execution on 4 June, 1934.

From the foregoing judgment the defendant appealed.

Gilliam & Bond for plaintiff.
Henry C. Bourne for defendant.

PER CURIAM. There was sufficient evidence to warrant the findings of fact made by the trial judge and such findings support the judgment rendered.

Affirmed.

L. R. MOFFITT v. THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

(Filed 10 October, 1934.)

APPEAL by plaintiff from *Schenck, J.*, at March Term, 1934, of BUNCOMBE.

Civil action to recover on certificate of group insurance, tried upon the following issue:

"1. Was the employment of the plaintiff L. R. Moffitt by American Enka Corporation in effect on 25 February, 1932, as alleged? Answer: 'No.'"

Plaintiff testified that he worked for the defendant until 4 February, 1932. He seeks to recover for an injury sustained on 25 February, 1932.

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

Cecil C. Jackson for plaintiff.

R. R. Williams and Bourne, Parker, Bernard & DuBose for defendant.

PER CURIAM. The certificate in suit automatically terminated, for present purposes, when plaintiff ceased to be an employee of the defendant. This was the theory upon which the case was tried. The issue is sufficient in form to settle the matter. The verdict and judgment will be upheld. *Boozer v. Assurance Society*, 206 N. C., 848; *Perry v. Assurance Society*, 206 N. C., 122, 172 S. E., 527; *Deese v. Ins. Co.*, 204 N. C., 214, 167 S. E., 797.

No error.

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

MINNIE MAUDE CAMPBELL v. W. H. CAMPBELL.

(Filed 10 October, 1934.)

Divorce A d—

Either party may bring an action for absolute divorce on the ground of two-years separation, C. S., 1659 (a), and the jury's finding that defendant did not abandon plaintiff without cause does not preclude judgment in plaintiff's favor.

APPEAL by plaintiff from *Parker, J.*, at March Term, 1934, of LEE.

Reversed.

Gavin & Jackson for appellant.
No counsel for appellee.

PER CURIAM. This was an action for divorce, instituted under chapter 163, Public Laws 1933, C. S., 1659 (a). The issue of residence, marriage, and two-years separation were answered in favor of the plaintiff, but under the issue numbered three the jury found that the defendant did not abandon the plaintiff without cause. Upon this verdict the plaintiff tendered judgment for absolute divorce, which the court declined to sign, and entered judgment denying the plaintiff a divorce.

This case is governed by *Long v. Long,* 206 N. C., 706. It should be stated, however, that the case at bar was decided before the decision in *Long's case, supra,* was rendered.

Upon the verdict the plaintiff was entitled to a decree of absolute divorce, and the case is remanded to the court below to the end that such decree may be entered.

Reversed.

WILKINS-RICKS COMPANY ET AL. v. J. D. G. DALRYMPLE.

(Filed 31 October, 1934.)

APPEAL by defendant from *Barnhill, J.,* at July Term, 1934, of LEE.

Civil action to recover balance due on promissory note, given for past-due account—goods sold and delivered—and tried upon the following issues:

"1. Did the defendant, J. D. G. Dalrymple, on or about 8 April, 1929, execute and deliver to the Wilkins-Ricks Company his promissory sealed note in the sum of $931.80, as alleged? Answer: 'Yes.'

"2. If so, what amount, if any, is the plaintiff entitled to recover thereon? Answer: '$738.80, with interest (from) 1 October, 1929.' "

From judgment on the verdict defendant appeals, assigning errors.

D. B. Teague and E. L. Gavin for plaintiff.
H. M. Jackson and K. R. Hoyle for defendant.

PER CURIAM. No reversible error in the trial of the cause has been made to appear; hence, the verdict and judgment will be upheld. Evidence of the account was competent, not only in corroboration of plaintiff's testimony to which it was limited, but also as tending to show the consideration for the note. *Bowman v. Blankenship,* 165 N. C., 519, 81 S. E., 746.

No error.

ADDIE SUMMEREL v. THE SOVEREIGN CAMP OF THE WOODMEN OF THE WORLD, OMAHA, NEBRASKA.

(Filed 21 November, 1934.)

APPEAL by plaintiff from *Cowper, Special Judge,* at May Term, 1934, of PITT. Affirmed.

This is an action to recover on a policy of insurance issued by the defendant in which the plaintiff is named as beneficiary.

At the close of all the evidence the court, being of opinion that the policy sued on had lapsed for nonpayment of premiums prior to the death of the insured, allowed defendant's motion for judgment as of nonsuit.

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

S. J. Everett for plaintiff.
Albion Dunn for defendant.

PER CURIAM. It is shown by all the evidence at the trial of this action that the insured died on 19 January, 1933, and that he had paid no premium on the policy sued on since April, 1930. The contention of the plaintiff that the policy was kept in force by its cash or loan value until the death of the insured was not sustained by the evidence.

There is no error in the judgment dismissing the action as of nonsuit. Affirmed.

JOHN DAVENPORT AND MILLARD DAVENPORT v. PENNSYLVANIA FIRE INSURANCE COMPANY.

(Filed 21 November, 1934.)

APPEAL by plaintiffs from *Frizzelle, J.,* at February Term, 1934, of LENOIR. Affirmed.

This action was brought by plaintiffs against defendant to recover $1,750, with interest from 14 April, 1931. The action was founded on an alleged parol contract for insurance, made by an alleged agent of defendant's company, for the destruction by fire of a building on 14 April, 1931, on which plaintiffs allege they had the parol contract for insurance.

Rouse & Rouse for plaintiffs.
Smith, Wharton & Hudgins and R. A. Whitaker for defendant.

PER CURIAM. At the close of plaintiffs' evidence and at the close of all the evidence, the defendant made motions for judgment as in case of nonsuit. C. S., 567. The court below overruled the motion of defendant, at the close of plaintiffs' evidence, and sustained the motion at the close of all the evidence. We think, on the entire record, that the court below was correct.

In *Lea v. Insurance Co.*, 168 N. C., 478 (482), quoting many authorities, it is said: "Is a parol contract of insurance or a memorandum of the contract, called a binder, valid, although a standard form of policy has been adopted by statute?

"In the absence of a statutory prohibition, the great weight of authority is in favor of the validity of a parol contract of insurance."

In *Manufacturing Co. v. Assurance Co.*, 161 N. C., 88 (96), it is said: "It can make no difference in the result what was intended by either party, nor can the contract be changed or modified by what one of the parties may now say he intended. It all depends upon what was said and done at the time. If no contract was made then, it cannot be made now *post facto*. 'A contract, express or implied, executed or executory, results from the concurrence of minds of two or more persons, and its legal consequences are not dependent upon the impressions or understandings of one alone of the parties to it. It is not what either thinks, but what both agree.' *Prince v. McRae*, 84 N. C., 674, citing *Brunhild v. Freeman*, 77 N. C., 128, and *Pendleton v. Jones*, 82 N. C., 249."

The foregoing is well-settled law in his jurisdiction. We have heard the arguments of counsel and read carefully the record and briefs of the parties to the controversy, but on the whole record we do not think a binding contract was made between the litigants to this controversy.

The judgment of the court below is

Affirmed.

FIRST NATIONAL BANK AND TRUST COMPANY, TRUSTEE AND RECEIVER OF CENTRAL SECURITIES COMPANY, v. GURNEY P. HOOD, COMMISSIONER OF BANKS, EX REL. CENTRAL BANK AND TRUST COMPANY.

(Filed 21 November, 1934.)

Appeal and Error J d—

Where the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment will be affirmed without becoming a precedent.

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

WILSON *v.* WHITAKER.

APPEAL by plaintiff from *Schenck, J.*, at May Term, 1934, of BUNCOMBE. Affirmed.

This is a proceeding to recover certain bonds now in the possession of the defendant Commissioner of Banks, who holds the same as assets of the Central Bank and Trust Company of Asheville, N. C., an insolvent banking corporation.

By consent a trial of the issues of fact by a jury was waived. At the request of the parties, the judge heard the evidence and found the facts, and on the facts found by him, and set out in the judgment, it was adjudged that the defendant Commissioner of Banks is the owner and entitled to the possession of the bonds described in the petition.

The plaintiff appealed from the judgment to the Supreme Court, assigning errors in the admission of evidence, and in the findings of fact.

Alfred S. Barnard for petitioner.
Johnson, Rollins & Uzzell for respondent.

PER CURIAM. The Court being evenly divided in opinion, *Justice Schenck* not sitting, the judgment of the Superior Court is affirmed, and stands as the decision in this proceeding, without becoming a precedent. *Nebel v. Nebel*, 201 N. C., 840, 161 S. E., 223.

Affirmed.

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

JOE N. WILSON v. F. L. WHITAKER ET AL.

(Filed 12 December, 1934.)

APPEAL by defendants from *Pless, J.*, at June Term, 1934, of BUNCOMBE.

Civil action to set aside deeds alleged to have been executed in fraud of plaintiff's rights.

It appears that on 24 August, 1927, F. L. Whitaker and his brother, S. R. Whitaker, executed their joint promissory note to the plaintiff in the sum of $1,262.50. Thereafter, on 9 April, 1929, suit was instituted to recover on said note, and judgment duly rendered therein for the plaintiff at the December Term, 1929, of Buncombe Superior Court. During the pendency of this action, *i.e.*, between April and December, 1929, the two brothers, defendants herein, conveyed all of their real

estate, without consideration, to their sons, and a nephew, for the purpose, it is alleged, of defeating any recovery which the plaintiff might obtain in said action.

The present suit is to set aside these conveyances as having been made in fraud of creditors and with intent to hinder and delay the plaintiff in the collection of his judgment.

Upon denial of plaintiff's right to the relief demanded, and issues joined, there was verdict and judgment for the plaintiff in the general county court of Buncombe County, from which an appeal was duly taken, on matters of law, to the Superior Court of said county. On consideration of the questions presented by the appeal, the judgment of the county court was affirmed.

Defendants appeal, assigning errors.

Edward H. McMahan, Vono L. Gudger, and Mark W. Brown for plaintiff.

J. Scroop Styles and James S. Styles for defendants.

PER CURIAM, after stating the case: The case was tried without error under the principles announced in *Aman v. Walker,* 165 N. C., 224, 81 S. E., 162.

Affirmed.

SHERRER JACKSON, BY HIS NEXT FRIEND, BERRY CARTER, v. WINSTON-SALEM SOUTHBOUND RAILWAY COMPANY.

(Filed 1 January, 1935.)

APPEAL by defendant from *Alley, J.,* at June Term, 1934, of FORSYTH.

Civil action to recover damages for personal injuries alleged to have been caused by the negligence of the defendant when plaintiff was struck by defendant's train at a street crossing in the city of Winston-Salem.

Demurrer interposed on the ground that the complaint does not state facts sufficient to constitute a cause of action. Demurrer overruled; exception; appeal.

No counsel appearing for plaintiff.

Craige & Craige and Parrish & Deal for defendant.

PER CURIAM. The brief of appellant abounds in fine distinctions and close differentiations, but a careful perusal of the complaint leaves us with the impression that the demurrer was properly overruled.

Affirmed.

STATE v. MILLARD WILSON.

(Filed 28 January, 1935.)

APPEAL by defendant from *Sinclair, J.*, at August Special Term, 1934, of DURHAM. No error.

This is a criminal action in which the defendant was convicted of an assault with a deadly weapon, to wit: an automobile.

From judgment that he be confined in the common jail of Durham County for a term of four months and assigned to work on the public roads, the defendant appealed to the Supreme Court.

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

A. W. Crawley and J. Grover Lee for defendant.

PER CURIAM. The evidence at the trial of this action, tending to show that the defendant wilfully and unlawfully drove his automobile against the automobile in which the prosecutor was riding, and thereby injured him, was properly submitted to the jury, under a charge which is free from error.

The defendant's assignments of error on his appeal to this Court cannot be sustained. The judgment is affirmed.

No error.

MRS. CATHERINE ROGERS v. AMERICAN TOBACCO COMPANY AND V. B. LOUGEE, JR.

(Filed 28 January, 1935.)

APPEAL by defendants from *Moore, Special Judge*, at March Term, 1934, of DURHAM. No error in appeal of the defendant American Tobacco Company; reversed in appeal of the defendant V. B. Lougee, Jr.

This is an action to recover damages for a personal injury suffered by the plaintiff while she was at work as an employee of the defendant American Tobacco Company, under the supervision of its superintendent, the defendant V. B. Lougee, Jr.

Issues submitted to the jury involving the negligence of the defendants as the proximate cause of plaintiff's injury, and the contributory negligence of the plaintiff, were answered in accordance with the contentions of the plaintiff. Her damages were assessed by the jury at $1,500.

From judgment that plaintiff recover of the defendants the sum of $1,500, the defendants appealed to the Supreme Court, assigning as error the refusal of the trial court to dismiss the action by judgment as of nonsuit.

Brawley & Gantt for plaintiff.
Fuller, Reade & Fuller for defendants.

PER CURIAM. There is no evidence in the record tending to show a breach by the defendant V. B. Lougee, Jr., of any duty which he owed to the plaintiff as superintendent of his codefendant, American Tobacco Company. For that reason there was error in the refusal of the trial court to allow the motion of said defendant, at the close of all the evidence, that the action be dismissed as to him. The judgment against the defendant V. B. Lougee, Jr., is reversed.

There was evidence at the trial tending to show that the plaintiff was injured by the negligence of the defendant American Tobacco Company. See *Ross v. Cotton Mills,* 140 N. C., 115, 52 S. E., 121. This evidence, together with the conflicting evidence with respect to the contributory negligence of the plaintiff, was properly submitted to the jury. There was no error in the refusal of the trial court to allow the motion of the defendant American Tobacco Company at the close of all the evidence that the action be dismissed as to said defendant. The judgment against the defendant American Tobacco Company is affirmed.

Reversed in appeal of defendant V. B. Lougee, Jr.

No error in appeal of defendant American Tobacco Company.

DURHAM AND SOUTHERN RAILWAY COMPANY v. E. G. BELVIN, SHERIFF OF DURHAM COUNTY, AND HUNTER JONES.

(Filed 28 January, 1935.)

APPEAL by defendant Hunter Jones from *Cranmer, J.,* at Chambers, July Criminal Term, 1934, of DURHAM. Affirmed.

The findings of fact and judgment in this action are as follows: "This cause coming on for hearing before the undersigned judge presiding in the Tenth Judicial District, upon an order to show cause why the restraining order heretofore issued by his Honor, N. A. Sinclair, judge then presiding in the Tenth Judicial District, returnable before his Honor, W. A. Devin, resident judge of the Tenth Judicial District,

and by agreement transferred and heard before the undersigned, should not be continued until the hearing, and being heard upon the following evidence, to wit: the complaint of the plaintiff treated as an affidavit, affidavits of T. B. Smith and Jones Fuller, and the answer and amended answer of Hunter Jones, all of which written evidence is attached to these findings and made a part of the record in the case, and upon which evidence the court finds the following facts and concludes as a matter of law thereon, to wit: Findings of Fact—(1) In November, 1917, Oliver Pierce and wife, and Lauretta Sowell, pursuant to an agreement between S. P. Mason and the plaintiff, conveyed to S. P. Mason in fee an undivided interest in a lot in Durham Township, containing 7¾ acres by deed recorded in Book 53 of deeds, on page 6, registry of Durham County. The deed to said Mason contained full covenants and warranty of title. No mention was made therein of any trust. The deed was delivered to Mason pursuant to an agreement between him and plaintiff which was entered into prior to the execution of said deed whereby Mason agreed to hold the land thereby conveyed solely as trustee for the plaintiff. Pursuant to said agreement, and subsequent thereto, plaintiff paid the entire purchase price of $950.00, but for its convenience and by its direction, and pursuant to the aforesaid agreement between it and said Mason, plaintiff had the deed made to said Mason. There is no claim of fraud or mistake in the making of the deed to said Mason.

"(2) On 27 August, 1918, as further evidence of the aforesaid agreement between him and plaintiff, said Mason, under seal, covenanted or contracted to convey to the Durham and Southern Railway Company said lot upon demand of said railway company, stating that the railway company had paid the entire purchase price for said interest, and that he had no interest therein except to hold the legal title. This contract to convey was delivered to the railway company, but was never registered. That said written instrument was merely confirmatory of the aforesaid agreement between Mason and plaintiff entered into before the deed from Pierce and wife and Lauretta Sowell to said Mason was executed and before the purchase price was paid by plaintiff. Plaintiff paid Mason $47.50 commission for buying the interest in said land for it, the said Mason at the time being a real estate agent in Durham, N. C.

"(3) That thereafter said Mason and wife became indebted to the estate of J. W. McFarland, and on 18 January, 1926, a judgment was obtained against them and docketed in Judgment Docket 9, page 120, said judgment being for $410.00, and interest thereon from 9 January, 1925, and for costs.

"(4) That on 8 June, 1927, Mason and wife conveyed the lands in controversy to the Durham and Southern Railway Company by deed recorded in Deed Book 90, page 597, registry of Durham County. That said deed was made by Mason and wife in fee, and made no mention whatever or reference to any trust relation existing theretofore between him and said railway company in connection with the land then being deeded.

"(5) That later, to wit, on 7 December, 1928, said Durham and Southern Railway Company instituted a special proceeding in the Superior Court of Durham County for the purpose of having the land in which it owned an undivided interest partitioned, and on 24 April, 1929, the commissioners appointed made their report, and a map showing the allotment was filed in Plat Book 9, page 30.

"(6) That on 21 March, 1934, Susie W. McFarland, administratrix of J. W. McFarland, assigned the judgment above referred to against said Mason and wife to E. E. Thompson, trustee, who on the same date, according to a notation appearing on said judgment docket, transferred and assigned it to the defendant Hunter Jones, who caused an execution to be issued thereon bearing date of 30 May, 1934, which was delivered to the defendant E. G. Belvin, sheriff, with directions to levy upon the land of the plaintiff to satisfy said judgment of the said Susie W. McFarland, administratrix, against the said S. P. Mason and wife.

"(7) That the defendant E. G. Belvin, sheriff of Durham County, pursuant to the execution directed to him to enforce the collection of the judgment above referred to, was preparing to levy upon and advertise and sell the land conveyed to plaintiff by deed of S. P. Mason and wife.

"(8) That on 25 June, 1934, plaintiff railroad company temporarily restrained the sheriff and his agents from selling or levying upon the land in controversy, and instituted this action for a perpetual injunction.

"It is now therefore considered, adjudged, and decreed that plaintiff is entitled to the relief prayed for in its complaint, and therefore the defendant E. G. Belvin, sheriff of Durham County, his deputies, agents, and all other persons, including the defendant Hunter Jones, be and they are hereby restrained and enjoined from advertising for sale or selling any land or other property of the plaintiff pursuant to said writ of execution or otherwise, and particularly the land of the plaintiff conveyed to it by S. P. Mason and wife on 8 June, 1927, the deed to which is recorded in the office of the register of deeds of Durham County, in Deed Book 90, at page 597. It is further ordered that the defendant Hunter Jones pay the costs of this action, to be taxed by the clerk. E. H. Cranmer, Judge Presiding, Tenth Judicial District."

To the foregoing judgment the defendant Hunter Jones, both as to the findings of fact and conclusions of law, excepted, assigned error, and appealed to the Supreme Court.

Fuller, Reade & Fuller for plaintiff.
R. O. Everett for defendant.

PER CURIAM. The judgment of the court below is affirmed on authority of *Crossett v. McQueen*, 205 N. C., 48.

Affirmed.

VESTA KING v. THACKERS, INC.

(Filed 28 January, 1935.)

APPEAL by plaintiff from *Devin, J.*, at July Special Term, 1934, of MECKLENBURG. Affirmed.

This is an action to recover damages for personal injuries suffered by the plaintiff and caused by the negligence of the defendant, as alleged in the complaint.

In its answer the defendant denies the allegations of negligence in the complaint, and in further defense of plaintiff's recovery pleads her contributory negligence.

At the close of the evidence for the plaintiff, on motion of the defendant, the action was dismissed by judgment as of nonsuit. The plaintiff appealed to the Supreme Court.

J. Louis Carter for plaintiff.
Ralph V. Kidd for defendant.

PER CURIAM. On 10 May, 1932, the plaintiff was in a restaurant in the city of Charlotte, which was owned and operated by the defendant. She left the dining-room, where she had met a friend for dinner, and started to the rest room to wash her hands. While she was walking through the kitchen on her way to the rest room she slipped and fell, thereby injuring her arm. She testified that she was walking carefully. She said: "I noticed something on the floor. It was as slick as it could be. My feet flew from under me and I fell. I could not get up. Someone picked me up. Corn meal was on the floor—in heavy and light places. I was completely covered with corn meal when they picked me up. I noticed it at first, but did not notice what it was, but the floor was slick. Corn meal makes a floor slick."

There was no evidence tending to show why the corn meal was on the floor in the kitchen, or how long it had been there, but conceding that there was evidence tending to show negligence on the part of the defendant, as alleged in the complaint (*Bowden v. Kress*, 198 N. C., 559, 152 S. E., 625, and *Parker v. Tea Co.*, 201 N. C., 691, 161 S. E., 209), we are of opinion that all the evidence shows that the plaintiff by her own negligence contributed to her injuries. *Clark v. Drug Co.*, 204 N. C., 628, 169 S. E., 217; *Davis v. Jeffreys*, 197 N. C., 712, 150 S. E., 488. For this reason there is no error in the judgment dismissing the action as of nonsuit.

Affirmed.

METROPOLITAN LIFE INSURANCE COMPANY ET AL. v. A. P. LEACH ET AL.

(Filed 28 January, 1935.)

APPEAL by plaintiffs from *Frizzelle, J.*, at February Term, 1934, of LENOIR.

Civil action in ejectment and to remove cloud from title.

Upon denial of plaintiffs' title, and counterclaim for rents, there was verdict and judgment for defendants, from which plaintiffs appeal, assigning errors.

Winston & Tucker and Sutton & Green for plaintiffs.
Shaw & Jones and J. Faison Thomson for defendants.

PER CURIAM. A searching investigation of the record fails to disclose any predicable assignment of error for reversal of the judgment. Hence, the result will not be disturbed. The jury's findings would seem to be determinative of the case.

No error.

PEARL J. HARTSELL v. C. G. HARRIS.

(Filed 28 January, 1935.)

APPEAL by plaintiff from *Stack, J.*, at August Term, 1934, of CABARRUS.

Civil action to recover damages for the death of plaintiff's intestate, alleged to have been caused by the neglect or wrongful act of the defendant.

The facts are these:

On the morning of 27 January, 1934, the defendant and Harry Mowrer, who were fellow employees at a filling station, left Concord about 1:30 a.m., in company with a Miss Hahn and plaintiff's intestate. They were riding in the defendant's Plymouth coupe, all on the same seat, the defendant driving, Miss Hahn sitting next to him, Mowrer next, and plaintiff's intestate in Mowrer's lap. At a service station two miles from Concord, "We had some sandwiches and some drinks. . . . We were out on a pleasure trip together."

At China Grove the defendant ran his car into the rear of a parked truck, severely injuring Mowrer and killing plaintiff's intestate. Plaintiff's intestate was 23 or 24 years old. She was employed in a hosiery mill, earning $15 per week at the time of her death.

The jury returned the following verdict:

"1. Was the plaintiff's intestate injured and killed by the negligence of the defendant? Answer: 'Yes.'

"2. If so, what amount, if anything, is the plaintiff entitled to recover? Answer: '$1,000.'"

Judgment on the verdict for plaintiff, from which an appeal was taken by the plaintiff, alleging inadequacy of amount awarded.

Hartsell & Hartsell for plaintiff.

B. W. Blackwelder for defendant.

PER CURIAM. A careful perusal of the record leaves us with the impression that no reversible error has been made to appear. *Rierson v. Iron Co.*, 184 N. C., 363, 114 S. E., 467.

The rule for the admeasurement of damages in cases of wrongful death has been stated in a number of recent decisions, notably *Carpenter v. Power Co.*, 191 N. C., 130, 131 S. E., 400, and *Purnell v. R. R.*, 190 N. C., 573, 130 S. E., 313.

The result will not be disturbed.

No error.

DOLIAN HARRIS, TRUSTEE, v. W. S. LOCKHART, TRUSTEE, ET AL.

(Filed 28 January, 1935.)

APPEAL by plaintiff from *Cranmer, J.*, at July Term, 1934, of DURHAM. Affirmed.

This is an action to have certain deeds of trust executed to certain of the defendants by certain persons who are the beneficiaries of the trusts

imposed upon the property, real and personal, held by the plaintiff, declared invalid on the ground that the grantors in said deeds of trust were without power to create liens upon the property held by the plaintiffs, by said deeds of trust.

Demurrers to the complaint filed by certain of the defendants on the ground that the facts stated in the complaint are not sufficient to constitute a cause of action on which the plaintiff is entitled to relief were sustained, and the plaintiff appealed to the Supreme Court.

Robert Moseley and Brawley & Gantt for plaintiff.

Bryant & Jones, W. H. Hoffer, Walter S. Lockhart, Allston Stubbs, and Sumter Brawley, Jr., for defendants.

PER CURIAM. In the absence of any allegation in the complaint that the execution of the deeds of trust referred to therein was procured by fraud, or of any allegation of other facts upon which the plaintiff would be entitled to equitable relief, the facts stated in the complaint are not sufficient to constitute a cause of action. There are no allegations in the complaint on which the plaintiff is entitled to relief in this action. In each of the deeds of trust referred to in the complaint the grantors convey only their undivided interest in the property described therein. The legal effect of the deeds of trust cannot be determined in an action to have the deeds of trust declared invalid.

For this reason the judgment dismissing the action is

Affirmed.

STATE v. SAM BLANTON.

(Filed 27 February, 1935.)

APPEAL by defendant from *Clement, J.*, at April Term, 1934, of GUILFORD.

Criminal prosecution, tried upon a warrant charging the defendant with operating a lottery in violation of C. S., 4428, as amended by chapter 434, Public Laws 1933.

From a verdict of guilty and judgment of six months on the roads the defendant appeals, assigning errors.

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

C. R. McIver, Jr., W. F. Renfrow, and A. Stacey Gifford for defendant.

PER CURIAM. A careful perusal of the record leaves us with the impression that it is free from reversible error. The questions presented have apparently been decided in a number of cases. The verdict and judgment will be upheld.

No error.

STATE v. HENRY HENDRICKS.

(Filed 27 February, 1935.)

1. Criminal Law G r—

Evidence objected to in this case *held* competent, upon cross-examination, to impeach testimony of defendant.

2. Criminal Law I h: L d—

Where remarks of solicitor upon evidence are not in the record, exception thereto cannot be considered on appeal.

3. Criminal Law I e—

Defendant desiring evidence to be restricted to particular purpose should make request to that effect. Rule 21.

4. Criminal Law I g—

Defendant desiring more full or detailed instructions as to any particular phase of evidence or law should request special instructions.

5. Criminal Law L d—

Attention is called to the fact that defendant's brief in this case does not comply with Rule 28.

APPEAL from *McElroy, J.*, at August Term, 1934, of FORSYTH. No error.

John C. Wallace and Harvey Lupton for appellant.

Attorney-General Brummitt and Assistants Attorneys-General Seawell and Bruton for the State.

PER CURIAM. The defendant appeals from a conviction and judgment upon a three-count bill charging (1) the unlawful and wilful breaking and entering into a railroad car containing merchandise and chattels with intent to steal such merchandise and chattels (C. S., 4237), (2) the larceny of a case of cigarettes of the value of $61.00, the chattels of the Southern Railway Company, and (3) the unlawful and felonious receiving said goods and chattels knowing them to have been stolen.

The evidence which the defendant makes the basis for exceptive assignments of error we think was clearly competent, upon cross-examina-

tion, to impeach the testimony of the defendant. We cannot here consider what the solicitor may have said relative to this evidence since his statements are not in the record. If the defendant desired to have the evidence restricted to a particular purpose he should have made request to that effect. Rule 21 of this Court.

The defendant complains that the charge lacks fullness and detail. We have read the charge carefully and are of the opinion that it does "state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon." (C. S., 564.) If the defendant desired more full or detailed instruction as to any particular phase of the evidence or the law, he should have requested special instructions. *S. v. Wade,* 169 N. C., 306.

We find no error on the record.

Attention is called to the fact that the defendant's brief does not comply with Rule 28 of this Court. See *S. v. Newton, ante,* 323, and *S. v. Bryant,* 178 N. C., 702.

No error.

CARRIE BLACKWELL v. MORRIS S. HAWKINS ET AL.

(Filed 27 February, 1935.)

APPEAL by plaintiff from *Moore, Special Judge,* at November Special Term, 1934, of MARTIN.

Civil action to recover damages for an alleged negligent injury.

The facts are these: Plaintiff, a guest in the automobile of John Little, was returning from a dance in Plymouth to her home in Williamston about the hour of 1:30 a.m., 27 January, 1934. The night was dark, cloudy, and foggy. The automobile was being operated at a speed of 20 or 25 miles per hour. A freight train operated by the defendant receivers, on approaching the intersecting tracks of the Atlantic Coast Line Railroad, stopped momentarily, as it was required to do before passing over the intersecting line, thus blocking the highway upon which plaintiff and her companion were traveling. The automobile ran into the freight car standing astride the road, and plaintiff was injured. The driver did not see the train until within about five feet of it.

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

H. L. Swain for plaintiff.

MacLean & Rodman for defendants.

PER CURIAM. Affirmed on authority of the principles announced in *Hinnant v. R. R.*, 202 N. C., 489, 163 S. E., 555.

The case of *Dickey v. R. R.*, 196 N. C., 726, 147 S. E., 15, is distinguishable in that the defendant's train was there blocking the street in violation of a town ordinance.

Affirmed.

MRS. ETHEL MORROW, WIDOW OF A. G. MORROW, DECEASED EMPLOYEE, v. NORTH CAROLINA EXPLORATION COMPANY, EMPLOYER, AND THE TRAVELLERS INSURANCE COMPANY.

(Filed 27 February, 1935.)

APPEAL by plaintiff from *Pless, J.*, at Fall Term, 1934, of SWAIN. Affirmed.

This was an appeal by the plaintiff from an award in this proceeding made by the North Carolina Industrial Commission in denying compensation to the plaintiff under the provisions of the North Carolina Workmen's Compensation Act for the death of her husband, A. G. Morrow, who was an employee of the defendant North Carolina Exploration Company at the date of his death.

At the hearing of the proceeding, the Commission found from all the evidence that the death of plaintiff's husband did not result from an accident which arose out of and in the course of his employment, but did result from disease, which had no relation to his employment. On this finding of fact, compensation was denied.

On plaintiff's appeal from the award of the Commission to the judge of the Superior Court, the award was affirmed. From the judgment affirming the award the plaintiff appealed to the Supreme Court.

J. N. Moody for plaintiff.

Edwards & Leatherwood for defendants.

PER CURIAM. There was no evidence at the hearing of this proceeding by the North Carolina Industrial Commission tending to show that the death of plaintiff's husband, A. G. Morrow, was the result of an injury by accident, or was the result of an occupational disease. For this reason, the award of the Commission denying compensation to the plaintiff in this proceeding was properly affirmed by the judge of the Superior Court. The judgment is

Affirmed.

MRS. ANNIE ANTHONY BEACH v. MRS. G. C. GLADSTONE, EXECUTRIX.

(Filed 27 February, 1935.)

Wills F h—

Judgment that legacy did not lapse by reason of fact that legatee predeceased testator is affirmed, C. S., 4166, it appearing that legatee would have been distributee of testator had she survived him.

APPEAL by defendant from *Devin, J.*, at September Term, 1934, of MARTIN. Affirmed.

F. L. Gladstone, of Martin County, North Carolina, died on 9 December, 1933, leaving a last will and testament, which has been duly probated. The material parts to be considered are: "Item 1. I give to my sister, L. F. Anthony, five thousand dollars in cash, or surety papers. Item 2. I give and bequest to my wife, G. C. Gladstone, the balance of my estate in real or personal of every kind and wherever located or found. . . ."

L. F. Anthony, the sister of the testator, to whom the legacy of five thousand dollars was bequeathed by Item 1, predeceased him, having died on 22 January, 1929. She left surviving her two children and three grandchildren by a deceased daughter, who died 2 April, 1926. Mrs. Annie Anthony Beach, one of the children of Mrs. L. F. Anthony, made demand upon the executrix for the payment to her of a one-third share in the legacy bequeathed to her mother, L. F. Anthony, by F. L. Gladstone in Item 1 of his said will, claiming that said legacy to her mother did not lapse by reason of the death of her mother in the lifetime of the testator, and that she was entitled to receive her share thereof. The executrix refused the demand, claiming that the legacy lapsed and passed to her, the widow of F. L. Gladstone, under Item 2 of his said will. Thereafter, Mrs. Beach instituted this action. Upon the hearing of the cause, a jury trial was waived and it was agreed that the court below should find the facts and render judgment thereon.

The court below rendered the following judgment: "This cause coming on to be heard, and being heard (the parties having waived submission of the cause to the jury and agreed that the court should find the facts and determine the questions presented), and the court finding the facts to be severally set out in the complaint of the plaintiff, and by reference thereto incorporates the several facts therein set out and alleged in this judgment, and it appearing to the court that the legatee, L. F. Anthony, she surviving, would have been among the heirs at law or distributees of F. L. Gladstone had he died intestate, and the court being of the opinion that said legacy did not lapse by reason of the prior death of L. F. Anthony, legatee, and that the plaintiff, Mrs. Annie Anthony Beach, is entitled to recover one-third of the legacy of $5,000,

that Gladstone Anthony is entitled to one-third thereof, and J. B. Harrington, Henry Harrington, Aurelia Harrington, Lula Harrington, and Shirley Harrington, children of Mary Charrity Harrington, deceased daughter of the legatee, L. F. Anthony, are entitled to a per capita division of one-third thereof, it is ordered, adjudged, and decreed that the plaintiff Mrs. Annie Anthony Beach recover of defendant Mrs. G. C. Gladstone, executrix, the sum of $1,666.66, together with the costs of this action. W. A. Devin, Judge Presiding."

The defendant excepted and assigned error as follows: "That the signing of judgment in favor of plaintiff was error in that the devisee, L. F. Anthony, named in section 1 of the will of the late F. L. Gladstone, predeceased him several years. Defendant says that said legacy lapsed by reason of the prior death of the devisee, L. F. Anthony, and that Mrs. G. C. Gladstone, under the construction of the will, is the owner of all the property that the late F. L. Gladstone died seized and possessed of."

Jos. W. Bailey for plaintiff.

Wheeler Martin, Albion Dunn, and B. A. Critcher for defendant.

PER CURIAM. The defendant in her brief says: "We have been unable to find that this Court has heretofore passed upon the question involved here, and it would seem that it is of first impression. We respectfully submit, however, that, for the reasons assigned, the learned judge who heard the case below committed error in adjudging that the bequest did not lapse, and that judgment should have been entered, adjudging that the bequest passed under the residuary clause in the will, and therefore we insist that the judge below should be reversed."

The Court construed C. S., 4166, in *Farnell v. Dongan, ante,* 611, opinion filed 23 January, 1935. It is there said: "The statute is not ambiguous. The intention of the General Assembly in its enactment is expressed in language which leaves no room for judicial construction. The distinction found in the common law between real and personal property, for purposes of devolution, is recognized and preserved. This appears from the use of the words 'devise' and 'legacy,' 'heir at law' and 'distributee.' Whether this distinction should be abandoned in the law of this State, as having no sound basis under modern social and economic conditions, is a matter for the General Assembly and not this Court to determine."

In construing C. S., 4166, we do not think it should be construed with C. S., 4168. Neither section is ambiguous and they are not interrelated.

The judgment of the court below is

Affirmed.

APPENDIX

STATE v. LONNIE M. UPCHURCH.

ORDER.

In the case of *S. v. Lonnie M. Upchurch,* from WAKE County, the defendant's application for *certiorari* and the State's motion to docket and dismiss are both disallowed on authority of *Smith v. Smith,* 199 N. C., 463, and cases there cited.

MICHAEL SCHENCK, J., *For the Court.*

DISPOSITION OF APPEALS FROM THE SUPREME COURT OF NORTH CAROLINA TO THE SUPREME COURT OF THE UNITED STATES

In re Estate of Reid, 206 N. C., 102, reversed.

S. v. Whitfield, 206 N. C., 696, petition for *certiorari* denied.

APPENDIX.

OPINIONS OF THE JUSTICES IN THE MATTER OF WHETHER THE ELECTION HELD ON TUESDAY AFTER THE FIRST MONDAY IN NOVEMBER, 1933, WAS THE NEXT GENERAL ELECTION FOLLOWING THE ADJOURNMENT OF THE 1933 SESSION OF THE GENERAL ASSEMBLY.

On 15 September, 1934, the following letter was received from His Excellency, J. C. B. Ehringhaus, Governor of the State of North Carolina:

SEPTEMBER 15, 1934.

HON. W. P. STACY,
HON. HERIOT CLARKSON,
HON. GEORGE W. CONNOR,
HON. W. J. BROGDEN,
HON. MICHAEL SCHENCK,

GENTLEMEN:—I am directing this letter to each of you individually in order to present what I conceive to be a most important question.

The present State Constitution provides, Article XIII, section 2, that any amendment to the Constitution must be submitted "at the next general election to the qualified voters of the whole State, in such manner as may be prescribed by law." Chapter 403 of the Public Laws of 1933 called a general election to be held in the State on Tuesday after the first Monday in November, 1933, to vote on the repeal of the Eighteenth Amendment to the United States Constitution. The question has arisen as to whether the general election to be held in November of this year is the "next" general election after the enactment of the bill by the General Assembly submitting the Revised Constitution to a popular vote.

Since the holding of this election involves a suggested change in the fundamental law of the State, I am impressed with the idea that the matter is of too great consequence to be controlled by any interpretation of the Executive branch of the Government. Such action might bring into question the validity of an election throughout the State of North Carolina and the adoption of important Constitutional revisions.

So impressed, I am writing this letter to you as the Chief Justice and Associate Justices of the Supreme Court, with the request that, if it be in keeping with the proprieties and the functions of the Court, you give me the benefit of an advisory opinion upon this important matter at the earliest possible moment, so that, as Chief Executive of the State of North Carolina, I may be able to advise and direct the Chairman of the Board of Elections and other election officials in accordance with sound law.

Respectfully,
J. C. B. EHRINGHAUS,
Governor of North Carolina.

OPINIONS OF THE JUSTICES

RALEIGH, N. C., 19 September, 1934.

To His Excellency, J. C. B. EHRINGHAUS,
Governor of North Carolina:

Your communication of the 15th instant presents the following question: Was the election held on Tuesday after the first Monday in November, 1933, pursuant to chapter 403, Public Laws 1933, "the next general election" following the adjournment of the 1933 session of the General Assembly within the meaning of section 2, Article XIII, of the Constitution?

The undersigned, each for himself, answers the question propounded in the affirmative. The General Assembly, after much debate, called the election under section 1, Article XIII, of the Constitution. See *Opinions of the Justices,* 204 N. C., 806, *et seq.*

Respectfully,
W. P. STACY,
Chief Justice;
GEO. W. CONNOR,
Associate Justice;
W. J. BROGDEN,
Associate Justice;
MICHAEL SCHENCK,
Associate Justice.

In my opinion to the General Assembly (204 N. C., 815), I took the position that calling a "special election" a "general election" did not make it so.

The majority decided otherwise, and the people of this State, under that decision, voted, on 7 November, 1933, on the question of convention or no convention in regard to the repeal of the 18th Amendment. Without the use of the absentee ballot, 415,536 voted, and a majority of 184,572 registered their votes for dry delegates against the repeal of the 18th Amendment. The majority opinion of this Court I consider a mandate binding on me. In deference to the majority view heretofore expressed, I concur in the majority answer above set forth.

