NORTH CAROLINA REPORTS

VOLUME 208

This book is an exact photo-reproduction of the original Volume 208 of North Carolina Reports that was published in 1936.

Published by
THE STATE OF NORTH CAROLINA
RALEIGH
1973

Reprinted by
COMMERCIAL PRINTING COMPANY
RALEIGH, NORTH CAROLINA

NORTH CAROLINA REPORTS
VOL. 208

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1935
FALL TERM, 1935

REPORTED BY
ROBERT C. STRONG

RALEIGH
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1936

CITATION OF REPORTS

Rule 46 of the Supreme Court is as follows:

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2 " "	"	24	"
3 " "	"	25	"
4 " "	"	26	"
5 " "	"	27	"
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7 " "	"	29	"
8 " "	"	30	"
9 Iredell Law	as	31	N. C.
10 " "	"	32	"
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The opinions published in the first six volumes of the reports were written by the "Court of Conference" and the Supreme Court prior to 1819.

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

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1934.

CHIEF JUSTICE:

W. P. STACY.

ASSOCIATE JUSTICES:

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

ATTORNEY-GENERAL:

A. A. F. SEAWELL.

ASSISTANT ATTORNEYS-GENERAL:

T. W. BRUTON.
JOHN W. AIKEN.†

SUPREME COURT REPORTER:

ROBERT C. STRONG.

CLERK OF THE SUPREME COURT:

EDWARD MURRAY.

LIBRARIAN:

JOHN A. LIVINGSTONE.

---

*Deceased. Succeeded by William A. Devin, November 1, 1935.
†Resigned February 1, 1936, succeeded by Harry McMullan.

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.
Clawson L. Williams	Fourth	Sanford.
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.
F. Donald Phillips	Thirteenth	Monroe.
W. F. Harding	Fourteenth	Charlotte.
John M. Oglesby	Fifteenth	Concord.
Wilson Warlick	Sixteenth	Newton.
J. A. Rousseau	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.

*Appointed Associate Justice of the Supreme Court. Succeeded as Judge of the Superior Court by Marshall T. Spears, November 7, 1935.

SOLICITORS

EASTERN DIVISION

Name	*District*	*Address*
Herbert R. Leary	First	Edenton.
Donnell Gilliam	Second	Tarboro.
W. H. S. Burgwin	Third	Woodland.
Claude C. Canady	Fourth	Benson.
D. M. Clark	Fifth	Greenville.
James A. Powers	Sixth	Kinston.
William Y. Bickett	Seventh	Raleigh.
John J. Burney	Eighth	Wilmington.
T. A. McNeill	Ninth	Lumberton.
Leo Carr	Tenth	Burlington.

WESTERN DIVISION

Allen H. Gwyn	Eleventh	Reidsville.
H. L. Koontz	Twelfth	Greensboro.
Rowland S. Pruette	Thirteenth	Wadesboro.
John G. Carpenter	Fourteenth	Gastonia.
Charles L. Coggin	Fifteenth	Salisbury.
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Jno. R. Jones	Seventeenth	N. Wilkesboro.
C. O. Ridings	Eighteenth	Forest City.
Z. V. Nettles	Nineteenth	Asheville.
John M. Queen	Twentieth	Waynesville.

LICENSED ATTORNEYS

FALL TERM, 1935.

List of applicants granted law license by the North Carolina Board of Law Examiners at Raleigh, N. C., 31 August, 1935:

ANDERSON, FRANCIS IRVING....Leaksville.
BAREFOOT, JOHN ROSCOE....Benson.
BOOTH, WILLIAM ROBERT....Pollocksville.
BRAWLEY, ROBERT VANCE....Salisbury.
CARLTON, JOSEPH LEE....Raleigh.
CARTER, CLYDE CASS....Wilmington.
COLTON, JOHN MILTON, II....Goldsboro.
COX, HENRY CLAY, JR....Mars Hill.
COX, JOE MONTE....Laurinburg.
DANIEL, JUSTUS GILBERT, JR....Raleigh.
DANIELS, DOROTHY....Wellesley Hills, Mass.
DAUGHTRIDGE, JOHN AYCOCK....Battleboro.
DAY, MABEL GERTRUDE....Raleigh.
FERGUSON, JAMES HARDIE....Wake Forest.
FOUNTAIN, GEORGE MARION, JR....Tarboro.
GAVIN, VANCE BEASLEY....Kenansville.
GILREATH, LEMUEL REID....Charlotte.
GREER, LEE JACKSON....Wilmington.
GURLEY, MILFORD KENNETH....Pine Level.
HARPER, FINLEY GWYN, JR....Hickory.
HAYES, CHARLES CLYDE....Wilkesboro.
HAYES, JOSEPH ALLIE....Purlear.
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HENRY, THOMAS ALLISON....New Bern.
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HOWELL, JULIUS AMMONS....Thomasville.
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JENKINS, JOHN ROBERT, JR....Parmele.
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MEDLIN, GILBERT MCEACHERN....Maxton.
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MOORE, EDWARD LAWSON....Durham.
MULLEN, JAMES....Durham.
PARKER, FRANCIS MARION....Asheville.
PEMBERTON, CLARENCE LILLY....Black Mountain.
REDMOND, LEO ANTHONY....Asheville.

ROSE, CHARLES G., JR. .... Fayetteville.
SHOCH, ARCH KERPER, JR. .... High Point.
SHATLEY, CODY WILBURN .... N. Wilkesboro.
SHREVE, CLYDE ALLISON .... Summerfield.
SMITH, CLIFFORD EMMETT .... Washington.
STEED, WILLIAM HOWARD .... Thomasville.
TAYLOR, HERBERT HAMILTON, JR. .... Tarboro.
VICK, GEORGE DAVIS, JR. .... Selma.
WALL, JOHN ROBERTSON .... Asheville.
WARD, DONALD BLOW .... Smithfield.
WESSELL, JOHN CHARLES, JR. .... Wilmington.
WEST, ROBERT LEE .... Warsaw.
WHITAKER, DAVID CORBETT .... Cliffside.
ZAGLIN, JOSEPH GOLDBERG .... Fayetteville.

COMITY LICENSEES.

LANE, MELVIN RUDYARD .... Hendersonville.
YOUNG, LEE L. .... Greensboro.

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 31, 1935.

Witness my hand and seal, this the 9th day of September, 1935.

(SEAL) H. M. LONDON,
Secretary.

SUPERIOR COURTS, FALL 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

Fall Term, 1935—Judge Harris.

Beaufort—Sept. 16* (A); Sept. 30† (2); Nov. 4* (A); Dec. 2†.
Camden—Sept. 23.
Chowan—Sept. 9; Dec. 16.
Currituck—Sept. 2.
Dare—Oct. 21.
Gates—Nov. 18.
Hyde—Aug. 24† (2); Oct. 14
Pasquotank — Sept. 16†; Oct. 7† (A) (2); Nov. 4†; Nov. 11*.
Perquimans—Oct. 28.
Tyrrell—Sept. 30 (A).

SECOND JUDICIAL DISTRICT

Fall Term, 1935—Judge Cranmer.

Edgecombe—Sept. 9; Oct. 14†; Nov. 11† (2).
Martin—Sept. 16 (2); Nov. 18† (A) (2); Dec. 9.
Nash—Aug. 26; Sept. 16† (A) (2); Oct. 7†; Nov. 25*; Dec. 2†.
Washington—July 8; Oct. 21†.
Wilson—Sept. 2; Sept. 30†; Oct. 28† (2); Dec. 16.

THIRD JUDICIAL DISTRICT

Fall Term, 1935—Judge Sinclair.

Bertie—Aug. 26; Nov 11 (2).
Halifax—Aug. 12 (2); Sept. 30† (A) (2); Oct. 21* (A); Nov. 25 (2).
Hertford—July 29; Oct. 14*; Oct. 21†.
Northampton—Aug. 5; Oct. 28 (2).
Vance—Sept. 30*; Oct. 7†.
Warren—Sept. 16 (2).

FOURTH JUDICIAL DISTRICT

Fall Term, 1935—Judge Devin.

Chatham—July 29† (2); Oct. 21.
Harnett—Sept. 2*; Sept. 16†; Sept. 30† (A) (2); Nov. 11* (2).
Johnston—Aug. 12*; Sept. 23† (2); Oct. 14 (A); Nov. 4† (A) (2); Dec. 9 (2).
Lee—July 15 (2); Oct. 28 (2).
Wayne—Aug. 19; Aug. 26†; Oct. 7† (2); Nov. 25 (2).

FIFTH JUDICIAL DISTRICT

Fall Term, 1935—Judge Small.

Carteret—Oct. 4; Dec. 2†.
Craven—Sept. 2*; Sept. 30† (2); Nov. 18† (2).
Greene—Dec. 2 (A); Dec. 9 (2).
Jones—Sept. 16.
Pamlico—Nov. 4 (2).
Pitt—Aug. 19†; Aug. 26; Sept. 9†; Sept. 23†; Oct. 21†; Oct. 28; Nov. 18† (A).

SIXTH JUDICIAL DISTRICT

Fall Term, 1935—Judge Barnhill.

Duplin—July 22*; Aug. 26† (2); Sept. 30*; Dec. 2† (2).
Lenoir—Aug. 19; Sept. 23†; Oct. 14; Nov. 4† (2); Dec. 9 (A).
Onslow—July 15‡; Oct. 7; Nov. 18† (2).
Sampson—Aug. 5 (2); Sept. 9† (2); Oct. 21† (2).

SEVENTH JUDICIAL DISTRICT

Fall Term, 1935—Judge Parker.

Franklin—Aug. 26† (2); Oct. 14*; Nov. 11† (2).
Wake—July 8*; Sept. 9*; Sept. 16 (2); Sept. 30†; Oct. 7*; Oct. 21† (2); Nov. 4*; Nov. 25† (2); Dec. 9* (2).

EIGHTH JUDICIAL DISTRICT

Fall Term, 1935—Judge Williams.

Brunswick—Sept. 2†; Sept. 30.
Columbus—Aug. 19 (2); Nov. 18† (2).
New Hanover—July 22*; Sept. 9*; Sept. 16†; Oct. 14† (2); Nov. 11*; Dec. 2† (2).
Pender—July 15; Oct. 28 (2).

NINTH JUDICIAL DISTRICT

Fall Term, 1935—Judge Frizzelle.

Bladen—Aug. 5; Sept. 16.
Cumberland—Aug. 26*; Sept. 23† (2); Oct. 21† (2); Nov. 18*.
Hoke—Aug. 19; Nov. 11.
Robeson—July 8†; Aug. 12*; Sept. 2†; Sept. 9*; Oct. 7*; Oct. 14†; Nov. 4*; Dec. 2† (2); Dec. 16*.

TENTH JUDICIAL DISTRICT

Fall Term, 1935—Judge Grady.

Alamance—July 29†; Aug 12*; Sept. 2†; Sept. 9*; Nov. 11† (A) (2); Nov. 25*.
Durham—July 15*; Sept. 2* (A); Sept. 9† (A); Sept. 16† (2); Oct. 7*; Oct. 21† (A); Oct. 28† (2); Dec. 2*.
Granville—July 22; Oct. 21†; Nov. 11 (2).
Orange—Aug. 19; Aug. 26†; Sept. 30†; Dec. 9.
Person—Aug. 5; Oct. 14.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

Fall Term, 1935—Judge Rousseau.

Ashe—July 22† (2); Oct. 21*.
Alleghany—Sept. 23.
Caswell—July 1; Nov. 18.
Forsyth—July 8 (2); Sept. 2 (2); Sept. 16; Sept. 23† (A); Oct. 7 (2); Oct. 21† (A) (2); Nov. 4 (2); Nov. 18† (A) (2); Dec. 2 (A); Dec. 9.
Rockingham—Aug. 5* (2); Sept. 2† (A) (2); Oct. 28*; Nov. 25† (2).
Surry—July 8† (A) (2); Sept. 30*; Oct. 7† (A).

TWELFTH JUDICIAL DISTRICT

Fall Term, 1935—Judge Pless.

Davidson—Aug. 19*; Sept. 9†; Sept. 16† (A); Oct. 7† (A) (2); Nov. 18 (2).
Guilford—July 8* (A); July 29*; Aug. 5† (2); Aug. 26† (2); Sept. 16 (2); Sept. 30† (2); Oct. 21* (A); Oct. 28† (2); Nov. 11*; Nov. 18† (A) (2); Dec. 16*.
Stokes—July 1*; July 8†; Oct. 14*; Oct. 21†.

THIRTEENTH JUDICIAL DISTRICT

Fall Term, 1935—Judge McElroy.

Anson—Sept. 9†; Sept. 23*; Nov. 11†.
Moore—Aug. 12*; Sept. 16†; Sept. 23† (A); Dec. 9†.
Richmond—July 15†; July 22*; Sept. 2†; Sept. 30*; Nov. 4†.
Scotland—Oct. 28†; Nov. 25 (2).
Stanly—July 8; Sept. 2† (A) (2); Oct. 7†; Nov. 18.
Union—July 29*; Aug. 19† (2); Oct. 14† (2).

FOURTEENTH JUDICIAL DISTRICT

Fall Term, 1935—Judge Alley.

Gaston—July 22*; July 29† (2); Sept. 9*; Sept. 16† (2); Oct. 21*; Nov. 25* (A); Dec. 2† (2).
Mecklenburg—July 8* (2); Aug 26*; Sept. 2† (A) (2); Sept. 16† (A) (2); Sept. 30† (2); Oct. 14† (A) (2); Oct. 28† (2); Nov. 11 (2); Nov. 25† (A) (2); Dec. 9† (A) (2).

FIFTEENTH JUDICIAL DISTRICT

Fall Term, 1935—Judge Clement.

Cabarrus—Aug. 19*; Aug. 26†; Oct. 14 (2).
Iredell—July 29 (2); Nov. 4 (2).
Montgomery—July 8; Sept. 23†; Sept. 30; Oct. 28†.
Randolph—July 15† (2); Sept. 2*; Dec. 2 (2).
Rowan—Sept. 9 (2); Oct. 7†; Oct. 14† (A); Nov. 18 (2).

SIXTEENTH JUDICIAL DISTRICT

Fall Term, 1935—Judge Sink.

Burke—Aug. 5 (2); Sept. 23† (3); Dec. 9 (2).
Caldwell—Aug. 19 (2); Nov. 25 (2).
Catawba—July 1 (2); Sept. 2† (2); Nov. 11*; Nov. 18†; Dec. 2† (A).
Cleveland—July 22 (2); Sept. 9† (A) (2); Oct. 28 (2).
Lincoln—July 15; Oct. 14† (2).
Watauga—Sept. 16.

SEVENTEENTH JUDICIAL DISTRICT

Fall Term, 1935—Judge Phillips.

Alexander—Dec. 16 (A).
Avery—July 1*; July 8† (2); Oct. 14*; Oct. 21†.
Davie—Aug. 26; Dec. 2†.
Mitchell—July 22† (2); Sept. 16 (2).
Wilkes—Aug. 5 (2); Sept, 30 (2); Nov. 11† (3).
Yadkin—Aug. 19*; Dec. 9† (2).

EIGHTEENTH JUDICIAL DISTRICT

Fall Term, 1935—Judge Harding.

Henderson—Oct. 7 (2); Nov. 18† (2).
McDowell—July 8† (2); Sept. 2 (2).
Polk—Aug. 19 (2).
Rutherford—Sept. 23† (2); Nov. 4 (2).
Transylvania—July 22 (2); Dec. 2 (2).
Yancey—Aug. 5 (2); Oct. 21† (2).

NINETEENTH JUDICIAL DISTRICT

Fall Term, 1935—Judge Oglesby.

Buncombe—July 8† (2); July 22 (2); Aug. 5† (2); Aug. 19; Sept. 2† (2); Sept. 16; Sept. 30† (3); Oct. 21; Nov. 4† (2); Nov. 18; Dec. 2† (2); Dec. 16.
Madison—Aug. 26; Sept. 23; Oct. 28; Nov. 25.

TWENTIETH JUDICIAL DISTRICT

Fall Term, 1935—Judge Warlick.

Cherokee—Aug. 5 (2); Nov. 4 (2).
Clay—Sept. 23 (A); Sept. 30.
Graham—Sept. 2 (2).
Haywood—July 8 (2); Sept. 16† (2); Nov. 25 (2).
Jackson—Oct. 7 (2).
Macon—Aug. 19 (2); Nov. 18; Nov. 25 (A).
Swain—July 22 (2); Oct. 21 (2).

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

UNITED STATES COURTS FOR NORTH CAROLINA

DISTRICT COURTS

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

EASTERN DISTRICT

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

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

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

Fayetteville, third Monday in March and September. S. H. BUCK, Deputy Clerk.

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

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

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

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

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

OFFICERS

J. O. CARR, United States District Attorney, Wilmington.
JAMES H. MANNING, Assistant United States District Attorney, Raleigh.
D. M. STRINGFIELD, Assistant United States District Attorney, Fayetteville.
F. S. WORTHY, United States Marshal, Raleigh.
S. A. ASHE, Clerk United States District Court, Raleigh.

MIDDLE DISTRICT

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

Greensboro, first Monday in June and December. HENRY REYNOLDS, Clerk; MYRTLE COBB, Chief Deputy; LILLIAN HARKRADER, Deputy Clerk; B. FRANK MILLIKAN, Deputy.

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

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

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

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

OFFICERS

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

WESTERN DISTRICT

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

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

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

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

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

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

OFFICERS

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

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1935

WILLIE THOMASON v. BALLARD & BALLARD COMPANY.

(Filed 20 March, 1935.)

1. **Trial D e—Voluntary nonsuit on cause of action based on negligence held admission for purpose of trial that defendant was not negligent.**

   Plaintiff sued the manufacturer for alleged negligence in the preparation of a sack of flour sold by the manufacturer to a retailer and purchased from the retailer by plaintiff, and for breach of implied warranty that the flour was wholesome and fit for human consumption, plaintiff alleging damage from a foreign and deleterious substance in the flour. Upon the trial plaintiff took a voluntary nonsuit on his first cause of action. *Held:* The voluntary nonsuit was an admission, at least for the purpose of trial, that defendant was not guilty of negligence in the manufacture or packing of the flour.

2. **Food A a—There is no implied warranty on part of manufacturer to consumer that food is wholesome and fit for human consumption.**

   As between the manufacturer and the ultimate consumer, there is no implied warranty that food prepared and sold by the manufacturer to a retailer and purchased from the retailer by the consumer, is wholesome and fit for human consumption, there being no contractual relation between the manufacturer and the ultimate consumer to which such warranty could attach, and in an action by the ultimate consumer against the manufacturer, based upon such implied warranty, the manufacturer's motion to nonsuit should be allowed.

CLARKSON, J., dissenting.

APPEAL by defendant from *Clement, J.*, at May Term, 1934, of DAVIDSON. Reversed.

This is an action to recover damages for personal injuries suffered by the plaintiff, and resulting from sickness caused by his eating bread made from flour which he had purchased from the City Grocery Company, at Lexington, N. C., on 22 July, 1933.

It is alleged in the complaint that the flour, from which the bread which the plaintiff ate was made, was manufactured by the defendant at Louisville, Kentucky, and was packed by the defendant in a sack, which was fastened at its top by a wire, before it was sold and shipped to the City Grocery Company at Lexington, N. C.; that after the flour was purchased by the plaintiff from the City Grocery Company, it was delivered at plaintiff's home in Davidson County, North Carolina, in the sack in which it was packed by the defendant in Louisville, Ky.; that the flour was poured from the sack by the plaintiff's wife into a bin in his kitchen cabinet and was used by her in making bread for plaintiff and his family; that after he had eaten the bread made from the flour, the plaintiff became sick, and that this sickness was caused by the unwholesome condition of the flour; and that when about half the flour in the bin had been used for making bread, the decomposed and putrid body of a dead rat was discovered in the flour, and that because of the presence of the body of the rat in the flour, the flour was unwholesome and unfit for use as a food.

Two causes of action are alleged in the complaint.

As his first cause of action, the plaintiff alleges that at the time the sack of flour which he purchased from the City Grocery Company was sold and shipped by the defendant to said grocery company, the body of the rat was in said flour, and that its presence in the flour was the result of the negligence of the defendant, as alleged in the complaint.

As his second cause of action, the plaintiff alleges that when the defendant sold and delivered the sack of flour to the City Grocery Company, for resale to its customers, it impliedly warranted that the flour in said sack was wholesome, and fit for human consumption; that this implied warranty was made by the defendant to customers of the City Grocery Company; and that there was a breach of said implied warranty, which caused plaintiff personal injuries for which he is entitled to recover of the defendant damages for the injuries which he suffered from eating bread made of said flour.

There was evidence at the trial tending to show that the dead body of the rat was in the sack of flour at the time it was sold by the defendant to the City Grocery Company; that the flour in the sack was unwholesome and not fit for human consumption, because of the presence in the flour of the dead body of the rat; and that plaintiff suffered personal injuries caused by his eating bread made from this flour.

At the close of the evidence for the plaintiff, the plaintiff took a voluntary nonsuit on his first cause of action, and resisted the motion of the defendant for judgment as of nonsuit on his second cause of action. The motion was denied, and defendant excepted.

The defendant then offered evidence tending to show that the body of the rat was not in the sack of flour at the time the flour was shipped by the defendant from Louisville, Ky., to the City Grocery Company at Lexington, N. C., and that the flour in the sack at said time was wholesome and fit for human consumption.

At the close of all the evidence the defendant again moved for judgment as of nonsuit. The motion was denied, and defendant excepted.

Issues were submitted to the jury, and answered as follows:

"1. Was the flour purchased by the plaintiff of the City Grocery Company on or about 22 July, 1933, manufactured by the defendant, as alleged in the complaint? Answer: 'Yes.'

"2. Was there an implied warranty by the defendant that the flour manufactured by it was fit for human consumption, as alleged in the complaint? Answer: 'Yes.'

"3. If so, was there a breach of said warranty? Answer: 'Yes.'

"4. What damages, if any, has the plaintiff sustained because of the breach of the said warranty? Answer: '$175.00.' "

From judgment that plaintiff recover of the defendant the sum of $175.00, and the costs of the action, the defendant appealed to the Supreme Court.

Don A. Walser and Phillips & Bower for plaintiff.
Sapp & Sapp for defendant.

CONNOR, J. The only question presented by this appeal is whether there was error in the refusal of the trial court to allow defendant's motion, at the close of all the evidence, for judgment as of nonsuit.

During the progress of the trial the plaintiff took a voluntary nonsuit on his first cause of action. He thereby abandoned his contention that the defendant was negligent with respect to the manufacture or packing of the flour which he had purchased from the City Grocery Company. His contention thereafter was that the defendant was liable to him, as the consumer of the flour, on an implied warranty that the flour was wholesome and fit for consumption as a food, at the time the defendant sold and delivered the flour to the City Grocery Company. This was, in effect, an admission by the plaintiff, at least for the purposes of the trial of this action, that the presence of the rat in the sack of flour was not the result of any failure on the part of the defendant to exercise due care in the manufacture or packing of the flour from which the bread which he ate was made.

There are decisions in this jurisdiction to the effect that as between a vendor and his vendee there is an implied warranty that the personal property sold by the vendor and purchased by his vendee was fit for the use for which it was sold and purchased, and that the vendor is liable to his vendee for a breach of this warranty. *Swift v. Aydlett,* 192 N. C., 330, 135 S. E., 141; *Poovey v. Sugar Co.,* 191 N. C., 722, 133 S. E., 12; *Swift v. Etheridge,* 190 N. C., 162, 129 S. E., 453.

There are no decisions, however, in this jurisdiction to the effect that there is any implied warranty as between a manufacturer and an ultimate consumer of a food product, which was purchased by the consumer from a retail merchant to whom the manufacturer had sold the food, for resale. It is true that in *Ward v. Sea Food Co.,* 171 N. C., 33, 87 S. E., 958, it is said that the authorities are numerous, that there is an implied warranty that runs with the sale of food for human consumption, that it is fit for food and is not dangerous and deleterious. In that case, however, the defendant was held liable to the plaintiff upon the finding by the jury that the death of plaintiff's intestate was brought about by the negligence of the defendant with respect to food which the defendant had sold to the retail merchant from whom plaintiff's intestate had bought the food.

In *Corum v. Tobacco Co.,* 205 N. C., 213, 171 S. E., 78, it is said: "There are many decisions to the effect that one who prepares in bottles or packages foods, medicines, drugs, or beverages and puts them on the market is charged with the duty of exercising due care in the preparation of these commodities, and under certain circumstances may be liable in damages to the ultimate consumer. *Broadway v. Grimes,* 204 N. C., 623, 169 S. E., 194; *Broom v. Bottling Co.,* 200 N. C., 55, 156 S. E., 152; *Harper v. Bullock,* 198 N. C., 448, 152 S. E., 405; *Grant v. Bottling Co.,* 176 N. C., 256, 97 S. E., 27; *Cashwell v. Bottling Works,* 174 N. C., 324, 93 S. E., 901."

In the absence of allegation and proof of negligence on his part with respect to the manufacture or preparation of a food product, the manufacturer is not liable as upon an implied warranty to an ultimate consumer for damages resulting from injuries caused by the condition of the food, which the consumer has purchased from a retail merchant to whom the manufacturer sold the food for resale. There is no contractual relation between the manufacturer and the consumer to which an implied warranty with respect to the food can attach. The manufacturer owes the duty of exercising a high degree of care in the manufacture and preparation of food for human consumption, and for a breach of this duty he may and should be held liable to the consumer. The law does not, however, make him an insurer of his products, or hold him liable solely upon an implied warranty to one with whom he had no contractual relation.

There was error in the refusal of the trial court to allow defendant's motion for judgment as of nonsuit.

The judgment is

Reversed.

CLARKSON, J., dissenting: The plaintiff purchased from a retailer a 24-pound sack of flour, manufactured by the defendant, and it was alleged that said sack of flour contained a dead rat, which made it unfit for food for human consumption. There were allegations for an action in tort, and also in contract, but the former action was abandoned, and the case was tried upon the theory of a breach of warranty. The jury found there was a breach of warranty, and that the plaintiff was entitled to damages in the amount of $175.00. The case is now before us on the question as to whether or not there was an implied warranty from the manufacturer to the defendant, an ultimate consumer, that the flour contained in a sack, packed in the plant of the plaintiff, was wholesome and fit for human consumption.

There is a conflict in the decisions as to the theory of liability of defendant in this class of cases, some holding that an action must be based upon negligence alone; others that it may be founded upon an implied warranty; and still others that, where an implied warranty exists, it does not extend to third parties. Some of the decisions in North Carolina based upon the theory of negligence by the defendant are set forth in *Corum v. Tobacco Co.,* 205 N. C., 213; *Broadway v. Grimes,* 204 N. C., 623; *Broom v. Bottling Co.,* 200 N. C., 55; *Grant v. Bottling Co.,* 176 N. C., 256; yet the doctrine of implied warranty was recognized by the late *Chief Justice Walter Clark,* speaking for a unanimous Court, in *Ward v. Sea Food Co.,* 171 N. C., 33. In that case it was held that the defendant was liable to the plaintiff upon the finding by the jury that the death of plaintiff's intestate was caused by the negligence of the defendant with respect to salt fish sold by the defendant to the merchant from whom the deceased bought the food. While the decision in that case was grounded upon negligence, it was pointed out that the authorities were numerous; that there is an implied warranty which runs with the sale of food for human consumption that it is fit for food, and is not dangerous and deleterious. That case did not involve a sealed package, as in the instant case, but salt mullets, and it can be assumed that the *Chief Justice* meant to imply that in a proper case the doctrine of implied warranty would apply.

The weight of authorities, I think, holds that an implied warranty will lie in cases such as the case at bar. In 26 C. J., 785, it is said: "It is generally agreed by the authorities that a manufacturer, packer, or bottler of foods or beverages is directly liable to a consumer for an in-

jury caused by the unwholesomeness or the unfitness of such articles, although purchased from a dealer or middleman and not from such manufacturer, bottler, or packer." The modern doctrine is stated in 11 R. C. L., 1122, as follows: "In the case of food sold in cans, bottles, and sealed packages, some of the earlier decisions denied the right of the consumer to recover from the manufacturer, it appearing that the goods were purchased through the medium of a retail dealer. . . . A great majority of the more recent cases, however, hold that the ultimate consumer of products sold in cans or sealed packages may bring his action direct against the packer or manufacturer." 17 A. L. R., 688; 39 A. L. R., 995; 63 A. L. R., 343; 88 A. L. R., 531; *Dothan-Chero-Colo Bottling Co. v. Weeks,* 80 So., 734 (Ala.); *Davis v. Van Camp Packing Co.,* 176 N. W., 382 (Iowa); *Parkes v. C. C. Yost Pie Co.,* 144 Pac., 202 (Kan.); *Meshbessher v. Channellene Oil Co.,* 119 N. W., 428 (Minn.); *Chenault v. Houston Coca-Cola Bottling Co.,* 118 So., 177 (Miss.); *Tomlinson v. Armour,* 70 Atl., 314 (N. J.); *Nock v. Coca-Cola Bottling Works of Pittsburgh,* 156 Atl., 537 (Pa.); *Mazetti v. Armour,* 135 Pac., 633 (Wash.).

There are many cases to the effect that negligence must be alleged and proven, and elaborate opinions have been written, pro and con, and it is sometimes not easy to determine whether the Court holds the manufacturer liable without negligence or that the defect proven to exist in the manufactured products is without more sufficient evidence of negligence. 1 Williston on Sales (2d Ed.), footnote, p. 490. While our own decisions in North Carolina are not definite, I think the better view is stated in *Nock v. Coca-Cola Bottling Works of Pittsburgh, supra,* as follows: "We think the sounder reasoning is in support of the theory that a sale of food or beverage impliedly warrants that it shall be free of a foreign matter which may be injurious to the well-being of the consumer. Nor do we see any just reason, from a public policy standpoint, as the health or human life may be involved, why a sale of food or beverage intended for human consumption should not carry with it an implied warranty that it is suitable and wholesome."

The flour manufacturer, in the instant case, when it delivered the sack of flour in question, impliedly represented to the public that it was free from injurious substances and fit for human food.

As pointed out in *Ward Baking Co. v. Trizzino,* 131 N. E., 557 (Ohio), there is no doubt that an implied warranty arises between the groceryman who makes the purchase and the manufacturer. The groceryman did not make the purchase for himself, but for his customers, who are the ultimate consumers. The groceryman is merely the distributing agent, he has no opportunity to make an inspection of a sealed package and the manufacturer is fully aware of that fact. The

contract between the manufacturer and the retailer is one for the benefit of a third party, the ultimate consumer. If there is any implied warranty between the manufacturer and the retailer, and there is no conflict of decisions on that point, then it is for the benefit of the third party, the ultimate consumer. Therefore, I fully agree with the holding in *Ward Baking Co. v. Trizzino, supra,* that an implied warranty for the benefit of an ultimate consumer of a food product can be relied upon by such a consumer against its maker, who supplied it to a store for resale to the public, upon the ground that "there is imposed the absolute liability of a warrantor on the manufacturer of articles of food, in favor of the ultimate purchaser, even though there are no direct contractual relationships between such ultimate purchaser and the manufacturer."

It is of the greatest importance to the health of the general public that when they purchase food or drink it should be pure, wholesome, and fit for use. It is a hard measure and almost impossible to prove negligence and by the weight of authorities, this rule under modern conditions is fastly growing obsolete. The true rule, in more recent decisions, is that there is an implied warranty from the manufacturer to the consumer, the general public, where there is no opportunity to inspect, that the food or drink is pure, wholesome, and fit for consumption. I think there is no error in the judgment of the court below.

WILMA LYNN, BY HER NEXT FRIEND, DANIEL H. LYNN, v. PINEHURST SILK MILLS, INC.

(Filed 20 March, 1935.)

1. Trial D a—On motion to nonsuit all the evidence tending to support plaintiff's claim is to be considered in most favorable light to him.

Upon a motion as of nonsuit all the evidence upon the whole record tending to support plaintiff's cause of action 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. Electricity A a—Evidence held sufficient for jury on question of defendant's negligence in permitting excessive voltage to be carried to plaintiff's home over defendant's wires.

Evidence that defendant purchased electricity from a power company, that the electricity was delivered to it over wires carrying 550 volts, and that defendant then ran the current through transformers, reducing its voltage to 110, and sold it to occupants of its company houses, that the house in which plaintiff lived was so furnished with electricity, that the wires going to the house were not grounded to prevent excessive current,

that fuses and bulbs frequently burned out in the house, that the condition had been reported to defendant, and that plaintiff was injured when an overhead socket fell upon the bed in which she was sleeping, setting it afire, that there was no other fire in the house at the time, and that the ends of the wires after the accident were hot and smoldering, together with expert testimony that such condition was the result of excessive voltage or defect in the wires, *is held* sufficient to overrule defendant's motion as of nonsuit in plaintiff's action to recover for the personal injury sustained by her.

3. Same—Instruction in this case as to duty of inspection and degree of care required of distributor of electricity held without error.

The court's charge in this case that defendant distributor of electricity to household users was under duty to exercise a constant vigilance and observe a high degree of care in keeping its wires outside plaintiff's house in good repair and in keeping its transformers in a safe condition at all times, so that excessive and dangerous current should not be conducted into plaintiff's house, and that its failure to use such care would be negligence entitling plaintiff to recover if the proximate cause of her injuries, *is held* without error on defendant's exceptions.

4. Evidence K a—

The admission of testimony of an electrical expert, upon proper hypothetical questions, as to the electrical causes of burned-out fuses and light bulbs and a burned socket and as to the effect of grounding a wire, *is held* without error in this case.

APPEAL by defendant from *Grady, J.*, and a jury, at March Term, 1934, of MOORE. No error.

This is an action for actionable negligence, brought by Wilma Lynn, by her next friend, Daniel H. Lynn, against the defendant, alleging damage. The evidence on the part of plaintiff Wilma Lynn was to the effect: That she was the daughter of Daniel H. Lynn, who had been working for defendant as a weaver. That one Edgar R. Brown owned certain dwelling-houses that he leased to defendant. That Daniel H. Lynn rented one of the houses from defendant and paid for the house and lights. A receipt given him is as follows: "The Pinehurst Silk Mills, Inc. 260. D. H. Lynn, Time Ending 1-13-34. Total Wages $16.80. Rent and Light $1.05. Balance enclosed $15.75." There were other receipts of like import.

The Carolina Power and Light Company, in July, 1932, furnished defendant electrical power and energy. The voltage carried on the main line of the Carolina Power and Light Company is 11,000 to the substation at Hemp, back of defendant mills, at this place there is a transformer with a meter and the 11,000 volts are reduced to 550 volts, which are delivered through the meter to defendant, which then belongs to defendant. The defendant has a line that runs from the substation, furnishing power to the home of Daniel H. Lynn, and this line runs

from the mill to the houses on the mill hill and Lynn's home, serving them with power and lights. There was a transformer about 1,000 feet from the houses on the mill hill that reduces the voltage from 550 to 110 volts. Daniel H. Lynn had nothing to do with the upkeep or repair of the lights or the wiring system. The lights in his home burned out so many bulbs and the fuse plugs blew out and the lights went out so often he reported the condition to the superintendent of defendant mills several times. Daniel H. Lynn told Mr. West, superintendent of defendant mills, that he wanted him to come and see what was wrong, as he couldn't keep any fuse plugs or bulbs, and Mr. West said when he got time he would come over.

H. G. Lee testified, in part: "All these appliances and all of these wires and all of the equipment that furnished light to that mill village, including the Lynn house, belonged to and was under the control of the Pinehurst Silk Mills."

It is necessary to inspect the transformer frequently. The transformer was not inspected within seven months before Wilma Lynn was burned. High and excessive voltage will blow out bulbs and fuses.

Mrs. D. H. Lynn slept with her little boy and the plaintiff Wilma Lynn, who was about eleven years old. The light hung down over the foot of the bed and was left burning. No other light was burning in the house. The plaintiff Wilma Lynn screamed and waked her up between 1 and 2 o'clock in the morning. Mrs. Lynn testified, in part: "The fire was at the foot of the bed. I found part of the electrical equipment in the bed. When I first noticed the wires left on there, they were still hot and smoking. I saw the bulb that was in this socket after the child was burned. It didn't look like it did before the fire. It was a good deal larger than a usual bulb. It was what I call all swollen up and it was a dark color. I could not say it was black, but it was changed. . . . There was no other fire there about that house that night that could have caught that bed. It was on 28 July. The child's health before she was burned was in good condition, I consider. Her physical strength was good. Her ability to get about, walk, run, and play was extra good. It has been very poor since that time. Before she was hurt she was more interested in her school work than she is now. Well, as far as the child's suffering, I know she suffered untold misery, agony; I don't suppose anybody can express the suffering except yourself; I could see she was suffering miserably. Her condition, she was so nervous; it seemed like it scared her to death, she didn't want them touched. She was afraid and she screamed. Oh, she slept good before she was burned and, of course, she has been disturbed greatly in her sleep since she has been hurt. The action of her kidneys before was normal, of course, but since she has been hurt they are uncontrollable. . . .

One of the quilts burned up and I think the other one that I put out is at home. I didn't have any other covering on the bed that night besides those two quilts except a sheet."

F. L. Bunker, admitted to be an expert electrical engineer, testified, in part: "Q. What do you mean by 'grounding'? A. Attaching a wire permanently and solidly to the box and one wire to the circuit and connecting that rigidly to some solidly grounded object, or some object connected solidly in the ground. Q. What is grounding designed to do, what is the purpose of it? A. It is placed there to serve as a protection to life and property. Q. In what does it protect? A. To prevent the building up of a high voltage or the transmission of high voltage or transmitting higher voltage than is prepared for in the wiring of the house. Q. State whether or not this wiring system at the Lynn home is grounded in the manner that you have just referred to. A. It was not. Q. State whether or not there is any grounding there to prevent high voltage from entering that house. A. There was not. Q. Mr. Bunker, if the jury shall find from the evidence in this case, and by its greater weight, that for some time prior to the month of July, 1932, the fuses in the fuse box at that residence would blow out at frequent intervals, and that the bulbs—that is, the globes in the house—would burn out, what, in your opinion, could have produced the blowing out of those fuses and the burning out of the bulbs? A. An indication of defective wiring or equipment or high voltage or a combination of both. Q. If the jury shall find from the evidence in this case, and by its greater weight, that for some time prior to July, 1932, the fuses in the fuse box of that house blew out at frequent intervals and that the bulbs—light globes—in the house would burn out at frequent intervals, and shall find from the evidence in this case that while only one light was burning in that house that a portion of that light socket into which the bulb fitted and a portion of the wire fell loose, and shall further find that the remaining wires, that is, the wires attached to the house, the ends of those wires, were charred and burned and were smoking, what, in your opinion, could have caused the dropping of that socket and wire? A. That was an indication that there was either a defect in that wire leading to that socket or else high voltage jumped across in that socket, causing a short circuit, or it could have been both. Q. State whether or not when a drop cord is in proper condition and the usual or normal voltage enters such wire as you have just examined, whether or not with normal voltage and with a wire in proper condition it will break loose and fall. A. It would not. Q. State whether or not you have seen electric light bulbs, such as the one offered in evidence in this case, that have been subjected to heat that would increase in size and, if so, to what extent and what causes that condition, in your opinion. A. Yes, sir, I have, and

that could only happen if the bulb were heated abnormally and allowed to expand; some bulbs are vacuum and others nitrogen filled, and with a high pressure that would only happen in the nitrogen-filled bulb."

The issues submitted to the jury, and their answers thereto, were as follows: "(1) Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? A. 'Yes.' (2) What damage, if any, is the plaintiff entitled to recover of defendant by reason of said injury? A. '$5,000.' "

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

H. F. Seawell, Jr., C. A. Douglass, and R. L. McMillan for plaintiff.
W. S. Coulter and U. L. Spence 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.

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.

We think there is ample evidence to be submitted to the jury. In *Small v. Southern Public Utilities Co.*, 200 N. C., 719 (721), we find: "Following are some of the various expressions found in the decisions: 'Highest degree of care' (*Ellis v. Power Co.*, 193 N. C., 357, 137 S. E., 163); 'highest degree of care in maintenance and inspection' (*Benton v. Public Service Corp.*, 165 N. C., 354, 81 S. E., 448); 'high skill, the most consummate care and caution, and the utmost diligence and foresight . . . consistent with practical operation' (*Turner v. Power Co.*, 167 N. C., 630, 83 S. E., 744); 'greatest degree of care and constant vigilance' (*Mitchell v. Electric Co.*, 129 N. C., 166, 39 S. E., 801); 'very high degree of care' (*Harrington v. Wadesboro, supra* [153 N. C., 437]); 'all reasonable precaution' (*Turner v. Power Co.*, 154 N. C., 131); 'utmost care and prudence consistent with practical operation' (*Helms v. Power Co.*, 192 N. C., 784, 136 S. E., 9); 'rule of the prudent man' (*Hicks v. Tel. Co.*, 157 N. C., 519, 73 S. E., 139); 'highest skill

. . . which is attainable, consistent with practical operation' (*Electric Co. v. Lawrence,* 31 Col., 308); 'necessary care and prudence to prevent injury' (*Love v. Power Co.,* 86 W. Va., 397)."

In *Turner v. Power Co.,* 154 N. C., 131 (137), it is said: "It was earnestly urged for error that the judge below refused to nonsuit the plaintiff, and this chiefly on the ground that there was no direct evidence that electricity had been negligently transmitted into the building by defendants, and in excess of the voltage stipulated for in the contract. The court was also asked to charge the jury to the same effect, but the position, in our opinion, cannot be sustained. The presiding judge charged the jury that if the injuries resulted by reason of defective apparatus or appliances existent within the building, they would render their verdict for defendants, and in effect excluded from the consideration of the jury any and all imputation of wrong except that which might arise by reason of an excess of voltage transmitted into the building over the wires of defendants and by reason of negligent default on the part of the company or their agents. This being true, on the facts in evidence, the case permits and calls for an application of the doctrine of *res ipsa loquitur,* and requires that the question of defendant's responsibility should be determined by the jury. This doctrine has been discussed and applied in several recent cases before this Court, as in *Dail v. Taylor,* 151 N. C., 284; *Fitzgerald v. R. R.,* 141 N. C., 530; *Ross v. Cotton Mills,* 140 N. C., 115; *Stewart v. Carpet Co.,* 138 N. C., 66; *Womble v. Grocery Co.,* 135 N. C., 474." *McAllister v. Pryor,* 187 N. C., 832; *Lynch v. Telephone Co.,* 204 N. C., 252; *Collins v. Electric Co.,* 204 N. C., 320.

In the *Lynch case, supra,* at page 258-9, quoting from Jones, 2d Ed., Telegraph and Telephone Companies, part sec. 198, p. 225, *et seq.,* it is said: "Furthermore, where so dangerous an agency as electricity is undertaken to be delivered into houses by electrical companies for daily use, very great care and caution should be observed, and such a degree thereof as is commensurate with the danger involved, and which is enhanced by the lack of the consumer's knowledge of the safety of the means and appliances employed to effect the delivery. It is generally held that in case of injuries sustained from electric appliances on private property the doctrine of *res ipsa loquitur* applies, where it is shown that all the appliances for generating and delivering the electric current are under the control of the person or company furnishing the same."

The court below charged the jury, in part: "I furthermore charge you, gentlemen, that it was the duty of the defendant to keep its transformers and electrical wires outside of the Lynn home in good repair; it was its duty to keep a constant lookout, a constant vigilance, and to observe a high degree of care in keeping its equipment outside of the

house in good condition. It was the duty of the defendant to furnish *to plaintiff's home electrical energy of such voltage as would not melt* the wires inside the house and thereby set fire to the insulation which covered such wires. It was the duty of the defendant to see that its transformer was kept in a safe condition at all times, so as to reduce *the current which flowed through it from a high voltage to a lower* voltage—to such voltage as was within the resistance of the electrical equipment inside of the house where the plaintiff lived, and if it failed to do so in the exercise of that degree of care with which it is charged under the law, then it would be guilty of *negligence, and if you so find*, and further find by the same degree of proof that such negligence on its part was the proximate cause of the plaintiff's injuries, it would be your duty to answer the first issue 'Yes,' and if you fail to so find by the greater weight of the evidence, it would be your duty to answer it 'No.' "

The court below had theretofore fully and correctly charged the law of actionable negligence and proximate cause. We think this charge, on the facts of this case, favorable to defendant. We do not think the exceptions and assignments of error in regard to the charge comply with what is said in *Rawls v. Lupton,* 193 N. C., 428. Notwithstanding, we have examined the charge as a whole and see no prejudicial or reversible error—in fact, it is advantageous to the defendant.

We see no error in admitting the testimony of the electrical expert, Bunker. In its other exceptions and assignments of error to the evidence admitted as competent by the court below, the defendant says, in its brief: "This evidence, to which objections and exceptions were interposed, is, for the most part, inconsequential."

We see no error in the admission of the evidence complained of. On the record, we find

No error.

METROPOLITAN LIFE INSURANCE COMPANY v. F. H. ALLEN AND WIFE, LOU REYNOLDS ALLEN, AND PETER FOSTER.

(Filed 20 March, 1935.)

1. **Betterments A a—Where relationship of mortgagor and mortgagee is terminated by foreclosure prior to claimant's possession under mesne conveyances from mortgagor, C. S., 710, does not apply.**

Where, at the time of claimant's going into possession under a deed purporting to convey the fee-simple title free from encumbrances, the deed of trust constituting a lien upon the lands, executed by claimant's predecessor in title, had been foreclosed and deed executed by the trustee to plaintiff, the mortgagee and purchaser at the foreclosure sale, claimant

is not precluded by C. S., 710, from filing his claim for betterments upon his ejectment by plaintiff, the relationship of mortgagor and mortgagee existing between plaintiff and claimant's predecessor in title having been terminated by the foreclosure sale and the trustee's deed prior to the time of claimant's taking possession, and therefore claimant not being included in the relationship of mortgagor and mortgagee.

2. **Betterments A b—Evidence held sufficient for jury on question of whether claimant of betterments was innocent third party.**

A judgment of nonsuit upon a petition for betterments is improperly entered on the ground that claimant was not an innocent third party in that it appeared that the deed of trust under which plaintiff claims as purchaser at the foreclosure sale was properly registered at the time deed was executed to claimant, where it appears that claimant's deed, regular upon its face, purported to convey the property in fee free from encumbrances and was supported by full consideration, and that claimant went into possession and made the improvements after foreclosure of the deed of trust under which plaintiff claims, and that at the time of the execution of the mortgage the mortgagor and mortgagee did not contemplate that the tract in question should be covered by the mortgage, and that claimant, at the time of purchasing the property, was advised by a reputable attorney that the title was free of encumbrances, and that claimant believed he had good title.

CIVIL ACTION, before *Grady, J.*, at February Term, 1934, of FRANKLIN.

The evidence tended to show that prior to 1 August, 1919, J. M. Allen and W. H. Allen were the owners of several tracts of land in Franklin County, and made an agreement to sell a certain portion thereof to E. T. Chaney. Chaney went into possession of the land and paid part of the purchase money, but received no deed. Thereafter, on 1 August, 1919, J. M. Allen and W. H. Allen borrowed $150,000 from the plaintiff, and as security for said loan executed and delivered to Charles H. Barron, trustee, a deed of trust covering twenty-nine separate tracts of land, including the land in controversy. This deed of trust was duly recorded on 2 August, 1919. Thereafter, on 11 March, 1922, the Allens conveyed approximately seventy-nine acres of land to E. T. Chaney for a recited consideration of $5,594.10. This deed was duly recorded on 25 March, 1922. On 1 December, 1922, Chaney executed a deed of trust on the land in controversy to the Southern Trust Company to secure a note for $1,500 to the land bank. This deed of trust was duly recorded on 22 December, 1922. The Allens paid approximately $60,000 on the Metropolitan loan, but were unable to complete the payments, and upon such default the trustee in the deed of trust securing the notes held by the plaintiff duly sold all of the land thereunder, at public auction, and the trustee in said deed of trust executed and delivered to the plaintiff a deed for all of the property, dated 28 September, 1926. At that time Chaney was in possession of the land in controversy and remained in possession until default was

made in the payment of his indebtedness to the land bank. By virtue of this default the Southern Trust Company, trustee for the land bank, sold the property in controversy and executed a deed to F. J. Beasley on 5 March, 1927. This deed was duly recorded on 16 April, 1927. Thereafter, on 27 July, 1927, Beasley and wife sold the land in controversy to the First National Bank of Louisburg and this deed was registered 28 July, 1927. Thereafter, the First National Bank of Louisburg, by deed dated 8 September, 1927, conveyed the land to F. H. Allen, the defendant, by deed recorded on 14 September, 1927. There was some uncertainty in the description of the original tracts of land included in the mortgage to the plaintiff, and there was evidence tending to show that W. H. Allen, at the time he executed the mortgage or deed of trust securing the indebtedness of the plaintiff, told the agent of plaintiff that the land in controversy was not to be included in the mortgage because "it was already sold to Mr. Chaney. . . . Chaney lived there for several years—five or six." The defendant F. H. Allen, after he went into possession under deed from the First National Bank of Louisburg, repaired the dwelling upon the land, built a kitchen and dining-room, a pack house, dug a pit, and repaired the stables and tobacco barn, and made other extensive and permanent improvements, expending for such purposes at least $800, and as a result of such improvements the value of the land had been enhanced in the sum of $1,000.