HERIOT CLARKSON,
Associate Justice.

APPENDIX.

ASSOCIATE JUSTICE W. J. ADAMS DIED ON SUNDAY, 20 MAY, 1934. REMARKS OF CHIEF JUSTICE STACY, ON BEHALF OF THE SUPREME COURT, FROM THE BENCH, WEDNESDAY MORNING, 23 MAY, 1934, CONCERNING THE DEATH OF ASSOCIATE JUSTICE ADAMS:

Before proceeding with the usual work of the Court, we pause to express the keen sense of personal sorrow, experienced by each one of us, and the profound appreciation which we have of the great loss that has come to the State and its people in the death of Associate Justice William J. Adams. The vacant chair is a reminder that in the midst of life we are in death.

Justice Adams was an able lawyer and a splendid judge—a student of the first order. His passion was "to live honestly, to harm nobody, to render to every man his due." The State is richer for his having lived and labored in it. It is poorer that he is gone. Material success may come to one by accident or by chance, or forsooth as a result of unrelenting toil, but moral achievements are never easy, and they never come fortuitously. For the legal profession which he served so long and well, his opinions will stand as his monument. He wrought effectively in his day and has earned a lasting place.

REMARKS OF CHIEF JUSTICE STACY FROM THE BENCH, TUESDAY, 5 FEBRUARY, 1935, REGARDING THE DEATH OF FORMER ATTORNEY-GENERAL DENNIS G. BRUMMITT.

Gentlemen of the Bar: Before taking up the usual work of the Court, we pause to express the profound sorrow which has come to the members of this Court, in common with all the people of North Carolina, in the death of Hon. Dennis G. Brummitt, formerly Attorney-General. For ten years, a longer period of continuous service in the position than that of any of his predecessors in office, he served the State patriotically and unselfishly as a distinguished citizen. An able lawyer, a skilled craftsman in his profession, his breadth of mind and his bigness of heart carried him far beyond the confines of the discharge of his professional duties in office. With him belief in democracy was a passion, and he held consistently to the Jeffersonian principle that "no government can continue good, but under the control of the people," and that "the will of the people is the only legitimate foundation of government." He regarded the preservation of the fundamental principles of the Bill of Rights as of first concern. He was a man of deep human sympathies who earnestly sought to make real his dream of a better day for the common man. In his death this Court has suffered the loss of a very efficient officer, and the State a courageous patriot. His record will stand as his monument.

In recognition of his notable service, the Court, when it adjourns today, will take its adjournment out of respect to his memory.

AMENDMENT TO ORGANIZATION OF THE NORTH CAROLINA STATE BAR.

Be it Resolved, by the Council of The North Carolina State Bar, that Article VI, section 1, of the Certificate of Organization be amended by striking out the word "October" and inserting in lieu thereof the word "July."

North Carolina—Wake County.

I, Henry M. London, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing amendment to the Certificate of Organization of The North Carolina State Bar was adopted at the regular meeting of the Council on the 18th of January, 1935, by unanimous vote of the Council. Given under my hand and the seal of The North Carolina State Bar, this the 26th day of January, 1935.

HENRY M. LONDON.

(SEAL.) *Secretary-Treasurer of the North Carolina State Bar.*

After examining the foregoing amendment to the Certificate of Organization of The North Carolina State Bar, it is my opinion that the amendment complies with a permissible interpretation of chapter 210, Public Laws 1933. This the 28th day of January, 1935.

W. P. STACY, *Chief Justice.*

Upon the foregoing certificate of the *Chief Justice*, it is ordered that the foregoing amendment to the Certificate of Organization of The North Carolina State Bar be spread upon the minutes of the Supreme Court, and that it be published in the forthcoming volume of the Reports as provided by the act incorporating The North Carolina State Bar. This the 28th day of January, 1935.

SCHENCK, J., *For the Court.*

APPENDIX.

AMENDMENT TO ORGANIZATION OF THE NORTH CAROLINA STATE BAR.

Be it Resolved, by the Council of The North Carolina State Bar, that section 1, of Article V, of the Certificate of Organization of The North Carolina State Bar, be amended to read as follows:

ARTICLE V.

MEETINGS OF THE NORTH CAROLINA STATE BAR.

SECTION 1. *Annual Meetings.* The annual meetings of The North Carolina State Bar, beginning with the year 1935, shall be held in the City of Raleigh, on the third Friday in October.

North Carolina—Wake County.

I, Henry M. London, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing amendment to the Certificate of Organization of The North Carolina State Bar was adopted at the regular meeting of the Council on the 5th day of October, 1934, by unanimous vote of the Council. Given under my hand and the seal of The North Carolina State Bar, this the 30th day of October, 1934.

HENRY M. LONDON,

(SEAL.) *Secretary-Treasurer of The North Carolina State Bar.*

After examining the foregoing amendment to the Certificate of Organization of The North Carolina State Bar, it is my opinion that the amendment complies with a permissible interpretation of chapter 210, Public Laws 1933. This the 30th day of October, 1934.

W. P. STACY, *Chief Justice.*

Upon the foregoing certificate of the *Chief Justice,* it is ordered that the foregoing amendment to the Certificate of Organization of The North Carolina State Bar be spread upon the minutes of the Supreme Court, and that it be published in the forthcoming volume of the Reports as provided by the act incorporating The North Carolina State Bar. This the 30th day of October, 1934.

MICHAEL SCHENCK, J., *For the Court.*

APPENDIX.

AMENDMENT TO ORGANIZATION OF THE NORTH CAROLINA STATE BAR.

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 section:

SECTION 35. It shall be deemed unethical and unprofessional for any attorney who is, or has been, a prosecuting officer in any court inferior to the Supreme Court, or in any Federal Court, to accept professional employment in any matter of a civil or criminal nature growing out of any matter or thing which is or may have been in any way connected with the office of such prosecuting officer during his incumbency.

The foregoing canon embodied in Section 35 shall be in full force and effect on and after 1 July, 1935.

North Carolina—Wake County.

I, Henry M. London, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing amendment to the Certificate of Organization of The North Carolina State Bar was adopted at the regular meeting of the Council on the 12th of April, 1935, by unanimous vote of the Council. Given under my hand and the seal of The North Carolina State Bar, this the 16th day of April, 1935.

HENRY M. LONDON,

(SEAL.) *Secretary-Treasurer of The North Carolina State Bar.*

After examining the foregoing amendment to the Certificate of Organization of The North Carolina State Bar, it is my opinion that the amendment complies with a permissible interpretation of chapter 210, Public Laws 1933. This the 17th day of April, 1935.

W. P. STACY, *Chief Justice.*

Upon the foregoing certificate of the *Chief Justice,* it is ordered that the foregoing amendment to the Certificate of Organization of The North Carolina State Bar be spread upon the minutes of the Supreme Court, and that it be published in the forthcoming volume of the Reports as provided by the act incorporating The North Carolina State Bar. This the 17th day of April, 1935.

MICHAEL SCHENCK, J., *For the Court.*

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Abatement and Revival.

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1. The pendency of a suit as ground for abatement may be taken advantage of by demurrer where the pendency of the suit appears upon the face of the complaint, N. C. Code, 511 (3), and where it does not appear upon the face of the complaint, by answer. *Reed v. Mortgage Co.*, 27.

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A Nature and Essentials.

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C Pleadings, Evidence, and Trial.

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show, merely upon uncontradicted evidence of thirty years possession, it being necessary for claimant to show by evidence that such possession was adverse and was under known and visible lines and boundaries. C. S., 425. *McKay v. Bullard*, 628.

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c Motions in Supreme Court.

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e Academic Questions

1. Where it appears upon appeal in proceedings to enjoin the borrowing of money by the board of commissioners of a county, that the money has already been borrowed, the question sought to be presented becomes academic. *Cahoon v. Comrs. of Hyde*, 48.

2. Where it appears on appeal that the rights of the parties do not depend upon the constitutionality of a statute invoked in the proceedings, the Supreme Court will not determine the question of constitutionality upon the appeal. *In re Owen*, 445.

f Parties Who May Appeal (In criminal prosecutions see Criminal Law L g.)

1. In this caveat proceeding the jury found against propounders, and the trial court set aside the verdict as being against the weight of the evidence and ordered a new trial. Propounders appealed, assigning as error the refusal of the court to sustain their pleas in bar: *Held*, the propounders are not the "parties aggrieved" by the order setting aside the verdict, C. S., 632, and cannot maintain the appeal. *In re Will of Hargrove*, 280.

B Presentation and Preservation in Lower Court of Grounds of Review. (Exceptions and Assignments of Error see hereunder F.)

b Theory of Trial

1. An appeal will be determined in accordance with the theory of trial in the lower court. *Weil v. Herring*, 6; *Harrison v. Ins. Co.*, 487.

2. Where an aspect of the law in a case is not mooted on the hearing or debated in the briefs on appeal it will not be considered in determining the appeal. *Haney v. Lincolnton*, 282.

3. Where an aspect of the law involved in a case is not presented in the trial court it will not be considered in determining the rights of the parties upon appeal to the Supreme Court. *Hood, Comr., v. Davidson*, 329.

4. Where a theory of the case argued on appeal is not supported by allegations in the pleadings, it will not be considered on appeal. *Lentz v. Johnson & Sons, Inc.*, 614.

c Appeal

1. Portions of a judgment not challenged by exception or appeal will be deemed correct. *Brown v. Mitchell*, 132.

Appeal and Error—*continued.*

C Requisites and Proceedings for Appeal.

e Appeals in Forma Pauperis

1. In pauper appeals it is required that appellant file the statutory affidavit in order to confer jurisdiction on the Supreme Court, C. S., 649, and a provision in the judgment allowing plaintiff to appeal *in forma pauperis* does not relieve plaintiff of the necessity of filing the jurisdictional affidavit or the twenty-five printed or mimeographed copies of her brief required by the Rules. *Brown v. Kress & Co.*, 722.

E Record.

a Necessary Parts of Record Proper

1. The pleadings are a necessary part of the record proper upon appeal, and where the pleadings are omitted from the record, the appeal must be dismissed. Rule of Practice No. 19, sec. 1. *S. v. Lumber Co.*, 47.

2. Where the pleadings are omitted from the record by agreement of the parties the appeal will be dismissed, since the pleadings are necessary to inform the Court of the nature of the action or proceeding and the Court can judicially know only what appears on the record. Rule 19, sec. 1. *Ins. Co. v. Bullard*, 652.

3. Where no summons appears in the record and there is nothing to show that the term of court was regularly held, or that the cause was properly constituted in court, the appeal is subject to dismissal under Rule 19. *Brown v. Johnson*, 807.

b Matters not in Record Presumed Correct

1. Where the charge of the court on an aspect of the case is not in the record it will be presumed that the court correctly charged the law applicable to the evidence. *Jernigan v. Jernigan*, 831.

g Conclusiveness and Effect of Record

1. The Supreme Court can judicially know only what properly appears on the record. *S. v. Lumber Co.*, 47; *Ins. Co. v. Bullard*, 652.

2. Where there is a conflict between recitals in the case on appeal and the judgment appealed from, the recitals in the judgment are controlling. *Ins. Co. v. Bullard*, 652.

3. The record imports verity, and the Supreme Court is bound thereby. *Acceptance Corp. v. Waugh*, 717.

h Questions Presented for Review

1. The rights of a person not made a party to the action cannot be adjudicated on appeal. *Shuford v. Bank*, 428.

F Exceptions and Assignments of Error.

b Necessity, Form, and Sufficiency

1. Where there is no exception to a finding of fact by the court, the fact so found will be assumed correct and the appeal determined in accordance with such finding. *Briggs & Sons v. Allen*, 10.

2. Portions of judgment not challenged by exception or appeal will be deemed correct. *Brown v. Mitchell*, 132.

3. Where there are no exceptions to the findings of fact, and the findings support the judgment, the judgment will be affirmed on appeal. *Radcker v. Royal Pines Park*, 209; *Warren v. Bottling Co.*, 313.

Appeal and Error F b—*continued.*

4. Interveners, the trustee and holder of notes secured by the deed of trust, moved to set aside foreclosure of the tax-sale certificate against the property for irregularities in that the sale was not held on the proper day under the provisions of the statute. Judgment was entered on the agreed facts denying the motion. Movants excepted for that the court signed the judgment: *Held*, the exception presents the question of whether the judgment was supported by the facts agreed, and it appearing of record that movants had not been made parties to the foreclosure of the tax-sale certificate, judgment is reversed for that the facts found and admitted are not sufficient to support it. *Orange County v. Atkinson*, 593.

5. Findings of fact by the court under agreement may be challenged by exceptions to the evidence upon which such facts were found. *Blades v. Trust Co.*, 771.

6. An exception to the judgment as rendered presents the single question of whether the facts found support the judgment. *Ibid.*

G Briefs.

c Abandonment of Exceptions by Failure to Discuss Exceptions in Briefs

1. Exceptions in the record which are not set out in appellant's brief, or in support of which no argument is stated or authority cited, will be taken as abandoned. Rule 28. *Keiger v. Sprinkle*, 733.

J Review.

a Of Matters in Discretion of Lower Court

1. On appeal from an award of the Industrial Commission, a motion to remand the case to the Commission on the ground of newly discovered evidence is addressed to the discretion of the Superior Court, and its determination thereof is not ordinarily reviewable by the Supreme Court. *Byrd v. Lumber Co.*, 253.

2. The Supreme Court will not interfere with the discretion of the trial judge in setting aside a verdict as being against the weight of the evidence. *In re Will of Hargrove*, 280.

3. Court's refusal to set aside verdict in its discretion is ordinarily not reviewable. *Harrison v. Ins. Co.*, 487.

c Of Findings of Fact

1. Where the parties agree that the court should find the facts, its findings upon conflicting evidence are as conclusive as the verdict of a jury, but where under such agreement the court determines the issues as a matter of law, the judgment must be reversed if there is any sufficient evidence contrary to the findings made by the court, although there is evidence to support such findings. *Assurance Society v. Lazarus*, 63.

2. Finding, upon supporting evidence, that attorney signing consent judgment was duly authorized, *held* conclusive on appeal. *Alston v. R. R.*, 114.

3. It will be presumed on appeal that findings of lower court are supported by evidence when no evidence appears in the case on appeal. *Radcker v. Royal Pines Park*, 209.

4. Refusal to find immaterial fact will not be held for error. *Whitford v. Bank*, 229.

Appeal and Error J c—*continued.*

5. Findings of fact by referee, approved by trial court and supported by evidence, are conclusive on appeal. *Hood, Comr., v. Davidson*, 329.

6. Where a jury trial is waived, the findings by the court upon conflicting evidence are conclusive and are not subject to review upon appeal. Art. IV, sec. 13. *Barringer v. Trust Co.*, 505.

d Presumptions and Burden of Showing Error (Matters not in record presumed correct see hereunder E b.)

1. The burden is on appellant to overcome the presumption against him and show error in the judgment or order appealed from. *LaNeve v. Tea Co.*, 281.

2. Where the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment will be affirmed without becoming a precedent. *Trust Co. v. Hood, Comr.*, 862.

e Harmless and Prejudicial Error

1. Where, upon the uncontroverted facts, plaintiff is not entitled to recover, upon appeal from judgment in defendant's favor, any error in the trial of the cause is harmless and is not sufficient grounds for a new trial. *Weatherman v. Ramsey*, 270.

2. Where additional evidence offered by plaintiff after he has rested and after denial of defendant's motion as of nonsuit in no way affects the right of plaintiff to recover, the action of the trial court in allowing plaintiff to offer such additional evidence cannot be held for prejudicial error. *Pearson v. Simon*, 352.

3. Where but one inference can be drawn from the evidence, a new trial will not be granted for error in the charge of the trial court upon appeal from a verdict in accordance with the evidence. *Brannon v. Sprinkle*, 398.

4. Amendment of verdict by trial court held not harmless error under facts of this case. *Bundy v. Sutton*, 422.

5. Testimony elicited on direct examination by leading questions will not be held for prejudicial error upon objection and exception where it appears that other testimony to the same import was given by the witness and others upon proper questions without objection. *Bank v. Rosenstein*, 529.

6. The exclusion of testimony of a witness on cross-examination by one defendant cannot be made the basis on complaint by the other defendant on appeal. *Gaffney v. Phelps*, 553.

7. The exclusion of testimony of a witness cannot be held prejudicial on exception where it appears that the answer of the witness, if he had been allowed to testify, would not have been responsive to the question, and it appears that testimony of the same import as that sought to be adduced by the question was admitted during the trial. *Ibid.*

8. The admission of a conclusion of an expert witness prefaced by the words "that would be hard to answer" *is held* not prejudicial in view of the other testimony elicited from the witness during the trial. *Ibid.*

Appeal and Error J e—*continued.*

9. The admission of evidence over defendant's objection *is held* not prejudicial under the facts of this case, the evidence objected to not being material to plaintiff's right to recover and its admission not being harmful to defendant. *Colson v. Ins. Co.*, 581.

10. The admission of incompetent evidence cannot be held harmless where it appears that it augmented the recovery, and a new trial will be awarded on defendant's exception. *Swinson v. Packing Co.*, 637.

11. Error in the charge of the court in this case *is held* cured, or at least rendered not prejudicial, by other portions of the charge on the same aspect of the case and the final instructions of the court. *Keiger v. Sprinkle*, 733.

12. The admission of testimony over objection cannot be held prejudicial where similar testimony is admitted without objection. *Light Co. v. Rogers*, 751; *Jernigan v. Jernigan*, 831.

13. Where a witness answers a question propounded notwithstanding appellant's sustained objection thereto, but the witness' answer to the question is favorable to appellant, appellant is not in a position to complain. *Light Co. v. Rogers*, 751.

f Of Injunctive Proceedings

1. While the Supreme Court on appeal in injunctive proceedings may review questions of fact as well as of law, there is a presumption that the proceedings in the lower court are correct, and appellant must show error. *Cahoon v. Comrs. of Hyde*, 48.

2. While the Supreme Court has the power on appeal in injunctive proceedings to find and review the findings of fact, where the findings are in accord with the greater weight of the evidence the Supreme Court will not be disposed to disturb the findings. *Whitford v. Bank*, 229.

3. While the Supreme Court, on appeal in injunctive proceedings, can find and review the findings of fact, the burden is on appellant to show error. *Scruggs v. Rollins*, 335.

4. The judgment denying motion to set aside foreclosure of tax-sale certificate being reversed for irregularity in that holders of registered liens were not made parties, the exception based upon the ground that the sale was not had on the proper day under the provisions of the statute need not be considered. *Orange County v. Atkinson*, 593.

g Questions Necessary to Determination of Appeal

1. Where the rights of the parties are determined by the decision of the court upon one of the assignments of error, questions presented by other assignments of error need not be considered. *Merrimon v. Tel. Co.*, 101.

2. Upon an appeal from an order striking out an allegation in the reply, affirmed upon the ground that the allegation was of a probative and not an ultimate fact, the Supreme Court will not decide the competency of evidence upon the trial in support of such allegation. *Revis v. Asheville*, 237.

Appeal and Error J g—*continued.*

3. Where a defendant's motion as of nonsuit should be allowed whether only the evidence introduced before plaintiff rested or whether all the evidence in the case is considered, the defendant's contention that it was entitled to have the motion considered solely upon the evidence introduced before the plaintiff rested, without considering the evidence introduced by its codefendant and the plaintiff's evidence in rebuttal thereof, although defendant had cross-examined the witness of its codefendant, need not be decided on appeal. *Van Landingham v. Sewing Machine Co.*, 355.

4. Where it is determined on appeal that defendant's plea of estoppel by judgment was properly allowed, other assignments of error by plaintiff need not be considered. *Ferguson v. Spinning Co.*, 496.

5. Where a new trial is awarded for the admission of incompetent evidence, other exceptions that may not arise on another hearing will not be considered on the appeal. *Swinson v. Packing Co.*, 637.

6. Where a demurrer *ore tenus* interposed in the Supreme Court is sustained, questions of law presented by appellant's exception to the overruling of his written demurrers by the lower court need not be considered, and the case will be remanded with direction that it be dismissed, unless in apt time plaintiff moves for leave to amend. C. S., 515. *White v. Charlotte*, 721.

7. Where a judgment declaring a deed invalid is sustained on appeal on one theory, another theory of invalidity advanced by plaintiff need not be considered. *Blades v. Trust Co.*, 771.

K Determination and Disposition of Cause.

b Remand

1. In this case proceedings after the consent judgment of the parties for the distribution of the estate in question being unauthorized, or irregular, all proceedings after the entry of the consent judgment are stricken out and the case remanded for adjustment of the rights of the parties in accordance with law. *In re Will of McLelland*, 375.

c Motions in Supreme Court for New Trial for Newly Discovered Evidence

1. A motion in the Supreme Court for a new trial for newly discovered evidence will not be granted where the evidence relied upon as a basis for the motion tends only to contradict and discredit evidence offered at the trial. *Furniture Co. v. Cole*, 847.

L Proceedings After Remand.

d Subsequent Appeals

1. Where the Supreme Court has ruled on a former appeal that the evidence was sufficient to overrule defendant's motion as of nonsuit, C. S., 567, and the evidence upon the second trial is substantially the same, the question of the sufficiency of the evidence is *res judicata* and will not be considered on the second appeal. *Jernigan v. Jernigan*, 831.

2. Where it is determined on appeal that a cause of action is stated and that the evidence should be submitted to the jury, the question is *res judicata* upon a subsequent appeal upon substantially similar evidence. *Lewis v. Frye*, 852.

Appearance. (Motion for continuance by insurer held not general appearance by it see Insurance S a 5.)

Arbitration and Award. (Of loss under fire insurance policy see Insurance L d.)

Arrest.
B On Criminal Charges.
d Resisting Arrest
1. A constable has authority to make an arrest anywhere in the county within which he is appointed, and in a prosecution for resisting arrest, C. S., 4378, a defense that the arrest was made by a constable outside of his township and that therefore defendant did not resist an officer in the performance of his duty is unavailing. C. S., 976, Art. IV, sec. 24. *S. v. Corpening*, 805.

Arrest of Judgment. (See Criminal Law J a.)

Arson.
C Prosecution and Punishment.
c Sufficiency of Evidence and Nonsuit
1. Evidence *held* sufficient to be submitted to jury in this prosecution for arson. *S. v. Moses*, 139; *S. v. Stamey*, 854.

Assistance, Writ of.
A Nature and Scope of Remedy.
a In General
1. A party purchasing land at a judicial sale is entitled to a writ of assistance to put him in possession, but a purchaser at such sale who transfers his title to a third person before applying for the writ, or who so transfers his title and takes a reconveyance back from his grantee, is not entitled to such writ. *Bohannon v. Trust Co.*, 163.

Asylums.
A Control and Management.
a Control of General Assembly
1. The State Hospital at Raleigh is a public corporation, created as an agency of the State for the care of insane persons who are residents of the State, and the hospital is subject to the control of the General Assembly. *State Hospital v. Bank*, 697.

B Care and Maintenance of Patients.
a Persons Entitled to Admittance
1. Under constitutional authority and statutory provision, indigent insane who are residents of the State may be cared for in the State Hospital at Raleigh without charge, and are to be given preference in admission over nonindigent insane, while nonindigent insane may be admitted and cared for in the hospital under certain circumstances, but have always been required by statute to pay at least the actual cost of their care, treatment, and maintenance, Art. XI, sec. 10, C. S., 6162, 6186, but it is not required that the directors of the hospital finally determine the status of a patient at the time of his admission, the financial status of the patient being subject to the vicissitudes of fortune. *State Hospital v. Bank*, 697.

2. Where a patient admitted to the State Hospital at Raleigh as an indigent person thereafter becomes nonindigent, he thereupon has

Asylums B a—*continued.*

the same rights as other nonindigent persons, and is entitled to remain in the hospital upon the payment of the actual cost of his care and maintenance therein. *Ibid.*

d Charges for Maintenance and Care

1. Defendant's ward, a veteran of the World War, was admitted to the State Hospital at Raleigh as an indigent person, and at the time of his admission it was the settled policy of the State to care for indigent persons without charge, and to charge nonindigent persons at least the actual cost of their care. Several years thereafter the Federal Government began to make monthly payments from War Risk Insurance to defendant as guardian, and the funds were invested in securities. Upon learning of the estate several years after the payments began, the State Hospital demanded payment for the actual cost of maintenance of the ward in the institution, and thereafter the hospital instituted suit against the ward's estate to recover the cost of his maintenance from the date of his admission into the hospital: *Held*, under the provisions of ch. 120, Public Laws of 1925, ratified several years after the admission of the ward into the institution, the hospital was entitled to recover the actual cost of the ward's care and maintenance for the whole period the ward was an inmate of the hospital, including the time the ward was indigent as well as the time he was nonindigent, and including the period both before and after demand by the hospital for the cost of his maintenance, and by the provisions of the statute no plea of the statute of limitations is available to defeat recovery. *State Hospital v. Bank*, 697.

Attorney and Client. (Fees in caveat proceedings see Wills D m.)

B The Relation.

b Scope of Attorney's Authority (Motion to set aside consent judgment for attorney's want of authority see Judgments K b 1.)

1. An agreement by an attorney for a bank employed to collect a past-due note owing the bank, that suit would not be instituted thereon if the maker would pay a stipulated sum thereon monthly, is not binding on the bank, since such agreement is beyond the scope of the attorney's authority. *Bank v. Trotter*, 442.

2. An attorney employed to collect a note made an unauthorized agreement with the maker not to institute suit on the note if the maker paid certain stipulated sums on the note monthly: *Held*, the acceptance by the payee of the stipulated sums does not constitute a ratification by the payee of the void agreement, since the payee received no moneys or payments it was not entitled to receive under the law. *Ibid.*

Attractive Nuisance. (See Negligence A c.)

Automobiles. (Liability of garage as bailee see Bailment.)

C Operation and Law of the Road. (City's duty to keep streets in safe condition see Municipal Corporations E c.)

b Intersections and Speed at Intersections and Residential Districts (Opinion evidence as to speed see Evidence K a.)

1. An automobile driven by defendant struck and killed a pedestrian as the pedestrian was crossing a street in a city at an intersection. There was testimony of witnesses to the effect that they heard

Automobiles C b—*continued.*

the impact and immediately thereupon looked in that direction and saw defendant's car, that in their opinion it was then traveling over thirty miles an hour, that it was slowing up and came to a stop some 71 steps from the point of impact, that the thud of the impact was heard several hundred feet away, and that the force of the impact knocked a hole in the pedestrian's head, *is held* sufficient circumstantial evidence to be submitted to the jury on the question of whether the driver of the car at the time of the accident was exceeding the speed limit at the intersection in violation of N. C. Code, 2618, and in violation of an ordinance of the city, N. C. Code, 2617 (a). *Jones v. Bagwell*, 378.

2. Plaintiff, a gratuitous passenger in an automobile, was injured in a collision occurring at a street intersection in the corporate limits of a city as the car in which she was riding attempted to cross an intersecting "through street." Plaintiff introduced in evidence an ordinance of the city requiring drivers of vehicles to stop before crossing intersections with "through streets." Plaintiff testified that the driver of the car in which she was riding failed to stop before attempting to cross the intersection, and that the other car was being driven along the "through street" recklessly and at a rate of speed in excess of that allowed by the ordinance on such "through streets": *Held*, the evidence, together with other evidence of negligence and proximate cause, was sufficient to be submitted to the jury on the issue of the concurrent negligence of the drivers of the cars, the evidence tending to show a violation of the ordinance by both drivers. *Gaffney v. Phelps*, 554.

3. Evidence that as defendant driver of an automobile approached a street intersection in a city his view was obstructed by a four-foot hedge growing on top of a three-foot embankment *is held* sufficient to support an instruction that if the jury should find from the greater weight of the evidence that defendant operated his car in the intersection when his view was obstructed, as defined by the court, at a speed in excess of 15 miles an hour he would be guilty of negligence, C. S., 2621 (46), and as the undisputed facts showed the intersection was obstructed as defined by the statute, the instruction cannot be held for error as a peremptory instruction or an expression of opinion by the court. *Ibid.*

d Stopping, Starting, and Turning

1. Evidence that the driver of the car in which plaintiffs were riding sounded his horn in warning of his purpose to pass defendant's car traveling in the same direction in front of him on the highway, and that the driver of defendant's car, in attempting to turn into a dirt road intersecting the highway to the left, suddenly and without warning turned his car to the left across the highway in front of the car in which plaintiffs were riding, in violation of statute of the state in which the accident occurred, resulting in the accident in suit, *is held* sufficient to be submitted to the jury on the issue of actionable negligence. *Exum v. Poole*, 244.

g Safety Statutes

1. The violation of a traffic ordinance of a city is negligence *per se*. *Gaffney v. Phelps*, 553.

Automobiles C g—*continued.*

2. The violation of the statutory speed limit is negligence *per se*, and an instruction that it is only evidence of negligence entitles defendant to a new trial on its exception based upon plaintiff's contributory negligence in exceeding the speed limit, but such violation must be a proximate cause of the injury in suit in order to constitute a defense to the action. *James v. Coach Co.*, 742.

h Condition and Defects in Vehicles

1. The evidence tended to show that plaintiff, an eleven-year-old boy, was walking along the highway, and that defendant's truck driver attempted to stop the truck to give plaintiff a ride, but that because of defective brakes the driver was unable to stop the truck before reaching plaintiff, that plaintiff attempted to jump on the truck as it went by him and fell to his injury, and that the truck traveled fifteen feet after plaintiff fell before it could be stopped: *Held*, the injury to plaintiff by reason of the defectives brakes could not have been foreseen in the exercise of due care, and foreseeable injury being a necessary element of proximate cause, defendant's motion as of nonsuit should have been allowed. *Osborne v. Coal Co.*, 545.

i Proximate Cause and Contributory Negligence

1. There must be a causal connection between the violation of a safety statute by the driver of an automobile and the injury in suit in order for such violation to render the driver liable in damages. *Jones v. Bagwell*, 378.

2. There was evidence that defendant drove his automobile across a street intersection in a city at a rate of speed in excess of that allowed by statute, C. S., 2618, and an ordinance of the city. Plaintiff's intestate was struck and killed by defendant's automobile at the intersection while intestate was attempting to cross the street. There was evidence that defendant was practically blind in one eye, but had normal vision in the other eye, that there was no traffic on the street at the time of the accident, but that defendant had a clear view of the straight street, which was lighted by arc lamps at the intersections, and that defendant stated immediately after the accident that he did not see intestate until he was in front of the car's headlights: *Held*, the evidence was sufficient to be submitted to the jury on the question of whether the unlawful speed at which defendant was driving was the direct and proximate cause of injury to plaintiff's intestate. *Ibid.*

3. Evidence tended to show that defendant, who was practically blind in one eye, drove his car thirty to forty miles an hour across a street intersection in a city, and struck and killed plaintiff's intestate, who was walking across the street at the intersection, that there was no traffic on the street at the time of the accident, and that the street was lighted at the intersection by an electric arc lamp, and that there was nothing to obstruct defendant's view, and that defendant stated immediately after the accident that he did not see plaintiff's intestate until he was in front of the car, *is held* not to establish contributory negligence as a matter of law in intestate's failure to avoid the rapidly approaching car, the questions of contributory negligence and the last clear chance, raised by the pleadings, being for the determination of the jury. *Ibid.*

Automobiles C—*continued.*

j Guests and Passengers

1. Plaintiffs were the driver of an automobile and persons riding with him at the time of the accident in suit. The jury found, from competent evidence under correct instructions, that the driver was not guilty of contributory negligence: *Held*, the defense of imputed negligence and joint enterprise relied on as against the other plaintiff's was not sustained. *Exum v. Poole*, 244.

2. Active negligence of driver *held* to insulate failure of city to erect guard at street end, even if such failure amounted to inactive negligence. *Haney v. Lincolnton*, 282.

3. The negligence of the driver of a car will not be imputed to a gratuitous passenger therein who has no control over the car or driver. *Gaffney v. Phelps*, 553.

4. What a joint enterprise is within the meaning of the doctrine of imputed negligence must be determined to a great extent from the facts of the particular case. *Jernigan v. Jernigan*, 831.

5. The uncontradicted evidence disclosed that defendant and his wife were taking a long trip in defendant's car to visit their daughter, that defendant's wife, in order to give defendant a rest, at his request, was driving the car at the time of the accident in suit, that defendant was sleeping or dozing and suddenly awoke as the car passed a truck on a fill just before a railroad overpass, and that defendant, thinking the car in imminent danger of being wrecked, grabbed the wheel and swerved the car to the right, resulting in the car being driven over the embankment: *Held*, in the wife's action against her husband to recover for her resulting injuries, a charge that if the jury should find the facts to be as testified and shown by all the evidence they should answer the issue of imputed negligence in the wife's favor is not error. *Ibid.*

m Sufficiency of Evidence and Nonsuit

1. The evidence in this case, considered in the light most favorable to plaintiff, tended to show that plaintiff was driving his coupe well on the right side of a highway within the corporate limits of a city, that another adult and four children were riding in the coupe, that plaintiff's left arm was hanging outside the car, and that defendant's bus, driven at an excessive speed, approached from the opposite direction in the middle of the highway, that the bus had just passed another car going in the same direction and was being driven back to the bus driver's right of the highway, that as the driver turned the bus to the right the back of the bus swung over the middle of the highway and hit plaintiff's arm and the back of his car, causing the injury in suit: *Held*, defendant's motion as of nonsuit, based upon plaintiff's failure to slacken his speed, was properly refused, plaintiff having the right to assume that the approaching bus would be driven to its right side of the road so that the bus and car could pass each other in safety. N. C. Code, 2621 (53). *James v. Coach Co.*, 742.

n Instructions

1. In this case plaintiff was driving his truck behind another truck along a busy and congested street in a city and plaintiff was injured in an accident occurring when the first truck turned off the

Automobiles C n—*continued.*

street to the right and a street car approaching from the opposite direction crashed into plaintiff's truck, plaintiff being unable to get out of the way of the street car because of automobiles parked along the curb of the street. The trial court fully and correctly defined contributory negligence and instructed the jury that plaintiff was required to drive with due care for his own safety and keep a proper lookout: *Held*, an exception to the charge for its failure to call the jury's attention to N. C. Code, 2621 (57), which provides that one car shall not follow another more closely than is reasonable and prudent cannot be sustained in the absence of a special request for such instructions. *Alexander v. Utilities Co.*, 438.

2. The charge of the court on the question of defendant's contributory negligence upon evidence tending to show that defendant was walking along the highway on the right side thereof in violation of a State Highway ordinance is not held for reversible error for its failure to contain a precise definition of contributory negligence. *Hunnicutt v. Kimbrell*, 494.

o Criminal Responsibility for Negligent Driving

1. Evidence that defendants operated car while intoxicated and failed to stop after inflicting injury *held* for jury. *S. v. Newton*, 323.

2. Evidence that defendant wilfully and unlawfully drove his automobile against the automobile of prosecuting witness *held* sufficient for jury in this prosecution for assault with deadly weapon. *S. v. Wilson*, 865.

D Liability of Owner for Driver's Negligence.

a In General

1. Where all the evidence tends to show that plaintiff's intestate was killed in an accident while riding in an automobile owned by defendant, but that at the time of the accident the car was being driven by a person to whom defendant had loaned the car and who was driving the car for his own pleasure and not as agent of defendant or for defendant's purposes, and there is no evidence that defendant knew the driver to be incompetent, defendant may not be held liable. *Weatherman v. Ramsey*, 270.

2. Where the evidence tends to show that the driver of an automobile involved in a collision had borrowed the car from the owner, and at the time of the accident was engaged in an enterprise of his own and not for the owner, the owner's motion as of nonsuit is properly allowed. *Gaffney v. Phelps*, 553.

b Agents and Employees

1. Where, in an action seeking to hold an employer liable for the negligent driving of his employee during business hours, there is no evidence that the automobile was a business vehicle or was owned by defendant, and no competent evidence that at the time of the accident the employee was engaged in the business of the employer, the employer's motion as of nonsuit is properly granted. *Cole v. Funeral Home*, 271.

Automobiles D b—*continued.*

2. Evidence that the driver of an automobile owned same but was employed by a sewing machine company and used the car for the business of his employer when occasion required, and that at the time of injury to plaintiff by the negligent driving of the car, the employee had on the rear of the automobile a sewing machine belonging to the employer, *is held* insufficient to be submitted to the jury on the issue of the employer's liability for the employee's negligent driving, and this result is not altered by further evidence that at the time of the injury the employee was driving from the office of the employer to the employee's home for lunch, without evidence that the car owned by the employee was used exclusively for business of the employer, the evidence failing to show that the relationship of master and servant existed at the time and in respect to the very transaction out of which the injury arose. *Van Landingham v. Sewing Machine Co.*, 355.

3. Where there is evidence that defendant telegraph company knew or should have known that its employee, hired to deliver messages by bicycle, was in the habit of using his automobile to deliver messages, and that the employee, while driving the car in delivering telegrams, negligently injured plaintiff, the evidence is sufficient to overrule defendant's motion of nonsuit, based upon the defense that the employee was not acting within the scope of his authority at the time of the injury. *Davidson v. Telegraph Co.*, 790.

c Family Car Doctrine

1. The evidence in this action was to the effect that defendant kept a Chandler automobile for the use of his family and a Chrysler automobile for his own personal use, and that in his absence his nephew, who lived with the family, asked defendant's wife for permission to use the Chrysler for a pleasure trip, and that plaintiff was injured in an accident while riding in the Chrysler as a guest of the nephew: *Held*, even conceding that the nephew was a member of the family within the meaning of the "family purpose doctrine," in the absence of evidence that the car in which plaintiff was riding at the time of the accident was kept by defendant for the use of his family, defendant's motion as of nonsuit should have been allowed. *Byers v. Brawley*, 151.

Bail.

B In Criminal Prosecutions.

c Liabilities on Bail Bonds

1. Judgment against defendant in a prosecution for abandonment was suspended upon condition that he pay into court for the benefit of his children a certain sum monthly and give bond for the cost and payment of the sum stipulated. Thereafter *scire facias* was issued against the surety on the bond solely on the ground that defendant had failed to appear in court as required by his bond, but the court found upon issuance of the *scire facias* that the defendant had never failed to appear in court at any term as required: *Held*, upon the findings of the court upon issuance of the *scire facias*, judgment absolute against the surety in the penal sum of the bond was error. *S. v. Branch*, 415.

Bail B c—*continued.*

2. A bond conditioned upon the appearance of defendant at a subsequent term of court does not obligate the surety thereon to take the place of defendant and abide by the judgment of the court. *Current v. Church*, 657.

Bailment.

B Rights and Liabilities of Parties.

b Care and Return of Property by Bailee

1. While evidence that plaintiff delivered his car to a garage for service furnished by such garage, and that the car was stolen from the garage, makes out a *prima facie* case against the bailee, nothing else appearing, where the bailee's evidence in rebuttal is uncontradicted and shows that at the time of the theft the car was parked inside the garage, that attendants were about, and that it was stolen by a stranger whose presence in the garage would not reasonably excite suspicion, and that the keys were in the car in order to move it about in the performance of the service required, it also appearing that all parties expected plaintiff to return for the car in a short period of time, the evidence fails to show failure on the part of the bailee to use reasonable care for the preservation and protection of the automobile, and his motion as of nonsuit in the bailor's action should be allowed. *Swain v. Motor Co.*, 755.

Bankruptcy. (Abandonment of property by trustee see Mortgages H j 1.)

C Administration and Distribution of Bankrupt's Estate.

b Title and Rights of Trustee

1. A trustee in bankruptcy is vested with title to the bankrupt's property by operation of law as of the date the debtor is adjudged a bankrupt. U. S. C. A. Title 11, sec. 110. *Angeloff v. Freeman*, 207.

c Sale by Trustee and Title of Purchaser

1. Where the trustee in bankruptcy sells a chattel belonging to the debtor the purchaser obtains the title of the trustee which vested in the trustee by operation of law as of the date of the adjudication of the debtor as a bankrupt, and the title of the purchaser at the trustee's sale is superior to the title of a purchaser at a sheriff's sale held subsequent to the adjudication in bankruptcy under execution on a judgment docketed prior to such adjudication, and the purchaser at the trustee's sale is the real party in interest and may assert in the courts of this State all rights which could have been asserted by the trustee. *Angeloff v. Freeman*, 207.

Banks and Banking.

C Functions and Dealings. (Appointment of bank as administrator see Executors and Administrators A a 1.)

c Deposits and Collection of Drafts and Checks

1. Evidence that a brokerage firm deposited in a local bank a draft drawn on a bank in another state, using the local bank's regular deposit slip, which gave it the right to charge the item back to the firm's account if not collected, *is held* sufficient to sustain the jury's finding that the local bank was an agent for collection of the draft and not a purchaser thereof in an action by customer of the brokerage firm to recover the proceeds of the draft. *Bank v. Bank*, 216.

Banks and Banking—*continued.*

H Insolvency and Receivership. (Bonds guaranteeing deposits see Principal and Surety B e.)

a Statutory Liability of Stockholders

1. A stockholder in an insolvent bank filed answer to the assessment of the statutory liability against him, C. S., 218 (c) (13), alleging that prior to the insolvency of the bank three corporations contracted to pay the liabilities of the bank and save the stockholders from liability on their stock if the assets of the insolvent bank were transferred to them, that the assets of the bank were transferred in accordance with the contract and that the contracting parties took possession of the bank, but that they had not complied with their contract, but were seeking to avoid compliance therewith. Defendant stockholder moved in apt time that the parties contracting to pay the liabilities of the bank be made parties defendant: *Held*, the motion for joinder of the contracting parties as parties defendant should have been allowed, the matter involving an accounting equitable in its nature, and the joinder of such parties being necessary to a complete determination of the questions involved in the action. C. S., 456. *Hood, Comr., v. Burrus*, 560.

b Liabilities of Officers and Directors (Officers' liability to depositor on guaranty of payment see Guaranty B a 1; bonds of officers see Principal and Surety B d.)

1. Director *held* not liable on note to bank where condition upon which it was to be used did not transpire. *Hood v. Bayless*, 82.

2. Evidence *held* insufficient to hold directors liable to administrator *d. b. n.* for loss alleged to have resulted from directors' gross neglect and mismanagement of bank. *Bank v. Bridgers*, 91.

3. A complaint setting out certain duties of the officers and directors of a bank and alleging that defendants, officers and directors of the bank in question, brought about a merger of several small banks which resulted in the insolvency of the parent bank, that defendants loaned directly or indirectly to various officers and directors sums exceeding a half-million dollars, and that defendants wrongfully received or wrongfully permitted employees to receive deposits of plaintiffs and others when they knew the bank to be insolvent, and that by reason of defendants' wrongful acts as alleged plaintiffs were damaged in the sum of their deposits, less a dividend paid by the receiver of the bank, *is held* to state a cause of action accruing to the receiver for wrongful acts resulting in loss to the bank, and in the absence of allegation that demand had been made upon the receiver to bring the action, defendants' demurrer to the complaint was properly sustained. *Sain v. Love*, 588.

c Management and Control of Assets

1. C. S., 218, does not deprive the Superior Courts of their equitable jurisdiction, upon a proper showing, over the Commissioner of Banks as an administrative officer of the State in the liquidation of banks. *Hood, Comr., v. Burrus*, 553.

c Claims, Priorities, and Distribution

1. The fiction that the amount due a contractor by the owner after notice to the owner by material furnishers of their claims is a trust

Banks and Banking H e—*continued.*

fund for the benefit of the materialmen will not be extended so as to give a materialman furnishing material for a building owned by a bank a preference in the bank's assets upon its later insolvency, especially where there is no finding that the bank paid anything to the contractor after notice by the materialman, and no finding as to the amount of cash the bank had when taken over by the statutory receiver, the giving of notice by the materialman not augmenting the bank's assets. *Briggs & Sons v. Allen*, 10.

2. The mere fact that a bank at the time of its failure held trust funds does not in itself entitle the beneficiary to a preference in its assets. *Ibid.*

3. Where a judgment is rendered against a bank after it has been placed in the hands of the statutory receiver, the judgment creditor is not entitled to a preference in the bank's assets merely by reason of the judgment. *Ibid.*

4. Bank's consolidation of small trust accounts and deposit of consolidated account in commercial department does not constitute consolidated account a special deposit. *Cocke v. Hood*, 14.

5. The mere fact that a bank holds and dissipates trust funds does not establish a preference in favor of the beneficiaries upon the bank's insolvency. *Ibid.*

6. Bank's purchase of securities from itself with trust deposits does not entitle depositors to preference for resulting loss. *Ibid.*

7. The relation of debtor and creditor exists between a depositor and the bank of deposit, which relation, upon the death of the depositor, exists between the bank and the depositor's estate, and this relation is not changed by the appointment of the bank as administrator where the deposit is co-mingled with other funds of the bank. *Bank v. Bridgers*, 91.

8. In absence of issue of conspiracy in obtaining certification of checks, holder for value of checks certified by bank prior to its closing is entitled to preference. *Mercerizing Co. v. Hood, Comr.*, 135.

9. Evidence that a bank received a draft from a brokerage firm for collection, and that prior to the collection of the draft, plaintiff's agent, upon the insolvency of the brokerage firm, notified the bank that the draft represented the purchase price of plaintiff's bonds sold by plaintiff through the brokerage firm, and that the proceeds of the draft belonged to plaintiff, *is held* sufficient to sustain the jury's finding that upon the collection of the draft the bank held the proceeds thereof as trustee for the plaintiff, the plaintiff being the owner thereof and not the brokers, and the bank had no right to credit the draft before it had been collected to a note due the bank by the brokerage firm, and upon the bank's later insolvency plaintiff was entitled to a preference in its assets for the amount collected on the draft by the bank. *Bank v. Bank*, 216.

10. Where a deposit is made in a savings bank under an agreement, entered in a deposit pass book, that the funds should be held by the bank at interest until depositor's grandson reached the age of twenty-one, and then paid to him, or if the grandson should die

Banks and Banking H c—*continued.*

before attaining his majority, the funds, upon his death, should be paid his mother, the deposit is not subject to the check of the depositor, but is held by the bank for a particular purpose, and constitutes a trust fund which, if the bank should become insolvent, would entitle the beneficiary of the deposit to a preference in its assets. *Andrews v. Hood, Comr.*, 499.

11. Evidence tending to show that plaintiff's agent, under agreement with officials of a bank, surrendered checks to the bank for collection and took a certificate of deposit therefor which the parties agreed should be treated as a receipt for the checks and agreed the bank be given thirty days to collect the checks *is held* sufficient to be submitted to the jury on the issue of plaintiff's right to a statutory preference in her action therefor after receivership of the bank, it appearing that the checks had been collected by the bank and had augmented its assets prior to its receivership. N. C. Code, 218 (c) (14). *Williams v. Hood, Comr.*, 737.

12. Evidence that at the time of surrendering checks to a bank, plaintiff's agent told the officers of the bank that he needed the cash from the checks for certain business transactions contemplated by him is insufficient to entitle plaintiff to a preference in the bank's assets under the trust fund theory upon the receivership of the bank after it had collected the checks so surrendered to it. *Ibid.*

13. Where a petition to establish creditor's claim against an insolvent bank also alleges a right to preference in payment, and the allegations are sufficient to state a claim of commonalty at least, a demurrer to the petition is improperly allowed. *In re Trust Co.*, 802.

J Merger and Consolidation.

c Status of Old Assets

1. Where a bank holds a sum of money as a trust fund, and thereafter the bank is merged with another bank, the merged bank also holds the funds as a trust fund. *Andrews v. Hood, Comr.*, 499.

K Reorganization and Reopening.

c Authority of Reopened Bank in Liquidation of Old Assets

1. An order of the Commissioner of Banks allowing a bank to reopen for business upon certain terms and limitations, which order expressly provides that the bank shall proceed in the orderly liquidation of its assets existing at the time of its closing and discharge its liabilities as of that date, authorizes the bank to institute and maintain suit on past-due notes existing in its favor at the date of its closing, suit on such notes being necessary for the liquidation of same, and being necessary to the execution of the order. *Bank v. Trotter*, 442.

Bastards.

B Custody and Support.

c Criminal Liability for Failure to Support Illegitimate Child

1. A defendant may be prosecuted under ch. 228, Public Laws of 1933, for wilful failure to support his illegitimate child born after the passage of the act although the child was begotten before the effective date of the statute, and defendant's contention that in regard to such prosecution the statute is *ex post facto* cannot be sustained,

Bastards B c—*continued.*

since the offense is the wilful failure to support the child, and the time it was begotten is immaterial. N. C. Constitution, Art. I, sec. 32. *S. v. Mansfield*, 233.

2. Wilfulness of defendant in his neglect or refusal to support his illegitimate child is an essential ingredient necessary for a conviction under ch. 228, Public Laws of 1933, and "wilful" as used in the statute means without just cause, excuse, or justification. *S. v. Cook*, 261.

3. In a prosecution under ch. 228, Public Laws of 1933, the presumption of innocence attaching to a defendant in a criminal prosecution, includes the presumption that defendant's neglect to support his illegitimate child was not wilful, and while failure to support may be an evidential fact tending to show wilfulness, such failure does not raise the presumption of wilfulness, and the burden is on the State to prove the element of wilfulness or criminal intent beyond a reasonable doubt. *Ibid.*

Bills and Notes.

A Requisites and Validity.

a Consideration

1. Forbearance to institute an action to set aside a conveyance from a husband to his wife as being voluntary is a valuable consideration and will support their promissory note, and the wife's contention that she received no consideration for the note is untenable. *Bank v. Dardine*, 509.

2. While the execution and delivery of a note under seal raises the presumption of consideration, such presumption is rebuttable as against any person not a holder in due course, C. S., 3008, and evidence of failure of consideration *held* for jury in this case. *Lentz v. Johnson & Sons, Inc.*, 614.

C Rights and Liabilities of Parties.

a Capacity of Parties

1. A person signing a note otherwise than as maker, drawer, or acceptor is deemed to be an endorser unless he clearly indicates, by appropriate words, his intention to be bound in some other capacity, C. S., 3044, and such "appropriate words" must appear upon the instrument itself or in some sufficient writing attached thereto and becoming an essential and integral part thereof, and in an action on the note by the payee parol evidence is not admissible to show that one signing as endorser is primarily liable on the note. *Waddell v. Hood, Comr.*, 250.

2. Defendants, directors of a bank, signed the note in question as endorsers pursuant to a resolution of the board of directors of the bank in which the bank assumed payment of the note and in which resolution it was stipulated that as between the maker "and endorsers" the endorsers should be all jointly and severally liable: *Held*, the resolution of the board of directors of the bank, in which defendants were described as "endorsers," is insufficient to constitute defendants sureties on the note, and they will be deemed endorsers. C. S., 3044. *Ibid.*

Bills and Notes C a—*continued.*

3. The presumption that the possessor of a negotiable note is the holder thereof is a presumption of fact and not of law, and may be rebutted by either plaintiff's or defendant's evidence. *Federal Reserve Bank v. Whitford*, 267.

4. As between the payee of a negotiable note and the signers thereof, a person signing his name on the face of the note may prove by parol evidence that to the knowledge of the payee he signed the same as surety and not maker, C. S., 2977, 3041, and the answer in this case, broadly construed, *is held* sufficient to allege the indispensable allegation that plaintiff payee knew that defendant signed the note as surety. *Davis v. Alexander*, 417.

b Rights and Liabilities of Makers

1. Evidence of a parol contemporaneous agreement that a person signing a note should not be obligated thereon in any way is incompetent, even as against the payee, the parol evidence being in contradiction of the written instrument. *Bank v. Dardine*, 509.

2. In this action by the payee against the makers and endorsers of a note secured by a deed of trust on lands one of the makers set up the defense that he held title to the lands as a naked trustee for the other makers, and that at the time the note was executed the facts were explained to the payee, and that the parties entered a parol contemporaneous agreement that his liability on the note should be limited to the value of the lands: *Held*, testimony of the parol agreement was competent under the rule that evidence of a parol contemporaneous agreement providing a mode of payment is competent as between the parties. *Bank v. Rosenstein*, 529.

c Bona Fide Purchasers and Holders in Due Course

1. In an action by the payee of a negotiable note against the maker thereof and the endorser thereon before delivery, the endorser alleged in his answer that he signed the note upon representations made by the maker that the payee was lending the money to the maker to finance the equipment of a law office, that in fact the note was given to cover funds of the payee on deposit in a bank which had been wrongfully converted by the maker, who was cashier of the bank and in complete control of its affairs, and that the payee had full knowledge of, agreed to, and participated in the fraudulent scheme to procure the endorser to sign the note by such false representations: *Held*, the allegations in the answer were sufficiently broad to allege fraud on the part of both the maker and the payee inuring to the benefit of both, and upon the allegations of the answer the payee did not take the note "for good faith" and did not take it with "no notice of any infirmity" in the instrument, and therefore was not a holder in due course, C. S., 3033, and judgment on the pleadings against the endorser was error. *Mitchell v. Strickland*, 141.

2. The maker of notes secured by a chattel mortgage *held* not entitled as against the purchaser of the notes to set up payee's verbal contract to insure the property. *Banking Corp. v. Linthicum*, 455.

Bills and Notes C—*continued.*

g Stipulations and Conditions

1. Where all the evidence tends to show that the directors of a bank executed their promissory notes to the bank under a contract stipulating that at the end of two years the notes were to be used if by their use the bank could pay depositors in full, reorganize and continue in business, and that otherwise the notes were to be returned to the makers, and that at the expiration of the two-year period the use of the notes would not enable the bank to pay depositors, reorganize and continue in business, and there is no evidence in contradiction, a judgment as of nonsuit in an action thereon by the liquidating agent of the bank will not be held for error. *Hood v. Bayless*, 82.

F Presentment, Demand, Notice, and Protest.

b Endorsers' Right to Notice of Nonpayment

1. The burden is on the holder of a negotiable note to show that notice of nonpayment was given the endorsers, and in the absence of evidence of such notice to an endorser, or to his personal representative after his death, the holder is not entitled to recover on the endorsement. C. S., 3084. *Williams v. Automobile Co.*, 309.

G Payment and Discharge.

a Payment by Note

1. The note sued on in this case was renewed from time to time and upon one of the renewals one endorser was substituted for another endorser by consent of all the parties: *Held*, the renewals and the substitution of endorsers with the consent of the parties did not operate as a discharge of the original note, and in an action instituted by the payee, the payee is bound by a parol contemporaneous agreement made with one of the makers at the time of the execution of the original note as to the mode of payment of the liability of such maker. *Bank v. Rosenstein*, 529.

b Payment Out of Particular Fund

1. Evidence of parol contemporaneous agreement for mode of payment of note *held* competent. *Bank v. Rosenstein*, 529.

f Extension of Time for Payment

1. Where the face of a note contains an agreement that the parties should remain bound notwithstanding any extension of time granted the maker, and extensions of time are granted the maker for definite periods of time upon payment of interest by him, the endorsers remain liable although ignorant of such extensions and payments of interest by the maker, they being bound by their agreement in the note and the extensions being supported by the necessary elements of certainty, mutuality, and consideration. C. S., 3092, 3102. *Bank v. Hossee*, 71.

2. Where an agreement between the maker of a note and the attorney of the payee for an extension of time for payment is void for want of authority on the part of the attorney to make the agreement, and there is no valid ratification of the agreement by the payee, the void agreement for extension of time for payment will not release an accommodation endorser of liability on the note. *Bank v. Trotter*, 442.

Bills and Notes—*continued.*

H Actions on Notes. (Limitation of actions on, see Limitation of Actions C a.)

a Conditions Precedent, Pleadings, and Parties

1. Where certain collateral is pledged as security for a note, the holder is not required to exhaust the collateral security before suing the endorsers, especially where the collateral security is worthless. *Bank v. Hessee*, 71.

2. Plaintiff Federal Reserve Bank brought suit on a note endorsed to it by the Federal Reserve Agent: "Pay to order of the Federal Reserve Bank for collection for the account of the Federal Reserve Agent." Defendant maker moved for nonsuit: *Held*, the presumption arising from possession of the note that plaintiff was the holder thereof was rebutted by plaintiff's own evidence, and as it appeared that plaintiff was not the real party in interest, C. S., 446, the motion of nonsuit was properly granted. *Federal Reserve Bank v. Whitford*, 267.

c Defenses

1. In an action on a note by an administrator against the intestate's son, the maker of the note, it is competent for the son to show by parol evidence that the note represented an advancement and was to be paid by crediting it against the son's anticipated share in the estate. *Galloway v. Thrash*, 165.

2. The receiver of the payee of a promissory note under seal brought action thereon against the corporate maker. Defendant introduced evidence that its president signed the note for the accommodation of the payee bank, the note being used to cover an indebtedness due the bank by the brother of the president of defendant corporation in order that the bank's records should not show the total amount loaned to the president's brother, and that defendant corporation received no benefit from the transaction, and that the payee bank paid nothing for the note: *Held*, the evidence of failure of consideration was competent and should have been submitted to the jury, and a directed verdict in plaintiff's favor was error. *Lentz v. Johnson & Sons, Inc.*, 614.

3. Plaintiff manufacturer brought suit on a promissory note made payable to its dealer, which note provided that transfer of the note should operate to transfer title to property described in a conditional sales contract between the parties of even date. Defendant offered in evidence the conditional sales contract which contained certain warranties of the property, setting up breach of the warranties by the manufacturer: *Held*, the conditional sales contract was competent in evidence, the note and contract being component parts of one completed transaction. *Case Co. v. Cox*, 759.

Brokers.

C Duties and Liabilities to Principals.

d Principal's Title to Property or Proceeds of Sale

1. In this case there was evidence that a customer of a bank, in accordance with an agreement negotiated through the bank, sent two North Carolina bonds to a brokerage firm for sale at a fixed price,

Brokers C d—*continued.*

and that on that day the brokerage firm deposited in a local bank two North Carolina bonds with draft attached drawn on a New York bank in the sum agreed upon for the sale of the bonds: *Held*, the evidence was sufficient to be submitted to the jury in the customer's action to recover the proceeds of the draft as to the identity of the customer's bonds and the bonds deposited by the brokers. *Bank v. Bank*, 216.

Chattel Mortgages.

G Transfer of Property by Mortgagor.

c Title and Rights of Purchaser

1. While the sale of property to a creditor in possession in partial payment of a preëxisting debt is not good as against the equity of a mortgagee having a prior unregistered chattel mortgage against the property, since the creditor takes the property subject to the equities existing against it in the hands of the debtor, the chattel mortgage in itself creates no equity in favor of the mortgagee therein, and where the mortgagee shows no equity existing in his favor, the creditor takes the property free from the lien of the unregistered chattel mortgage. C. S., 3311. *Weil v. Herring*, 6.

Cities and Towns. (See Municipal Corporations.)

Claim and Delivery.

A Nature and Grounds of Remedy. (Limitation of actions in, see Limitation of Actions A c 1.)

a In General

1. An action in claim and delivery, being for the possession of property, must be brought against the party in possession. N. C. Code, 830, 831 (2), 834, 836. *Acceptance Corp. v. Waugh*, 717.

2. Upon the findings of fact by the court under agreement of the parties defendant *is held* estopped to deny that the property, the subject of the action in claim and delivery, was in possession of defendant at the time of the institution of the action. *Ibid.*

Clerks of Court. (Duty to notify Attorney-General of appeal in criminal cases see Criminal Law L a 3.)

Compensation Act. (See Master and Servant F.)

Consolidated Statutes and Michie's Code Construed. (For convenience in annotating.)

SEC.

101, 109, 147. Administrator may refuse to disburse estate prior to one year from appointment. *Bank v. Bridgers*, 92.

185, 191(5). Adopted child may inherit only from adoptive parent, and may not inherit through such parent from such parent's ancestors. *Grimes v. Grimes*, 778.

218. Does not deprive Superior Courts of equitable jurisdiction in proper instances in liquidation of banks. *Hood, Comr., v. Burrus*, 560.

218(c) (13). In action on liability of stockholder, joinder of parties contracting to pay liabilities of bank *held* proper. *Hood, Comr., v. Burrus*, 560.

Consolidated Statutes—*continued.*

SEC.

218(c) (14). Evidence *held* sufficient to be submitted to jury on question of plaintiff's right to statutory preference. *Williams v. Hood, Comr.*, 737. In absence of issue of conspiracy in obtaining certification of checks by bank, holder of checks certified by bank prior to its closing *held* entitled to preference. *Mercerizing Co. v. Hood, Comr.*, 135.

415, 160. Evidence in this action *held* not substantially identical with evidence in former action nonsuited, and dismissal on plea of *res judicata* was error. *Jones v. Bagwell*, 378.

417. Payment by maker after action against surety is barred will not repeal bar of statute as to surety. *Davis v. Alexander*, 417.

425. Claimant must show not only possession but also that possession was adverse and under definite boundaries. *McKay v. Bullard*, 628.

437. Nonresidence of debtor in judgment for fine does not affect running of statute of limitations in favor of purchaser of lands. *Osborne v. Board of Education*, 503.

441(1). Action against surety on note is barred in three years. *Davis v. Alexander*, 417.

441(1), 765, 3243. Cause of action against commissioner for failure to distribute funds in accordance with order of court is barred by lapse of three years. *Peal v. Martin*, 106.

441(1) (4), 830. Three-year statute applies to ancillary remedy of claim and delivery for chattel covered by conditional sale contract not under seal. *Piano Co. v. Loven*, 96.

441(9). Cause of action for reformation of bonds *held* barred in this case, the amendment to complaint alleging cause for reformation having been filed after three years from accrual of cause therefor. *Moore v. Casualty Co.*, 433.

446. Bank holding note as agent for collection may not maintain action thereon. *Federal Reserve Bank v. Whitford*, 267.

446, 556, 567. Question of whether plaintiff was real party in interest *held* not determinable by motion before introduction, and granting of motion by court on ground that same question would be presented by motion of nonsuit *held* error. *Hershey Corp. v. R. R.*, 122.

455. It is not necessary that parties plaintiff have identical interest, but only that each have interest in subject-matter of action and in obtaining relief demanded. *Wilson v. Motor Lines*, 263.

456. In action on liability of stockholder, joinder of parties contracting to pay liabilities of bank *held* proper. *Hood, Comr., v. Burrus*, 560.

463(1). Form of action stated in complaint determines whether action is local or transitory, and this action to recover worth of timber wrongfully cut and removed *held* transitory. *Blevens v. Lumber Co.*, 144.

500. In suit attacking foreclosure, remedy to prevent transfer of property is by notice of *lis pendens* and not by injunction. *Whitford v. Bank*, 229.

507(1). It is not necessary that causes of action of plaintiffs be identical, but only that causes arise out of same transaction or transaction connected with same subject of action. *Wilson v. Motor Lines*, 263.

Consolidated Statutes—*continued.*

SEC.

511(3). Pendency of action as ground for abatement may be taken advantage of by demurrer where facts appear on face of complaint, and where pendency of action does not so appear, by answer. *Reed v. Mortgage Co.*, 27.

515. Plaintiff may move for leave to amend complaint after demurrer is sustained in Supreme Court. *White v. Charlotte*, 721.

521. Scope of counterclaim in general. *Bourne v. Board of Financial Control*, 170.

534. Granting of bill of particulars lies in the sound discretion of the trial court. *Savage v. Currin*, 222. Where failure to file bill of particulars as ordered was due to destruction of records by fire, plaintiff *held* not precluded from establishing debt by competent evidence. *Ibid.*

537. Allegation *held* to be one of probative fact and not of ultimate fact, and was properly stricken out. *Revis v. Asheville*, 237.

547. Court has discretionary power to allow amendment of pleadings during trial. *Gaffney v. Phelps*, 553.

564. Charge *held* not to impinge on section when construed as whole. *Harrison v. Ins. Co.*, 487. Charge *held* not to contain expression of opinion by court. *S. v. Johnson*, 273.

564, 4268. Charge in this case *held* insufficient in failing to point out that one count in indictment was invalid. *S. v. Ray*, 642.

567. On motion of nonsuit all evidence is to be considered in light most favorable to plaintiff. *Garren v. Youngblood*, 86; *Bank v. Bank*, 216; *McGee v. Frohman*, 475; *Oliver v. Hecht*, 481; *James v. Coach Co.*, 742; *Lincoln v. R. R.*, 787; *Gasque v. Asheville*, 821. Evidence sufficient to support verdict in plaintiff's favor is sufficient to overrule nonsuit. *Davidson v. Tel. Co.*, 790; *Lincoln v. R. R.*, 787. Where defendant does not move for nonsuit, he waives his right to have the sufficiency of the evidence considered on appeal. *Harrison v. Ins. Co.*, 487.

569. Court must find material facts, and this case remanded for definite and sufficient findings of fact. *Shore v. Bank*, 798.

573. It is error for court to order compulsory reference before disposing of pleas in bar. *Graves v. Pritchett*, 519.

591. Motion to set aside verdict as being contrary to weight of evidence is addressed to discretion of court, and is not reviewable. *Harrison v. Ins. Co.*, 487.

600. Finding that attorney signing consent judgment was duly authorized *held* binding upon appeal. *Alston v. R. R.*, 114. It will be presumed upon appeal that findings upon which judgment is set aside are supported by evidence. *Radeker v. Royal Pines Park*, 209.

626. Proceeding in this case *held* not to come within provisions of the act. *Moore v. Caldwell County*, 311.

632. Propounders are not "parties aggrieved" by order setting aside verdict in favor of caveators. *In re Will of Hargrove*, 280.

649. Statutory affidavit must be filed in order to confer jurisdiction on Supreme Court in pauper appeals. *Brown v. Kress & Co.*, 722.

Consolidated Statutes—*continued.*

SEC.

830, 831(2). Action in claim and delivery, being for possession of property, must be brought against party in possession. *Acceptance Corp. v. Waugh*, 717.

976. Constable's powers and duties are coextensive with limits of county within which he is appointed. *S. v. Corpening*, 805.

985. Refusal to effectuate agreement to sign consent judgment may not be made basis for contempt where it does not appear that parties ever agreed to exact terms of such judgment. *S. v. Clark*, 657.

987. Promise to answer for debt *held* original promise not coming within provisions of statute. *Garren v. Youngblood*, 86. Party sought to be charged *held* not original promisor. *Gennett v. Lyerly*, 201.

1007. Failure to retain property sufficient to pay then existing debts is prerequisite to presumption of fraud. *Hood, Comr., v. Cobb*, 128.

1137. Where nonresident corporation was always liable to service under the statute, nonresidence did not prevent running of statute of limitations. *Smith v. Finance Co.*, 367.

1177. Proceeding under this section is summary in its nature and is properly instituted by service of ten days notice on adverse parties, and Superior Court has not power in such proceeding to appoint receiver for corporation. *In re Hotel Raleigh*, 521.

1291. Board of Financial Control of Buncombe County may sue and be sued in its own name. *Bourne v. Board of Financial Control*, 170.

1322. Issuance of bonds *held* properly restrained to hearing upon complaint alleging filing of petition for vote in accordance with statute. *Scruggs v. Rollins*, 335.

1500(6). Oral pleadings are permissible in proceedings before justice. *Building & Loan Asso. v. Moore*, 515.

1536. Legislature may create courts inferior to Superior Courts, provided legislative discretion is not delegated and right of appeal to Superior Courts is preserved. *Albertson v. Albertson*, 547.

1659(a). Either party may bring action for divorce on grounds of two years separation. *Campbell v. Campbell*, 859.

1705, 1706. Defendant hydroelectric company *held* to have power of eminent domain. *Mfg. Co. v. Aluminum Co.*, 52.

1795. Applies to action in tort as well as actions on contract. *Boyd v. Williams*, 30. Testimony of transaction with decedent which is material to establishment of liability of estate to witness *held* incompetent. *Ibid.*

2162, 2163. Persons signing guardianship bonds as sureties are not relieved of liability thereon by guardian's failure to sign. *Cheshire v. Howard*, 566.

2306. Sum deducted by lender in excess of legal interest must be reserved as interest in order to constitute usury. *Ray v. Ins. Co.*, 654.

2306, 442(2). Action to recover statutory penalty for usury is barred by lapse of three years. *Smith v. Finance Co.*, 367.

2309. Where principal is not liable for interest, surety may not be held liable therefor. *S. v. Guarantee Co.*, 725.

Consolidated Statutes—*continued.*

SEC.

2365, *et seq.* Justice of the peace *held* to have had jurisdiction of this suit in summary ejectment under this section. *Shuford v. Bank*, 428. Title to property *held* put in issue and action in summary ejectment was properly dismissed in Superior Court upon appeal. *Building & Loan Asso. v. Moore*, 515. Issue of fraud *held* improperly submitted in action in summary ejectment. *Dees v. Apple*, 763.

2437. Notice to owner is prerequisite to lien of laborers. *Price v. Gas Co.*, 796.

2461. Hotel keeper's lien *held* not to attach to automobile belonging to third person and brought to hotel by guest. *Hotel Co. v. Blair*, 464.

2617(a). Evidence that driver was exceeding speed limit at intersection *held* sufficient to be submitted to jury. *Jones v. Bagwell*, 378.

2621(44) (45) (71a). Evidence that defendants operated car while intoxicated and failed to stop after inflicting injury *held* sufficient to be submitted to jury. *S. v. Newton*, 323.

2621(46). Evidence that intersection was obstructed *held* sufficient to support charge under this section. *Gaffney v. Phelps*, 553.

2621(53). Motion for nonsuit, based upon plaintiff's failure to slacken speed upon seeing bus approaching in middle of highway *held* properly overruled, plaintiff having the right to assume that bus would be driven to its right to allow plaintiff to pass in safety. *James v. Coach Co.*, 742.

2621(57). Failure of court to bring jury's attention to this section *held* not reversible error under the facts of this case. *Alexander v. Utilities Co.*, 438.

2677. Construed with charter, *held* to authorize city to levy tax on bakeries operating or delivering in city. *Hilton v. Harris*, 465.

2688, 2787(2). City *held* authorized to lease auditorium built by it in its general municipal building. *Cline v. Hickory*, 125.

2712, 2713. Jurisdiction of Superior Court on appeal from street assessments is derivative, and it has not jurisdiction on appeal to condemn lands for street purposes. *R. R. v. Ahoskie*, 154.

2713. Lien for street assessments attaching subsequent to execution of deed does not violate covenant against encumbrances. *Oliver v. Hecht*, 481.

2830. Municipal officers *held* liable to city for loss occasioned by their wilful and unlawful disbursement of city funds in payment of contract let in violation of statute. *Moore v. Lambeth*, 23.

2977, 3041. As against payee, person signing note as maker may show he signed same as surety to knowledge of payee. *Davis v. Alexander*, 417.

3008. Presumption of consideration from seal is rebuttable. *Lentz v. Johnson & Sons*, 614.

3033. Answer *held* to allege fraud rendering payee not a holder in due course, and judgment on pleadings was error. *Mitchell v. Strickland*, 141.

3044. Resolution of directors *held* insufficient to show their intention to be bound in capacity other than endorsers. *Waddell v. Hood, Comr.*, 250.

Consolidated Statutes—*continued.*

SEC.

3084. Burden is on holder of negotiable note to show that notice of non-payment was given endorsers. *Williams v. Automobile Co.*, 309.

3092, 3102. Definite extension of time granted maker does not relieve endorsers where note contains agreement to remain bound. *Bank v. Hessee*, 71.

3311. Transfer of property by mortgagor in payment of preëxisting debt *held* valid as to mortgagee in unregistered chattel mortgage who shows no equity existing in his favor. *Weil v. Herring*, 6.

3561. Mortgages filed for registration at same instant of time are equal. *Hood, Comr., v. Landreth*, 621.

4131, 4144(2). Fact that paper-writing in testatrix's handwriting contains immaterial, printed words does not render writing invalid as holographic will. *In re Will of Parsons*, 584.

4166. Devise lapses upon prior death of devisee unless devisee would have been heir at law, and bequest lapses unless legatee would have been distributee of testator. *Furnell v. Dongan*, 611. Judgment that legacy did not lapse by reason of prior death of legatee affirmed, it appearing that legatee would have been distributee of testator. *Beach v. Gladstone*, 876.

4175. Evidence *held* sufficient to be submitted to jury on charge of being accessory before the fact to crime of murder. *S. v. Mozingo*, 247.

4200. Murder committed by person lying in wait is murder in first degree. *S. v. Satterfield*, 118; *S. v. Mozingo*, 247. Where murder is committed by one conspirator in furtherance of common plan to rob bank, each conspirator is guilty of murder in the first degree, and it is immaterial which conspirator actually fired fatal shot. *S. v. Green*, 369.

4209. Every element of crime of having carnal knowledge of female under sixteen years of age *held* supported by evidence. *S. v. Houpe*, 377. In prosecution under the section it is not error to exclude evidence of improper relations between prosecuting witness and another several months after the alleged crime of defendant. *Ibid.*

4245. Evidence *held* sufficient to be submitted to jury in this prosecution for arson. *S. v. Moses*, 139.

4250. Felonious intent in receiving goods, knowing at the time that they had been stolen, is necessary to conviction. *S. v. Morrison*, 804.

4339. Testimony of prosecutrix as to each element of offense of seduction *held* supported by other evidence. *S. v. Tuttle*, 649.

4358. Evidence of reputation of place *held* competent in prosecution under this section. *S. v. Waggoner*, 306.

4378. In prosecution under this section, defense that arrest was made by constable outside of his township is unavailing, since constable's powers are coextensive with boundaries of county. *S. v. Corpening*, 805.

4449. Right to suspend judgment is established by decisions, and is authorized by statute in prosecution for abandonment of wife. *S. v. Henderson*, 258.

Consolidated Statutes—*continued.*

SEC.

4622. Refusal of court to grant separate trial on each of indictments charging conspiracy to rob and murder committed in perpetration of robbery *held* not error. *S. v. Green*, 369.

4625. In prosecution of defendant for being accessory before fact of murder, variance of few days between the indictment and proof as to the day the murder was committed *held* not fatal. *S. v. Gore*, 618.

4643. Only incriminating evidence need be considered upon motion as of nonsuit. *S. v. Satterfield*, 118; *S. v. Moses*, 139.

4649. State may appeal from acquittal upon special verdict, although the verdict is fatally defective in that it fails to find essential facts. *S. v. Gulledge*, 374.

4650. Defendant is entitled to appeal only from conviction or final judgment. *S. v. Rooks*, 275.

4650, 4654. Recognizance may not be construed as stay bond. *Current v. Church*, 658.

4654. Clerk of Superior Court should notify Attorney-General of appeal and of any extension of time for perfecting same. *S. v. Etheridge*, 801.

4655, 614. Judgment for fine duly docketed constitutes lien on realty of defendant which attaches immediately upon docketing. *Osborne v. Board of Education*, 503.

5275. Notice and hearing are necessary to valid levy of either original or additional drainage assessments. *Spence v. Granger*, 19.

5287, 637. Superior Court *held* to have obtained jurisdiction to retain cause for hearing upon appeal from clerk's order setting aside drainage assessments. *Spence v. Granger*, 19.

5352. Lands within district are subject to additional assessments until district's original debt for improvements is paid. *Bank v. Watt*, 577.

5373. *Held* not to affect liability of lands for additional drainage assessments necessary to pay judgment against district rendered prior to effective date of statute. *Bank v. Watt*, 577.

6106. It will be presumed that act has been passed in conformity with requirements. *Grimes v. Holmes*, 293.

6162, 6186. Nonindigent insane may be treated at State Hospital, but must pay at least actual cost of maintenance. *State Hospital v. Bank*, 697.

6262, 6288, 6298, 6302. License of indemnity company stating that certain person was its agent in this State *held* evidence of such agency. *R. R. v. Lassiter & Co.*, 408.

6289. Whether misrepresentations in application for insurance are fraudulent or material are ordinarily questions for jury. *Harrison v. Ins. Co.*, 487.

6351, 6352. *Held* not applicable to this case. *Paramore v. Ins. Co.*, 300.

6376, 6377, 6378, 6379. It will be presumed that bank acting as administrator has complied with statutes. *Bank v. Bridgers*, 92.

Consolidated Statutes—*continued.*

SEC.

6497, 6508. Contract defining association as Fraternal Benefit Contract *held* governed by statutes. *Trust Co. v. Widows' Fund of Oasis Temple*, 534. And trust company could not be named beneficiary in such policy. *Ibid.*

6649. Section does not prohibit truthful advertising by dentist. *In re Owen*, 445.

7116, 7123. Town and owner of fee *held* properly joined as plaintiffs in action to restrain trespass on watershed. *Morganton v. Hudson*, 360.

7125. Does not impose mandatory duty on court to restrain city from discharging raw sewage into stream. *Smithfield v. Raleigh*, 597.

7880(152) (155). Claim for refund of income taxes *held* barred by failure to make application for revision within three years from return and thirty days of redetermination by Federal Government. *Maxwell, Comr., v. Hinsdale*, 37.

7987, construed with ch. 389, Public Laws of 1931. Tax lien of city and county are equal. *Saluda v. Polk County*, 180.

8081(i). Fact that city's employee is paid from funds obtained from Reconstruction Finance Corporation does not affect contract of employment with city. *Mauze v. Forest City*, 168.

8081(ff). Whether section is statute of limitations or condition precedent to right to recover, *quære? Wilson v. Clement Co.*, 541.

8081(kk) (mm) (ww). Compensation allowed injured employee, including amount for facial disfigurement, may not exceed $6,000. *Arp v. Wood & Co.*, 41.

8081(uu). Posthumous illegitimate child acknowledged by father is dependent of father within meaning of compensation act. *Lippard v. Express Co.*, 507.

8081(ppp). Jurisdiction of Superior Court upon appeal from award of Industrial Commission is limited to questions of law. *Byrd v. Lumber Co.*, 253.

8081(ppp), 1530, 1531. Statutes regulating appeals from justice of the peace govern appeals from Industrial Commission, and notice of appeal in this case from Industrial Commission *held* not sufficient. *Higdon v. Light Co.*, 39.

Conspiracy. (See Homicide A c 2.)

Constables.

B Powers and Duties.

a Territorial Extent of Authority

1. A constable has authority to make an arrest anywhere in the county within which he is appointed, and in a prosecution for resisting arrest, C. S., 4378, a defense that the arrest was made by a constable outside of his township and that therefore defendant did not resist an officer in the performance of his duty is unavailing. C. S., 976, Art. IV, sec. 24. *S. v. Corpening*, 805.

Constitution, Sections of, Construed. (For convenience in annotating.)

ART.

I, sec. 17. Person may not be tried twice for same offense, but bastardy proceedings, being civil, *held* not to support plea of former jeopardy in prosecution under ch. 228, Public Laws of 1933. *S. v. Mansfield*, 233. Taking of land by hydroelectric company for dam site purposes *held* taking for public and not private purpose. *Mfg. Co. v. Aluminum Co.*, 52.

I, sec. 19. Where parties do not consent to trial by court, the court may not determine, prior to introduction of evidence, issue of fact joined by pleadings. *Hershey Corp. v. R. R.*, 122.

I, sec. 31. City *held* authorized to tax bakeries located outside of city but delivering within city in order to prevent undue advantage of such bakeries over bakeries located within city. *Hilton v. Harris*, 465.

I, sec. 32. In prosecution for wilful neglect to support bastard child begotten before passage of law, plea of *ex post facto held* untenable, since the offense is not begetting bastard child but wilful failure to support. *S. v. Mansfield*, 233.