On 13 February, 1932, the plaintiff instituted an action of ejectment against the defendant, alleging that it was the owner of the land, and that the defendant was in the unlawful possession thereof. The defendant pleaded the statute of limitations, and at the February Term, 1933, upon the trial the jury answered the issue in favor of the plaintiff, and judgment was entered decreeing that the plaintiff was the owner of and entitled to the possession of the land in controversy.

Thereafter, in October, 1933, the defendant duly filed a petition for betterments. At the hearing of his petition he offered evidence of the chain of title and the value of improvements he had placed upon the land. He testified that he did not know that his land was included in the deed of trust to the plaintiff, and that the First National Bank, his grantor, was in possession at the time he purchased, and that E. T. Chaney had previously been in possession of the land for seven or eight years prior to that time. He further testified that W. H. Allen, the original owner of the land, had stated to him that the land was not included in the deed of trust to the plaintiff, "and I believed when I bought it that I was getting a good deed."

The plaintiff offered the testimony of Mr. G. M. Beam, a reputable attorney, who investigated the title of the land in controversy for the

land bank when the loan was made to Chaney, who said that he did not discover any encumbrances upon the land. This testimony was excluded by the court. However, the defendant testified without objection that the cashier of the First National Bank, the immediate grantor of defendant, told him that the attorney for the bank had examined the title, and that the title was "all right."

Mr. Beam further testified that the description in the deed from the Allens to Chaney was not the same as the description in the deed of trust from the Allens to the plaintiff, and the attorney stated: "I read them over carefully and I could not say that the conveyance in the Chaney deed was included in the Metropolitan deed of trust. It appeared to me that it was two separate descriptions," etc.

At the conclusion of all the evidence the petition of the defendants was dismissed, and they appealed.

Jones & Brassfield for plaintiff.
Yarborough & Yarborough for defendants.

BROGDEN, J. A. owns approximately nine thousand acres of land, and agrees to sell to B. a small tract containing about seventy-nine acres. B. enters into possession and makes a part payment on the purchase money, but receives no deed. Thereafter A. executes a deed of trust upon the entire body of land to secure a large indebtedness. About three years after the recording of said deed of trust A. conveys the seventy-nine-acre tract to B. by deed duly recorded. B. mortgages his seventy-nine-acre tract to secure an indebtedness, and being unable to pay, the land is duly sold under the mortgage and purchased by another. By *mesne* conveyances, duly executed and recorded, the title to the land was vested in the First National Bank of Louisburg, and said bank conveyed the same to the defendant by deed duly executed and recorded. A., the original owner of the land, did not pay his indebtedness secured by the deed of trust and sale was duly made thereunder, and the whole body of land purchased by the plaintiff. About six years after the land was purchased by the plaintiff it brought a suit in ejectment against the defendant and recovered possession. The defendant thereupon duly filed a petition for betterments and offered evidence tending to show that he had expended a substantial sum of money in making permanent improvements.

Upon the foregoing facts the following question of law arises:

Can the defendant maintain his petition for betterments?

The sale of the land under the original deed of trust, dated August, 1919, the purchase thereof by the plaintiff, and the deed from the trustee to the plaintiff dated 28 September, 1926, terminated the relationship

of mortgagor and mortgagee between the plaintiff and the original owners and mortgagors of the land. Hence, when the defendant went into possession in 1927 there was no such relationship existing between him and the plaintiff. Consequently, C. S., 710, does not apply.

The doctrine of betterments rests upon equitable principles and considerations of natural justice. That is to say, if the mortgagee becomes the purchaser of the mortgaged premises, he is entitled to receive the land in the same condition it was when he loaned the money for the manifest reason that he was satisfied with the security as it stood, otherwise, he would not have entered into the transaction. The law, however, declares that if improvements are put upon the mortgaged premises by the mortgagor or his assigns during the existence of the mortgage that by such act he is improving his own land, and such improvements strengthen the security and inure to the benefit of the mortgagee.

In the case at bar, however, the improvements were put upon the land after the termination of the mortgage relationship, and nothing else appearing, natural justice does not presume that a former mortgagee should be enriched by the labor and money of an innocent third party.

Obviously it must be determined whether the defendant was such innocent third party. A solution of this inquiry invokes a consideration of certain pertinent facts, to wit:

(a) The defendant was a purchaser for value of the land, and had a deed for it duly recorded, which deed was regular upon its face and purported to convey the land in fee.

(b) The defendant went into possession and made all the improvements claimed by him after the foreclosure of the deed of trust under which the plaintiff claims.

(c) Evidence was offered that it was not within contemplation of the original parties that the defendant's land should be included in the deed of trust.

(d) The defendant was advised at the time of the purchase that a reputable attorney had theretofore examined the title to the property and found no spot or blemish upon it.

(e) The defendant offered evidence that he had paid full value for the property.

(f) The defendant offered evidence that he had reason to believe, and did believe, that he had a good title.

The decisions in this jurisdiction shedding light upon the principles of law involved are *Hallyburton v. Slagle,* 132 N. C., 947, 44 S. E., 655; *Pritchard v. Williams,* 176 N. C., 108, 96 S. E., 733; *Eaton v. Doub,* 190 N. C., 14, 128 S. E., 494; *Layton v. Byrd,* 198 N. C., 466, 152 S. E., 161. While none of these cases are specifically in point, nevertheless they contain signboards marking out the highway along which the

law travels in determining whether the defendant is entitled to betterments. The opinion in *Pritchard v. Williams, supra,* quoted with approval the following: "The good faith which will entitle to compensation for improvements has been defined to mean simply an honest belief of the occupant in his right or title, and the fact that diligence might have shown him that he had no title does not necessarily negative good faith in his occupancy." The opinion proceeds: "There are many cases where it has been held that although aware of an adverse claim, the possessor may have reasonable and strong grounds to believe such claim to be destitute of any just or legal foundation, and so be a possessor in good faith, and as such entitled to compensation for improvements." See, also, North Carolina Practice and Procedure, 860, *et seq.*

As the Court interprets the applicable decisions, it holds the opinion that the defendant can maintain his petition, and, therefore, the judgment of nonsuit was inadvertently entered.

Reversed.

SALLIE HENSLEY v. GURNEY P. HOOD, COMMISSIONER OF BANKS, STATE OF NORTH CAROLINA, EX REL. THE PEOPLE'S BANK OF BURNSVILLE, NORTH CAROLINA.

(Filed 20 March, 1935.)

Banks and Banking H e—Plaintiff held entitled to preference under order of court prior to receivership that bank pay amount claimed by plaintiff into court for distribution according to law.

A sum in excess of the judgment was realized upon an execution sale against plaintiff's property, and while this sum was held by the sheriff, a consent judgment was entered against plaintiff in favor of defendant bank, and in pursuance of the consent judgment the sum was paid over to the bank. Thereafter the consent judgment was set aside by motion in the cause for want of authority on the part of plaintiff's attorneys to enter same, and the order setting aside the judgment stipulated that the bank return the sum of money to the court to be held by the court until final determination of the appeal from the order, and then the money paid out according to law. The bank became insolvent without complying with the order of court, and the order setting aside the consent judgment was affirmed on appeal to the Supreme Court. *Held:* As between plaintiff and the bank, the bank's receipt of the money was wrongful, and the relation of debtor and creditor did not exist between the bank and plaintiff, and plaintiff was entitled to a preference in the bank's assets in the hands of the receiver.

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

APPEAL by defendant from *Warlick, J.,* at August Term, 1934, of YANCEY. Affirmed.

This is a civil action, brought by plaintiff against defendant to recover of the defendant Gurney P. Hood, Commissioner of Banks, the sum of $1,940.95, together with interest from 25 January, 1930. That the recovery be declared a preferred claim, paramount to all the rights of unsecured and unpreferred creditors of the said bank. That the defendant be directed to allow said claim against the assets of the insolvent bank as a preferred claim.

An order of Judge Warlick was as follows: "It is agreed by counsel in the above-entitled action that a jury trial is waived, and that the court may, without the intervention of a jury under the agreement herein, hear the controversy in so far as it relates to and as stated therein to the question of whether or not the claim of the plaintiff is a preferred claim against the assets of the insolvent People's Bank of Burnsville, N. C.; that being the only and sole question agreed upon by counsel for the court to pass upon, and all other matters of defense and such matters as appear otherwise as disputed controversies between the parties are retained for a jury trial in the event counsel subsequently seeks to do so, without prejudice to the rights of either the plaintiff or defendant parties to this controversy. Therefore, the court agrees to hear said controversy in so far as it relates, and that only, to whether or not the fund admittedly in the hands of the People's Bank of Burnsville is a preferred claim against the assets of said institution. Wilson Warlick, Judge presiding."

The judgment of the court below was as follows: "Upon the foregoing order of submission to the court of finding the facts and rendering the judgment thereon in the above action, the court finds the following facts: That prior to the January Term of Superior Court for Yancey County, 1930, that J. R. Penland, father of the plaintiff in this action, conveyed certain properties to the plaintiff; that subsequently thereto the plaintiff in this action had instituted against her a civil action by a party by the name of Deck Jarrett, on which judgment was rendered against the plaintiff in this action, and subsequently execution issued out of the office of the clerk of the Superior Court of Yancey County, and under said execution property then vesting in the plaintiff in this action was levied upon, homestead was allotted, and the residue thereupon sold at public sale, as is provided by law for the purpose of the satisfaction of said judgment on which execution had issued; that at the sale of said property under execution, after the allotment of homestead there was received a sum of money which fully compensated the said Deck Jarrett by way of his judgment and left remaining in the hands of the sheriff of Yancey County the sum of $1,940.95; that thereupon the People's Bank of Burnsville instituted its action in the Superior Court of Yancey County to set aside certain conveyances made by the

father of the plaintiff to this action and in said action sought a restraining order which in terms and effect restrained the sheriff of Yancey County from paying over the sum of $1,940.95 to the plaintiff in this action, and sought to attach in said action other property alleged to belong to the plaintiff in this action, Mrs. Sallie Hensley; that thereupon the sheriff of Yancey County, by virtue of a consent judgment, paid over said sum of $1,940.95 to the People's Bank of Burnsville, and it accepted said payment, but without an order of the court; that said consent judgment purported to adjudicate the rights between the parties to a certain action, and that in said action the said Sallie Hensley had filed an answer by and through her counsel, Hon. Charles Hutchins, of the Burnsville bar; that a third party at that time had stated to the law firm of Watson & Fouts that he had authority to consent to a judgment in said cause and that action, thereupon the firm of Watson & Fouts, which is a highly reputable firm of attorneys, consented to said consent judgment and affixed their names thereto, though they did not represent the said Sallie Hensley, but acted entirely in so consenting on the information given them by the third party; that thereupon, to wit, at the August Term, 1933, Superior Court of Yancey County, in said original case, motion was made before the Hon. Michael Schenck, judge presiding at the said term of court, to set aside said consent judgment, and on a hearing thereof his Honor, Judge Schenck, set said judgment aside after a full hearing thereon, and from said order an appeal was taken to the Supreme Court of North Carolina, wherein said order setting aside said consent judgment was affirmed by the Supreme Court; that in said order, copy of which is hereto attached as a part of this finding of fact, the People's Bank of Burnsville was ordered and adjudged: 'That the People's Bank return to the court the sum of $1,940.95, together with interest from the date it was received by said bank, said amount to be held by the court until final determination upon appeal, and then to be paid out according to law.'

"Upon the foregoing finding of fact by the court, for the purpose of this judgment, the court concludes that the People's Bank of Burnsville originally received the sum of money in question from the sheriff of Yancey County in so far as the present plaintiff is concerned without authority; second, that the sum of money herein was then and still is now the property of Sallie Hensley, and has at all times been the property of Sallie Hensley, and that in so receiving it without any authority from the said Sallie Hensley, who had previously thereto filed her answer in said cause, it received it wrongfully and unlawfully, and after receiving it wrongfully and unlawfully, held it with a trust express for the use and benefit of Sallie Hensley without a deposit therefor on her part and contrary to her wishes, and that from the time of its original

receipt up to, including, and through the order of Judge Michael Schenck, holds the said funds as a trust fund, express with the trust thereon, and that the said sum of $1,940.95, together with interest thereon from date it was received by the said bank, as ordered by Judge Schenck, is and shall be a preferred claim against the assets of the People's Bank of Burnsville. This 23 August, 1934. Wilson Warlick, Judge presiding."

The defendant's exceptions and assignments of error are as follows: "(1) For that the court found as a fact that the plaintiff is entitled to a preferred claim against the assets of the People's Bank of Burnsville, N. C., for the sum of $1,940.95, and interest thereon from 25 January, 1930. (2) The signing of the judgment by Judge Warlick, which appears in the record."

W. K. McLean, Anglin & Randolph, and Huskins & Wilson for plaintiff.

Charles Hutchins for defendant.

CLARKSON, J. While the sheriff of Yancey County held the sum of $1,940.95 as an excess from an execution sale of the plaintiff's property, a consent judgment was entered in favor of the People's Bank of Burnsville, North Carolina, and against the plaintiff by attorneys purporting to represent the plaintiff. Under said consent judgment the sheriff paid the said $1,940.95 over to the People's Bank of Burnsville, North Carolina. The said consent judgment was set aside at the August Term, 1933, of the Superior Court of Yancey County by Schenck, J., on the ground that the attorneys signing said consent judgment on behalf of plaintiff had no authority to represent her. And the People's Bank of Burnsville, N. C., was ordered by said court to return the $1,940.95, with interest, to the clerk of the Superior Court of Yancey County, to be held by him until final determination upon appeal. The bank never returned the money into court as ordered. The said bank was taken over by the defendant Commissioner of Banks on 2 October, 1933, for liquidation. The order of Schenck, J., was affirmed by the Supreme Court of North Carolina in *Bank v. Penland,* 206 N. C., 323.

The only question involved on this appeal is whether the plaintiff, under the facts found by the court below, is entitled to a preferred claim against the assets of the People's Bank of Burnsville, North Carolina, for the sum of $1,940.95, and interest thereon from 25 January, 1930. We think so.

Under a consent judgment, the amount in controversy was paid over by the sheriff of Yancey County, North Carolina, to the People's Bank of Burnsville, N. C. Upon motion in the cause, this consent judgment was set aside by Schenck, J., and on appeal to this Court was affirmed.

In the order setting aside said consent judgment, Schenck, J., ordered and adjudged: "That the People's Bank return to the court the sum of $1,940.95, together with interest from the date it was received by said bank, said amount to be held by the court until final determination upon appeal, and then to be paid out according to law."

The bank, so far as plaintiff was concerned, received the money wrongfully. There existed between her and the bank no relationship of debtor and creditor. *Bank v. Bank,* 207 N. C., 216.

The bank having never complied with the court order, became liable *ex maleficio,* and the plaintiff is entitled to a preference. The case of *Zachery v. Hood, Comr. of Banks,* 205 N. C., 194, is in point. *Flack v. Hood, Comr. of Banks,* 204 N. C., 337; *Andrews v. Hood, Comr. of Banks,* 207 N. C., 499. The judgment of the court below is

Affirmed.

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

MISSOURI STATE LIFE INSURANCE COMPANY AND GENERAL AMERICAN LIFE INSURANCE COMPANY v. EUGENE B. HARDIN AND EUGENE B. HARDIN, JR., AND EUGENE B. HARDIN, GUARDIAN AD LITEM.

(Filed 20 March, 1935.)

1. **Insurance I b—C. S., 6460 and 6289, held applicable to this action to cancel policy purchased by father on life of son.**

A father took out a policy of life insurance on his son in the sum of two thousand dollars, the policy providing that no further premiums would be required upon the death or total and permanent disability of the father. Insurer required no medical examination of the father. In an action by insurer to cancel the policy for alleged false and fraudulent representations as to the father's health made by the father in his application for the policy, C. S., 6460, providing that a policy issued without physical examination should not be void or payment resisted for misrepresentations as to applicant's physical condition except in cases of fraud, and C. S., 6289, providing that all statements in applications for insurance shall be deemed representations and not warranties, and that a representation should not prevent recovery on the policy unless material or fraudulent, *are held* applicable, and insurer is not entitled to cancellation for misrepresentations relating to the health of the father in the absence of fraud.

2. **Same—Applicant's statement that health was good held not fraudulent where evidence shows that applicant bona fide believed health to be good.**

The fact that at the time of making application, applicant suffered with an incurable disease is no evidence that his statement in his application,

that he was in good health, was fraudulent, where the uncontradicted evidence discloses that applicant was ignorant that he had the disease and had been informed by the physician discovering his condition upon examination that there was nothing the matter with him.

3. **Same—Applicant's failure to disclose physical examination held insufficient evidence of fraud where physician reported to applicant that health was good.**

In response to question in application as to whether applicant had had any disease or received any medical attention within ten years prior to application, applicant stated that he had been attended for influenza, but failed to disclose a physical examination upon which he was advised that there was nothing the matter with him, although the physician had discovered he was suffering from an incurable disease. The evidence disclosed that applicant believed in good faith that his health was good. *Held:* The evidence of fraud in applicant's answer to the question is insufficient to be submitted to the jury, insurer having accepted applicant's answer as satisfactory and sufficiently definite, and it appearing that the fact of examination with a favorable report thereon to applicant by the physician was not regarded by applicant as material.

APPEAL by plaintiffs from *Harris, J.*, at April Term, 1934, of NEW HANOVER. Affirmed.

This is an action for the cancellation of a policy of insurance which was issued by the plaintiff Missouri State Life Insurance Company on 17 February, 1931, and was thereafter assumed by the plaintiff General American Life Insurance Company, on the ground that the issuance of said policy was procured by false and fraudulent representations made by the defendant Eugene B. Hardin in his application for said policy. The action was begun on 11 February, 1933.

The policy was issued on the application of the defendant Eugene B. Hardin, and insures the life of his infant son, Eugene B. Hardin, Jr., in the sum of two thousand dollars. It was understood and agreed that the premiums on the policy would be paid by the defendant Eugene B. Hardin. It is provided in the policy that "in the event of the death of Eugene B. Hardin, Sr., father of the insured, hereinafter referred to as purchaser, while no premium is in default, no further payment of premiums will be required, and this policy will continue in force as a fully paid up policy." It is also provided in the policy that "the company will waive the payment of further premiums if the purchaser becomes totally and permanently disabled, subject to the limitations and conditions hereinafter defined."

The application for the policy, which is in writing, was signed by the defendant Eugene B. Hardin, at Wilmington, N. C., on 12 February, 1931, and contains, among others, the following questions and answers, together with the applicant's certificate that said answers are full, correct, and true:

"9. Has the purchaser had any disease or injuries, or received any medical or surgical advice or attention within the past ten years? If so, give details.

"Disease or injury: 'Flu.' Date: 'March, 1922.' Duration: '4 days.' Complications: 'None.' Result: 'Recovered.' Name medical attendant: 'Infirmary, U. of N. C., Chapel Hill, N. C.'"

"11. Is the purchaser now in good health? 'Yes.'"

The application was solicited by L. K. Breeden, agency supervisor of the plaintiff Missouri State Life Insurance Company, and was signed by the defendant Eugene B. Hardin, as purchaser, in his presence and in the presence of Leslie R. Hummel, local agent of the plaintiff, at Wilmington, N. C. The questions in the application were read to the applicant by L. K. Breeden, who wrote the answer to each question in accordance with the response of the applicant. The application, after it was signed by the applicant, was forwarded by its agents, with their approval endorsed thereon, to the plaintiff, and was received by the plaintiff at its home office in the city of St. Louis, Missouri, where it was in due course considered and approved by its underwriting department. No medical examination of the applicant was required by the plaintiff. The policy was issued by the plaintiff in accordance with the application as signed by the defendant and approved by its underwriting department. It has been in full force and effect since its delivery. All premiums due on the policy prior to the commencement of this action have been paid.

The evidence at the trial tended to show that for some time prior to July, 1928, the defendant had observed that he was at times unsteady in his walk or clumsy; that he would have a feeling that he was about to fall forward, especially when he was descending a stairway, which caused him to catch at and hold on to the rail or banister of the stairway. At times he felt a numbness in his fingers. He had observed these and other symptoms, from time to time, since he was a student at the University of North Carolina, in 1922, and spoke of them to his mother in 1928. At her suggestion, the defendant consulted Dr. David R. Murchison, of Wilmington, N. C., who examined him, and advised him to consult Dr. E. J. Wood, also of Wilmington, N. C. The defendant consulted Dr. Wood, who examined him, but did not inform the defendant his opinion as the result of the examination. Dr. Wood reported to Dr. Murchison, who then advised the defendant to go to Baltimore, Maryland, and there consult Dr. Walter E. Dandy. The defendant went to Baltimore and consulted Dr. Dandy, who examined him, and advised him to consult Dr. F. R. Ford, of Baltimore, Maryland. The defendant consulted Dr. Ford, who examined him, but did not inform the defendant his opinion as to his condition. Dr. Ford reported to Dr. Dandy, who

thereupon advised Dr. Murchison, at Wilmington, by letter dated 19 July, 1928, that he and Dr. Ford were of the opinion that the defendant was suffering with disseminated schlerosis, or creeping paralysis. This disease is progressive in its nature and is incurable. Dr. Murchison consulted with a brother of the defendant and informed him of the diagnosis made by all the doctors who had examined the defendant. They both agreed that it was best for the defendant, who was then about 25 years of age, not to inform him that he was suffering with an incurable disease. Dr. Murchison told the defendant that there was nothing *the matter with him. When the defendant signed the application* for the policy involved in this action, he did not know that he was then suffering with an incurable disease, but, on the contrary, was of the opinion that he was in good health. He was at that time employed in his father's drug store in Wilmington and continued in such employment until some time in 1932, when he was informed by a doctor in Philadelphia that he was suffering with an incurable disease—multiple schlerosis, or creeping paralysis. The defendant is now and has been since some time in 1932 totally and permanently disabled, within the terms of the policy. When the plaintiffs were informed of defendant's condition, they began this action to cancel the policy. At the date of the issuance of the policy the plaintiffs did not know that the defendant was then suffering with an incurable disease, or that he had consulted Dr. Murchison, Dr. Wood, Dr. Dandy, and Dr. Ford, in July, 1928.

At the close of all the evidence the defendant's motion for judgment as of nonsuit was allowed, and plaintiffs duly excepted.

From judgment dismissing the action as of nonsuit the plaintiffs appealed to the Supreme Court.

Harold D. Knight and I. C. Wright for plaintiffs.
Bryan & Campbell for defendants.

CONNOR, J. It is provided by statute in this State that when there was no medical examination of the applicant for a policy of life insurance which has been issued by a company doing business in this State, the policy shall not be rendered void, nor shall payment be resisted on account of any misrepresentation by the applicant as to his physical condition at the date of the application, except in cases of fraud. C. S., 6460. This statute is applicable to the instant case.

There was no evidence at the trial of this action tending to show any false and fraudulent representation by the defendant Eugene B. Hardin in his application for the policy, which was issued on said application by the plaintiff Missouri State Life Insurance Company, with respect to the physical condition of the applicant at the date of

application. It is true that all the evidence shows that he was suffering then with an incurable disease, but the uncontradicted evidence shows that the defendant was ignorant of this fact, and that he had been assured by a physician whom he had consulted in July, 1928, that there was nothing the matter with him at that time. There is certainly no evidence from which the jury could have found that the statement made by the applicant in answer to the 11th question in the application was fraudulent. All the evidence shows the good faith of the defendant when in response to the 11th question he stated that he was then in good health.

It is further provided by statute in this State that all statements in an application for a policy of insurance, or in the policy itself, shall be deemed representations and not warranties, and that a representation, unless material or fraudulent, will not prevent a recovery on the policy. C. S., 6289. This statute is applicable to the instant case.

There was no evidence tending to show that the answer of the defendant to the 9th question contained in the application was false or fraudulent. The evidence shows that the answer, while true and correct as certified by the defendant, was not full. It appears from the answer that the question was not answered categorically. The answer as written in the application by the agent of the plaintiff was accepted by him, and by the underwriting department of the plaintiff, as satisfactory. There was no evidence tending to show that the plaintiff Missouri State Life Insurance Company, before issuing the policy which it now seeks to have canceled, notified the defendant that his answer to the 9th question was not satisfactory. While the plaintiff had a right to all the information sought to be elicited by the question, when it issued the policy without requiring of the defendant a categorical answer to the question, it waived this right, and in the absence of fraud is not entitled to have the policy canceled upon its contention that the defendant wrongfully concealed the fact that he had received medical advice or attention within the ten years preceding the date of the application. All the evidence shows that if the defendant had been informed before the issuance of the policy that the plaintiff regarded the fact that he had been examined by doctors, and informed by them that there was nothing the matter with him, as material, he would have so informed the plaintiff.

The cases in this and other jurisdictions cited by counsel for the plaintiff do not sustain their contention that there was error in the judgment of the Superior Court in this action. The judgment is

Affirmed.

CARTER DALTON, TRUSTEE OF PERLEY A. THOMAS CAR WORKS, INC., AND PERLEY A. THOMAS CAR WORKS, INC., v. JOHN C. STRICKLAND, GUARDIAN OF VIRGINIA HUNT, AND MRS. NELLIE HUNT ADAMS.

(Filed 20 March, 1935.)

1. Judgments R a—Judgment debtor paying amount of judgment to clerk held entitled to cancellation of judgment as cloud on title.

A judgment debtor is entitled to credit on the judgment for amounts paid by him on the judgment to the clerk of the Superior Court in whose office the judgment is docketed, C. S., 617, although the clerk fails to enter payment on the judgment docket, the judgment debtor being under no duty to require the clerk to make entry of payment on the judgment docket and the clerk being in effect the statutory agent of the owner of the judgment in making such entries.

2. Clerks of Court B b—

The clerk of the Superior Court and the surety on his bond are liable for loss resulting to the owner of a judgment from the clerk's failure to perform his statutory duty to enter the judgment and payments thereon on the judgment docket or his failure to account to the owner for sums paid on the judgment by the judgment debtor, C. S., 617.

APPEAL by plaintiffs from *Alley, J.*, at October Term, 1934, of GUILFORD. Reversed.

A trial by jury of the issues of fact raised by the pleadings in this action was expressly waived by the parties, who agreed upon the facts as follows:

"1. This is an action to quiet title brought by the plaintiffs Carter Dalton, trustee of Perley A. Thomas Car Works, Inc., and Perley A. Thomas Car Works, Inc., against the defendants John C. Strickland, guardian of Virginia Hunt, a *minor*, and Mrs. Nellie Hunt Adams, widow of R. D. Hunt.

"2. The administrator of the estate of R. D. Hunt, deceased, G. W. Bennett, instituted an action in the Superior Court of Guilford County in 1923 to recover damages from Perley A. Thomas Car Works, Inc., and Perley A. Thomas, individually, for the alleged wrongful death of R. D. Hunt, deceased.

"3. A consent judgment was entered in the above-mentioned action on 4 June, 1923, before M. W. Gant, former clerk of the Superior Court of Guilford County, providing that 'the plaintiff recover of the defendants the sum of $9,000, the said sum of $9,000 to be paid in monthly installments of $75.00 each,' said judgment being docketed in Book of Judgments R, at page 131, a copy of same being hereto attached, marked 'Exhibit A,' and made a part of this agreed statement of facts.

"4. On 24 July, 1924, G. W. Bennett filed a final account of his administration of the estate of R. D. Hunt, deceased, with the clerk of the Superior Court of Guilford County, and was on that day duly and regularly discharged as administrator of said estate. This final account did not show any payments on the aforesaid judgment as having been received by the administrator.

"5. Mrs. Nellie Hunt Adams, widow of R. D. Hunt, deceased, and Virginia Hunt, minor, daughter of R. D. Hunt, deceased, are the only surviving heirs of the said R. D. Hunt, and are therefore the sole owners of the aforementioned judgment. John C. Strickland, guardian of Virginia Hunt, minor, is the owner of a two-thirds interest in said judgment, and Mrs. Nellie Hunt Adams is the owner of a one-third interest in said judgment.

"6. Perley A. Thomas Car Works, Inc., from 29 June, 1923, to 1 October, 1930, paid to M. W. Gant, former clerk of the Superior Court of Guilford County, a total of 84 payments of $75.00 each, amounting in the aggregate to $6,300, plus $5.55 court costs, to pay in part the aforesaid judgment.

"7. The said Perley A. Thomas Car Works, Inc., has in its possession canceled checks for each of said payments, and all of them were made and received as payments on said judgment. All bear the endorsement of M. W. Gant, clerk Superior Court of Guilford County, and all were deposited to the credit of said clerk, and so credited, $5,630.55 of the total amount being deposited in the Atlantic Bank and Trust Company, and $675.00 in the North Carolina Bank and Trust Company. Only seven of these payments of $75.00 each, or a total of $525.00, appear on the judgment docket as having been received by the said M. W. Gant, the entries of said payments having filled the space provided therefor. No reference to any other book or account was made by the said M. W. Gant on the judgment docket in his office.

"8. On 9 October, 1930, a number of shortages and misappropriations were discovered in the office of the said M. W. Gant, clerk of the Superior Court of Guilford County, and he was on that day disqualified from holding said office. On or about 15 November, 1930, a State court receiver was appointed for the said M. W. Gant. This receiver acted until on or about 16 April, 1931, at which time the said M. W. Gant was adjudged a bankrupt, and all of his estate is still in the hands of the bankrupt court. On 10 October, 1930, by appointment, A. Wayland Cooke duly qualified as clerk of the Superior Court of Guilford County, and since that time has acted in that capacity.

"9. Perley A. Thomas Car Works, Inc., and Carter Dalton, trustee, paid the remainder of said judgment, amounting in the aggregate to $2,700, to A. Wayland Cooke, present clerk of the Superior Court of

Guilford County, who qualified for said office following the removal of M. W. Gant as clerk. It appears from the Trust Account Book No. 1, at page 4, that this amount ($2,700) was duly received by A. Wayland Cooke, clerk of the Superior Court of Guilford County, and was properly disbursed by him, but no record of said payments is shown on the judgment docket in his office, the space for entries of such payments having been completely filled, said docket, however, referring to said trust book account.

"10. Virginia Hunt, minor, had no general or testamentary guardian prior to 28 August, 1931. On 28 August, 1931, John C. Strickland duly qualified as general guardian of Virginia Hunt, and since that time has received from A. Wayland Cooke, clerk of the Superior Court of Guilford County, two-thirds of each payment made to said clerk of the Superior Court by Perley A. Thomas Car Works, Inc., on aforesaid judgment. No question arises in this case as to Mrs. Nellie Hunt Adams. She has duly received her one-third share of each payment made to M. W. Gant and A. W. Cooke on said judgment.

"11. The only question in this action concerns the $4,200 paid by the Perley A. Thomas Car Works, Inc., to M. W. Gant, former clerk of the Superior Court of Guilford County, and being the share of said sum of $6,300 which should have gone to Virginia Hunt, minor, no part of which has ever been received by Virginia Hunt, minor, or anyone in her behalf, except $1,260 received by John C. Strickland, guardian of Virginia Hunt, from the trustee in bankruptcy of M. W. Gant.

"12. John C. Strickland, as guardian of Virginia Hunt, filed a claim with the trustee in bankruptcy of M. W. Gant for the said sum of $4,200, which was never received by her or by her guardian. The said trustee has paid a dividend of thirty per centum on all claims filed and allowed, and the said John C. Strickland, guardian, has received from the said trustee in bankruptcy the sum of $1,260 on the aforesaid claim. The remainder of the claim, amounting to the sum of $2,940, is due and owing to the person or persons entitled thereto.

"13. The defendants in this action refuse to satisfy and cancel said judgment unless and until the plaintiffs pay to the said John C. Strickland, guardian of Virginia Hunt, the aforesaid sum of $2,940, with interest thereon at the rate of six per centum per annum from 1 July, 1923, claiming said sum to be a valid lien upon the real estate of the plaintiffs.

"The plaintiffs contend that on the above facts agreed they are entitled to have said judgment canceled and marked 'Satisfied' on the judgment docket in the office of the clerk of the Superior Court of Guilford County."

On the foregoing statement of facts agreed, it was considered, ordered, and adjudged by the court, on the authority of *Gilmore v. Walker,* 195 N. C., 460, that the plaintiffs herein are liable for the payment of the balance due on the judgment in the action entitled *"G. W. Bennett v. Perley A. Thomas Car Works, Inc., et al.,"* duly docketed on the judgment docket in the office of the clerk of the Superior Court of Guilford County, to wit: The sum of $2,940, less two-thirds of the seven payments aggregating the sum of $525.00 mentioned in the statement of facts agreed, or a total of $2,590, with interest from 1 July, 1923, and the costs of this action.

The plaintiffs excepted to the foregoing judgment, and appealed to the Supreme Court.

Dalton & Pickens and Byron Haworth for plaintiffs.
E. M. Stanley for defendants.

CONNOR, J. The question presented by this appeal is whether a payment made by a judgment debtor to the clerk of the Superior Court in whose office the original judgment is docketed, on the judgment, is good and available to the party making the payment, and against the owner of the judgment, where the clerk has failed to enter the payment on the judgment docket, as he is required to do by the statute.

C. S., 617, is as follows: "The party against whom a judgment for the payment of money is rendered by any court of record may pay the whole, or any part thereof, to the clerk of the court in which the same was rendered, at any time thereafter, although no execution has issued on said judgment; and this payment of money is good and available to the party making it, and the clerk shall enter the payment on the judgment docket."

We are of opinion that where a payment has been made as authorized by the statute, such payment is good and available to the party making it and against the owner of the judgment, although the clerk fails to enter the payment on the judgment docket. It is the duty of the clerk, as provided by the statute, to enter the judgment on the judgment docket, and both he and the surety on his official bond are liable to the owner of the judgment for any loss which such owner has suffered by reason of the failure of the clerk to perform his statutory duty, or to account to such owner for the payment. The statute imposes no duty on the party making the payment to the clerk to make or to require the clerk to make an entry on the judgment docket. The effect of the statute is to make the clerk the statutory agent of the owner of the judgment, and not of the party making the payment.

The third question presented in *Gilmore v. Walker,* 195 N. C., 460, 142 S. E., 579, was correctly decided on the facts in that case. That decision is not an authority in support of the judgment in the instant case. In that case the judgment debtor had paid the amount of the judgment which was docketed against him, and was a lien on his land, to the clerk of the court, who failed to enter the payment on the judgment docket or to account to the judgment creditor for the amount of the payment. The judgment debtor paid the amount of the judgment to the judgment creditor, who thereupon canceled the judgment. This left in the hands of the clerk the sum of money which the judgment debtor had paid him under the provisions of C. S., 617. The judgment creditor, whose judgment had been paid by the judgment debtor, was manifestly not entitled to the money. On these facts it was correctly decided that the judgment debtor was entitled to the money, and that both the clerk and the surety on his official bond were liable to him.

In accordance with this opinion, the judgment in this action is

Reversed.

J. J. PARKER, ADMINISTRATOR OF BRITTON VAUGHAN, DECEASED; B. R. KENNON, AND THOMAS D. CHITTY v. SALLIE PORTER AND HUSBAND, JOHN PORTER; SUSIE JENKINS AND HUSBAND, JOE JENKINS; ROSETTA VAUGHAN, WALTER VAUGHAN, C. W. JONES, COMMISSIONER, AND C. W. JONES, TRUSTEE, AND EULA CARTER JONES, WIFE OF SAID C. W. JONES.

(Filed 20 March, 1935.)

1. Executors and Administrators E a—

Personal property of the estate is the primary fund for the payment of the debts of the estate, and it is only when the personalty is insufficient for this purpose that the administrator has the right and duty to apply for license to sell real property of the estate to make assets. C. S., 74.

2. Executors and Administrators B a: Descent and Distribution A b—

Personal property of a deceased passes direct to his administrator, but the real property passes direct to the heirs at law, subject to be divested only if it becomes necessary to sell the realty to make assets.

3. Executors and Administrators E a: Descent and Distribution A b—

The heirs at law have the right to pay off debts of the estate and the costs of administration in order to prevent the necessity of selling the realty to make assets.

4. Executors and Administrators E a—Administrator's right to attack partition is precluded by tender of amount sufficient to pay debts of estate.

Suit by the administrator against the heirs at law to set aside partition of the lands of deceased upon allegations of necessity to sell realty to

make assets, and inadequacy of the purchase price upon the partition sale and irregularities therein, should be dismissed upon tender into court by one of the heirs at law, the purchaser at the partition sale, of an amount sufficient to pay the debts of the estate, the cost of administration, and the costs of the litigation, the sole interest of the administrator in the lands being the right to sell same to make assets and pay costs of administration, and the other grounds for relief alleged being available solely to the other heirs at law.

5. **Executors and Administrators D g—Creditor's right to attack partition is precluded by tender of amount sufficient to pay debts of estate.**

Suit by creditors of an estate to set aside partition by the heirs at law should be dismissed upon tender into court of an amount sufficient to pay all debts of the estate, nor in such instance may a lessee of the lands from the administrator maintain the suit after the expiration of the period of the lease, since any claim he might have on account of the lease is a claim against the estate protected by the tender of money into court.

APPEAL from *Cowper, Special Judge,* at November Term, 1934, of HERTFORD. Reversed.

This is an action, instituted by the administrator of Britton Vaughan, one creditor of Britton Vaughan and one who claims a contract of lease with said administrator, to have declared null and void a deed to Sallie Porter from a commissioner appointed in a special proceeding brought by the heirs at law of the said Britton Vaughan to sell his real estate for partition among said heirs, and also to cancel a certain deed of trust subsequently given by said Sallie Porter upon the land described in said deed. The defendants are the heirs at law of Britton Vaughan, and the husbands of the *feme* heirs, the commissioner in said special proceeding, and the trustee and *cestui que trust* in said deed of trust from Sallie Porter, the purchaser of the land under said partition proceeding. However, only Sallie Porter and her husband, and C. W. Jones, as commissioner and trustee, and his wife, Eula Carter Jones, as *cestui que trust,* file answer.

Since the validity of the deed of trust from Sallie Porter must stand or fall upon the validity of the deed to her from the commissioner, it becomes necessary to consider only the facts and the law as they relate to the latter.

The substance of the plaintiffs' complaint is that the administrator has not sufficient personal property in hand to pay all of the indebtedness and costs of the administration of the estate of Britton Vaughan, and that it may become necessary for him to obtain license to sell the land covered by the deed in question in order to make assets to pay debts. It is further alleged that the personal property which the administrator now has on hand consists solely of a deposit of $486.24 in a bank which is now in liquidation, and has so far paid only twenty-five per centum

in dividends, or approximately $122.00, and that the estate still owes approximately $400.00; and that the heirs at law of the intestate have had a sale for partition of the real estate of said intestate, and that the purchaser of the land under the partition proceeding was the petitioner in said proceeding, and that said purchaser acquired the land for a price that was inadequate, and that the confirmation of the sale was procured by oversight and inadvertence of the clerk, and that the administrator was not made a party to or given notice of said proceeding; and prays the court to set aside the sale made under said partition proceeding and to declare the deed given thereunder null and void.

The defendants deny that the purchase price was inadequate and that the deed was procured by oversight or inadvertence of the clerk, and aver that more than two years had elapsed from the time of the qualification of the plaintiff administrator and the institution of the partition proceeding by the heirs at law.

Before judgment was entered the answering defendants tendered into court cash money sufficient to pay all the indebtedness and liabilities of the estate of the intestate, including all costs of administration and all court costs in connection with this action, and upon such tender moved the court for a judgment that the plaintiffs be granted no further relief. The court denied this motion and the defendants excepted. The court then, upon the pleadings, ordered, adjudged, and decreed that the deed to the defendant Sallie Porter from the commissioner appointed in the partition proceeding be declared null and void, and from a judgment to that effect the answering defendants appealed to the Supreme Court, assigning errors.

C. W. Jones and A. T. Castelloe for defendants, appellants.
D. C. Barnes and Lloyd J. Lawrence for plaintiffs, appellees.

SCHENCK, J. We are of the opinion that when the defendants tendered into court cash money sufficient to pay all of the indebtedness and liabilities of the estate of the intestate, including all costs of administration and all court costs in connection with this action, that his Honor should have entered judgment to the effect that the plaintiffs recover nothing more, and that the action be dismissed. The only interest that the plaintiff administrator could have in this action was the payment of the liabilities of his intestate, and when the defendants offered to make available sufficient cash money to pay all the liabilities of the estate, including costs of administration as well as of litigation, the said administrator had no further legal interest in or right to pursue the litigation. Since the plaintiff Kennon was simply an alleged creditor

of the intestate, he was protected by the tender of cash money sufficient to pay the liabilities of the intestate, and likewise ceased to have further interest in or right to pursue the litigation. The claim of the plaintiff Chitty, if indeed he asserts any individual claim, is based upon an alleged lease for the year 1934. That time has now passed and he has no further interest in the land, and if he has any just claim against the estate of the intestate it is but a liability of the estate included in the liabilities to cover which the defendants tendered cash money. It would seem, however, that Chitty took the alleged lease with constructive notice, at least, of the deed to Sallie Porter, since said deed was duly placed of record prior to the date of said lease.

While it is well settled that an administrator has the right, and that it becomes his duty under certain conditions, to apply for license to sell the real estate of his intestate to make assets with which to pay debts, it is necessary that the personal property shall first be exhausted. When this has been done and it has been ascertained that the personalty is insufficient to discharge the debts, resort may be had to the realty. The personalty, however, is always the primary fund for the payment of debts. C. S., 74; *Shaw v. McBride,* 56 N. C., 173; *Clement v. Cozart,* 107 N. C., 697.

Personal property passes direct to the administrator and is by him passed to the distributees, while real estate does not pass to the administrator and from him to the heirs at law, but passes direct from the intestate to the heirs. The only right that the administrator can have in the real estate of his intestate is the right to subject it to the payments of the debts and costs of administration when the personal property is insufficient for that purpose. It follows, then, that the heirs at law, upon the death of the intestate, become seized and possessed of the real estate, subject to be divested if it becomes necessary to sell the realty to make assets. It is therefore logical that the heirs at law, and those claiming under them, should have a right to pay off the debts of the intestate, or the costs of administration, or both, that they may thereby take the real estate of the intestate free from any claims of the administrator. *James v. Withers,* 126 N. C., 715; 24 C. J., pp. 570, *et seq.*

This case is remanded to the Superior Court that, upon the payment by the defendants of sufficient cash money into court to pay all the debts of the estate of the intestate, together with all costs of the administration, as well as all costs in connection with this action, judgment may be entered dismissing the action.

The disposition we have made of this case in no wise precludes any of the heirs at law of the late Britton Vaughan from attacking the deed

from the commissioner to their joint heir, Sallie Porter, for lack of consideration, fraud, or any irregularity in the partition proceeding of which they may be advised. We simply hold that the tender of cash money sufficient to pay all liabilities of the estate and all costs is a satisfaction of any cause of action alleged by the plaintiffs in this case.

Reversed and remanded.

W. C. MORELAND v. WICKES WAMBOLDT, MAYOR AND COUNCILMAN, AND PLOTT BOYD ET AL., COUNCILMEN OF THE CITY OF ASHEVILLE, AND F. A. TURNER ET AL., INTERVENERS.

(Filed 20 March, 1935.)

1. Appeal and Error E h—

Where a judgment entered in the cause is stricken out and another judgment entered in lieu thereof, exceptions to the signing of the first judgment and to the findings supporting such judgment are unavailing on appeal.

2. Appeal and Error F b—

An exception to the signing of the judgment appealed from, without exception to the findings of fact or the failure to find facts supporting such judgment, confines the appeal solely to whether error is apparent in the record proper.

3. Mandamus A d—Mandamus will lie to compel exercise of discretionary powers but court may not direct decision to be made.

The charter of a city directed the city council, upon the filing of a proper petition, to pass the ordinance proposed in the petition or to submit the proposed ordinance to the qualified voters of the city. Ch. 121, art. 12, sec. 83, Private Laws of 1931. In an action against the city councilmen, judgment that they should pass an ordinance proposed in a petition duly filed is erroneous as an interference with the discretion vested in the council.

APPEAL from *Finley, J.*, at December Term, 1934, of BUNCOMBE. Reversed.

J. Scroop Styles and James S. Styles for plaintiff.
C. E. Blackstock for defendants.
Joseph L. Auten for interveners, appellants.

SCHENCK, J. This was a civil action wherein the plaintiff W. C. Moreland sought to have a writ of *mandamus* issued to the mayor and councilmen of the city of Asheville directing them to proceed in accord with section 83, article 12, chapter 121, Private Acts 1931 (charter of

the city of Asheville), to call an election upon a proposed ordinance relative to water rates and meter rents, petitioned for by the number of voters required by the statute.

On 14 November, 1934, Judge Finley found "that the petition and ordinance set forth in the complaint was in all respects in full compliance with the requirements of the charter," and ordered the council of the city of Asheville to call an election upon the proposed ordinance within 45 days, as provided by the charter. Later, on motion of the plaintiff, without finding any facts and without being requested to find any facts, Judge Finley struck out his former judgment and entered in lieu thereof a judgment directing the council of the city of Asheville to adopt the proposed ordinance. This judgment was dated 11 December, 1934, but was not filed until 21 December, 1934, being, by consent, signed out of term and out of the district.

On 21 December, 1934, Judge Pless, upon motion theretofore filed by the interveners on 20 December, 1934, and after due notice to the plaintiff and defendants, and after finding that they were property owners and taxpayers in the city of Asheville and were proper parties to the action, allowed said interveners, namely, F. A. Turner, John S. Suddreth, and A. F. McGraw to become parties defendant for the purpose of appealing from the last judgment of Judge Finley. From this order there was no appeal.

By virtue of the authority conferred by the order of Judge Pless, the interveners appealed to the Supreme Court from the judgments of Judge Finley, making three assignments of error, as follows: (1) The finding in the judgment of 14 November, 1934, that "the petition and ordinance set forth in the complaint was in all respects in full compliance with the requirements of the charter"; (2) "the signing of the judgment of 14 November, 1934"; and (3) "the signing of the judgment of 11 December, 1934."

The first and second assignments of error cannot avail the appellants, since the judgment of 14 November, 1934, to which they relate, was "cancelled and nullified," and the judgment of 11 December, 1934, "entered in lieu thereof."

There is left for consideration only the third assignment of error, which is to "the signing of the judgment of 11 December, 1934." Conceding, but not deciding, that an ordinance such as that proposed was embraced within the intent of the statute, the judgment, in the absence of any exception to the findings of fact or to the failure to find facts, should be affirmed, *Henderson v. Hardware Co.*, 204 N. C., 775, unless there is error apparent in the record proper, that is, in the pleadings, verdict, or judgment. *Thornton v. Brady*, 100 N. C., 38; *Dixon v. Osborne*, 201 N. C., 489. Hence, we are confronted with the single question: Is the judgment of Finley, J., of 11 December, 1934, void

by reason of errors apparent in the record proper? We are constrained to answer the question in the affirmative.

Section 83, article 12 of chapter 121, Private Laws of 1931 (charter of the city of Asheville), which the plaintiff invoked in his complaint for a writ of *mandamus,* reads as follows: "Any proposed ordinance may be submitted to the council by a petition signed by registered voters of the city as shown by the registration books for the last preceding election of municipal officers therein (in no event less than one thousand) equal to fifteen per cent of one-ninth of the total of all votes cast for members of the city council at the next preceding municipal election. The signatures, residence, addresses, verifications, filings, authentications, inspections, certifications, amendments, and submission of such petition shall be the same as hereinafter provided in this article for petitions for the recall of officials. If the petition accompanying the proposed ordinance be signed by the requisite number of voters and contains a request that said ordinance be passed or submitted to a vote of the electors if not passed by the council, such board shall within fifteen days after such petition is submitted to it, either:

"(a) Pass such ordinance without alteration, or

"(b) Submit the ordinance to the qualified voters at a special election called for that purpose and held not more than forty-five days after the date of such call, or at a general election occurring within ninety days after the date of the certificate of the chairman of the board of elections."

It will be noted that the filing of the petition places upon the council alternative duties, namely: "*Either* pass such ordinance without alteration, *or* submit the ordinance to the qualified voters . . ." Which of the two courses it will pursue, pass the ordinance *or* submit it to the electorate, is left to the discretion of the council. The judgment of Judge Finley, which in its very nature is a *mandamus,* directing "that the mayor and city council of the city of Asheville be and they are hereby directed to adopt the ordinance, . . ." was, therefore, an erroneous interference with the discretion vested in the council by the charter.