II, sec. 12. It will be presumed that act has been passed in conformity with constitutional requirements. *Grimes v. Holmes*, 293; *Matthews v. Blowing Rock*, 450.

II, sec. 29. Act relating to tax liens and collection of taxes which applies to one county only *held* void. *Wake Forest v. Holding*, 808. *Semble:* Legislature has power by private act to enlarge town limits and provide that town maintain streets in annexed territory. *Matthews v. Blowing Rock*, 450.

IV, sec. 8. Finding that attorney signing consent judgment was duly authorized *held* binding upon appeal. *Alston v. R. R.*, 114.

IV, sec. 12. Under this provision Legislature may create courts inferior to Superior Courts, provided legislative discretion is not delegated and right of appeal to Superior Courts is preserved. *Albertson v. Albertson*, 547.

IV, sec. 13. Where jury trial is waived, findings of fact upon conflicting evidence are not subject to review upon appeal. *Barringer v. Trust Co.*, 505.

IV, sec. 24. Constable's powers and duties are coextensive with limits of county within which he is appointed. *S. v. Corpening*, 805.

V, sec. 3. Power given Legislature to levy taxes on trades, professions, etc., may be delegated by it to cities and towns. *Hilton v. Harris*, 465.

VII, sec. 9. Levy of assessments by city for public improvements does not come within provisions of the section. *Saluda v. Polk County*, 180.

VIII, sec. 4. Legislative control over counties and cities is limited only by organic law. *Saluda v. Polk County*, 180.

XI, sec. 7. State has no contractual duty to care for insane, and change of regulations does not impair obligations of contract. *State Hospital v. Bank*, 697.

XI, sec. 10. Nonindigent insane may be treated at State Hospital, but must pay at least actual cost of maintenance. *State Hospital v. Bank*, 697.

Constitution—*continued.*

ART.

XIV, sec. 7. Legislature may place additional duties upon municipal officer with provision that he receive compensation of only one office. *Grimes v. Holmes*, 293.

Constitutional Law. (Constitutional requirements and restrictions in taxation see Taxation A; in enactment of statutes see Statutes A; in establishing courts inferior to Superior Courts see Courts B a; prohibition against person holding more than one public office see Public Officers B c.)

E Obligations of Contract.

a Nature and Extent of Mandate

1. Chapter 120, Public Laws of 1925, providing that where a person admitted to the State Hospital at Raleigh as an indigent person thereafter becomes nonindigent, such person or his estate should be liable to the hospital for the actual cost of his care and maintenance in the hospital from the date of his admission, in accordance with the settled policy of the State in regard to nonindigent inmates, although such person may have been admitted prior to the effective date of the statute, is not unconstitutional upon the ground that it violates the obligations of a contract, there being no contractual duty on the part of the State to care for and maintain insane persons in such institution, the hospital being a charitable institution of the State, maintained voluntarily in recognition of Christian principles. Art. XI, sec. 7. *State Hospital v. Bank*, 697.

F Constitutional Rights and Guarantees of Person Accused of Crime.

e Former Jeopardy (Plea of, see Criminal Law F.)

1. A person cannot be tried twice for the same offense. N. C. Constitution, Art. I, sec. 17; Federal Constitution, Amendment 5. *S. v. Mansfield*, 233.

f Ex Post Facto Laws

1. *Held:* Offense of wilful neglect to support illegitimate child was committed after effective date of the statute, although child was begotten prior to effective date thereof. *S. v. Mansfield*, 233.

Contempt of Court.

A Acts Constituting Contempt.

a Acts Tending to Impede or Frustrate Administration of Law

1. In this proceeding for contempt it appeared that respondents, as defendants in partition proceedings, had agreed to enter a consent judgment in that proceeding, and that the matter was continued from time to time upon representations made in open court that a consent judgment would be submitted to the court, that several tentative drafts of the proposed judgment had been made but none actually signed by the parties, that the petitioner in that proceeding had died, rendering it more troublesome to establish the allegations of the petition, and that respondents now decline to sign the proposed consent judgment, contending that at no time had they consented to its terms: *Held*, the record does not support a judgment for contempt, C. S., 985, it appearing that the exact terms of the proposed consent judgment had never been agreed upon by the parties or their counsel. *S. v. Clark*, 657.

Contracts. (Required to be in writing see Frauds, Statute of: particular kinds of contracts see Particular Heads.)

A Requisites and Validity.

b Offer and Acceptance

1. The essential elements of a valid contract of sale are a completed and communicated offer and an acceptance in the exact terms thereof. *Cobb v. Dibrell Bros.*, 572.

2. The agreement of the parties gives rise to a contract unaffected by what either party thought the agreement to be. *Ibid.*

B Construction and Operation.

a General Rules of Construction

1. In determining the meaning of an indefinite contract, the construction placed upon the contract by the parties themselves will usually be adopted by the Court. *Hood, Comr., v. Davidson*, 329.

D Abandonment.

a In General

1. In this case *held* there was no evidence of abandonment of the contract in suit by any of the recognized and accepted methods pointed out in *Bixler v. Britton*, 192 N. C., 199. *Cobb v. Dibrell Bros.*, 572.

F Actions for Breach.

a Parties Who May Sue

1. Plaintiff held not a party to contract in deed for support of grantor and could not maintain action against grantee. *Richardson v. Richardson*, 314.

2. Plaintiff alleged that he was liable under a debt assumption contract on notes secured by a first mortgage on property in which he had purchased and later sold the equity of redemption, that defendant, the holder of a second mortgage on the property, agreed with the holder of the first mortgage notes that if the holder of the first mortgage notes would grant extension of time for payment and would defer foreclosure, defendant would lend the holder of the equity money to refinance the first mortgage notes, that at the expiration of the extension agreement defendant refused to lend the money in accordance with his agreement, and that the holder of the first mortgage notes foreclosed the property and recovered a deficiency judgment against plaintiff on the debt assumption contract, which plaintiff was forced to pay. Plaintiff brought suit to recover of defendant the amount of the deficiency judgment, claiming that plaintiff had been injured in this sum by defendant's breach of the contract: *Held*, plaintiff was not a party to defendant's agreement to lend the money to the holder of the equity, made with the holder of the first mortgage notes, nor was the agreement made for plaintiff's benefit, and plaintiff could not maintain an action thereon. *Land Co. v. Realty Co.*, 453.

c Evidence and Nonsuit

1. Evidence *held* sufficient to be submitted to jury on issue of existence of contract alleged. *Grocery Co. v. Power Co.*, 340.

2. Nonsuit on plaintiff's testimony tending to show affirmance of contract by defendant with knowledge of facts *held* error. *McGee v. Frohman*, 475.

Contracts F c—*continued.*

3. Plaintiff offered evidence tending to show that plaintiff's father, acting in behalf of plaintiff, offered to purchase certain stock at a stipulated price, and that defendant accepted the offer, and that at the time defendant understood that plaintiff was purchasing the stock: *Held*, the evidence was sufficient for the jury upon the question of the existence of a valid contract, although defendant offered evidence that at the time of the alleged agreement he thought he was dealing solely with plaintiff's father. *Cobb v. Dibrell Bros.*, 572.

Controversy Without Action.

A Nature and Grounds of Remedy.

a Subject-matter and Real Controversy

1. Where it appears that an action is instituted solely to obtain the advice and opinion of the Court as to the validity of a proposed county bond issue upon facts agreed, and that the interest of both parties is the same and there is no "question of difference" between them, the proceeding will be dismissed in the Supreme Court for want of jurisdiction of the Superior Court to enter the judgment appealed from. C. S., 626. *Moore v. Caldwell County*, 311.

Corporations.

C Directors and Officers.

a Election, Appointment, and Tenure

1. The jurisdiction of a judge of the Superior Court over matters involved in the election of directors of a corporation organized under the laws of this State is statutory. C. S., 1176, 1177. *In re Hotel Raleigh*, 521.

2. The officers of a corporation may be chosen only by its directors, and its directors, duly elected by its stockholders, hold office until their successors are duly elected. *Ibid.*

3. A proceeding based upon the failure of stockholders of a corporation to elect directors thereof at the annual meeting held for that purpose because of dissension among the stockholders, and the postponement of such election because of such dissension with the result that the directors theretofore elected continued in office, is a proceeding under C. S., 1177, which is summary in its nature, and notice in writing signed by complainant served on the adverse parties by the sheriff ten days before the date designated for the hearing of the complaint confers jurisdiction upon the judge of the Superior Court over the parties and subject-matter of the proceeding, nor is the failure of the directors to hold an election within thirty days after written request therefor by holders of ten per cent of the stock of the corporation a prerequisite to the proceedings, the conditions precedent to proceedings under C. S., 1176, not being applicable. *Ibid.*

4. In proceedings under C. S., 1177, for the failure of the stockholders of a corporation to elect directors thereof because of dissension among the stockholders at a meeting held to elect such directors, the corporation is neither a necessary nor a proper party, nor may

Corporations C a—*continued.*

its rights be affected, and the judge of the Superior Court has no jurisdiction to appoint a receiver for the corporation in such proceeding; although, in proper instances, in the exercise of its equitable jurisdiction, the Superior Court may appoint a receiver for a corporation whose business is mismanaged, with resulting loss of its assets, because of dissensions among its stockholders or directors. *Ibid.*

d Transactions with the Corporation

1. Transfer of corporate funds by the president of the corporation to a preëxisting debt due by the corporation to the president's wife is not wrongful and does not constitute wilful misapplication of the funds by the president, if at the time of such transfers the corporation is solvent. *Cheshire v. Parker*, 364.

2. In an action seeking to establish fraud in the transfer of corporate property by the president of the corporation in paying a preëxisting debt due the president's wife by the corporation, the admission of testimony by the president as a witness in his own behalf as to his present financial condition cannot be held for reversible error. *Ibid.*

G Corporate Powers and Liabilities.

c Representation of Corporation by Officers and Agents

1. The corporate maker of a note may escape liability thereon on the plea of *ultra vires* upon a showing that the execution of the note by its president was not in pursuance of its corporate business, or incident thereto, and was wholly without consideration or benefit to the corporation to the knowledge of the payee. *White v. Johnson & Sons, Inc.*, 205 N. C., 773, distinguished in that the evidence in that case showed consideration to the corporation. *Lentz v. Johnson & Sons, Inc.*, 614.

H Insolvency and Receivership. (Receivership of banking corporations see Banks and Banking H.)

a Grounds and Procedure

1. Superior Court has no power to appoint receiver for corporation in proceedings under C. S., 1177. *In re Hotel Raleigh*, 521.

d Liability of Officers and Directors for Wrongful Depletion of Assets

1. The directors of a corporation may be held personally liable for gross neglect of their duties, mismanagement, fraud, and deceit resulting in loss to a third person, but not for errors of judgment made in good faith. *Bank v. Bridgers*, 91.

Counterclaims. (See Set-offs and Counterclaims, Pleadings C.)

Counties.

E Fiscal Management, Debts, and Securities. (Taxation see Taxation; county courts see Courts B.)

c Collection of Notes Due the County

1. The maker of a note held by the Board of Financial Control of Buncombe County *held* entitled to tender past-due bonds of the county in payment of the note. *Bourne v. Board of Financial Control*, 170.

Counties—*continued.*

F Actions.

a Parties and Process

1. The Board of Financial Control of Buncombe County, created by chapter 253, Public Laws of 1931, is given power to sue and be sued in its own name, and an action may be maintained against it by a person liable to the county on a chose in action held by the Board of Financial Control to compel the board to allow an offset against the chose in action. C. S., 1291. *Bourne v. Board of Financial Control*, 170.

Courts.

A Superior Courts.

c Appeals from Inferior Courts, State Commissions, and Governmental Agencies

1. Where no procedure for appeal is prescribed by statute, the rules regulating appeals from a justice of the peace are applicable and controlling. *Higdon v. Light Co.*, 39.

2. Jurisdiction of Superior Court on appeal from street assessments is derivative, and it has no jurisdiction on appeal to condemn land for street purposes. *R. R. v. Ahoskie*, 154.

3. While the jurisdiction of the Superior Court upon appeal from a municipal court which does not require written pleadings is derivative, where equitable relief is demanded in the Superior Court written pleadings are required. *Dees v. Apple*, 763.

4. Upon appeal from a municipal court to the Superior Court the case must be tried in the Superior Court as instituted in the municipal court, and appellant may not change his cause of action upon appeal. *Ibid.*

5. Upon appeal to Superior Court from continuance of restraining order, court may not find facts determinative of controversy. *Sims v. Building and Loan Asso.*, 809.

d Jurisdiction on Appeal from Clerk

1. Superior Court *held* to have obtained jurisdiction to retain cause for hearing upon appeal from clerk's order setting aside drainage assessments. *Spence v. Granger*, 19.

B County and Municipal Courts. (Ch. 115, Public Laws of 1929, see Statutes A c 1.)

a Creation and Establishment

1. Under constitutional authority, Art. IV, sec. 12, the General Assembly may create courts inferior to the Supreme Court, provided it does not delegate its discretion (N. C. Code, Art. 18, subch. 4), and provided such inferior courts do not have substantially the same powers as those of the Superior Courts, and are given a less extensive jurisdiction, with provision for appeal from such inferior court to the Superior Courts, so that the constitutional powers and provisions relative to the Superior Courts are not invaded. *Albertson v. Albertson*, 547.

b Jurisdiction

1. The municipal court of the city of High Point *is held* to have had jurisdiction to grant a judgment for absolute divorce between the

Courts B b—*continued.*

parties to this action under the provisions of ch. 699, Public-Local Laws of 1927, amending ch. 569, Public-Local Laws of 1913, both parties being residents of the city, and the act giving the city court jurisdiction in divorce actions providing for appeal to the Superior Court, and the city court being given an original jurisdiction less extensive than that of the Superior Court of the county. *Albertson v. Albertson*, 547.

2. The civil division of the municipal court of Greensboro *is held* to have jurisdiction of suits in summary ejectment. *Dees v. Apple*, 763.

Covenants. (See Deeds and Conveyances C h.)

Criminal Law. (Particular crimes see Particular Titles of Crimes; parties and offenses in prosecution for homicide see Homicide A c; indictment see Indictment.)

F Former Jeopardy.

d Same Offense

1. Bastardy proceedings against defendant under C. S., 265, *et seq.* (repealed by sec. 9, ch. 228, Public Laws of 1933), being civil, will not support a plea of former jeopardy in a prosecution under ch. 228, Public Laws of 1933, for wilful failure to support his illegitimate child. *S. v. Mansfield*, 233.

2. Defendant was tried for arson and acquitted. Thereafter he was indicted for murder. In the prosecution for murder it appeared that the deceased was fatally burned in the fire which was the basis of the former prosecution, and that the evidence as to defendant's actions in both prosecutions was the same: *Held*, in the prosecution for murder it was error for the court to withhold from the consideration of the jury defendant's plea of former acquittal. *S. v. Clemmons*, 276.

G Evidence. (Competency of witnesses see Witnesses; evidence of particular offenses see Particular Titles of Crimes; presumptions from use of deadly weapons see Homicide G b.)

b Facts in Issue or Relevant Thereto

1. In a prosecution for receiving stolen goods knowing them to have been stolen, testimony that defendant sold liquor is incompetent as substantive proof, even of the intent to commit the crime charged. *S. v. Jordan*, 460.

j Testimony of Defendant

1. An instruction that the jury should carefully scrutinize the testimony of defendant in a criminal prosecution, but that if, having done so, the jury is satisfied defendant is telling the truth, to give his testimony as much credibility as a disinterested witness, *is held* without error. *S. v. Deal*, 448.

2. When a defendant voluntarily becomes a witness in his own behalf he has the same privileges and position, and is equally liable to be impeached or discredited, as any other witness. *S. v. Jordan*, 460.

Criminal Law G j—*continued.*

3. While it is proper in a criminal prosecution for the court to charge that the jury should scrutinize the testimony of a defendant testifying in his own behalf, it is error for the court to charge that the law presumes the defendant is laboring under a temptation to testify to whatever he thinks will clear him of the charge, whether the defendant is so tempted and whether he yields to such temptation being for the determination of the jury. *S. v. Carden*, 517.

n Circumstantial Evidence

1. An accumulation of independent incriminating circumstances may be sufficient when taken together to warrant the submission of the case to the jury, although each single circumstance, when standing alone, is insufficient. *S. v. Moses*, 139.

2. Circumstantial evidence *held* sufficient to be submitted to jury. *S. v. Newton*, 323.

q Privileged Communications

1. Error, if any, in the admission of a note written to defendant by his wife, *is held* cured by her testimony upon the trial in his behalf, the note tending to discredit her testimony on the trial. *S. v. Gore*, 618.

r Impeaching and Corroborating Evidence

1. Defendant, on trial for receiving stolen goods knowing them to have been stolen, testified on cross-examination by the State that he had not stated he sold liquor, and that he had not been selling liquor: *Held*, the State was bound by defendant's testimony on cross-examination in response to the collateral questions relative to his selling liquor and was precluded from contradicting it by testimony of other witnesses that defendant had stated he sold liquor to everyone in the county. *S. v. Jordan*, 460.

2. Defendant was charged with being an accessory before the fact of murder, and pleaded not guilty. Upon the trial the perpetrator of the crime testified that he killed deceased because of the promises and inducements of defendant. Defendant cross-examined the witness and sought to impeach his character: *Held*, certain written and oral statements made by the witness to others prior to the trial were competent as tending to corroborate his testimony, the credibility of the witness having been challenged by the plea of not guilty, the cross-examination, and the evidence of his bad character. *S. v. Gore*, 618.

3. Defendant was charged with being an accessory before the fact of murder in procuring the murder of deceased: *Held*, testimony of a quarrel between defendant and his wife over the attentions paid defendant's wife by deceased was competent to show motive and as corroborative of the testimony of the perpetrator of the crime that defendant stated this was his motive. *Ibid.*

4. Evidence of the circumstances under which a witness had made statements, competent upon the trial as corroborative of his testimony, is properly admitted to enable the jury to determine the weight to be given the statements upon the basis of whether they were voluntary or were obtained by coercion or duress. *Ibid.*

Criminal Law G r—*continued.*

5. Note from defendant to his wife *held* competent as discrediting her testimony upon the trial in his favor. *Ibid.*

6. The cross-examination of defendant in this case *held* well within the latitude allowed by law. *S. v. Gore*, 618; *S. v. Hendricks*, 873.

H Time of Trial.

c Continuance

1. Where the testimony of a defendant at the trial amounts to a confession of the crime charged, and is sufficient for conviction of both defendants, the refusal of a motion for continuance cannot be held for error, since a continuance would have availed defendants naught. *S. v. Green*, 369.

2. A motion for continuance is addressed to the sound discretion of the trial court. *Ibid.*

I Trial. (Consolidation and severance of counts in indictment see Indictment B; trial for particular offenses see Particular Titles of Crimes.)

e Reception of Evidence

1. It is within the sound discretion of the trial court to allow the solicitor to offer additional evidence after the argument has begun, and in this case there was no suggestion of abuse of discretion, it appearing that the evidence was not discovered until the night before, and that the court stated it would allow defendant any reasonable time to investigate the additional evidence. *S. v. Satterfield*, 118.

2. Where testimony is competent as corroborative evidence, the failure of the trial court to so restrict its admission will not be held for error in the absence of a request to that effect by defendant. *S. v. Tuttle*, 649.

3. Defendant desiring evidence to be restricted to particular purposes should make request to that effect. Rule 21. *S. v. Hendricks*, 873.

g Instructions

1. In this prosecution for murder all the evidence tended to show that deceased was killed in the perpetration of a robbery. The trial court instructed the jury "all the evidence tends to show a homicide committed in the perpetration of a robbery," and that the State has offered evidence "which, it contends, tends to show, and which should satisfy you, gentlemen, beyond a reasonable doubt," etc.: *Held*, the charge will not be held for error on defendant's exception on the ground that it contained an expression of opinion by the court in violation of C. S., 564. *S. v. Johnson*, 273.

2. Error of the court in stating the evidence or in stating the contentions of a party must be brought to the court's attention in apt time to afford correction or an exception based thereon is unavailing upon appeal. *Ibid.*

3. The indictment charged defendant with unlawfully conspiring with M. and G., without words indicating conspirators other than those named. The trial court charged the jury that defendant would be guilty if he conspired as charged with M. and G., "or with others":

Criminal Law I g—*continued.*

Held, the charge was erroneous in that it went beyond the averments of the indictment, upon which defendant was entitled to rely for information of the accusation against him. *S. v. Mickey*, 608.

4. An exception based upon the court's failure to define an "accessory before the fact" in a prosecution of defendant for being an accessory before the fact of murder, cannot be sustained where the record shows the court read to the jury the indictment which fully described the offense, it being the duty of defendant, if he desires more elaborate instruction, to aptly tender a request therefor. *S. v. Gore*, 618.

5. In this prosecution for murder defendant relied on an alibi. The court instructed the jury as to the presumption of innocence and that no burden of proof rested upon defendant, but that the burden of proof was on the State to prove defendant's guilt beyond a reasonable doubt, and correctly defined reasonable doubt, and that before returning a verdict of guilty they should so find the defendant guilty "from the evidence or lack of evidence in the case": *Held*, defendant's contention that the phrase "or lack of evidence" placed the burden of proving his alibi on him cannot be sustained, and the phrase complained of cannot be held for prejudicial error when construed contextually with the whole charge upon the burden of proof. *S. v. Beard*, 673.

6. Defendant desiring more full or detailed instructions as to any particular phase of evidence or law should request special instructions. *S. v. Hendricks*, 873.

j Sufficiency of Evidence and Nonsuit (Of particular crimes see Particular Titles of Crimes.)

1. Only incriminating evidence need be considered upon defendant's motion as of nonsuit under C. S., 4643, and contradictions in the inculpatory testimony and equivocations of some of the State's witnesses, which affects the weight or credibility of the evidence but not its competency, need not be taken into account in determining whether there is any competent evidence to sustain the allegations of the indictment. *S. v. Satterfield*, 118.

2. Upon defendant's motion as of nonsuit only the incriminating evidence need be considered. C. S., 4643. *S. v. Moses*, 139.

3. Independent incriminating circumstances *held* sufficient to overrule defendant's motion to nonsuit. *Ibid.*

4. While circumstantial evidence is a recognized and accepted instrumentality in ascertaining the truth, when relied upon in a criminal prosecution it should tend to establish guilt to a moral certainty, and exclude any other reasonable hypothesis, but it should be submitted to the jury if it reasonably conduces to the conclusion of guilt as a fairly logical and legitimate deduction, it being for the jury to decide whether it establishes guilt beyond a reasonable doubt. *S. v. Newton*, 323.

5. Where defendant does not renew his motion of nonsuit at the close of his evidence he waives his right to have the sufficiency of the evidence to warrant a conviction considered upon appeal. *S. v. Waggoner*, 306.

Criminal Law I j—*continued.*

6. The unsupported testimony of an accomplice is sufficient to overrule a motion for nonsuit, since such testimony is sufficient to sustain a verdict of guilty. *S. v. Gore*, 618.

k Verdict

1. A special verdict that fails to find facts essential to an adjudication of defendant's guilt or innocence is fatally defective and a *venire de novo* will be ordered on appeal. *S. v. Gulledge*, 374.

m Errors Cured or Rendered Harmless by Verdict

1. Where the jury renders a verdict of guilty on both counts in a bill of indictment, error in the trial or charge of the court upon one count is cured by the verdict on the other count where the counts are of the same grade and punishable alike, and only one sentence is imposed, and the error in respect to one count could not affect the verdict on the other. *S. v. Newton*, 323.

2. Error in the charge of the court as to the burden of proof on the lesser degree of the crime charged *is held* not cured by a verdict of guilty of the highest degree of the crime charged, since it cannot be known whether the jury would have rendered the lesser verdict had the two degrees of the crime arising upon the evidence been submitted to them under correct instructions. *S. v. Brown*, 156.

J Motions After Verdict.

a Motions in Arrest of Judgment

1. A motion in arrest of judgment is proper when, and only when, some error of fatal defect appears upon the face of the record. *S. v. Satterfield*, 118; *S. v. Deal*, 448.

K Judgment and Sentence. (In homicide prosecution see Homicide H f.)

b Suspended Judgments and Executions

1. The practice of suspending judgments or staying executions in criminal prosecutions upon reasonable and just terms, with the consent of defendant, is established by custom and judicial decision, and in prosecutions for abandonment has received express legislative sanction. C. S., 4449. *S. v. Henderson*, 258.

2. Defendant may not challenge terms upon which judgment was suspended upon State's motion that judgment be executed for his failure to comply therewith. *Ibid.*

3. If the conditions upon which the execution of a judgment in a criminal prosecution is suspended are void, the judgment is at all times enforceable, if they are valid defendant cannot resist enforcement of the judgment upon his failure to comply with the conditions. *Ibid.*

g Stay of Execution Upon Appeal

1. Defendant in a criminal action was allowed to appeal from judgment imposing a fine and a road sentence upon filing a bond for his appearance at the next criminal term of the court with sufficient surety, but the stay bond required by C. S., 4650, was not filed: *Held*, upon affirmance of the judgment by the Supreme Court, judgment may not be had against the surety on the appearance bond for the amount of the fine, and as there was nothing to stay execution of

Criminal Law K g—*continued.*

the judgment at any time, C. S., 4654, 4655, 650, the recognizance may not be construed as a stay bond on the ground that the parties so intended. *Current v. Church*, 658.

L Appeal in Criminal Cases.

a Prosecution of Appeal

1. The appeal in this case is dismissed for failure of defendant to prosecute the appeal in accordance with the Rules of Court, the defendant having failed to take any steps toward perfecting the appeal after the service of case on appeal on the solicitor, but as defendant was convicted of a capital felony, the appeal is dismissed only after an inspection of the record for errors appearing on its face. *S. v. Hooker*, 648.

2. When appellant in a criminal case fails to make out and serve his statement of case on appeal within the time allowed he loses his right to do so, and the appeal must be dismissed on motion of the Attorney General, but where the life of the prisoner is involved this will be done only after an inspection of the record for errors appearing upon its face. *S. v. Etheridge*, 801.

3. When an appeal is taken in a criminal case and the execution of the judgment stayed under C. S., 4654, the clerk of the Superior Court is required to notify the Attorney-General of the appeal, and, if the statutory time for perfecting the appeal is extended, he should notify him of such extension. *Ibid.*

d Record and Briefs

1. The record on appeal imports verity and the Supreme Court is bound thereby. *S. v. Brown*, 156.

2. Defendants' briefs in this case *held* not to comply with Rule 28 in that they do not contain the exceptions and assignments of error, properly numbered, with reference to the printed record. *S. v. Newton*, 323; *S. v. Tuttle*, 649; *S. v. Hendricks*, 873.

3. The failure of defendant to file a brief on appeal works an abandonment of the assignments of error. *S. v. Hooker*, 648.

4. Where remarks of solicitor upon evidence are not in the record, exception thereto cannot be considered on appeal. *S. v. Hendricks*, 873.

e Review; Harmless and Prejudicial Error. (Error cured by verdict see hereunder I m.)

1. The admission of incompetent testimony tending to disprove a defendant's testimony in his own behalf as to a matter collateral to the charge upon which he is tried cannot be held harmless, since it would tend to discredit his testimony relative to his innocence of the charge. *S. v. Jordan*, 460.

2. The court erroneously instructed the jury that defendant would be guilty if he unlawfully conspired with named conspirators, "or with others," when the indictment charged unlawful conspiracy with those named in the charge without words indicating others: *Held*, the error in the charge is not cured by construing the charge contextually as a whole, since it appears that the erroneous portion is

Criminal Law I. e—*continued.*

in accord with the theory of the charge as a whole, nor was the error rendered harmless when considered in the light of the evidence upon the trial, since there was evidence introduced tending to show that defendant entered into the unlawful conspiracy with persons not named in the indictment. *S. v. Mickey*, 608.

3. The State introduced evidence that after the arrest of a person involved in the crime with which defendant was charged, officers went to the place where defendant was living, and that defendant was not there. Defendant introduced evidence showing that he left his home and the State before he was charged with the crime in compliance with the terms of a judgment entered against him in a criminal prosecution: *Held*, the admission of the State's evidence was at least not prejudicial to defendant. *S. v. Beard*, 673.

4. Charge of court in this case *held* not to contain prejudicial error when construed contextually as a whole. *Ibid.*

g Nature and Grounds of Appellate Jurisdiction in Criminal Prosecutions

1. Appeals in criminal cases are controlled by statute, C. S., 4650, and a defendant is entitled to appeal only from conviction in the Superior Court or some final judgment thereof, and an appeal from an order of the Superior Court remanding the case to the recorder's court will be dismissed. *S. v. Rooks*, 275.

2. The State may appeal from acquittal of defendant upon a special verdict, although the verdict is fatally defective in that it fails to find facts essential to an adjudication of defendant's guilt or innocence. C. S., 4649. *S. v. Gulledge*, 374.

Customs and Usages.

A Establishment and Proof of Custom.

a Evidence

1. In this action on a fire insurance policy in a mutual insurance association, plaintiff introduced evidence of the custom of defendant to mail notices of past-due assessments with notices of current assessments and to reinstate policies upon payment of past due and current assessments. Plaintiff testified to the effect that after the assessment against him was past due he went to defendant's secretary-treasurer to pay same and was told not to do so at that time, that the matter of reinstatement would be taken up at a meeting of defendant's directors, and that thereafter plaintiff sent him notice of the past-due assessment with notice of a current assessment, which notice stated that the policy would be forfeited if the total assessment were not paid within sixty days: *Held*, plaintiff's testimony was competent with the other evidence of custom. *Paramore v. Ins. Co.*, 300.

Damages.

F Measure of Damages.

a For Personal Injury

1. In this personal injury action the evidence tended to show that plaintiff had been seriously and painfully injured, and that his injury was disabling and permanent: *Held*, a charge that plaintiff was entitled to recover past, present, and future damages, based upon

Damages F a—*continued.*

plaintiff's age and earning capacity, but limiting the recovery of future damages to their present cash worth, is without error. *Gasque v. Asheville*, 821.

b For Breach of Contract

1. Ordinarily the measure of damages for breach of contract to lend money to refinance mortgage loan is not the amount of deficiency after foreclosure. *Land Co. v. Realty Co.*, 453.

2. Measure of damages for breach of contract of employment. *Dotson v. Guano Co.*, 635.

Deeds and Conveyances.

A Requisites and Validity.

c Delivery

1. The owner of lands executed deed to same to his wife and two sons, and the deed was duly registered. Thereafter the grantor and his wife executed a mortgage on the same lands to plaintiff. The grantor remained in possession of the lands until his death, and the recorded deed was found among his papers: *Held*, the fact that the grantor remained in possession and that the recorded deed was found among his papers before or after his death is not sufficient to rebut the presumption of delivery of the deed arising from the registration thereof, there being no evidence that the registration was inadvertent or fraudulent, and each of the grantor's sons is entitled to a one-third undivided interest in the lands free from the lien of plaintiff's mortgage. *Bank v. Griffin*, 265.

2. The trial court found upon competent supporting evidence that grantor executed the deed in question to her husband upon a nominal consideration, that the deed was found among the husband's papers after his death in a sealed envelope with a notation thereon in his handwriting that it was not to be used unless he survived his wife, the grantor, and that the deed was not filed for registration until more than four years after its execution, that the husband and wife moved into the dwelling-house on the land and remained there until his death, that the wife, the grantor, listed the land for taxes the first year, and that thereafter the husband, the grantee, listed the land in his wife's name, and that the wife paid the taxes for each year, and that on numerous occasions after the execution of the deed the husband stated the land belonged to his wife: *Held*, the findings of fact support the judgment of the court setting aside the deed in the wife's action for this relief, it being necessary for a valid delivery of a deed to the grantee that the delivery be made with the present intention of passing title to the grantee. *Blades v. Trust Co.*, 771.

C Construction and Operation.

f Conditions and Covenants

1. A husband and wife divided their lands between their two sons by separate deeds, each providing that the grantee therein should pay one-half the costs of maintenance of the grantors for life and one-half the costs of their funeral expenses. After the death of the grantors one of the grantees brought action against the other,

Deeds and Conveyances C f—*continued.*

alleging that defendant had failed to pay one-half the costs of maintenance and care of the grantors, and had failed to pay one-half their funeral expenses, and that plaintiff had paid more than one-half the costs thereof, and sought to recover the amount by which plaintiff had contributed beyond his share: *Held*, plaintiff could not maintain the action, and defendant's demurrer was properly sustained. *Richardson v. Richardson*, 314.

2. Plaintiff's grantor obtained title to the property in question by deed containing a covenant restricting the use of the property to residential purposes. Plaintiff contracted in writing to sell the property to defendant free from restrictions, and upon defendant's refusal to accept the deed, brought suit. The trial court found that the fundamental character of the property in the vicinity had changed from residential to business property and had rendered plaintiff's property wholly unfit for use for residential purposes, and decreed that plaintiff's deed would convey the property free from the restrictions: *Held*, the judgment is affirmed under the principle announced in *Starkey v. Gardner*, 194 N. C., 74. *Snyder v. Caldwell*, 626.

h Warranties

1. Plaintiff, grantee in a deed to land, brought suit against his grantor to recover the amount of street assessments against the property, plaintiff claiming that defendant had warranted and represented that no assessments existed against the property. The evidence tended to show that assessments against the property had been made but not confirmed at the time of the execution of the deed. Plaintiff introduced in evidence his deed containing the usual covenants of warranty and against encumbrances: *Held*, in the absence of fraud or mistake, the covenant in the solemn instrument precluded plaintiff from introducing in evidence a letter written by defendant to plaintiff stating that the municipal authorities had assured defendant that there were no assessments against the property, and testimony of plaintiff of statements made by defendant at the time of the delivery of the deed that the property was not subject to street assessments, and that defendant would make good any assessments against the property. *Oliver v. Hecht*, 481.

2. By provision of statute the lien for street assessments does not attach to land until confirmation of the assessments, C. S., 2713, and where such assessments are not confirmed by the governing body of the town until after the execution of a deed to the property, the subsequently attaching lien for the assessments does not violate the warranty and covenant in the deed, in the usual language, against encumbrances. *Ibid.*

3. The owner of land within a drainage district paid the full amount of assessments levied against the land by the district. Thereafter judgment was obtained by holders of bonds issued by the district, the full amount of the district's bonds not having been liquidated by the district from collections of assessments therein: *Held*, the lands of the owner paying his assessments were not subject to a lien in violation of warranties in his warranty deed, drainage

Deeds and Conveyances C h—*continued.*

assessments not being a lien upon lands in the district until the assessments are due, and the judgment against the district not being a lien on the lands within the district. *Bank v. Watt*, 577.

Dentists. (See Physicians and Surgeons.)

Descent and Distribution.

B Persons Entitled and Their Respective Shares. (Family agreements see Executors and Administrators F e.)

g Adopted Children

1. A child, upon the death of his mother, was adopted for life by his mother's brother. Thereafter the child's maternal grandfather died intestate, but the child's adoptive father predeceased his grandfather: *Held*, the child is not entitled to represent his adoptive father as an heir at law in the distribution of his grandfather's estate, since such inheritance would depend upon the statute, and the statute gives the adopted child the right to inherit only from the adoptive parent and does not give him the right of representation in inheriting through such adoptive parent as an heir general, nor is this result effected in the instant case by the fact that the child is of the blood of the grandfather, since his right of inheritance by virtue of his blood relationship with the grandfather is fulfilled by his inheritance of his proportionate share with his other brothers and sisters as a representative of his deceased mother. *Grimes v. Grimes*, 778.

2. The statute providing that an adopted child may inherit from its adoptive parent, being in derogation of the common-law canons of descent, must be strictly construed so as not to confer any right not clearly given. *Ibid.*

Disorderly House.

B Prosecution and Punishment.

c Evidence

1. Evidence of the reputation of the upstairs of a building owned by defendant, and of the persons frequenting it, *is held* competent in a prosecution under C. S., 4358. *S. v. Waggoner*, 306.

Divorce. (Does not affect prior judgment for abandonment see Husband and Wife G d 3.)

A Grounds for Divorce.

d Separation

1. Either party may bring an action for absolute divorce on the ground of two-years separation, C. S., 1659 (a), and the jury's finding that defendant did not abandon plaintiff without cause does not preclude judgment in plaintiff's favor. *Campbell v. Campbell*, 859.

E Alimony.

c Alimony Without Divorce

1. Where in an action for alimony without divorce the wife alleges that she left the home of her husband because of his conduct toward her, but the jury answers the issue in conformity with the contention of the husband that the wife left his home without excuse or justification, the wife is not entitled to alimony. *Byrum v. Byrum*, 655.

Drainage Districts.

B Levy and Assessments.

a Procedure

1. Where drainage assessments are levied against lands under C. S., 5275, either original assessments or additional assessments to cover unforeseen expenses in the construction of the drainage ditch, the parties whose lands are assessed are entitled to notice and an opportunity to be heard. *Spence v. Granger*, 19.

d Vacating Assessments and Reassessments

1. Additional assessments were levied against lands to cover expenses not foreseen when original assessments were levied against the lands in accordance with law, but the additional assessments were levied without notice to the owners of the lands, as required by law, and certain owners appeared before the clerk, filed exceptions to the report of the commissioners, and moved to set aside the additional assessments, and the clerk sustained their exception based upon their contention that their lands did not drain into the ditch in question. On appeal to the Superior Court, the clerk's order was reversed on the ground that the assessments were *res judicata*. On further appeal, the Supreme Court reversed the judgment of the Superior Court. *Held*, the appearance of the protestants to move to set aside the additional assessments was not a waiver of notice of such assessments, but the Superior Court, upon certification of the opinion of the Supreme Court, had jurisdiction to retain the cause for hearing upon the appeal from the clerk's order sustaining protestants' exception and setting aside the additional assessments, the statute, C. S., 5287, providing that appeals from the clerk in drainage assessment proceedings should be the same as in special proceedings, and C. S., 637, giving the Superior Court jurisdiction to hear and determine all matters in controversy upon appeal from the clerk in special proceedings. *Spence v. Granger*, 19.

e Liability of Land for Additional Assessments

1. The owner of land within a drainage district paid the full amount of assessments levied against the land by the district. Thereafter judgment was obtained by holders of bonds issued by the district, the full amount of the district's bond not having been liquidated by the district from collection of assessments therein: *Held*, the land of the owner who had paid his assessments was subject to additional assessments, the lands in the district being liable until the original bond issue for making the improvements or indebtedness incurred therefor is paid in full, C. S., 5352, and the owner was liable for such additional assessments as might be levied against the lands under his contract with a party purchasing the land from him. *Bank v. Watt*, 577.

2. N. C. Code, 5373 (g), *is held* not to affect the liability of lands within a drainage district for additional assessments necessary to pay a judgment against the district rendered prior to the effective date of the statute for improvements theretofore made by the district. *Ibid.*

Drainage Districts—*continued.*

C Drainage Liens.

a Attachment of Lien

1. Assessment is not lien against land until due, and judgment against district creates no lien on lands therein. *Bank v. Watt*, 577.

Ejectment.

A Right of Action and Defenses.

a Title

1. In an action in ejectment in which both parties claim title to the land in controversy from a common source, plaintiff may connect defendant with the common source of title and show in himself a better title from that source. *Biggs v. Oxendine*, 601.

2. Where plaintiff in ejectment claims title as purchaser at the foreclosure sale of a registered deed of trust against the property, defendant's subsequently registered contract of conveyance from the mortgagor is properly excluded from evidence, plaintiff's prior registered deed of trust being notice to the world. *Ibid.*

B Summary Ejectment.

a Jurisdiction

1. A suit to restrain execution on a judgment in summary ejectment by a justice of the peace, on the ground that the justice had no jurisdiction, is properly dismissed where it appears that plaintiff, formerly the mortgagor of the property, had leased the property and was estopped from attacking the foreclosure and setting up the relation of mortgagor and mortgagee. C. S., 2365. *Shuford v. Bank*, 428.

2. Where, in proceedings in summary ejectment before a justice of the peace, C. S., 2365, plaintiff claims title through a deed from defendants' father and maintains that defendants orally leased the land from plaintiff, and defendants claim that the land belonged to their mother, and that they acquired title by inheritance from her, and that they have steadfastly refused to pay rent upon demand, the adverse contentions of the parties, supported by evidence, put the title to the property in issue, and the jurisdiction of the justice of the peace is ousted, and on appeal in the Superior Court the action is properly dismissed. *Building & Loan Asso. v. Moore*, 515.

3. The civil division of the municipal court of Greensboro *is held* to have jurisdiction of suits in summary ejectment. *Dees v. Apple*, 763.

b Nature and Scope of Remedy

1. Where a verbal lease does not provide for its termination or reserve the right of reëntry for breach by the tenant of stipulated conditions in regard to maintenance and operation of the property, breach of such conditions cannot be made the basis for summary ejectment, C. S., 2365, and issues of fraud in procuring the lease and wilful breach of the conditions are erroneously submitted in the Superior Court upon appeal in such action, the action upon such issues being for the equitable relief of recision, and it not being permissible for a party to institute suit in summary ejectment and substitute therefor on appeal to the Superior Court a suit for recision. *Dees v. Apple*, 763.

Embezzlement.

B Prosecution and Punishment.

c Evidence

1. In a prosecution of defendant for embezzlement of funds coming into his hands as commissioner to sell lands, defendant is entitled to have the jury consider the fact that defendant was looking for some of the heirs at the time he filed his report showing his failure to account for some of the funds. *S. v. Ray*, 642.

d Instructions

1. The indictment charged defendant with embezzlement of funds, in one count as commissioner appointed to sell lands, and in a second count as agent and attorney. The evidence tended to show embezzlement by defendant of funds coming into his hands solely as commissioner: *Held*, the charge of the court which failed to point out the distinction between the counts in the indictment, and which left the jury with the impression that both counts were valid, was inadequate, C. S., 564, 4268, the sole question to be considered by the jury being whether defendant had embezzled funds coming into his hands as commissioner. *S. v. Ray*, 642.

Eminent Domain.

B Delegation of Power.

b To Public Utilities

1. Where a corporation is authorized by its charter to generate and sell electricity, build dams and hydroelectric plants necessary to the generation of such hydroelectric power, and is therein given power of eminent domain to acquire the necessary rights of way and lands for its dams and the ponding of water, if it could not agree with the owners of such lands upon a purchase price, and in pursuance of its charter powers such corporation builds hydroelectric plants and generates and sells electricity to municipalities and individuals as well as electric power to private manufacturing plants, such corporation is a public-service corporation and has the power of eminent domain, N. C. Code, 1705, 1706, and it cannot be successfully contended that its taking of lands for ponding water necessary for one of its dams is a taking of private lands for a private use, N. C. Constitution, Art. I, sec. 17, Federal Constitution, 14th Amendment, sec. 1, nor does the fact that such public-service corporation also engages in private enterprises not connected with its public service alter this result. *Mfg. Co. v. Aluminum Co.*, 52.

C Compensation.

e Measure and Amount of Compensation

1. Where an electric power company, under the power of eminent domain, has erected a permanent dam that has ponded water back upon the lands of a private owner, the measure of damages recoverable by the owner is the fair market value of the land so taken at the time of the taking, in arriving at which the jury may consider the value of the land in connection with all the uses to which it could have been reasonably put, and not exclusively its value for the purpose for which it was used by the owner at the time of the taking, it being the object of the law to fully compensate the owner

Eminent Domain C c—*continued.*

for his lands, and the charge of the trial court to the jury on the issue of damages in this case *is held* to be without error. *Mfg. Co. v. Aluminum Co.*, 52.

2. In proceedings to assess compensation in condemnation proceedings an instruction to the jury, supported by the evidence, that respondent is entitled to recover the actual market value of the easement taken plus the injury to respondent's contiguous lands resulting from such taking, measured by the actual market value of the contiguous lands immediately before and after the taking, is without error. *Light Co. v. Rogers*, 751.

D Proceedings to Take Land and Assess Compensation. (Superior Court has no jurisdiction to condemn land upon appeal from street assessments see Municipal Corporations G d 1.)

a Procedure

1. Where a power company has the right of condemning lands by a certain method prescribed by statute and its charter, but title to certain land covered by its ponded water is in dispute between it and one claiming title, and such land is covered by its ponded water for a number of years and claimant repeatedly refuses to sell until other unrelated disputes between it and the power company are settled, and in an action in ejectment by the power company in which it prays that if it be determined that defendant is the owner of the land, permanent damages be assessed and it be given title to the property, the defendant fails to demand that the land be regularly condemned, but demands damages for trespass, and acquiesces in a jury trial, the defendant is estopped to complain that plaintiff did not pursue the method of condemnation prescribed by statute and its charter. *Mfg. Co. v. Aluminum Co.*, 52.

c Evidence

1. In proceedings to assess compensation in condemnation proceedings it is competent for the owner of the land in controversy and other witnesses familiar with the land to testify as to their opinion of the value of the land taken, and as to the value of respondent's contiguous lands before and after the taking, and as to the reasonable uses and capabilities of the land. *Light Co. v. Rogers*, 751.

Estoppel. (Tenant estopped to deny landlord's title see Landlord and Tenant C b.)

B By Record. (Judgment as bar to subsequent action see Judgments L.)

c Formal Instruments

1. Sureties on guardianship bond *held* estopped by recital in bond from attacking validity of guardian's appointment. *Cheshire v. Howard*, 566.

2. Where it is judicially determined that the surviving children of testator are the sole beneficiaries under a trust established by the will, and it appears that each of the children joined in the execution of a ratification and confirmation of a deed of trust executed on trust property by the trustee, each of the children is estopped to attack the deed of trust for want of authority in the trustee to execute same. *Haywood v. Rigsbee*, 695.

Estoppel—*continued.*

C Equitable Estoppel.

a Grounds and Essentials in General

1. Plaintiff corporation sought to set up a parol trust in its favor in land conveyed to its president and owner of practically all of its stock, alleging the land was bought for it by its president and that it paid the purchase price. Interveners, creditors of the president of the corporation, contended that the corporation was estopped from setting up the parol trust by certain financial transactions and bookkeeping entries between it and its president, which were based upon the ownership of the land by the president of the corporation. The transactions relied upon transpired subsequent to the creation of the liability by the president of the corporation to the interveners. Plaintiff corporation was not indebted to interveners, and no question of fraud was raised: *Held*, the evidence is insufficient to preclude plaintiff corporation, as a matter of law, from claiming the land as against the interveners, since interveners could not have been misled by the transactions or induced thereby to alter their position to their damage. *Furniture Co. v. Cole*, 840.

b Estoppel by Ratification

1. Evidence that plaintiff mortgagor ratified his conveyance of his equity of redemption to the *cestui que trust* and was thereby estopped to attack his deed for fraud *is held* for jury under proper issue and instructions. *Hinton v. West*, 708.

c Wrongful Acts of Third Persons

1. Person first reposing confidence in third party must suffer loss occasioned by third party's misconduct. *R. R. v. Lassiter & Co.*, 408.

d Inconsistent Claims Against Third Persons

1. Plaintiff was persuaded from withdrawing her deposit in a bank by the personal guaranty of her deposit by the vice-president, director and stockholder of the bank. Upon the failure of the bank she filed a claim with the liquidating agent for the amount of her deposit: *Held*, plaintiff was not estopped by filing her claim with the bank from bringing suit on the guaranty, her action in filing the claim and obtaining what dividends she could on the deposit being to the interest of the guarantor. *Garren v. Youngblood*, 86.

Evidence. (In criminal prosecution see Criminal Law G; in particular action see Particular Titles of Actions; reception of evidence see Trial B; sufficiency of evidence see Trial D a.)

B Burden of Proof.

a General Rules

1. Where a party claims the benefit of an exception in a statute, he has the burden of showing that he comes within the exception. *Moore v. Lambeth*, 23.

2. A charge that the burden of convincing the jury by "clear, strong, and convincing proof" means evidence convincing the jury to a "moral certainty" *is held* for error. The degrees of proof required in civil and criminal actions, and definitions of same, are discussed by *Mr. Justice Schenck*. *Williams v. Building & Loan Asso.*, 362.

Evidence—*continued.*

D Relevancy, Materiality, and Competency.

b Transactions with Decedent

1. C. S., 1795, rendering incompetent testimony by an interested party as to transactions or communications with a decedent applies to actions in tort as well as actions on contract. *Boyd v. Williams*, 30.

2. A husband driving a car owned and controlled by him had an accident resulting in his death and serious injury to his wife, who was riding with him. The wife sued his estate to recover for her injuries, and the only evidence of negligence was her testimony that he was traveling at an excessive speed upon a curve, and that the accident occurred when the car failed to make the curve, and that she had spoken to him in regard to the speed he was driving the car: *Held*, the driving of the car was a transaction within the meaning of the term as used in C. S., 1795, and her testimony of his manner of driving and her statement to him regarding the speed was incompetent under the statute, her testimony of the transaction and communication being an essential or material link in the chain establishing liability of the estate to her. *Ibid.*

c Facts in Issue or Relevant Thereto.

1. Testimony of a witness that some nine months after the accident in suit he saw at the scene of the accident a growing hedge four feet high *is held* some evidence that the hedge was there at the time of the accident, it being common knowledge that it takes time for a hedge to grow four feet high. *Gaffney v. Phelps*, 553.

f Impeaching or Corroborating Evidence

1. Plaintiff *held* entitled to show facts to be otherwise than as stated in its depositions. *Hershey Corp. v. R. R.*, 122.

2. A party introducing a note in evidence endorsed to it as collecting agent cannot be heard to attack the endorsement. *Federal Reserve Bank v. Whitford*, 267.

h Similar Facts or Occurrences

1. The exclusion of testimony that others had been injured in the rock quarry in which plaintiff received the injury in suit *is held* without error in this case, the evidence failing to disclose the required substantial identity of circumstances or proximity of time. *Watson v. Durham*, 624.

l Circumstantial Evidence

1. An essential fact may be proven by circumstantial evidence. *Bank v. Bank*, 216.

H Hearsay Evidence.

b Res Gestæ

1. Testimony of disinterested witnesses as to statements made by the grantee at the time of the preparation of the deed, relating to the intent of the parties in respect thereto, *is held* competent as a part of the *res gestæ* in this action to set aside the deed for that it was never delivered with intent to pass title, the grantee having died prior to the institution of the action. *Blades v. Trust Co.*, 771.

Evidence H—*continued.*

c Declarations by Decedents Against Interest

1. Testimony of disinterested witnesses as to declarations made by decedent against his interest while in possession of the land in controversy is competent as against those claiming under decedent. *Blades v. Trust Co.*, 771.

I Documentary Evidence.

b Accounts, Ledgers, and Private Writings

1. In action for accounting, books of account are competent when properly identified and verified. *Breneman Co. v. Cunningham*, 77.

2. Letters purporting to have been written by a party to the suit relating to a material matter in controversy must be properly identified as genuine in order to be competent in evidence. *Banking Corp. v. Linthicum*, 455.

J Parol Evidence Affecting Writings.

a Admissibility in General

1. An order for fertilizer for cotton and corn was signed by the purchaser. Thereafter the fertilizer was shipped, and most of it used before the purchaser signed notes for the purchase price. The purchaser brought suit to cancel the notes given for the purchase price on the ground that he ordered fertilizer for tobacco, that the seller knew the facts, and that the fertilizer was worthless for the only purpose for which the purchaser could and did use it, and that there was a total failure of consideration: *Held*, in the absence of allegations of fraud, mistake, or mistake of one party induced by the fraud of the other, parol evidence in contradiction of the stipulation in the order that the fertilizer was for cotton and corn is not admissible, and such evidence was properly excluded by the lower court. *Winstead v. Mfg. Co.*, 110.

2. Under a consent judgment jointly against endorsers on a note parol evidence is admissible to show agreement among endorsers that their respective liabilities should not be equal. *Stanley v. Parker*, 159.

3. Parol evidence that note was to be paid by crediting it against maker's anticipated share in payee's estate *held* competent. *Galloway v. Thrash*, 165.

4. As against payee, person signing note as maker may show he signed same as surety to knowledge of payee. *Davis v. Alexander*, 417.

5. Parol evidence of contemporaneous agreement to insure *held* incompetent as against purchaser of note secured by chattel mortgage. *Banking Corp. v. Linthicum*, 455.

6. Parol evidence is not admissible to add to, vary, or contradict the terms of a written instrument, and all contemporaneous oral agreements are merged in the writing. *Oliver v. Hecht*, 481.

7. Evidence of a parol contemporaneous agreement that a person signing a note should not be obligated thereon in any way is incompetent, even as against the payee, the parol evidence being in contradiction of the written instrument. *Bank v. Dardine*, 509.

Evidence J a—*continued.*

8. In this action by the payee against the makers and endorsers of a note secured by a deed of trust on lands one of the makers set up the defense that he held title to the lands as a naked trustee for the other makers, and that at the time the note was executed the facts were explained to the payee, and that the parties entered a parol contemporaneous agreement that his liability on the note should be limited to the value of the lands: *Held*, testimony of the parol agreement was competent under the rule that evidence of a parol contemporaneous agreement providing a mode of payment is competent as between the parties. *Bank v. Rosenstein*, 529.

9. Evidence of a contemporaneous parol agreement *is held* incompetent in this case as being in contradiction of the written trust agreement between the parties. *Bank v. Sternberger*, 811.

b To Establish Parol Trust

1. In an action to establish a parol trust it is competent for plaintiff to introduce evidence that at the time of the purchase of the property the purchaser declared he was buying it for plaintiff, and objection to the testimony in this case for that the witness testified that the purchaser stated that it was his purpose to acquire the property for plaintiff is untenable, it being obvious from the record that the word "purpose" was used to designate for whom the purchaser was acting in buying the property. *Furniture Co. v. Cole*, 840.

K Expert and Opinion Evidence.

a Subjects of Expert and Opinion Evidence

1. Nonexpert witnesses, who saw defendant's car within a second or so after the accident in suit, *are held* competent to testify as to the speed of the car at the time they saw it. *Jones v. Bagwell*, 278.

2. In reply to a question as to the condition of a hammer furnished plaintiff for the performance of his work, defendant's witness, who had observed the hammer, was permitted to testify, "I would say it was in good condition": *Held*, the testimony was competent as opinion testimony. *Watson v. Durham*, 624.

3. Witness familiar with land in question may give his opinion of value of land taken and damage to contiguous land. *Light Co. v. Rogers*, 751.

c Conclusiveness of Expert Testimony

1. A physician's statement as to the condition of insured is not conclusive on the question of insured's disability within the terms of the policy. *Guy v. Ins. Co.*, 278.

Executors and Administrators.

A Appointment and Qualification.

a Persons Qualified and Entitled to Appointment

1. There is a presumption that the Insurance Commission has complied with the statutes in licensing a bank to act as administrator, and where there is evidence that a bank, on the date it was appointed administrator, was solvent in an amount in excess of $100,000, the contention of an administrator *d. b. n.* appointed upon the bank's insolvency that the bank had not complied with the provisions of C. S., 6376, 6377, 6378, 6379, cannot be sustained. *Bank v. Bridgers*, 91.

Executors and Administrators A—*continued.*

b Attack of Appointment

1. The appointment of a bank as administrator cannot be attacked in an action against the directors of the bank to recover losses sustained to the estate by alleged gross neglect and mismanagement of the bank by the directors. *Bank v. Bridgers*, 91.

B Assets, Appraisal, and Inventory.

a Assets Passing to Executor or Administrator

1. The law casts title to lands devised upon the devisees upon the death of testator, and the executor has no interest therein and may not maintain an action in respect thereto, his sole right being to sell the lands to make assets upon the insufficiency of the personalty to make assets. *Hoke v. Trust Co.*, 604.

C Collection and Management of Estate.

c Power and Authority of Executor, Administrator, or Trustee

1. Where it is judicially determined that the surviving children of testater are the sole beneficiaries under a trust established by the will, and it appears that each of the children joined in the execution of a ratification and confirmation of a deed of trust executed on trust property by the trustee, each of the children is estopped to attack the deed of trust for want of authority in the trustee to execute same. *Haywood v. Rigsbee*, 695.

c Debts Due Estate by Heirs or Beneficiaries

1. In an action on a note by an administrator against the intestate's son, the maker of the note, it is competent for the son to show by parol evidence that the note represented an advancement and was to be paid by crediting it against the son's anticipated share in the estate. *Galloway v. Thrash*, 165.

f Actions

1. An administrator *c. t. a.* has no interest in lands devised by testator, and cannot maintain a suit to enjoin foreclosure of a mortgage thereon executed by testator, nor is this result altered by insufficiency of personalty to pay debts, since an executor authorized to sell lands to make assets may not enjoin foreclosure of a valid mortgage against the property. *Hoke v. Trust Co.*, 604.

D Allowance and Payment of Claims.

b Liability of Estate for Personal Services Rendered Deceased

1. The evidence in this case, considered in the light most favorable to plaintiff upon defendant's motion as of nonsuit, tended to show that plaintiff was married and lived with her family, that her father visited her in her home for several months each year during the last years of his life, that her father was old, and that plaintiff nursed him, washed his linen, cared for him and bought medicine and special food for him, and that her father stated to third persons that he wished to pay plaintiff for her services. After her father's death plaintiff brought this action against his administrators to recover the value of the services: *Held*, under the evidence the relationship between plaintiff and her father did not raise the

Executors and Administrators D b—*continued.*

presumption that the services rendered by plaintiff were gratuitous. *Keiger v. Sprinkle*, 733.

2. When a person performs services under an oral agreement, express or implied, that compensation therefor should be provided in the will of the person receiving the services, and no such testamentary provision is made, a cause of action accrues against the estate for breach of the contract or for the value of the services rendered. *Lipe v. Trust Co.*, 794.

F Distribution of Estate.

a Time Within Which Distribution Must Be Made

1. A bank, acting as administrator, has a legal right to hold the funds of the estate and to refuse to settle the estate and distribute it to the heirs upon their demand prior to the expiration of one year from the appointment of the bank as administrator. C. S., 101, 109, 147. In this case demand was made shortly before the bank was placed in liquidation, but it appeared that the bank was solvent on the date it was appointed administrator, and there was evidence that it was solvent a few months before being placed in liquidation, and that it was placed in liquidation in less than a year after its appointment as administrator. *Bank v. Bridgers*, 91.

e Family Agreements

1. Family settlements of estates are commended by the law. *In re Will of McLelland*, 375.

Exemptions. (Of insurance funds from debt see Insurance N a; from taxation see Taxation B d.)

"Family Car Doctrine." (See Automobiles D c.)

Food.

A Liability of Manufacturer for Injuries to Consumer.

a Foreign and Deleterious Substances

1. Evidence that plaintiff purchased a plug of chewing tobacco from a retail merchant of the same brand as manufactured by defendant, and that the tobacco contained a foreign, deleterious substance causing injury to plaintiff is insufficient to resist defendant's motion as of nonsuit. There is no evidence to show a complete chain from the manufacturer to the consumer. *Keith v. Tobacco Co.*, 645.

Forcible Trespass. (See Trespass A d.)

Former Jeopardy. (See Constitutional Law F e; Criminal Law F.)

Fraud.

A Deception Constituting Fraud. (Answer held to allege fraud rendering payee not a holder in due course see Bills and Notes C e 1.)

b Misrepresentation of Past or Subsisting Fact

1. Breach of conditions relating to maintenance and operation of the property by the tenant after he had gone into possession is no evidence of fraud in procuring the lease contract. *Dees v. Apple*, 763.

e Deception

1. Ignorance of the contents of an instrument is no defense in an action on the instrument against a party signing same where such party is able to read and no fraud is alleged. *Bank v. Dardine*, 509.

Frauds, Statute of.

A Promise to Answer for Debt or Default of Another.

a Applicability

1. Plaintiff, a depositor in a bank, went to the bank with the intention of withdrawing her deposit, and was persuaded from withdrawing her funds by representations of the bank's soundness made by the vice-president, director and stockholder of the bank, and by his personal guaranty against loss of her deposit by the bank's insolvency: *Held*, the guaranty of payment made by the vice-president, director and stockholder of the bank, was an original promise to answer for the debt, upon sufficient consideration, and does not come within the provisions of the statute of frauds, C. S., 987, and upon the insolvency of the bank and loss to the depositor the plea of the statute is not a valid defense. *Garren v. Youngblood*, 86.

2. Where the party sought to be charged is in fact the direct paymaster, or makes an original promise to answer for the debt of another, the statute of frauds, C. S., 987, does not apply to relieve him of liability. *Gennett v. Lyerly*, 201.

3. The president and treasurer of a corporation who owns a large amount of the corporation's stock, although interested in the successful and profitable operation of the corporation, has no personal, immediate, and pecuniary benefit in the purchase of materials by the corporation for use in its manufacturing processes so as to make him an original promisor on the corporation's agreement to pay the purchase price of such materials, and where he pleads the statute of frauds, C. S., 987, he may not be held personally liable for the purchase price because of verbal promises to answer for the debt made in his behalf by the secretary of the corporation as his alleged agent. *Ibid.*

E Application of Statute in General.

b Signature of Party to Be Bound

1. A manufacturing corporation purchased several carloads of lumber from plaintiff, each carload purchased being an independent transaction, based upon independent orders. One of the orders signed by the secretary of the corporation contained a notation that the president of the corporation should be personally liable for the purchase price, and the corporation paid for the lumber shipped under this order. Plaintiff sought to hold the president of the corporation personally liable for the purchase price of the lumber sold under other subsequent orders upon the theory that the secretary signed the notation as agent for the president, either duly authorized or by estoppel. The president pleaded the statute of frauds, C. S., 987. The secretary testified that he had no authority to bind the president personally for materials purchased by the corporation: *Held*, plaintiff was not entitled to recover, even assuming that the president was bound by the notation, since the extent of liability thereunder was for the one carload of lumber shipped under the order which had been paid for, the notation not constituting a continuing guaranty, since each order was independent of the others and constituted a separate transaction. *Gennett v. Lyerly*, 201.

Frauds, Statute of, E b—*continued*.

2. The fact that goods are shipped to a corporation with a notation that the president of the corporation was to be responsible for the payment of the purchase price does not impose liability upon the president upon default of the corporation. *Ibid.*

Fraudulent Conveyances.

A Transfers and Transaction Invalid. (Mortgagor's transfer of property covered by chattel mortgage to payment of preëxisting debt see Chattel Mortgages G c 1.)

d Insolvency and Intent of Grantor

1. In an action to set aside a voluntary deed as being fraudulent as to creditors of the grantor, the failure of the debtor to retain property sufficient and available to satisfy his then existing creditors is necessary to raise the presumption of fraud, since the statute, C. S., 1007, destroyed the presumption of fraud theretofore arising from the fact of the grantor's indebtedness, and made such indebtedness merely evidence tending to show an intent to delay, hinder, and defraud creditors. *Hood, Comr., v. Cobb*, 128.

2. In an action to set aside deed as being fraudulent as to creditors, evidence of the tax valuation of the other lands of the debtor at the time of the conveyance is competent on the issue of intent to hinder, delay, and defraud creditors as tending to show the debtor had reason to believe he was retaining property sufficient and available to pay his then existing creditors. *Ibid.*

3. A commissioner's deed of sale of part of the lands of the debtor, executed three years after the execution of the deed sought to be set aside as being fraudulent as to creditors, *is held* incompetent, the issue being the value of all the debtor's lands at the time of the voluntary deed attacked in the action. *Ibid.*

4. In an action seeking to establish fraud in the transfer of corporate property by the president of the corporation in paying a preexisting debt due the president's wife by the corporation, a question to the president as a witness in his own behalf as to whether he had a "feeling" the corporation was solvent at the time of the transfers will not be held for reversible error where it appears from the witness' answer that he understood the question to be as to his opinion of the solvency of the company at the times in question. *Cheshire v. Parker*, 364.

5. Instructions of the court upon the issue as to the insolvency of the corporation at the time of application of funds by the president thereof to a preëxisting debt due by the corporation to the president's wife *are held* to be without error in this case. *Ibid.*

C Actions to Set aside.

d Burden of Proof

1. The burden is on plaintiff in an action to set aside a deed as being fraudulent as to creditors to prove that the grantor failed to retain property sufficient and available to pay his then existing creditors. *Hood, Comr., v. Cobb*, 128.

Guaranty. (Surety bonds see Principal and Surety.)

B Construction and Operation of Agreement.

a In General

1. Allegation and evidence that defendant guaranteed plaintiff's deposit in a bank *are held* sufficient to constitute a guaranty of payment, and not merely a guaranty of collection, and plaintiff's right of action *is held* to have accrued upon the insolvency of the bank and its inability to pay the deposit on demand, and plaintiff was not required to wait until the liquidation of the bank and the payment of all dividends on her deposit before instituting action. *Garren v. Youngblood*, 86.

D Actions.

a Election of Remedies

1. Plaintiff *held* not estopped by filing claim with bank for deposit from suing on individual's guaranty against loss. *Garren v. Youngblood*, 86.

Guardian and Ward.

B Appointment, Qualification, and Tenure.

c Attack of Appointment

1. Persons signing a guardianship bond as sureties, which bond recites that the guardian therein bonded had been duly appointed by the clerk, are estopped by the recital in the bond from attacking the validity of the appointment of the guardian for that the guardian had not signed the application for appointment or the required oath, the guardian having been appointed by the clerk and having received the estate pursuant thereto and filed the bond signed by the sureties, and the guardian not denying the validity of her appointment or her liability as guardian. *Cheshire v. Howard*, 566.

H Liabilities on Bonds.

a In General

1. Although the acceptance by the clerk of a guardianship bond without the signature of the guardian as principal thereon, C. S., 2162, 2163, is an irregularity, the sureties signing the bond are not thereby relieved of liability, the guardian being liable because filing the bond with the court, and the sureties being liable because signing same, and the failure of the guardian to sign same being a mere technical defect resulting in no injury to the sureties since upon payment by them upon default of the guardian a cause of action accrues in their favor against the guardian. *Cheshire v. Howard*, 566.

2. Defendants signed the guardianship bond in question on the same day the guardian therein named was appointed. In an action against them on the bond they alleged that they signed the bond upon assurance that the guardian therein named would sign the bond, and that the bond would not be effective as to them unless signed by the guardian, and that the guardian did not sign the bond until the institution of the action: *Held*, it was not error for the court to refuse to admit evidence in support of such allegations, since it was not alleged by whom such assurances had been given, and it being doubtful whether the clerk could have accepted the bond conditionally. *Ibid.*

Guardian and Ward H—*continued.*

c Control and Investment of Funds

1. Guardian depositing funds without negligence pending investment is not liable for loss through bank's failure. *Marriner v. Mizzelle*, 34.

Highways. (Duty of city to keep streets in safe condition see Municipal Corporations E c: law of the road see Automobiles C.)

Homicide.

A Homicide in General.

c Parties and Offenses

1. Evidence that defendant, for the purpose of freeing himself of competition in the illegal sale of intoxicating liquors, procured another to kill deceased by shooting him from ambush while lying in wait, *is held* sufficient to be submitted to the jury in a prosecution as an accessory before the fact to the crime of murder, C. S., 4175, and sufficient to deny defendant's prayers for special instructions. *S. v. Mozingo*, 247.

2. Where a conspiracy is formed to rob a bank, and murder is committed by one of the conspirators in the attempt to perpetrate the crime, each conspirator is guilty of murder in the first degree, C. S., 4200, and it is immaterial which one of them fired the fatal shot. *S. v. Green*, 369.

B Murder

a Murder in the First Degree

1. Evidence that deceased was killed by a person lying in wait for the purpose is sufficient to sustain the State's contention that the murder was murder in the first degree. C. S., 4200. *S. v. Mozingo*, 247.

G Evidence.

b Presumptions and Burden of Proof

1. Defendant, charged with murder, tendered a plea of second-degree murder, and the State contended for a verdict of murder in the first degree. The court charged the jury that if the State had satisfied them that defendant killed deceased with a deadly weapon, the burden shifted to defendant to rebut the presumptions arising therefrom that the killing was unlawful and was done with malice: *Held*, defendant's assignment of error to the charge must be sustained, since there was no question of acquittal or of manslaughter in the case, and defendant at no time had the burden of proof. *S. v. Brown*, 156.

c Dying Declarations

1. Testimony tending to show that deceased was found mortally wounded and in eminent danger of death, and that he fully realized his condition, lays a proper predicate for the admission of deceased's dying declaration. *S. v. Deal*, 448.

2. Defendant was charged with murder in the perpetration of robbery. Deceased died three days after the fatal shooting, and before his death stated, in effect, that he knew he could not recover from his wound, and that he was shot as he attempted to recover the

Homicide G c—*continued.*

money of which he had been robbed: *Held*, testimony of the statements was competent as being testimony of deceased's dying declarations. *S. v. Beard*, 673.

d Competency and Admissibility in General

1. Evidence of the relations between defendant and deceased for some time before the homicide *is held* competent in a prosecution of defendant as an accessory before the fact of the crime of murder. *S. v. Mozingo*, 247.

2. Defendant was charged with being an accessory before the fact of murder in procuring the murder of deceased: *Held*, testimony of a quarrel between defendant and his wife over the attentions paid defendant's wife by deceased was competent to show motive and as corroborative of the testimony of the perpetrator of the crime that defendant stated this was his motive. *S. v. Gore*, 618.

3. The State contended defendant murdered deceased in the perpetration of a robbery. The homicide occurred on a Thursday night. The State offered evidence that it had been the custom of deceased, for business reasons, to have in his possession large sums of money on Thursday of each week, and that he was robbed of such sums on the night of the homicide: *Held*, the evidence of the custom of deceased was competent as tending to show deceased had such sum of money in his possession on the night of the homicide, and that the homicide was murder in the first degree, in that it was committed in the perpetration of a robbery. There was also evidence tending to show that defendant knew deceased had such sums of money on the day of the homicide. *S. v. Beard*, 673.

e Weight and Sufficiency

1. Evidence *held* sufficient to be submitted to jury on charge of murder in the first degree. *S. v. Satterfield*, 118.

H Prosecution and Punishment.

e Instructions

1. Where all the evidence tends to show that deceased was killed by a person lying in wait, with evidence that defendant committed the crime, it is not error for the court to limit the jury to a verdict of guilty of murder in the first degree or not guilty. C. S., 4200. *S. v. Satterfield*, 118.

f Judgment and Sentence

1. Defendant was convicted as an accessory before the fact to the crime of murder and sentenced to life imprisonment. Thereafter the actual murderer was sentenced to thirty years imprisonment upon acceptance of his plea of guilty of murder in the second degree: *Held*, defendant's objection that his sentence was greater than that of the actual perpetrator of the crime cannot be sustained, since both sentences were authorized by statute. C. S., 4176, 4200. *S. v. Mozingo*, 247.

2. Where the jury convicts a defendant of murder in the first degree, the court must disregard the jury's recommendation of mercy. *S. v. Green*, 369.

Husband and Wife. (Consideration sufficient to support wife's execution of note see Bills and Notes A a; alimony without divorce see Divorce E c; execution of and liability on mortgage see Mortgages C b; wife's right to recover for husband's negligence see Automobiles C j 5; privileged communications see Criminal Law G q.)

G Abandonment of Wife.

d Judgment and Sentence

1. Right to suspend judgment is established by decisions, and is authorized by statute for abandonment. *S. v. Henderson*, 258.

2. Where a defendant in a prosecution for abandonment accepts the terms upon which judgment is suspended, and does not object or appeal on the ground that terms are indefinite, he may not thereafter challenge the validity of the terms upon motion of the solicitor that the judgment be executed for his failure to comply with the conditions upon which the execution of the judgment was suspended. *Ibid.*

3. A subsequent decree of divorce does not affect a prior judgment against the husband for abandonment of his wife, or the conditions upon which such judgment is suspended. *Ibid.*

F Violation of Marriage Sanctity.

a Alienation

1. Consent of the wife is not a defense to an action for alienation of her affections or for criminal conversation with her. *Chestnut v. Sutton*, 256.

2. In an action for alienation and criminal conversation it is not error for the trial court, in the absence of prayers for special instructions, to fail to charge the jury on the issue of damages that if they believe defendant's evidence with respect to plaintiff's misconduct and his ill-treatment of his wife, they should consider such facts in diminution of actual damages. *Ibid.*

3. In this action for alienation and criminal conversation the charge to the jury on the issue of actual damages *is held* to cover every phase of the law relied upon by defendant in minimizing damages, and to be without error on defendant's exception. *Ibid.*

Indictment.

B Form and Sufficiency of Indictment.

a In General

1. Defendant is entitled to rely upon averments in indictment for information of the accusation against him, and it oftentimes becomes necessary to set out the names of third parties, or at least indicate that there are such third parties, when such third parties are necessary for the consummation of the offense, or constitute a necessary part of the description of the offense. *S. v. Mickey*, 608.

d Joinder and Severance of Counts

1. It is not error for the trial court to refuse a separate trial on each of two counts in an indictment charging defendants with conspiracy to rob and with murder committed in the attempt to perpetrate the robbery. C. S., 4622. *S. v. Green*, 369.

Indictment—*continued.*

C Motions to Quash or Dismiss.

c For Incompetent or Illegal Evidence Before Grand Jury

1. Where some of the witnesses examined by the grand jury are competent but one of them is incompetent to testify, a motion to quash the bill for that the incompetent witness was allowed to testify is properly refused. *S. v. Deal*, 448.

d Time for Making Motion to Quash

1. A motion to quash the bill of indictment on the ground that all the evidence before the grand jury was incompetent, which motion is not made until after defendant had entered a plea of not guilty upon his arraignment, is not made in apt time, and it is not error for the trial court to refuse to hear evidence in support of the motion to quash. *S. v. Beard*, 673.

E Issues, Proof, and Variance.

c Proof of Crime as Charged

1. In a prosecution of defendant for being an accessory before the fact of murder, variance of a few days between the indictment and proof as to the day the murder was committed is not fatal, C. S., 4625. *S. v. Gore*, 618.

Infants. (Contributory negligence of, see Negligence C b; competency as witnesses see Witnesses A a.)

Injunctions. (Enjoining foreclosure see Mortgages H b; H c.)

B Grounds for Injunctive Relief.

b Inadequate Remedy at Law

1. Where there is a full, complete, and adequate remedy at law, the equitable remedy of injunction will not lie. *Whitford v. Bank*, 229.

D Preliminary and Interlocutory Injunctions.

b Continuing, Modifying, or Dissolving

1. Where plea in abatement raising issues of fact is filed in suit for injunction, continuance of temporary order to hearing on issues raised by the plea is not error. *Reed v. Mortgage Co.*, 27.

2. Where plaintiff has shown probable cause, or a *prima facie* case, or it can reasonably be seen that he will be able to make out his case at the final hearing, continuance of the temporary order is proper. *Scruggs v. Rollins*, 335.

3. Equity will generally continue a temporary restraining order to the hearing upon a proper showing for injunctive relief when it appears that no harm can come to respondents from its continuance, and great injury might result to petitioners from its dissolution. *Boushiar v. Willis*, 511.

4. A temporary restraining order will ordinarily be continued to the hearing upon a *prima facie* showing for injunctive relief when it appears that no harm can come to defendant from such continuance, and great injury might result to plaintiff from its dissolution. *Porter v. Ins. Co.*, 646.

5. Upon appeal from a county court to the Superior Court from a judgment continuing a temporary restraining order to the hearing, the

Injunctions D b—*continued.*

sole question to be determined by the Superior Court is whether there was error in continuing the restraining order, and it is error for the Superior Court to find facts which in effect determine the controversy and to adjudge that the trial court should be bound thereby, and upon further appeal to the Supreme Court the case will be remanded to the end that such erroneous portion of the judgment be stricken out and the case remanded to the county court for trial in accordance with the correct portion of the judgment of the Superior Court continuing the restraining order to the hearing. *Sims v. Building & Loan Asso.*, 809.

6. A temporary restraining order will ordinarily be continued to the hearing upon a *prima facie* showing for injunctive relief, especially when respondent is indemnified against loss from its continuance and injury might result to petitioner from its dissolution. *Hare v. Hare*, 849.

H Liability on Injunction Bonds.

a Items of Damage

1. Interest on value of property at time of issuance of order for time order is in force may be recovered where value of property is insufficient to pay debt secured thereby. *Bank v. Hicks*, 157.

Innkeepers.

B Charges.

a Lien

1. A hotel keeper's lien for charges, C. S., 2461, will not attach to a chattel belonging to a third person which is brought to the hotel by the guest. *Hotel Co. v. Blair*, 464.

Insane Persons. (Charges by State Hospital see Asylums B.)

C Guardianship.

c Liabilities of Guardian and Bondsman

1. Where a guardian of a lunatic deposits funds of the estate in a bank temporarily pending investment of the funds, and is not guilty of negligence in making the deposit or in allowing the funds to remain on deposit until the bank's failure, the guardian is not liable for loss to the estate caused by the bank's subsequent failure, but if the guardian does not exercise due diligence in making the deposit, or is guilty of negligence or bad faith in allowing the deposit to so remain until the bank's failure, or if the deposit is made for a fixed period of time, the guardian would be liable, since in the latter case the deposit would be regarded as a loan to the bank without security, and liability would attach although the guardian acts in good faith and the bank is solvent at the time of the deposit. *Marriner v. Mizzelle*, 34.

2. In an action by a guardian of a lunatic to have credited on his accounts sums lost to the estate by reason of the failure of the banks wherein the guardian had deposited moneys of the estate, the burden is on the guardian to prove that the deposit was temporary pending investment, and that he was not guilty of negligence in respect thereto. *Ibid.*

Insane Persons C—*continued.*

c Guardian's Right to Commissions.

1. In an action by a guardian of a lunatic to have credited on his account as guardian sums lost to the estate by reason of the failure of the bank in which the guardian had deposited moneys of the estate, the commissions which the guardian may retain must be passed upon by the clerk after decision of the court on the question of whether the guardian is entitled to the alleged credits. *Harriner v. Mizzelle*, 34.

Insurance. (Surety bonds see Principal and Surety.)

C Insurance Agents.

b Authority

1. An indemnity company, by letter to its agent, authorized the agent to write a freight charge bond for a contractor only in the event the agent wrote the contract bond for the contractor on the project for which the freight was shipped. The agent, in violation of his authority contained in the letter, wrote a freight charge bond for the contractor. The railroad company accepting the bond had no knowledge of the limitation on the agent's authority. The license of the indemnity company to do business in this State stated that the agent signing the bond for the company was its duly authorized agent (N. C. Code, 6262, 6288, 6298, 6302), and the bond was written on a form furnished by the company for freight charge bonds and the company's seal was affixed thereto by the agent: *Held*, the agent had apparent authority to sign the bond for the company, and the railroad company was not chargeable with knowledge of the agent's lack of authority, and the granting of the indemnity company's motion as of nonsuit on the ground that it was not bound by its agent's unauthorized act was error. *R. R. v. Lassiter & Co.*, 408.