The law apposite to this situation is clearly and definitely stated in the case of *Battle v. Rocky Mount,* 156 N. C., 329, in these words: "The rule may be thus briefly stated: *Mandamus* extends to all cases of neglect to perform an official duty clearly imposed by law, when there is no other adequate remedy. While the court may not control the official discretion of the board, it may compel the reluctant officers to exercise it; and while it cannot direct them in what manner to decide, it may set them in motion and require them to act in obedience to law." See, also, *Dula v. School Trustees,* 177 N. C., 426, and cases there cited.

Reversed.

WILLIAM C. HOLDER AND WIFE, ILA K. HOLDER, v. ATLANTIC JOINT-STOCK LAND BANK OF RALEIGH.

(Filed 20 March, 1935.)

1. **Contracts G a—Procurement of breach of contract by third person held lawful in this case and was therefore damnum absque injuria.**

Defendant mortgagee instituted foreclosure proceedings against plaintiff mortgagor and the purchaser of the equity of redemption who had assumed the deed of trust, the purchaser of the equity having defaulted in payment. Prior to confirmation of the sale, plaintiff, in order to be in a position to make title to the property, obtained an agreement from the purchaser of the equity to surrender the land to plaintiff upon cancellation of notes executed by him to plaintiff in part payment of the equity of redemption, and plaintiff, with knowledge of defendant, negotiated for private sale of the land and obtained a prospective purchaser who agreed to buy the land from plaintiff and make a cash payment sufficient to pay delinquent installments due defendant, assume defendant's deed of trust, and execute a second mortgage to plaintiff. Thereafter defendant induced the prospective purchaser to breach his contract with plaintiff by advising him that plaintiff could not convey good title, and promising that defendant would acquire title upon completion of the foreclosure proceedings and would sell the land to the prospective purchaser at a price lower than that agreed upon with plaintiff, and at a profit to defendant. Plaintiff mortgagor instituted this action upon allegations of wilful, wrongful, and malicious interference with the contract between him and his prospective purchaser. There were no allegations of slander of title, fraudulent misrepresentations to the prospective purchaser, or breach of contract with plaintiff to coöperate with him in the sale of the land. *Held:* Defendant's motion as of nonsuit was properly allowed, the procurement of breach of the contract by the prospective purchaser being lawful and therefore *damnum absque injuria.*

2. **Same—Malicious procurement of breach of contract is not actionable when such procurement is lawful.**

In order for a cause of action to lie against a competing third party for procuring the breach of a contract by one of the contracting parties it is necessary for such procurement to be unlawful and wrongful, since the law affords no protection against lawful competition, however malicious, the lawful procurement of the breach of the contract being *damnum absque injuria.*

3. **Trial D a—**

The failure to appeal from judgment overruling a demurrer to the complaint does not preclude defendant from entering a motion for nonsuit, since a demurrer is addressed to the pleadings and a motion of nonsuit is addressed to the evidence.

APPEAL from *Moore, Special Judge,* at March Term, 1934, of WAKE. Affirmed.

At the conclusion of the plaintiffs' evidence the defendant's motion for a judgment as of nonsuit was allowed, and the plaintiffs excepted and appealed to the Supreme Court, assigning errors. The facts are set forth in the opinion.

J. M. Broughton and W. H. Yarborough, Jr., for plaintiffs, appellants.
McLean & Stacy and I. M. Bailey for defendant, appellee.

SCHENCK, J. Construing the evidence most favorably to the plaintiffs, the facts are substantially as follows:

In the month of January, 1925, the *feme* plaintiff was the owner of a tract of land located in St. Mary's Township, Wake County, consisting of 66 acres. Under date of 2 January, 1925, she, with her husband, executed a deed of trust on said land to the defendant land bank to secure a loan of $2,000, and on 14 January, 1925, they conveyed the land to W. O. Fuller and his wife, Fannie G. Fuller, and as a part of the consideration therefor the said Fuller and his wife assumed the payment of the loan notes and deed of trust theretofore given to the defendant land bank, and also executed to the plaintiffs promissory notes in the aggregate of $3,000 securing the same with a deed of trust on said land. Thereafter, in the year 1931, the purchasers, Fuller and his wife, defaulted in the payments to the land bank and foreclosure proceedings were instituted by the bank against the plaintiffs and against Fuller and his wife in the Superior Court of Wake County. While the foreclosure proceedings were pending and before the order of confirmation of sale therein was made, the plaintiffs, with the knowledge of the defendant, negotiated for a private sale of said land to one Pascal Barber and his wife, Allie Barber, and the said Barber and wife contracted and agreed to purchase said land by making a cash payment in an amount sufficient to pay all the deferred installments on the loan to the land bank and to cover all costs and expenses in connection with the foreclosure proceedings, and agreed in addition thereto to assume the payment of the remaining balance of $1,829.12 due the land bank, and to deliver to the plaintiffs notes aggregating $1,856.20 covering the balance of the purchase price and to secure said notes by a mortgage on said property subject to the land bank deed of trust. When W. O. Fuller and wife defaulted in payment of the land bank indebtedness and in the indebtedness to the plaintiffs they agreed to surrender the land to the plaintiffs in consideration of their notes being canceled, thus putting the plaintiffs in a position to make title to the property. And, further, after the plaintiffs had reached an agreement with Pascal Barber and his wife, and after said Barber and his wife had placed themselves in a position to comply with the terms of said agreement, the defendant land bank,

with full knowledge of the negotiations between the plaintiffs and the said Barbers, through its agents, informed Barber and his wife that the plaintiffs could not give them title to the land, and if they would abandon their negotiations with the plaintiffs and wait a few days until the land bank acquired the property through the pending foreclosure proceedings, the land bank would sell them the land at a price of at least $1,000 less than the price at which the plaintiffs had agreed to sell them the same, and that in this manner the land bank would make a profit and at the same time save the prospective purchasers a substantial amount. Pascal Barber and his wife were induced by such representations of the defendant land bank to abandon their contract with the plaintiffs with the view of later purchasing the land from the bank at a lower price.

It is alleged in the complaint "that the action of the defendant in procuring the said Pascal Barber and wife to break their contract with plaintiffs and in inducing them not to carry out their definite contract with the plaintiffs for the purchase of the said land, constituted a malicious interference with the contractual rights of the plaintiffs; that said action on the part of the defendant was actuated by malice and by a wilful and reckless disregard for the rights of plaintiffs, and by the desire on the part of the defendant to obtain for itself a substantial profit and benefit. That by reason of the said wilful, wrongful, and malicious act of the defendant in interfering with said contract, and in inducing and procuring the said Pascal Barber and wife to break the said contract, the plaintiffs have been damaged. . . ."

Since the gravamen of the plaintiffs' alleged cause of action is the "wilful, wrongful, and malicious act of the defendant in interfering with said contract and in inducing and procuring the said Pascal Barber and wife to break said contract," and since the motion for judgment of nonsuit was allowed, the only question for our consideration is whether there was any evidence of a wilful and wrongful interference by the defendant with a contract of sale made by the plaintiffs with Pascal Barber and his wife.

The purport of what the defendant did was to offer to sell the land to Pascal Barber and his wife for less money than it would cost them if they bought the land from the plaintiffs, and thereby caused Barber and his wife to abandon their contract with the plaintiffs. If this was unlawful and wrongful, then the plaintiffs made out a cause of action, but if it was not unlawful and wrongful, however malicious it may have been, the plaintiffs failed to make out a cause of action. *Elvington v. Shingle Co.*, 191 N. C., 515. "Malicious motive makes a bad act worse, but it cannot make that wrong which in its own essence is lawful. . . . As long as a man keeps himself within the law by doing no act which violates it, we must leave his motives to Him who searches the heart."

Biggers v. Matthews, 147 N. C., 299. We hold that the acts of the defendant were within the law.

In the complaint there is no allegation that the defendant made any false or fraudulent representation to Barber and his wife, and no allegation that the defendant breached any contract with the plaintiffs to cooperate with them in the sale of the land to Barber and his wife or any other third person, and no allegation upon which an action for slander of title might be predicated. Therefore it would seem that any loss that the plaintiffs suffered by reason of the defendant's acts in the premises was the result of lawful competition, and the law does not protect one against competition. Disturbance or loss resulting therefrom is *damnum absque injuria. Swain v. Johnson,* 151 N. C., 93.

"An action cannot, in general, be maintained for inducing a third person to break his contract with the plaintiff; the consequence, after all, being only a broken contract, for which the party to the contract may have his remedy by suing upon it." Cooley on Torts, 4th Ed., Vol. 2, p. 602, sec. 360. See, also, *Biggers v. Matthews, supra; Swain v. Johnson, supra; Elvington v. Shingle Co., supra,* all of which are authority for the action of the Superior Court in allowing the motion for judgment as of nonsuit.

The position of the appellant that the failure of the defendant to appeal from the judgment overruling a demurrer to the complaint was *res adjudicata* of the question raised upon the motion for judgment as of nonsuit is untenable, since a demurrer is addressed to the pleadings and a motion for nonsuit is addressed to the evidence.

Affirmed.

HENRY H. COKER AND WIFE, RUTH COKER, v. VIRGINIA-CAROLINA JOINT-STOCK LAND BANK, INC., AND G. M. MAXWELL.

(Filed 20 March, 1935.)

1. Home site A b: Mortgages A a: Infants A c—Minor wife may disaffirm her joinder in mortgage on husband's home site upon her majority.

A minor wife's joinder in the execution of a mortgage on the home site of her husband may be disaffirmed by her within three years after her majority, her husband living, and the execution of the instrument never having been ratified by her, and upon such disaffirmance the mortgage is void, N. C. Code, 4103, and sections 997, 4102, 4103 (a) (b), being separate and distinct statutes, *are held* to have no application to this action.

2. Infants B a—

With certain common-law and statutory exceptions, N. C. Code, 220 (i), 994, 4103 (b), 5181, contracts of infants are voidable at the option of the infant, and when so avoided are void *ab initio.*

APPEAL by defendant Virginia-Carolina Joint-Stock Land Bank, Inc., from *Small, J.*, at January Civil Term, 1934, of WAYNE. Affirmed.

It was alleged in the complaint that the land in controversy is fifty-five acres. It is further alleged: "That the plaintiff Henry H. Coker and Ruth Holmes intermarried on 5 September, 1925, and the said plaintiffs continued to occupy the said land till the fall of 1931. *It being their only home and all the land that they owned.* That on 1 November, 1926, the plaintiffs executed a deed of trust on said above 55 acres of land to the Southern Trust Company, trustee, for the defendant Virginia-Carolina Joint-Stock Land Bank. That on account of the low price of farm products and the high cost of materials which he had to buy in order to farm, that the plaintiff Henry H. Coker, during the years 1928, 1929, and 1930, found it very hard to meet his semiannual payments called for in said deed of trust, and in the year 1931 he was unable to meet his payments due the defendant bank, and although he pleaded for more time and agreed to give additional personal security the said bank refused to give more time. That the defendant bank foreclosed the said deed of trust in August, 1931, and put the plaintiffs out of possession in the fall of 1931. That the plaintiffs are informed and believe that the said bank has since conveyed the said land to defendant G. M. Maxwell, who claims to be in possession of the same. The plaintiff Ruth Coker, the wife of the plaintiff Henry H. Coker, says that at the time of the execution of the aforesaid deed of trust above mentioned she was only 16 years of age, and knew nothing of business, was uneducated, and ignorant of the contents of the said deed of trust, and did not know the meaning of the contents thereof, or that she was conveying away her rights to the home site of herself and her husband, said Henry H. Coker, and that she has not, since becoming of age, by word, act, or deed confirmed the signing of said deed of trust, and that it has not been three years since she became 21 years old. That the said plaintiff Ruth Coker did not receive the money loaned to Henry H. Coker by the defendant bank; that she now disaffirms, repudiates, and avoids the said deed of trust, executed by her to the said defendant, the Virginia-Carolina Joint-Stock Land Bank, Inc., and wishes the said deed of trust set aside, and that she be put back into possession of her said home site, the said 55 acres of land. That the fair rental value of the said 55 acres of land per annum is $300.00. That there were 40 acres cleared, that it would make a bale of cotton per acre, and that it was fine tobacco land.

"Wherefore, the plaintiff Ruth Coker prays: That the deed of trust to the Southern Trust Company, trustee, for the defendant, the Virginia-Carolina Joint-Stock Land Bank, Inc., be declared void; and that the deed from said bank to the defendant G. M. Maxwell be declared void or

set aside; and that she, the plaintiff Ruth Coker, be put into possession of said 55 acres of land described in the foregoing complaint; and that she recover the sum of $300.00 per annum from 1 January, 1932, until possession be restored to her; and for any other and further relief that she, the said plaintiff, may be entitled to; and for the cost of action."

The judgment overruling the demurrer in the court below is as follows: "This cause coming on to be heard and being heard before his *Honor*, W. L. Small, judge holding the courts of the Fourth Judicial District at Goldsboro, N. C., at the January Civil Term of Wayne Superior Court, upon the demurrer filed in said cause by the defendant Virginia-Carolina Joint-Stock Land Bank and the plaintiffs and said defendant being represented in court by counsel; and the court having heard the arguments presented on behalf of the plaintiffs and on behalf of the said defendant Virginia-Carolina Joint-Stock Land Bank, and having examined the complaint filed in said cause, and being of opinion that the complaint does state a cause of action, in that the same alleges that the property conveyed by the deed of trust, in which the plaintiff Ruth Coker joined during her minority, was a conveyance of the home site owned by her husband, and that this action was brought for the recovery of the possession of said home site within three years after the female plaintiff became 21 years of age, and that her husband, plaintiff Henry H. Coker, is living. It is now therefore ordered, adjudged, and decreed that the demurrer filed in this cause by the defendant Virginia-Carolina Joint-Stock Land Bank be and the same is hereby overruled, and said defendant shall have an opportunity to file its answer within the time allowed by law."

Judgment was rendered on the verdict. The only exception and assignment of error made by defendant was to the judgment as signed.

H. B. and Ed Parker and W. A. Dees for plaintiff.
Worth & Horner for defendant.

CLARKSON, J. The question presented: Does N. C. Code 1931 (Michie), sec. 4103, authorize a married woman under the age of 21 years to convey her interest in the home site as defined in said statute? We think not.

It is alleged in the complaint that the land in controversy contained fifty-five acres, and it being the only home and all the land owned by plaintiffs. That at the time of the execution of the deed of trust to the Southern Trust Company, trustee for the Virginia-Carolina Joint-Stock Land Bank, Inc., Ruth Coker was 16 years of age. "And that she has not, since becoming of age, by word, act, or deed confirmed the signing of said deed of trust, and that it has not been three years since she became 21 years old."

N. C. Code 1931 (Michie), sec. 4103, is as follows: "No deed or other conveyance, except to secure purchase money, made by the owner of a home site, which shall include the residence and other buildings, together with the particular lot or tract of land upon which the residence is situated, whether actually occupied by said owner or not, shall be valid to pass possession or title during the lifetime of the wife without the voluntary signature and assent of his wife, signified on her private examination according to law: *Provided,* the wife does not commit adultery, or has not and does not abandon the husband and live separate and apart from him."

Sections 997, 4102, and 4103 (a) (b), are separate and distinct statutes and have no application to the facts in the present case. In regard to the "home site" so far as the rights of the wife are concerned, the statute is mandatory. The language is that "no deed or other conveyance, except to secure purchase money . . . shall be valid to pass possession, or title, during the lifetime of the wife," etc. This whole matter was thoroughly discussed in *Boyd v. Brooks,* 197 N. C., 644, and the act held constitutional. In that case the wife did not join in the conveyance of the "home site" as required by the statute. In the present case she joined in the conveyance of the "home site," but was an infant under 21 years of age, and from the complaint has never ratified the conveyance within three years after she became of age. The general rule is that contracts of an infant are voidable at the option of the infant, and when avoided the contract is null and void *ab initio. Pippen v. Mutual Ben. Life Ins. Co.,* 130 N. C., 23; *Morris Plan Co. v. Palmer,* 185 N. C., 109; *Collins v. Norfleet-Baggs,* 197 N. C., 659. To the general rule there are exceptions, such as necessities and certain statutory exceptions. N. C. Code (Michie), secs. 220 (i); 994; 4103 (b), *supra;* 5181 (Building and Loan Association), and perhaps others. For the reasons given, the judgment of the court below is

Affirmed.

STATE v. JEROME MORRIS.

(Filed 20 March, 1935.)

1. **Criminal Law L g—**

The State may appeal from judgment for defendant upon a special verdict, upon a demurrer, upon a motion to quash, or upon arrest of judgment. N. C. Code, 4649.

2. **Bastards B c—Bastardy Act is repealed in toto by Act of 1933.**

The old bastardy act is repealed *in toto* by ch. 228, Public Laws of 1933, the provisions of sec. 2 that the Act of 1933 should not affect pending

litigation or accrued actions being repugnant to the specific repealing clause of sec. 9, and in a prosecution under the Act of 1933 a demurrer on the grounds that proceedings under the old bastardy act were then pending should be overruled. C. S., 265, *et seq.*

3. Same—

In a prosecution under ch. 228, Public Laws of 1933, it is immaterial when the illegitimate child was begotten, the offense under the act being the wilful neglect or refusal to support and maintain an illegitimate child born after the ratification of the act.

APPEAL by the State from *Barnhill, J.*, at October Term, 1934, of LEE. Reversed.

The judgment of the court below is as follows: "This criminal action coming on to be heard before the undersigned at this the October Term, 1934, of Lee Superior Court, upon the motion filed by the defendant, as will appear of record, and upon the hearing of the same it is agreed between the State and the defendant that the following are the pertinent facts herein, to wit: That on 14 February, 1933, Mabel Hooker, then being pregnant with child, instituted proceedings under the old bastardy statute as it existed prior to the Act of 1933; that upon the hearing in said action it was adjudged that the defendant was the putative father of said child, and judgment was entered accordingly, for $150.00 for maintenance of said child; that the defendant appealed from said judgment to the Superior Court; that said child was born on 17 May, 1933; that on 29 September, 1934, the said Mabel Hooker procured the issuance of a warrant under the terms of chapter 228, Public Laws of 1933, against the defendant, charging him with the crime of having wilfully neglected, failed, and refused to support his bastard child, as set out in said warrant, this cause being the cause as instituted by said warrant; that on 12 October, 1934, the defendant attempted to withdraw his appeal from the original judgment in the bastardy proceedings, same having been undertaken before the clerk, and not the judge presiding; that the defendant has never complied with the original judgment in the bastardy proceedings, but is now in jail under order issued by the magistrate after the defendant attempted to withdraw his said appeal. Upon the foregoing agreed facts, the court is of the opinion that the proviso in section 2 of chapter 228, Public Laws of 1933, 'that the provisions of this act shall not apply to pending litigation or accrued actions,' exempts this defendant from prosecution under the Act of 1933; it is therefore ordered and adjudged that this action be and the same is dismissed from the docket. M. V. Barnhill, Judge presiding."

To the foregoing judgment of dismissal, the State excepts and appeals to the Supreme Court. The only exception and assignment of error on

the part of the State is as follows: "His Honor erred when he rendered judgment as appears of record, sustaining one of defendant's grounds of demurrer in his plea in abatement, and in ordering and adjudging that this action be dismissed from the docket."

Attorney-General Seawell and Assistant Attorney-General Aiken for the State.
E. L. Gavin for defendant.

CLARKSON, J. The State is limited to appeals under N. C. Code 1931 (Michie), sec. 4649, as follows: "An appeal to the Supreme Court may be taken by the State in the following cases, and no other. Where judgment has been given for the defendant—(1) Upon a special verdict. (2) Upon a demurrer. (3) Upon a motion to quash. (4) Upon arrest of judgment."

Public Laws of North Carolina, Session 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." *S. v. Cook,* 207 N. C., 261.

Section 2 is as follows: "The provisions of this act shall apply whether such child shall have been begotten or shall have been born within or without the State of North Carolina: *Provided,* that the child to be supported is a *bona fide* resident of this State at the time of the institution of any proceedings under this act: *Provided,* the provisions of this act shall not apply to pending litigation or accrued actions."

Section 9 is as follows: "All acts or parts thereof inconsistent with the provisions of this act are hereby repealed. In particular, the following sections of the Consolidated Statutes of North Carolina are hereby repealed: Sections 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 1632, subsec. 1."

Section 265, *supra,* is as follows: "Justices of the peace of the several counties have exclusive original jurisdiction to issue, try, and determine all proceedings in cases of bastardy in their respective counties. A warrant in bastardy shall be issued only upon the voluntary affidavit and complaint of the mother of the bastard; or upon the affidavit of one of the county commissioners, setting forth the fact that the bastard is likely to become a county charge." This section 265, *supra,* and the other sections cover the entire field of the old bastardy act, which was a civil action.

The Act of 1933 was intended to cover the entire subject dealing with bastardy, and will work a repeal of all the former bastardy acts. *Lassiter v. Commissioners,* 188 N. C., 379 (383). In fact, the repealing clause of the new act clearly repeals the old act. Section 9 of the act says: "In particular" (section 265, *et seq., supra*) "are hereby repealed." By a repeal of these sections the very cornerstone of the old bastardy act is knocked out, and the new act becomes operative. We think the sections 2 and 9 are not reconcilable and the old bastardy act *in toto* is repealed. We think the questions presented by this appeal have been decided adversely to the position taken by the defendant in the case of *S. v. Mansfield,* 207 N. C., 233.

The Act of 1933, ch. 228, was ratified 6 April, 1933. The child was born 17 May, 1933, after the ratification of the act. In *S. v. Mansfield, supra,* at p. 236, we said: "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."

The judgment of the court below is

Reversed.

STATE v. EDGAR PIERCE.

(Filed 20 March, 1935.)

Indictment E e—Counts in indictment held separate and distinct and defendant could be acquitted on one and found guilty on the other.

Defendant was indicted in two counts, one under N. C. Code, 4242, for wantonly and wilfully burning a dwelling-house used as a storehouse or barn, and the other under N. C. Code, 4245 (a), for wilfully and maliciously burning personal property in such dwelling, with intent to injure the owner thereof. The court charged the jury that defendant could be found guilty on both counts, or not guilty on one count and guilty on the other. Defendant appealed from a conviction on the second count. *Held:* Defendant's contention that a verdict of not guilty on the first count necessarily carried a verdict of not guilty on the second count upon his exception to the charge for separating the counts cannot be sustained, the counts being separate and distinct and each requiring proof of facts which the other does not.

APPEAL by defendant from *Small, J.,* and a jury, at November Term, 1934, of BERTIE. No error.

This is a criminal action. The defendant was charged in two counts in the bill of indictment, which will hereafter be set forth, and convicted on the second count. The court below, under the verdict, imposed sentence on defendant. The defendant made several exceptions and assignments of error, and appealed to the Supreme Court.

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

E. R. Tyler and J. H. Matthews for defendant.

CLARKSON, J. N. C. Code 1931 (Michie), sec. 4242, is as follows: "If any person shall wantonly and wilfully set fire to or burn, or cause to be burned, or aid, counsel, or procure the burning of any church, chapel, or meeting-house, or any stable, coach house, outhouse, warehouse, office, shop, mill, barn, or granary, or to any building or erection used in carrying on any trade or manufacture, or any branch thereof, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, he shall be guilty of a felony, and shall be imprisoned in the State's Prison for not less than two nor more than forty years."

Under the above section, the first count in the bill of indictment reads as follows: "The jurors for the State upon their oath present: That Edgar Pierce, late of the county of Bertie, on 28 March, 1934, with force and arms, at and in the county aforesaid, did unlawfully and wilfully and feloniously set fire to and burn a dwelling-house of E. B. Hughes, used by the said E. B. Hughes as a storehouse or barn, against the form of the statute in such case made and provided and against the peace and dignity of the State."

N. C. Code 1931 (Michie), sec. 4245 (a), is as follows: "Any person who shall wilfully or maliciously burn, or cause to be burned, or aid, counsel, or procure the burning of any goods, wares, merchandise, or other chattels or personal property of any kind, whether the same shall be at the time insured by any person or corporation against loss or damage by fire or not, with intent to injure or prejudice the insurer, creditor, or the person owning the property, or any other person, whether the same be the property of such person or another, shall be guilty of felony."

Under this section the second count in the bill of indictment reads as follows: "And the jurors aforesaid, on their oaths as aforesaid, do further present: That Edgar Pierce, late of the county of Bertie, on 28 March, A.D. 1934, with force and arms, at and in the county aforesaid, did unlawfully, wilfully, feloniously, and maliciously set fire to and burn certain personal property of the said E. B. Hughes, to wit: A quantity of corn, shingles, and hay, and with intent to injure him, the said E. B. Hughes; said personal property being stored in a dwelling-house used by said E. B. Hughes as a storehouse or barn, belonging to the said E. B. Hughes, against the form of the statute in such cases made and provided, and against the peace and dignity of the State."

We think the two counts set forth are separate and distinct offenses under the above statutes.

In the first count, to reach a conviction of the defendant, the State must prove beyond a reasonable doubt that the act was done "wantonly and wilfully," and the subject is "any building"—in the present case, a dwelling-house. In the second count, to reach a conviction of the defendant, the State must prove beyond a reasonable doubt that the act was done "wilfully or maliciously," and the subject is "chattels or personal property of any kind," in the present case, a quantity of corn, shingles, and hay, and the statute further requires that this act must be done "with intent to injure . . . the person owning the property," etc.

The court below charged the jury: "You can find him (the defendant) guilty under both counts, or guilty under one count, and not guilty under the other, but before you can find him guilty of either you must be satisfied, beyond a reasonable doubt, of his guilt."

The defendant contends that there is error in the charge: "For the reason that the charge separates the burning of the barn from the burning of the personal property inside the barn. The jury returned a verdict of not guilty of burning the barn, and which necessarily carried a verdict of not guilty of burning the personal property inside of the barn, under all of the evidence in the instant case. If he was not guilty of burning the barn he could not be guilty of burning the personal property in the barn."

We cannot sustain defendant's contention. The two offenses are separate and distinct. The fact that in setting fire to the corn, shingles, and hay with intent to injure the person owning the property cannot be imputed to him for righteousness, because in so doing he was guilty of another and different offense in burning the house.

In *S. v. Nash,* 86 N. C., 650 (651), we find: "To support a plea of former acquittal, it is not sufficient that the two prosecutions should grow out of the same transaction, but they must be for the same offense; *the same, both in fact and in law.*" *S. v. Gibson,* 170 N. C., 697; *S. v. Malpass,* 189 N. C., 349.

In *S. v. Malpass, supra,* at p. 355, it is said: "If two statutes are violated, even by a single act, and each offense requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the one statute. *S. v. Stevens,* 114 N. C., 873; *S. v. Robinson,* 116 N. C., 1046. To the same effect: *S. v. Hankins,* 136 N. C., 621."

In *S. v. Sisk,* 185 N. C., 696 (700), it is said: "The indictment was against the father and the two boys as coprincipals. If the defendants

originated the firing in which Zeigler was killed, and the boys were in armed resistance to the service of legal process, they were responsible for the homicide of the officer. So far as they are concerned, it is no defense that the officer was killed by their father, whom the jury, whether rightly or wrongly, acquitted of any responsibility, presumably upon the ground that the old man's part in the fight was taken in self-defense. The verdict as to him cannot be considered by us, and it 'cannot be imputed to the defendants for righteousness.' "

The present case is distinguished from *S. v. Bell,* 205 N. C., 225, and *S. v. Clemmons,* 207 N. C., 276. The exceptions and assignments of error made by the defendant cannot be sustained. For the reasons given there is, in the judgment of the court below,

No error.

H. P. BROWN v. TENNESSEE COAL, IRON AND RAILROAD COMPANY.

(Filed 20 March, 1935.)

Appeal and Error J c: Process B d—Finding, supported by evidence, that foreign corporation was not doing business in the State held conclusive.

Defendant, a foreign corporation, was served with summons by service upon the Secretary of State in accordance with C. S., 1137. Defendant entered a special appearance and moved to dismiss the action for want of jurisdiction. *Held:* Upon the hearing of the motion, the finding of the trial court, supported by evidence, that defendant is not, and was not at the date of service of summons upon the Secretary of State, doing business in North Carolina is conclusive and not subject to review upon appeal, even conceding that there was evidence to the contrary, and judgment dismissing the action upon such finding was proper.

APPEAL by plaintiff from *Hill, Special Judge,* at April Term, 1934, of FORSYTH. Affirmed.

This action was begun by a summons duly issued on 21 October, 1933, by the clerk of the Superior Court of Forsyth County. This summons was served by the sheriff of Wake County, North Carolina, on 25 October, 1933, on Stacey W. Wade, Secretary of State of North Carolina, under the provisions of C. S., 1137, and duly returned showing such service. The complaint was duly filed on 10 November, 1933.

It is alleged in the complaint that the plaintiff is a resident of Forsyth County, North Carolina, and, on information and belief, that the defendant is a corporation organized and existing under and by virtue of the laws of the State of Alabama, with its principal office and place of

business in the city of Birmingham, in said State, and that said defendant is now and was at all times mentioned in the complaint doing business in the State of North Carolina.

On the facts alleged in the complaint, the plaintiff demands judgment that he recover of the defendant large sums of money as damages for its breaches of the contracts between plaintiff and defendant, as alleged in the complaint.

In apt time a motion was made in the action on behalf of the defendant, which is in writing and is as follows:

"Now comes the defendant Tennessee Coal, Iron and Railroad Company, by its attorneys appearing specially for the purpose of this motion only, and for no other purpose whatsoever, and moves:

"1. That this court quash, set aside, and hold for naught the pretended service of summons upon said defendant, and the return of said service;

"2. That this court dismiss this action.

"As grounds of this motion, the defendant says:

"1. That the defendant Tennessee Coal, Iron and Railroad Company is a corporation, organized and existing under and by virtue of the laws of the State of Alabama, with its principal place of business in Birmingham, Alabama.

"2. That the defendant is not now, and was not at the time of the said pretended service of summons, nor at any mentioned time prior thereto, doing business in the State of North Carolina; that it has never come into the State of North Carolina for the purpose of doing business therein; that it has no property in the State of North Carolina; that it has no qualified agent therein upon whom service can be had, nor, as it is informed and believes, is it necessary for it to have any such agent; that it has never been licensed to do business within the State of North Carolina; that it has never complied with any of the statutes of the State of North Carolina relative to a foreign corporation doing business in North Carolina; and that it has never sought, through compliance with said statutes, or any of them, to do business in the State of North Carolina.

"3. That said defendant was not at the time of said pretended service found within said State of North Carolina, is not amenable to service of process within the State of North Carolina, and has not waived due service of summons herein by voluntary appearance or otherwise.

"4. That this court has no jurisdiction by reason of said pretended service of summons upon the Secretary of State of North Carolina, or by reason of said return thereon.

"5. That the pretended service of summons upon this defendant being improper and insufficient, as above stated, the Superior Court of Forsyth County, North Carolina, from which court summons was issued, never

acquired and does not now have by reason of said pretended service jurisdiction over said defendant; and that as said defendant is not doing business in North Carolina, and has no property in North Carolina, service of summons upon the Secretary of State of North Carolina cannot be had so as to give this court jurisdiction over the defendant Tennessee Coal, Iron and Railroad Company.

"In support of this motion, defendant will offer affidavits herein and hereon.

"CRAIGE & CRAIGE,
RATCLIFF, HUDSON & FERRELL,
Attorneys for Defendant."

At the hearing of the foregoing motion evidence was offered by both the defendant and the plaintiff in support of their respective contentions. On the facts found from all the evidence the court was of opinion, and held, that the defendant is not now and was not at the date of the service of the summons in this action upon the Secretary of State of North Carolina doing business in the State of North Carolina, and accordingly ordered and adjudged that the service of summons be quashed, set aside, and vacated, and that the action be dismissed.

From judgment dismissing the action the plaintiff appealed to the Supreme Court, assigning as error the finding by the court that the defendant is not now and was not at the date of the service of summons in the action doing business in this State, and the failure of the court to find that the defendant is now and was at the date of the service of the summons doing business in this State.

Eugene M. Whitman, Thos. A. Banks, and J. M. Broughton for plaintiff.

Benners, Burr, McKamy & Forman, Craige & Craige, and Ratcliff, Hudson & Ferrell for defendant.

CONNOR, J. Conceding without deciding that there was evidence at the hearing of defendant's motion in this action tending to show that the defendant, a foreign corporation, was doing business in this State at the time the summons in this action was served on the Secretary of State of North Carolina, under the provisions of C. S., 1137, we find in the record ample evidence to the contrary. For that reason, the findings of fact made by the court from all the evidence, and fully set out in the order, are conclusive and not subject to review by this Court. *Lumber Co. v. Finance Co.*, 204 N. C., 285, 168 S. E., 219, and cases cited in the opinion in that case.

On the findings of fact, which are supported by evidence appearing in the record, there was no error in the order that the service of the summons be quashed, set aside and vacated, or in the judgment dismissing the action. *Timber Co. v. Insurance Co.,* 192 N. C., 115, 133 S. E., 424. See *Lunceford v. Commercial Travelers Mutual Accident Association,* 190 N. C., 314, 129 S. E., 805.

The judgment is

Affirmed.

S. A. WARD v. L. C. NURNEY.

(Filed 20 March, 1935.)

Sales F f—

Where the evidence is conflicting whether the purchaser signed a renewal note for machinery before or after discovery by him of breach of warranty, the question of waiver is for the jury, and a peremptory instruction in plaintiff's favor on the note is error.

CIVIL ACTION, before *Grady, J.,* at October Special Term, 1934, of WASHINGTON.

The plaintiff brought suit in a court of a justice of the peace on a note under seal, dated 1 January, 1924, for $150.00, payable to plaintiff. The defendant filed an answer alleging that he bought an automobile from the plaintiff for $300.00, paying $150.00 in cash and executing a note for $150.00. He further alleged that the plaintiff at the time of the purchase of the car warranted the same to be in "good condition and perfect running order," and that he relied upon such representation so made. He further alleged that he put the car in a shop for repairs, and that mechanics worked upon it for more than eight months and were never able to make it run at all. He further alleged that he was never in the car, never took it from the garage or used it in any way for the reason that it would not run, and was entirely worthless, and that he had spent more than $80.00 in an effort to put the car in running condition.

Having admitted the execution of the note, plaintiff assumed the burden and testified at the trial with respect to the representations so made, that the same were false, and that the note was wholly without consideration for the reason that the car would not run and could not be put into running condition, and that he had notified the defendant that he would not pay. The defendant said: "I know it was around eight months before I gave it up as hopeless. . . . They couldn't get it to run, . . . kept running up the bill until I paid him about $80.00, and I just told him to stop. Thereupon I saw Mr. Ward. I

told him the car was at the garage and that he could get it and do what he pleased with it, I did not intend to pay anything else on it. . . . I don't know what finally became of the car. I never drove it. . . . I have not paid a penny on this note and have not paid a penny on it since it was executed. I was induced to buy the car in the first place because I had confidence in Mr. Ward. I believed what he said and relied on what he said. . . . I can't say exactly when I bought the car. I think it was around 1924. It must have been in 1923. I could not say positively. . . . Immediately upon buying the car I sent Mr. Guirkin to get it and take it to his garage. If I did that in January, 1923, and in eight months found out that the car was no good, I couldn't say why I gave Mr. Ward another note in January, 1924. I suppose I thought I could eventually get it so it would be all right. I don't remember when I bought the car. In January, 1924, I probably signed another note for $150.00, the note they have here. . . . At the time I signed this note, dated 1 January, 1924, I had not found out that the car was worthless. If I had known at that time that the car was worthless I would not have signed the note." A mechanic, who worked on the car, testified for the defendant that the car stayed in the garage about twelve months, and that it was eventually sold for $35.00. He said: "I never got it so it worked good. . . . It was not worth anything as an automobile in the condition it was in."

The following issues were submitted to the jury:

1. "Was the execution of the $150.00 note procured by false and fraudulent representations, as alleged in the answer?"

2. "In what amount is defendant indebted to plaintiff?"

The trial judge directed the jury to answer the first issue "No," and the second issue "$140.00, with interest."

S. A. Ward, Jr., for plaintiff.
W. L. Whitley for defendant.

BROGDEN, J. The defendant offered competent evidence tending to establish a warranty and the breach thereof. There was also evidence upon which a jury could have inferred that the plaintiff gave the note in controversy as a renewal of a former note after he had knowledge of the breach of warranty and the worthless condition of the car.

Manifestly, upon such facts, nothing else appearing, the peremptory instruction would have been correct. *Barco v. Forbes,* 194 N. C., 204, 139 S. E., 227; *Bulluck Auto Co. v. Meyer,* 206 N. C., 198, 172 S. E., 877.

However, the plaintiff testified that he did not know exactly when he bought the car, but did state positively, "At the time I signed this note,

dated 1 January, 1924, I had not found out that the car was worthless. If I had known at that time that the car was worthless I would not have signed the note."

While the testimony is indefinite and wobbles considerably, nevertheless, it warranted submittal to the jury.

Reversed.

W. F. NUFER, FIDELITY PHŒNIX FIRE INSURANCE COMPANY, AND SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 20 March, 1935.)

1. Evidence D h—

In an action to recover damages caused by a fire alleged to have been set out by defendant's railroad engine, evidence that one of defendant's engines had theretofore set out fires is incompetent in the absence of evidence that this particular engine set out the fire in suit.

2. Same—Plaintiff must establish that fire originated from engine before attempting to identify the engine by elimination.

Where plaintiff's allegation that the fire in suit was caused by defendant's railroad engine is denied, and the fact that the fire originated from a railroad engine is not established, plaintiff's contention that evidence that one of defendant's engines had theretofore set out fires was competent in that the engine was identified by showing that the other two engines at the scene at the time were not responsible therefor, cannot be sustained.

APPEAL from *Barnhill, J.*, at October Term, 1934, of WAYNE. No error.

The individual plaintiff alleges that the burning of his planing mill and connected buildings was caused by the negligent operation of a locomotive engine of the defendant railroad company whereby he was damaged in the sum of $16,000; and the plaintiff insurance companies allege payment, under policies issued upon said mill and buildings, of the sum of $500.00 each, and their respective rights of subrogation to that amount.

The defendant railroad company denies the allegation of negligence, and, for want of information, the payment by the insurance companies; and for further defense set up certain contracts running with the land existing between the defendant and those through whom the individual plaintiff claims title.

Appropriate issues were submitted, as follows:

"1. Was the property of the plaintiff damaged by the negligence of the defendant, as alleged in the complaint?

"2. What damages, if any, has plaintiff sustained?

"3. Did the Virginia Box and Lumber Company execute the contract dated 13 June, 1916, with the Atlantic Coast Line Railroad Company, as alleged in the answer?

"4. If so, on 27 November, 1931, did the plaintiff W. F. Nufer have actual notice of the covenants in said agreement of 13 June, 1916, as alleged in the answer?"

The jury answered the first issue in the negative and left the remaining issues unanswered.

From a judgment for the defendant, the plaintiffs appealed to the Supreme Court, assigning errors.

Langston, Allen & Taylor for appellants.

Thos. W. Davis, V. E. Phelps, Dickinson & Bland, and W. B. R. Guion for appellee.

SCHENCK, J. The answering of the first issue in favor of the defendant and the leaving of the subsequent issues unanswered obviate the necessity of our passing upon any assignments of error except those relating to the first issue.

The appellants seem to rely upon their assignments of error which assail the ruling of his Honor in excluding evidence as to prior fires set out by the defendant's shifting engine, or yard engine. A perusal of the pleadings and of the evidence (we have not the benefit of the charge in the record) leaves us with the impression that this case was tried upon the theory that the defendant's engine No. 1666, drawing through freight train No. 217, was the engine that set out the fire. There is no evidence which tends to show that the shifting engine, No. 182, was in close proximity of the burned buildings when the fire originated, or that tends to establish it as the source of the conflagration. In other words, there is no evidence to identify the shifting engine No. 182 as the engine that set out the fire. Therefore, the evidence as to prior fires set out by the shifting engine was properly excluded.

The rule of evidence here applicable has been enunciated by this Court as follows: "It is conceded that where a fatal fire has been set out from a designated or known engine, it is admissible to introduce evidence of other fires previously set out by the same engine for the purpose of showing its defective condition, but the rule has never been extended so as to permit evidence of sparks emitted by some other engine at some other time and place." *Kerner v. R. R.*, 170 N. C., 94. And again in *Heath v. R. R.*, 197 N. C., 541, where the defendant insisted that the testimony of a certain witness to the effect that an engine of the defendant was throwing sparks the night before the plaintiff's property was

burned was incompetent, it is said: "The position of the defendant upon this point would be sound and effective if the record did not disclose that the same engine was involved."

The position of the appellants that since only three engines were in the vicinity of the burned buildings at the time the fire originated, namely, the engine of through freight train No. 217, the engine of the through passenger train No. 42, and the shifting engine No. 182, and since the evidence excludes the engine of train No. 217 and the engine of train No. 42 as the engine that set out the fire, it necessarily follows that the shifting engine No. 182 set out the fire. This would be true if it be conceded that the fire was set out by an engine, but this fact is denied. Hence, it became necessary for the plaintiffs to establish that the fire originated from an engine of the defendant before they could identify which engine by elimination. The case was one for the twelve, and they, under a charge to which there was no exception, have answered the determinative issue in favor of the defendants. We find

No error.

HARRY BROWN v. ATLANTIC COAST LINE RAILROAD COMPANY ET AL.

(Filed 20 March, 1935.)

1. **Railroad D b—Complaint held to allege negligence of railroad as concurrent cause of accident at crossing.**

   The complaint in this action *is held* to allege negligence on the part of defendant railroad company and the owner of the car in which plaintiff was riding as a guest, which jointly caused the accident at a grade crossing in which plaintiff was injured, and defendant railroad's demurrer, interposed on the ground that the negligence of the owner as alleged insulated the alleged negligence of the railroad as a proximate cause or one of the proximate causes of the injury, should have been overruled.

2. **Automobiles C j: Torts B a—Guest in car may recover of driver and third person for injuries resulting from their concurrent negligence.**

   A person riding in an automobile, the driver of which is not his agent or servant, nor under his control, and who is injured by the joint or combined negligence of a third person and the driver, may recover of either or both, upon proper allegations, for the injuries thus inflicted through such concurring negligence.

APPEAL by plaintiff from *Small, J.*, at January Term, 1935, of WAYNE.

Civil action to recover damages for alleged negligent injury.

The complaint alleges:

1. That on 8 March, 1934, plaintiff was a guest in an automobile owned by Joe Brown and operated at the time by Matthew Kornegay, which collided with a train of the Atlantic Coast Line Railroad Company in the town of Garland, Sampson County, where Highway No. 23 crosses the track of the defendant railroad, and resulted in great injury to the plaintiff.

2. That S. L. Long and J. A. King were, respectively, conductor and engineer in charge of defendant's train.

3. That the crossing was a dangerous one by reason of obstructions on the right of way, etc.

4. That defendants permitted the train to block the highway in such manner and for such an unreasonable length of time as to create a dangerous obstruction, etc., and failed to take any precautions or to warn travelers upon the highway of such dangers.

5. That the defendant Joe Brown was negligent in that his automobile at the time of the collision was in bad condition, defective brakes, etc., and was being driven in a careless and heedless manner, so as to endanger the lives of persons riding in said automobile.

6. That the negligence of each of the defendants continued up to the time of the collision and concurred as a proximate cause in producing plaintiff's injury.

Wherefore, plaintiff prays, etc.

Demurrer interposed by the Atlantic Coast Line, S. L. Long, and J. A. King on the ground that the complaint does not state facts sufficient to constitute a cause of action against said defendants, or any of them. Demurrer sustained. Plaintiff appeals.

Kenneth C. Royall, Robert A. Hovis, and Paul B. Edmundson for plaintiff.

Thomas W. Davis, V. E. Phelps, Dickinson & Bland, and W. B. R. Guion for defendants.

STACY, C. J. The theory of the demurrer and the court's ruling is, that the negligence alleged against the owner of the automobile, *ex necessitate,* insulates the negligence of the demurring defendants as a proximate cause or one of the proximate causes of plaintiff's injury. *George v. R. R.,* 207 N. C., 457; *Ballinger v. Thomas,* 195 N. C., 517, 142 S. E., 761. The conclusion is a *non sequitur* on the allegations of the complaint. *Keller v. R. R.,* 205 N. C., 269, 171 S. E., 73; *Brown v. R. R.,* 204 N. C., 25, 167 S. E., 479; *Sanders v. R. R.,* 201 N. C., 672, 161 S. E., 320; *Godfrey v. Coach Co.,* 201 N. C., 264, 159 S. E., 412; *Campbell v. R. R.,* 201 N. C., 102, 159 S. E., 27; *Ballinger v. Thomas, supra;*

Hanes v. Utilities Co., 191 N. C., 13, 131 S. E., 402; *White v. Realty Co.,* 182 N. C., 536, 109 S. E., 564; *Duffy v. R. R.,* 144 N. C., 26, 56 S. E., 557; 25 R. C. L., 1292; 90 A. L. R., 631.

It is well settled by the decisions here and elsewhere that one who is riding in an automobile, the driver of which is not his agent or servant, nor under his control, and who is injured by the joint or combined negligence of a third person and the driver, may recover of either or both, upon proper allegations, for the injuries thus inflicted through such concurring negligence. *Hanes v. Utilities Co., supra; White v. Realty Co., supra; Wood v. Public Service Corp.,* 174 N. C., 697, 94 S. E., 459; *Pusey v. R. R.,* 181 N. C., 137, 106 S. E., 452; *Bagwell v. R. R.,* 167 N. C., 611, 83 S. E., 814; *Harton v. Tel. Co.,* 141 N. C., 455, 54 S. E., 299; *Carterville v. Cook,* 129 Ill., 152, 16 Am. St. Rep., 248, and note.

The rule is stated in *Matthews v. Delaware L. & W. R. Co.,* 56 N. J. L., 34, 27 Atl., 919, 22 L. R. A., 261, by *Magie, J.,* as follows: "If two or more persons owe to another the same duty, and by their common neglect of that duty he is injured, doubtless the tort is joint, and upon well-settled principles each, any, or all of the *tort-feasors* may be held. But when each of two or more persons owes to another a separate duty which each wrongfully neglects to perform, then although the duties were diverse and disconnected and the negligence of each was without concert, if such several neglects concurred and united together in causing injury, the tort is equally joint and the *tort-feasors* are subject to joint and several liability."

The allegations of the present complaint, properly interpreted, seem to bring the case within this principle.

Reversed.

JOHN H. HALL, ADMINISTRATOR OF B. L. BANKS, DECEASED, v. GURNEY P. HOOD, COMMISSIONER OF BANKS, EX. REL. SAVINGS BANK AND TRUST COMPANY OF ELIZABETH CITY, N. C., MAUD K. BANKS, ET AL.

(Filed 20 March, 1935.)

1. Limitation of Actions A b—

A cause of action against the guarantor on a note accrues upon the maturity of the note and the failure of the maker to pay same according to its tenor. C. S., 405.

2. Limitation of Actions C a—Involuntary payment of note by application of funds of maker in hands of payee to note does not affect running of statute in favor of guarantor on note.

The liquidating agent of a bank wrongfully applied the deposit of an administrator to the payment of a note in the bank's favor executed by

the administrator for the estate. Thereafter, the application of the deposit was set aside, and the liquidating agent prayed judgment on the note against the maker and the guarantor of payment thereon. The guarantor of payment pleaded the three-year statute of limitations, C. S., 441 (1), more than three years having elapsed from the maturity of the note. *Held:* The action against the guarantor was barred, there having been no voluntary payment of the note.

APPEAL by the defendant Maud K. Banks from *Cranmer, J.*, at January Term, 1935, of PASQUOTANK. Reversed.

The defendant Gurney P. Hood, Commissioner of Banks, *ex rel.* Savings Bank and Trust Company of Elizabeth City, N. C., which is now in his hands for liquidation because of its insolvency, has in his possession as an asset of said Savings Bank and Trust Company a note which is in words and figures as follows:

"$2,000.00. ELIZABETH CITY, N. C., 5 December, 1930.

"Without grace, on 3 February, next after date, I promise to pay to the order of Savings Bank and Trust Company of Elizabeth City, N. C., two thousand dollars, at Savings Bank and Trust Company.

"No. 89778—Due 3 Feb. JOHN H. HALL,
Administrator of B. L. Banks."

On the back of said note appear the following endorsements:

"Payment guaranteed. Protest, demand, and notice of nonpayment waived. MAUD KRAMER BANKS."