2. An agent of an indemnity company executed, in behalf of the company, a freight charge bond for a contractor in violation of a limitation upon the agent's authority to write such bond unless the agent also wrote the bond for the principal contract. The indemnity company held the agent out as its general agent, and the bond was executed on a form furnished by the company which was filled in by the agent, and the agent affixed thereto the indemnity company's corporate seal: *Held*, in an action on the bond the indemnity company's motion as of nonsuit on the ground that the agent was without authority to sign the bond was erroneously granted, the rule applicable being that where one of two innocent parties must suffer loss by the misconduct of a third person, he who first reposes confidence in such third person, and makes it possible for the loss to occur, must bear the loss. *Ibid.*

3. The agent and attorney in fact of defendant indemnity company was clothed by it with apparent authority to execute the indemnity bond in suit. In an action on the bond defendant indemnity company moved for nonsuit on the ground that the agent exceeded his authority, and contended that the obligee of the bond was charged with making inquiry, upon the presentation of the bond by the attorney in fact, which would have disclosed his lack of authority to execute the bond in suit: *Held*, the contention cannot be sustained, and the granting of the nonsuit was error, the obligee of the

Insurance C b—*continued.*

bond having determined that the act of the agent was within the agent's apparent authority, was not required as a matter of law to inquire further into the agent's actual authority. *Ibid.*

E The Contract in General.

b Construction and Operation

1. An ambiguous clause in a policy of insurance or in a rider attached thereto will be construed in favor of insured within a reasonable interpretation of the contract to ascertain the intent of the parties. *Hallock v. Casualty Co.*, 195.

2. A manual of an insurance company issued by it to guide its local agents as to rates, which is not made a part of the insurance contract, will not be considered in construing the contract as to risks covered. *Ins. Co. v. Harrison-Wright Co.*, 661.

3. Where a policy of insurance is reasonably susceptible to two constructions, the construction favorable to insured will be adopted, the insurer having chosen the language of the policy. *Ibid.*

4. While a policy of insurance will be construed liberally in favor of insured, it cannot be enlarged beyond its plain provisions and reasonable implications. *Lexington v. Indemnity Co.*, 774.

f Mortgagee's Rights Under Loss Payable Clause.

1. A standard mortgagee clause in a policy of fire insurance creates a separate contract between the mortgagee and the insurer to the extent, at least, of not being invalidated, *pro tanto* or otherwise, by any act or omission on the part of the owner or mortgagor which is unknown to the mortgagee, whether done prior or subsequent to the issuance of the policy. *Stockton v. Ins. Co.*, 43.

2. The fact that a mortgagee named in a standard mortgagee clause in a policy of fire insurance hypothecates the mortgage note and policy as collateral security for his note does not *ipso facto* render the standard mortgagee clause void as to his interest. *Ibid.*

c Contracts to Insure

1. Plaintiff, the purchaser of notes secured by an instrument amounting in effect to a chattel mortgage on an automobile, brought suit on the notes. The instrument and notes stipulated that there was no contemporaneous oral agreement between the parties. Defendant maker set up the defense that the payee of the note, at the time of the loan, agreed to use part of the proceeds to purchase insurance on the automobile, that the payee had failed to do so, and that the car had been burned, and that the amount of the loss by fire should be subtracted from the amount of the note: *Held*, in the absence of evidence that plaintiff was not a purchaser for value, or that the payee of the note was plaintiff's agent in making the agreement, defendant was not entitled to set up the verbal agreement of the payee to purchase the insurance. *Banking Corp. v. Linthicum*, 455.

F Group Insurance.

b Relation of Employer and Employee

1. Employee *held* not entitled to recover under group policy for injury sustained after termination of employment. *Moffitt v. Assurance Society*, 859.

Insurance F—*continued.*

e Classification of Employees and Amount of Individual Insurance.

1. Employees under a group policy of insurance were divided into two classes, in accordance with their position with the company, a higher premium being deducted from the salaries of the higher group and the higher group being insured for a larger amount. Plaintiff, with knowledge of the two classes and of the premiums of each, was promoted from the lower class to the higher class, and the deductions from his salary for the insurance correspondingly increased, and was thereafter demoted to the lower class, but the employer continued to deduct from his salary the premiums for the higher class, but insurer did not receive such overcharge. Plaintiff thereafter became disabled under the terms of the policy, and insurer paid him the insurance for the lower class and the employer tendered him the overcharge of premiums. Plaintiff brought this action to recover of the insurer the amount of insurance for the higher class: *Held*, insurer's motion as of nonsuit was properly allowed. *Sowell v. Ins. Co.*, 372.

G Mutual Benefit Societies.

a Definition

1. A contract in the form of a life insurance policy with a mutual benefit society, which contract stipulates that insured agrees that the society is a Fraternal Benefit Society as defined by C. S., 6497, is a Fraternal Benefit Contract, and C. S., 6508, prescribing certain limitations upon the designation of beneficiaries in such contracts applies, and the contention that the contract is not controlled by the statute for that the statute applies only to membership benefits and not to insurance policies, cannot be sustained. *Trust Co. v. Widows' Fund*, 534.

f Beneficiaries

1. An incorporated trust company, authorized by a trust agreement to collect the proceeds of life insurance policies on the life of the trustor upon his death, and administer the funds for the benefit of the children of the trustor's sisters, with power to advance money to the trustor's administrator to pay taxes, claims, or other indebtedness of the estate, may not be named beneficiary in a Fraternal Benefit Contract on the trustor's life, the trustee not being a natural person nor a charitable institution as defined by C. S., 6508, and being empowered to use the funds for purposes other than for the benefit of the trustor's kindred, and where the wife of the trustor is named beneficiary in the Fraternal Benefit Contract and the attempted change of beneficiary to the trust company is made without the consent of the wife, as required by the by-laws of the society, made a part of the contract, for change of beneficiary, the trustor's wife and not the trust company is entitled to the proceeds of the Fraternal Benefit Contract. *Trust Co. v. Widows' Fund*, 534.

H Cancellation of Policies.

a Cancellation by Insurer

1. Where a policy has not been canceled in accordance with its provisions relating thereto, and has not been forfeited by insured, the refusal of insurer's agents to accept premiums thereon will not terminate the contract. *Westbrook v. Ins. Co.*, 630.

Insurance—*continued.*

I Avoidance of Policy for Misrepresentation or Fraud.

b Matters Relating to Person Insured

1. Insurer defended this action on a policy of life insurance on the ground of fraud in that insured made misrepresentations in her application in that she stated that she had not been attended by a physician within the last five years, while in fact during such time she had gone to the office of a physician and had been told that she had goiter. There was evidence tending to show that insurer's physician examined insured prior to the issuance of the policy, and that he found no impairment of her health, and that insured died from apoplexy. Insurer did not resist recovery upon the ground of a material misrepresentation affecting the risk. The court instructed the jury that the burden was upon insurer to show that insured made the false statement with intent to deceive insurer's agent, and that insurer, by reason of such false and fraudulent misrepresentation, was induced to issue the policy to its damage: *Held*, insurer's exception and assignment of error to the charge cannot be sustained. *Harrison v. Ins. Co.*, 487.

2. Under the provisions of N. C. Code, 6289, all statements in an application for a policy of life insurance are deemed representations and not warranties, and a misrepresentation must be material or fraudulent in order to prevent recovery, and whether a misrepresentation is made with fraudulent intent by insured, or whether it is material, so that insurer would not have issued the policy had it known the truth, are ordinarily questions for the jury. *Ibid.*

J Forfeiture of Policy for Breach of Covenants or Conditions.

a In General

1. The policy of life, disability, and accident insurance in this case contained a clause stipulating that insurer should have the right to inspect the policy and receipt book, and by later cancellation clause provided that insurer should have the right to cancel the policy for nonpayment of premiums, and the right to cancel or reduce the disability and accident insurance upon written notice: *Held*, insured's refusal to allow insurer to inspect the policy would not work a forfeiture of the policy, the clause of the policy relating to insurer's right of inspection not providing for forfeiture for its breach, and the law not favoring forfeitures. *Westbrook v. Ins. Co.*, 630.

b Nonpayment of Premiums or Assessments

1. Where the right of plaintiff to recover upon a policy of life insurance in which she is named beneficiary is made to depend solely upon whether a premium thereon had been paid, and plaintiff introduces insurer's receipt therefor, but insurer introduces evidence that the insured's check given in payment was worthless and was returned to insured upon his written acknowledgment that the receipt had been lost, and plaintiff testifies that the purported signature of insured to the acknowledgment was not genuine: *Held*, the evidence as to payment was conflicting and raised an issue for the jury, and the direction of a verdict in insurer's favor was error. *Ferrell v. Ins. Co.*, 51.

Insurance J b—*continued.*

2. Evidence that defendant Mutual Fire Insurance Association sent plaintiff a notice of assessment on his policy which provided, under its charter and by-laws, that the policy would be forfeited unless the assessment were paid within sixty days, and that about six months thereafter defendant sent plaintiff notice of an additional assessment and included in such notice the past-due assessment, the second notice stating that if the total assessment were not paid within sixty days the policy would be forfeited, together with evidence that it was defendant's custom to mail notices of past-due assessments with current assessments and reinstate policies upon payment of the past-due and current assessments, and that within sixty days from receipt of the second notice plaintiff tendered payment of both his past-due assessment and his current assessment, and that he had suffered loss by fire within the sixty days after receipt of the second notice, *is held* sufficient to be submitted to the jury on the question of defendant's waiver of the forfeiture of the policy for nonpayment of the first assessment within the time prescribed, and as to whether the policy was in effect at the time of the fire. *Paramore v. Ins. Co.*, 300.

3. C. S., 6351 and 6352, *held* not applicable to facts in this case, in which plaintiff seeks to establish a waiver of the forfeiture of his policy of fire insurance for nonpayment of an assessment within the time limit prescribed. *Ibid.*

4. Forfeiture of policy for nonpayment of premiums upheld. *Summerel v. Woodmen of the World*, 861.

K Waiver of Violation of Conditions Working Forfeiture.

a Knowledge of Agent

1. Evidence that insurer's agent knew at the time of the issuance of a fire insurance policy that the property was subject to a prior encumbrance is competent in an action on the policy in which plaintiff's plea that insurer waived the provisions of the policy relating to encumbrances. *Stockton v. Ins. Co.*, 43.

2. In the absence of fraud or collusion on the part of the local agent of insurer, knowledge of the local agent accepting insured's application for reinstatement of the policy that insured was then suffering with diabetes, is imputed to insurer and is a waiver of the provisions of the application for reinstatement signed by insured that he had not suffered from any disease whatsoever for the past twelve months, and that the truth of the statements in the application was made the basis for reinstatement of the policy, and the evidence in this case was properly submitted to the jury under correct instructions from the court. *Colson v. Ins. Co.*, 581.

L Extent of Liability of Insurer.

d Fire Insurance

1. An award of fire loss made in accordance with the terms of the policy providing for arbitration is presumed valid and must stand, in the absence of fraud, mistake, duress, or other impeaching circumstances. *Young v. Ins. Co.*, 188.

2. "An interested appraiser," who is not qualified to act under an arbitration clause in a policy of fire insurance, is one who is partial,

Insurance L d—*continued.*

unfair, arbitrary, and dominated by bias and prejudice for or against the parties or the property in question, or both, or who has some pecuniary interest in the result of the performance of the duties of appraiser. *Ibid.*

3. Evidence that insurer's appraiser had previously acted as appraiser for insurance companies is insufficient to show interest. *Ibid.*

4. Evidence *held* insufficient to show interest on part of third appraiser or undue influence on him by insurer's appraiser. *Ibid.*

c Fees of Attorneys Employed by Insured to Defend Suit

1. Insurer *held* liable under policy for fees of attorneys employed by insured to defend suit after insurer's refusal to defend. *Ins. Co. v. Harrison-Wright Co.*, 661.

M Proof of Death or Loss.

c Waiver of Proof

1. Where insured sends insurer a physician's report in furnishing proof of disability within the terms of the policy, and insurer's agent writes insured that the company declined the claim on the ground that the physician's report failed to show disability within the terms of the policy, the letter constitutes a denial of liability by insurer which waives further proof of disability. *Guy v. Ins. Co.*, 278.

N Persons Entitled to Proceeds and Exemption of Proceeds from Debts.

a War Risk Insurance

1. Where funds from War Risk Insurance have been invested in securities by the guardian of an insane veteran, such funds are subject to charges for the care and maintenance of the veteran in the State Hospital, sec. 454, Title 38, World War Veterans' Act of 1924, not applying to investments made with the proceeds of the insurance. *State Hospital v. Bank*, 697.

P Actions on Policies. (Right of insured to maintain action against tort feasor after payment of loss by insurer see Pleadings D b 1.)

a Right of Action, Pleadings, and Parties

1. Where a policy of insurance is subsisting and effective, the policy not having been forfeited or canceled, insured may not maintain an action to recover premiums paid on the contract. *Westbrook v. Ins. Co.*, 630.

R Accident and Health Insurance.

c Disability Clauses (Waiver of proof of disability see hereunder M c.)

1. Where, in an action by insured to recover an annual premium paid under protest upon the ground that payment of the premium was waived under the disability clause of the policy, the parties agree that the court should find the facts, and the court finds that insured was disabled within the terms of the policy, and enters judgment for insured, but it does not appear from the findings when insurer received due proof of such disability, or that such disability had then existed for not less than sixty days, as required by the policy, the findings do not support the judgment, and the case will be remanded for further proceedings. *Wyche v. Ins. Co.*, 45.

Insurance R c—*continued.*

2. In this action on a disability clause in a policy of life insurance which provided for benefits to insured if he should become permanently and totally disabled to pursue any occupation for wages or profit, all the evidence tended to show that insured, although his health was greatly impaired by a progressive disease subsequently causing his death, continued to work regularly and continuously while the policy was in force and after its termination, and was paid wages by his employer regularly during this period: *Held*, the evidence failed to show total disability of insured while the policy was in force, and insurer's motion as of nonsuit was properly allowed. *Hill v. Ins. Co.*, 166.

3. A physician's statement as to the condition of insured is not conclusive on the question of insured's disability within the terms of the policy. *Guy v. Ins. Co.*, 278.

4. Where a disability clause in a policy of insurance provides for benefits to insured upon proof of total and permanent disability, and that such disability had continued for six months, under plain terms of the policy, disability as defined by the policy must exist for the six-months period before liability attaches to insurer, and where the insurance is not kept in force by the payment of premiums for six months after insured sustained such disability, insured's action on the disability clause is properly nonsuited. *Johnson v. Ins. Co.*, 512.

5. Testimony that insured was rendered wholly disabled by disease from following any occupation for remuneration or profit *held* sufficient to take the case to the jury in this action on a disability clause in a policy of life insurance, although the testimony of other witnesses was in sharp conflict. *Gennett v. Ins. Co.*, 640.

6. An incurable disease requiring careful and close observation of a physician, and requiring that the patient refrain from the ordinary exactions of a fixed employment, *is held* to have been within the contemplation of the parties as a permanent and total disability at the time the policies sued on were executed. *Ibid.*

7. Attending school is not pursuing an occupation for remuneration or profit as a matter of law. *Ibid.*

S Liability and Property Damage Insurance. (Surety Bonds see Principal and Surety.)

a Risks Covered

1. The policy of insurance in suit indemnified insured against loss from liability imposed by law for personal injuries inflicted while the car was being driven by the owner or by an adult with the owner's permission, and an endorsement in the policy provided insurance for damage to the car from accidental collision, with $50 deductible feature, "subject to all the terms" of the policy: *Held*, the provision in the personal-injury clause limiting liability to injuries sustained while the car was being driven by the owner or an adult authorized by him does not apply to the collision-damage endorsement, the collision-damage endorsement not containing a limitation to this effect and the phrase "subject to all terms" of the policy being too indefinite to bring the limitation within its terms, and the

Insurance S a—*continued.*

policy *is held* to cover damage to the car by accidental collision while it was being driven by the owner's chauffeur against the owner's orders for the chauffeur's personal pleasure. *Hallock v. Ins. Co.*, 195.

2. Damage to an automobile resulting when it was being driven around a sharp curve and failed to make the turn, ran off the road, down a bank and into some bottom land at the foot of the bank, upsetting the car and turning it over on its side, *is held* damage by collision within the meaning of a policy of collision-damage insurance providing insurance, with $50 deductible feature, for damage to the car by "accidental collision with another object, either moving or stationary, including upsets." *Ibid.*

3. Property damage insurance in this case *held* to include damage to property from blasting, though policy excluded "explosions." *Ins. Co. v. Harrison-Wright Co.*, 661.

4. Plaintiff municipality was covered by a policy of indemnity insurance against injuries to third persons during the progress of business operations of the municipality in connection with its waterworks and other municipal activities. A third person was injured when he stepped on a storm sewer near a sidewalk in the city, and the city paid him damages under a consent judgment, and sought to recover the amount thereof from the insurer. There was no evidence that at the time of the accident the city was engaged in any business operations at the storm sewer: *Held*, the injury was not covered by the policy, maintenance of equipment and structures of the city not being covered by the policy, either by express language or by reasonable implication. *Lexington v. Indemnity Co.*, 774.

5. Insurer in a policy of indemnity insurance was advised by insured of an action for personal injury brought against insured. Insurer requested and obtained an extension of time for filing answer, but thereafter denied liability under the policy, and insured defended the suit and thereafter entered a consent judgment therein: *Held*, the request for an extension of time did not bind insurer to the payment of the judgment rendered against insured, insurer not being a party to the suit, and the request for extension of time having been made on behalf of insured. *Ibid.*

Judgments.

II Lien.

a Attachment of Lien

1. A judgment for a fine, duly docketed, constitutes a lien on the real estate of defendant, C. S., 4655, which lien attaches immediately upon the docketing of the judgment, C. S., 614. *Osborne v. Board of Education*, 503.

d Life of Lien

1. An action on a judgment must be brought within ten years from its rendition and docketing or the lien of the judgment against the lands of the judgment debtor is lost, C. S., 437, but transfer of the lands by the judgment debtor does not release the land of the lien. *Osborne v. Board of Education*, 503.

Judgments H d—*continued.*

2. Where a judgment for a fine is rendered against a defendant residing in this State, and who remains in the State several months after the rendition and docketing of the judgment, the fact that thereafter the defendant left the State will not prevent the loss of the judgment lien by the lapse of ten years after the rendition and docketing of the judgment as against a purchaser of the land from the judgment debtor, C. S., 437, no execution on the judgment having been completed within the ten-year period, and the land having been subject to sale under execution continuously since the rendition and docketing of the judgment. *Ibid.*

K Attack and Setting Aside.

b For Surprise or Excusable Neglect

1. Where, upon a motion to set aside a judgment for surprise and excusable neglect, C. S., 600, on the ground that the judgment was a consent judgment and was signed by movant's attorney without authority, and a motion to set aside the consent judgment for such want of authority by movant's attorney, the court finds, upon evidence by affidavits, that the attorney was duly authorized to sign the judgment for movant, the finding is conclusive on the Supreme Court upon appeal, Art. IV, sec. 8, and the order refusing the motions will be upheld. *Alston v. R. R.*, 114.

2. After appeal from an order of the clerk refusing to set aside a judgment for surprise and excusable neglect it is too late for movant to request the clerk to find the facts upon which he bases his order. *Ibid.*

3. Where no evidence appears in the case on appeal from an order setting aside a judgment for surprise and excusable neglect under C. S., 600, it will be presumed that the findings of fact are based upon sufficient evidence in the absence of exceptions to the findings, and the order will be affirmed where the findings sustain the court's holding that movants have shown excusable neglect and meritorious defense. As to whether the pleadings, judgment sought to be set aside, and the record incident thereto, and the motion and affidavit of movants may be treated as evidence, *quære? Radeker v. Royal Pines Park*, 209.

L Operation of Judgments as Bar to Subsequent Action.

a Judgments as of Nonsuit

1. Evidence in this action *held* not substantially identical with evidence in former action nonsuited, and dismissal on plea of *res judicata* was error. *Jones v. Bagwell*, 378.

2. Judgment dismissing an action instituted after judgment of nonsuit in a prior action between the same parties is properly allowed upon the plea of *res judicata* where it appears that the allegations and evidence in both actions are substantially identical, and that the only variance is that the allegations and evidence in the second action are more elaborate and cumulative. *Brown v. Johnson*, 867.

b Matters Concluded

1. Where, upon a plea of estoppel by judgment, the trial court finds that the allegations and evidence in the second action instituted by plain-

Judgments L b—*continued.*

tiff after his majority are substantially identical with the allegations and evidence in the former action against the same defendant brought by plaintiff through his next friend during plaintiff's minority, and the findings of the court are supported by the pleadings and evidence in the former trial introduced in evidence in the second trial, judgment dismissing the second action upon the plea of estoppel will be affirmed. *Ferguson v. Spinning Co.*, 496.

f Plea of Res Judicata, Procedure and Determination of Plea

1. The refusal of a motion to dismiss an action on the plea of *res judicata* will be affirmed on appeal where no facts as to the identity of the actions are found by the trial court and none appear from an inspection of the record. *Buchanan v. Oglesby*, 149.

M Conclusiveness of Adjudication.

b Persons Concluded

1. A judgment in plaintiff's favor against several defendants, and the recitals therein of the liability of each of the defendants to plaintiff, is conclusive as between the plaintiff and the defendants, but is not conclusive as to the respective liability of the several defendants among themselves, unless the liability among themselves is drawn in issue and determined in the action. *Stanley v. Parker*, 159.

2. Judgment against endorsers on note reciting that defendants had paid plaintiff the amount of the note in satisfaction of their joint liability *held* not to preclude one defendant from showing by parol evidence that other defendant had agreed to pay more than one-half the judgment in so far as it affected the liability of defendants among themselves. *Ibid.*

Judicial Sales.

A Nature of Remedy and Conduct of Sales.

a In General

1. A commissioner appointed by the court to sell lands and distribute the proceeds in accordance with the order of the court is in a certain sense an officer of the court to perform the specific acts specified in the order, and he is not an attorney for either party to the suit, and the relationship of attorney and client existing between him and one of the parties prior to his appointment is terminated by the appointment, since he must then act in accordance with the orders of the court, and can no longer act in accordance with private contract. *Peal v. Martin*, 106.

2. A commissioner appointed by the court to sell lands and disburse the proceeds according to law is not a trustee in the general meaning of that term, nor an agent either of the court or the parties to the suit. *S. v. Ray*, 642.

b Confirmation

1. A judgment confirming a sale of land by a commissioner appointed by the court which is entered out of the county under a misapprehension of the agreement of the parties is properly set aside upon motion in the cause made before another judge of the Superior Court, since a judge has no authority to hear a cause or make an order substantially affecting the rights of the parties outside the

Judicial Sales A b—*continued.*

county in which the action is pending, unless authorized by statute or agreement of the parties. *Brown v. Mitchell*, 132.

c Rights and Remedies of Distributees

1. Cause of action accrues to distributees upon commissioner's failure to distribute funds in accordance with order of court. *Peal v. Martin*, 106.

Jury.

C Right to Trial by Jury.

a In General

1. Right to a jury trial is guaranteed by our Constitution, Art. I, sec. 19, and where the parties do not consent to trial by the court, the court may not determine, prior to the introduction of evidence, an issue of fact joined by the pleadings. *Hershey Corp. v. R. R.*, 122.

Justices of the Peace.

D Proceedings in Civil Actions. (Jurisdiction in summary ejectment see Ejectment B a.)

a Pleadings

1. In proceedings before a justice of the peace oral pleadings are permissible. C. S., 1500, Rule 6. *Building & Loan Asso. v. Moore*, 515.

Laborers' and Materialmen's Liens.

B Proceedings to Perfect.

c Notice of Lien of Laborers and Sub-Contractors

1. Persons employed by an agent of the principal contractor to perform certain work on the premises may not recover of the owner for the value of such labor merely upon a showing that they performed the work and that the owner received the benefit thereof. C. S., 2437. *Price v. Gas Co.*, 796.

C Operation and Effect.

b Nature of Lien and Priorities

1. Where a material furnisher gives notice to the owner of his claim, and there is a sufficient sum due or to become due by the owner to the contractor under the terms of the contract to pay such claim, it is the duty of the owner to retain out of the funds due or to become due to the contractor a sum sufficient to pay the materialman, the amount due the contractor by the owner being considered a trust fund for the material furnishers giving notice for the purpose of enabling the materialmen to sue to have the fund so applied, and to attain a pro rata distribution of the fund to the materialmen. *Briggs & Sons v. Allen*, 10.

2. Notice of materialman to bank owner does not entitle materialman to preference upon bank's insolvency. *Ibid.*

Landlord and Tenant.

C Title of Landlord. (Summary ejectment see Ejectment B.)

b Estoppel of Tenant to Deny Landlord's Title

1. Upon the foreclosure of a mortgage on plaintiff's land an officer of defendant bank, the mortgagee, bid in the property, and later conveyed the property to the bank. Thereafter the mortgagors pro-

Landlord and Tenant C b—*continued.*

cured the bank to lease the property to a third person for their benefit, and later procured the bank to lease the property to them and entered a consent judgment in which they admitted that the title to the land was in the bank, and acknowledged that their only claim to the land was under their lease: *Held*, the mortgagors are estopped by their conduct from attacking the title of the bank on the ground that in effect the bank bought the property at the foreclosure sale of its own mortgage, the title of a mortgagee bidding in the property at his own sale being voidable and not void, and the mortgagors, by their conduct, having confirmed and ratified the bank's title. *Shuford v. Bank*, 428.

Libel and Slander.

D Actions.

c Evidence

1. While evidence of secondary publications of an alleged slander are admissible on the issue of damages when such secondary publications are the natural, probable, and foreseeable consequences of the original slander sued on, the evidence of subsequent defamatory statements made by others was erroneously admitted in this case for that it appeared the subsequent statements were not repetitions or secondary publications of the original slander which was the basis of the cause of action. *Swinson v. Packing Co.*, 637.

Licenses. (See Taxation A c; B c; Municipal Corporations K b.)

Limitation of Actions.

A Statute of Limitations. (Charter provisions requiring notice and claim for damages see Municipal Corporations J b; life of judgment lien see Judgments H d; time for filing claim for injuries see Master and Servant F c.)

b Actions Barred in Two Years

1. An action to recover the statutory penalty for usury, C. S., 2306, is barred after the lapse of two years from the accrual of the cause of action in the absence of disability or nonresidence affecting the running of the statute. C. S., 442 (2). *Smith v. Finance Co.*, 367.

c Actions Barred in Three Years

1. Defendant had possession of a chattel purchased by her under a promissory note and conditional sale contract not under seal. Plaintiff, the owner of the conditional sale contract, instituted claim and delivery proceedings for the possession of the chattel for sale under the terms of the contract. Defendant pleaded the three-year statute of limitations, and plaintiff admitted that there had been no new promise or payment on the purchase price for over three years prior to the institution of the action: *Held*, the three-year statute of limitations, C. S., 441 (1), (4), barred the ancillary remedy of claim and delivery, C. S., 830, action on the note being also barred by the statute. *Piano Co. v. Loven*, 96.

2. An action on a note under seal against a surety thereon is barred after the lapse of three years from the maturity of the note, or after three years from the expiration of an extension of time for payment binding on the surety. C. S., 441 (1). *Davis v. Alexander*, 417.

Limitation of Actions—*continued.*

B Computation of Period of Limitation.

a Accrual of Right of Action

1. A cause of action accrues and the statute of limitations begins to run whenever a party becomes liable to an action, if at such time the demanding party is under no disability. *Peal v. Martin*, 106.

2. A cause of action for breach of a contract to devise or for the value of services rendered in reliance upon such agreement accrues upon default, which may arise from abandonment or anticipatory breach, but which usually arises upon failure to make testamentary provision as promised. *Lipe v. Trust Co.*, 794.

b Demand, Notice, and Fraud

1. Persons entitled to funds derived from the sale of land by a commissioner appointed by the court brought action against the administratrix of the commissioner to recover the funds, the commissioner having failed to distribute the funds in accordance with the order: *Held*, plaintiff's contention that upon the commissioner's failure to file a report and final account with the clerk the cause of action did not accrue until demand upon the commissioner or his administrator is untenable, since the order did not direct the commissioner to file such report, and if the statutes, C. S., 765, 3243, applied, the law made demand for the disbursement of the funds, and plaintiff had notice of such failure upon the expiration of the ten days therein prescribed for the filing of a report, or the sixty days therein prescribed for the filing of the account. *Peal v. Martin*, 106.

2. A cause of action for reformation of an instrument for fraud or mistake accrues when the fraud or mistake is discovered, or when it should have been discovered in the exercise of due diligence. *Moore v. Casualty Co.*, 433.

3. Bonds securing county funds on deposit in a bank contained a clause stipulating in unequivocal terms that the bonds should not cover county funds represented by certificates of deposit. The county treasurer brought suit on the bonds to recover funds of the county on general deposit and funds represented by certificates of deposit, and sought to have the bonds reformed by eliminating the clause exempting certificates of deposit because of the mutual mistake of the parties. Defendant surety company pleaded the three-year statute of limitations, C. S., 441 (9), it appearing that the action was begun some five years after the delivery of the bonds. Plaintiff alleged in his reply that the clause exempting certificates of deposit was not discovered until after the failure of the bank in which the county funds were deposited: *Held*, the actual time of the discovery of the alleged mistake is not determinative, but the cause of action for reformation of the bonds accrued when the mistake should have been discovered by plaintiff in the exercise of due diligence, and plaintiff being an educated man, and there being no evidence of any effort to conceal the plain language of the bonds or to prevent plaintiff from reading them, plaintiff's cause of action was barred by the statute. *Ibid.*

c Fiduciary Relationships

1. Where a commissioner appointed in a civil action is ordered to sell land and distribute the proceeds as specifically directed, and after

Limitation of Actions B c—*continued.*

sale by the commissioner an order is entered directing him to forthwith execute a deed to the highest bidder at the sale upon the payment of the purchase price, and to distribute the funds as specified, a cause of action accrues in favor of the persons entitled to receive the funds against the commissioner for money had and received, and the commissioner not being in a fiduciary relationship with such persons, and they being under no disability, their right of action against the commissioner is barred after the lapse of three years. *Peal v. Martin*, 106.

e Absence and Nonresidence

1. The nonresidence of a foreign corporation will not prevent the running of the statute of limitations in its favor where constantly from the accrual of the cause of action it might have been served with summons under the provisions of C. S., 1137. *Smith v. Finance Co.*, 367.

g Institution of Action

1. Defendant surety company issued its bonds securing county funds on deposit in a bank. Upon the loss of the funds through the insolvency of the bank, suit was instituted on the bonds. Part of the county funds were on general deposit and part were represented by certificates of deposit, and defendant surety company set up the defense that the bonds contained a clause which provided that funds represented by certificates of deposit should not be covered by the bonds. Thereafter plaintiff was allowed to amend his complaint so as to allege that the clause exempting certificates of deposit was inserted through the mutual mistake of the parties and that the clause should be eliminated therefrom: *Held*, suit for reformation of the bonds was instituted as of the date of the amendment of the complaint. *Moore v. Casualty Co.*, 433.

C Matters Affecting Waiver of Plea and Estoppel.

a Partial Payment

1. While payment of interest on a note by the maker will not ordinarily affect the running of the statute of limitations in favor of the endorsers, where the endorsers agree upon the face of the note to remain bound notwithstanding extensions of time granted the maker, and the maker pays interest for definite periods for extensions to dates certain, the statute does not begin to run in favor of the endorsers until after the maturity date under the last extension agreement, although the endorsers were ignorant of payments of interest by the maker and extensions of time granted him, and refused to sign a renewal note upon the original maturity date of the note. *Bank v. Hessee*, 71.

2. Where more than three years elapse after the maturity of a note, and no notice of nonpayment is given the endorsers, and all payments on the note are made by the maker thereof, and there is no waiver of notice on the face of the note, the endorsers' plea of the statute of limitations is a complete defense to their liability thereon. *Waddell v. Hood, Comr.*, 250.

Limitation of Actions C a—*continued.*

3. After the statute of limitations has barred the right of action by the payee of a negotiable note against the surety thereon, payment on the note by the maker thereof operates as a renewal only as to the maker, and does not repeal the bar of the statute as to the surety. C. S., 417. *Davis v. Alexander*, 417.

E Pleading, Evidence, and Trial.

c Evidence and Burden of Proof

1. Upon the plea of the statute of limitations the burden is on plaintiff to show that his claim is not barred. *Savage v. Currin*, 222; *Davis v. Alexander*, 417.

2. Where plaintiff resists defendant's plea of the statute of limitations solely on the ground that defendant left the State prior to three years from the accrual of the cause of action, and defendant denies the allegation of nonresidence, in the absence of evidence by plaintiff in support of the allegation of nonresidence, defendant's motion as of nonsuit is properly allowed. *Savage v. Currin*, 222.

Malicious Prosecution.

A Right of Action and Defenses.

c Probable Cause

1. Plaintiff was convicted in the recorder's court of larceny. On appeal to the Superior Court a *nolle prosequi* was entered. Plaintiff then instituted this action for malicious prosecution in the Superior Court against the prosecuting witness in the criminal action, and introduced plenary evidence that the conviction in the recorder's court was obtained by fraud upon false and perjured testimony secured by threats and promises of reward: *Held*, the conviction in the recorder's court was not conclusive evidence of probable cause, and the question of whether defendant had probable cause to believe plaintiff guilty of the larceny as charged in the warrant sworn out by defendant was properly submitted to the jury under correct instructions from the court, and testimony of a witness tending to show that the witness' testimony in the trial in the recorder's court was procured by intimidation is competent. *Moore v. Winfield*, 767.

Mandamus.

A Nature and Ground of Remedy.

b Performance of Legal Duty

1. A writ of *mandamus* can confer no new authority, but the writ lies only to compel the performance of an existing ministerial duty by a party having a clear legal right to demand its performance. *John v. Allen*, 520.

Master and Servant. (Employer's liability for employees negligent driving see Automobiles D b; group insurance see Insurance F.)

A The relation.

a Creation and Existence

1. The trial of the issues relating to the establishment and breach of the contract of employment sued on *held* without error in this case. *Dotson v. Guano Co.*, 635.

Master and Servant A—*continued.*

b Distinction Between This and Other Relations

1. Where a contract of employment is in writing and is unambiguous it is a question of law for the court whether the employee is an agent or an independent contractor. *Construction Co. v. Holding Corp.*, 1.

2. In determining whether a contract of employment constitutes the employee an agent or an independent contractor, the terms used in the contract to designate the parties are not controlling, but the question must be determined by the intent of the instrument and the meaning of the terms used, the employee being an independent contractor if the owner has no interest in the performance of the contract, but only in the finished product. *Ibid.*

3. Where the contract for the erection of a building expresses a nominal consideration given by the builder and the further consideration of "services to be rendered" by him, and the owner agrees to pay the builder a "fee for services," and the contract provides that if the building should cost less than estimated the saving should be divided between the owner and builder up to a certain sum, and that if the owner should retain any savings in excess of the sum stipulated, and that the owner should reimburse the builder monthly for all moneys expended for pay rolls, materials, etc., *is held* to constitute the builder an agent of the owner in the construction of the building and not an independent contractor, agency being implied by the use of the terms "fee" and "services to be rendered," and the owner retaining some interest in and control over the cost of the building, and certain contradictory terms used in the specifications do not alter this result, the contract of employment specifying that the owner should so pay for materials notwithstanding stipulations in the specifications to the contrary. *Ibid.*

g Breach of Contract of Employment

1. Plaintiff declared upon a contract of employment, based upon sufficient consideration, under which defendant agreed to continue to give plaintiff employment for life or so long as he was able to perform same, of the kind and character he was performing at the time of the execution of the contract. Defendant promoted plaintiff from time to time with increased compensation, but thereafter discharged plaintiff: *Held*, in plaintiff's action for breach of the contract, under the evidence the damages should have been limited to and based upon the rate of compensation paid for the kind and character of the work plaintiff was performing at the time the contract was executed, and the rule that a contract will be construed in connection with the practical interpretation given thereto by the parties has no application to the case. *Dotson v. Guano Co.*, 635.

F Workmen's Compensation Act.

a Nature, Construction, and Application

1. A worker employed by a city under a contract stipulating the wages to be received by the worker is an employee of the city within the meaning of the Compensation Act, and the fact that the city obtains the money to pay the wages from the Reconstruction Finance Corporation is immaterial on the question of the relationship between the worker and the city. N. C. Code, 8081 (i). *Mayze v. Forest City*, 168.

Master and Servant F a—*continued.*

2. A workman in a cotton mill paid by the piece or quantity of the work performed by him is an employee of the mill within the intent of the North Carolina Workmen's Compensation Act. *Morgan v. Cloth Mills*, 317.

3. Plaintiff brought action in the Superior Court alleging that as a result of being required to move heavy objects in the performance of his work over a period of years plaintiff's health had been shattered, and that defendant had negligently ordered plaintiff to move the heavy objects without furnishing plaintiff sufficient help to do the work. Defendant demurred upon the ground that the action was within the exclusive jurisdiction of the Industrial Commission: *Held*, the demurrer was properly sustained, injuries to employees by accident in the course of their employment being compensable whether from active negligence or not, and sickness or physical breakdown produced solely by negligence not being *per se* an "occupational disease." *Johnson v. Hughes*, 544.

4. There was no evidence at the hearing of this proceeding by the North Carolina Industrial Commission tending to show that the death of plaintiff's husband, A. G. Morrow, was the result of an injury by accident, or was the result of an occupational disease. For this reason, the award of the Commission denying compensation to the plaintiff in this proceeding was properly affirmed by the judge of the Superior Court. *Morrow v. Exploration Co.*, 875.

b Injuries Compensable

1. In this hearing before the Industrial Commission there was evidence that the deceased employee was a piece worker in the employer's cotton mill, and was required to report for work at the mill at six o'clock in the morning, at which time he was given work if any was available, or told when to report back for work later in the day; that on the morning of the accident the employee reported for work at the usual time, and was told to return at eleven or twelve o'clock; that he said he would go home and come back; and that shortly thereafter he was found unconscious near a platform at an entrance of the mill with indications that he had slipped on some ice or stumbled over some lumber or a hand truck on the unlighted platform and had fallen to the frozen ground, fracturing his skull, which injury caused his death: *Held*, the evidence was sufficient to sustain the finding of the Industrial Commission that the employee's death resulted from an accident arising out of and in the course of his employment. *Morgan v. Cloth Mills*, 317.

2. There was evidence in this case tending to show that claimant, while performing the duties of his employment, was corrected by his foreman, and that another employee, not on duty at the time and whose place of work was some distance away, and who was intoxicated at the time, thereupon abused claimant and hit claimant with a hammer, that claimant ran away, but returned later to work, and that after his return to work the intoxicated fellow employee again got after him, and claimant, in attempting to get away, fell and broke his leg, and that not until then did the foreman grab the intoxicated employee and force him to desist: *Held*, the evidence was sufficient to support the finding of the Industrial Commission

Master and Servant F b—*continued.*

that there was a causal connection between claimant's employment and the injury and its finding that the injury resulted from accident arising out of and in the course of claimant's employment. *Wilson v. Boyd & Goforth, Inc.*, 344.

3. Claimant was driving a truck in the course of his employment and, while passing a group of boys playing baseball, the baseball struck the windshield and a piece of glass from the windshield struck claimant in the eye, resulting in the injury: *Held*, the injury resulted from accident arising out of and in the course of the employment. *Perkins v. Sprott*, 462.