"Pay to the order of John H. Hall, administrator of B. L. Banks, without recourse on us. SAVINGS BANK AND TRUST COMPANY,
By A. G. SMALL, *Liq. Agt.*"

This note was executed by John H. Hall as administrator of B. L. Banks and endorsed by Maud K. Banks, in renewal of a note for a like amount, which was executed by B. L. Banks and endorsed by Maud K. Banks, and was owned by the Savings Bank and Trust Company at the death of B. L. Banks, on 2 October, 1930.

After the said note came into the possession of the North Carolina Corporation Commission, the predecessor of the defendant Gurney P. Hood, Commissioner of Banks, upon the insolvency of the Savings Bank and Trust Company of Elizabeth City, N. C., A. G. Small, liquidating agent, charged the amount of said note to the account of the plaintiff, marked the note paid, and tendered the same to the plaintiff, with his endorsement as now appears on the note. The plaintiff declined to accept

the note, contending that the liquidating agent had no right, legal or equitable, to charge the same to his account. On 6 October, 1931, the plaintiff instituted this action for an order of the court directing the defendant Gurney P. Hood, Commissioner of Banks, to restore to his credit on his books the amount which had been wrongfully applied by the liquidating agent as a payment of the note.

On 11 May, 1934, pursuant to an order made in this action, on the motion of the defendant Gurney P. Hood, Commissioner of Banks, summons was issued against the defendant Maud K. Banks, who was thereby made a party to the action. Thereafter judgment was rendered at May Term, 1934, directing the defendant Gurney P. Hood, Commissioner of Banks, to restore to the credit of the plaintiff on his books the amount which had been wrongfully applied by the liquidating agent in payment of said note.

In his answer to the complaint in this action the defendant Gurney P. Hood, Commissioner of Banks, prays judgment, in the event the court should direct him to restore to plaintiff's credit the amount applied by the liquidating agent to the payment of said note, that he recover of the plaintiff as maker and of the defendant as guarantor on said note the sum of two thousand dollars and interest.

In her answer to the complaint, in defense of the cross-action alleged in the answer of Gurney P. Hood, Commissioner of Banks, against her, the defendant Maud K. Banks, among other things, says:

"15. That the cause of action, if any, which the defendant Gurney P. Hood, Commissioner of Banks, *ex rel.* Savings Bank and Trust Company of Elizabeth City, N. C., may have had against this defendant, accrued more than three years prior to the issuing of summons in this action against her, and she pleads this lapse of time in bar of any recovery by the said Gurney P. Hood, Commissioner of Banks, of her in this action."

On the foregoing facts, which appear in the statement of facts agreed by the parties to the controversy with respect to said note, the court was of opinion that the cause of action of the defendant Gurney P. Hood, Commissioner of Banks, against the defendant Maud K. Banks is not barred by the three-year statute of limitations, and thereupon rendered judgment that the defendant Gurney P. Hood, Commissioner of Banks, *ex rel.* Savings Bank and Trust Company, recover of the defendant Maud K. Banks the sum of two thousand dollars, with interest thereon from 3 February, 1931.

From said judgment the defendant Maud K. Banks appealed to the Supreme Court.

Thompson & Wilson for Gurney P. Hood, Commissioner.
Worth & Horner for Maud K. Banks.

CONNOR, J. The cause of action on the note involved in this action accrued on 3 February, 1931.

The statute of limitations began to run at that date against the holder and in favor of both the maker and the guarantor of the note. C. S., 405; *Trust Co. v. Clifton,* 203 N. C., 483, 166 S. E., 334.

No voluntary payment has been made on the note since the cause of action accrued by either the maker or the guarantor. The wrongful application by the liquidating agent of the Corporation Commission of the sum of $2,000, which he charged to the account of the maker, was not a voluntary payment of the note, and did not stop the running of the statute of limitations. See *Bank v. King,* 164 N. C., 303, 80 S. E., 252. The statute of limitations continued to run against the holder and in favor of the guarantor of the note, until the issuing of summons in this action against the guarantor on 11 May, 1934.

More than three years having elapsed from the date the cause of action in this note accrued to the date of the commencement of this action, the action is barred. C. S., 441 (1). See *Trust Co. v. Clifton, supra.*

There was error in the judgment of the Superior Court in this action. The judgment is

Reversed.

MRS. W. W. CALL POINDEXTER, WIDOW OF W. W. CALL, v. WILMA CALL, NINA CALL, AND WALTER CALL, JR., HEIRS AT LAW OF W. W. CALL.

(Filed 20 March, 1935.)

1. Appeal and Error F b—

Where there are no findings of fact or request therefor, the Supreme Court, on appeal, will not attempt to ascertain the material facts from conflicting affidavits, upon a sole exception to the judgment.

2. Appeal and Error J d—

The burden is on appellant to show error, the presumption being against him.

3. Dower C a—Creditors of estate objecting to allotment of dower on the grounds that allotment is excessive must pursue remedy in apt time.

While creditors of an estate may be permitted to contest the widow's allotment of dower in proper instances upon the ground that the allotment is excessive, they must pursue their remedy in apt time by excepting to the report of the jury, and their motion to be made parties in order to contest the allotment of dower, made in this case almost three months after approval by the court of the clerk's confirmation of the jury's report, *is held* too late.

4. Dower C c—

Ordinarily, the court, before which exceptions to the report of the jury in the allotment of dower is heard, is the sole judge whether a reassignment or successive reassignments shall be made.

APPEAL by movants from *Oglesby, J.*, at Fall Term, 1934, of WILKES. Affirmed.

This is a motion in the cause lodged before the clerk of the Superior Court of Wilkes County by Mrs. T. J. Call and R. G. Call, creditors of W. W. Call, deceased, to have themselves made parties defendant in a proceeding instituted by Mrs. W. W. Call Poindexter, widow of W. W. Call, against the heirs at law of said W. W. Call for the allotment of her dower under C. S., 4105, *et seq.* The clerk denied the motion and the movants excepted and appealed to the Superior Court. The judgment of the clerk was affirmed by the judge holding the courts of the district, and the movants appealed to the Supreme Court, assigning error.

Bowie & Bowie for appellants.
Chas. G. Gilreath and Burke & Burke for appellee.

SCHENCK, J. The only assignment of error in the record is "that his Honor erred in confirming the judgment of the clerk of the Superior Court overruling the movants' motion to become parties defendant in the dower proceeding."

We gather from the record that the gravamen of the motion is that the movants are judgment creditors of the deceased to the amount of $4,474, and the dower allotted was in excess of one-third in value of the property of which the deceased died seized and possessed, and that the deceased was insolvent, and they are likely to suffer by reason of the excess in value of the allotment. However, it does not appear from the record that they ever requested any findings of fact to this effect, either by the clerk or, upon appeal, by the judge, and neither the clerk nor the judge found these facts, or any other facts.

Where there is no finding of fact, and no request therefor, the Supreme Court, upon appeal, will not attempt to ascertain the truth from conflicting affidavits, and the judgment will be affirmed, it being presumed correct with the burden on appellant to show error. *Henderson v. Hardware Co.*, 204 N. C., 775. We have examined the record, however, and find no reversible error. *Thresher v. Thomas*, 170 N. C., 680; *Cecil v. Lumber Co.*, 197 N. C., 81.

While under certain circumstances the court may permit creditors of a person who died seized and possessed of lands to be made a party to the proceeding for dower and contest the claim of the widow, such creditors must move in apt time. The remedy against an excessive assign-

ment of dower is by exceptions to the report of the jury, and ordinarily the court before which such exceptions are heard is the sole judge whether a reassignment or successive reassignments shall be made. *Stiner v. Cawthorn,* 20 N. C., 640; *Welfare v. Welfare,* 108 N. C., 272.

This proceeding was instituted on 12 May, 1933. The jury made their report allotting dower on 19 May, 1933, and, after it had lain in his office more than 30 days, the clerk confirmed the report on 20 June, 1933. The resident judge of the district approved the clerk's confirmation on 22 June, 1933. The movants did not give notice of their purpose to lodge their motion to be made parties until 15 September, 1933. It would seem that this motion came too late.

The judgment of the Superior Court confirming the judgment of the clerk denying the motion of the movants to be made parties defendant in the proceeding is

Affirmed.

D. L. MAYBERRY v. GEORGE A. GRIMSLEY ET AL.

(Filed 20 March, 1935.)

Deeds and Conveyances C c—Rule in Shelley's case held applicable to deed in this case.

A deed "to M. and her children," with granting clause "to M., her heirs and assigns," and *habendum* "to have and to hold . . . to M., her heirs, and assigns," *is held* to convey no estate to the children of M. *in esse* at the time of the execution of the deed, the word "children" appearing only in the premises, and the intent of the grantor as gathered from the whole instrument being to convey the estate to M. in fee.

APPEAL by plaintiff from *Oglesby, J.,* at August Term, 1934, of YADKIN.

Civil action to restrain foreclosure under deed of trust on ground that plaintiff's wards have an interest in the lands sought to be sold.

The facts are these:

1. On 9 September, 1925, a deed for the land in question was made, according to the premises, "to Nonnie A. Mayberry and her children," while in the granting clause the property is conveyed "to said Nonnie A. Mayberry, her heirs and assigns," and the *habendum* is "To have and to hold . . . to the said Nonnie A. Mayberry, her heirs and assigns," etc.

2. Plaintiff's wards are children of Nonnie A. Mayberry and were *in esse* at the time of the execution and delivery of said deed.

3. On 20 April, 1929, Nonnie A. Mayberry and her husband executed deed of trust on said land, with full covenants of warranty, to George

A. Grimsley, trustee, to secure a loan of $1,000 from the Security Life and Trust Company.

4. Plaintiff seeks to restrain sale or foreclosure under said deed of trust on the ground that his wards are owners, as tenants in common with their mother, of said land.

From judgment dissolving the temporary restraining order and holding the deed of 9 September, 1925, to convey no interest in said land to plaintiff's wards, plaintiff appeals, assigning errors.

W. M. Allen for plaintiff.
Avalon E. Hall and Earl C. James for defendants.

STACY, C. J. Plaintiff's action is grounded on the principle, settled by numerous decisions, that a conveyance or devise to "Nonnie and her children" vests in Nonnie and her children then living, including any *in ventre sa mere,* as tenants in common, the present estate conveyed or devised. *Tate v. Amos,* 197 N. C., 159, 147 S. E., 809; *Cunningham v. Worthington,* 196 N. C., 778, 147 S. E., 294; *Snowden v. Snowden,* 187 N. C., 539, 122 S. E., 300; *Benbury v. Butts,* 184 N. C., 23, 113 S. E., 499; *Cullens v. Cullens,* 161 N. C., 344, 77 S. E., 228.

The defendants, on the other hand, say the doctrine announced in *Boyd v. Campbell,* 192 N. C., 398, 135 S. E., 121, *Triplett v. Williams,* 149 N. C., 394, 63 S. E., 79, and others to the effect that the "intent as gathered from the four corners of the instrument" is to govern, precludes the application of the principle invoked by plaintiff, because the deed in question, taken in its entirety, clearly excludes the children of the grantee as partakers with their mother in the estate conveyed. The "children" appear only in the premises, while the operative words of conveyance, as contained in the granting clause, are "to said Nonnie A. Mayberry, her heirs and assigns." 8 R. C. L., 936 and 1046. This was the view of the trial court, and we agree with his decision.

Affirmed.

IN RE LIQUIDATION OF THE CITIZENS BANK OF MOUNT OLIVE.

(Filed 20 March, 1935.)

Banks and Banking H a—

Judgment in this case dismissing an appeal from the levy of the statutory liability on bank stock for laches or because not taken in apt time for that nineteen or twenty months had elapsed since the assessment, is affirmed. N. C. Code, 218 (c).

APPEAL by C. W. Oliver from *Barnhill, J.*, at October Term, 1934, of WAYNE.

Motion to dismiss appeal from levy of stock assessment.

The facts are these:

1. On 9 January, 1933, the Commissioner of Banks, under authority of C. S., 218 (c), levied a stock assessment against the stockholders of the Citizens Bank of Mount Olive, N. C., including, among others, an assessment of $800 against C. W. Oliver, who appeared upon the books of the bank as the owner of eight shares of its capital stock.

2. The assessment was docketed in the clerk's office, Wayne Superior Court, 11 January, 1933.

3. C. W. Oliver had actual knowledge of this assessment in February, 1933.

4. Notice of appeal was filed 31 August, 1934.

5. Motion to dismiss the appeal for laches, or because not taken in apt time, was heard and allowed solely upon the procedural ground, without considering the question sought to be raised by the appeal, from which ruling this appeal is prosecuted.

Langston, Allen & Taylor for appellant.
Kenneth C. Royall and Robert A. Hovis for appellee.

STACY, C. J. Section 13, chapter 113, Public Laws 1927, provides for summary assessment of liability of stockholders in insolvent banks, *Corp. Com. v. Murphey,* 197 N. C., 42, 147 S. E., 667; and further: "Any stockholder may appeal to the Superior Court from the levy of assessment." No time is designated in the statute for taking the appeal. Hence, we must proceed by analogy to the practice in other like cases so as to effectuate the purpose and intent of the law. *S. v. Carroll,* 194 N. C., 37, 138 S. E., 339.

Whether it was the intention of the General Assembly that the rules governing appeals from justices' courts should apply to appeals from such assessments need not be decided on the present record. *Higdon v. Light Co.,* 207 N. C., 39, 175 S. E., 710. "Where an appeal is expressly or impliedly given, the courts may look to other general statutes regulating appeals in analogous cases and give them such application as the particular case and the language of the statute may warrant, keeping in view always the intention of the Legislature"—*Walker, J.,* in *Cook v. Vickers,* 141 N. C., 101, 53 S. E., 740.

That the appeal should be taken "within a reasonable time" is all the appellant could claim. *Blair v. Coakley,* 136 N. C., 405, 48 S. E., 804. We agree with the trial court that a delay of nineteen or twenty months is too long.

Affirmed.

J. M. FERGUSON ET AL. v. G. D. FERGUSON.

(Filed 20 March, 1935.)

Deeds and Conveyances C f—Verdict that grantee had not breached condition precedent held determinative of grantors' present right to cancellation.

The grantors brought action to cancel deed delivered to the clerk of the court in escrow, delivery to defendant grantee being conditioned upon defendant's maintenance and care of the grantors during the term of their natural lives. Upon sharply conflicting evidence the jury found that defendant had not breached the conditions of the deed. *Held:* By force of the jury's verdict, plaintiffs are not presently entitled to cancellation of the deed, and defendant's ultimate right to the land, conditioned upon his continued performance, is not in issue.

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

APPEAL by plaintiffs from *Warlick, J.,* at August Term, 1934, of YANCEY.

Civil action to cancel deed and to remove same as cloud on plaintiffs' title.

An uncle, desirous of providing for himself and his wife during their old age, makes a deed for 50 acres of land to his nephew in consideration of "care, maintenance, and support for the remainder of our natural lives and for a decent burial of each," and delivers the same in escrow to the clerk of the Superior Court "to be held by the clerk of the court and to be delivered by him to the said G. D. Ferguson following the death of J. M. Ferguson and his wife, on his proving to the satisfaction of the court that he has complied with the terms of said deed."

Upon allegation and denial of no delivery and breach of the condition in said deed "to support and maintain the parties of the first part," the jury returned the following verdict:

"1. Was there an actual delivery of the deed, as set out in the pleadings, from the plaintiffs to the defendant, without conditions? Answer: 'No.'

"2. Was the deed from the plaintiffs to the defendant delivered to Fred Proffitt, clerk of the Superior Court of Yancey County, to be held by him in escrow if and until the conditions set out therein were met by the defendant, and were such conditions set out therein conditions precedent to the actual vesting of the title in the defendant? Answer: 'Yes.'

"3. Did the defendant G. D. Ferguson breach the conditions precedent, and by said breach fail to perform the contract set out in the deed held in escrow by the clerk of the Superior Court of Yancey County? Answer: 'No.'"

Judgment on the verdict that the plaintiffs take nothing by their present action, and that the defendant recover his costs, from which the plaintiffs appeal, assigning errors.

Charles Hutchins for plaintiff.
Watson & Fouts for defendant.

STACY, C. J. This is the same case that was before us at the Spring Term, 1934, opinion filed 2 May, and reported in 206 N. C., 483, 174 S. E., 304.

The real purpose of the action is to have the deed in question surrendered up and canceled for alleged breach of the conditions precedent to vesting of title. Upon sharply conflicting evidence the jury finds that the defendant has thus far complied with his part of the contract. His continued performance, or whether he will ultimately be entitled to the land, is not presently at issue. *Craddock v. Barnes,* 142 N. C., 89, 54 S. E., 1003. The verdict settles the controversy up to now. We have discovered no sufficient reason for disturbing the result. Hence, the verdict and judgment will be upheld.

No error.

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

STATE v. VANDER GLOVER AND HOUSTON MCMILLAN.

(Filed 20 March, 1935.)

1. Criminal Law L c—

Held: Neither evidence admitted over defendants' objection nor evidence excluded on objection by the State was of sufficient probative value to affect the verdict of the jury, and *held further,* there was no error either in the admission or exclusion of evidence.

2. Homicide G c—

Evidence of defendants' guilt of murder in the first degree in killing deceased while attempting to rob him *held* sufficient to be submitted to the jury. C. S., 4200.

3. Criminal Law B a—

Defendants' pleas of mental irresponsibility, one based upon mental incapacity and the other upon drunkenness, *held* determined adversely to defendants by the verdict of the jury upon conflicting evidence.

APPEAL by defendants from *Cranmer, J.,* at June Term, 1934, of CUMBERLAND. No error.

This is a criminal action in which the defendants were convicted of murder in the first degree.

From judgment that the defendants each suffer death by means of electrocution, as prescribed by statute, both defendants appealed to the Supreme Court, assigning as errors in the trial the admission of evidence offered by the State over objections by defendants, the exclusion of evidence offered by defendants on objections by the State, and instructions by the court to the jury, to which the defendants duly excepted.

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

Gilbert A. Shaw and W. Louis Ellis, Jr., for defendants.

CONNOR, J. A careful examination of the assignments of error appearing in the record in this appeal fails to disclose any error in the trial of this action, for which either of the defendants is entitled to a new trial. Neither the evidence admitted over the objection of the defendants nor the evidence excluded on the objection of the State was of sufficient probative value to affect the verdict of the jury. There was no error in the admission or exclusion of this evidence, or in the instruction of the court to the jury to which the defendants excepted. Neither of the assignments of error requires discussion.

All the evidence at the trial of this action shows that the deceased, Robert Williams, was murdered in his home, in a suburb of the city of Fayetteville, N. C., on Saturday night, 10 April, 1934, at about 10 o'clock, and that the murder was committed in the perpetration of a felony, to wit, robbery. The homicide was, therefore, murder in the first degree, as defined by statute. C. S., 4200.

All the evidence further shows that both the defendants were present in the home of the deceased at the time of the murder, and that the defendants and the deceased were the only persons present. The evidence for the State shows that the defendants went to the home of the deceased early Saturday night for the purpose of robbing him of his money, and that in accomplishing that purpose they killed him. One of the defendants cut the throat of Robert Williams with a knife and the other struck him on the forehead with a bottle.

After they were arrested, each defendant made a voluntary confession to the chief of police of the city of Fayetteville, which tended to show that the other defendant committed the murder. There was evidence tending to corroborate each confession, and to contradict so much of each confession as tended to exculpate the defendant who made the confession.

There was evidence tending to show that the defendant Houston McMillan did not have sufficient mental capacity at the time of the murder to be criminally responsible for his act, and that the defendant Vander Glover was so drunk that he did not know what he was doing at the time of the murder. There was evidence to the contrary. This conflicting evidence was submitted to the jury under instructions which are supported by applicable decisions of this Court. The defenses relied upon by the defendants were not sustained by the jury.

The verdict that each defendant is guilty of murder in the first degree is amply supported by the evidence which was submitted to the jury in a charge which is free from error.

The judgment is affirmed.

No error.

STATE v. BOOKER T. WATSON.

(Filed 20 March, 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 statutory time, no extension of time being asked or granted, 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.**

   Where 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.

3. **Same—Where defendant fails to docket his appeal within time prescribed, clerk of Superior Court should certify facts to Attorney-General.**

   Where execution is stayed in a criminal case under C. S., 4654, but the defendant fails to docket his appeal within the time prescribed by Rule 5 of the Rules of Practice in the Supreme Court, the clerk of the Superior Court, in order that the Attorney-General may move to docket and dismiss the appeal, should certify to him the day the court convened, the name of the presiding judge, the organization and action of the grand jury, the indictment in full, the impaneling and action of the trial jury, the judgment, the appeal entries, and the facts constituting abandonment of the appeal, or failure to prosecute it.

MOTION by State to docket and dismiss appeal.

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

STACY, C. J. At the August Criminal Term, 1934, Nash Superior Court, the defendant herein, Booker T. Watson, was tried upon indictment charging him with the murder of one Hines B. Williams, which resulted in a conviction of murder in the first degree and sentence of death. From the judgment thus entered, the defendant gave notice of appeal to the Supreme Court. The clerk certifies that 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 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 failed to make out and serve statement of case on appeal within the statutory period, or the time extended (no extension of time was asked or granted), has lost his right to prosecute the appeal, 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. It is customary, however, in capital cases, where the life of the prisoner is involved, to examine the record to see that no error appears upon its face. *S. v. Goldston,* 201 N. C., 89, 158 S. E., 926. This we have done in the instant case without discovering any error on the face of the record. *S. v. Hamlet,* 206 N. C., 568, 174 S. E., 451.

When an appeal is taken in a criminal prosecution 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 be brought to his attention. *S. v. Etheridge,* 207 N. C., 801.

Even though execution of the judgment is stayed, unless the defendant shall proceed further and docket the appeal within the time prescribed by Rule 5 of the Rules of Practice in the Supreme Court, the clerk of the Superior Court wherein the case was tried should certify the facts to the Attorney-General of the State, to the end that he may move to docket and dismiss the appeal under Rule 17. *S. v. Hooker,* 207 N. C., 648; *S. v. Lea,* 203 N. C., 316, 166 S. E., 292. This certificate ought to show: 1. The day on which the court convened. 2. The name of the judge who presided. 3. Organization and action of the grand jury. 4. The indictment (set out in full). 5. The impaneling and action of the petit jury. (The verdict should be copied *ipsissimis verbis.*) 6. The judgment. 7. Appeal entries. 8. Facts constituting abandonment of the appeal, or failure to prosecute it.

Appeal dismissed.

W. R. McLAMB AND HIS WIFE, IDA McLAMB, v. MONROE McLAMB AND HIS WIFE, MAHALA McLAMB, CITIZENS BANK AND TRUST COMPANY, AND EZRA PARKER, TRUSTEE.

(Filed 20 March, 1935.)

Mortgages H b—Tenant in common paying half the notes secured by deed of trust held entitled to have lands of cotenant sold first under foreclosure.

The owners of land as tenants in common executed, with joinder of their wives, a deed of trust thereon. One of the tenants in common paid one-half the amount due on the notes secured by the deed of trust and brought suit to restrain foreclosure, joining the other tenant in common and his wife as defendants. Pending the action, the lands were partitioned between the tenants in common. *Held:* Judgment entered in the action dissolving prior restraining orders entered in the cause and providing that the trustee should sell the land of the defendant tenant in common before selling the land of plaintiff tenant who had paid his part of the notes, and that if it became necessary to sell plaintiff's land, plaintiff should be subrogated to the rights of the *cestui* in the judgment to the extent his land was subjected to the payment of the judgment, *is held* without error, the right of the *cestui* to have both tracts sold, if necessary to pay the notes, being recognized, and the equities of the tenants in common being protected, and the judgment not being inconsistent with prior restraining orders entered in the cause.

APPEAL by defendants Monroe McLamb and his wife from *Barnhill, J.*, at September-October Term, 1934, of JOHNSTON. Affirmed.

From judgment in this action dissolving certain restraining orders issued from time to time, and directing the sale by the defendant Ezra Parker, trustee, of the lands described in a deed of trust executed by the plaintiff W. R. McLamb and his wife and the defendant Monroe McLamb and his wife to the said trustee to secure notes payable to the defendant Citizens Bank and Trust Company, in accordance with instructions contained in said judgment, the defendants Monroe McLamb and his wife appealed to the Supreme Court.

F. H. Brooks for plaintiffs.
Young & Young for defendants.

CONNOR, J. This action was begun in the Superior Court of Johnston County on 16 December, 1929, to restrain a sale of the lands described in the complaint by the defendant Ezra Parker, trustee, under the power of sale contained in a deed of trust executed by the plaintiffs and the defendants Monroe McLamb and his wife to the said trustee to secure the payment of notes described in said deed of trust, which are payable to the defendant Citizens Bank and Trust Company.

At the date of the commencement of the action the lands described in the deed of trust were owned by the plaintiff W. R. McLamb and the defendant Monroe McLamb, as tenants in common. The notes secured by the deed of trust were executed by the said tenants in common and their wives, who are jointly and severally liable on said notes. The plaintiffs have paid one-half the amount due on said notes; the defendants have not paid any sum on said notes. Since the commencement of this action, the lands described in the deed of trust have been duly partitioned between the tenants in common, each now owning his share in said lands in severalty. During the pendency of the action judgment was rendered that the defendant Citizens Bank and Trust Company recover of the plaintiffs and of the defendant Monroe McLamb and his wife, on the notes described in the deed of trust, the sum of $2,763.99, with interest thereon at the rate of six per cent per annum from 27 April, 1931. Restraining orders were issued in the action from time to time restraining the sale by the trustee in the deed of trust of the lands described therein.

The action was heard by Judge Barnhill, at September-October Term, 1934, of the Superior Court of Johnston County. On the facts found by him, Judge Barnhill dissolved all of the restraining orders issued in the action, and ordered the defendant Ezra Parker, trustee, to sell the lands described in the deed of trust, under the power of sale contained therein, first selling the share which had been allotted to the defendant Monroe McLamb, and then selling the share allotted to the plaintiff W. R. McLamb, if the share allotted to the said defendant did not produce a sum sufficient to pay the amount now due on the notes secured by the deed of trust. He further ordered that in the event the share of the plaintiff W. R. McLamb was sold by the trustee under the judgment, the plaintiff should be subrogated to the rights of the defendant Citizens Bank and Trust Company in and to the judgment rendered in this action, to the extent only that his land was subjected to the payment of said judgment.

The defendants' exception to this judgment is not sustained. The judgment is in accord with the rights, legal and equitable, of all the parties to the action. It is not inconsistent with orders and judgments which have been made and entered in the action, from time to time, and does not overrule or set aside any of said orders or judgments. The right of the Citizens Bank and Trust Company to have all the lands conveyed in the deed of trust sold, if necessary, for the payment of its notes, is recognized by the judgment. The equities of the plaintiffs and the defendants Monroe McLamb and his wife are likewise recognized and protected. The judgment is

Affirmed.

ANNIE C. WALLACE v. CITY OF ASHEVILLE.

(Filed 20 March, 1935.)

Municipal Corporations J b—Claim against city must be filed within prescribed time from first substantial injury to land by continuing trespass.

An action against a city to recover permanent damages resulting to plaintiff's land by reason of defendant municipality's diversion of water therefrom by a dam erected on its property is barred where plaintiff fails to file claim for damages with the city within ninety days after the first substantial injury to her lands, as required by the city charter as a prerequisite to the maintenance of the action against it.

APPEAL by defendant from *Finley, J.*, at October Term, 1934, of BUNCOMBE. Error.

During the month of September, 1923, the plaintiff purchased seventeen acres of land situate in Buncombe County, North Carolina, and located on both sides of Bee Tree Creek. She owned the said land at the commencement of this action, and has owned it continuously since 1923.

During 1926 the defendant, a municipal corporation created under the laws of this State, caused a dam to be erected across Bee Tree Creek, and thereby impounded the waters of said creek in a reservoir, for use by the defendant. The erection of said dam diverted the waters of said creek from their natural course, and permanently damaged the land of the plaintiff. The first substantial injury to said land occurred during the summer of 1927.

On 24 August, 1933, the plaintiff filed with the governing body of the defendant a notice in writing of her claim for damages for the injury to her land. The defendant refused to allow the claim. This action was begun on 14 May, 1934.

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

"1. Did the defendant city of Asheville wrongfully divert the waters of Bee Tree Creek from its natural flow, as alleged in the complaint? Answer: 'Yes.'

"2. Was the plaintiff's property damaged by the wrongful diversion of the water by the city of Asheville, as alleged in the complaint? Answer: 'Yes.'

"3. If so, when did plaintiff sustain the first substantial injury to her land? Answer: '1927, through 1932.'

"4. Did the plaintiff, within 90 days after sustaining her first substantial injury, file a claim in writing with the governing body of the

city of Asheville demanding damages in a definite sum, in accordance with the terms of the charter of the defendant? Answer: 'No.'

"5. In what amount, if any, has plaintiff's land described in the complaint been depreciated in value or damaged by the diversion of water from Bee Tree Creek by the defendant? Answer: '$433.34.'"

From judgment that plaintiff recover of the defendant the sum of $433.34, together with the costs of the action, the defendant appealed to the Supreme Court, assigning errors in the trial and in the judgment.

Ford, Coxe & Carter for plaintiff.
C. E. Blackstock for defendant.

CONNOR, J. The failure of the plaintiff to give notice in writing to the defendant of her claim for damages within 90 days after the first substantial injury to her land, which was a prerequisite to the maintenance of this action, under the provisions of defendant's charter, precludes her recovery in this action. *Dayton v. Asheville,* 185 N. C., 12, 115 S. E., 827; *Biggs v. Asheville,* 198 N. C., 271, 151 S. E., 199.

In view of the answers to the third and the fourth issues submitted to the jury, there is error in the judgment that plaintiff recover of the defendant her damages as assessed by the jury in the answer to the fifth issue. The action is remanded to the Superior Court of Buncombe County that judgment may be entered there in accordance with this opinion.

Error.

S. T. PRICE v. J. T. DAVIS AND D. R. HOCUTT, INTERPLEADER.

(Filed 20 March, 1935.)

Mortgages H m—Mortgagor held not entitled to crops when mortgage is foreclosed and title conveyed prior to severance of crops.

A mortgage on the lands in question was foreclosed in July and deed made to the purchaser on 3 August, under an agreement that the purchaser should hold the land for plaintiff until plaintiff could obtain a loan. In October the purchaser made deed to plaintiff in pursuance of the agreement. *Held:* As between the mortgagor and plaintiff, plaintiff is entitled to the crops, the crops not having been severed at the time of the foreclosure and execution of the commissioner's deed, at which time the mortgagor's interest in the land was terminated.

CIVIL ACTION, before *Cowper, Special Judge,* at November Term, 1934, of JOHNSTON.

The plaintiff owned a tract of land in Johnston County, and in March, 1927, rented part of the land to Ramson Whitley. The interpleader, Hocutt, agreed to furnish certain fertilizer. At that time the land was subject to a mortgage, held by R. B. Whitley, which was past due. A foreclosure suit was brought by Whitley against Price, a commissioner appointed and the land sold on 14 July, 1927, E. J. Wellons being the purchaser thereof. The deed from the commissioner to Wellons was dated 3 August, 1927, and thereafter recorded on 8 November in the same year.

Testimony tended to show that the interpleader, Hocutt, had agreed to buy the land from the plaintiff for $5,000, and that Wellons was to bid off the land and hold it until a Federal Land Bank loan could be secured. Thereafter, on 3 November, 1927, Wellons conveyed the land to D. R. Hocutt and wife. This deed was recorded on 8 November, 1927.

In October, 1927, the plaintiff took 800 pounds of tobacco raised upon the premises and carried the same to the home of one Davis. Davis did not return the tobacco to the plaintiff, and thereupon, on 27 November, 1927, the plaintiff instituted an action against Davis in the recorder's court of Johnston County and issued claim and delivery papers for the 800 pounds of tobacco. Hocutt, who was then the owner of the land, interpleaded in the action and claimed the tobacco by virtue of his purchase of the property.

The recorder's court rendered a judgment in favor of the plaintiff, from which judgment there was an appeal to the Superior Court.

In the Superior Court two issues were submitted to the jury, as follows:

1. "Is the interpleader, D. R. Hocutt, entitled to the possession of the tobacco seized under claim and delivery issued herein?"

2. "What was the value of the tobacco at the time of the seizure?"

The judge instructed the jury to answer the first issue "Yes," and the jury found the value of the tobacco was $220.10.

From judgment upon the verdict the plaintiff appealed.

Parker & Lee for plaintiff.
E. J. Wellons for defendant.

PER CURIAM. The plaintiff, as the owner of the land, claimed possession of the tobacco in controversy. The interpleader claimed the tobacco by virtue of the purchase of the land, and that as there was no reservation of the crop in the deed, his title to the tobacco was paramount. The plaintiff insisted that the crop had been severed prior to

the time the interpleader had acquired title. However, the evidence discloses that the land was sold by virtue of a foreclosure proceeding in July, 1927. Consequently, the plaintiff was divested of title, and there is no evidence that the crop had either matured or been severed at that time. While, of course, the interpleader did not receive a deed until November, 1927, after the crop had been severed, the evidence disclosed that Wellons, the intermediary purchaser, was acting for the interpleader.

The only parties before the Court are the plaintiff, former owner of the land, and the interpleader, the subsequent purchaser thereof. As the action was instituted in 1927, the case of *Collins v. Bass,* 198 N. C., 99, 150 S. E., 706, is in point and determinative. See, also, *Bank v. Page,* 205 N. C., 248, 171 S. E., 68.

Affirmed.

GURNEY P. HOOD, COMMISSIONER OF BANKS, EX REL. PAGE TRUST COMPANY, v. CHARLES E. JOHNSON AND HAMLET ICE COMPANY.

(Filed 20 March, 1935.)

Controversy without Action B d—Trial court held without authority to find fact not appearing in statement of facts agreed.

Where a note signed by defendants as comakers is set out in the agreed statement of facts, and there is no agreement that one of them signed the note as surety, the court is without authority to find as an additional fact that one of the defendants signed as surety for the other, the parties having agreed that the facts stated were the facts relative to the controversy.

APPEAL by defendants from *Grady, J.,* at May Term, 1934, of WAKE. Remanded.

This is an action brought by plaintiff against the defendants to recover the sum of $500.00, and interest, by note, under seal, due at thirty days, dated 22 April, 1933.

The agreed statement of facts is as follows: "The plaintiff and defendants respectfully agree that the facts relative to this controversy, in addition to those admitted in the pleadings, are as follows:

"(1) That on 22 January, 1933, Charles E. Johnson, for value received, executed and delivered to Page Trust Company a promissory note in the sum of five hundred dollars ($500.00), maturing on 22 April, 1933, Hamlet Ice Company not being a party to this note.

"(2) That on 4 March, 1933, Page Trust Company restricted withdrawals to five per cent of the amount then on deposit; and on 5 March, 1933, Page Trust Company was closed under a proclamation of the President of the United States; and that since 5 March, 1933, Page Trust Company has not been open for business on an unrestricted basis.

"(3) That on 22 April, 1933, when the note referred to in paragraph 1 hereof was due, there was delivered to the agent in charge of Page Trust Company a note in words and figures as follows:

"$500.00, Hamlet, N. C., April 22nd, 1933. Thirty (30) days after date without grace, for value received, the undersigned promise to pay to Page Trust Company or order, at its banking house at Hamlet, North Carolina, Five Hundred and 00/100 Dollars. The subscribers, sureties, guarantors, and endorsers hereof hereby agree to remain and continue bound therefor, notwithstanding any extension or extensions of the 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 for its nonpayment, and any and all notice of any extension or extensions of time of payment of it, or any part of it, or of its nonpayment of dishonor or protest or any other notice whatsoever. This note, or any part thereof, at maturity, or any time thereafter, may be charged to account of principal or endorsers, sureties, or guarantors, but a failure to so charge shall not in any way affect the liability of any of the makers, sureties, guarantors, or endorsers of this note. Charles E. Johnson (Seal), Hamlet Ice Company (Seal), By Charles E. Johnson, President (Seal). Due 5-22-33. No. 7658.

"Whereupon the note of 22 January, 1933, was marked 'paid' and returned.

"(4) That on 22 May, 1933, Gurney P. Hood, Commissioner of Banks, took possession of Page Trust Company for the purpose of liquidating the same, and duly appointed as liquidating agent therefor, under the provisions of C. S., 218 (c).

"(5) That on 4 March, 1933, Hamlet Ice Company had on deposit in Page Trust Company the sum of four thousand five hundred and seventeen dollars and ninety cents ($4,517.90); and that said deposit has remained in said bank continuously to this day.

"(6) That no amount has been paid on the note for five hundred dollars ($500.00) referred to in paragraph 3 hereof (unless, as defendant Hamlet Ice Company contends, the same has been paid by offset).

"Upon these facts, the plaintiff contends that Charles E. Johnson and Hamlet Ice Company are indebted to the plaintiff in the sum of five hundred dollars ($500.00), with interest from 22 May, 1933; and

Charles E. Johnson and Hamlet Ice Company contend that Hamlet Ice Company has the right to offset the indebtedness against the deposit of Hamlet Ice Company in Page Trust Company in the sum of four thousand five hundred and seventeen dollars and ninety cents ($4,517.90), and that therefore no amount is due to the plaintiff on said five hundred dollar ($500.00) note referred to in paragraph 3 hereof.

"The parties hereto agree that upon these facts, and upon those admitted in the pleadings, the court may render such judgment as may be proper, it being understood that either party has the right of appeal to the Supreme Court of North Carolina. Respectfully submitted, Kenneth C. Royall, Attorney for Gurney P. Hood, Commissioner of Banks, *ex rel.* Page Trust Company. S. Brown Shepherd, Attorney for Charles E. Johnson and Hamlet Ice Company."

The court below rendered judgment for plaintiff, and defendants excepted and assigned errors and appealed to the Supreme Court. The assignment of errors made by defendants are as follows: "(1) To the finding in the judgment, as follows: 'It is perfectly apparent to the court, although not specifically admitted as a fact, that the second note was substituted for the original, and that Hamlet Ice Company is a surety for its codefendant Johnson.'

"(2) To the finding of the court that the second note was signed by the Hamlet Ice Company as security for the original note.

"(3) To the judgment as rendered."

Kenneth C. Royall and Allen Langston for plaintiff.
S. Brown Shepherd and J. E. Shepherd for defendants.

PER CURIAM. The court below rendered judgment for the plaintiff. In the judgment of the court below is the following: "It is perfectly apparent to the court, although not specifically admitted as a fact, that the second note was substituted for the original, and that Hamlet Ice Company is a surety for its codefendant Johnson." We think the court below was without power to find the fact as above set forth.

The agreed statement of facts recited: "The plaintiff and defendants respectfully agree that the *facts relative to this controversy,* in addition to those admitted in the pleadings, are as follows," etc. For the reasons given, this cause is

Remanded.

S. E. VEST, ADMINISTRATOR OF CHARLIE BLISSCO HEWITT, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 10 April, 1935.)

1. Master and Servant E a—

Where it is admitted that a railroad employee was killed while engaged in interstate commerce, the Federal Employers' Liability Act applies in an action against the railroad to recover for his death.

2. Master and Servant F c—Contributory negligence and assumption of risk held to bar recovery in this action to recover for employee's death.

The evidence disclosed that plaintiff's intestate, a member of a track crew engaged in repairing a grade crossing, was working upon a track adjacent to the track upon which defendant's extra freight train was approaching at a speed of from thirty-five to forty miles per hour, and that intestate's back was toward the approaching train, and that the train whistle was blown about a quarter of a mile away, that the track was straight and unobstructed, that as it approached the crossing the train made enough noise to be easily heard, and that as it approached to within a few feet of intestate, he stepped back from the track where he was working toward the track upon which the train was approaching, and was struck and killed by a beam of the engine. There was no evidence that there were distracting noises at the scene of the accident. *Held:* Defendant's motion as of nonsuit was properly granted.

3. Same—

Under the Federal Employers' Liability Act an employee working upon a live track is charged with knowledge of the conditions and that a train is likely to be upon the scene at any time.

CLARKSON, J., dissents.

CIVIL ACTION, tried before *Stack, J.,* 30 April, 1934. From MECKLENBURG.

Plaintiff's intestate was a white boy about seventeen years old, although he said he was twenty-one. He was a member of a track repair crew, consisting of a foreman and five colored men. These track men were leveling Main Street crossing in Latta, South Carolina. This work was done by placing screenings under and about the crossties. On 1 September, 1928, Charlie Hewitt, plaintiff's intestate, was killed by an extra freight train.

The story of the killing is related by several witnesses. Arthur Flowers, kinsman of the deceased, testified that he was standing thirty or thirty-five yards up the street from the track. He said: "I was standing there talking to Clarence and Homer Carter, two colored boys. . . . I knew the train was coming because I heard it blow down at the edge of town and heard the noise of it. I did not hear it blow at

the crossing. I heard it blow north of the depot as it came into town. That is around one-fourth of a mile from the crossing. I also heard the noise of the train. The closer it came to the street crossing the more noise it made. I guess everybody knew the train was coming. It was making enough noise so that people with good ears could have heard it if they had been listening for it. The whole section crew was working on that crossing. . . . *All the crew went off on the opposite side* except the section foreman and this boy. This boy worked on and the section foreman stayed on the same side the boy was on. I saw all the other hands go to the right-hand side as you look south. . . . The boy was looking south when he was hit and had his back to the train. He was stooped over using the scoop or shovel, looked to be working around the end of the ties. . . . When I heard the train whistle blow it was two crossings down the railroad. I don't know how far it is. . . . Just blowed for the crossing like he was supposed to, and did not blow any more. I was not thinking of whether it was blowing for any other crossing. I didn't have it on my mind. I knew it was coming. The track was perfectly straight. If you had been standing in the middle of the street you could see the train two or three miles. There was no bell ringing. I didn't hear it. I did not have any special reason to listen to the bell." . . .

The foregoing was all the testimony offered by the plaintiff.

The defendant offered the testimony of several witnesses, including the engineer, foreman, and other members of the track crew. The engineer said: "I was on the right-hand side. I could see the section crew. I could not distinguish the boy until I got close to him. They were spreading gravel around the station. All the colored men apparently went over to the north side of the road. This boy was walking along facing west with his back towards the train and just as I got in about three feet of him he made a backward step and the side of my engine hit him there. He had a shovel in his hand. The pilot beam hit him, *which is about the average height of a man's hips.* . . . *I had no* idea he was going to step back against my train. He was clear when I saw him just before he made that step. He was about three feet to the right of the pilot beam before he made that backward step. The train had moved 25 or 30 feet since it stopped blowing. . . . I quit blowing when I was in 25 or 30 feet of it. . . . He was about the same distance from the track all the time, working on the sidetrack south with his back to the track my train was on." In response to a question by the court, the engineer further said: "When I first saw the boy he was on the sidetrack, sprinkling dirt on the sidetrack up between the two, just stepped back three feet." The engineer further said: "He was not on my track. We would have cleared him all right if he had not stepped back. His back was three feet from my track."

McLaurin, foreman, testified that at the time of the killing the track crew, consisting of six men, including the deceased, was leveling up Main Street with screenings while filling up holes in order to make smooth crossings for automobiles. He said: "I called the attention of the hands to the train coming, told them to clear the track. At the time I told them to clear that track, some were on the sidetrack, some on the main line southbound track, and I told them to clear the northbound track, to get out of the way. All the darkies cleared the northbound track and Hewitt and myself stayed over to the right of the southbound track next to the passenger station. . . . When I called to him and told him to let's clear the track he said, 'All right, captain, coming.' I walked up to the edge of the yard of the passenger station. From the time I gave him notice I walked 20 or 30 feet. . . . I was looking at the approaching train. . . . After I turned my face around where I could see him before he was hit was one second, maybe. As I was looking the train hit him. . . . I stopped him from working when the train got some distance from us. I told him to clear the track. He quit working when I told him to quit. He must have started back to work."

The telegraph operator testified that he heard signals and the notice given by the foreman to the workmen near the track.

The defendant offered the testimony of three or four witnesses, including members of the track crew, who testified to the effect that the track was straight, that signals were given by the engineer both by bell and whistle, and that the foreman gave due notice to the workmen to clear the track.

The witness Flowers was recalled and said: "Just before he was struck Charles Hewitt was working, it looked like, sideways. He stayed about the same distance from the track."

It was admitted that plaintiff's intestate at the time of his death was engaged in interstate commerce.

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

John M. Robinson and Hunter M. Jones for plaintiff.
Cansler & Cansler for defendant.

BROGDEN, J. A young white man is employed by a railroad as a member of a track crew, and is engaged in leveling the track at a street crossing in a town in South Carolina. He had been engaged in work for two or three months. While so engaged, an extra freight train approaches in the daytime, traveling at a speed of thirty-five or forty miles an hour. The workman has his back to the train and is apparently scattering screenings or gravel about the end of the crossties.

All other workmen in the squad leave the track in safety, but the deceased remains and is struck in the back by a beam of the engine and killed. At the point of the killing the track is "perfectly straight" for a distance of some three to seven miles, and there are no obstructions to the vision of an employee. At the trial practically all of the witnesses for the defendant assert that signals were given both by whistle and bell. A witness for the plaintiff testified that the whistle was blown about a quarter of a mile from the place of the killing and not thereafter, but that he "heard the noise of the train, the closer it came to the street crossing the more noise it made. I guess everybody knew the train was coming. It was making enough noise so that people with good ears could have heard it if they had been listening for it."

Upon the foregoing facts the sole question of law involved is the correctness of the judgment of nonsuit.

Obviously this question must be solved by application of the principles of law held and promulgated by the Federal courts. Apparently the leading decisions of the Supreme Court of the United States on the subject are *Aerkfetz v. Humphreys,* 36 Law. Ed., 758; *Chesapeake & Ohio R. Co. v. Nixon,* 271 U. S., 218, 70 Law Ed., 914; *Rocco v. Lehigh Valley R. R. Co.,* 288 U. S., 275, 77 Law Ed., 743. See, also, *Biernacker v. Penn. R. R.,* 45 Fed. (2d), 677, and *S. A. L. R. Co. v. Horton,* 233 U. S., 492, 58 Law Ed., 1062. In the *Nixon case, supra,* the deceased was riding a railroad velocipede in returning home from his work. He was run down and killed by a train traveling in the same direction as the velocipede. It seems that the engineer and fireman were not keeping a lookout. The Court, speaking through *Mr. Justice Holmes,* said: "If the accident had happened an hour later when the deceased was inspecting the track, we think there is no doubt that he would be held to have assumed the risk, and to have understood, as he instructed his men, that he must rely upon his own watchfulness and keep out of the way. The railroad company was entitled to expect that self-protection from its employees."

The *Rocco case, supra,* presents a different aspect of the question. In that case the track inspector was using a railroad tricycle in the course of his duties, and was killed by a head-on collision with a passenger train. The killing occurred "on a blind curve," where the deceased "could not see the approaching train nor the motorman see him." *Mr. Justice Roberts* wrote as follows: "Respondent relies on the duty of a person employed on the tracks of a railroad to exercise vigilance for his own safety, and to keep out of the way of moving trains, and asserts that the chance of a collision was a risk assumed by an employee assigned to work on the roadbed. *Aerkfetz v. Humphreys,* 145 U. S., 418, 36 Law Ed., 758, 12 S. Ct., 835; *Chesapeake & Ohio R. Co. v. Nixon,*

271 U. S., 218, 70 L. Ed., 914, 46 S. Ct., 495. Those cases applied the principle to accidents on a stretch of tracks where the workman's view was unobscured. Here, according to the proof, the curve on which the collision occurred, and obstructions at the side of the roadway, prevented any but a very short view of the track ahead. We think these facts required that the jury should determine whether the motorman exercised reasonable care to have his train under control, to sound a warning before entering the curve, and to be on the lookout for workmen whose presence might be expected on the day in question, when the waters of the lake were washing over the tracks at this point and inspection and repair might be required. Under the authorities cited the decedent assumed the risks ordinarily incident to his employment as a track inspector, but in the circumstances shown, we do not think they included a failure on the part of the motorman to keep a lookout and to give warning in places where the view of one who might be expected to be on the track or approaching in the opposite direction was shut off and the probability of accident was therefore much greater than where the track is straight and the view unobstructed."

Judge Hand, in the *Biernacker case, supra,* rests the decision of the Court upon the *Nixon case, supra.* He declared: "Finally, it is not clear that even if the custom should be construed as imposing a duty upon the crews to keep a lookout for trackmen, the intestate did not assume the risk of their neglect. Under the Employers' Liability Act (45 U. S. C. A., secs. 51-59), it is not true that an employee never assumes the risk of his employer's negligence. . . . If the dangers be apparent and known, they are assumed; so far as this may differ from the common law, if at all, the statute prevails." The Supreme Court of the United States on April 20, 1931, denied a petition for *certiorari* to review the foregoing case. See 283 U. S., 840, 75 Law Ed., 1451.

The plaintiff relies upon *Reed v. Director-General,* 258 U. S., 92, 66 Law Ed., 480, and the cases of *Brown v. R. R.,* 144 N. C., 634, 57 S. E., 397; *Moore v. R. R.,* 185 N. C., 189, 116 S. E., 409; and *Moore v. R. R.,* 186 N. C., 257, 119 S. E., 357. See, also, 71 A. L. R., 461. The *Brown case, supra,* apparently did not involve the Employers' Liability Act. *Moore v. R. R.,* 186 N. C., 257, did involve the application of said act. However, the principle of liability invoked in the *Moore case, supra,* rested ultimately upon the theory that the engineer of the train could see that the deceased was deeply engrossed in his work and wholly oblivious of approaching danger, and that such information was available to the engineer in time to have stopped the train before killing plaintiff's intestate.

The Court is of the opinion that the cases relied upon by the plaintiff are not controlling and decisive. The evidence offered in behalf of the

plaintiff disclosed that a signal had been given about a quarter of a mile from the point of injury, and that, although no other signal was heard, "everybody knew the train was coming. It was making enough noise so that people with good ears could have heard it if they had been listening for it." Consequently, full notice of the approaching train was available to plaintiff's intestate. All other members of the crew were fully appraised of the danger and moved off the track into a place of safety.

The evidence for plaintiff further disclosed that at the time of the impact the deceased "looked to be working around the end of the ties." Obviously, he was not working upon the track at the time he was killed. Although he was not a foreman or an experienced workman, nevertheless he was charged with notice that he was working upon a live track, and that a train was likely to be upon the scene at any time. His vision was unobstructed for at least three miles, and there was no evidence of noises or other traffic movements about the scene calculated to divert his attention or to prevent him from hearing the noise of the approaching train.

Therefore, the Court is of the opinion that the ruling of the trial judge was correct.

Affirmed.

CLARKSON, J., dissents.

J. M. BROADWAY v. KELLY L. COPE.

(Filed 10 April, 1935.)

1. **Trial D a—**

   Upon a motion as of nonsuit the evidence will be taken in the light most favorable to plaintiff.

2. **Libel and Slander A a—Words spoken held actionable per se as tending to injure plaintiff in his trade.**

   Plaintiff and defendant were rival butchers or meat dealers. Defendant stated to third persons words which in effect charged that the cow which plaintiff butchered the previous day had been bitten by a mad dog and advised such persons not to buy the meat from plaintiff. There was no contention that the words were true and no claim of privilege. *Held:* The words were actionable *per se* as a matter of law.

3. **Libel and Slander D d—**

   Where words spoken by defendant are actionable *per se* malice and compensatory damage are conclusively presumed.

4. Same: Appeal and Error J e—

Plaintiff's testimony in this action for slander on the issue of damages *is held* not incompetent as being of speculative damage, or at least the testimony was harmless in view of the fact that other testimony of like import was admitted without objection.

5. Libel and Slander D d—Charge of court on issue of damage held without error.

The charge of the court on the issue of damage in this action for slander by words actionable *per se* as a matter of law, that upon an affirmative finding that the plaintiff published the words complained of, the law presumed malice and compensatory damage, and that plaintiff was entitled to recover his actual damage naturally and proximately resulting from the words spoken, and that plaintiff could be awarded punitive damage in the discretion of the jury upon a finding of actual malice *is held* without error.

APPEAL by defendant from *Oglesby, J.*, at December Term, 1934, of DAVIE. No error.

This is an action brought by plaintiff against defendant to recover damages for slander to his business.

The plaintiff testified, in part: "On 18 October, 1932, I bought a heifer from Mr. Bud Foster, in Rowan County, and I butchered her on the 19th day. She was fine and fat and as nice a cow as I ever saw. I do not think she was bitten by a mad dog. I would say she was not. When I purchased her, she was in Rowan County at Bud Foster's home. I inspected her before buying. I butchered the cow on Thursday and, in consequence of some word that had gotten out, I had a conversation with Mr. Cope. . . . He said he heard I had butchered a mad-dog-bitten cow, and I said, 'Kelly, if it had been me and I had heard that, and found out that you were butchering a beef, I would have told you, but you didn't say a word and drove by and didn't turn your head when I was butchering it.' He never made any answer to that, and I said, 'Kelly, me and you worked together for a long time; I worked for you a long time; you have come to my house at 12 o'clock at night when you wanted me to help you, and why did you do that if you thought I was dirty enough to kill a mad-dog-bitten cow?' I said, 'That ain't what you thought, you thought you would put this word out on me and steal my trade.' He said he hated the word had gotten out and he would not do anything to hurt me if he knew it, but he did tell it. He said, 'I told my wife.' "

Charlie Hepler testified, in part: "Q. You know Sheriff Cope, do you? A. Yes, sir. Q. You can state whether or not you heard a conversation by him while talking to Charlie Carter about this cow. A. I heard a small conversation. They were talking and he was talking

about it, said he went over in the country to buy a cow and he was telling Mr. McDaniel about it, and he told him not to buy that cow, it was neighborhood talk that she had been mad-dog bit, and he said he thought he would go down there, and he went, and Mr. Broadway had the cow down there, skinning her, and he didn't buy her; said Mr. McDaniel told him it was neighborhood talk that the cow had been mad-dog bit. That is all I know about it. Q. Now, where was he? A. He was in his market at North Cooleemee. Q. Who was he talking to? A. A whole crowd in there; Mr. Carter was in there and I was in there, and I didn't pay attention to who all was in there. Q. That in his meat market in Cooleemee? A. North Cooleemee. Q. That was how long after this cow had been butchered by Broadway? A. I don't know exactly how long it was afterwards; that was about the same time. Second or third day, I think, afterwards."

Hill Myers testified, in part: "Q. Well now, at that time, or shortly thereafter, did you hear Mr. Cope—were you at Mr. Kelly Cope's meat market? A. Yes, sir. Q. When was it with reference to the time the cow was butchered? A. Next day. Q. Now, state what, if anything, you heard Mr. Cope say? A. Mr. Cope asked me had I heard about Mr. Broadway killing a mad-dog-bitten cow, and I said no, and he says, 'He has'; says, 'I thought I would tell you not to buy any meat, as a friend; the cow has been mad-dog bit.' Q. Who else was in there? A. I don't remember now; his wife was in there, for one."

The issues submitted to the jury and their answers thereto were as follows: "(1) Did the defendant, in the presence and hearing of others, charge the plaintiff with having butchered a cow that had been mad-dog bitten, or words of the same substance and meaning, as alleged in the complaint? A. 'Yes.' (2) If so, was said charge made by the defendant maliciously with the design and purpose of injuring the plaintiff in his business? A. .... (3) What actual damage, if any, is plaintiff entitled to recover? A. '$250.00.' (4) What punitive damage, if any, is plaintiff entitled to recover? A. ...."

The court below rendered judgment on the verdict. Defendant made several exceptions and assignments of error, and appealed to the Supreme Court. The material ones and necessary facts will be considered in the opinion.

Hayden Clement for plaintiff.
A. T. Grant and B. C. Brock 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. These motions were over-

ruled by the court below, and in this we can see no error. The evidence must be taken in the light most favorable to the plaintiff. The plaintiff operated a meat market in Cooleemee, under the name of the "Cooleemee Meat Market." Defendant also ran a meat market in North Cooleemee. They were competitive dealers.

Plaintiff testified: "He said he heard I had butchered a mad-dog-bitten cow, and I said, 'Kelly, if it had been me and I had heard that, and found out that you were butchering a beef, I would have told you, but you didn't say a word, and drove by and didn't turn your head when I was butchering it.' . . . He said he hated the word had gotten out and he would not do anything to hurt me, if he knew it, but he did tell it. He said, 'I told my wife.' "

Hill Myers testified: "Q. Now, state what, if anything, you heard Mr. Cope say? A. Mr. Cope asked me had I heard about Mr. Broadway killing a mad-dog-bitten cow, and I said no, and he says, 'He has'; says, 'I thought I would tell you not to buy any meat as a friend; the cow has been mad-dog bit.' "

The plaintiff was a butcher. Is the above language actionable *per se?* We think so. There was no evidence to the effect that plaintiff had butchered a mad-dog-bitten cow.

Webster's International Dictionary defines a "butcher" as follows: "One who slaughters animals, or dresses their flesh for market; also, a dealer in meat."

In *Pentuff v. Park,* 194 N. C., 146 (154), is the following: "An action for libel may always be brought when the words published expose the plaintiff (1) to contempt, hatred, scorn, or ridicule; or (2) are calculated to injure him in his office, profession, calling, or trade." *Ferrell v. Siegle,* 195 N. C., 102. The same principle applies in slander —one is oral and the other is written.

In *Stevenson v. Northington,* 204 N. C., 690 (694), we find: "Undoubtedly, the publication was actionable, if untrue and not privileged, for it tended to expose the plaintiff to ridicule or scorn, and was calculated to injure her in her calling or profession."

There seems to be no dispute as to the publication. The language used was calculated to injure plaintiff in his trade and was actionable *per se.* Malice and compensatory damage are conclusively presumed. Defendant, in his brief, says: "There are other questions discussed in the brief, but the above are the main questions involved in this appeal."

The exceptions and assignments of error in regard to the plaintiff's testimony as to business losses cannot be sustained. They were not so speculative as to be incompetent, at least, the same kind of evidence, unobjected to, appears in the record, which precludes defendant's complaint on this aspect—for example: "Q. What were your profits, if any,

from October, 1932, up until you went out of the meat business? A. Not any. It went down every day."

In the *Stevenson case, supra,* at p. 694, it is said: "Finally it is contended the action should be dismissed because no damage has been shown. The point is without merit. Plaintiff not only proved losses of a financial nature, but she also established injury to her reputation and standing in the community as a result of the publication in question." In the present case, compensatory damage is presumed.

The able and learned judge in the court below, taking the charge as a whole, set forth the law applicable to the facts: "(The court instructs you, gentlemen, that in an action of this character, where justification is not pleaded and privilege is not claimed, the jury, upon finding an affirmative answer to the first issue, implies as a matter of law the charge complained of is false and malicious and compensatory, that is, actual damages may be awarded, and additional punitive damages may also be given if the jury find actual malice.)

"(The court further instructs you, gentlemen of the jury, that in an action of slander for words spoken which are actionable *per se,* compensatory damages may be awarded, which embrace compensation for injuries, if any, which most naturally, proximately, and necessarily are the result of the statement.)

"(The court further instructs you that if the plaintiff has satisfied you by the greater weight or preponderance of the evidence that Cope made the statements, as alleged in the complaint; that is, if you answer the first issue 'Yes,' that the words would be actionable *per se.*)

"The law holds it is a wrong or tort to make statements that have a tendency to injure a person in his profession, calling, or trade. If the plaintiff would be entitled to recover on the third issue under the rules of law given by the court, based upon the facts you find to be true from the evidence, he would be entitled to recover under the rule of law which the court gave you; award no damages based upon speculation, or no damages based upon imagination; but you would be confined to the rule of law which the court gave you; that is, compensatory damages that actually flow, that proximately flow and are necessary results of the words, of the wrong done the plaintiff by the defendant, if you find that he did him a wrong.

"The fourth issue: 'What punitive damages, if any, is the plaintiff entitled to recover?' There is a different rule, gentlemen of the jury, of punitive damages, sometimes called smart money, are allowed in cases where the injury is inflicted in a malicious, wanton, and reckless manner. The defendant's conduct must have been actually malicious or wanton, displaying a spirit of mischief toward the plaintiff, or reckless and criminal indifference to his rights. When these elements

are present, damages commensurate with the injury may be allowed by way of punishment to the defendant. But these damages are awarded on the ground of public policy, for example's sake, and not because plaintiff has a right to the money, but it goes to him merely because it is assessed in his suit. In a proper case, both the awarding of punitive damages and the amount to be allowed, if any, rest in the sound discretion of the jury."

The defendant made exceptions and assignments of error to the above charge set forth in parentheses. They cannot be sustained. We think the charge, under the facts and circumstances of this case, sets forth the law in this jurisdiction. On the whole record, we find no prejudicial or reversible error.

No error.

STATE v. HARRY BAXTER.

(*Filed 10 April, 1935.*)

1. **Criminal Law L d—The record as certified to the Supreme Court is controlling.**

   The only authority for the holding of the special criminal term of court at which defendant was tried appearing in the record in this case was a carbon copy of a letter from the Governor's office stating that the court had been authorized and that the Governor's order was enclosed. Upon issuance of a writ of *certiorari* from the Supreme Court it appeared that the letter appearing of record was the sole authority for the holding of the court, and that there were no orders or commissions in the court relative to said special term. *Held:* The record as certified to the Supreme Court must be accepted in determining defendant's motion in arrest of judgment.

2. **Criminal Law J a: L e—**

   A motion in arrest of judgment for vital defect appearing in the record proper may be made for the first time in the Supreme Court at the hearing of the appeal from the judgment of the Superior Court.

3. **Courts A g: Grand Jury A b—Governor has authority to order special term of Superior Court and to order drawing grand jury therefor.**

   The Governor has statutory authority to order a special term of the Superior Court, C. S., 1450, in which case he should appoint a judge to hold such term and issue a commission to the judge appointed, and, if such special term is for trial of criminal cases, only cases pending in the court at the time may be tried, and no grand jury may be drawn, unless the Governor also expressly orders that a grand jury be drawn, C. S., 1454, in which event indictments returned by such grand jury may be tried at such term.

4. Indictment A b: Criminal Law J a—Motion in arrest of judgment allowed for that record disclosed that grand jury was not ordered to be drawn for special term of court at which defendant was tried.

The record in this case disclosed that defendant was tried at a special term of criminal court upon an indictment returned by a grand jury drawn for the special term, but that there was no order by the Governor that a grand jury be drawn for such term. *Held:* Defendant's motion in arrest of judgment, made the first time in the Supreme Court upon appeal, must be allowed. Art. I, sec. 12.

5. Criminal Law L f—

Where a judgment in a criminal case is arrested for fatal defect appearing on the record, the defendant is not entitled to his discharge, but will be held subject to further action by the Superior Court of the county in which the judgment was rendered.

6. Criminal Law L e—

Where defendant's motion in arrest of judgment is allowed in the Supreme Court, exceptions in the record upon which defendant relies for a new trial need not be considered.

APPEAL by the defendant Harry Baxter from *Barnhill, J.*, at August Special Term, 1934, of CHATHAM. Judgment arrested in Supreme Court.

This is a criminal action in which the defendants Harry Baxter and J. B. Willis were tried at a Special Term of the Superior Court of Chatham County, which began on Monday, 6 August, 1934, on an indictment for murder. The indictment was returned by a grand jury, which was chosen, sworn, and impaneled at said special term of said court, and is as follows:

"STATE OF NORTH CAROLINA—CHATHAM COUNTY.

"In the Superior Court, August Term, 1934.

"The jurors for the State upon their oath present that Harry Baxter and J. B. Willis, late of the county of Chatham, on 9 July, in the year of our Lord 1934, with force and arms, at and in the county aforesaid, did unlawfully and wilfully and feloniously, of malice aforethought, kill and murder one H. C. Routh, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

It appears from the records and minutes of the Superior Court of Chatham County that the sole authority for the holding of a special term of the Superior Court of Chatham County, beginning on Monday, 6 August, 1934, is the carbon copy of a letter addressed to the chairman of the board of county commissioners of said county, which is in words and figures as follows:

"July 14th, 1934.

"MR. C. D. MOORE, Chairman,
Board of County Commissioners,
Pittsboro, N. C.

"DEAR SIR:—In accordance with the request of your Board, and of members of the County Bar, Governor Ehringhaus has issued his order, which is herewith enclosed, calling a one-week special criminal term of Court for Chatham County, beginning August 6th, 1934, this being in lieu of the regular civil term, which has been called off for the reason that it is not needed.

"Judge Barnhill has been commissioned to hold same. Copy of this letter is being sent to the Clerk of the Superior Court of Chatham County; also to Judge Barnhill.

"Yours very truly,
"GOVERNOR'S OFFICE,
"By MAMIE C. TURNER,
"Executive Clerk."

Upon their arraignment on the indictment appearing in the record, the defendants Harry Baxter and J. B. Willis, before pleading to said indictment, moved the court, in writing, as follows:

"Now come into court, the defendants above named, and, in apt time, move that the bill of indictment returned at this term of the Superior Court of Chatham County be quashed for that the holding of this special term of said court has not been advertised as by law required."

The court heard the motion, and from all the evidence at the hearing found as a fact that no advertisement of the holding of said term of the court was made by the chairman of the board of county commissioners of Chatham County, as required by statute. C. S., 1452. Notwithstanding this finding of fact, the motion of the defendants was denied, the court being of the opinion that the failure of the chairman of the board of county commissioners to comply with the requirements of the statute did not affect the validity of the special term of the court. The defendants excepted to the denial of their motion.

After their motion to quash the indictment was denied by the court, each of the defendants named in the indictment entered a plea of "Not guilty," and moved the court to continue the trial of the action on the ground that the defendants, who were arrested immediately after the homicide on 9 July, 1934, had been confined in the State's Prison at Raleigh continuously until the convening of the court on 6 August, 1934, and for that reason had been unable to prepare their defense to the indictment. This motion was denied by the court, in its discretion.

The defendants then moved the court to order that jurors for the trial of the action be summoned from an adjoining county, as authorized by

statute, for reasons set out in their motion, which is in writing. C. S., 473. This motion was denied by the court, in its discretion.

The trial then proceeded on defendants' pleas of not guilty, and resulted in a verdict that the defendant Harry Baxter is guilty of murder in the first degree, and that the defendant J. B. Willis is guilty of murder in the second degree.

From judgment that he suffer death by means of electrocution, as prescribed by statute (C. S., 4657), the defendant Harry Baxter appealed to the Supreme Court, assigning errors in the trial as set out in the record.

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

Walter D. Siler for defendant.

CONNOR, J. When this appeal was called for hearing in this Court, counsel for defendant moved that the judgment of the Superior Court in this action be arrested, for that it does not appear from the record certified to this Court that in his order for a special term of the Superior Court of Chatham County, to begin on Monday, 6 August, 1934, the Governor of this State ordered that a grand jury should be drawn at said special term. The defendant contends that the indictment on which he was tried and convicted is void for that said indictment was returned by a grand jury which was drawn, chosen, sworn, and impaneled without lawful authority, and that for this reason the judgment on his conviction of the crime charged in said indictment should be arrested by this Court.

The record certified to this Court in this appeal shows that the sole authority for the holding of the special term at which the indictment was returned, and at which the defendant was tried and convicted, was the letter set out in the record. The record does not contain an order by the Governor for the holding of said special term. We were apprehensive that the order of the Governor, referred to in the letter, had been omitted from the record by an inadvertence, and for that reason caused a writ of *certiorari* to be sent from this Court to the clerk of the Superior Court of Chatham County directing the said clerk to send to this Court certified copies of any orders or commissions from the Governor on file in his office relative to said special term. The return on this writ shows that the letter appearing in the record certified to this Court was the sole authority for the holding of said court, and that at the time the court convened for the purpose of holding a special term, there was no order or commission in the records of said court relative to said special term. For the purposes of defendant's motion for the arrest of

the judgment in this action, we must accept the record as certified to this Court in this appeal.

It does not appear in the statement of the case on appeal that the defendant moved in the Superior Court for the arrest of the judgment on the ground assigned for his motion in this Court. However, it is well settled that a motion for the arrest of a judgment of the Superior Court in a criminal action tried in that court may be made in the Supreme Court at the hearing of an appeal from the judgment of the Superior Court. *S. v. Marsh,* 132 N. C., 1000, 43 S. E., 828. Indeed, in *S. v. Watkins,* 101 N. C., 702, 8 S. E., 346, it is said by *Merrimon, J.:* "It is the duty of this Court to look through and scrutinize the whole record, and if it sees that the judgment should be arrested, it will, *ex mero motu,* direct that it be done." The motion must be based upon matter appearing in the record, or upon an omission from the record of some matter which should appear therein. *S. v. Jenkins,* 164 N. C., 527, 80 S. E., 231.

The power of the Governor to order a special term of the Superior Court for any county in this State, for the trial of criminal or civil actions, is statutory. C. S., 1450. See *S. v. Ketchey,* 70 N. C., 622, in which it was held that the statute authorizing the Governor of this State to order a special term of the Superior Court is valid. When he has ordered such term to be held in any county of this State, it is the duty of the Governor to appoint one of the judges of the Superior Court to hold such term, and to issue to the judge appointed by him a commission authorizing him to hold such court. If a special term is ordered by the Governor for the trial of criminal actions, no grand jury shall be drawn at such term, unless the Governor shall so order. C. S., 1454. Unless a grand jury is ordered for such term, only criminal actions pending in the court at the time the special term convenes may be tried at such term. When, however, the Governor expressly orders a grand jury to be drawn at such term, indictments returned by such grand jury may be tried at such term.

Conceding without deciding that the letter appearing in the record in this appeal is sufficient authority for the holding of a special term of the Superior Court of Chatham County, beginning on Monday, 6 August, 1934, for the trial of criminal actions, we must hold that in the absence of any order of the Governor that a grand jury be drawn at said term, the indictment returned at said time is void, and for that reason the motion of the defendant, first made in this Court, that the judgment in this action be arrested, must be allowed. If we should hold otherwise, the defendant would be deprived of a right guaranteed by the Constitution of this State. Const. of N. C., Art. I, sec. 12.

The defendant will not be discharged from custody, but will be held subject to further action by the Superior Court of Chatham County.

The judgment in this action is arrested; for that reason it is needless to discuss the assignments of error appearing in the case on appeal, on which defendant relies to support his contention that he is entitled to a new trial of this action.

Judgment arrested.

BERTHA JENNETTE APOSTLE v. ACACIA MUTUAL LIFE INSURANCE COMPANY.

(Filed 10 April, 1935.)

1. Appeal and Error B b—

An appeal will be determined in accordance with the theory of trial in the lower court. Art. IV, sec. 8.

2. Insurance H e—Whether insurer acted on application for reinstatement of policy within reasonable time held for determination of jury.

The policy in suit lapsed for nonpayment of premiums thirty-one days after 1 June. Upon solicitation of insurer's local agent, insured signed application for reinstatement in accordance with the terms of the policy, and gave same, together with check for past-due premiums, to the agent in Winston-Salem 24 July following, and insurer's agent forwarded same by mail from High Point to insurer's branch office in Charlotte, which received same during the afternoon of 28 July or the morning of 29 July. The branch office deposited the check, which was paid by the drawee bank 31 July, and forwarded the application to insurer's home office in Washington, D. C., where it was received 31 July. While the application was under consideration at the home office, it was notified on 2 August that insured had died 1 August from injuries received in an automobile accident. Insurer's local agent testified that he mailed the application in High Point to the branch office in Charlotte 25 July. Plaintiff, beneficiary in the policy, introduced evidence from which the jury could find that the policy was not mailed by insurer's agent in High Point until the morning of 28 July. *Held:* Whether insurer acted upon the application for reinstatement within a reasonable time was properly submitted to the jury, the lapse of three days between the agent's receipt of the application and plaintiff's evidence of date he mailed same not being a reasonable time as a matter of law, and the conflicting evidence as to the date the agent mailed same being for the determination of the jury.

APPEAL by defendant from *Parker, J.*, at November Term, 1934, of FORSYTH. Affirmed.

This action was begun in the Forsyth County court on 31 August, 1933, and was tried in said court at its September Term, 1934.

The action is to recover on a policy of insurance which was issued by the defendant on or about 1 January, 1933, and which insured the life of Charles I. Apostle in the sum of $5,000.

The insured, Charles I. Apostle, died on 1 August, 1933, from injuries resulting from an accident which occurred on 29 July, 1933. The plaintiff, his wife, is the beneficiary named in the policy. The defendant denied liability under the policy on the ground that the policy had lapsed prior to the death of the insured, because of the nonpayment of the premium which was due on 1 June, 1933.

The premiums on the policy were payable monthly, each monthly premium being due and payable, in advance, on the first day of the month. The amount of each monthly premium was $10.55.

It is provided in the policy that after the payment of one monthly premium, a grace period of one month (not less than 31 days), without interest, would be allowed for the payment of subsequent monthly premiums, as they should fall due, and that "if any premium be not paid when due, as specified, or during the grace period, the policy shall lapse and be void, except as to the provisions for surrender options printed herein."

It is further provided in the policy that "a lapsed policy may be reinstated at any time, provided the member makes application therefor, furnishes evidence of insurability satisfactory to the company, and pays the premiums due to the date of the reinstatement, with interest at the rate of six per centum per annum."

All monthly premiums which had become due on the policy prior to 1 June, 1933, were paid by the insured, and the policy was in full force and effect at that date. The insured failed to pay the premium which was due on 1 June, 1933, at that date or within the grace period allowed for its payment by the policy. For this reason the policy had lapsed at the expiration of 31 days after 1 June, 1933.

At about noon on 24 July, 1933, upon the solicitation of an agent of the defendant, the insured signed an application to the defendant for the reinstatement of the policy, and delivered the application, with his check for $21.10, the amount then due for all premiums in arrears, to the said agent at Winston-Salem, N. C. In the application the insured certified that he was then in good health, and had not been sick during the past twelve months. After he received the application and the check from the insured at Winston-Salem, defendant's agent returned to his home in High Point, N. C., where he had his office. The application and the check were forwarded by the agent from High Point to the branch office of the defendant at Charlotte, N. C., by mail. Both the application and the check were received at the branch office of the defendant at Charlotte during the afternoon of 28 July, 1933, or the morning of 29 July, 1933. The check was deposited by the cashier in defendant's branch office at Charlotte on 29 July, 1933, and was paid in Winston-Salem on 31 July, 1933, by the bank on which it was drawn.

The application for the reinstatement of the policy was forwarded by mail from Charlotte, N. C., on 29 July, 1933, and was received at the home office of the defendant, in Washington, D. C., on 31 July, 1933, when it received attention by the various departments in defendant's home office. While it was under consideration by the underwriting department on 2 August, 1933, the defendant was informed that the insured had died on 1 August, 1933, and that his death had resulted from injuries which he had suffered on 29 July, 1933, in an automobile accident. The defendant gave no further consideration to the application, and immediately tendered to the plaintiff the amount of the check which the insured had delivered to its agent in payment of the premiums due on the policy. The plaintiff refused to accept said amount.

The only issue submitted to the jury at the trial was answered as follows:

"Did the defendant fail to act within a reasonable time, under all the facts and circumstances surrounding the parties, with respect to the application for reinstatement? Answer: 'Yes.'"

From judgment that the plaintiff recover of the defendant the amount due under the policy, to wit: $4,949, with interest and costs, the defendant appealed to the Superior Court of Forsyth County, assigning as error the refusal of the trial court to allow defendant's motion, at the close of all the evidence, for judgment as of nonsuit, and the instruction of said court to the jury that if the plaintiff had satisfied the jury by the greater weight of the evidence that the defendant had failed to act upon the application for the reinstatement of the policy within a reasonable time, under all the facts and circumstances surrounding the parties, the jury should answer the issue "Yes."

At the hearing of defendant's appeal to the Superior Court, the judge overruled defendant's assignments of error, and affirmed the judgment of the Forsyth County court. The defendant appealed to the Supreme Court, assigning as error the rulings of the judge of the Superior Court on its assignments of error, and the judgment.

Ingle & Rucker for plaintiff.
Manly, Hendren & Womble for defendant.

CONNOR, J. This action was tried in the Forsyth County court upon the theory that, notwithstanding the policy had lapsed and become void, according to its terms, because of the nonpayment of the monthly premium due on 1 June, 1933, the policy was in full force and effect at the death of the insured on 1 August, 1933, if the defendant had failed to act upon the application of the insured for its reinstatement within a reasonable time after the application was delivered to defendant's agent

by the insured at Winston-Salem, N. C., on 24 July, 1933. The record of the trial shows that it was conceded by the parties that if the defendant had failed to so act upon the application, the plaintiff was entitled to recover on the policy; and that otherwise she was not entitled to recover. Therefore, the only question presented by this appeal is whether there was evidence at the trial from which the jury could find, as contended by the plaintiff, that the defendant failed to act upon the application of the insured for the reinstatement of the policy within a reasonable time after its delivery to its agent at Winston-Salem, N. C., on 24 July, 1933. No other question is presented by this appeal, for it is well settled, as said in *Hargett v. Lee,* 206 N. C., 536, 174 S. E., 498, that an appeal *ex necessitate* follows the theory of the trial. See *Shipp v. Stage Lines,* 192 N. C., 475, 135 S. E., 339. This principle is enforced by this Court, because of the constitutional limitation of its jurisdiction as an appellate Court. Const. of N. C., Art. IV, sec. 8.

It may be conceded that after the application for the reinstatement of the policy was received by the defendant at its home office in Washington, D. C., on 31 July, 1933, the defendant did not fail to act upon it within a reasonable time. The evidence, however, shows that nearly four days elapsed from the time the application was delivered to defendant's agent at Winston-Salem, on 24 July, 1933, to the time it was received at defendant's branch office in Charlotte, during the afternoon of 28 July, 1933. While there was evidence tending to show that this delay was not due to the default of the agent, the credibility of this evidence was for the jury. Whether upon all the facts and circumstances, as shown by the evidence, there was an unreasonable delay on the part of the agent was a question for the jury.

In *Trust Co. v. Ins. Co.,* 199 N. C., 465, 154 S. E., 743, it is said: "Reasonable time is generally conceived to be a mixed question of law and fact. 'If, from the admitted facts, the Court can draw the conclusion as to whether the time is reasonable or unreasonable, by applying to them a legal principle or a rule of law, then the question is one of law. But if different inferences may be drawn, or circumstances are numerous and complicated, and such that a definite legal rule cannot be applied to them, then the matter should be submitted to the jury. It is only when the facts are undisputed and different inferences cannot be reasonably drawn from them, that the question ever becomes one of law.' *Claus v. Lee,* 140 N. C., 552, 53 S. E., 433; *Blalock v. Clark,* 133 N. C., 306, 45 S. E., 642; *Blalock v. Clark,* 137 N. C., 140, 49 S. E., 88."

In the instant case it cannot be held as a matter of law that the time which elapsed from the delivery by the insured to defendant's agent of his application for the reinstatement of his policy to the receipt of the application at defendant's branch office in Charlotte was a reasonable

time. Whether or not the agent mailed the application at High Point on 25 July, 1933, as he testified, was for the jury to determine. There was evidence from which the jury could find that the application was not mailed at High Point until the morning of 28 July, 1933, and that for at least three days the agent, without any valid reason, kept the application in his possession at High Point, thus unreasonably delaying its consideration by the defendant at its home office in Washington, D. C.

We find no error in the judgment of the Superior Court. It is

Affirmed.

EDWARD DALTON SMITH v. NEW YORK LIFE INSURANCE COMPANY.

(Filed 10 April, 1935.)

1. Pleadings E c—Allowance of amendment to pleadings held within discretionary power of trial court in this case.

Plaintiff brought suit on a disability clause in a policy of life insurance, and defendant insurer filed answer alleging that the disability complained of, originating prior to the issuance of the policy, was not covered thereby. The trial court allowed plaintiff to amend his complaint by alleging waiver by defendant of the condition precedent to his right of action that the disability should originate subsequent to the issuance of the policy. *Held:* The allowance of the amendment was in the court's discretionary power, and is not objectionable on the ground that it substantially changed the cause of action, C. S., 547, or that the time for filing reply to defendant's further answer had long since expired, C. S., 536.

2. Insurance K a—

In the absence of fraud or collusion between insured and insurer's agent, knowledge of the agent, acting in the scope of his authority, at the inception of the policy of violations of its conditions or covenants is imputed to the insurer, though the policy contains a stipulation to the contrary.

3. Insurance R c—Complaint held to state cause of action on disability clause.

In an action on a disability clause in a policy of life insurance a complaint alleging disability within the terms of the policy, and that the condition of the policy that such disability should occur after the issuance of the policy, was waived by knowledge of insurer's agent at the time the policy was issued that insured had been treated for a defect in his eye and had seemingly entirely recovered and had been in good health for five years *is held* good as against a demurrer.

4. Appeal and Error J a—

Ordinarily an appeal from a discretionary order of the lower court will be dismissed.

APPEAL by defendant from *Cowper, Special Judge,* at November Term, 1934, of PITT. Affirmed.

This is an action brought by plaintiff to recover a certain amount of money, for total and permanent disability, under a policy for $5,000, issued to him by defendant, on 9 October, 1926. The premiums have all been paid.

A provision in the policy is as follows: "Disability shall be considered total whenever the insured is so disabled by bodily injury or disease that he is wholly prevented from performing any work, from following any occupation, or from engaging in any business for remuneration or profit, provided such disability occurred after the insurance under this policy took effect and before the anniversary of the policy on which the insured's age at nearest birthday is sixty."

It is contended by defendant that the disability occurred before the policy was issued. That the plaintiff answered "No" in his application to the following question: "Have you consulted any physician for or suffered from any ailment or disease of the skin, middle ear, or eyes?"

In plaintiff's claim for disability benefits made 19 August, 1932, he answered questions as follows: "(a) Are you wholly disabled at the present time? 'Yes.' (b) State cause of disability: 'Don't know.' (a) On what date did the illness begin that led up to the present disability, and what was the nature of the illness? 'Some time in 1925, my right eye hurt at night, until I had it treated.' (b) Give name and address of the first physician consulted at the beginning of that illness: 'A. L. MacLean, 1201 N. Calvert St., Baltimore, Md. Was at Johns Hopkins Hospital at that time.' (c) State date on which you first consulted that physician: 'Sept. 16, 1925.' (d) Give names of all other physicians consulted and dates of such consultations: 'J. O. Baxter, New Bern, N. C., April, 1932.' From what date has your disability prevented you from engaging in any occupation whatsoever for remuneration or profit? 'January 1, 1932.'"

The plaintiff was allowed by the court below to amend his complaint and set up the plea of waiver. The plaintiff contended their agent who sold him the policy knew about the eye treatment. That the eye, for six years, had given him no trouble after the treatment, and for five years from the time the policy was issued he was in good health and under no disability. That when the policy was taken out he was not 19 years old, and a pupil in the school conducted by the agent of the defendant company, who solicited the insurance. Without further detailing same, facts are set forth that would entitle plaintiff to a waiver issue on this application aspect. This action was here before on the question of removal to the Federal Court, 205 N. C., 348. The only exception and assignment of error made by the defendant will be set forth in the opinion.

S. J. Everett for plaintiff.
Albion Dunn for defendant.

CLARKSON, J. The defendant's first and only exception and assignment of error embraces its exception to the order of his Honor, G. V. Cowper, special judge presiding at the November Term, 1934, permitting the plaintiff to amend his pleadings so as to set up a waiver of the conditions of the policy by the defendant, and the defendant contends that said order was erroneously granted for that: "(1) It is in violation of section 547, C. S., in that the amendment changes substantially the claim of the plaintiff, and (2) the court was without authority to permit a replication, for that the time for replying to the further answer and defense of the defendant had long since expired." We cannot so hold.

N. C. Code 1931 (Michie), sec. 536, is as follows: "The judge may likewise, in his discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited, or by an order to enlarge the time."

Section 547 is as follows: "The judge or court may before and after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding by adding or striking out the name of any party; by correcting a mistake in the name of a party, or a mistake in any other respect by inserting other allegations material to the case; or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the fact proved. When a proceeding taken by a party fails to conform to law in any respect, the trial judge may permit an amendment of the proceeding so as to make it conformable thereto."

The contention of defendant cannot be sustained. In *Aldridge v. Ins. Co.,* 194 N. C., 683 (685), we find: "At a special term of the Superior Court held in December, 1926, the *feme* plaintiff was made a party and leave was granted the plaintiffs to reply to the answer. The defendant objected to the order authorizing the replication, apparently on the ground that pleadings must be filed and issues joined before the clerk. Public Laws 1921, Ex. Ses., ch. 92; Public Laws 1923, ch. 53; Public Laws 1924, Ex. Ses., ch. 18. These statutes have reference to the clerk and were not intended to impair the broad powers conferred on the judge, who 'may in his discretion and upon such terms as may be just allow an answer or reply to be made, or other act done, after the time limited or by an order to enlarge the time.' C. S., 536; *McNair v. Yarboro,* 186 N. C., 111; *Cahoon v. Everton,* 187 N. C., 369; *Battle v. Mercer, ibid.,* 437; *Roberts v. Merritt,* 189 N. C., 194; *Butler v. Armour,* 192 N. C., 510. The order was an exercise of the court's discretion, and will not be disturbed."

In *Hines v. Lucas,* 195 N. C., 376 (377), is the following: "The judge had the power to extend the time for filing complaint and his refusal to dismiss the action, under the facts presented, was at least equivalent to an order permitting the filing of complaint. Under the law as now written, when a cause is properly before the judge, he has power, in the exercise of a sound legal discretion, to extend the time for filing pleadings. C. S., 536; *Aldridge v. Ins. Co.,* 194 N. C., 683. While it is true that the *Aldridge case, supra,* and the line of cases therein cited, refer more particularly to filing answer, no sound reason occurs to us why the same power does not exist for enlarging the time for filing complaint. C. S., 536." *Bowie v. Tucker,* 197 N. C., 671 (673); *Washington v. Hodges,* 200 N. C., 364 (370); N. C. Practice and Procedure in Civil Cases (McIntosh), sec. 485, pp. 513-4.

It is well settled by a long line of decisions in this jurisdiction that in the absence of fraud or collusion 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 stipulation to the contrary. This principle applies to conditions existing at the inception of the policy and not after the policy has been issued. The doctrine of waiver is applied by the courts upon the well-settled principles of equity. *Greene v. Ins. Co.,* 196 N. C., 335 (339-40); *Midkiff v. Ins. Co.,* 197 N. C., 139 (142); *Houck v. Ins. Co.,* 198 N. C., 303 (305); *Colson v. Assurance Co.,* 207 N. C., 581 (583-4).

In *Stockton v. Insurance Co.,* 207 N. C., 43 (44), it is said: "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 amended pleading, which was granted in the discretion of the court below, did not change substantially the cause of action, and it set up a waiver to defendant's allegation. A cause of action is stated by plaintiff and the demurrer *ore tenus* of defendant cannot be sustained. Ordinarily an appeal to this Court will be dismissed when taken from a discretionary order in the court below. The judgment of the court below is

Affirmed.

H. STADIEM v. RUFUS HARVELL.

(Filed 10 April, 1935.)

1. Trial G b—

A verdict will be liberally construed with a view of sustaining it, and to this end resort may be had to the pleadings, evidence, and charge of the court.

2. Ejectment B e—Verdict liberally construed in light of evidence and charge held to sustain judgment for defendant in this action in summary ejectment.

The issue submitted in this action in summary ejectment was: "Is the defendant a tenant of the plaintiff, and does he hold over after the expiration of the tenancy?" to which the jury answered "No." In the light of an affidavit filed by plaintiff before the justice of the peace, the evidence and charge of the court in the Superior Court and the court's statement of the contentions of the parties to which no objection was entered, it appeared that the parties admitted the tenancy and the only issue of fact was whether the parol lease terminated the December prior to the institution of the action or the December next succeeding, and that the jury answered this issue of fact on conflicting evidence in defendant's favor. *Held:* The verdict sustains the judgment of the court that plaintiff is not entitled to the relief of summary ejectment.

3. Appeal and Error F a—

Appellant's assignment of error to the trial court's refusal to submit the issue as tendered by him cannot be considered on appeal where there is neither objection nor exception taken on the trial to the court's refusal to submit the issue as tendered or to the issue as submitted by the court.

4. Trial E e—

This action in summary ejectment was tried solely upon the theory of whether defendant's lease had expired. *Held:* Plaintiff's exception to the court's refusal to give instructions requested as to the necessity of giving notice to quit cannot be sustained, the instructions requested having no relevancy to the theory upon which the case was tried.

THIS was an action in summary ejectment, commenced before a justice of the peace under C. S., 2365, *et seq.*, and heard upon appeal by the plaintiff to the Superior Court by *Parker, J.*, and a jury, at the February Term, 1935, of LENOIR. Affirmed.

Issues were submitted to and answered by the jury as follows:

"1. Is the defendant a tenant of the plaintiff, and does he hold over after the expiration of the tenancy? Answer: 'No.'

"2. What amount, if any, is the defendant indebted to the plaintiff for rent per month for the house and land? Answer: 'Nothing.' (By consent.)"

His Honor entered judgment "that the tenancy of the defendant has not expired and that the plaintiff is not entitled to the possession of the

tract of land and the buildings described in the complaint in this action," and "that the defendant is tenant of the plaintiff, and as such tenant is entitled to the possession of said lands and buildings during the year 1935." From this judgment the plaintiff appealed to the Supreme Court, assigning errors.

Allen & Allen for plaintiff, appellant.
Sutton & Greene for defendant, appellee.

SCHENCK, J. The perplexity presented on the record arises from the way the first issue was drawn. If we had only the issue and its answer to enlighten us, it would seem that however the issue was answered the defendant must lose, since if the answer should be in the affirmative, there would be a finding that the defendant was a tenant and that he was holding over after the expiration of his tenancy, and, therefore, should be ejected; and if the answer should be in the negative there would be a finding that the defendant was not a tenant and not holding over after his tenancy expired, and, therefore, not being a tenant was a trespasser, and should be ejected. A case for the plaintiff of "Heads I win and tails you lose." Albeit, that conflicts in the findings of essential and determinative facts in a verdict will vitiate it, it is well recognized that a verdict should be liberally and favorably construed with a view of sustaining it, if possible, and that resort may be had to the pleadings, evidence, and charge of the court in order to obtain a proper interpretation of a verdict. *Donnell v. Greensboro,* 164 N. C., 330; *Sitterson v. Sitterson,* 191 N. C., 319; *Wilson v. Fertilizer Company,* 203 N. C., 359, and cases there cited.

While the first issue may be inartificially drawn, by reference to such pleadings as were in this case, the affidavit and summons in the court of first instance, and to the evidence and charge in the Superior Court, it is apparent that his Honor instructed the jury to consider the issue as if it read substantially: "Does the defendant as a tenant of the plaintiff hold over after the expiration of his tenancy?" Construing the issue as so reading, we think any error or irregularity was fully cured. *Richardson v. Edwards,* 156 N. C., 590.

By reference to the affidavit of the plaintiff before the justice of the peace and his testimony in the Superior Court, it will be seen that the plaintiff contended that he rented the lands to the defendant for the years 1932, 1933, and 1934, that he made a separate rental contract for each year, and that the defendant's term expired 31 December, 1934. And by reference to the defendant's testimony in the Superior Court it will be seen that the defendant contended that the rental contract under which he held was made in September, 1933, and covered the three years

of 1933, 1934, and 1935, and that, therefore, the defendant's term expired on 31 December, 1935. Neither party contended that the defendant was not at one time a tenant of the plaintiff by virtue of an oral contract of lease, or that the defendant was not then in possession, and the sole issue of fact raised was whether this tenancy expired on 31 December, 1934, or on 31 December, 1935.

The controversy was narrowed to one question of fact, and, consequently, the court instructed the jury that if they should find that the plaintiff and defendant entered into a contract whereby the defendant leased the land for the period of the year 1934, it would be the duty of the jury to answer the first issue "Yes," but that if the jury should find that the plaintiff entered into a contract whereby he leased the premises to the defendant for a period of three years, that is, for the years 1933, 1934, and 1935, they would answer the first issue "No." In the light of the evidence and of the charge only one interpretation of the verdict is permissible, and that is, that the jury accepted the defendant's version of the contract and found that he was still the tenant of the plaintiff, and that his term had not expired.

His Honor charged the jury that "the plaintiff contends that you should be satisfied from the evidence and by its greater weight that the tenancy of the defendant terminated on 31 December, 1934, and that he is now holding over wrongfully after his rental period has expired, and that you should answer the first issue 'Yes' "; and, further, that "upon all the testimony in the case the plaintiff contends that you should be satisfied from the evidence and by its greater weight that the tenant is holding over after the expiration of his tenancy." These statements of the plaintiff's contentions, unchallenged by objection or exception, clearly indicate that the plaintiff admitted that the defendant was his tenant, and made only one contention, namely, that the defendant was holding over after the expiration of his tenancy, and that this expiration took place 31 December, 1934. The charge further reveals that the court stated to the jury that the defendant admitted that he was a tenant of the plaintiff and contended that his contract of lease was for three years, and therefore did not expire until 31 December, 1935. Therefore, it is manifest that but one question of fact was submitted to the jury, namely, did the contract of lease expire on 31 December, 1934, or 31 December, 1935? While the evidence was conflicting, it was fully and clearly presented to the jury under a fair and impartial charge by the court, and the issue was answered by the jury as the jury was told the defendant contended it should be answered. Interpreting the verdict in the light of the evidence and charge, we see no error in entering judgment for the defendant as appears in the record.

The plaintiff's first assignment of error as to the refusal to submit the first issue as tendered by him and the adoption of the first issue as submitted by the court cannot be considered for the reason that it appears from the record that neither objection nor exception to such refusal or submission of issues was made at the trial. C. S., 590; *Cotton Mills v. Abernathy,* 115 N. C., 402, and cases there cited. However, the issue as tendered by the plaintiff would have carried the same confusion as did the one submitted by the court. The issue so tendered was: "Was the defendant a tenant of the plaintiff, and if so, did he hold over after the expiration of the tenancy?" If answered in the affirmative, there would be a finding that the defendant was a tenant of the plaintiff holding over after the expiration of the tenancy, and hence should be ejected; and if answered in the negative, there would be a finding that the defendant was not a tenant of the plaintiff, and therefore a trespasser, and should be ejected. This tendered issue, unexplained by evidence or charge, would have been but another "sure bet" for the plaintiff.

The plaintiff's second and third assignments of error, which are to the court's refusal to give requested prayers for instructions as to the necessity of giving notice to quit, cannot be sustained, since such prayers had no relevancy to the theory upon which the case was tried.

The plaintiff's fourth and fifth assignments of error are to the court's signing judgment for the defendant and refusal to sign judgment for the plaintiff. These assignments are disposed of by the discussion in the outset of this opinion.

Affirmed.

TOWN OF FARMVILLE v. JOHN HILL PAYLOR AND WIFE, ALICE PAYLOR.

(Two Cases.)

(Filed 10 April, 1935.)

1. **Limitation of Actions B a—Tardy payment of street assessment will not start running of statute against remaining unpaid installments where municipality does not declare them due under acceleration provision.**

   Defendants paid the first of ten yearly installments on liens against their lots for street improvements fourteen days late, and made no further payments on the liens. Over ten years elapsed from the date of defendants' tardy payment of the first installment to the date plaintiff municipality instituted this action to enforce the liens, but the action was instituted less than ten years from the date the second installment was due. *Held:* Plaintiff's action was not barred by the ten-year statute of limitations, since the provision of C. S., 2716, that upon failure to pay any

installment when due all installments remaining unpaid should at once become due and payable, gives the municipality the optional right to declare all installments due and payable upon default, and in the absence of its declaration to invoke the acceleration provision the statute of limitations will not begin to run against unpaid installments not then due. C. S., 437.

2. **Municipal Corporations G i—C. S., 2716, gives municipality option to accelerate maturity of unpaid assessments for street improvements upon default.**

The provision of C. S., 2716, that upon default in the payment of an installment due on street assessments, the remaining unpaid installments should thereupon become due and payable, being for the benefit of the *municipality*, gives the municipality the optional right to declare remaining unpaid installments due upon default in payment of any installment and does not automatically accelerate the maturity of unpaid installments.

APPEAL by the defendants in two cases consolidated for the purpose of trial from *Parker, J.*, at September Term, 1934, of PITT. Affirmed.

The plaintiff town of Farmville instituted two separate actions for the purpose of collecting pavement assessment liens against two lots owned by the defendants Paylor and his wife, on Main and Pine streets, respectively, in said town. The assessments were levied under chapter 56, Public Laws 1915, being C. S., 2703, *et seq.* The first installment of each assessment was due and payable on 1 October, 1920, and was paid 14 October, 1920. No other installments have been paid. Summonses were issued on 31 December, 1930.

The defendants in answering the complaints pleaded the ten-year statute of limitations in bar of any recovery by the plaintiff. The following issues, with the proper name of street inserted, were submitted in each case:

"1. What amount, if any, is owed as paving assessment upon the property on ....Street, as described in the complaint?

"2. Is the plaintiff's cause of action barred by the statute of limitations?"

The first issues in the respective cases were, by consent, answered, "$417.28, with interest from 1 October, 1920," and "$305.54, with interest from 1 October, 1920," and the court instructed the jury that if they found the facts to be as shown by all of the evidence they would answer the second issue in each case in the negative. From judgments for the plaintiff based upon the verdicts, the defendants appealed to the Supreme Court, assigning errors.