4. Each of the antecedent elements of an injury by accident, which arises out of and in the course of employment, is necessary to an award of compensation under the Workmen's Compensation Act. *Holmes v. Brown Co.*, 785.

c Filing of Claim

1. Claimant sustained an injury by accident arising out of and in the course of his employment, but no claim for compensation was filed with the Industrial Commission for more than twelve months after the injury, N. C. Code, 8081 (ff). Claimant testified that within the twelve months period he inquired of his superintendent several times as to compensation, and was told on one occasion that his "wages were going on," and that he relied upon the foreman's statement. The evidence disclosed that he received no wages or compensation for over twelve months after the injury: *Held*, the facts do not bring the case within the principle of equitable estoppel, there being no request by defendant that claimant delay the pursuit of his rights, nor was there an express or implied agreement not to plead the statute, and claimant's right to compensation was barred by N. C. Code, 8081 (ff). Whether N. C. Code, 8081 (ff), is a statute of limitations or condition precedent to the right to recover compensation which cannot be waived by the parties, *quære?* *Wilson v. Clement Co.*, 541.

g Persons Entitled to Payment

1. An illegitimate child, born after the death of its father, who before his death had acknowledged his paternity of the child, is a dependent of its deceased father within the provisions of the North Carolina Workmen's Compensation Act, and such child is entitled to share with children of its deceased father who were born of his marriage to their mother, from whom their father had been divorced prior to his death, in compensation awarded under the act to his dependents. N. C. Code, 8081 (uu), 8081 (i). *Lippard v. Express Co.*, 507.

h Amount of Compensation or Award

1. The amount allowed by the Industrial Commission for serious facial or head disfigurement is to be included with other amounts allowed an injured employee in determining the total compensation allowed such employee, which in no case may exceed six thousand dollars. N. C. Code, 8081 (kk), 8081 (mm), 8081 (ww). *Arp v. Wood & Co.*, 41.

Mechanics' Liens. (See Laborers' and Materialmen's Liens.)

Mortgages. (Rights of mortgagee in proceeds of fire insurance policy see Insurance E f.)

C Construction and Operation.

b Parties and Debts Secured and Parties Liable (Upon transfer of title or equity see hereunder F.)

1. Where both the husband and wife sign and deliver a note and deed of trust securing same it is immaterial which of them holds title to the lands, and upon the return of a temporary restraining order in a suit to set aside foreclosure of the deed of trust, an exception to the court's refusal to find which held title will not be sustained. *Whitford v. Bank*, 229.

c Lien and Priority

1. Where plaintiff in ejectment claims title as purchaser at the foreclosure sale of a registered deed of trust against the property, defendant's subsequently registered contract of conveyance from the mortgagor is properly excluded from evidence, plaintiff's prior registered deed of trust being notice to the world. *Biggs v. Oxendine*, 601.

2. Where the record discloses that a purchase-money mortgage and another mortgage given to another party to secure the cash payment required by the grantor for the land were filed for registration at the same instant of time, neither mortgage has priority over the other, but both constitute a first lien on the land, C. S., 3561, and fact that one necessarily appeared before the other on the index of the day's transactions does not alter this result, since the record fails to show that the mortgages were not indexed at the same time. *Hood, Comr., v. Landreth*, 621.

F Transfer of Equity of Redemption.

a Liability of Mortgagor After Transfer

1. The liability of the maker of a mortgage note to the payee thereof is not changed from that of principal to that of guarantor by the fact that the maker transfers his equity in the property to a third person who assumes the debt and the payee accepts from such third person partial payments on the note and extends the time of payment without the maker's knowledge. *Bank v. Carson*, 495.

b Rights and Liability of Purchaser of Equity

1. Where the grantee in a deed, by valid contract therein, personally assumes the payment of a prior mortgage debt against the lands, which contract is accepted or relied upon by the mortgagee, as between themselves and the makers of the mortgage note, the grantee becomes the principal debtor, and a discharge of the makers of the mortgage notes by the mortgagee will not release the grantee of liability to the mortgagee on the debt assumption contract. *Bank v. Randolph*, 241.

2. Transferee of equity liable for the debt *held* not party to contract to refinance first mortgage made by second mortgagee with holder of first mortgage notes. *Land Co. v. Realty Co.*, 453.

Master and Servant F—*continued.*

i Appeals

1. The statutes regulating appeals from a justice of the peace are applicable and control in appeals from the Industrial Commission to the Superior Court, N. C. Code, 8081 (ppp), failing to provide the procedure for such appeals. *Higdon v. Light Co.*, 39.

2. A carbon copy of a letter written by the secretary of the Industrial Commission to the attorneys for appellant relating to the appeal, which carbon copy is sent by the secretary of the Industrial Commission to the attorneys for appellee, is not sufficient notice to appellee of an appeal from an award of the Industrial Commission, appeals from the Industrial Commission, N. C. Code, 8081 (ppp), being governed by the statutes regulating appeals from a justice of the peace, and such notice being insufficient under the statutes applicable, C. S., 1530, 1531, the appeal was properly dismissed in the Superior Court. *Ibid.*

3. The finding of the Industrial Commission that claimant is an employee of defendant employer is conclusive on appeal when supported by evidence. *Mayze v. Forest City*, 168.

4. The award of the Industrial Commission is conclusive on appeal as to all questions of fact involved in the proceeding and determined by the Commission, and the jurisdiction of the Superior Court is limited to questions of law only. N. C. Code, 8081 (ppp). *Byrd v. Lumber Co.*, 253.

5. While the Compensation Act contains no express provision authorizing the Superior Court, upon appeal from an award of the Industrial Commission, to remand the case to the Commission for a rehearing on the ground of newly discovered evidence, the Superior Court has the discretionary power to do so in proper instances. *Ibid.*

6. The findings of fact of the Industrial Commission are conclusive on the courts when supported by any sufficient evidence. *Morgan v. Cloth Mills*, 317; *Wilson v. Boyd & Goforth, Inc.*, 344.

7. On appeal from an award of the Industrial Commission, the Superior Court may review all the evidence to determine whether any evidence tends to support the Commission's findings. *Morgan v. Cloth Mills*, 317.

8. Where all the facts are admitted and the Industrial Commission denies compensation on the facts as a matter of law, the Superior Court, on appeal, has jurisdiction to reverse the Industrial Commission and remand the cause. *Perkins v. Sprott*, 462.

9. The Industrial Commission found upon competent supporting evidence that claimant's injury did not arise out of his employment. Upon appeal the Superior Court interpreted this finding in the light of the evidence before the Commission, but reached the same conclusion: *Held*, the finding of the Commission was binding on the court, and it was without authority to interpret the finding in the light of the evidence, but as the same result was reached the error was harmless. *Holmes v. Brown Co.*, 785.

Materialmen's Liens. (See Laborers' and Materialmen's Liens.)

Mortgages F—*continued.*

c Transfer to Mortgagee and Presumption of Fraud

1. A complaint alleging that a mortgagee in possession by fraud and artifice procured the mortgagors to deed him their equity of redemption is good as against a demurrer unaffected of admissions made by counsel in response to interrogation by the court. *Harrelson v. Cox*, 651.

2. Transfer of equity to *cestui que trust held* to raise presumption of fraud under evidence indicating that trustee acted as agent of *cestui que trust* and was primary party to the purchase. *Hinton v. West*, 708.

H Foreclosure. (Writ of assistance see Assistance, Writ of: summary ejectment see Ejectment B.)

b Right to Foreclosure and Defenses

1. Where injunctive relief is asked against the foreclosure of a deed of trust on the ground of usury and for an ascertainment of the amount of the debt due after deducting penalties for the alleged usury, it is proper for the trial court to ascertain, with the aid of a jury, the amount of the debt with six per cent interest, and to order the land sold and applied to the payment thereof. *Thomason v. Swenson*, 519.

2. Executor may not maintain suit to restrain foreclosure of mortgage on lands devised by will. *Hoke v. Trust Co.*, 604.

3. In a suit by a junior lienor to restrain foreclosure under a first lien on the lands, the continuance of the temporary restraining order to the hearing upon the contention of the junior lienor that the amount due on the first lien is in dispute will not be disturbed on appeal where it appears that the continuance results in no injury to the first lienor, although the first lienor contends that the amount secured by the first deed of trust is no longer in dispute. *Porter v. Ins. Co.*, 646.

4. Upon the termination of a receivership, foreclosure against property theretofore held by the receiver can no longer be resisted on the ground that it would unnecessarily interfere with the administration of the property by the receiver. *Haywood v. Rigsbee*, 695.

5. Foreclosure of a deed of trust may not be enjoined merely upon allegations of general financial depression or that the time is not auspicious for a sale. *Ibid.*

c Injunction and Receivership

1. Where a temporary order restraining the sale of lands under a mortgage thereon is dissolved and the value of the land does not appreciate or depreciate during the time the injunction is in force, and the value of the land at the time of the issuance of the order and at the time of its dissolution is insufficient to pay the debt, the mortgagee is entitled to recover against the injunction bond, within the penal sum thereof, interest on the value of the property at the time of the issuance of the order for the time the order is in force, plus the cost of readvertisement. *Bank v. Hicks*, 157.

2. In a suit attacking the validity of a foreclosure sale under a deed of trust, a temporary order enjoining further transfer of the property

Mortgages H c—*continued.*

by the *cestui que trust*, the purchaser at the sale, is properly dissolved, since plaintiff trustor has an adequate remedy at law by filing notice of *lis pendens* in accordance with the statute. C. S., 500, *et seq.* *Whitford v. Bank*, 229.

h Execution of Power of Sale

1. The law presumes regularity in the execution of the power of sale in a deed of trust duly executed and regular upon its face, and the recital of proper advertisement in the trustee's deed to the purchaser at the sale is *prima facie* evidence of proper advertisement, and the burden is on the party attacking the validity of the sale to show failure of the trustee to properly advertise the sale. *Biggs v. Oxendine*, 661.

2. It is not required that the trustee in a deed of trust give notice of sale under power contained in the instrument to the mortgagor or the purchaser of the equity of redemption, nor is the notice of sale defective for the sole reason that the name of the mortgagor is not recited therein. *Ibid.*

3. Where foreclosure under power in a deed of trust is advertised according to law, the recital in the trustee's deed to the purchaser at the sale that the advertisement was printed in one newspaper published in the county, whereas in fact the advertisement was published in another newspaper published in the county, is not a vital defect. *Ibid.*

j Purchase of Land by Mortgagee

1. The purchase of property by a mortgagee at the foreclosure of the mortgage, or the purchase of the property by an officer of the mortgagee and his transfer of the property to the mortgagee is not void, but is voidable at the option of the mortgagor. *Shuford v. Bank*, 428.

2. Mortgagors *held* estopped by their conduct from attacking title of mortgagee on ground that he purchased property at his own foreclosure sale. *Ibid.*

3. Defendant executed a mortgage to his half-brother to secure payment of a note, and within four months thereafter defendant went into bankruptcy. The bankruptcy court adjudged the mortgage valid and not a voidable preference and approved and confirmed the order of the referee, which did not find that there was any equity over and above the mortgage debt, and which did not restrain the mortgagee from exercising the power of sale contained in the instrument. Thereafter the mortgagee foreclosed under the instrument and the mortgagee's wife bid in the property at the sale and instituted this action in ejectment against the mortgagor: *Held*, the evidence tended to show that the trustee in bankruptcy saw no equity and abandoned any claim he might have, or at least asserted none, in favor of the mortgagor's creditors, and upon the record the foreclosure was valid as between the parties, and plaintiff was entitled to the relief prayed for. *Bunting v. Bunting*, 792.

o Consummation of Sale and Execution of Deed

1. A parol agreement to defer the execution of the deed from the trustee to the *cestui que trust*, the purchaser at the foreclosure sale, in

Mortgages H o—*continued.*

order to give the trustor time to raise funds to redeem the lands, is revocable at the will of the *cestui que trust* where there is no agreement as to the length of time the execution of the deed should be deferred. *Whitford v. Bank*, 229.

2. Ch. 275, Public Laws of 1933, has no application after a foreclosure sale under power contained in the instrument has been confirmed. *Ibid.*

3. Where, in proceedings to enjoin the consummation of a sale under the power contained in a deed of trust on the ground that the amount bid at the sale was inadequate, ch. 275, Public Laws of 1933, the parties expressly waive a jury trial, and the trial court finds from admissions in the pleadings and from conflicting affidavits filed by the parties that the amount bid at the sale represented the fair market value of the lands, and that there was no assurance that a larger sum would be offered if the lands were resold, the findings support his judgment dissolving the temporary order restraining the consummation of the sale. *Barringer v. Trust Co.*, 505.

p Attack of Foreclosure

1. Inadequacy of purchase price, standing alone, is not sufficient to set aside a deed to the purchaser at a foreclosure sale where the sale is made in conformity with the power of sale in the instrument, and, upon the return of a temporary restraining order in a suit attacking the validity of the foreclosure, the court's refusal to find the value of the lands at the time of the sale will not be held for error, since such finding, in the absence of allegations of fraud, is immaterial. *Whitford v. Bank*, 229.

Municipal Corporations. (Counties see Counties.)

B Powers and Functions.

d Private or Corporate Powers

1. The charter of defendant city authorized it to acquire and hold real and personal property and to invest, sell, or dispose of same, and provided that all questions of administration not provided for by the charter should be governed by the general laws of the State: *Held*, the city had authority to lease an auditorium in its municipal building which it had equipped at the time the building was erected with a ticket booth and moving-picture projecting equipment, C. S., 2688, 2787 (2), it appearing that the lease did not involve property held in trust for the use of the city, or property devoted to governmental purposes, although administrative offices of the city were located elsewhere in the building. *Cline v. Hickory*, 125.

C Legislative Control and Supervision.

a In General

1. Counties and cities and towns are governmental agencies of the State, created by the Legislature for administrative purposes, and the Legislature retains control and supervision over both classes of municipal corporations, limited only by the organic law, Art. VIII, sec. 4. *Saluda v. Polk County*, 180.

2. Under the unlimited power of the Legislature to provide for the creation and extension of corporate limits of municipalities, it

Municipal Corporations C a—*continued.*

would seem that it has the power to provide by private act enlarging the boundaries of a town that it should take over the streets existing in the annexed territory and levy taxes to maintain such streets as a necessary power of its existence, and that such private act would not contravene Art. II, sec. 29, prohibiting the Legislature from authorizing the opening, maintaining, or discontinuance of streets by private act. *Matthews v. Blowing Rock*, 450.

D Officers, Agents, and Employees. (As public officers see Public Officers.)

f Civil Liability for Misfeasance or Malfeasance

1. Where municipal officers wrongfully, wilfully, and knowingly disburse municipal funds in payment for municipal construction under a contract let without advertising for bids, as required by C. S., 2830, and it appears that the contract price was excessive and exorbitant, and was let by such officers with intent to evade the law, such officers may be held liable, for the benefit of the city, in a suit by taxpayers of the city, for the amount by which the contract price paid exceeds the reasonable worth of work performed thereunder, even though they did not act corruptly and of malice. The distinction between the suits by individuals to recover for themselves and suit to recover on behalf of the city is pointed out by STACY, C. J. *Moore v. Lambeth*, 23.

E Torts of Municipal Corporations.

c Defects or Obstructions in Streets or Sidewalks

1. A municipality is not an insurer of the safety of its streets, but is required to use ordinary care and due diligence to see that they are safe for travel. *Haney v. Lincolnton*, 282.

2. It is the duty of a municipality to place some guard at dangerous and exposed places adjacent to its streets where the happening of accidents to motorists exercising ordinary care for their own safety may be reasonably anticipated from the failure to place such guards, and whether the danger at a particular place is sufficiently imminent to require guards must be decided on the facts of each particular case. *Ibid.*

3. A street within the corporate limits of defendant city intersected, but did not cross, a paved highway. There was a dirt shoulder four to eight feet wide on the highway opposite the intersection, and then a gradual downward slope with a total drop of six to ten feet. The highway had been widened where the street intersected it so that the hard surface at the intersection was something over thirty feet wide. Plaintiff's intestate was killed when a car in which she was riding was driven along the street toward the intersection, and over the embankment opposite the intersection, and turned over: *Held*, the failure of the city to place a guard at the street end did not breach its duty to exercise ordinary care to keep its streets safe for travel to the injury of plaintiff's intestate. *Ibid.*

4. Active negligence of driver *held* to insulate failure of city to erect guard at street end, even if such failure amounted to inactive negligence. *Ibid.*

5. The evidence in this case tended to show that plaintiff, in recrossing a street, at an intersection in a slightly diagonal course by the same

Municipal Corporations E c—*continued.*

route used by her in crossing the street a short time before, slipped on ice and snow along the gutter on the south side of the street and fell to her injury. There was evidence that plaintiff could have avoided the ice and snow by crossing directly at the intersection, and defendant pleaded plaintiff's failure to have so avoided the hazard as contributory negligence, and aptly requested special instructions on this aspect of the case: *Held*, the court's refusal to give the requested instructions was error entitling defendant to a new trial although the court correctly stated the abstract law of contributory negligence, and the charge would have been sufficiently full in the absence of the request for special instruction. *Groome v. Statesville*, 538.

6. In an action against a city to recover for personal injury resulting from the negligent condition of its streets or sidewalks, the burden is on plaintiff to prove the alleged negligence and proximate cause by the greater weight of the evidence. *Gasque v. Asheville*, 821.

7. Duty of city to keep its streets and sidewalks in reasonably safe condition. *Ibid.*

f Treatment and Discharge of Sewage Into Streams

1. C. S., 7125, does not impose the mandatory duty upon the trial judge of enjoining a municipality from discharging raw sewage into a stream from which another municipality takes its water supply, and where in an action for such injunctive relief the trial court finds that the acts complained of have resulted in no injury or inconvenience to the inhabitants of complaining municipality, and that there were no facts tending to show immediate menace to them, and that the financial condition of defendant municipality is such that it could not immediately install purification plants, and that therefore the granting of the order prayed for would cause untold hardship upon the inhabitants of defendant municipality, the court's order denying the injunctive relief but providing that the judgment should not prevent the bringing of another suit for the same relief upon a change in the fundamental conditions, will be upheld on appeal. *Smithfield v. Raleigh*, 597.

F Contracts and Conveyances.

d Remedies for Unlawful Letting of Municipal Contracts

1. Where, in an action to recover for a city moneys expended by it for municipal construction, the verdict of the jury establishes that the contract for such construction was in excess of one thousand dollars, and that the contract was let to the corporate defendant without first advertising for bids, in violation of C. S., 2830, and that no emergency involving the safety or health of the people or their property existed, and that the corporate defendant conspired with the other defendants to obtain the contract in violation of the statute, and charged excessive and exorbitant prices therefor, the corporate defendant doing the work is entitled to the reasonable value of the work as determined by the jury on the issue of *quantum meruit*, and it is liable to the city for the amount by which the price paid exceeds the reasonable value of the work performed. *Moore v. Lambeth*, 23.

Municipal Corporations F d—*continued.*

2. Municipal officers *held* liable to city for loss sustained by their wilful and unlawful disbursement of city funds. *Ibid.*

G Public Improvements. (Bonds for public construction see Principal and Surety B.)

d Objections and Appeal

1. The jurisdiction of the Superior Court upon appeal from a levy of assessments for street improvements by the governing body of a town is entirely derivative, and as the governing body of the town has no jurisdiction in the statutory proceedings, C. S., 2712, 2713, to condemn land for street purposes, under the power of eminent domain, the Superior Court on appeal likewise has no jurisdiction to do so, and the petition of the town, filed in the Superior Court upon appeal, asking that the land in question be condemned, is properly dismissed. *R. R. v. Ahoskie*, 154.

i Nature of Lien, Priority, and Enforcement

1. The lien against property for street improvements is a lien *in rem* against the land itself, but it is not strictly a tax lien and is based upon the theory of special benefit to the property itself, and therefore does not come within the provisions of Art. VII, sec. 9, requiring all taxes on real and personal property to be levied by uniform rule and *ad valorem*, and a lien for street assessments, while superior to the liens of mortgages or deeds of trust, C. S., 2713, is subject to the lien of the city and county for taxes for general revenue, and where the property is sold under the tax sale certificates of the city and county, the taxes due the city and county should first be paid before applying the proceeds of sale to the payment of street assessments levied against the property. *Saluda v. Polk County*, 180.

J Actions. (Right to maintain action for injury to easement over watershed see Trespass B b.)

b Charter Provisions as to Notice of Claim of Damages

1. Notice to a city of a claim against it for damages for injury to lands, given the city by the owner of the equity of redemption in the lands, will not inure to the benefit of the trustee in a deed of trust thereon in the absence of a showing that such notice was given on behalf of the trustee or was intended to include the trustee's claim, since knowledge of the claimant is as necessary as knowledge of the injury in affording the city an opportunity to discharge its liability without suit, and where no proper notice is given the city by the trustee within the time prescribed by the city charter, the trustee's action against the city on such claim is properly nonsuited. *Trust Co. v. Asheville*, 162.

K Fiscal Management and Power to Tax. (Constitutional requirements and restrictions in taxation see Taxation A.)

b Subjects of Municipal Taxation

1. The charter of a city giving it certain powers in respect to the levying of franchise taxes on trades and professions, etc., and C. S., 2677, will be construed together in determining the legislative grant of power to the municipality to levy taxes of this class, and construing the charter of the city of Concord *in pari materia* with

Municipal Corporations K b—*continued.*

C. S., 2677, *it is held* the city is given authority by the Legislature to levy a tax upon bakeries operating or delivering in the city, the Legislature being given the power to levy such taxes by Art. V, sec. 3, of the Constitution, and having the power to delegate this authority to counties, cities, and towns as administrative agencies of the State. *Hilton v. Harris*, 465.

2. The charter of the city in question authorized it to levy a tax on "every person who shall manufacture and sell any bread" in the city, and gave the city "all powers incident and usual to corporations of like character under the general laws of the State." C. S., 2677, gives municipalities power to tax trades, professions, etc., "carried on or enjoyed within the city": *Held*, construing the charter *in pari materia* with the statute, the city is given power to tax a firm whose bakery is outside the city, but which delivers bread and bakery products inside the city to customers procured by its salesman, and collects for its goods upon delivery, such trade being "carried on or enjoyed within the city." *Ibid.*

c Rights and Remedies of Taxpayer

1. A party not liable for a franchise tax imposed by municipal ordinance may not attack the constitutionality of the ordinance. *Linen Service Corp. v. Crisp*, 633.

Negligence. (In operation of autos see Automobiles C; in operation of trains see Railroads D, Street Railroads B; in preparation of food see Food; of municipal corporations, see Municipal Corporations E.)

A Acts and Omissions Constituting Negligence.

b Sudden Peril

1. The court's charge to the jury on the doctrine of sudden peril to the effect that a person confronted with a sudden and unexpected emergency is not required to exercise the same presence of mind and judgment as in ordinary circumstances, and that defendant would not be liable if the jury should find that he acted as an ordinary prudent man would have acted under the circumstances, *is held* without error, and defendant's objection on the ground that the court should have charged that defendant would not be liable if he acted as an ordinary prudent man might have acted under the circumstances, instead of as an ordinary prudent man would have acted, cannot be sustained, "would" and "might" having no substantial difference under the facts and circumstances of the case, and the charge containing no prejudicial error when construed as a whole. *Jernigan v. Jernigan*, 831.

c Condition and Use of Land and Buildings

1. Doctrine of attractive nuisance *held* not applicable to facts alleged in complaint in this action. *Boyd v. R. R.*, 390.

2. Evidence *held* sufficient for jury upon doctrine of attractive nuisance. *Brannon v. Sprinkle*, 398.

3. While a child who goes upon lands without legal right by permission, invitation, license, or relation to the premises or its owner is as much a trespasser as an adult, a child cannot be held to the same degree of care for its own safety, and where an owner permits a dangerous and exposed place, which is alluring and attractive to

Negligence A c—*continued.*

small children, to exist and remain unguarded on his lands, and has actual or constructive notice that small children habitually play at or near such place, so that their presence there and injury to them could be anticipated, the owner may be held liable for injury resulting from his failure to properly guard against such dangers. *Ibid.*

B Proximate Cause.

c Intervening Negligence

1. The intervening active negligence of a responsible third party will insulate the conduct of defendant, even though it amounts to inactive negligence, where the conduct of defendant would not have resulted in injury except for such intervening negligence. *Haney v. Lincolnton*, 282.

c Anticipation of Injury

1. Injury in this case *held* not foreseeable in exercise of due care, and defendant's motion of nonsuit was properly granted. *Osborne v. Coal Co.*, 545.

C Contributory Negligence.

a In General

1. Contributory negligence is plaintiff's negligent act concurring and cooperating with defendant's negligence in producing the injury, and negligence and contributory negligence do not differ essentially. *Jones v. Bagwell*, 378.

2. The burden of proving contributory negligence is on defendant, and is ordinarily a question for the jury. *Ibid.*

3. Court's refusal to charge that choice of dangerous way was contributory negligence where safe way was open *held* error. *Groome v. Statesville*, 538.

b Of Minors

1. It is error for the trial court to hold as a matter of law that a seven-year-old boy cannot be guilty of contributory negligence. *Morris v. Sprott*, 358.

2. While a child is not chargeable with the same degree of care as an adult, he is required to exercise such prudence for his own safety as one of his age may be expected to possess, which is usually a question for the jury. *Ibid.*

D Actions.

a Right of Action and Pleadings

1. A complaint alleging that plaintiff was forced to abandon a contract for the delivery of merchandise because of defendant's negligent damage to plaintiff's truck, and demanding the recovery of the loss of profits from such contract *is held* not demurrable for failure to state a cause of action. *Wilson v. Motor Lines*, 263.

2. Where it is not alleged in the complaint that the negligence complained of was the proximate cause of the injury in suit, the complaint is subject to demurrer for failure to state a cause of action. *White v. Charlotte*, 721.

Negligence D—*continued.*

c Sufficiency of Evidence and Nonsuit

1. When more than one legitimate inference can be drawn from the evidence the question of proximate cause is for the jury. *Lincoln v. R. R.*, 787.

2. The issue of contributory negligence is ordinarily for the jury, and it is only when the plaintiff proves himself out of court that a nonsuit for contributory negligence should be allowed, and even then, in proper instances and upon sufficient showing, plaintiff may be entitled to go to the jury on the doctrine of last clear chance. *Ibid.*

d Instructions

1. Where but one inference can be drawn from the evidence as to the proximate cause of the injury in suit, a new trial will not be awarded for the court's failure to charge the jury upon the question. *Brannon v. Sprinkle*, 398.

New Trial. (In proceedings under Compensation Act see Master and Servant F i 5; motions for, in Supreme Court, see Appeal and Error K e; setting aside verdict in discretionary power see Trial K.)

Nonsuit. (See Trial D a, Criminal Law I j.)

Nuisance.

A Conditions Constituting Nuisance.

b Use of Land and Buildings

1. Plaintiff brought suit alleging defendant maintained a private nuisance in the operation by the defendant of a cotton gin on property near plaintiff's dwelling. The trial court charged the jury, upon competent evidence, in effect that the ordinary, careful, and reasonable operation of a business which is not in itself a nuisance creates no liability to adjacent property owners, but that liability would attach only upon its negligent and unreasonable operation and maintenance: *Held*, the judgment upon the jury's verdict in plaintiff's favor must be affirmed on appeal. *King v. Ward*, 782.

Obstructing Justice. (Resisting arrest see Arrest B d.)

Parent and Child. (Criminal liability for failure to support illegitimate child see Bastards B c; parent's liability for child's negligent driving see Automobiles D c; right of adopted child to inherit see Descent and Distribution B g.)

Parties.

A Parties Plaintiff. (Demurrer for misjoinder of parties and causes see Pleadings D b; owners of easement and fee may maintain joint action for trespass see Trespass B b.)

a Person Who May or Must Sue

1. Question of whether plaintiff was real party in interest *held* not determinable by motion before introduction of evidence. *Hershey Corp. v. R. R.*, 122.

2. It is not necessary that the interest of parties plaintiff should be identical, but only that each have an interest in the subject-matter of the action and in obtaining the relief demanded. C. S., 455. *Wilson v. Motor Lines*, 263.

Parties A a—*continued.*

3. Bank holding note as agent for collection may not maintain action on the note. *Federal Reserve Bank v. Whitford*, 267.

Payment.

B Application of Payment.

b Where Debtor Does Not Direct Application

1. Where the debtor does not direct the application of the proceeds of sale of his property in the hands of the creditor, the creditor selling the property may in his own judgment apply the proceeds of sale to any one of the debtor's several accounts. *Weil v. Herring*, 6.

C Transactions Operating as Payment. (Conflicting evidence of payment of premiums see Insurance J b 1; payment out of particular fund see Bills and Notes C.)

b Payment to Agent for Collection

1. Payment by a debtor to the collecting agent of the creditor is payment to the creditor. *Assurance Society v. Lazarus*, 63.

2. Evidence *held* sufficient to raise issue of whether party to whom payment was made was collecting agent. *Ibid.*

c Payment of Claims of Third Persons Against Creditor

1. Where a builder contracts to erect a building as an agent of the owner, the builder to receive a certain "fee" for his services, and the owner to reimburse the builder monthly for sums expended for pay rolls and materials, the builder may not claim that a sum paid by him to discharge a materialman's lien for material used in the construction of the building should be allowed as a credit against the amount due the builder for services rendered under the contract, since under the contract the owner and not the builder was bound to pay for materials. The owner would have been entitled to such credit against the builder if the builder had been an independnt contractor in the erection of the building, since in such case the builder would have been liable for payment of materialmen. *Construction Co. v. Holding Corp.*, 1.

Physicians and Surgeons.

A Licensing and Revocation of Licenses.

d Grounds of Revocation of Licenses

1. The grounds for revocation of the license of a dentist under C. S., 6649, as amended by ch. 270, Public Laws of 1933, are solicitation of professional business and false advertising and the circulation of false claims or fraudulent or misleading statements, and the statute does not render truthful advertising and circulation of truthful statements by a dentist unlawful. *In re Owen*, 445.

2. Advertising in newspapers and the maintenance of a large sign on the building in which he maintains his office does not constitute solicitation of professional business by a dentist, advertising and solicitation not being synonymous terms, and where it is not alleged that such advertising was false or misleading, it is not sufficient ground for the revocation of the dentist's license. *Ibid.*

Pleadings. (In criminal prosecutions see Indictment; in particular actions see Particular Titles of Actions.)

A Complaint.

a Form and Joinder of Actions (See, also, hereunder D b.)

1. It is not necessary that the causes of action of several plaintiffs be identical, but only that the causes of action arise out of the same transaction or transactions connected with the same subject of action. C. S., 507 (1). *Wilson v. Motor Lines*, 263.

2. A cause of action in the nature of abuse of process for wrongful and unlawful dispossession in summary ejectment and for false imprisonment is improperly joined with actions for breach of contract to purchase the land at foreclosure for the mortgagor and to set aside the foreclosure for fraud. *Fertilizer Co. v. Bowen*, 308.

C Counterclaims and Set-offs.

b Subject-matter

1. Our statute relative to counterclaims, C. S., 521, goes beyond the common-law pleading and practice, and under its provisions a defendant in an action on contract may file a counterclaim arising on a contract unrelated to the cause of action sued on when the required mutuality exists, so that two independent disputes between the parties may be settled in one action. *Bourne v. Board of Financial Control*, 170.

D Demurrer.

a For Failure to State Cause of Action

1. A complaint will be liberally construed in favor of the pleader upon a demurrer for failure to state a cause of action. *Wilson v. Motor Lines*, 263.

2. A demurrer on the grounds that the complaint fails to state a cause of action must specify wherein the complaint is deficient, or the demurrer is defective and cannot be sustained. *Ibid.*

3. A demurrer for failure of a pleading to state a cause of action should be denied unless the pleading is wholly insufficient for any cause, since a demurrer goes to the heart of a pleading and challenges the right of the pleader to maintain his position in any view of the matter. *In re Trust Co.*, 802.

b Misjoinder or Defect of Parties and Causes

1. Plaintiff, a shipper of goods by rail, instituted this action against the carrier to recover damages sustained by the loss of the goods, alleging negligence of the carrier. Before a jury was impaneled, defendant carrier, upon depositions taken by plaintiff, moved to dismiss the action, for that the depositions showed that the loss had been paid to plaintiff by insurance companies, and that therefore plaintiff was not the real party in interest. C. S., 446. Over plaintiff's objection, the court granted the motion, stating that the same question would be presented by a motion of nonsuit after the evidence, C. S., 567, and that by this procedure the same result would be reached with less cost: *Held*, the court had no jurisdiction to anticipate what the evidence would be on the issue raised by the pleadings or whether plaintiff was the real party in interest, plaintiff not being bound to introduce the depositions in evidence, or if they were introduced, plaintiff having the right to controvert the

Pleadings D b—*continued.*

facts therein shown, thus raising an issue for the determination of the jury. C. S., 556. *Hershey Corp. v. R. R.*, 122.

2. Action was brought by the holder of a lien upon a truck to recover for loss of his security and by the owner of the truck to recover damage to the truck, and to recover loss of profits to the owner by reason of his forced abandonment of a contract to deliver merchandise, it being alleged that all items of damage were the result of damage to the truck by the negligent act of defendant's agent: *Held*, both plaintiffs had an interest in the subject-matter of the action, and in obtaining the relief demanded, C. S. 455, and their respective causes of actions arose out of the same transaction or transactions connected with the same subject of action, C. S., 507 (1), and defendant's demurrer for misjoinder of parties and causes of action was properly overruled. *Wilson v. Motor Lines*, 263.

d Time of Entering Demurrer

1. Jurisdiction over the subject-matter of an action cannot be waived or conferred by consent, and objection to such jurisdiction may be made at any time during the trial, or even in the Supreme Court upon appeal. *Dees v. Apple*, 763.

2. Demurrer for failure of complaint to state cause of action may be entered at any time, even in the Supreme Court on appeal. *White v. Charlotte*, 721.

e Effect of Demurrer

1. A demurrer admits the truth of facts properly alleged in the complaint, but not inferences or conclusions of law therein. *Richardson v. Richardson*, 314.

2. Upon demurrer a pleading will be construed liberally in favor of the pleader. *Wilson v. Motor Lines*, 263; *Fairbanks, Morse & Co. v. Murdock Co.*, 348.

E Amendment of Pleadings.

c Amendment During Trial

1. The trial court has the discretionary power to refuse to allow a motion by a party litigant upon the trial to amend his pleadings. *Winstead v. Mfg. Co.*, 110.

2. The court has discretionary power to allow an amendment of the complaint during the trial. N. C. Code, 547. *Gaffney v. Phelps*, 553.

F Bill of Particulars.

a Right Thereto

1. The granting of a bill of particulars pursuant to C. S., 534, lies in the sound discretion of the trial judge. *Savage v. Currin*, 222.

b Effect of Bill of Particulars

1. Where a motion for a bill of particulars is allowed the evidence offered at the trial must be confined to the specific items set forth in such bill. *Savage v. Currin*, 222.

Pleadings F b—*continued.*

2. Where plaintiff's failure to comply with an order of the court to file an itemized statement of the account sued on is due to the fact that his records had been destroyed by fire, plaintiff is not precluded by his failure to comply with the order from establishing the debt by competent evidence. C. S., 534. *Ibid.*

G Issues, Proof, and Variance.

a In General

1. The admission of evidence tending to show the extent of injuries sustained by plaintiff in an auto accident will not be held for error on the contention that such evidence tended to show special damage not alleged in the complaint. *Exum v. Poole*, 244.

I Motions.

a Motions to Strike Out Allegations in Pleadings

1. Plaintiff brought suit against defendant city to recover for personal injuries sustained by plaintiff by reason of the alleged negligence of the city in the construction, operation, and maintenance of a municipal swimming pool. Issue was joined in the pleadings as to whether the city, in the construction, operation, and maintenance of the pool, was engaged in a business enterprise for profit or in the performance of a governmental function. Plaintiff's allegation in his reply to the effect that the city carried accident and liability insurance on the pool and other recreational features of the municipal park was stricken out upon motion under C. S., 537, and plaintiff appealed: *Held*, the allegation as to the city carrying accident and liability insurance was an allegation of an evidential and probative fact and not of a material, essential, or ultimate fact, and there was no error in the trial court's ordering it stricken out. *Revis v. Asheville*, 237.

2. Whether evidence in support of an allegation would be competent upon the trial does not determine plaintiff's right to have it stricken out upon motion under C. S., 537, the test being whether the allegation is of a probative or of an ultimate fact. *Ibid.*

c Motions for Judgment on Pleadings

1. A motion by plaintiff for judgment on the pleadings is in effect a demurrer to the answer, and the motion should be overruled if the answer, liberally construed, alleges facts sufficient to constitute a defense. *Mitchell v. Strickland*, 141.

Pledges. (Payee need not exhaust collateral before suing endorsers see Bills and Notes H a 1.)

Principal and Agent.

A The Relation. (Agent for collection see Payment C b.)

a Creation and Existence

1. Plaintiff brought suit for breach of alleged contract under which plaintiff was constituted defendant's exclusive agent for the distribution of defendant's products in certain counties of the State. The president of plaintiff company testified that he had received a letter from defendant stating that K. was defendant's agent, and K. testified that he was defendant's sole agent in this State, with power to make the contract in question, and the president of plain-

Principal and Agent A a—*continued.*

tiff company testified that he made the alleged contract with K. for exclusive distribution of defendant's products in certain counties and in certain towns and cities of this State, and that he accepted the agency for distribution in reliance thereon, and gave up a like contract with another firm, and advertised defendant's products in the territory assigned. There was also evidence of ratification of the contract by defendant by shipment of products to plaintiff: *Held*, the evidence was sufficient to be submitted to the jury on the issue of the existence of the alleged contract between the parties, and an instruction to the jury that if they believed all the evidence they should answer the issue in the negative constitutes reversible error. *Grocery Co. v. Power Co.*, 340.

b Distinction Between Agency and Other Relationships

1. Contract of employment determines whether employee is agent or independent contractor, and where contract is not ambiguous the question is one of law for the court. *Construction Co. v. Holding Corp.*, 1.

C Rights and Liabilities as to Third Persons.

a In General

1. Employee *held* agent and not independent contractor in erection of building, and employer and not agent was liable to material furnishers. *Construction Co. v. Holding Corp.*, 1.

b Scope of Authority (Insurance agents see Insurance C.)

1. As between the principal and agent, the agent's authority is limited to the authority actually conferred, but as between the principal and a third party dealing with the agent, the principal is bound by acts of the agent within the agent's apparent authority where such third party, in the exercise of reasonable prudence, deals with the agent in reliance upon the agent's apparent authority and has no knowledge that the acts of the agent are in violation of a limitation placed upon the agent by the principal. *R. R. v. Lassiter & Co.*, 408.

2. Third party dealing with agent in reliance upon agent's apparent authority *held* not required, as matter of law, to make further inquiry as to agent's actual authority. *Ibid.*

e Undisclosed Principal

1. An undisclosed principal may maintain an action to enforce a contract made by his agent in his own name. *Cobb v. Dibrell Bros.*, 572.

f Ratification

1. Acceptance by payee of payments on note *held* not ratification of agent's void agreement not to sue thereon. *Bank v. Trotter*, 442.

Principal and Surety. (Guaranty see Guaranty.)

B Nature and Extent of Liability on Surety Bonds and Rights of Parties Thereunder. (Authority of surety's agent in writing indemnity bonds see Insurance C b.)

b Bonds for Public Construction

1. The bond of a contractor given in accordance with a contract for public construction and the contract itself will be construed to-

Principal and Surety B b—*continued.*

gether to determine the extent of the liability of the surety under the bond. *Pearson v. Simon*, 351.

2. The contract for municipal construction in this case provided that the contractor should file bond conditioned, among other things, for the payment of laborers, foremen, and superintendents employed in the performance of the contract. The bond filed in accordance therewith stated it was for the benefit of all persons furnishing material or performing labor in the performance of the contract: *Held*, although the surety, by strict construction of the bond itself, might not be liable for the salary of a superintendent employed in the performance of the contract, construing the bond with the contract it is manifest that it was the intention of the parties to the contract, as well as the parties to the bond, that the bond should also be liable for the salary of the superintendent, such provision being expressly incorporated in the contract. *Ibid.*

d Bonds of Private or Corporate Officers and Agents

1. Defendant surety executed a bond for a bank officer which provided that it should continue in force until terminated or canceled by written notice to the employer stating when such cancellation should be effective, which notice should be given at least thirty days prior to such cancellation. Three years thereafter the same surety executed a bond on the same officer to the same employer, which bond stated that it was issued as a continuation of the old bond, that the old bond and the renewal should be deemed one bond, and that the surety's aggregate liability should not exceed the greatest amount for which the surety was liable under one of the bonds: *Held*, the two papers, executed for a common intent, will be construed together, and in view of the language of the bonds and the construction placed thereon by the parties, together with the pertinent principles of law, the two bonds constituted but one contract of indemnity. *Hood, Comr., v. Davidson*, 329.