John B. Lewis for plaintiff.
John Hill Paylor for defendants.

SCHENCK, J. The assessments were levied by virtue of chapter 56, Public Laws of 1915, and it is conceded that the plaintiff has complied with the provisions of the statute, and that the amounts sued for, namely, $417.28 and $305.54, are due and constitute a lien against the lots of the defendants, unless the causes of action are barred by the ten-year statute of limitations. C. S., 437; *High Point v. Clinard,* 204 N. C., 149. The determinative facts are these: The first installment of each assessment fell due on 1 October, 1920, and the second installments thereof fell due on 1 October, 1921, and other installments on each succeeding 1 October up to and including the year 1929. The first installments, due 1 October, 1920, were paid on 14 October, 1920, and no other installments have been paid. The summons in the respective actions was issued 31 December, 1930.

A portion of section 10 of the act under which the plaintiff proceeded (C. S., 2716), reads as follows: "Such installments shall bear interest at the rate of six per centum per annum from the date of the confirmation of the assessment roll, and in case of the failure or neglect of any property owner . . . to pay any installment when the same shall become due and payable, then and in that event all of the installments remaining unpaid shall at once become due and payable, and such property . . . shall be sold by the municipality under the same rules, regulations, rights of redemption, and savings as are now prescribed by law for the sale of land for unpaid taxes."

The defendants' contention is that the failure to pay the first installment when due on 1 October, 1920, caused all of the installments to become at once due and payable after that date, and caused the ten-year statute of limitations to begin to run against all unpaid assessments; and that the making and acceptance of the payment on 14 October, 1920, extended the time of the beginning of the running of the statute of limitations against all installments then remaining unpaid until 15 October, 1920, and that from 15 October, 1920, to 31 December, 1930, being more than ten years, the causes of action were barred when the summonses were issued. The plaintiff, on the contrary, contends that while the failure to pay the first installments when due on 1 October, 1920, gave to it the right to declare all the remaining installments due and payable, that said installments did not automatically become due and payable in the absence of any declaration by the plaintiff of its purpose to invoke the acceleration provisions of the statute, and that the earliest possible date that the statute of limitations could have begun to run was 1 October, 1921, the date the second installments, the first in which there was a default in payment, fell due, and that therefore its causes of action are not barred by the statute of limitations pleaded, since from 1 October, 1921, to 31 December, 1930, is less than ten years. We concur in the contentions of the plaintiff.

In *Meadows Co. v. Bryan,* 195 N. C., 398, the statute of limitations was interposed to a series of notes secured by a mortgage deed containing a provision by the terms of which, upon default in the payment of any one of said notes, "the entire debt shall be due and payable, and the parties of the first part in such case do hereby authorize and fully empower the said party of the second part, his heirs, executors, administrators, and assigns to sell" the lands conveyed at the courthouse door, and this Court held that where notes are given in series and are secured by a mortgage deed on lands containing a provision that upon the failure to pay any one of the notes in the series upon maturity all the notes of the series shall become due and payable, that the mortgagee had the option to enforce the sale upon the happening of the event so specified, and when the mortgagee had not exercised his option the statute of limitations applied as from the due date of each note in the series, as if the provision for the acceleration of the payment had not been incorporated in the mortgage.

The language of the statute, "in case of the failure or neglect of any property owner . . . to pay said installment when the same shall become due and payable, then, in that event, all of said installments remaining unpaid shall at once become due and payable," is to the same effect as that of the mortgage deed above set forth, and we are of the opinion that the purpose of the statute was to provide an optional remedy to the creditor town (the plaintiff) by giving it the discretionary right to declare the whole debt due upon failure in the payment of past-due installments, rather than to provide for the automatic acceleration of the maturity of all unpaid assessments. To hold that the failure to pay any installment when due automatically matured the remaining installments and started the running of the statute of limitations against the entire debt would work hardship upon the debtor property owner, since they would be subject to foreclosure proceedings which the creditor town might not institute except to protect itself against the statute of limitations; and to hold that the making and acceptance of payment of past-due assessments did not postpone the running of the statute until another assessment became due would destroy any incentive to the debtor property owners to reëstablish the installment plan for the payment of assessments due in the future by paying installments past due.

The Appellate Court of Indiana, in the case of *People's Trust & Savings Bank et al. v. Hennessey et al.,* 149 N. E., 365, when called upon to consider a plea of the statute of limitations interposed under similar facts and involving a statute with practically the same provision as is contained in our statute, held that the statute of limitations did not begin to run against unpaid deferred installments of municipal assessment liens upon failure in the payment of the first installments when

due, in the absence of any declaration by the assignee of the assessment liens (the plaintiff) of its purpose to avail itself of its optional right to accelerate the maturity of said deferred installments. The Court's conclusion was reached by drawing an analogy between the failure to pay notes secured by mortgages with acceleration clauses and failure to pay deferred installments of paving assessments levied by virtue of statutes with similar acceleration clauses.

We hold that the provision for the acceleration of the maturity of deferred installments upon default in payment of past-due installments is for the benefit of the creditor town, and is not self-operative, and that the town, upon default, may either institute foreclosure proceedings or may waive the acceleration provision without starting the running of the statute of limitations.

The judgments of the Superior Court are

Affirmed.

HENRY C. MOYE AND WIFE, FRANCES MOYE, v. NORTH CAROLINA JOINT-STOCK LAND BANK OF DURHAM, A CORPORATION, WILLIAM MOYE, AND JOHN W. HOLMES.

(Filed 10 April, 1935.)

1. **Vendor and Purchaser E c—Where purchaser does not establish valid, subsisting contract he may not attack vendor's subsequent contract to convey.**

Where, in an action on a contract to convey lands, the jury finds that plaintiff purchaser had abandoned or canceled the contract sued on, a subsequent issue as to whether the vendor's subsequent contract with a third person to convey the same lands was entered into collusively in furtherance of a conspiracy to defeat plaintiff purchaser's right to specific performance, is rendered immaterial, since such issue determines only whether plaintiff is entitled to specific performance or is remitted to damages for breach of the contract, and the answer to the first issue determines that plaintiff has no rights under the contract sued on, and has no legal basis to demand cancellation of the second contract to convey.

2. **Same—Burden is on plaintiff purchaser to prove his vendor's subsequent contract to convey to third person was entered into collusively.**

In a suit by the purchaser in a contract to convey lands against the vendor therein and a third person to whom the vendor subsequently contracted to convey the same lands, the burden is on plaintiff to prove that the second contract to convey was entered into through conspiracy and collusion to defeat plaintiff's right to specific performance, and where plaintiff's evidence is insufficient to sustain an affirmative answer to the issue, the court's peremptory instruction to answer the issue in defendant's favor is not erroneous.

APPEAL by plaintiffs from *Barnhill, J.,* at January Term, 1935, of PITT. Affirmed.

Three separate actions were consolidated for the purpose of trial, namely, (1) an action in summary ejectment instituted by William Moye against Henry Moye, and (2) an action to recover rents for the year 1934 instituted by William Moye against Henry Moye, and (3) an action instituted by Henry C. Moye and his wife, Frances Moye, against the North Carolina Joint-Stock Land Bank, William Moye, and J. W. Holmes, in which the plaintiffs allege that they, acting through J. W. Holmes, had contracted for a reconveyance from the defendant land bank of a farm which they had formerly owned, and which had been purchased by the bank under a foreclosure proceeding, and that said bank had breached said contract and refused to reconvey the land to them, and that these plaintiffs were entitled to a deed for said land by way of specific performance. These plaintiffs further allege that while the said bank may have contracted to convey the land to William Moye, that such contract of conveyance was not in good faith, but merely a subterfuge to make it appear that the title was in a third party, so that the plaintiffs could not have specific performance of their contract of sale and purchase, and that they are entitled to have such contract of sale by the land bank to William Moye, which is of record, canceled and set aside; or, in the event that William Moye took such contract of sale without notice of the rights and claims of the plaintiffs, and for that reason specific performance could not be had, that they, the plaintiffs, are entitled to recover the sum of $2,000 for the breach of their said contract. The defendants North Carolina Joint-Stock Land Bank and William Moye filed answers in which they averred that any contract of sale and purchase, which may have existed between said land bank and the plaintiffs Henry C. Moye and his wife, was canceled or abandoned by mutual consent of the parties. The defendant J. W. Holmes filed no answer.

From a judgment for the defendants North Carolina Joint-Stock Land Bank and William Moye to the effect that said plaintiffs were not entitled to specific performance of the contract of the sale and purchase, or to recover damages for the breach thereof, since said contract was canceled or abandoned by said plaintiffs, the plaintiffs Henry C. Moye and his wife, Frances Moye, appealed to the Supreme Court, assigning errors.

S. J. Everett for plaintiffs, appellants.
J. B. James and J. S. Patterson for defendants, appellees.

SCHENCK, J. These consolidated cases were first heard before Daniels, J., at the February Term, 1934, and answers were made to various

issues, all of which were set aside with the exception of two, and the case was retained that further issues might be answered at a subsequent term. The two issues and the answers thereto retained by Daniels, J., and brought forward as a part of this case on appeal, are as follows:

"1. Did the defendant North Carolina Joint-Stock Land Bank, under written contract, agree to sell the lands in question of Henry C. Moye to the defendant J. W. Holmes? Answer: 'Yes.'

"2. Did Mr. J. W. Holmes purchase from the defendant bank the property described in the complaint as the agent or trustee of Henry C. Moye? Answer: 'Yes.' "

To the action of Daniels, J., no objection or exception was noted.

Eight issues were submitted by Barnhill, J., at the January Term, 1935, and were answered, or left unanswered, as follows:

"1. Was the contract of purchase and sale between North Carolina Joint-Stock Land Bank and J. W. Holmes for Henry Moye canceled by mutual consent of the parties, or abandoned by the purchaser, as alleged? Answer: 'Yes.'

"2. If not, did the North Carolina Joint-Stock Land Bank breach said contract? Answer: ....

"3. What damage, if any, is Henry Moye entitled to recover on account of the breach of said contract? Answer: ....

"4. Did Henry Moye rent or lease the land in controversy from William Moye for the year 1933, as alleged? Answer: 'No.'

"5. If so, did the said William Moye give the said Henry Moye due notice to vacate at the end of his said lease, as alleged? Answer: ....

"6. What amount, if any, is William Moye entitled to recover of Henry Moye for rent for said premises for the year 1933? Answer: ....

"7. What was a fair and reasonable rental value for said land for the year 1934? Answer: '$425.00.'

"8. Did the North Carolina Joint-Stock Land Bank conspire and collude with William Moye to make a fictitious conveyance to the said William Moye of said premises for the purpose of defeating the rights of Henry Moye under the contract of purchase entered into by J. W. Holmes, as alleged? Answer: 'No.' "

The assignments of error assail the charge of the court to the effect that since the burden of proof on the eighth, and last, issue was upon the plaintiffs, and since there was not sufficient evidence to be submitted upon the affirmative thereof, that the jury should answer the eighth issue in the negative; and the admission and exclusion of certain evidence in the course of the trial.

We will address ourselves first to the assignments of error relating to the peremptory charge upon the eighth issue. The jury having answered the first issue in the affirmative, and thereby found that the

contract of sale and purchase between the land bank and the defendant Holmes for the plaintiff Henry Moye was either canceled or abandoned, it would seem to matter not whether the eighth issue was answered at all, since if the contract of sale and purchase was either canceled or abandoned there would be no "rights of Henry Moye under the contract of purchase entered into by J. W. Holmes" to be defeated by conspiracy and collusion, or otherwise.

The manifest purpose of the eighth issue was, in the event the first issue was answered in the negative, to determine whether the plaintiffs would recover the land or a monetary judgment. If the first issue had been answered in the negative and the eighth issue in the affirmative, the plaintiffs Henry Moye and wife would have been entitled to a decree canceling the contract of sale by the land bank to William Moye and directing the bank to make a deed to J. W. Holmes for the use and benefit of Henry Moye and his wife. If the first issue had been answered in the negative and the eighth issue in the negative, the plaintiffs Henry Moye and his wife would have been entitled to a judgment for the difference in the purchase price alleged to have been fixed in the contract of sale and purchase, $1,300, and the market value of the land, said difference being alleged as $2,000. However, since the first issue was answered in the affirmative, it became unnecessary to answer the eighth issue, and the more logical course to have been pursued would have been to have charged the jury that if they answered the first issue "No," they need not answer the eighth issue. *If the contract of sale and purchase* of the land was either canceled or abandoned, there were no rights left thereunder to be defeated.

There is no allegation or even suggestion that the canceling or abandonment of the contract of sale and purchase was procured by conspiracy and collusion. On the contrary, the plaintiffs deny that there was ever any such cancellation or abandonment. The only result of conspiracy and collusion alleged is the contract of sale by the land bank to William Moye, and since the jury has found that the contract of sale and purchase between the land bank and J. W. Holmes for Henry Moye was canceled by mutual consent of the parties or abandoned by the purchaser, the plaintiffs Henry Moye and wife have no legal basis upon which to rest a demand that the contract of sale by the land bank with William Moye be canceled, however it may have been obtained. The *answering of the first issue against them puts Henry Moye and his wife* out of the picture.

Albeit, it seems to us that the answering of the first issue in the affirmative rendered the answering of the eighth issue an act of supererogation, we have examined the record and agree with his Honor that

there was not sufficient evidence to be submitted to the jury upon the affirmative of the latter issue.

We have examined the objections and exceptions to the admission and exclusion of evidence in the course of the trial. Few, if any, of these relate to evidence addressed to the first issue, and we find no reversible error among them.

Affirmed.

W. D. BAILEY AND WIFE, ROSA BAILEY, v. W. F. STOKES AND J. B. CONGLETON, TRADING AS STOKES & CONGLETON, AND W. G. STOKES (ORIGINAL PARTIES DEFENDANT); AND ERNEST J. WHITEHURST (ADDITIONAL PARTY DEFENDANT).

(Filed 10 April, 1935.)

1. Mortgages H m—Evidence held insufficient to show that purchaser from purchaser at foreclosure sale was not bona fide purchaser without notice.

The mortgagee, a partnership, foreclosed the mortgage, and one of the partners bid in the land at the foreclosure sale and thereafter transferred title to the partnership. The partnership thereafter leased the land to the former mortgagors for one year, and the subsequent year leased the land to a third person. Upon the termination of the lease of the former mortgagors they voluntarily gave up possession to such third person and sold him certain personal property consisting of tobacco sticks, screens, etc. Upon the termination of the second lease the partnership sold the land to such third person for value. Prior to institution of action the former mortgagors did not notify such third person purchaser that they claimed any equity in the land. *Held:* In the mortgagors' action against the partnership and the third person purchaser, attacking the foreclosure for irregularities, a nonsuit was properly granted as to the third person purchaser, the record evidence being insufficient under the facts and circumstances of this case to show that the third person purchaser was not a *bona fide* purchaser without notice.

2. Mortgages H p: Estoppel B b—Mortgagor must elect between setting aside foreclosure and recovery of damage from mortgagee.

The mortgagee, a partnership, foreclosed the mortgage and one of the partners bought the land at the foreclosure sale and thereafter transferred title to the partnership. The partnership thereafter sold the land to a third person. The mortgagors instituted action against the partnership and the purchaser, attacking the foreclosure sale for irregularities. A nonsuit was granted as to the purchaser, and issues were submitted to the jury with plaintiffs' consent as to the validity of the foreclosure sale and damages recoverable by plaintiff mortgagors against the partnership, and upon plaintiffs' motion upon a verdict in their favor, judgment was entered upon the verdict. *Held:* Plaintiffs are estopped from maintaining on appeal that there was error in granting defendant purchaser's motion as of nonsuit.

APPEAL by plaintiffs from *Cowper, Special Judge,* at November Term, 1934, of PITT. Affirmed.

This is an action, brought by plaintiffs against defendants, to set aside certain deeds as irregular and void. The defendants denied the material allegations of plaintiffs' complaint. The defendants W. F. Stokes and J. B. Congleton set up a counterclaim of $420.03. The defendant Ernest J. Whitehurst set up the plea of estoppel, and "that he purchased the property in good faith, for value and without notice." When the cause came on for trial, a nonsuit was entered in the court below, as to Ernest J. Whitehurst.

The following issues were submitted to the jury, and their answers thereto: "(1) Did the plaintiffs, after the foreclosure sale of the land in controversy, lose their right to redeem said land, as alleged in the answer? A. 'No.' (2) If not, what damages, if any, are the plaintiffs entitled to recover of the defendants W. F. Stokes and J. B. Congleton? A. '$2,500.' (3) Are the plaintiffs indebted to the defendants, and if so, in what amount? A. '$300.00.' "

Judgment was rendered on the verdict by the court below. The exception and assignment of error made by plaintiffs and the necessary facts will be set forth in the opinion.

S. J. Everett for plaintiffs.
J. B. James for defendants.

CLARKSON, J. The plaintiffs' only exception and assignment of error is to the judgment of nonsuit in the court below, as to Ernest J. Whitehurst. Plaintiffs contend that there is sufficient "evidence in the record to fix Ernest J. Whitehurst with notice of the defect and fraud in the title of codefendants, Stokes & Congleton, and with notice of the equity of redemption in the plaintiffs." We cannot so hold.

Stokes & Congleton (W. F. Stokes and J. B. Congleton) sold under a mortgage made to them by plaintiffs. At the mortgage sale W. G. Stokes purchased the land, and title was made to him. Thereafter, W. G. Stokes conveyed the property to Stokes & Congleton. The plaintiffs, recognizing Stokes & Congleton as owners in 1932, rented the farm from the said firm, paying rent therefor in the fall of that year. During said year, and while the plaintiffs were occupying the same, Stokes & Congleton, the purchasers, made numerous improvements thereon. At the beginning of 1933 the farm was rented to the defendant Whitehurst. The plaintiffs, before moving from said farm, sold a considerable amount of personal property to the new tenant, Whitehurst, this property consisting of tobacco sticks, lumber, light fixtures, and wire screens. At no time did the plaintiffs notify Whitehurst that they

claimed any interest in the farm, but moved off voluntarily and without protest. Whitehurst cultivated the farm during 1933. Before this action was begun, and during the fall of 1933, Stokes & Congleton, for value and without notice, sold the farm to Whitehurst for a consideration of $4,500—$500.00 cash and the remainder secured by a lien on the property—since which time an additional sum of $500.00 has been paid on said indebtedness. Numerous witnesses testified that the amount paid by Whitehurst was the reasonable market value of the farm. All the evidence discloses the fact that at no time did Stokes & Congleton, or the plaintiffs, notify Whitehurst that the plaintiffs were claiming any interest in the property, or claiming that the sale was irregular and illegal.

The evidence was to the effect that Whitehurst purchased the property in good faith for full value and without any notice of plaintiffs' claim to an equity of redemption in the land. If there were anything in the chain of title that would put Whitehurst on notice, the plaintiffs would be estopped by their conduct to assert same. We think that the ruling of the court below is fully supported by the case of *Lockridge v. Smith,* 206 N. C., 174, where the matter is fully discussed and authorities cited.

The second question involved on this appeal, as set forth by defendant Whitehurst, is as follows: "Whether the plaintiffs are now estopped, the record disclosing that they consented to issues and moved for judgment on the findings of the jury awarding damages, the same constituting an election on his part." We think, under the facts and circumstances of this case, that plaintiffs are estopped.

Plaintiffs elected to press their cause for damages after the nonsuit was entered in the court below as to Whitehurst. The issues were agreed to by plaintiffs, a verdict was rendered in plaintiffs' favor, and on motion of plaintiffs the court below rendered judgment. The amount of recovery was paid to the clerk of the Superior Court. Plaintiffs cannot "blow hot and cold in the same breath."

In *Warren v. Susman,* 168 N. C., 457 (459-460), speaking to the subject, is the following: "As to the land, defendant bought it for itself, though it acted indirectly by an agent. It is the same in equity as if it had bought in its own name. *Whitehead v. Hellen,* 76 N. C., 99. The plaintiff could elect to have the sale set aside and the property returned to the trust fund, or recover of the defendant, who had sold and bought at the same time, in breach of his trust, the value of the land where the trustee insists on the validity of the sale and his right to retain the property, and has conveyed it to a third person, whose title he also insists is unassailable. . . . The *cestui que trust,* in making his election, is not required, in such circumstances, to take the property upon his trustee's terms, or at a price fixed by him; but equity requires

that if the trustee elects to stand upon his right as purchaser, instead of surrendering the property to the beneficiary, he must pay the reasonable value of the land or a fair compensation for the breach of his trust; and this, with greater reason, is true where the trustee has himself subsequently conveyed the land to a *bona fide* purchaser for value and without notice. *Sprinkle v. Wellborn,* 140 N. C., 163." *Lykes v. Grove,* 201 N. C., 254. For the reasons given, the judgment of the court below is

Affirmed.

GUY E. WALLER v. L. M. HIPP AND THE QUAKER STATE OIL REFINING COMPANY. INC.

(Filed 10 April, 1935.)

1. Automobiles D b—

A person riding in an automobile upon the invitation of the driver and the driver's employer, who is injured by the negligence of the driver in the performance of his duties, may recover of both the driver and the employer.

2. Master and Servant D b—

An employer is liable for negligence of the employee causing injury to a third person when the employee is acting within the scope of his employment and about his employer's business.

3. Automobiles C c: C h—Evidence that skidding was caused by worn-out tires and excessive speed under the circumstances held sufficient for jury.

Evidence that the car in which plaintiff was riding as a guest skidded on the wet paved highway and that the driver explained the skidding was caused by worn-out tires, and that, upon plaintiff's suggestion, the driver slowed his speed to 35 or 37 miles per hour, and that thereafter at this speed the car skidded again, resulting in the injury in suit *is held* sufficient to be submitted to the jury on the question of negligence, there being evidence from which the jury could find that the skidding was caused by driving the car with worn tires at a speed, which although not ordinarily unlawful, was unlawful under all the circumstances shown by the evidence. C. S., 2621 (45).

4. Automobiles C f: Negligence A b—

Whether the conduct of the driver of an automobile in turning the steering wheel from one side to the other in an attempt to obtain control of the car after it had skidded on the highway was that of a prudent man *held* a question for the jury and not for the court.

5. Appeal and Error J a—

The refusal of the trial court to set aside the verdict on the ground that excessive damages were awarded is not reviewable.

APPEAL by defendants from *Devin, J.*, at October Term, 1934, of NASH. No error.

This is an action to recover of the defendants damages for personal injuries suffered by the plaintiff, and caused, as alleged in the complaint, by the negligence of the defendant L. M. Hipp, an employee of the defendant the Quaker State Oil Refining Company, Inc., while he was driving an automobile which was owned by the defendant the Quaker State Oil Refining Company, Inc., in the performance of his duties as its employee, and in which the plaintiff was riding as a passenger.

In their answer the defendants admit that the plaintiff was injured as alleged in the complaint, and that at the time he was injured he was riding as a passenger in an automobile owned by the defendant the Quaker State Oil Refining Company, Inc., and driven by its employee, the defendant L. M. Hipp, in the performance of his duties. They deny that plaintiff's injuries were caused by the negligence of the defendant L. M. Hipp, as alleged in the complaint.

At the trial evidence was introduced by the plaintiff; no evidence was offered by the defendants or by either of them.

The issues submitted to the jury were answered as follows:

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

"2. What damages, if any, is the plaintiff entitled to recover of the defendants? Answer: '$12,500.'"

From judgment that plaintiff recover of the defendants the sum of $12,500, with interest and costs, the defendants appealed to the Supreme Court, assigning as error (1) the refusal of the court to allow their motion for judgment as of nonsuit; (2) an instruction of the court to the jury, in its charge; and (3) the refusal of the court to allow defendants' motion to set aside the verdict on the ground that the damages assessed by the jury are excessive.

Cooley & Bone and Alexander & Gold for plaintiff.
Burgess, Baker & Allen for defendants.

CONNOR, J. In view of the admissions in the pleadings in this action, the only question involved in the first issue submitted to the jury was whether the plaintiff's injuries were caused by the negligence of the defendant L. M. Hipp, as alleged in the answer.

It is alleged in the complaint, and admitted in the answer, that at the time the plaintiff was injured he was riding in an automobile which was owned by the defendant the Quaker State Oil Refining Company, Inc., and driven by the defendant L. M. Hipp in the performance of his duties as its employee; and that the plaintiff was riding in the automo-

bile upon the invitation of the defendants, and for the purpose of aiding the defendant L. M. Hipp in the performance of his duties as an employee of the defendant the Quaker State Oil Refining Company, Inc.

On these admissions in their answer, both the defendants are liable to the plaintiff for the damages which he sustained as the result of his injuries, if his injuries were caused by the negligence of the defendant L. M. Hipp, as alleged in the complaint. It is elementary law that the employer is responsible for the negligence of his employee which results in injury to a third person, when the employee is acting within the scope of his employment, and about his employer's business. See *Martin v. Bus Line,* 197 N. C., 720, 150 S. E., 501.

The evidence at the trial tended to show that as the plaintiff and the defendant L. M. Hipp were riding in the automobile, on a State highway between the town of Fountain and the town of Farmville, at a speed of 35 to 37 miles an hour, the automobile side-slipped or skidded, and that the defendant L. M. Hipp, the driver, attempted to control the automobile by turning the steering wheel from his right to his left, and *vice versa,* with the result that the automobile "zig-zagged" across the highway until it went off the highway and down an embankment, with the result that both the plaintiff and the defendant L. M. Hipp were injured. The evidence tended to show further that the highway was wet and slippery, and that the tires on the automobile were worn and slick. The plaintiff testified as follows:

"The road between Pinetops and Farmville is of material commonly used in highway construction, and is paved. The road was damp, due to the mist which had fallen during the day on it. We had trouble between Fountain and Farmville. A few miles out of Fountain, the automobile side-slipped. We had been driving at a speed of 40 to 42 miles per hour. I said: 'Mr. Hipp, why does this car side-slip when we are running no faster than we are?' He replied, 'The tires are worn out.' I said, 'Why don't you put on new tires?' He said, 'I intended to do so, but the district manager of the company told me to keep down expenses.' He said he was going to slip new tires on the automobile, one at a time. I told him that he had better slow down. He did so. We were running at a speed of 35 to 37 miles per hour when the automobile side-slipped and skidded. Mr. Hipp was not able to right the automobile with the steering wheel."

There was no evidence which tended to show that the plaintiff knew that the tires on the automobile were worn and slick until his conversation with the defendant L. M. Hipp, almost immediately before the accident.

The evidence in this case was properly submitted to the jury as tending to show that the plaintiff was injured by the negligence of the de-

fendant L. M. Hipp. The mere fact that the automobile side-slipped or skidded was not in itself evidence of its negligent operation by the defendant. *Springs v. Doll,* 197 N. C., 240, 148 S. E., 251. But in this case, as in *Butner v. Whitlow,* 201 N. C., 749, 161 S. E., 389, there was evidence from which the jury could find that the skidding of the automobile was the result of the negligence of the defendant in driving an automobile with tires which he knew were worn out and slick, on a highway which was wet and slippery, at a rate of speed which, although not ordinarily unlawful, was unlawful under all the circumstances shown by the evidence. C. S., 2621 (45).

There was no error in the refusal of the court to give the special instruction as prayed by the defendants. Whether or not the conduct of the defendant L. M. Hipp, after the automobile had skidded on the highway, in attempting to control it, was that of a prudent man was for the jury and not for the court to determine. The instruction, as properly modified by the court, was given in the charge to the jury. *Newman v. Queen City Coach Company,* 205 N. C., 26, 169 S. E., 808. There was nothing in the charge to the jury of which the defendants can justly complain. It was full and correct.

The refusal of the court to set aside the verdict on the ground that the damages assessed by the jury are excessive is not reviewable by this Court. *Lane v. R. R.,* 192 N. C., 287, 134 S. E., 855. The evidence with respect to the plaintiff's injuries, and his resultant damages, was sufficient to justify the answer to the second issue.

The assignments of error on this appeal cannot be sustained. The judgment is affirmed.

No error.

GURNEY P. HOOD, COMMISSIONER OF BANKS, EX REL. THE PEOPLE'S BANK OF BURNSVILLE, N. C., v. J. N. WILSON, ROBERT PRESSNELL, SHERIFF OF YANCEY COUNTY, AND A. G. WILSON.

(Filed 10 April, 1935.)

1. Judgments G b—Consent judgment may be entered at any time by clerk of Superior Court in which the action is pending.

A consent judgment may be entered at any time by the clerk of the Superior Court in which the action is pending, C. S., 593, and it is not required that such judgment be entered on a Monday as is the case with other judgments which the clerk is authorized to enter. C. S., 597 (b).

2. Judgments H a—Consent judgments have priority in accordance with priority of docketing.

Plaintiff's consent judgment was docketed 7 o'clock p.m., 6 December, and defendant judgment creditor's consent judgment against the same

party was docketed 3 o'clock p.m., the same day, the judgments being docketed on a day other than a Monday, as authorized by statute. *Held:* The judgment of defendant judgment creditor has priority over plaintiff's judgment, C. S., 614, since the provisions of C. S., 613, that judgments rendered during a term should relate back to the first day thereof, and that the liens of all judgments rendered on the same Monday shall be of equal priority, do not apply to judgments by consent.

3. **Execution E a: Receivers A a—Execution may not be enjoined nor receiver appointed on ground that execution would not satisfy all judgment liens.**

Allegations that because of prevailing financial conditions a sale of defendant judgment debtor's lands under execution will not produce money sufficient to pay all judgments docketed against him, but that a sale under supervision of the court would probably produce sufficient money to pay all the judgments, are insufficient to state a cause of action upon which plaintiff judgment creditor is entitled to enjoin execution upon defendant judgment creditor's prior docketed judgment, nor are such allegations sufficient to support the appointment of a receiver by the court for the property of the judgment debtor.

APPEAL by the defendant J. N. Wilson from *Warlick, J.,* at October Term, 1934, of YANCEY. Reversed.

This is an action to enjoin the defendant Robert Pressnell, sheriff of Yancey County, from selling, and the defendant J. N. Wilson from causing the sale of the lands of the defendant A. G. Wilson, situate in Yancey County, under execution on a judgment in favor of the said J. N. Wilson and against the said A. G. Wilson; for the appointment of a receiver of the property of the defendant A. G. Wilson pending the trial of the action; and for other relief.

The plaintiff is the owner of a judgment against the defendant A. G. Wilson, which was duly docketed in the office of the clerk of the Superior Court of Yancey County, at 7 o'clock p.m., on 6 December, 1933, and is by virtue of the statute (C. S., 614) a lien on the real property of the said A. G. Wilson, situate in Yancey County. This judgment was rendered in an action brought by the plaintiff against A. G. Wilson in the Superior Court of Yancey County, and was entered by the clerk of said court by consent on Wednesday, 6 December, 1933.

The plaintiff is also the owner of other judgments against A. G. Wilson, which were rendered and docketed subsequent to 6 December, 1933. These judgments are also liens on the real property of A. G. Wilson, situate in Yancey County.

The defendant J. N. Wilson is the owner of a judgment against the defendant A. G. Wilson, which was docketed in the office of the clerk of the Superior Court of Yancey County, at 3 o'clock p.m., on 6 December, 1933, and is by virtue of the statute (C. S., 614) a lien on the real property of the said A. G. Wilson, situate in Yancey County. This

judgment was rendered in an action brought by the said J. N. Wilson against the said A. G. Wilson in the Superior Court of Yancey County, and was entered by the clerk of said court, by consent, on Wednesday, 6 December, 1933.

On motion of the defendant J. N. Wilson, an execution was issued by the clerk of the Superior Court of Yancey County, on the judgment against A. G. Wilson, now owned by him, and at the commencement of this action the said execution was in the hands of the defendant Robert Pressnell, sheriff of Yancey County. The said defendant had caused the homestead of A. G. Wilson to be allotted and set apart to him, as required by law, and had advertised all the lands owned by the said A. G. Wilson, and situate in Yancey County, not included in his homestead, for sale on Monday, 1 October, 1934, under the execution in his hands.

It is alleged in the complaint, upon information and belief, that the defendant A. G. Wilson is now either insolvent or in grave danger of becoming insolvent, and that if his lands are now sold under execution, the proceeds of said sale will not be sufficient to pay the judgments docketed against him and the other claims of his creditors, but that if the said lands are sold under the supervision of the court, they will bring sufficient sums to pay off and discharge the said judgments and other claims against the said A. G. Wilson.

The action was heard in the Superior Court (1) on defendant's demurrer *ore tenus* to the complaint on the ground that the facts stated therein are not sufficient to constitute a cause of action;

(2) On defendants' motion that the temporary restraining order issued in the action be dissolved; and,

(3) On plaintiff's motion that a receiver of all the property of the defendant A. G. Wilson be appointed by the court pending the trial of the action.

At the hearing defendants' demurrer *ore tenus* to the complaint was overruled, and their motion that the temporary restraining order be dissolved was allowed.

The court was of opinion that the judgments of the plaintiff and of the defendant J. N. Wilson against the defendant A. G. Wilson, both of which are liens on the real property of the said A. G. Wilson, situate in Yancey County, are of equal dignity, and that the judgment of the defendant J. N. Wilson has no priority over the judgment of the plaintiff because the former judgment was docketed at 3 o'clock p.m. and the latter judgment was docketed at 7 o'clock p.m. on 6 December, 1933.

In accordance with this opinion, a receiver of all the property of the defendant A. G. Wilson was appointed by the court, pending the trial of the action.

The defendant J. N. Wilson appealed from the judgment, assigning as error (1) the overruling of the defendants' demurrer *ore tenus;* (2) the holding of the court that his judgment had no priority over the judgment of the plaintiff; and (3) the appointment of a receiver of the property of the defendant A. G. Wilson pending the trial.

Watson & Fouts for plaintiff.
J. G. Merrimon and A. Hall Johnston for defendant J. N. Wilson.

CONNOR, J. The facts alleged in the complaint in this action are not sufficient to constitute a cause of action on which the plaintiff is entitled to relief. For that reason, there is error in the judgment overruling the demurrer to the complaint. The demurrer should have been sustained and the action dismissed. On the facts alleged in the complaint, the plaintiff is not entitled to an injunction against the defendants, or either of them.

Both the plaintiff and the defendant J. N. Wilson are judgment creditors of the defendant A. G. Wilson. Neither the validity of the defendant's judgment nor the regularity of the execution issued on said judgments, and now in the hands of the defendant Robert Pressnell, sheriff of Yancey County, are challenged by the plaintiff. Both judgments were duly rendered by the Superior Court of Yancey County, and were duly docketed in the office of the clerk of said court, and are liens on the real property of the judgment debtor, in Yancey County. The judgment of the defendant J. N. Wilson, having been first docketed, is a prior lien on said real property. C. S., 614.

It is provided by statute that a judgment by consent may be entered at any time by the clerk of the Superior Court in which the action is pending. C. S., 593. Such judgment need not be entered on a Monday, as is the case with other judgments which the clerk is authorized to enter. C. S., 597 (b). The statute provides that "the liens of all judgments rendered on the same Monday shall be of equal priority, and each Monday shall be held and construed, in determining the priority of judgment liens, as a term of court, and the first day thereof." See C. S., 613. This provision does not apply to judgments by consent, which were rendered, as authorized by statute, on a day other than a Monday. As to such judgments, in the absence of statutory provisions to the contrary, the rule, *"qui prior est in tempore, prior est in jure,"* applies. See *Bates v. Hinsdale,* 65 N. C., 424.

The allegations in the complaint to the effect that because of financial conditions now prevailing throughout the country, a sale of the lands of the judgment debtor under an execution will not produce a sum of money sufficient to pay all the judgments docketed against him, but

that a sale of said lands under the supervision of the court will probably produce such sum, although admitted by the demurrer, are not sufficient to constitute a cause of action on which the plaintiff is entitled to the injunction prayed for by the plaintiff. See *Bolich v. Ins. Co.*, 202 N. C., 789, 164 S. E., 335. Nor are such allegations sufficient to support the appointment by the court of a receiver of the property of the judgment debtor.

As there is error in the judgment overruling the demurrer to the complaint, the judgment must be reversed, and the action dismissed. It is so ordered.

Reversed.

T. F. SHOEMAKE v. SINCLAIR REFINING COMPANY, A CORPORATION, AND R. L. WALSER AND A. F. WALSER, PARTNERS, TRADING AND DOING BUSINESS UNDER THE FIRM NAME OF WALSER BROS.

(Filed 10 April, 1935.)

1. Appeal and Error J g—

Where it is determined on appeal that defendants' motion for judgment as of nonsuit should have been allowed, other exceptions upon which defendants rely for a new trial need not be considered.

2. Same—

Where there is no evidence that at the time of the injury in suit the tort-feasor was an employee of the individual defendants, it is immaterial whether the individual defendants were partners or whether the individual defendants were independent contractors with respect to the corporate defendant, since the principle of *respondeat superior* is not applicable to the facts.

3. Automobiles D b—Evidence held insufficient to show that driver of car was employee of defendants at time of injury in suit.

The evidence disclosed that the tort-feasor was requested and instructed to stay at a gasoline plant used in connection with defendants' business, answer the telephone and keep a record of orders for gasoline, that the tort-feasor, in response to a telephone call from his mother to come to supper, took a truck maintained at the plant to deliver gasoline, and without authorization drove the truck to his home, and in attempting to drive into the driveway near his home, collided with plaintiff's car, causing the injury in suit. *Held:* Defendants' motion for judgment as of nonsuit should have been granted, the evidence failing to show that the tort-feasor, at the time of the injury in suit, was an agent or employee of defendants, or either of them.

APPEAL by defendants from *Stack, J.*, at February Term, 1934, of MECKLENBURG. Reversed.

This is an action to recover of the defendants damages for personal injuries suffered by the plaintiff as the result of the negligence of Sink Walser, while he was driving a truck on a street in the city of Salisbury, N. C.

It is alleged in the complaint that the truck which Sink Walser was driving at the time the plaintiff was injured was owned by the defendants, and used by them in the conduct of their business; that Sink Walser, the driver of the truck, was an employee of the defendants, and was driving the truck owned by the defendants in the performance of his duties as their employee at the time the plaintiff was injured. Each of these allegations was denied by the defendants in their answers. The defendants also denied that the plaintiff was injured by the negligence of Sink Walser, as alleged in the complaint.

At the trial evidence was introduced by both the plaintiff and the defendants.

The issues submitted to the jury were answered as follows:

"1. Was the plaintiff injured by the negligence of the defendants R. L. Walser and A. F. Walser, as alleged in the complaint? Answer: 'Yes.'

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

"3. What damages, if any, is the plaintiff entitled to recover of the defendants? Answer: '$8,500.'"

From judgment that plaintiff recover of the defendants the sum of $8,500, and the costs of the action, the defendants appealed to the Supreme Court, assigning as error, among other things, the refusal of the trial court to allow their motion for judgment as of nonsuit, at the close of all the evidence.

J. C. Newell and H. L. Taylor for plaintiff.

J. Laurence Jones and J. L. DeLaney for defendant Sinclair Refining Company.

Clyde E. Gooch and Tillett, Tillett & Kennedy for defendants R. L. Walser and A. F. Walser.

CONNOR, J. As we are of opinion that there was error in the refusal of the trial court to dismiss this action by judgment as of nonsuit, in accordance with the motion of the defendants at the close of all the evidence, we shall not discuss the assignments of error on their appeal to this Court, on which they rely in support of their contention that they are entitled to a new trial. It is immaterial whether or not the defendants R. L. Walser and A. F. Walser were partners, as contended by the plaintiff, or whether or not the relation of these defendants to

their codefendant Sinclair Refining Company was that of independent contractors, as contended by the defendants. There was no evidence at the trial tending to show that Sink Walser was an employee of the defendants, or of either of them, at the time the plaintiff was injured by the collision of the truck which Sink Walser was driving and the automobile in which the plaintiff was riding. For that reason, conceding that the collision was caused by the negligence of Sink Walser, as contended by the plaintiff, in no aspect of the case are the defendants, or either of them, liable for the damages which the plaintiff sustained as the result of his injuries. The evidence considered most favorably in support of the plaintiff's allegations and contentions with respect to the relation of Sink Walser to the defendants, or either of them, fails to show any facts to which the principle of *respondeat superior* can be applied.

Sink Walser, who was about 16 years of age at the time the plaintiff was injured, is a son of the defendant A. F. Walser, and a nephew of the defendant R. L. Walser. The last-named defendant, on 22 August, 1928, was the agent of the defendant Sinclair Refining Company, in charge of its plant at Salisbury, N. C. His brother, the defendant A. F. Walser, was employed by him to aid in the conduct of the business at said plant. Each of these defendants owned a truck which he used for the purpose of delivering gasoline from the plant of the defendant Sinclair Refining Company to customers of said plant. All the evidence shows that each of said defendants used the truck owned by him and that neither, at any time, used the truck owned by the other. After the expenses of the operation of the plant had been paid out of the commissions received by R. L. Walser from the Sinclair Refining Company, under his contract with said company, the balance was divided equally between said defendants.

During the afternoon of 22 August, 1928, the defendant R. L. Walser was at the plant of the Sinclair Refining Company in Salisbury, N. C. The defendant A. F. Walser was not at the plant that afternoon. A friend of R. L. Walser came to the plant and suggested that they attend a baseball game. R. L. Walser called his nephew, Sink Walser, by telephone, and asked him to come to the plant. When Sink Walser arrived at the plant, his uncle, R. L. Walser, asked him to remain at the plant, and while he was at the baseball game to answer the telephone and to keep a record of orders for gasoline. R. L. Walser thereupon went with his friend to the baseball game, leaving Sink Walser in charge of the plant, with instructions to answer telephone calls and to keep a record of orders for gasoline from customers of the plant. There was no evidence tending to show that R. L. Walser requested or authorized his nephew, Sink Walser, to use his truck, which was then at the plant, for any purpose.

At about 5 o'clock that afternoon his mother called Sink Walser over the telephone and requested him to come home for supper. Sink Walser, in response to his mother's request, left the plant, but instead of walking to his home, which was about eight city blocks from the plant, got into his uncle's truck and drove it in the direction of his home, which was just across the street from his uncle's home. When he reached his uncle's home, Sink Walser suddenly turned the truck to his left, for the purpose of driving it into the driveway. As he did so, the truck collided with the automobile in which the plaintiff was riding. There was evidence tending to show that the collision between the truck and the automobile was caused by the negligence of Sink Walser, the driver of the truck, as alleged in the complaint.

In the absence of any evidence tending to show that Sink Walser was driving the truck at the time of its collision with the automobile in which the plaintiff was riding as the servant, employee, or agent of the defendants, or of either of them, there was error in the refusal of the trial court to allow the motion of the defendants for judgment as of nonsuit. See *Martin v. Bus Line,* 197 N. C., 720, 150 S. E., 501, and *Linville v. Nissen,* 162 N. C., 95, 77 S. E., 1096.

The judgment in this action is

Reversed.

STATE v. REX MARSHALL.

(Filed 10 April, 1935.)

1. Homicide E a—Evidence held to show defendant was not in imminent danger of death or great bodily harm and did not apprehend such danger.

Defendant testified that he shot deceased when deceased reached for a hammer because he thought deceased was going to hit or kill him with the hammer, but that deceased had not grasped the hammer or drawn it back when defendant shot him, and there was other testimony that deceased did not reach for the hammer until after he was shot. *Held:* Defendant's own testimony shows that he was not in imminent danger of death or great bodily harm when he shot deceased, and did not apprehend that he was in such danger.

2. Same—Right to kill in self-defense or defense of family.

A homicide is justifiable when committed by a person in defense of himself or family when such person reasonably believes, under the facts and circumstances as they appear to him at the time, that such action is necessary to save himself or his family from death or great bodily harm, the reasonableness of his belief or apprehension under the circumstances as appearing to him being for the jury to determine.

3. Same—

In the exercise of the right of self-defense, more force must not be used than is reasonably necessary under the circumstances, and if excessive force or unnecessary violence be employed, the party charged will be guilty of manslaughter, at least.

4. Homicide H g—

Error, if any, in the charge of the court on the question of the right of self-defense, *is held* cured or rendered harmless by the verdict in the light of defendant's admissions and the evidence appearing on the record.

APPEAL by defendant from *Harding, J.*, at December Term, 1934, of BURKE.

Criminal prosecution, tried upon indictment charging the defendant with the murder of one Richard Lloyd.

Verdict: Guilty of manslaughter.

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

The defendant appeals, assigning errors.

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

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

STACY, C. J. When the case was called for trial, the solicitor announced that the State would not insist upon a verdict of murder in the first degree, but would ask for a verdict of murder in the second degree or manslaughter, as the evidence might disclose.

Thereupon, the defendant admitted the killing with a deadly weapon, and assumed the burden of rebutting the presumptions arising from such admission. *S. v. Keaton,* 206 N. C., 682, 175 S. E., 296.

The homicide occurred in the defendant's filling station. The deceased had been drinking, and, with imbecilic courtesy, undertook to engage the defendant's wife in a whispered conversation. This was repulsed and the deceased ordered to leave the building. The defendant testified: "I ordered him out two or three times; he would not leave; and the next thing he said you G— d— s— o— b— and b—; pulled off his hat and slammed it on the counter with his right hand and said you haven't got the guts to shoot me, and that he would die like a man; and when he reached to pick up the hammer in the other hand, I fired. . . . I fired because I thought he was going to kill me with the hammer, or hit me with the hammer and kill me, maybe. (Cross-examination.) He cursed me; I got the pistol and ordered him out, . . . I was scared of the man. No, I was not mad. . . . When I shot him there was

the width of the counter between us. We were between $2\frac{1}{2}$ and $3\frac{1}{2}$ feet apart. . . . I did not shoot to kill. . . . I saw him when he grabbed the hammer. I did not say he picked it up, but he grabbed it; he raised the hammer up when he fell back, but he did not have it in a striking position; he was reaching and he grabbed the hammer. I do not say he raised it up in a striking position before I shot. . . . I say he did not draw the hammer back to strike."

Defendant's wife testified: "When Rex shot I saw him (deceased) grab for the hammer."

It appears, therefore, from the defendant's own testimony that he was not in imminent danger of death or great bodily harm when he shot the deceased; nor did he apprehend that he was in such danger. "I did not shoot to kill" is his statement, and it appears from the record that the deceased did not reach for the hammer until after he was shot. The clear inference is that the defendant used excessive force. *S. v. Keeter,* 206 N. C., 482, 174 S. E., 298.

The right to kill in self-defense or in defense of one's family or habitation rests upon necessity, real or apparent, and the pertinent decisions are to the effect:

1. That one may kill in defense of himself, or his family, when necessary to prevent death or great bodily harm. *S. v. Bryson,* 200 N. C., 50, 156 S. E., 143; *S. v. Bost,* 192 N. C., 1, 133 S. E., 176; *S. v. Johnson,* 166 N. C., 392, 81 S. E., 941; *S. v. Gray,* 162 N. C., 608, 77 S. E., 833.

2. That one may kill in defense of himself, or his family, when not actually necessary to prevent death or great bodily harm, if he believes it to be necessary and has a reasonable ground for the belief. *S. v. Barrett,* 132 N. C., 1005, 43 S. E., 832.

3. That the reasonableness of this belief or apprehension must be judged by the facts and circumstances as they appeared to the party charged at the time of the killing. *S. v. Blackwell,* 162 N. C., 672, 78 S. E., 316.

4. That the jury and not the party charged is to determine the reasonableness of the belief or apprehension upon which he acted. *S. v. Nash,* 88 N. C., 618.

It is also established by the decisions that in the exercise of the right of self-defense, more force must not be used than is reasonably necessary under the circumstances, and if excessive force or unnecessary violence be employed, the party charged will be guilty of manslaughter, at least. *S. v. Glenn,* 198 N. C., 79, 150 S. E., 663; *S. v. Robinson,* 188 N. C., 784, 125 S. E., 617; *S. v. Cox,* 153 N. C., 638, 69 S. E., 419; *S. v. Garrett,* 60 N. C., 148.

Conceding, without deciding, that some of the illustrations used in the charge, of which the defendant complains, were inappropriate and perhaps misleading, nevertheless it would seem they were harmless or cured by the verdict in the light of defendant's admissions and the evidence appearing on the record.

No error.

IN RE WILL OF JAMES TURNAGE.

(Filed 10 April, 1935.)

1. Appeal and Error J e—

Exceptions and assignments of error relating to an issue answered in favor of appellants will be disregarded on appeal, since errors cured by the verdict are not ground for reversal.

2. Wills D e—

Testimony of a declaration made by testator four years after the execution of the will to the effect that he had let others take advantage of him, and lead him to make the will, is insufficient, standing alone, to be submitted to the jury on the issue of undue influence.

3. Same—Definition of "undue influence."

Undue influence sufficient to avoid an instrument is such influence which destroys the free agency of the person executing the instrument and substitutes therefor the will of another, and although moral turpitude is not a necessary element of undue influence, where influence exerted upon the person executing the instrument amounts to a substitution of wills and constrains the person executing the instrument to do what he or she otherwise would not have done, it is a fraudulent influence in the eyes of the law.

APPEAL by propounders from *Parker, J.*, at September Term, 1934, of PITT.

Issue of *devisavit vel non,* raised by a caveat to the will of James Turnage, late of Pitt County, based upon alleged mental incapacity and undue influence.

The paper-writing propounded as the last will and testament of the deceased was executed 9 October, 1928. It was prepared by counsel and duly attested. The caveator, testator's only son, is given $25 in the first item in the will, "and this is to be all he is to have out of my estate." The testator died in December, 1932. About a week before his death, he was heard to say he wanted to change his will. He asked the deputy clerk of the court if he would run over to Winterville in a day or two and make a little change in his will for him. This was on Saturday preceding his death on Wednesday. On Monday intervening, the testator went to the home of Glasco Baker "and was speaking about them not having come to fix the will, and he said that his time had

come and he had to go away from here, and he burst out crying, and he said he didn't have but one child in the world and he had cut him clear out, and he wanted him to have what he had." Mrs. Baker asked: "Mr. Turnage, why did you treat him that way?" He answered: "I let other folks take advantage of me and lead me to make the will."

Motion for nonsuit, or directed verdict, on the issue of undue influence. Overruled; exception.

The jury returned the following verdict:

"2. Was the execution of said paper-writing procured by the exercise of undue influence over James Turnage? Answer: 'Yes.'

"3. Did James Turnage, at the time of the execution of said paper-writing by him, have sufficient mental capacity to make a will? Answer: 'Yes.' "

Judgment on the verdict, from which the propounders appeal, assigning error.

Julius Brown for caveator.
S. O. Worthington and J. B. James for propounders.

STACY, C. J. The issue of testamentary capacity was answered in favor of the propounders, hence the exceptions and assignments of error addressed to this issue may be disregarded. Errors cured by the verdict are not ground for reversal on appeal. *Daniel v. Power Co.,* 201 N. C., 680, 161 S. E., 210; *Rankin v. Oates,* 183 N. C., 517, 112 S. E., 32.

We agree with propounders that the evidence was not such as to warrant a verdict for caveator on the issue of undue influence, and the jury should have been instructed accordingly. *Evans' Will case,* 123 N. C., 113, 31 S. E., 267. The case, in this respect, rests upon the bare declaration of the testator, made four years after the execution of his will, that he had let others take advantage of him, and lead him to make the will. There is nothing to show what "advantage" was taken of the testator, and for aught that appears, the will was written as he wanted it at the time. He expressed no desire to revoke the will, which he might have done, but simply that he wanted to make a change in it. *In re Hurdle,* 190 N. C., 221, 129 S. E., 589; *In re Creecy,* 190 N. C., 301, 129 S. E., 822.

To constitute "undue influence," within the meaning of the law, there must be something operating upon the mind of the person whose act is called in judgment, of sufficient controlling effect to destroy free agency and to render the instrument, brought in question, not properly an expression of the wishes of the maker, but rather the expression of the will of another. "It is the substitution of the mind of the person exercising the influence for the mind of the testator, causing him to make a will which he otherwise would not have made."

In short, undue influence, which justifies the setting aside of a will, is a fraudulent influence, or such an overpowering influence as amounts to a legal wrong. *In re Mueller's Will,* 170 N. C., 28, 86 S. E., 719; *Plemmons v. Murphey,* 176 N. C., 671, 97 S. E., 648; *In re Craven's Will,* 169 N. C., 561, 86 S. E., 587. It is close akin to coercion produced by importunity, or by a silent, resistless power, exercised by the strong over the weak, which could not be resisted, so that the end reached is tantamount to the effect produced by the use of fear or force. To constitute such undue influence, it is not necessary that there should exist moral turpitude, but whatever destroys free agency and constrains the person, whose act is brought in judgment, to do what is against his or her will, and what he or she otherwise would not have done, is a fraudulent influence in the eye of the law. *In re Lowe's Will,* 180 N. C., 140, 104 S. E., 143; *In re Abee's Will,* 146 N. C., 273, 59 S. E., 700.

New trial.

K. C. SPEIGHT ET AL. v. CARRIE B. SPEIGHT, INDIVIDUALLY, AND CARRIE B. SPEIGHT, ADMINISTRATRIX OF THE ESTATE OF W. W. SPEIGHT, DECEASED.

(Filed 10 April, 1935.)

1. Deeds and Conveyances A i—Limitation over after reservation of life estate is void as to personal property.

A deed to certain described lands and of all the personalty of the grantor, reserving in the grantor "the complete use and control" of said property during his natural life, is void as to the personalty, since the deed reserves a life estate in the personalty and there can be no limitation over after a life estate in personal property.

2. Common Law A a—

The common-law rule that there can be no limitation over in personal property after reservation of a life estate therein is in force in this State, C. S., 970, and has been recognized by judicial decision and by statutory implication.

APPEAL by plaintiffs from *Cranmer, J.,* at November Term, 1934, of PAMLICO.

Civil action to establish plaintiffs' alleged interests in the estate of W. W. Speight, deceased.

On 8 January, 1934, W. W. Speight, of Pamlico County, died intestate, leaving him surviving his widow, Carrie B. Speight, defendant herein, and two sons by a former marriage, K. C. and M. L. Speight, plaintiffs herein. About sixty days prior to his death, the deceased executed to his wife a deed in due form for a tract of land, and included

therein, "also all the personal property that I own of every kind and description, including household and kitchen property, choses in action, notes and mortgages, etc. Always reserving to said party of the first part the complete use and control of said property during his natural life."

The court held, as a matter of law, that this deed conveyed all of the grantor's property, both real and personal, to the grantee named therein. The sufficiency of the deed to convey the land is no longer mooted.

. Plaintiffs appeal, assigning as error the refusal of the court to hold that the deed in question is void on its face as to the personal property therein described.

Ward & Ward for plaintiffs.
L. I. Moore and T. O. Moore for defendant.

STACY, C. J. It has been the consistent holding in this jurisdiction, following the decision in *Graham v. Graham,* 9 N. C., 322 (1822), that a reservation of a life estate in personal chattels, in a deed attempting to convey them in remainder, reserves the whole estate, and the limitation over is void. *Morrow v. Williams,* 14 N. C., 263; *Hunt v. Davis,* 20 N. C., 36; *Newell v. Taylor,* 56 N. C., 374; *Dail v. Jones,* 85 N. C., 222; *Outlaw v. Taylor,* 168 N. C., 511, 84 S. E., 611.

It is quite clear, we think, that the deed in question falls within the principle established by these decisions. A reservation for life of "the complete use and control" of personal chattels, is a reservation for life of said chattels. 25 C. J., 1039; 17 R. C. L., 617; 11 R. C. L., 473.

Speaking to the question in a case where the "use" of a slave was attempted to be reserved for the life of the bargainor in a bill of sale, *Sutton v. Hollowell,* 13 N. C., 185, *Hall, J.,* delivering the opinion of the Court, said:

"The cases on this subject are not altogether reconcilable. Parol gifts by delivery, reserving life estates, are contradictory and inconsistent, in the nature of things. Property cannot be delivered, and retained at the same time. If there is a delivery there can be no reservation of a life estate. Of this kind were *Duncan v. Self,* 5 N. C., 466, and *Vass v. Hicks,* 7 N. C., 493.

"At common law there could not be a limitation of personal chattels after a life estate created by deed. It was also held that in a gift or limitation of slaves, after a life estate reserved by the donor, the limitation was not good, because the life estate might be lawfully reserved, and the limitation over on that account was too remote, and this was in conformity (as was supposed) with the principle before laid down, that there could not be a limitation of personal chattels after a life

estate. *Black v. Beattie,* 6 N. C., 240; *Graham v. Graham,* 9 N. C., 322; *Foscue v. Foscue,* 10 N. C., 538.

"Whether it would not have been more correct to say the reserved life estate was void, as being inconsistent with the grant, and that the gift or limitation passed the property *in præsenti,* it is too late, and, of course, unnecessary to decide, because too much property depends upon those decisions," etc.

On authority of these decisions, therefore, it would seem that the limitation in the deed of the personal chattels, following the reservation of the complete use and control of said property during the life of the grantor, was ineffectual to vest title to the personal property in the grantee. The contrary ruling was erroneous.

It is suggested by the defendant that the common-law rule, relative to the matter now in hand, has not been followed in a majority of the American jurisdictions, and that North Carolina, to this extent, is out of line with the weight of judicial opinion in this country. It should be remembered, however, that so much of the common law "as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State, . . . and which has not been . . . abrogated or repealed, or become obsolete," is declared by C. S., 970, to be in full force and effect in this jurisdiction. This statute was first enacted in 1715, reënacted in 1778, and successively with each complete reënactment of our statute law. *Price v. Slagle,* 189 N. C., 757, 128 S. E., 161. It appears, therefore, with full knowledge of the decisions on the subject, the General Assembly has not seen fit to alter the rule, except as to slaves (Act of 1823), which was said in *Dail v. Jones, supra,* to be a strong recognition by the law-making body of the correctness of the principle. Hence, the rule may be said to rest upon common-law authority with statutory support and judicial approval in this State. *Sutton v. Hollowell, supra.*

Error.

W. W. BEACH, ADMINISTRATOR OF THE ESTATE OF C. J. BEACH, DECEASED, v. F. E. PATTON, MRS. GRACE PATTON, AND W. O. RIDDICK.

(Filed 10 April, 1935.)

Automobiles C i—Intervening negligence of one defendant in exceeding speed limit held to insulate other defendant's negligence in parking on highway.

The evidence tended to show that one defendant parked his car on the highway for fifteen minutes after colliding with another automobile, on a damp, dark night, and that the car driven by the second defendant, at an

unlawful rate of speed, in order to avoid colliding with the parked car, was driven on the shoulders of the highway and struck and killed plaintiff's intestate, who was standing on the shoulder of the road. *Held:* Even conceding that the first defendant was negligent in leaving the car parked on the highway under the circumstances, such negligence was not the proximate cause of the injury to plaintiff's intestate, since defendant so parking his car could not have reasonably anticipated or foreseen that a driver of another car would operate his car in such a negligent manner as to be forced to run on the shoulder of the road and strike plaintiff's intestate in order to avoid a collision with the parked car.

APPEAL from a judgment of nonsuit as to the defendant W. O. Riddick, entered by *Harding, J.*, at September Term, 1934, of BURKE. Affirmed.

The plaintiff is the duly appointed administrator of C. J. Beach, deceased, whose death was caused by being stricken by a Plymouth automobile, the property of the defendant Grace Patton and driven by the defendant F. E. Patton on Highway No. 10 on the night of 16 December, 1933. The intestate was standing on the shoulder of the highway when the automobile driven by Patton at a negligent rate of speed was forced, in order to avoid a collision therewith, to go around a Ford automobile belonging to the defendant W. O. Riddick; and the plaintiff alleges and contends that the defendant W. O. Riddick negligently allowed his said Ford automobile to remain parked on the highway for a space of some fifteen minutes after it had collided with a certain Buick automobile occupied by "two ladies," and that the negligence of the defendant Riddick in allowing his car to remain so parked upon a much-used highway on a damp, dark night was a proximate cause of the death of his intestate.

At the close of the evidence, upon motion of the defendant Riddick, the court entered a judgment as of nonsuit as to him, and the plaintiff excepted and appealed to the Supreme Court, assigning errors. Upon the entering of the involuntary nonsuit as to the defendant Riddick, the plaintiff submitted to a voluntary nonsuit as to the defendants F. E. Patton and Mrs. Grace Patton.

Mull & Patton for plaintiff, appellant.
Ervin & Ervin for defendant, appellee.

SCHENCK, J. The only allegation of negligence against the defendant Riddick was that his car was left parked for some fifteen minutes on a damp, dark night on a much-used highway after it had been engaged in a collision. Assuming, but not deciding, that the defendant Riddick was

negligent in so leaving his car parked on the highway, there is no evidence that such negligence was the proximate cause of the death of plaintiff's intestate, and the establishment of the fact that the negligence of the defendant was the proximate cause of the death of the intestate is just as essential to the plaintiff's cause of action as is the establishment of the negligence itself. *Campbell v. Laundry,* 190 N. C., 649, and cases there cited. This case, as it relates to the defendant Riddick, is governed by the principle of the case of *Burke, Admr., v. Coach Company and Capeheart,* 198 N. C., 8, as it relates to the defendant Capeheart.

"The proximate cause of the event must be understood to be that which in natural and continuous sequence, unbroken by any new and independent cause, produces that event, and without which such event would not have occurred. . . . The test by which to determine whether the intervening act of an intelligent agent which has become the efficient cause of an injury shall be considered a new and independent cause, breaking the sequence of events put in motion by the original negligence of the defendant, is whether the intervening act and the resultant injury is one that the author of the primary negligence could have reasonably foreseen and expected." *Harton v. Telephone Co.,* 141 N. C., 455; *Balcum v. Johnson,* 177 N. C., 213.

We think the act of F. E. Patton in operating the Plymouth car in such a way as to be forced to drive it off of the pavement on to the shoulder of the highway to avoid a collision with the Riddick car, and thereby collide with and cause the death of the intestate, was a cause new and independent of the alleged negligent act of parking the Riddick car on the highway, and broke any sequence between such death and such parking of said car, and that the unfortunate result was not one that Riddick could have reasonably foreseen and expected.

To hold that the defendant Riddick owed the duty to the plaintiff's intestate to foresee that a third person would operate a car in such a negligent manner as to be compelled to drive out on to the shoulder of the highway in order to avoid a collision with a car parked on the opposite side thereof, and thereby strike a person standing on the shoulder, would not only "practically stretch foresight into omniscence," *Gant v. Gant,* 197 N. C., 164, but would, in effect, require the anticipation of "whatsoever shall come to pass." We apprehend that the legal principles by which individuals are held liable for their negligent acts impose no such far-seeing and all-inclusive duty.

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 this case as it relates to the defendant Riddick there is an absence of foreseeable injury, and consequently there was no error in entering the judgment as of nonsuit as to him. *Osborne v. Coal Co.*, 207 N. C., 545.

The judgment is
Affirmed.

W. H. NORTON v. CARRIE ELLIOTT McLELLAND, EXECUTRIX, ET AL.

(Filed 10 April, 1935.)

Wills B c—

In an action to recover the reasonable value of services rendered deceased under an oral contract to devise lands, the value of lands promised to be devised is competent as affording some estimate of what the parties themselves contemplated such services probably would be worth.

APPEAL by defendants from *Stack, J.*, at November Term, 1934, of IREDELL.

Civil action to recover for services rendered by plaintiff to W. D. McLelland during the last five years of his life, it being alleged that in 1926 the said W. D. McLelland entered into an agreement with the plaintiff to devise him fifty acres of land, known as the Bradshaw Place, in consideration of services rendered and to be rendered.

It is admitted that W. D. McLelland died in 1931 without devising the Bradshaw Place to plaintiff.

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

"Are the defendants indebted to the plaintiff for services rendered to their testator, as alleged in the complaint, and if so, in what amount? A. '$1,000.'"

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

Scott & Collier for plaintiff.
Burke & Burke, Buren Jurney, Jack Joyner, and Lewis & Lewis for defendants.

STACY, C. J. The case was tried upon the theory that when services are performed under an agreement that compensation is to be provided therefor in the will of the party receiving the benefit, and no such pro-

vision is made, an action in *assumpsit* will lie to recover for the breach (*Lipe v. Trust Co.,* 207 N. C., 794), and that the value of the property, agreed to be devised, may be considered in connection with other evidence, on the issue of *quantum meruit* or the reasonable value of the services rendered. *Grantham v. Grantham,* 205 N. C., 363, 171 S. E., 331.

The value of the property is allowed to be shown in evidence as affording some estimate of what the parties themselves contemplated such services probably would be worth. *Faircloth v. Kenlaw,* 165 N. C., 228, 81 S. E., 299; *Deal v. Wilson,* 178 N. C., 600, 101 S. E., 205. The decisions have established the competency of this evidence, which we are disposed to follow, notwithstanding the cogency of the reasons advanced against its reception.

Speaking directly to the question in *Faircloth v. Kenlaw, supra, Walker, J.,* delivering the opinion of the Court, said: "We take this to be the true and the sensible rule, that in a suit for work and labor performed, under a contract void by the statute of frauds, evidence of the terms of the contract with reference to plaintiff's compensation is admissible to show the value of his services, as agreed upon by the parties, but is only evidence, and not controlling as matter of law. It is for the jury to consider in making their estimate, and they may award such sum as they may find, upon all the evidence, including that drawn from the contract, is a reasonable value of the services (*Moore v. Nail Co.,* 76 Mich., 606; *Schauzenbach v. Brough,* 58 Ill. App., 526); the inquiry at last being, What are the services really worth? And the contract price is some evidence upon that question, it being in the nature of an admission or declaration of the parties as to the value, and having no more effect as evidence. It is certainly not conclusive upon the jury. Browne on the Statute of Frauds (5 Ed.), sec. 126."

The rule of evidence thus established in this jurisdiction was reaffirmed in *Deal v. Wilson, supra, Grantham v. Grantham, supra,* and *Lipe v. Trust Co.,* 206 N. C., 24, 173 S. E., 316.

The matters presented have been so recently discussed in the cases cited that further elaboration would seem to be supererogatory.

A careful perusal of the record leaves us with the impression that no reversible error was committed on the trial, hence the verdict and judgment will be upheld.

No error.

THE FIRST CAROLINA'S JOINT-STOCK LAND BANK, INCORPORATED, OF COLUMBIA, SOUTH CAROLINA, v. SARAH C. STEWART ET AL.

(Filed 10 April, 1935.)

Mortgages H k: H p—Foreclosure sale cannot be collaterally attacked in mortgagee's action for deficiency after foreclosure.

In an action to recover the balance due on mortgage notes after foreclosure, confirmation of the sale by the clerk, C. S., 2591, and application of the proceeds of sale to the notes, equitable matters in defense relevant only upon the motion to confirm the sale are properly stricken from the answer upon motion, C. S., 537, since plaintiff seeks a legal remedy only and invokes no equitable jurisdiction of the court, and the foreclosure sale cannot be collaterally attacked in plaintiff's action to recover the deficiency after foreclosure.

APPEAL by defendants from *Hill, Special Judge,* at November Term, 1934, of CRAVEN. Affirmed.

This is an action to recover the balance due on a note executed by the defendants on 2 January, 1925, and secured by a deed of trust which was duly recorded in the office of the register of deeds of Beaufort County, North Carolina.

Upon default in the payment of the note, according to its terms, the deed of trust was foreclosed by the sale of the land conveyed thereby, under the power of sale contained in the deed of trust. The sale was made on 5 March, 1931, and was duly confirmed by the clerk of the Superior Court of Beaufort County. The proceeds of the sale were applied as a payment on the note, leaving a balance due as alleged in the complaint. This action was begun in the Superior Court of Craven County on 12 September, 1931.

The action was heard at November Term, 1934, of said court on plaintiff's motion that certain allegations in the further answer of the defendants be stricken out, on the ground that the matters contained therein do not constitute a defense to this action, and are for that reason immaterial and irrelevant.

From an order allowing plaintiff's motion, in part, the defendants appealed to the Supreme Court.

Ward & Ward and Warren & Warren for plaintiff.
L. I. Moore and William Dunn for defendants.

CONNOR, J. The matters contained in the allegations in the further answer of the defendants, which were stricken out, on the motion of the plaintiff, do not constitute a defense to the cause of action alleged in the complaint. They are, therefore, immaterial and irrelevant, and were

properly stricken from the answer. C. S., 537. They were material and relevant only on the motion to confirm the sale of the land conveyed by the deed of trust, which was duly reported to the clerk of the Superior Court of Beaufort County, and confirmed by him. C. S., 2591. This sale is not subject to collateral attack in this action.

It would seem from the allegations in their answer that the defendants were dealt with harshly by the plaintiff, but the Court is without power to give them relief in this action. The plaintiff does not in this action invoke the equitable powers of the Court. It is content to have only its legal remedy. The order must be

Affirmed.

STATE v. LEWIS SENTELL.

(Filed 10 April, 1935.)

Criminal Law L a—Appeal must be dismissed where defendant fails to make out and serve statement of case on appeal within required time.

Where defendant in a capital case fails to make out and serve his statement of case on appeal within the statutory period, or the time extended, he loses his right to prosecute the appeal, and same will be dismissed upon motion of the Attorney-General after examination of the record proper for errors appearing upon its face.

MOTION by State to docket and dismiss appeal.

Attorney-General Seawell and Assistant Attorneys-General Aiken and Bruton for the State.

STACY, C. J. At the January Term, 1935, Cleveland Superior Court, the defendant herein, Lewis Sentell, was tried upon indictment charging him with the murder of one Mrs. William Drake, which resulted in a conviction of murder in the first degree and sentence of death. From the judgment thus entered, the defendant gave notice of appeal to the Supreme Court. The clerk certifies that nothing has been done towards perfecting the appeal, albeit the defendant was allowed thirty days from the rising of the court within which to prepare and serve statement of case on appeal. The time for serving statement of case has now expired. *S. v. Brown,* 206 N. C., 747, 175 S. E., 116.

The prisoner having failed to make out and serve statement of case on appeal within the statutory period, or the time extended, has lost his right to prosecute the appeal, and the motion of the Attorney-General to docket and dismiss under Rule 17 must be allowed. *S. v. Watson, ante,*

70; *S. v. Etheridge,* 207 N. C., 801; *S. v. Hooker,* 207 N. C., 648; *S. v. Lea,* 203 N. C., 316, 166 S. E., 292. It is customary, however, in capital cases, where the life of the prisoner is involved, to examine the record to see that no error appears upon its face. *S. v. Goldston,* 201 N. C., 89, 158 S. E., 926. This we have done in the instant case without discovering any error on the face of the record. *S. v. Hamlet,* 206 N. C., 568, 174 S. E., 451.

Appeal dismissed.

MRS. IDELLA W. KNOX, INDIVIDUALLY AND AS SOLE EXECUTRIX OF THE ESTATE OF R. C. KNOX, v. ADRIAN C. KNOX, EXECUTOR OF THE ESTATE OF F. J. KNOX, AND JOHN W. KNOX, ET AL., NEXT OF KIN TO F. J. KNOX, DECEASED.

(Filed 10 April, 1935.)

1. Wills E b—

A devise of the use and benefit of the rents and profits from designated real property transfers the land itself to the beneficiary in the absence of a clear intention to separate the income from the principal.

2. Same—

A direction to sell realty and distribute the proceeds of sale works an equitable conversion of the property so that the beneficiaries take a bequest and not a devise.

3. Wills E d—

Where the time of enjoyment of a gift or devise is merely postponed, the interest is a vested one, but where time is annexed to the substance of the gift or devise as a condition precedent the interest is a contingent one.

4. Same—Interest passing under this devise held contingent and not vested.

Testator devised to his wife a life estate in certain lands and the fee in certain other lands, and directed that at her death the property not disposed of in fee should revert to his executor and be disposed of as thereafter provided. In the subsequent residuary clause of the will the testator directed that his lands be sold and the proceeds of sale divided among his next of kin and their representatives. *Held:* The interests created after the termination of the life estate were contingent and vested upon the death of the widow in those of testator's next of kin alive as of the date of the widow's death and in the living representatives of deceased next of kin.

5. Wills E f—Next of kin as used in devise exist by operation of law and cannot be created, destroyed, or transmitted by will.

In a devise the words "next of kin" mean "nearest of kin" by blood relationship and not next of kin in the sense of the statute of distribution, and where a devise provides that upon the termination of a life estate in certain of testator's property the lands should be sold and the proceeds divided among testator's next of kin and their representatives, a

widow of one of testator's brothers may not claim as one of testator's next of kin or as a representative of a deceased next of kin, although she is made the sole legatee and executrix in the will of testator's brother, who survived testator but who died without issue prior to the vesting of the proceeds of sale of testator's lands, she not being related to testator by blood, and an executrix not being a "representative" within the meaning of the will.

6. Wills E d—Where interest of beneficiary vests upon death of testator it is not divested by beneficiary's death prior to distribution.

Testator's will provided that certain of his lands should be sold upon his death and the proceeds divided among his next of kin and their representatives. One of testator's next of kin died less than two months after testator's death and before the lands could be sold and the proceeds distributed. *Held:* The interest in the proceeds of sale vested in the beneficiaries *eo instanti* the death of the testator, and such interest was not divested by the fact that the next of kin died before the lands could have been sold and the proceeds distributed, and before the expiration of the year given by law as the minimum time for the sale of the property and settlement of the estate by the executor.

7. Wills E f—Legatee and not devisees held entitled to property vesting in testator as distributee of funds derived from sale of lands.

Where a will provides for the sale of testator's lands and distribution of the proceeds of sale to certain beneficiaries, the beneficiaries take a bequest and not a devise, and where one of the beneficiaries survives testator but dies prior to the distribution of the fund, the interest of such beneficiary passes under his will to his sole legatee, and not to those to whom he devised his realty.

8. Wills D m—

Where the purpose of an action is to construe a will, the costs are properly taxed against the executor thereof.

APPEAL from *Devin, J.*, at July Special Term, 1934, of MECKLENBURG. Affirmed.

Trial by jury was waived and this case submitted for decision of the court upon agreed facts, as follows:

"1. That F. J. Knox died on 27 December, 1928, leaving a last will and testament, which was duly probated, and that the defendant Adrian C. Knox is sole executor thereof, in the office of the clerk of Superior Court of said county and State, on 31 December, 1928. A copy of said will is attached to the complaint, marked 'Exhibit B.'

"2. That the said F. J. Knox, at the time of his death, was the owner and seized and possessed of the property, the proceeds of the sale of which is in controversy in this action.

"3. That at the time of his death said F. J. Knox left surviving his widow, Elizabeth A. Knox; that he had four brothers, to wit: J. A. Knox, Samuel E. Knox, W. A. Knox, and T. B. Knox, who predeceased him and who left surviving the children whose names are set out in the

answer of Jno. W. Knox and others filed herein. That the said F. J. Knox died without lineal issue surviving him.

"4. That R. C. Knox, one of the two surviving brothers, died on 9 February, 1929, leaving a last will and testament, which was duly probated; that the plaintiff is the sole executrix and devisee (legatee?) thereof, in the office of the clerk of said court, on 18 February, 1929, a copy of which will is attached to the plaintiff's complaint, as 'Exhibit A.' R. C. Knox left no lineal issue surviving.

"5. That the defendant Adrian C. Knox duly qualified as executor under the will of F. J. Knox, before the clerk of Superior Court of said county and state on 31 December, 1928, and thereupon entered upon his duty as executor of the said estate. That from the residuary estate of the said testator there came into the hands of said executor total receipts of $17,888, which does not include the proceeds of the sale of property in which the widow of the said testator had a life estate under the terms of the said will. That the total disbursements from this phase amounted to $8,530.90, leaving a balance in the hands of the executor for distribution under residuary item 18 of the will, the sum of $9,357.10. That at the date of his death the said F. J. Knox had on hand on deposit in bank and upon certificates of deposit a total of $3,581.33, and building and loan certificates to the amount of $4,800, which item went into the total receipts as above shown. That $9,506.67, the difference between the said total receipts and the said funds in bank and building and loan stock came from dividends on corporate stock, interests from Government securities and miscellaneous items, rents, and proceeds of the sale of the assets of the estate. That no assets of the estate were sold by the executor before 1 January, 1931. That in May, 1931, the executor had ready for distribution from the residuary estate, other than that in which the testator's widow was given a life estate, the sum of $9,000. Of this amount he distributed to J. V. Knox, a brother of the testator, the sum of $1,500, and a like amount to each set of children of the four brothers who predeceased the testator, and left lineal issue surviving, making a total distributed of $7,500. The executor was notified by J. V. Knox and representatives of the deceased brothers, through their attorney, that they claimed the balance of $1,500, and that the plaintiff was not entitled to it, and to hold this amount pending the decision of the court. The executor, for this reason, withheld the payment thereof, and still holds the same, pending the decision of the court as to the owner thereof. That in addition to the $1,500 referred to there is a farm located in Iredell County, containing about 192 acres, which has not been sold for the reason that the executor has not been able to make a satisfactory sale thereof and the proceeds of sale of which passes under the said residuary item of said will.

"6. That J. V. Knox, the last surviving brother of F. J. Knox, died on 8 April, 1932, leaving surviving the children as set out in the answer of Jno. W. Knox and others filed herein, together with Adrian C. Knox, who is also a son of J. V. Knox.

"7. That Mrs. Elizabeth A. Knox, widow of F. J. Knox, died on or about 3 September, 1933. That since the date of her death the said Adrian C. Knox, executor, under and pursuant to the terms of the will of his testator, has sold all of the real estate in which the said Mrs. Elizabeth A. Knox, widow of the said F. J. Knox, had a life estate, with the exception of a vacant lot in or near the town of Davidson, and of very small value. That there has to date been collected from the sale of property referred to in this paragraph the sum of $17,808, which amount, however, is subject to all costs, expenses and commissions, and certain other pieces have been sold but the proceeds not as yet collected, to the amount of $2,133.

"8. That all of the brothers of F. J. Knox predeceased him except R. C. Knox and J. V. Knox. That the said F. J. Knox had no other brothers or sisters who died leaving lineal issue surviving except those referred to in the answer of Jno. W. Knox and others."

"EXHIBIT A. LAST WILL AND TESTAMENT OF R. C. KNOX.

"NORTH CAROLINA—MECKLENBURG COUNTY.

"I, R. C. Knox, of aforesaid County and State, being of sound mind and considering the uncertainty of my earthly existence, do make and declare this my last Will and Testament.

"1st. My Executor, hereinafter named, shall give my body a decent burial, suitable to the wishes of my friends and relatives, and pay all funeral expenses, together with all of my just debts out of the first moneys which may come into her hands belonging to my estate.

"2nd. I give and devise to my beloved wife, Idella W. Knox, all my real estate both farming lands and town lots for her natural life.

"3rd. I give and bequeath to my said beloved wife all my personal property of every description—that is gin shares, moneys, crops and everything else of personal property.

"4th. That at the time of my said beloved wife's death, I give and bequeath to three of my nephews, namely, J. Boyce Knox, W. J. Knox, W. Moffet Knox, my real estate to have, share and share alike—that is, each one to have one-third interest.

"5th. I hereby constitute and appoint my said beloved wife my lawful executor to execute this my last will and testament without bond.

"In witness whereof, I, the said R. C. Knox, do hereunto set my hand and seal this the 16th day of November, 1927.

"Signed—R. C. KNOX."

"EXHIBIT B. LAST WILL AND TESTAMENT OF F. J. KNOX.

"NORTH CAROLINA—MECKLENBURG COUNTY.

"I, F. J. Knox, of the aforesaid County and State, being of sound mind and disposing memory, but considering the uncertainty of my earthly existence, do make and declare this my last Will and Testament.

"First: My executor hereinafter named shall give my body a decent burial and erect a suitable monument or tombstone at my grave or last resting place, suitable to the wishes of my friends and relatives, and pay all funeral expenses, together with all my just debts, out of the first moneys which may come into his hands belonging to my estate.

"Second: I give, devise and bequeath to my beloved wife, Elizabeth A. Knox, the house and lot, where we now reside in the Town of Davidson, together with all household and kitchen furniture therein; to her I also give Five Thousand ($5,000.00) Dollars, face value of my North Carolina State Bonds; my (8) eight shares of stock in the Davidson Cotton Mills; my preferred stock Three Thousand ($3,000.00) Dollars in the Mooresville Cotton Mills; all my shares of stock in the Cornelius Cotton Mills; all my shares of preferred stock in the Cascade Mills at Mooresville; also Two Thousand ($2,000.00) Dollars, face value of my United States Government Bonds; to her I also give the two-story brick building on Main Street in Davidson, N. C., now occupied by M. H. Goodrum & Co. Hardware Department; all the foregoing are given in fee, with full right and privilege and power granted to my said wife to use and dispose of as she sees fit. And in order that my said wife shall have all the things useful and necessary for her comfort during the remainder of her natural life; I give and bequeath to her the use and benefit of the rents and profits of all my other real estate within the corporate limits of the Town of Davidson, N. C., and also the Fifty (50) Acres of land in Deweese Township, Mecklenburg County, North Carolina, known as the Hall tract—upon the death of my said wife, the property mentioned in this paragraph not disposed of in fee shall revert to my executor and be by him disposed of as hereinafter provided.

"Third: I give, devise and bequeath to Jay Knox, and Melvin Knox, sons of my deceased brother, T. B. Knox, the two houses and lots in the Town of Cornelius, known as the Mooney property on Mulberry Street; Jay to have the one now occupied by a Mr. Pless, and Melvin to have the one now occupied by a Mr. McCloud.

"Fourth: I give, devise and bequeath to my brother, J. V. Knox, Five Hundred ($500.00) Dollars, face value of my United States Government Bonds, or their value, if not owned by me on the date of my death.

(NOTE: Items Fifth to Seventeenth, inclusive, with the exception of Item Thirteenth, make individual devises or bequests to the nephews of the testator, being sons of his brothers and all bearing the name Knox. Item Thirteenth gives and bequeaths to the Board of Deacons of the Bethel Presbyterian Church in Lemly Township, Mecklenburg County, the sum of $2,000, and provides that in the event this church ceases to exist that the bequest shall revert to the Synod of North Carolina of the Presbyterian Church, South.)

"Eighteenth: It is my Will and I hereby authorize, direct and empower my executor to collect all moneys due me; to sell all my property not otherwise disposed of herein, either at public or private sale, to deliver the personal property to the devisees named, to convey title to purchasers of my real estate, and after taking out the cost of administration, to divide the net proceeds, in equal proportions, share and share alike, among my next of kin, representatives of my next of kin to inherit by succession *per stirpes* and not *per capita.*

"Nineteenth: I hereby constitute and appoint my nephew, Adrian C. Knox, my lawful executor, without bond, to execute this my last Will and Testament according to law and the true intent and meaning of the same and every part and clause thereof, hereby revoking and declaring utterly void all other wills by me heretofore made.

"In Witness whereof I, F. J. Knox, do hereunto set my hand and seal this the 10th day of January, 1928.

"F. J. KNOX."

His Honor entered the following judgment:

"This cause coming on to be heard at 30 July Special Term, 1934, before his Honor, W. A. Devin, Judge presiding, and all parties having waived a jury trial, and having submitted the case to the court for its decision upon an agreed statement of facts, and the plaintiff being represented by her attorney, Thos. W. Alexander, and the defendant Adrian C. Knox being represented by his attorneys, Pharr & Bell, and Jno. W. Knox and the other defendants being represented by their attorney, Jno. A. McRae, and the matter having been argued by the attorneys, and considered by the court,

"It is therefore ordered and adjudged, and is hereby ordered and adjudged, as follows:

"That the plaintiff is entitled to the $1,500 which has been held by the executor since he filed his report in May, 1932, and referred to in the pleadings, together with the actual interest which the executor has collected, or may collect, thereon, and one-sixth of the proceeds of the sale of the tract of land containing 192 acres, and located in Iredell County, when the same is sold as provided in the will of F. J. Knox,

less its proportionate part of the cost of the administration of the estate, the said $1,500 and the said tract of land being property not specifically devised, but included in the residuary item of the will of the said F. J. Knox.

"That Jno. W. Knox and the other defendants named in the answer of the said Jno. W. Knox and others, and all of those in whose behalf the said answer is filed, including Adrian C. Knox, are entitled to all of the proceeds of sale of the property in which Elizabeth A. Knox, widow of F. J. Knox, was given a life estate under and by virtue of the will of the said F. J. Knox, less its proportionate share of the cost of administration, and that the said plaintiff is not entitled to any interest or share therein, and,

"That the cost of this action shall be paid by the executor out of the funds belonging to the estate.

"W. A. DEVIN, *Judge Presiding.*"

From the foregoing judgment plaintiff appealed and made the following assignment of error: "The plaintiff excepts and assigns as error so much of the judgment as excludes the plaintiff from a one-sixth net interest in the portion of the estate of F. J. Knox, which reverted to the executor upon the death of Mrs. Elizabeth A. Knox, widow of F. J. Knox."

From said judgment the defendants, except Adrian C. Knox, executor of will of F. J. Knox, appealed and made the following assignment of error: "The defendants except to and appeal from so much of the judgment as shown of record as awards the plaintiff a one-sixth interest in the proceeds of the property which was not specifically devised by the will of the said F. J. Knox, and which was covered by the residuary item of his will."

The defendant Adrian C. Knox, executor of will of F. J. Knox, takes the position that he is a stakeholder in this controversy and awaits orders from the court, and does not appeal.

Thos. W. Alexander for Idella W. Knox, individually and as executrix of R. C. Knox, plaintiff.

Jno. A. McRae for Jno. W. Knox et al., next of kin of F. J. Knox, defendants.

Pharr & Bell for Adrian C. Knox, executor of F. J. Knox, defendant.

SCHENCK, J. We are called upon by the plaintiff's appeal to determine whether the plaintiff Idella W. Knox, as the sole legatee and executrix of the will of her late husband, R. C. Knox, is entitled to take a one-sixth interest in the net proceeds derived from the sale of real

property, which reverted to the executor of F. J. Knox upon the death of Mrs. Elizabeth A. Knox, widow of the said F. J. Knox, under the second item of the will of F. J. Knox; and we are called upon by the defendants' appeal to determine whether the plaintiff Idella W. Knox, as the sole legatee and executrix of the will of her late husband, R. C. Knox, is entitled to take a one-sixth interest in the net proceeds of the other property, real and personal, which was not specifically devised by the will of F. J. Knox and which passed by virtue of the residuary clause (the eighteenth item) thereof.

We shall first address ourselves to the question raised by the plaintiff's appeal: Is Idella W. Knox, as sole legatee and executrix of her late husband, R. C. Knox, entitled to a one-sixth interest in the net proceeds derived from the sale of real property which reverted to the executor of F. J. Knox under the second item of his will upon the death of Elizabeth A. Knox, his widow?

The answer to this question depends upon whether the interest in the proceeds of the sale of the lands, the use and benefit of the rents and profits of which are given to the testator's wife, with the provision that they shall revert, upon the death of his wife, to the executor for disposition as thereafter provided, vested upon the death of the testator or upon the death of his wife. If the interest in the proceeds of such sale vested upon the death of the testator, one-sixth part of such interest vested in R. C. Knox, who was then living and was a brother of the testator, and his wife, the plaintiff, as his sole legatee and executrix, would be entitled to recover said one-sixth interest. If, on the other hand, the vesting of the interest in the proceeds of the sale of said lands was postponed till the death of the wife of F. J. Knox, the plaintiff would be entitled to recover nothing, since R. C. Knox, her husband and testator, was dead at that time. See agreed facts and items second and eighteenth of the will of F. J. Knox.

It is well to observe that while the second item of the will of F. J. Knox gives to the wife of the testator only "the use and benefit of the rents and profits" of the real estate under discussion, that "it is regarded as settled that, within the limits of the rule against perpetuities, and in the absence of a clear intention to separate the income from the principal, an absolute devise of the income from land passes the land itself." *Benevolent Society v. Orrell,* 195 N. C., 405. Therefore, Elizabeth A. Knox, widow of F. J. Knox, became a tenant for life in the land under discussion.

It is well to further observe that since the second and eighteenth items of the will of F. J. Knox jointly provide for the disposition of the land under discussion by sale and division of the net proceeds therefrom, that "a direction to sell and divide does no more than to work an equitable

conversion of the real property as of the time of the death of the testator, and the gift, technically speaking, becomes a bequest instead of a devise, but the right of the beneficiary . . . vests alike in either case." *Witty v. Witty,* 184 N. C., 375.

The rule is that if there is in terms a gift or devise, and the time of enjoyment merely is postponed, the interest is a vested one; but if the time be annexed to the substance of the gift or devise, as a condition precedent, the interest is a contingent one, and the gift or devise vests only if and when the contingency happens at the time designated. *Bowen v. Hackney,* 136 N. C., 187.

The very language itself of the second item of the will of F. J. Knox negatives any intention of making a disposition in fee by that item of the property of which the widow is made the life tenant, since it designates such property as "the property mentioned in this paragraph not disposed of in fee"; and also negatives any intention of making a disposition in fee in that item by the testator, since it provides that "upon the death of my said wife" the property of which she is made the life tenant "shall revert to my executor and be by him disposed of as hereinafter provided."

The eighteenth item of the will of F. J. Knox provides that his executor shall sell his property "not otherwise disposed of herein" and "divide the net proceeds, in equal proportions, share and share alike among my next of kin, representatives of my next of kin to inherit by succession *per stirpes* and not *per capita.*"

We hold that the provisions of the second item of the will of F. J. Knox negativing any intention therein to dispose of the fee in the property under discussion and providing that it shall, upon the death of the life tenant, revert to the executor to be disposed of by him as thereafter provided, that is, as provided in the eighteenth item, postponed not only the right to enjoy but also the right to take the remainder, and created contingent interests in those who could answer the roll call at the time the provision for sale and division of net proceeds could be carried out, namely, "upon the death of my said wife." To answer that roll call upon the death of the widow of F. J. Knox, one must be, according to the eighteenth item of his will, either next of kin of F. J. Knox or a representative of next of kin of F. J. Knox. If R. C. Knox had been living at the time of this roll call he could have answered present as next of kin of F. J. Knox, as did J. V. Knox, the only brother of F. J. Knox then surviving; or if R. C. Knox had had children surviving him they could have answered present as representatives of next of kin of F. J. Knox, as did John W. Knox and others, children of deceased brothers of F. J. Knox; but R. C. Knox was dead and had no lineal issue surviving him. The plaintiff, although she be the widow and the

sole legatee and executrix of R. C. Knox, could not answer as either next of kin or as representative of next of kin of F. J. Knox. Next of kin and representatives of next of kin exist by operation of law among those of the same blood, and these relationships cannot be created, destroyed, or transmitted by will. In a devise the words "next of kin" mean "nearest of kin," and those nearest in blood are entitled to take to the exclusion of others who may be next of kin in the sense of the statute of distribution. *Jones v. Oliver,* 38 N. C., 369; *Wallace v. Wallace,* 181 N. C., 158. Also, in a devise the word "representative," if it appears from the whole instrument that it was used in reference to other persons than executors and administrators, will be so interpreted that such other persons will take. *Peterson v. Webb,* 39 N. C., 56. R. C. Knox could not by will or otherwise make his widow, Idella W. Knox, next of kin to his brother, F. J. Knox, or a representative of such next of kin.

We hold that the words "to divide the net proceeds, in equal proportions, share and share alike, among my next of kin, representatives of my next of kin to inherit by succession *per stirpes* and not *per capita*" in the eighteenth item of the will of F. J. Knox are qualifying words, and keep the disposition of the proceeds of the sale of the residuary property from being a gift *simpliciter,* importing a division among those who were heirs (or next of kin) of the testator at the time of his death, as in *Witty v. Witty, supra,* and are words, in the language of the opinion in that case, in pointing out exceptions to the general rule, "showing clearly that not only the enjoyment of the remainder, but also the right to take it was intended to be postponed until after the expiration of the preceding life estate."

That portion of the judgment from which plaintiff appealed is affirmed.

We will now address ourselves to the question raised by the defendants' appeal. Is Idella W. Knox, as sole legatee and executrix of her late husband, entitled to a one-sixth interest in the net proceeds derived from the sale of the property, real and personal, not specifically devised or bequeathed by the will of F. J. Knox, and not included in the life estate given to the wife of the testator, and which passed by virtue of the residuary clause (the eighteenth item) thereof?

The defendants upon their appeal contend that the bequest under the residuary clause of the will of F. J. Knox is a gift to a class, and is alternative or substitutional, and that if any interest therein vested in R. C. Knox at the date of the death of the testator, such interest was divested by reason of his death on 9 February, 1929, less than two months after the testator's death on 27 December, 1928. They contend that this is so for the reasons that (1) the property included in the

residuary clause could not be sold and the net proceeds therefrom ready for distribution by the date of the death of R. C. Knox—that two months would not be a reasonable time in which to accomplish the sale and distribution, and that (2) the executor, in any event, under the law, had one year in which to sell the property and settle the estate, and that since an actual distribution of the proceeds arising from the sale of the property passed by virtue of the residuary clause of the will could not be made before the death of R. C. Knox, any interest with which he might have been vested by virtue of the residuary clause of the will was divested by his death. We do not agree with this novel contention of the defendants, and they do not cite any precedent or authority therefor.

While the time required and allowed in which to sell the property and make distribution may have postponed the right to enjoy the bequest, it did not postpone the right to take the bequest. The postponement of the right of enjoyment of an interest does not make the interest a contingent one, or make a vested interest an alternative or substitutional one. There must be a postponement not only of the right to enjoy but also of the right to take an interest in order to make it either a contingent interest or a substitutional or alternative interest. *Bowen v. Hackney, supra.* In this case, we have no postponement of the right to take the interest. R. C. Knox was alive when F. J. Knox, the testator, died. He was a brother and next of kin of the testator. Upon the death of the testator *eo instanti* one-sixth interest in the property passing by virtue of the residuary clause of the will to the next of kin of F. J. Knox vested in R. C. Knox. Since the one-sixth interest vested in R. C. Knox, it passed by his will. Under the provisions of his will the plaintiff is his sole legatee and executrix. The direction that the land be sold and the proceeds divided made the gift a bequest instead of a devise, *Witty v. Witty, supra,* and as sole legatee the plaintiff is entitled to recover such interest.

The portion of the judgment from which the defendants appealed is affirmed.

There is no appeal from that portion of the judgment taxing the costs against Adrian C. Knox, executor of F. J. Knox, although it appears from the record that said executor asked that the costs be not taxed against him. The purpose of this action being to obtain a construction of the will and protection for the executor, we think the costs are properly taxed.

Affirmed.

A. BURGEN GOSSETT v. METROPOLITAN LIFE INSURANCE COMPANY.

(Filed 10 April, 1935.)

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 favorable to plaintiff on the whole record, 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 inference therefrom and every reasonable intendment thereon. C. S., 567.

2. **Insurance R c—Evidence of total and permanent disability held sufficient to be submitted to jury.**

   Evidence that insured had undergone several successive operations, and had had a nervous breakdown, and because of his nervous, weak, and run-down condition had been unable for a period of two years to perform any work for remuneration or profit, and that there had been no improvement in his condition, *is held* sufficient to be submitted to the jury on the question of insured's total and permanent disability within the meaning of the policies sued on.

3. **Same—**

   It is not necessary that insured introduce testimony of a physician that insured is totally and permanently disabled in order for insured to recover on disability clauses in policies of life insurance.

4. **Insurance M e—Question of waiver of proof of total and permanent disability held properly submitted to jury in this case.**

   Insured claimed temporary and total disability under a group policy in which he was insured, and insurer paid temporary disability benefits thereunder but denied the permanency of the disability. Insured demanded of insurer's agent forms on which to make proofs of disability under other policies of life insurance taken out with insurer which provided for benefits for total and permanent disability, and defendant's agent refused to furnish such forms on the ground that insured was not entitled to disability benefits under the policies. *Held:* In insured's action on each of the policies the submission of issues as to whether insured furnished due proof of total and permanent disability under each of the policies and whether insurer waived the furnishing of blanks for the production of proof of disability was without error.

5. **Evidence K a—**

   In an action on a disability clause in a policy of life insurance a lay witness may testify from his personal observation of insured that in his opinion insured would not be able to do any kind of physical work.

6. **Appeal and Error B b—**

   Insurer's contention that insured accepted a check in full payment of insured's claim under a disability clause in a policy of group insurance *held* untenable upon the theory upon which case was tried, there being no pleadings or issues on this phase of the case.

7. Appeal and Error J e—

The court's refusal to give instructions requested by defendant on one issue of the case will not be held for error where plaintiff would be entitled to recover notwithstanding the jury's answer to such issue.

8. Appeal and Error K e—

Where there is no error in the trial of several issues in the case, but there is error in the trial of the issues relating to the amount recoverable by plaintiff, a partial new trial may be granted on appeal, there being no danger of complication since the issues are entirely separable.

APPEAL by defendant from *Pless, J.*, at December Term, 1934, of BUNCOMBE. Affirmed in part, and reversed in part.

This is a civil action, commenced in the general county court of Buncombe County, North Carolina, wherein the plaintiff seeks to recover certain benefits alleged to be payable in the event of total and permanent disability under certain policies of insurance issued by the defendant upon the life of A. Burgen Gossett. The case was tried before his Honor, J. P. Kitchin, judge, and a jury, at the June Term, 1934, of the general county court. Judgment was rendered in favor of the plaintiff, from which the defendant appealed to the Superior Court, assigning certain errors, among which was the refusal of the court to sustain its motion for judgment as of nonsuit.