2. The bond of a bank official provided, among other conditions relating to notice, filing claim and suit, that no claim should be filed thereunder after fifteen months from the expiration or cancellation of the bond. Thereafter a renewal bond was executed by the surety, which renewal bond and original bond constituted but one contract, and there was no evidence that the old bond had been canceled in accordance with its terms. Loss covered by the contract was sustained during the period covered by the original bond, but was not discovered until more than fifteen months after the execution of the renewal bond: *Held*, the right to file claim and sue on the bond to recover such loss was not precluded by the limitation in the original bond, since the original bond had not expired and had not been canceled in accordance with its terms, and the provisions in the second bond requiring notice in thirty days after discovery of loss, itemized proof of loss within three months after such discovery, and suit within twelve months from such discovery, amended and modified like provisions in the first bond, and governed the rights of the parties. *Ibid.*

Principal and Surety B—*continued.*

c Construction of Surety Bonds in General

1. Ambiguous language in a surety bond will be construed most strongly against the surety who chose the words to suit itself. *Hood, Comr., v. Davidson*, 329.

2. The measure of the surety's liability is that of the principal, provided such liability does not exceed the penal sum of the bond, and where a bank gives a bond to an agency of the State to protect such agency's deposit, upon the insolvency of the bank with assets insufficient to pay depositors in full, the State agency may not hold the surety liable for interest from the time action on the bond is instituted, since in such circumstances the bank is not liable for interest, but the surety is liable for interest only from date of judgment against it on the bond, C. S., 2309, on the amount for which the bank is liable to the State agency as of that date. *S. v. Guaranty Co.*, 725.

f Cancellation of Bonds

1. Where, in an action on a surety bond, the surety sets up the defense that the bond had been canceled by mutual consent of the parties, the burden on the issue of cancellation is upon the surety. *S. v. Surety Co.*, 725.

2. Peremptory instruction in favor of obligee in surety bond on issue of cancellation by mutual consent *held* correct in this case. *Ibid.*

Process.

B Service of Process.

d On Foreign Corporations

1. A foreign corporation, having property and doing business in this State and not having a process agent here, may be served with summons by service on the Secretary of State, in accordance with C. S., 1137. *Smith v. Finance Co.*, 367.

Prostitution. (Maintaining house of assignation see Disorderly House.)

Public Officers. (Civil liability of municipal officers for misfeasance see Municipal Corporations D f.)

B Qualifications, Appointment, and Tenure.

c Constitutional Prohibition Against Person Holding More Than One Public Office at a Time

1. The Legislature of this State may abolish, subject to some specific constitutional restrictions, an existing public office, and therefore it has power to place additional duties upon the officers of a municipal corporation, and a statute (ch. 175, Private Laws of 1933) which places the affairs of a municipal corporation in the hands of a city council and a city manager and provides that in the event of a vacancy in the office of city manager, by sickness or otherwise, the council may delegate the duties of this office to one of its members, to be performed *ex officio* as mere auxiliary duties with such compensation as the council may determine, but shall receive no salary as a member of the council, *is held* not to contravene Art. XIV, sec. 7, of the State Constitution prohibiting the holding of more than one office of trust or profit by any one person, since the statute merely places additional duties upon the municipal

Public Officers B c—*continued.*

officer and provides that the incumbent of the office shall receive compensation for that one office. C. S., 2896, 2897. *Grimes v. Holmes*, 293.

Railroads.

D Operation.

b Accidents at Crossings

1. In action against driver of car and railroad, railroad company's demurrer is properly sustained upon complainant's allegation that driver drove upon track after seeing approaching train. *George v. R. R.*, 457.

2. In this action to recover for intestate's death resulting from a collision of intestate's car with a train at a railroad crossing, defendant railroad company moved for nonsuit on the ground of contributory negligence for that intestate did not stop the car before driving upon the tracks: *Held*, the motion should have been denied under the evidence, considered in the light most favorable to plaintiff. *Lincoln v. R. R.*, 787.

3. Guest in automobile *held* not entitled to recover of railroad for injuries sustained when driver drove car into train standing at crossing. *Blackwell v. Hawkins*, 874.

c Injuries to Persons On or Near Track

1. The evidence tended to show that defendant railroad maintained two tracks at the scene of the accident, that it was customary for trains going east to use one track and trains going west to use the other, and that plaintiff's intestate was walking west on one track towards a crossing and was struck and killed by a train going in the same direction which was running on that track contrary to custom, and which failed to give signals or warning. There was no evidence that plaintiff's intestate was not in full possession of his faculties: *Held*, defendant's motion as of nonsuit was properly allowed. *Way v. R. R.*, 799.

d Highway Underpasses

1. Driver's own evidence *held* to disclose contributory negligence on his part in running into center post supporting railroad overpass, and nonsuit was properly entered in his action against railroad. *Owens v. R. R.*, 856.

Rape.

C Prosecution and Punishment.

b Evidence

1. In a prosecution under 3 C. S., 4209, it is not error to exclude evidence of improper relations between the prosecuting witness and another several months after the alleged crime of the defendant. *S. v. Houpe*, 377.

c Sufficiency of Evidence and Nonsuit

1. Every element of the crime of having carnal knowledge of a female child under sixteen years of age, 3 C. S., 4209, being supported by the State's evidence in this case, defendant's motion as of nonsuit was properly denied. *S. v. Houpe*, 377.

Receivership. (See Corporations H, Banks and Banking H.)

Receiving Stolen Goods.

A Elements of the Crime.

b Intent

1. Felonious intent in receiving stolen goods with knowledge at the time that they had been stolen is necessary to a conviction under C. S., 4250, and a charge which fails to submit the question of such intent to the jury entitles defendant to a new trial. *S. v. Morrison*, 804.

B Prosecution and Punishment.

d Verdict

1. In a prosecution under C. S., 4250, it is not required that the jury should determine the value of the goods in its verdict. *S. v. Morrison*, 804.

Reformation of Instruments. (Limitation of actions for, see Limitation of Actions B b 3.)

A Grounds for Reformation.

a In General

1. Equity has the power to reform instruments for mutual mistake of the parties, or for mistake of one party induced by the fraud of the other, in order to make the instruments express the true intent of the parties. *Moore v. Casualty Co.*, 433.

Release. (See Torts C.)

Replevin. (See Claim and Delivery.)

Rule in Shelley's Case. (See Wills E c.)

Sales.

A Requisites and Validity.

a In General

1. The essential elements of a valid contract of sale are a completed and communicated offer and an acceptance in the exact terms thereof. *Cobb v. Dibrell Bros.*, 572.

H Remedies of Buyer.

c Actions and Counterclaims for Breach of Warranty

1. Under our rule that a pleading will be liberally construed in favor of the pleader upon demurrer, *it is held* that defendants' answer alleged as a counterclaim in plaintiff's action on notes given for the purchase price of machinery, that plaintiff represented not only that the machinery would furnish power sufficient to produce thirty tons of ice per day, but also that it would develop power sufficient to operate at all times, as desired by the defendant, the defendant's ice plant, the size and specifications of which plaintiff had full knowledge, and, there being evidence in support of the allegations of the counterclaim as thus interpreted, it was error for the court to dismiss the counterclaim upon plaintiff's motion. *Fairbanks, Morse & Co. v. Murdock Co.*, 348.

2. Plaintiff manufacturer brought suit on a promissory note made payable to its dealer, which note provided that transfer of the note should operate to transfer title to property described in a condi-

Sales H e—*continued.*

tional sales contract between the parties of even date. The conditional sales contract contained a warranty by the manufacturer that the machinery was well made, of good material, and capable under proper conditions of doing the work for which it was designed. Defendant offered evidence that the machinery failed to satisfy the warranties contained in the conditional sales contract: *Held*, the note and conditional sales contract, being component parts of a single transaction, are to be construed together, and the evidence of breach of warranty was properly submitted to the jury. *Case Co. v. Cox*, 759.

3. Where a warranty provides that in case of claim thereunder the machinery should be returned free of charge to the place of delivery, it is competent for the purchaser to testify that the machinery was delivered to him in his yard, and that upon discovery of its uselessness he disconnected it and pushed it to the edge of the yard. *Ibid.*

f Waiver of Breach of Warranty

1. The purchaser of a tractor suffered judgment to be taken against him for part of the purchase price and executed a mortgage on his lands for the balance thereof. Thereafter, to free his lands of the liens in order to obtain a Federal loan, he executed notes to the seller. In the seller's action on the notes, *it is held*, the purchaser waived his right to set up a counterclaim for breach of warranty in the sale of the tractor for defects in the tractor existing to his knowledge at the time he executed the notes, and upon his testimony to this effect the trial court was warranted in charging the jury to answer the issue against him, if they believed the evidence. *Holt v. Maddox*, 147.

2. Where, upon his own testimony, the purchaser waives his right to set up a breach of warranty, the trial court properly excludes evidence of damage resulting from such breach of warranty. *Ibid.*

Schools and School Districts. (Taxation for, see Taxation A a 1.)

G Teachers and Principals.

b Compensation

1. *Mandamus* will not lie to compel a county to issue its voucher to pay a debt due by a county school district to a principal in its elementary school, chs. 88 and 361, Public-Local Laws of 1933, applying only to county vouchers and county obligations. *John v. Allen*, 520.

Seduction.

B Prosecution and Punishment.

d Evidence

1. In a prosecution for seduction testimony of witnesses that prosecutrix told them she was engaged to defendant is competent in corroboration of prosecutrix' testimony that defendant promised to marry her. *S. v. Tuttle*, 649.

2. Testimony of prosecutrix as to each essential element of the offense *held* supported by other evidence in this case. *Ibid.*

Set-offs and Counterclaims. (Right to plead see Pleadings C.)

A Nature and Grounds of Remedy.

b Subject-matter

1. Past-due bonds of county *held* proper subject of set-off at their face value *against note* due county by holder of the county bonds, the necessary mutuality existing. *Bourne v. Board of Financial Control*, 170.

Slander. (See Libel and Slander.)

State Hospital. (See Asylums.)

Statute of Frauds. (See Frauds, Statute of.)

Statute of Limitations. (See Limitation of Actions.)

Statutes.

A Requisites and Validity.

a Constitutional Requirements and Restrictions in Enactment

1. The courts will not go behind the ratification of an act of the Legislature to inquire as to whether notice required by Art. II, sec. 12, of the Constitution of North Carolina and C. S., 6106, and will conclusively presume that this requirement binding upon the conscience of the Legislature has been observed. *Grimes v. Holmes*, 293.

2. The courts will conclusively presume from the ratification of a private act that the notice required by Art. II, sec. 12, has been given. *Matthews v. Blowing Rock*, 450.

3. *Semble:* Legislature has power by private act to enlarge town limits and provide that town maintain streets in annexed territory. *Ibid.*

b Inhibition on Legislature to Pass Special Acts

1. An act relating to establishment and collection of tax liens was thereafter repealed by a subsequent act of the same Legislature, but the repealing act exempted from its operation one designated county of the State: *Held*, the original act is void as a violation of Art. II, sec. 29, of the State Constitution, since it is applicable to only one county of the State. *Wake Forest v. Holding*, 808.

c Attack of Statutes and Construction in Respect to Constitutionality

1. An act of the General Assembly may be declared unconstitutional by the courts only in the exercise of judicial power properly invoked, and an order of the Superior Court remanding a case to the recorder's court *ex mero motu*, which cause had been transferred by the recorder's court to the Superior Court in accordance with statute (ch. 115, Public Laws of 1929), will be stricken out on appeal. *S. v. Rooks*, 275.

2. In the absence of allegation and proof that plaintiff's rights are injuriously affected by a statute, plaintiff may not maintain an action to have the statute declared unconstitutional. *Matthews v. Blowing Rock*, 450.

3. A statute will not be declared unconstitutional unless clearly so. *Albertson v. Albertson*, 547.

Statutes—*continued.*

C Repeal and Revival.

a By Enactment

1. An act relating to establishment and collection of tax liens was thereafter amended by exempting from its provisions certain "counties and each municipality therein." Thereafter the act was repealed, but the repealing act provided that nothing therein should effect one designated county of the State: *Held*, the proviso in the repealing act exempting from its operation the designated county does not apply to municipalities within such county, and as to municipalities in such county the original act is repealed in accordance with the legislative intent. *Wake Forest v. Holding*, 808.

Street Railways.

B Operation.

b Collisions With Other Vehicles

1. The evidence in this case tended to show that plaintiff was driving a truck along a busy and congested street in a city, that at the place of the accident there were cars parked at angles and double parked so that there was not sufficient space between the parked cars and the street car tracks for a vehicle to pass, that plaintiff was driving behind another truck, that the first truck turned off the street and plaintiff then saw for the first time defendant's street car approaching him from the opposite direction, that plaintiff was powerless to get out of the way of the approaching street car because of the automobiles parked along the curb of the street, and that the street car was being driven 25 to 28 miles an hour, and that without slackening its speed or giving warning by bell or gong, the street car crashed into the truck plaintiff was driving, resulting in injury to plaintiff: *Held*, the evidence was sufficient to be submitted to the jury on the issue of the negligence of defendant street car company. *Alexander v. Utilities Co.*, 438.

Submission of Controversy. (See Controversy Without Action.)

Supersedeas. (Stay bond in criminal actions see Criminal Law K g.)

Taxation.

A Validity of Levy or Bond Issue and Constitutional Requirements and Restrictions.

a Necessity for Vote

1. Plaintiffs, taxpayers of a county, filed suit to restrain the issuance of bonds by the county for necessary county expenses until the issuance of such bonds should be authorized by the qualified voters of the county, and plaintiffs alleged in their complaint that the levying of taxes for the proposed bond issue would work irreparable injury to plaintiffs and other taxpayers, and that a petition signed by more than twenty per cent of the qualified voters of the county had been filed with the defendant county commissioners, which petition asked that the proposed bond issue be submitted to the voters. N. C. Code, ch. 24, Art. VII-A. Defendants filed answer alleging that the petition did not contain names of the required fifteen per cent of the qualified voters of the county: *Held*, the temporary order restraining the issuance of the bonds was properly continued to the hearing on the merits of the case when the sufficiency of the petition could be determined. *Scruggs v. Rollins*, 335.

Taxation A—*continued.*

c Uniform Rule and Classification

1. The municipal ordinance in question levied a tax on bakeries operating or delivering bread and bakery products within the city. Plaintiff firm operated a bakery outside the city, but delivered bakery products inside the city to customers obtained by its salesman, and collected for its products upon delivery. Plaintiff contended that as to it the tax was discriminatory, and that while the city might have the power to tax the trade it did not have the power to tax an incident to such trade: *Held*, plaintiff's contentions cannot be sustained, the tax being equal upon all who operate or deliver bread and bakery products within the city, and tending to protect bakeries operating within the city and thus prevent monopolies, Art. I, sec. 31, and taxing without discrimination both residents and nonresidents carrying on the trade within the city. *Hilton v. Harris*, 465.

2. The municipal ordinance in this case levied a tax of $100.00 on bakeries operating or delivering bread and other bakery products within the city, and levied a tax of $50.00 on bakeries operating and delivering only cakes or pies or doughnuts within the city: *Held*, the classification was not unjust, arbitrary, or discriminatory, but operated equally upon all coming within the specified classifications, whether operating within the city or bringing themselves within the city for the purpose of carrying on the trades made the subjects of such classification. *Ibid.*

B Liability of Persons and Property.

c License Taxes

1. Plaintiff paid, under protest, a municipal franchise tax levied against persons renting or supplying clean linen who solicited business for services to be performed outside the city. The statement of facts agreed disclosed that plaintiff supplied clean linen to its customers within the city under contract giving it the option to supply new linen or to have the soiled linen of its customers laundered and returned, but the facts agreed did not show that plaintiff laundered the soiled linen of its customers: *Held*, plaintiff did not render any service to its customers outside the city, and was not liable for the tax. *Linen Service Corp. v. Crisp*, 633.

d Exemptions from Taxation

1. Plaintiff railroad company paid under protest that part of its income tax to the State that was based upon its compensation from the Federal Government for carrying United States mail, plaintiff claiming that its income from that source was exempt from taxation under the Revenue Act of 1931, ch. 427, sec. 317 (2) (e): *Held*, plaintiff was not entitled to the exemption claimed, since the provision of the act exempting from income tax that part of gross income received from salaries, wages, or other compensation from the Federal Government applies to individuals only and not to corporations, foreign or domestic. *R. R. v. Maxwell, Comr.*, 746.

2. The principle that the State cannot tax a public agency of the United States Government in the performance of a governmental function does not apply to exempt from State income tax compensation paid

Taxation B d—*continued.*

a railroad company by the Government for carrying United States mail, the railroad being a corporation engaged in business as a common carrier and not being an instrumentality of the Federal Government in carrying the mail, its relation to the Government in respect to the mail being that of an independent contractor, and the tax on its income derived from carrying the mail not interfering or burdening the Federal Government in the performance of its governmental function with respect to the mails. *Ibid.*

C Levy and Assessment.

c Levy and Assessment of Corporate Excess or Stock

1. Where, in a suit by a bank against a board of commissioners of a county to restrain the board from listing shares of stock of plaintiff bank for taxation, it appears that the method for determining the value of the bank stock for taxation, prescribed by sec. 600, ch. 204, Public Laws of 1933, has not been followed, judgment continuing the temporary restraining order to the hearing will be affirmed. *Bank v. Comrs. of Pasquotank*, 50.

D Lien and Priority.

c Priority

1. Construing ch. 389, Public Laws of 1931, with C. S., 7987, *it is held*, the liens for taxes due a city and the liens for taxes due the county against property situated in the city within the county are on a parity and are equal, and the proceeds of sale of the property in a tax foreclosure suit instituted by the city and county should be applied equally to the payment of city and county tax liens against the property, and the remainder, if any, should then be applied to the payment of a lien for street assessments levied by the city against the property. *Saluda v. Polk County*, 180.

E Refunding and Remedies for Wrongful Collection.

b Notice, Claim, and Demand

1. Where a taxpayer, claiming a refund for overpayment of income taxes to the State by reason of error in its return, fails to apply to the Commissioner of Revenue for a revision within three years from the filing of its return, its claim is barred, N. C. Code, 7880 (155), nor will the fact that the application for a revision is made within three years of redetermination of income tax by the Federal Government avail the taxpayer where he does not make a new return within thirty days after such redetermination by the Federal Government, N. C. Code, 7880 (152), since the limitation prescribed by N. C. Code, 7880 (155), is explicit and unequivocal, and since the procedure prescribed by N. C. Code, 7880 (155), that such new return be made within thirty days of redetermination by the Federal Government is exclusive and must be followed to entitle the taxpayer to the relief therein provided. *Maxwell, Comr., v. Hinsdale*, 37.

F Payment and Discharge.

c Set-offs

1. Past-due bonds of county may not be used as set-off against taxes due the county. *Bourne v. Board of Financial Control*, 170.

Taxation—*continued.*

H Tax Sales and Foreclosures. (Special acts relating to enforcement of tax liens see Statutes A b 1.)

b Parties and Process

1. It is necessary that the holders of liens under prior registered mortgages be made parties and be duly served with summons in proceedings to foreclose a tax-sale certificate in order for the purchaser at the sale to obtain title free from the lien of the encumbrances, the holders of such liens being entitled to notice and an opportunity to be heard under the fundamental law of the land as a part of due process, and the provisions of ch. 260, sec. 5, Public Laws of 1931, cannot affect this fundamental right of notice and hearing. *Beaufort County v. Mayo*, 211.

2. Where the trustee and holders of notes secured by registered deed of trust against the property are not made parties to the foreclosure of the tax-sale certificate, they may intervene and make motion in the cause to set aside the tax foreclosure for such irregularity. *Orange County v. Atkinson*, 593.

Trespass.

A Acts Constituting Trespass.

d Forcible Trespass

1. Evidence tending to show rudeness of language or a slight demonstration of force against which ordinary firmness is sufficient protection is insufficient to sustain an action for trespass against the person or possession of plaintiff. *Kaylor v. Sain*, 312.

B Actions.

b Jurisdiction, Parties, and Process

1. A town owning by condemnation an easement over lands for its watershed and the owner of the fee in such lands may maintain a joint action against a third party for damages for trespass and to restrain further acts of trespass, both plaintiffs having an interest in the lands. *Morganton v. Hudson*, 360.

c Pleadings and Evidence

1. A complaint alleging that defendant wrongfully and unlawfully entered upon lands over which the municipal plaintiff owned an easement for its watershed and in which the other plaintiff owned the fee, and that the defendant cut and removed from the lands valuable timber and interfered with the enjoyment of the easement, and threatened the health of the citizens of the town, and praying damage for the trespasses committed and an order restraining further acts of trespass, *is held* not demurrable on the ground that it fails to state a cause of action, it not being alleged that defendant owned or lived upon land embraced in the municipal watershed. C. S., 7116, 7123. *Morganton v. Hudson*, 360.

Torts. (Particular torts see Automobiles, Negligence, Railroads D, and Particular Titles of Torts.)

C Release from Liability.

c Scope and Effect of Release

1. Plaintiff, having asserted a claim against defendant, signed a release for the claim asserted, and for "all claims of every nature, kind,

Torts C e—*continued.*

and description, which I have . . . up to and including the date of this release." Thereafter plaintiff instituted this action upon a claim existing, to her knowledge, at the time of the execution of the release, but based upon an unrelated cause of action: *Held*, in the absence of fraud or mistake, plaintiff is bound by the terms of the release, which are sufficiently broad to include the cause of action sued on, the plaintiff having signed the release after full consideration of its contents at a time when she knew all the facts, and the release being supported by consideration. *Merrimon v. Tel. Co.*, 101.

Trial. (Trial of criminal prosecutions see Criminal Law I; of particular actions see Titles of Particular Actions.)

B Reception of Evidence.

b Order of Proof

1. The trial court has discretionary power, not reviewable on appeal, to allow plaintiff, prior to the introduction of evidence by defendant, to offer additional evidence after plaintiff has rested and after denial of defendant's motion as of nonsuit. *Pearson v. Simon*, 351.

f Admission of Evidence for Restricted Purpose

1. Where part but not all of a letter offered in evidence is competent, it is the duty of the objecting party to point out the objection at the time and request court to properly restrict its admission. *Cobb v. Dibrell Bros.*, 572.

D Taking Case or Question from Jury.

a Nonsuit (In criminal actions see Criminal Law I j; in particular actions see Negligence D c and Particular Titles of Actions.)

1. A nonsuit and dismissal under the Hinsdale Act has the same legal effect as a directed verdict, and where, in an action on a note, there is no evidence in contradiction of defendant's evidence constituting a complete defense to the action, a judgment as of nonsuit will not be held for error, since the evidence would support a directed verdict in defendant's favor, the court not weighing the evidence, but taking it to be true. *Hood, Comr., v. Bayless*, 82.

2. Upon a motion as of nonsuit all the evidence which makes for plaintiff's claim or tends to support his cause of action is to be considered in its most favorable light for plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567. *Garren v. Youngblood*, 86; *Bank v. Bank*, 216; *Jones v. Bagwell*, 378; *McGee v. Frohman*, 475; *Oliver v. Hecht*, 481; *James v. Coach Co.*, 742; *Lincoln v. R. R.*, 787; *Gasque v. Asheville*, 821.

3. Where there is evidence in support of plaintiff's contention as to the amount of indebtedness sued on, defendant's motion as of nonsuit is properly denied, although there is evidence in contradiction. *Pearson v. Simon*, 351.

4. A mere scintilla of evidence, which raises only a suspicion, conjecture, guess, surmise, or speculation, is insufficient to resist a motion as of nonsuit. *Jones v. Bagwell*, 378.

5. Only the evidence favorable to plaintiff need be considered in passing upon the sufficiency of the evidence to be submitted to the jury upon defendants' motion as of nonsuit. *Brannon v. Sprinkle*, 398; *Davidson v. Telegraph Co.*, 790.

Trial D a—*continued.*

6. Where defendant in an action on contract sets up a counterclaim arising out of the same contract declared upon by plaintiff, defendant may not withdraw his counterclaim over plaintiff's objection in order to enter a motion as of nonsuit on the plaintiff's cause of action. *McGee v. Frohman*, 475.

7. Where defendant does not move for nonsuit in the lower court he waives his right to have the insufficiency of the evidence to be submitted to the jury considered on appeal. C. S., 567. *Harrison v. Ins. Co.*, 487.

8. A showing sufficient to support plaintiff's claim carries the case to the jury over defendant's motion as of nonsuit, and plaintiff's case may be established by circumstantial evidence, and mere discrepancies and contradictions, even in plaintiff's evidence, are not sufficient to warrant the withdrawal of the case from the jury, since the weight and credibility of the testimony is for the jury, but where the evidence is so slight as not reasonably to warrant the inference of the fact in issue the motion should be allowed. *Lincoln v. R. R.*, 787.

9. Where the evidence is sufficient to support a verdict in plaintiff's favor, defendant's motion as of nonsuit is properly overruled. C. S., 567. *Davidson v. Telegraph Co.*, 790.

b Directing Verdict

1. Where there is no real conflict in the evidence as it relates to certain of the issues, the court may instruct the jury to answer such issues as directed if they believe the evidence. *Moore v. Lambeth*, 23.

2. Evidence on issue of payment of premium *held* conflicting, and directed verdict in insurer's favor was error. *Ferrell v. Ins. Co.*, 51.

d Questions of Law and of Fact

1. The competency of evidence and witnesses is for the court, while their credibility is for the jury. *Lincoln v. R. R.*, 787.

E Instructions.

c Form, Requisites, and Sufficiency of Instructions

1. Where the charge of the court fully sets forth all substantive, material, and essential questions of law arising upon the facts necessary to a determination of the controversy, the charge will not be held for error upon appellant's exception to its sufficiency, it being incumbent on appellant to have requested special instructions if he desired a fuller and more specific instruction on any aspect of the case. *Garren v. Youngblood*, 86.

2. A party desiring the judge to present a particular theory of the case, or a particular phase of the law applicable to his evidence, should offer a prayer for special instructions. *Chestnut v. Sutton*, 256.

3. The charge of the trial court will be construed as a whole, and if, upon such construction, it fully charges the law applicable to the facts and does not impinge C. S., 564, it will not be held for error on appeal. *Harrison v. Ins. Co.*, 487.

4. Where contention of plaintiff is not supported by allegations in complaint, court's refusal to submit such contention is not error. *Watson v. Durham*, 624.

Trial E—*continued.*

e Requests for Instructions

1. The refusal of the court to give instructions aptly requested which present a material aspect of the case supported by the evidence and pleadings is reversible error. *Groome v. Statesville*, 538.

2. A request for special instructions will not be held fatally defective because prefaced upon the finding of the jury from all the evidence instead of by its greater weight, since the instruction as requested would have been substantially correct when taken in connection with a correct instruction from the court on the burden of proof on the issue. *Ibid.*

3. The refusal of the court to give requested instructions will not be held for error where such requested instructions are not supported by the evidence, or where the requested instructions are substantially given in the charge. *Gasque v. Asheville*, 821.

f Objections and Exceptions to Charge

1. An objection to the statement of the contentions of a party by the trial court must be made in time to afford the court opportunity to make correction in order to be available on appeal. *Hood, Comr., v. Cobb*, 128.

2. A slight oversight of the court in calculating the length of time for which plaintiff was entitled to compensation for services rendered will not be held for prejudicial or reversible error when the oversight was not called to the court's attention so that it could be corrected, and it appears from the verdict of the jury that no harm resulted therefrom. *Keiger v. Sprinkle*, 733.

g Construction of Instructions

1. A charge to the jury will be construed contextually as a whole, and detached portions thereof will not be held for error when the charge considered as a whole contains no reversible error. *Marriner v. Mizzelle*, 34.

F Issues.

a Form and Sufficiency of Issues

1. Where the court submits the first two issues tendered by a party, which issues arise upon the pleadings and are determinative of the controversy, the court's refusal to submit other issues tendered will not be held for error. *Harrison v. Ins. Co.*, 487.

2. Where questions sought to be presented by issues tendered are submitted to the jury by the court under one issue, and the issues submitted encompass all material phases of the evidence, the refusal to submit the issues tendered will not be held for error, the form of the issues being largely in the court's discretion and not being the proper basis for exception unless prejudicial or affecting substantial rights. *Gasque v. Asheville*, 821.

G Verdict.

b Form and Sufficiency of Answers to Issues

1. The verdict of the jury will be construed in the light of the pleadings and charge of the court. *Bundy v. Sutton*, 422.

Trial G—*continued.*

c Setting Aside Verdict

1. The parties have a substantial right in the verdict of the jury, and while the trial court has the power to set aside the verdict in his discretion or as a matter of law to prevent miscarriage of justice, or to allow the jury to correct their verdict with his approval, or to dismiss the action irrespective of the verdict where the plaintiff is not entitled to recover on any aspect of the case, the trial court does not have the power to reverse or amend the verdict of the jury by "setting it aside" as to some of the defendants as being against the weight of the evidence while rendering judgment against the other defendants upon the verdict. *Bundy v. Sutton*, 422.

2. A motion to set aside the verdict as being contrary to the evidence is addressed to the sound discretion of the trial court, and his refusal of the motion is not ordinarily reviewable on appeal. C. S., 591. *Harrison v. Ins. Co.*, 487.

H Trial by Court by Agreement.

b Findings of Fact (Review of findings see Appeal and Error J c.)

1. Where the parties waive a jury trial and agree that the court should find the facts, and the court fails to find the material facts, the case may be remanded for sufficient and definite findings of fact upon appeal from the judgment rendered therein. *Shore v. Bank*, 798.

I Waiver and Correction of Irregularities and Errors.

a Errors Cured by Verdict

1. In this action to recover for services rendered deceased, an exception that recovery should have been based upon the claim filed with the administrators is not sustained in view of the verdict of the jury, the claim filed with the administrators being in evidence. *Keiger v. Sprinkle*, 733.

Trusts.

A Creation and Validity.

b Resulting Trusts

1. A resulting trust arises in favor of the party paying the purchase money for property, although legal title is conveyed to a third person, unless a contrary intention or contrary presumption of law prevents. *Furniture Co. v. Cole*, 840.

2. Evidence that the purchaser of property stated at the time of the purchase that he was buying the property for plaintiff, with evidence that thereafter the property was treated as belonging to plaintiff, and that plaintiff furnished the money for the purchase price of the property, *is held* sufficient to sustain the jury's finding that a parol trust was created in plaintiff's favor, although there was abundant evidence from which the jury could have found *contra*. *Ibid.*

D Revocation or Termination of Trusts.

a By Trustor

1. In this action to revoke gratuitous or voluntary trust upon allegations that it proved ill-advised, improvident, and impossible of fulfillment, decree terminating the trust is upheld. *Durner v. Hood, Comr.*, 856.

Trusts D—*continued.*

b By Beneficiaries

1. The owner of stock in a corporation transferred certain numbers of shares to each of his children. After his death the children entered into a written agreement which provided that, in order to keep the stock intact and in the immediate family in accordance with their father's wish, a trustee should hold the stock intact, and that none of it should be sold or hypothecated without the written consent of all. Possession of the stock was given the trustee, but the stock remained in the names of the individual owners upon the books of the corporation, and each of them received the dividends from and voted his respective stock: *Held*, as no duties were imposed upon the trustee in respect to the stock except to hold same, and as the individuals were the sole beneficiaries of their respective shares without limitation over, the trust was a simple, passive, or dry trust, and the trustee was bound to deliver possession and legal title to a beneficiary demanding his respective share, and to the administrator *c. t. a.* of another beneficiary demanding his testatrix' share in order to carry out the terms of her will bequeathing her share to her husband. *Bank v. Sternberger*, 811.

Usury. (Actions for, barred, see Limitation of Actions A b.)

A Usurious Contracts and Transactions.

a In General

1. In this action against the purchaser of notes to recover the amount of interest paid thereon on the ground that the notes were tainted with usury, C. S., 2306, it appeared from the facts agreed that the borrower executed notes for the principal sum borrowed and notes for the interest on the principal notes from the time of their execution until their respective maturities, and that the lender paid the borrower the principal sum borrowed less an amount deducted and retained by the lender: *Held*, in the absence of an agreed fact or a finding by the court that the sum deducted was reserved by the lender as interest, the transaction did not constitute usury, and therefore the notes were not tainted with usury in the hands of the purchaser. *Ray v. Ins. Co.*, 654.

B Effect of Usury and Penalties.

b Where Claim for Usury Is Coupled with Demand for Equitable Relief

1. Where foreclosure is enjoined for an accounting for usury, order that land be sold for debt as ascertained with legal interest is proper. *Thomason v. Swenson*, 519.

Venue.

A Nature and Subject of Action.

a Interest in Realty

1. The form of action alleged in the complaint determines whether the action is local or transitory, and upon defendant's motion for removal under C. S., 463 (1), the allegations in defendant's petition that the question of title would be put in issue by defendant's answer denying that portion of the complaint alleging title in plaintiff, must be disregarded in passing upon defendant's motion. *Blevens v. Lumber Co.*, 144.

Venue A a—*continued.*

2. A complaint alleging that defendant wrongfully cut and removed timber growing upon lands in which plaintiff had an interest, and which seeks to recover the reasonable worth of plaintiff's interest in the timber so cut, states an action of trover and conversion or of trespass *de bonis asportatis* which is transitory, and defendant's motion for removal from the county of plaintiff's residence where the action was instituted to the county in which the land is situate, upon allegations that the plaintiff's title would be put in issue, was properly refused. *Ibid.*

Veterans. (War Risk Insurance see Insurance N a.)

War Risk Insurance. (See Insurance N a.)

Wills.

B Contracts to Devise. (Claim against administrator upon implied contract see Executors and Administrators D b.)

a In General (Limitation of actions on, see Limitation of Actions B a 2.)

1. When a person performs services under an oral agreement, express or implied, that compensation therefor should be provided in the will of the person receiving the services, and no such testamentary provision is made, a cause of action accrues against the estate for breach of the contract or for the value of the services rendered. *Lipe v. Trust Co.*, 794.

c Measure of Damages

1. Plaintiff alleged that he performed services in reliance upon testatrix' oral agreement to will him all of her property. Testatrix' estate consisted largely of real estate: *Held*, upon the facts disclosed by the record, plaintiff's recovery was properly limited to the reasonable value of the services rendered. *Lipe v. Trust Co.*, 794.

C Requisites and Validity.

d Holograph Wills

1. A paper-writing in the handwriting of testatrix, duly proven by three credible witnesses, signed by testatrix and found among her valuable papers after her death, which paper-writing contains dispositive words sufficient to dispose of the estate, is valid as a holograph will, and it is not necessary that the writing be dated or show the place of execution, N. C. Code, 4131, 4144 (2), and the fact that the paper-writing contains printed words not essential to the meaning of the written words does not render such paper-writing invalid as a holograph will, and the charge of the court on this aspect of the case *is held* without error. In this case the will was written on a printed form for nuncupative wills and there was evidence that the written words disposed of the estate in accordance with the declared intention of testatrix. *In re Will of Parsons*, 584.

D Probate and Caveat.

m Costs and Attorneys' Fees

1. Where an executor named in a will advises the chief beneficiaries named therein that a caveat had been filed and that his interest was identical with the caveators', but that the beneficiaries could use his name as executor in joining the propounders in the caveat proceedings, and it appears that the will would not be proven in solemn

Wills D m—*continued.*

form unless the beneficiaries propounded same: *Held*, upon the determination of the proceedings in favor of the propounders, the trial court has the discretionary power to allow reasonable fees out of the estate to the attorneys employed by the propounders, the employment of the attorneys being necessary to the successful prosecution of the proceedings. *Wells v. Odum*, 226.

E Construction and Operation. (Family agreements see Executors and Administrators F e.)

a General Rules of Construction

1. Where a competent person undertakes to make a will, the law presumes he does not intend to die intestate as to any part of his property. *Case v. Biberstein*, 514.

2. The intention of the testator as gathered from the entire instrument is controlling, and will prevail over particular expressions which, in their technical sense, are apparently inconsistent therewith. *Haywood v. Rigsbee*, 684.

b Estates and Interests Created

1. The pertinent provisions of the will in this case were "I will and bequeath" certain sums of money and a chattel to named beneficiaries, "to my aunt, C., use of the entire balance during her lifetime and at her death this balance to J.": *Held*, the dispositive words "will and bequeath" are sufficient to include both realty and personalty, and the word "balance" referred to both, and under the presumption against partial intestacy, C. and J. took a life estate and remainder in such realty and their joint deed conveyed the fee-simple title thereto. *Case v. Biberstein*, 514.

c Rule in Shelley's Case

1. A devise to W. "for the term of her natural life," remainder "to her legitimate children" should she die leaving lawful issue of her body her surviving, otherwise to her brother, T., with an ulterior limitation that in the event either W. or T. should die without lawful issue, then to the survivor for life, remainder to his or her heirs in fee simple forever, but if both should die leaving no lawful "issue of his or her body, him or her surviving," then to the testator's "nearest blood kindred as regulated by the laws of descent," *is held* to create less than an indefeasible fee in W., the rule in *Shelley's case* not applying, since the expressions in the will indicate that the word "heirs" in the ulterior clause was intended to be taken in the sense of issue or children, and not in its technical sense. *Brown v. Mitchell*, 132.

2. Where the limitation over to the heirs of the first taker is restricted to some but not all of his heirs general, it is a circumstance indicating the testator's intention, and with other indicia, may be sufficient to show that the word "heirs" was not used in its technical sense. *Ibid.*

d Vested and Contingent Interests

1. A devise to testator's wife for life, the property then to be sold and divided equally among testator's children by his first wife, "and if none alive, to my first wife's grandchildren," *is held* to vest the

Wills E d—*continued.*

remainder after the life estate in the sole survivor of testator's children by his first wife as of the date of the death of his widow, unaffected by the direction to sell the land and divide the proceeds. *Fuller v. Rhododendron Corp.*, 660.

f Designation of Devisees and Legatees and Thier Respective Shares

1. Where a will bequeaths property to be equally divided among testator's "children and their issue," but it is apparent from the context of the will that testator intended a stirpital distribution of the funds, the language of the bequest will not be given a technical construction which would defeat the intent of the testator as gathered from the whole instrument, and the property will be distributed *per stirpes* among the lineal descendants, thereby precluding children taking with their living parents. *Haywood v. Rigsbee*, 684.

2. Under provisions of will in this case funds held in trust should be distributed *per stirpes* upon termination of trust. *Ibid.*

F Rights and Liabilities of Devisees and Legatees.

h Lapsed Legacies and Devises

1. Under C. S., 4166, devise lapses upon prior death of devisee unless devisee would have been heir at law and bequest lapses unless legatee would have been distributee of testator. *Farnell v. Dongan*, 611.

2. Judgment that legacy did not lapse by reason of fact that legatee predeceased testator is affirmed, C. S., 4166, it appearing that legatee would have been distributee of testator had she survived him. *Beach v. Gladstone*, 876.

Witnesses. (Testimony of transactions with decedent see Evidence D b; impeaching or corroborating witness see Evidence D f, Criminal Law G r.)

A Competency of Witnesses.

a Age

1. The competency of a 7-year-old child to testify as a witness is a matter resting in the sound discretion of the trial court. *S. v. Satterfield*, 118.

Workmen's Compensation Act. (See Master and Servant F.)

Writ of Assistance. (See Assistance, Writ of.)