The case then duly came on for hearing on defendant's appeal before his Honor, J. Will Pless, Jr., judge of the Superior Court of Buncombe County, at the December Term, 1934. Judge Pless, ruling on each one of defendant's exceptions and assignments of error, refused to sustain said assignments of error and affirmed the judgment of the general county court. The defendant excepted to the signing of this judgment, and to each ruling of the court, and to its failure to sustain each exception and assignment of error, and appealed to the Supreme Court.

The evidence on the part of plaintiff was to the effect: That on 27 December, 1926, he went to work for defendant company in Asheville, N. C., attending to all the company's business and engaged in writing all kinds of insurance that defendant company sold. He quit working for them on 26 February, 1932, on account of ill health. He purchased three policies from the defendant: (1) On 11 January, 1923, an ordinary life insurance policy, No. 3516939-A, for $2,500, the quarterly premium being $14.88, with total and permanent disability provision. The premiums are paid to date. (2) On 12 May, 1925, a life and accident policy of insurance, No. 4251190-A, for $2,414, an ordinary life policy, with total and permanent disability provision. The quarterly payments are $16.53. The premiums are paid to date. (3) The plaintiff was an employee of defendant company. On 1 April, 1929, a group contract policy issued to defendant's employees, plaintiff paid $1.90 a

week on this group benefit until February, 1932. During the time he was sick, the premiums were taken out and he was paid $23.85 a week for forty weeks. This policy had a total and permanent disability provision. This action is brought to recover on the above policies, by plaintiff, for total and permanent disability benefits. The plaintiff quit the service of defendant company on 26 February, 1932, on account of a general nervous breakdown. He started out to find the cause of it. He went to the hospital to have his tonsils removed. He then had his teeth fixed, several filled and quite a few pulled. On 10 April, 1932, he had hemorrhoids pretty bad and went to a hospital for an operation, which was not exactly successful and kept him down until about the first of June, 1932, and defendant ordered him back to work. He was not able to go to work and talked to the manager, who told him to wait a week or two, as he thought he was not able to work. At the suggestion of the manager, he went over the territory to show the new assistant manager. This took about a week. Immediately after that, he had a rectumnal abscess and went back to the hospital. The abscess was opened and drained, or an attempt to drain it, for four or five weeks, and the doctor finally told him that he would have to have an operation to have it cut out. He had no money. The benefits under his little policy were stopped about 29 May, and he owed the hospital. He then got in touch with an osteopath and he treated him for four or five months. He also got in touch with another doctor, who told him that he had to have an operation, which was performed at the Biltmore Hospital, 21 January, 1933. He was treated about six weeks or two months and a second slight operation was performed. The defendant company seemed to think he had gotten rid of all his troubles, but he was still weak and nervous, but went back to the company. He did not think he was able to hold a job down. He asked the manager why the company did not offer him something light and was told that the company felt he was insane. He did not go to a doctor for a long while, but stayed run down and no good. He finally consulted a doctor and took treatment for two or three months. About the latter part of August, 1933, he wanted to do something, and made connection with the Prudential Life Insurance Company. He was really a sick man. He took the best care of himself, but was in a nervous, run-down condition—if he worked a full day his nerves would get so bad that he could not sleep at nights. He tried to work a full week, and two nights of that week he might as well not gone to bed, as he could not sleep. He has stayed in that nervous, run-down condition since—made no money with the Prudential Life Insurance Company, as he could not close a deal after he secured a customer, as he had not been well. Since he left the defendant in February, 1932, he has not seen a good day. He has not been able to do any work or engage in any business for compensation or

profit. He is in a nervous, weak, and run-down condition. He has not been able to perform any work. He submitted to an examination by two of the defendant company's doctors at the company's request. They did not testify at the trial.

In the record, commencing 21 March, 1932, and ending 7 April, 1934, there are ten letters, written by the defendant supervisor of employees group claim, to plaintiff in reference to plaintiff's disability. These letters in answer to plaintiff's letters written to him at defendant's headquarters in New York. These letters of plaintiff claim benefits on account of disability; also a certificate of Dr. R. P. Ivey, on 9 January, 1933, as to his condition and need of an operation. The last letter states: "I immediately filled out the form you sent me over two weeks ago and left it with Mr. Barron to fill out his part, and I understand from his office that it was mailed to you the date after he received it."

The plaintiff, during his sickness, was in bed or on a couch in the house over a year. He had four or five operations in all. His nervous system does not seem to improve much. The defendant paid him a certain length of time, on the group policy, but nothing on the other two policies. The plaintiff testified: "I paid the premiums after I got disabled because I had to, after they refused to get my disability papers to keep them in force."

After he was sick and in bed the general agent of defendant, E. F. Nagle, came to see plaintiff. Plaintiff testified without objection: "His duties as agent were taking care of any business of the company; writing insurance, the same as myself. He had the same duties that I had to perform. In the event that I, as agent of the company and a policyholder, became sick and disabled under one of those policies like I have described. It would be his duty to go to the office and request the blanks of the manager for the man to be examined. That was part of my duties. Mr. Nagle, as agent of the Metropolitan Life Insurance Company, had the same duties I had. It was part of Mr. Nagle's duty, when policyholders were disabled, upon request by them, to furnish them those blanks. Mr. Nagle came to see me while I was in bed. After I got back on the job about the first of July and could not make it, Mr. Nagle was at my house and I asked him to get the forms on which to make the proofs of my disability. I was then drawing temporary disability on the certificate, and he said that he would be glad to get them if I was entitled to them. And he reported to me later that he had gone to Mr. Barron and that he had refused to get them for him, stating that I was not entitled to the benefits under my policies. We talked about my getting those blanks before he told me he would get them. I thought there was a possibility of my getting well when I first talked to him about it, but when he came back later I asked him to get the blanks. When Mr. Nagle reported to me that Mr. Barron had refused to let me

have the blanks, my wife was present. Mr. Nagle lives here in Asheville. He is still the agent for this insurance company." Plaintiff's testimony was corroborated by his wife and other witnesses.

W. M. Jemison testified, in part: "As to his condition on down to date, I think it is anything but good, the way I would size it up. At the present time, absolutely I do consider him a sick man. Q. Able to do any kind of work? Defendant objects. Overruled. Exception. A. I do not think he is a well man, and I certainly do not think he would be able to do any kind of physical work. From general observation, that is my opinion. As to his nervous condition, I notice he seems to be exceedingly nervous. I am not related to him in any way whatever."

Wm. F. Barron (signed "Boone" in record). This was immaterial, as the party was the defendant's manager. He made the following statement on 31 January, 1933: "How many times have you seen him since disability commenced? A. Ten or fifteen times. Q. Did you find him totally disabled on those occasions? A. Looked to be. Q. When and where did you see him last? A. About two months ago, at my office. Q. Have you any reason to believe that this claim represents a voluntary absence because of his record or for vacation, rest, travel, or to engage in any other business? (If so, state your views or write accompanying letter.) A. No."

The issues submitted to the jury in the general county court of Buncombe County, North Carolina, and their answers thereto, are as follows: "(1) Did the plaintiff furnish to the defendant due proof of total and permanent disability, as required by policy of insurance No. 3516939-A? A. 'Yes.' (2) Did the plaintiff furnish to the defendant due proof of total and permanent disability, as required by policy of insurance No. 4251190-A? A. 'Yes.' (3) Did the plaintiff furnish to the defendant due proof of total and permanent disability, as required by Certificate No. 54, Policy No. 50? A. 'Yes.' (4) Did the defendant waive the furnishing of blanks for the production of proof of disability under Policy No. 3516939-A? A. 'Yes.' (5) Did the defendant waive the furnishing of blanks for the production of proof of disability under Policy No. 4251190-A? A. 'Yes.' (6) Did the defendant waive the furnishing of blanks for the production of proof of disability under Certificate No. 54, Policy No. 50? A. 'Yes.' (7) Did the plaintiff become totally and permanently disabled as the result of bodily injury or disease, so as to be prevented thereby from engaging in any occupation or performing any work for compensation or profit? A. 'Yes, 26 February, 1932.' (8) If so, from what date is plaintiff entitled to recover benefits under Policy No. 3516939-A? A. 'Yes, 26 February, 1932. $366.12.' (9) If so, from what date is plaintiff entitled to recover benefits under Policy No. 4251190-A? A. 'Yes, 26 February, 1932. $556.89.' (10) If so, from what date is plaintiff entitled to recover benefits under Policy No.

50, Certificate No. 54? A. 'Yes, 12 February, 1932. $900.30.' (11) In what amount, if any, is the defendant indebted to plaintiff? A. '$1,823.31.' "

The material exceptions and assignments of error and other necessary facts will be set forth in the opinion.

Jones & Ward for plaintiff.
John Izard and Harkins, Van Winkle & Walton 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 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. We think the evidence plenary to have been submitted to the jury.

In *Bulluck v. Ins. Co.*, 200 N. C., 642 (646), the following law is well settled in this State: "The reasoning of the opinions seems to indicate that engaging in a gainful occupation is the ability of the insured to work with reasonable continuity in his usual occupation, or in such an occupation as he is qualified physically and mentally, under all the circumstances, to perform substantially the reasonable and essential duties incident thereto. Hence, the ability to do odd jobs of comparatively trifling nature does not preclude recovery. Furthermore, our decisions and the decisions of courts generally have established the principle that the jury, under proper instructions from the trial judge, must determine whether the insured has suffered such total disability as to render it 'impossible to follow a gainful occupation.'" *Green v. Casualty Co.*, 203 N. C., 767; *Smith v. Assurance Society*, 205 N. C., 387; *Misskelley v. Ins. Co.*, 205 N. C., 496; *Baker v. Ins. Co.*, 206 N. C., 106.

The language in the policies in this action are practically all the same: "Has become totally and permanently disabled so as to be unable at any time to perform any work or engage in any business for compensation or profit."

We will consider the questions involved, as set forth in defendant's brief. *First:* "Is the plaintiff entitled to recover total and permanent disability benefits under a policy of insurance where the evidence shows

that he has been ill, but no physician testifies, and no evidence of 'permanency' is introduced?"

We do not think this question, as a whole, is borne out by the facts. Plaintiff testified, unobjected to, to the effect that since he left the defendant in February, 1932, he has not seen a good day. He has not been able to do any work or engage in any business for compensation or profit. He is in a nervous, weak, and run-down condition. He has not been able to perform any work. In this jurisdiction it has been held that to recover on policies, as in this case, it is not necessary that a physician must testify to total and permanent disability.

In *Bulluck v. Insurance Co., supra,* at pages 646-7, speaking to the subject: "The ability of a party to perform physical or mental labor is not a question of such exclusively technical significance as to permit expert testimony to be given conclusive effect. Indeed, the identical question arose in *Fields v. Assurance Co., supra* (195 N. C., 262), in which the physician had testified that the plaintiff was not in his opinion permanently disabled. Moreover, there was a conflict between the testimony of physicians and the plaintiff with respect to permanent disability, and it has been the uniform policy of the law of this State, for many years, to submit conflicting evidence to the jury upon the theory that in the last analysis the jury is the weigh-master of the evidence." *Misskelley v. Ins. Co., supra; Guy v. Ins. Co.,* 207 N. C., 278.

Second: "Is the notice of temporary disability furnished to the company under one policy to be considered a sufficient compliance with the condition in a different policy requiring proof of total and permanent disability?"

We do not think this question is borne out by the entire record. In the group policy, the correspondence between the litigants showed that plaintiff was claiming temporary disability, and also permanent disability. Defendant was denying permanent disability. As to the policies, plaintiff asked the general agent of defendant company for forms on which to make the proofs of his disability. This was refused by Mr. Barron, defendant's general agent, on the ground that he was not entitled to the benefits under his policies. The defendant denied liability on the ground that plaintiff was not totally and permanently disabled, and also that plaintiff had not furnished due proof.

In *Guy v. Ins. Co., supra,* at p. 279, it is said: "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* (205 N. C., 496)."

We think that the demand by plaintiff on the general agent of defendant company, and his refusal to furnish forms for plaintiff to make

proof of disability, on the ground that plaintiff was not entitled to benefits under the policies—under the facts and circumstances of this case, was properly left to the jury under the issues. *Paramore v. Ins. Association,* 207 N. C., 300 (304); *Colson v. Assurance Co.,* 207 N. C., 581; C. S., 6479, subsec. (6).

Third: "Did his Honor, the judge of the general county court, err in his ruling on the admission of evidence, and in propounding to the jury the law applicable to the case?"

The defendant contends that the following testimony of a lay witness, Jemison, was incompetent: "I do not think that he is a well man, and certainly do not think he would be able to do any kind of physical work. From general observation, that is my opinion."

We do not think this exception and assignment of error can be sustained. The authorities are to the contrary. *Gasque v. City of Asheville,* 207 N. C., 821. The case of *Potts v. Ins. Co.,* 206 N. C., 257, is distinguishable. Under Group Policy No. 54, it was contended by defendant that plaintiff accepted a check in full payment. There are no pleadings or issues to that effect, and we do not think, from the theory on which the case was tried, that defendant's position is tenable. The issues submitted to the jury as to the furnishing of due proof of disabilities under the policies were all answered by the jury in favor of plaintiff. It is well settled that if the verdict is correct on either one of the aspects, it will support the judgment. From the view we take of the law in this case, we see no error in the refusal of the court to grant defendant's request for special instructions.

Fourth: "Is the sum awarded by the jury in excess of the amount provided by the policies of insurance sued upon?" We think so.

Exceptions and assignments of error made by defendant present the question as to the correctness of the jury's answers to issues 8, 9, 10, and 11. There is no error in the answers to all the other issues except these issues. As to these issues, there must be a new trial.

"In *Lumber Co. v. Branch,* 158 N. C., at p. 253, the law is thus stated: 'It is settled beyond controversy that it is entirely discretionary with the court, Superior or Supreme, whether it will grant a partial new trial. It will generally do so when the error or reason for the new trial is confined to one issue, which is entirely separable from the others, and it is perfectly clear that there is no danger of complication. *Benton v. Collins,* 125 N. C., 83; *Rowe v. Lumber Co.,* 133 N. C., 433.' *Whedbee v. Ruffin,* 191 N. C., at p. 259." *In re Will of Bergeron,* 196 N. C., 649 (652); *Lumber Co. v. Power Co.,* 206 N. C., 515 (522).

We find no error on issues 1, 2, 3, 4, 5, 6, and 7, and the judgment affirmed on these issues. We find error on issues 8, 9, 10, and 11, and judgment reversed on these issues.

NELL GLENN SCOTT v. ÆTNA LIFE INSURANCE COMPANY.

(Filed 10 April, 1935.)

Insurance R a—Death resulting from embolus caused by infection from tooth extraction held accidental, but not caused by accidental means.

Plaintiff's evidence tended to show that insured had a tooth extracted by a competent and skillful dentist, who performed the operation at the request of insured with proper and sterile instruments in the usual and ordinary manner, employing the requisite degree of care and skill, that thereafter infection set in which produced an embolus which caused the death of insured. Plaintiff's evidence was not conclusive that the embolus resulted from the extraction of the tooth. *Held:* The evidence was insufficient to show that insured died from an external, violent, and accidental means within the terms of the double indemnity clause of the policy sued on, for although insured's death was the result of an accident in that death from an embolus caused by infection is not the ordinary and expected result of a tooth extraction, yet such accidental death was not the result of accidental means, since the tooth extraction ultimately resulting in death was performed intentionally in a skillful and usual manner, without mishap or unforeseen element.

CLARKSON, J., dissents.

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

On or about 26 April, 1921, the defendant delivered to Robert B. Scott two policies of life insurance, Nos. N-282880 and N-282881, each for the amount of $1,000. The plaintiff is the beneficiary named in said policies. Riders were on the policies providing double indemnity and reading as follows: "If the death of the insured occurs before the first anniversary date of this policy which follows the age of seventy years, and before a payment under the permanent total disability provision, if any, has been made or benefit thereunder allowed, all premiums previously due having been paid, and such death result directly and independently of all other causes from bodily injuries effected solely through external, violent, and accidental means within ninety days from the occurrence of such accident, and if such accident is evidenced by a visible contusion or wound on the exterior of the body (except in case of drowning and internal injuries revealed by an autopsy), and if such death does not result from suicide, while sane or insane, nor from military or naval service in time of war, nor from any aeronautic flight or submarine descent, nor directly or indirectly from disease in any form, then the company will pay a sum equal to the sum herein described as the sum insured in addition thereto."

On 25 April, 1931, the insured, Robert B. Scott, consulted Dr. Sheffield in Greensboro, North Carolina, who was a duly and regularly licensed dentist and was admitted to be an expert. Dr. Sheffield said at the trial: "I saw him on or about 25 April, 1931, at my office. . . . I extracted a tooth for him. It was a left lower, third molar, last tooth in the mouth. It was extracted about two o'clock in the afternoon. The treatment was as in the usual extraction. The first procedure was to sterilize the area around the tooth. . . . Washing off all debris and foreign particles in that area, followed by an application of tincture of iodine; an injection was made for an anæsthetic, and the tooth was extracted. Immediately following the extraction cotton rolls were placed on either side of the socket until a blood clot was formed in the socket. The date of the extraction was Saturday, 25 April. . . . I saw him on Monday following. . . . At that time I observed first a complete blood clot, no swelling, very little soreness, and no complaint from patient. He reported that he had had no trouble so far. I next saw him on Thursday morning, about two o'clock. . . . He called me . . . and told me he was having trouble, and asked me to tell him what to do. . . . At that time he was complaining of a swelling and soreness of the neck, and of course I gave him the treatment, socket treatment, and asked him . . . to get in touch with an eye, ear, nose, and throat specialist. . . . I observed swelling about his neck on the left side of his neck and some soreness. . . . The treatment I gave in connection with the extraction of the tooth on 25 April was the treatment that is usually followed by members of my profession, and was the general and approved treatment. . . . In consequence of his asking me to pull it, and because of the fact that I thought it ought to be pulled, then I treated it in the manner that teeth are treated by dentists who are preparing to pull that kind of a tooth. I made an X-ray picture of the tooth before I extracted it. I saw that the roots were straight, and that there would not be any difficulty in extracting the tooth. . . . It was just a pure, clean extraction. . . . So far as the extraction is concerned, it had been successful, and the wound was healing up successfully, and there was going to be an uneventful recovery. At the time I saw him on Monday everything was in good shape. He had had an operation at the Mayo Clinic in Rochester for an ulcerated stomach. . . . I saw him on Friday, 1 May, at the hospital. At that time the swelling had increased and it had moved slightly toward the under part of the jaw. After that, about seven or eight o'clock p.m. on Friday, the incision was made. I was present. That was a week after I had pulled the tooth. . . . The incision was made in toward the center of the throat in order to drain the condition. . . . He died the next morning about two o'clock a.m.

He died suddenly. From the information I had as to the manner of his death, it was my opinion that he died from an embolus. That is the opinion of all the doctors. An embolus is due to a blood clot or some foreign body in the blood that is passing through the heart. It can come from some tissue sloughing from a recent wound, or come from an air bubble, or come from a blood clot, or come from anything that cuts off the arteries. It is entirely possible that infection could have gone into that socket at some time after extraction, and this condition would have set up. . . . It is hard to say definitely whether or not this condition came from the extraction of that tooth. It all lies in this: Every tooth that is extracted is infected, every socket is infected. We have hundreds of organisms in the mouth, so that a patient recovering from a condition like that, it might be fatal, resting entirely on the resistance of the patient to the type of organisms."

Dr. Schoonover testified: "I was called to see him on Thursday, 30 April, 1931. He was unable to speak. I noticed his jaw and neck enormously swollen on the left side. . . . In my opinion, an infection caused that condition, the condition from which he was suffering. The only infection that would be virulent enough would be what we call streptococcus germs or organisms. . . . It is indefinite how long after that germ is contracted or enters the blood stream before its effects are seen in swelling or otherwise. It can be twenty-four or forty-eight hours. . . . He was carried to the hospital the next morning. . . . At that time he had elevated temperature, his neck was enormously swollen, he could scarcely turn his head, he was unable to speak, suffering great pain. . . . The other physician and I finally decided to operate. The operation was performed, but I did not get around until about eleven o'clock that night. In the meantime he had been operated on. . . . The operation apparently did give relief. . . . Streptococcus infection was the contributing cause, and there was probably an embolus that was the immediate cause of death. An embolus is a clot of anything that gets in the blood stream and circulates in the blood stream and lodges in the artery of the heart. . . . A clot quite frequently follows an operation. Quite frequently following an operation a patient is relieved of the trouble for which the operation was had and then dies from a blood clot, as a result of the operation. . . . In order for the streptococci germ to get into the blood stream, it has to have an avenue of entrance, a port of entrance, a raw surface. I did not see at any time I saw Mr. Scott what I call a port of entrance or raw surface other than the place where this tooth had been extracted. Probably the embolus could have come from this operation. . . . In my opinion the condition from which Mr. Scott was suffering and which necessitated this operation was an infection, . . . and in my opin-

ion that infection came in consequence of a streptococcus germ entering the blood stream from some source and from some place. It usually develops itself in twenty-four or forty-eight hours. No rule about that, that is usually so. Any exposed surface that is broken permits the entry means of those germs on any part of the body."

Dr. R. O. Lyday testified as follows: "I saw Mr. Scott about five or ten minutes after his death. His death was sudden and unexpected. I believe his death was caused from a coronary embolism. . . . An infection of this kind does not usually follow the extraction of a tooth. . . . Streptococci germs getting into the blood stream manifest their presence usually immediately. I meant in just a few hours. . . . Usually an embolus is more common during illness or following an operation. . . . It is possible that his death might be disconnected entirely from the operation or from the extraction of the tooth. This streptococcus germ may be present in the mucus lining. It is rare. . . . I don't believe the swelling would have started in the adjacent area to the opening of the tooth socket. . . . The pulling of the tooth and the following of the blood clot could have left it in perfect condition, but some days after that he could have by chewing or in some other way reopened that surface and then permitted those streptococci germs to have gotten in. . . . There is no way that anybody can tell whether or not this condition came from an infection that got into his blood stream at the time this tooth was pulled. . . . I have only an opinion as to where it came from. It could have come from this tooth or it could have come from other places. The reason we believed it came from the tooth was the locality it entered. It is our opinion the thing that caused his death was this embolus. The embolus came from the operation. That was the immediate cause."

There was evidence that prior to the time of the extraction of the tooth that the insured was in good health.

The defendant paid the face of the policies, but declined to pay the double indemnity.

The defendant offered no evidence, and at the conclusion of plaintiff's evidence made a motion of nonsuit, which was denied.

Thereupon, the trial judge submitted the following issues:

1. "Did the death of Robert B. Scott result, directly and independently of all other causes from bodily injuries effected solely through external, violent, and accidental means within ninety days from the occurrence of such accident?"

2. "Was such accident evidenced by a visible contusion or wound on the exterior of the body?"

3. "What amount, if any, is the plaintiff entitled to recover of the defendant?"

The jury answered the first and second issues "Yes," and the third issue "$2,000."

From judgment upon the verdict, the defendant appealed.

Hines & Boren for plaintiff.
Sapp & Sapp for defendant.

BROGDEN, J. If a tooth is extracted, upon request of the insured, by a competent and skillful dentist, who performs the operation in the usual and ordinary manner, with proper and sterile instruments, employing the requisite degree of care and skill, and thereafter an embolus develops from infection, producing death, can the beneficiary recover double indemnity provided in a policy of insurance for such death resulting "directly and independently of all other causes from bodily injuries effected solely through external, violent, and accidental means," etc.?

Undoubtedly the insured met an accidental death, but the determinative question is whether such death was produced by "external . . . accidental means." The plaintiff proceeds upon the theory that the extraction of the tooth produced a port of entry for streptococcus germs, and that these germs in turn ultimately produced the embolus resulting in death. Hence, the inquiry arises: Was such port of entry the result of "external, . . . accidental means"?

The courts and textwriters are divided into two opposing camps in solving the relative significance to be given the terms "accidental death" and "external . . . accidental means." Literally hundreds of cases have been written upon the subject, and while many of them may be distinguished from the facts in the case at bar, nevertheless many of them in principle are directly in point, and it is useless to attempt to harmonize the trend of judicial thought. Indeed, it must be conceded that the two lines of reasoning are parallel. There are three cases which illustrate the divergence of reasoning and are typical in every particular among a host of cases, far too numerous to discuss or cite. These cases are *Lewis v. Ocean Accident & Guarantee Corporation,* 120 N. E., 56, 7 A. L. R., 1129; *Caldwell v. Travelers' Ins. Co.,* 267 S. W., 907, 39 A. L. R., 56; *Landress v. Phoenix Ins. Co.,* 291 U. S., 491. The opinion in the *Lewis case, supra,* was written for the New York Court by *Justice Cardozo.* The *Caldwell case, supra,* was written for the Missouri Court by presiding *Justice Blair,* and the *Landress case, supra,* was written by *Mr. Justice Stone,* with *Mr. Justice Cardozo* dissenting.

The fundamental difference between the two schools of thought upon the question of law involved is stated clearly and at length in the *Caldwell case, supra.* The opinion declares: "There are two clearly defined lines of cases on this question. One holds that, where an unusual or

unexpected result occurs by reason of the doing by insured of an intentional act, where no mischance, slip, or mishap occurs in doing the act itself, the ensuing injury or death is not caused through accidental means; that it must appear that the means used was accidental, and it is not enough that the result may be unusual, unexpected, or unforeseen.

"The other line of cases holds that, where injury or death is the unusual, unexpected, or unforeseen result of an intentional act, such injury or death is by accidental means, even though there is no proof of mishap, mischance, slip, or anything out of the ordinary in the act or event which caused such injury or death.

"Industrious counsel have cited an imposing array of cases from this and other jurisdictions. In the number of cases cited respondent has far outdone the appellant. By actual count, her counsel has cited 116 cases and textwriters to this point alone. Such a formidable array has challenged the interest and industry of the writer to undertake the laborious, although not entirely unpleasant, task of examining every case cited. The great majority of those cases are found not to be in point on the question before us."

Thereupon, the opinion analyzes the Missouri decisions upon the subject and many of the leading cases in other jurisdictions. The conclusion reached by the writer of the opinion is as follows: "Defendant insured only against death or injury suffered through accidental cause of insured's death. Assuming that insured's death was caused by the operation voluntarily undertaken and admittedly performed in a skillful manner, plaintiff must show that something unforeseen, unusual, or unexpected and unintended occurred during the progress of the operation, and that this something caused insured's death. It is not enough that there be suspicion, guess, possibility, or speculation that something unexpected, unusual, or unforeseen occurred during the operation." A thumb-nail sketch of the facts in the *Caldwell case, supra,* is that the insured's bowels became obstructed in an unusual and unexpected manner as a result of a skillful operation performed on him for hernia, causing death.

The *Lewis case, supra,* disclosed that the insured voluntarily punctured a pimple on his lip, resulting in death from inflammation of the brain. *Justice Cardozo* said: "We think there is testimony from which a jury might find that the pimple had been punctured by some instrument, and that the result of the puncture was an infection of the tissues. If that is what happened, there was an accident. We have held that infection resulting from the use of a hypodermic needle is caused by 'accidental means.' . . . Unexpected consequences have resulted from an act which seemed trivial and innocent in the doing. Of itself,

the scratch or the puncture was harmless. Unexpectedly it drove destructive germs beneath the skin, and thereby became lethal. . . . The punctured wound is an adequate cause. The evidence suggests no other. . . . Here, as elsewhere, the law contents itself with probabilities, and declines to wait for certainty before drawing its conclusions."

In the *Landress case, supra,* the insured voluntarily exposed himself, under normal conditions, to the sun while playing golf, resulting in death from sunstroke. The pertinent language of the disability clause in the policy was substantially similar to that in the policy involved in this suit. The Supreme Court of the United States, speaking through *Mr. Justice Stone,* declared: "Petitioner argues that the death, resulting from voluntary exposure to the sun's rays under normal conditions, was accidental in the common or popular sense of the term, and should therefore be held to be within the liability clauses of the policies. But it is not enough, to establish liability under these clauses, that the death or injury was accidental in the understanding of the average man—that the result of the exposure 'was something unforeseen, unsuspected, extraordinary, an unlooked-for mishap, and so an accident,' . . . for here the carefully chosen words defining liability distinguish between the result and the external means which produces it. The insurance is not against an accidental result. The stipulated payments are to be made only if the bodily injury, though unforeseen, is effected by means which are external and accidental. . . . This distinction between accidental external means and accidental result has been generally recognized and applied where the stipulated liability is for injury resulting from an accidental external means." See, also, *Harris v. Ins. Co.,* 204 N. C., 385, 168 S. E., 208; *Mehaffey v. Ins. Co.,* 205 N. C., 701, 172 S. E., 331.

In the case at bar liability must rest upon the theory that the extraction of the tooth made a port of entry for death-dealing germs residing in the mouth or body of the insured, and that such germs produced an infection resulting in an embolus, producing death. It is manifest that the chain of causation must begin at the extraction of the tooth. However, the evidence discloses that such extraction was intentional, skillfully done in the ordinary and usual manner, with no mishap, unforeseen element, or misadventure. Furthermore, such extraction was the means, cause, or agency resulting ultimately in death. Therefore, if such cause or agency was intentional, usual, and expected, can it be said that such cause or agency was accidental, or constituted "external . . . accidental means?"

After a full examination of pertinent authorities, this Court is of the opinion that the line of cases or school of thought denying liability under such circumstances is in accord with the greater weight of reason and

justice, and the motion for nonsuit should have been sustained. Moreover, the experts who testified at the trial were unable to say whether the embolus developed from the extraction of the tooth or the subsequent operation, and consequently the real cause of the death is left in fog and conjecture.

Reversed.

CLARKSON, J., dissents.

HAYDEN CLEMENT AND WACHOVIA BANK AND TRUST COMPANY, ADMINISTRATORS, C. T. A., D. B. N., OF MRS. FRANCES KELLY FRERCKS, v. MRS. HOPE S. WHISNANT, MRS. ROBERT CRAWFORD, ET AL.

(Filed 10 April, 1935.)

Wills E f—Construction of will as to priority of payment of legacies upon deficiency of estate to pay all legacies in full.

Testatrix bequeathed certain designated amounts of money to certain relatives and friends, then a certain sum to her church for the erection of a parish house and Memorial Pipe Organ, and a certain sum to a church school for boys, and then various designated amounts to various charitable and religious organizations. The will provided that in case of a deficit the "deficit" should be "divided pro rata among the bequests to church and charity, . . . excepting the bequests to" her church for the pipe organ and parish house and the bequest to the boys school. There was a shrinkage in value of assets of the estate and costs of administration amounting to $10,000, and the executor misappropriated $40,000, with the result that the estate was insufficient to pay all bequests in full. *Held:* The legacies to relatives and friends should be first paid, then the legacies for the pipe organ and parish house and the boys school, and third, all other legacies to church and charity, and if the funds are insufficient to pay in full all legacies of any class when reached, the legatees of that class should share pro rata, the term "deficit" used in the will being sufficiently broad to cover a deficiency from any source, including defalcation, and there being nothing to show that the construction of the parish house or the installation of the organ had been undertaken, the legacies for these purposes impose no contractual obligation upon the estate, and were not such debts of piety as to impress a priority of payment.

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

CIVIL ACTION, before *Harding, J.*, at May Term, 1934, of ROWAN.

Mrs. Frances Kelly Frercks died in May, 1931, leaving a last will and testament, in which J. M. McCorkle was duly named as executor. The executor was required to give bond. At the time of the death of testatrix and the qualification of the executor, the value of the estate was $106,185.29. The will, in items 2 and 3 thereof, designated legacies in

various amounts to various relatives, aggregating approximately $41,000. After specifying said legacies to relatives, the will declares: "If either or any of the foregoing relatives undertake to contest this will they shall forfeit all rights under this will. If there be any other relatives not named in this will, their names are omitted purposely." The will then proceeds to designate certain legacies for certain friends of testatrix, some of them living in Germany. The total amount of such legacies to friends was $6,300. The will then proceeds to designate and specify certain legacies for church and charity. The legacies for church and charity aggregate $54,000.

The legacies specified for St. Luke's Church for Memorial Pipe Organ and the erection of a new parish house are $17,000, and the legacy specified for Patterson School for Boys is $7,000, making a total of $24,000 for St. Luke's Vestry and the Patterson School.

Capitulating the facts, the situation is this: Legacies for relatives and friends, first set up in the will, aggregate approximately $47,000. Legacies for St. Luke's Vestry and Patterson School, $24,000; legacies for general church and charity purposes, $30,000; total legacies specified in the will, $101,750.

The executor defaulted and misappropriated approximately $40,000. He was removed, and on 26 September, 1933, the plaintiffs were appointed administrators, *d. b. n., c. t. a.*, to administer the estate. At the time the plaintiffs qualified they received from the clerk of the Superior Court of Rowan County the sum of $69,677.78, representing the gross assets of the estate then available to pay legacies specified in the will. It appeared that this sum so available included the value of certain worthless stocks, and that certain costs of administration and of a caveat proceeding were unpaid. This shrinkage of assets plus such unpaid costs amounted to $10,000.

Thereupon plaintiffs brought the present suit against the legatees and other parties named in the will for a construction of the will and for the advice of the court in the distribution of the estate.

From judgment rendered, the relatives and St. Luke's Episcopal Church appealed to the Supreme Court.

Pharr & Bell for personal legatees.

Charles Price and Lee Overman Gregory for St. Luke's Vestry.

Taliaferro & Clarkson and James O. Moore for Protestant Episcopal Diocese of North Carolina.

Hamilton C. Jones for Thompson Orphanage.

BROGDEN, J. The testatrix in her will gave to relatives and friends legacies aggregating approximately $47,000. She then gave to the

Vestry of St. Luke's Episcopal Church, of which she was a member, $17,000 for a new parish house and a Memorial Pipe Organ. She also gave to the Patterson School for Boys $7,000. She gave substantial legacies to the Protestant Episcopal Diocese, the Thompson Orphanage, the Rowan County Welfare Department, and Valle Crucis School for Girls, aggregating $30,000. Shrinkage of value of assets and the costs of administration aggregated $10,000. The executor misappropriated $40,000. The result is that there is now approximately $59,000 in hand or available to pay $101,000 of legacies and bequests.

After specifying all the legacies and bequests, and in the latter part of the will, immediately before that portion appointing an executor, the testatrix used the following language: "If after paying off and discharging all of the bequests and legacies, and paying all the costs of executing this my will, there should be a deficit, I direct my executor and trustee to divide said deficit pro rata among the several bequests I have made to church and charity, and deduct the same from these; excepting, however, from said deductions the bequests to St. Luke's Church for a Memorial Pipe Organ, the bequests toward the erection of a new parish house and the memorial bequest to the Patterson School for Boys at Legerwood, N. C."

The interpretation of the foregoing clause is the determinative question of law in the case. Three theories have been advanced by the parties. First, the theory advanced by the personal legatees and friends of the deceased is that the testatrix intended to insert in the above-quoted clause from the will, in line one and before the word "bequests," the word "personal." These parties further assert that the controverted clause of the will creates three classes of beneficiaries and establishes a priority of payment as follows: (a) Relatives and friends; (b) St. Luke's Vestry for the pipe organ and parish house and Patterson School for Boys; (c) all other church and charity bequests, including the Thompson Orphanage, the diocese, county welfare, etc.

That is to say, that in the event there was not enough money to pay the bequests and legacies, then the relatives and friends should be paid in full, and thereafter St. Luke's Vestry and Patterson School for Boys should be paid in full, and the balance, if any, distributed pro rata among all bequests to other general, church, and charity activities specified in the will.

The second theory is that advanced by the Vestry of St. Luke's Episcopal Church, which contends that, as the testatrix gave to the Vestry of St. Luke's Church the sum of $10,000, for the erection of a Memorial Pipe Organ . . . "in memory of Peter A. Frercks and family," this bequest constituted a contractual obligation imposed upon the estate, and as these were debts of piety and reverence, they took precedence

over all other bequests and legacies, and therefore should have priority of payment. The same reasoning was applied to the bequest of $7,000 to the Vestry of St. Luke's Episcopal Church "toward the erection of a new parish house. This gift shall be known as the Peter A. Frercks and family memorial gift."

The third theory is that advanced by the beneficiaries of general church and charity bequests, particularly the Protestant Episcopal Diocese and the Thompson Orphanage. These parties assert that the testatrix intended the word "deficit" used in the foregoing clause of the will to apply only in case there was a natural deficit, or such as was created by loss resulting from economic causes or natural shrinkage of assets. They assert further that a defalcation is not the result of an economic cause. Consequently, the $40,000 loss should be applied pro rata to all the legacies and bequests specified in the will so as to give everybody something.

The trial judge decreed:

(1) That the $10,000 shrinkage, due to worthless stock and costs of administration, "shall be charged to church and charity bequests and deducted therefrom, excepting from such charge and deduction the bequests to the Vestry of St. Luke's Episcopal Church of Salisbury, N. C., in the amount of $10,000 for the erection of a Memorial Pipe Organ, the bequest to the Vestry of St. Luke's Episcopal Church of Salisbury, N. C., in the amount of $7,000, toward the erection of a new parish house, and the bequest to the trustees for the Patterson School for Boys at Legerwood, N. C., in the amount of $7,000.

"(2) That the loss occasioned by the misappropriation of the executor, aggregating approximately $40,000, shall be chargeable to all bequests and divided between them pro rata according to the amount of each as stated in the will; except as to those church and charity bequests which must bear the loss prescribed in the preceding paragraph, and they must be charged pro rata with the rest of the bequests the said loss due to the misappropriation on their net legacy after deducting the loss and deficit from depreciation as set out in the preceding paragraph. In other words, all legacies named in the will are to share pro rata in the loss occasioned by the misappropriation of the executor, but the deficit chargeable to the church and charitable organizations set out in paragraph 1 are to share the loss occasioned by the executor's misappropriation proportionately upon the balance of their bequests after deducting their losses occasioned by the deficit as above set out."

Reviewing the controverted clause in the will, together with the various theories of interpretation, it would seem that the bald question is: On whom should the axe fall in the event the assets of the estate were not sufficient to pay all the legacies in full?

Of course, it is to be conceded that the intent of the testatrix should be the guide to courts. However, this process of probing the minds of persons long in their graves as to what they meant by words used when they were alive is, at best, no more than guesswork. Courts and text-writers have undertaken in some instances to make it highly scientific and specialized guesswork, but it remains guesswork nevertheless. Manifestly, the testatrix neither contemplated nor anticipated that her friend, the executor, would misappropriate $40,000 of money; and hence, as a plain matter of common sense, it is wholly impossible to undertake to ascertain with any degree of satisfaction the intention of a person concerning an event or transaction that had never occurred to him, or that he had never thought about. In those cases in which language is so muddled, confused, and ambiguous that it does not make sense, or works out strange, unusual, and unjust results, courts, under the guise of interpretation, have been compelled as a practical matter of the administration of law to make wills for people and do the best they can to produce equitable results.

In the case at bar the testatrix used the word "deficit," and thereby said in substance that if there was a loss it should fall on "church and charity; excepting the Vestry of St. Luke's Church and Patterson School for Boys." When she used the word "deficit" her estate was ample to pay everybody in full. Assuming that she contemplated a deficit from economic causes, and that in such event church and charity should first feel the pruning knife, what solid ground is there for concluding that if a loss or deficiency resulted from other causes that she would thereupon have turned the knife upon her relatives and friends. That is to say, that a contemplated loss from economic causes should fall upon outsiders and not upon the family, but an uncontemplated loss from other than economic causes should fall upon the family and friends and not upon the outsiders. In other words, the cause of the loss or source of the loss would determine the bearer of the burden. Certainly, these considerations open a wide field of speculation.

The testatrix chose the word "deficit." It may have been that she did not know the technical meaning and variations of the word, but she put it in the will and there it stands. It is broad enough to cover defalcation, misappropriation, shrinkage, or costs. In its popular meaning and acceptation it signifies deficiency—plain deficiency from any cause—and there is nothing in the controverted clause of the will, or in the context thereof, to indicate that the testatrix was using it in any other sense.

The diocese, Thompson Orphanage, and other general church and charity organizations relied upon the case of *Henry v. Griffis,* 56 N. W., 670. In that case the testator gave land to his boys and money to his

daughter, declaring in the will "if there is not personal property and money enough to make the amount, the boys is to pay enough to make the amount." The executor misapplied approximately $4,000 of the money, and the Iowa Court held that the loss resulting therefrom should be apportioned pro rata among the children. It must be observed, however, in that case a father was undertaking to deal with his own children, and it is not to be assumed, therefore, that he expected one to profit at the expense of the other. Moreover, there was no clause in the will undertaking to charge any part of the loss to an outsider.

The personal legatees rely upon the case of *Silsby v. Young and Silsby,* 3 Cranch, 250, 2d L. Ed., 429. *Chief Justice Marshall,* writing for the Supreme Court of the United States, said: "If, at the time of his death, his estate had been sufficient, but before it could be collected and applied according to his will, bankruptcies, or any other casualties, had occasioned a deficiency, no reason can be perceived by the Court for supposing that the contemplation of such a deficiency would have induced him to make a different arrangement of his affairs from what he would have made had he contemplated a deficiency at his death. And between such a deficiency and one occasioned by the fault or misfortune of an executor, chosen, not by his legatees, but by himself, the Court can perceive no distinction."

While the facts in the *Silsby case, supra,* are not identical with those in the case at bar, it is authority for the proposition that a deficiency may include, or is broad enough to include, losses resulting from the fault or misfortune of an executor.

There is nothing in the record to indicate that the construction of the new parish house or installation of the Memorial Pipe Organ had ever been undertaken, and the Court is not disposed to hold that those legacies imposed contractual obligation upon the estate or were such debts of piety as to impress a priority of payment. The testatrix directed that any deficit should be divided or borne pro rata among the "several bequests as made to church and charity and deduct the same from these," but that no deduction should be made from the legacies to the vestry as aforesaid, and to Patterson School. Obviously, such exemption of the legacies to the vestry and to Patterson School should become effective only in the event it was necessary to prune bequests to "church and charity." That is to say, that as between legacies given to "church and charity" the bequests to the vestry and the Patterson School should be preferred.

The Court concludes that the money available, after payment of costs, charges, and fees incident to administration, shall be first applied to the payment of the legacies set up in the will for relatives and friends, and that if the fund is not sufficient to pay such legacies in full, then they

shall be paid pro rata. After the payment of the personal legacies, the bequest to St. Luke's Vestry for the new parish house, the Memorial Pipe Organ, and Patterson School for Boys shall be paid, and the balance, if any, to other legatees as specified in the will. That is to say, the order of priority of payment shall be as follows: First, legacies to relatives and friends; second, legacies to St. Luke's Episcopal Church for the new parish house and the Memorial Pipe Organ and Patterson School for Boys; third, all other legacies to church and charity.

Reversed.

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

JULIUS KAMINSKY v. D. C. WADDELL, JR.

(Filed 10 April, 1935.)

Negligence A c—Evidence held insufficient to show negligence of defendant in condition and use of building.

Evidence that plaintiff, the purchaser of bankrupt stock stored in the building of the defendant, went to defendant's warehouse Sunday night to inspect the stock before the time for its delivery the following morning, and left defendant's warehouse by the back door and fell from a loading platform at the rear of the building to his injury *is held* insufficient to be submitted to the jury on the issue of negligence on the contention that defendant owed plaintiff the duty, in common with all persons entering the building, to maintain a guard rail around the platform and to maintain a light over the platform, since a rail around the loading platform would interfere with the very use for which the platform was maintained, and since the failure to maintain a light over the platform at 9:30 Sunday night cannot be held negligent.

APPEAL by the plaintiff from a judgment of nonsuit entered at the close of the evidence by *Cowper, Special Judge,* at December Term, 1934, of CATAWBA. Affirmed.

Self, Bagby, Aiken & Patrick and Theodore F. Cummings for plaintiff, appellant.

J. Y. Jordan, Jr., for defendant, appellee.

PER CURIAM. This is an action for personal injuries alleged to have been caused by the negligence of the defendant. The plaintiff bought a bankrupt stock of goods stored in the building owned by the defendant, and on Sunday night went to the storehouse to arrange the goods to be removed the following Monday morning, and about 9:30 p.m. left by

the rear door of said building and walked off of the loading platform in the rear thereof and fell about 8 feet to his injury. While the plaintiff does not contend that the defendant breached any special duty he owed to him, he does contend that the defendant breached the duty he owed to all persons entering the building, including himself, to keep said building in a reasonably safe condition, and that the defendant breached this duty in failing to construct and maintain a guard rail or banister around the rear platform of the storehouse, and in failing to maintain a light over said platform.

Both the allegations and the evidence are to the effect that the platform was constructed and used for the purpose of loading and unloading merchandise coming into and going out of the building. We do not agree with the plaintiff's contention that the defendant owed the duty to the plaintiff in common with others who entered the building to maintain a rail or banister around a loading platform. Such a barricade would interfere with the very use for which the platform was maintained, namely, loading and unloading merchandise. Nor can we hold that an owner of a building rented for mercantile purposes owes the duty to those entering the building to keep a light burning over a loading platform in the rear thereof at 9:30 o'clock Sunday night.

Affirmed.

W. C. DAVIS AND SMITH DAVIS v. D. F. WARREN.

(Filed 10 April, 1935.)

1. Evidence K a—Admission of testimony of surveyor as to acreage as ascertained from ex parte survey without notice held not error under the facts.

Plaintiff purchaser brought suit on a contract to convey forty acres of land, which stipulated that the vendor should pay the purchaser for any shortage in the tract at the rate of $75.00 an acre, the vendor to be bound by a survey to be made of the land, the contract failing to stipulate which party was to make the survey. The vendor denied the execution of the contract, but upon the trial both parties introduced evidence as to the disputed acreage. *Held:* The admission of testimony of a surveyor as to the acreage as ascertained by him in an *ex parte* survey without notice to defendant will not be held for error upon the vendor's exception.

2. Limitation of Actions E f—Directed verdict in plaintiff's favor on issue of bar of statute held correct under the evidence.

Plaintiff brought suit to recover the amount of shortage in a tract of land under the provision of a contract under seal to convey which provided that defendant vendor should pay for such shortage at the rate of a stipulated sum per acre as ascertained by a survey to be made, the

vendor binding himself to "a survey of said land before the final settlement is made so as to know the correct number of acres to settle on." The evidence showed that the action was instituted more than ten years after the execution of the contract, but less than four years from the date of final payment of the purchase price by the purchaser. *Held:* A directed verdict in plaintiff's favor on the issue of the bar of the statute of limitations was not error.

3. **Judgments L f—Under the facts of this case defendant held not entitled to dismissal of action on ground of estoppel by judgment.**

Defendant did not plead estoppel by judgment in his answer, but his contention that the execution of notes by plaintiff upon which defendant had obtained judgment constituted a new contract superseding the contract sued on by plaintiff in this action was fully submitted to the jury and answered in plaintiff's favor. *Held:* Defendant's contention that the court erred in refusing to dismiss the action on the ground of the former action between the same parties on the notes cannot be sustained.

APPEAL by defendant from *Sinclair, J.*, at December Term, 1934, of WATAUGA. No error.

The plaintiffs bring an action on the following contract: "State of North Carolina, Watauga County: this is to sertify contract between D. f. Warren, T. S. Davis and W. C. Davis whereas i, the said D. f. Warren, have this day sold to T. S. and W. C. Davis 40 acres of land at 75 Dollars per acre this land not being surveyed at the time of sale, but i, the said D. F. Warren, do hereby bind myself to a survey of said land before the final settlement is made so as to know the correct number of acres to settle on with said purchasers at the price of 75 Dollars per acre and if said land runs over 40 acres the said purchasers do hereby agree to pay 75 Dollars per acre for the over-run if there be any and i, the said D. f. Warren, do hereby bind myself to pay back to the purchasers 75 Dollars per acre for all under 40 acres. this March 4, 1919. (Signed) D. F. Warren (Seal). T. S. Davis (Seal). W. C. Davis (Seal)."

The plaintiffs allege that the land contains only thirty acres and pray judgment for $750.00. The defendant denies that there was such a contract and that the same is a forgery and pleads the ten-year statute of limitations.

The issues submitted to the jury and their answers thereto were as follows: "(1) Did the defendant execute the contract, as alleged in the complaint? A. 'Yes.' (2) If so, what was the amount of shortage, if any? A. 'Six acres.' (3) Is the plaintiffs' claim barred by the statute of limitations? A. 'No.' (4) What sum, if any, are the plaintiffs entitled to recover of the defendant? A. '$450.00.'"

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.

Wiley H. Swift and C. David Swift for plaintiffs.
W. R. Lovill and T. E. Bingham for defendant.

PER CURIAM. The questions involved on this appeal, as set forth by defendant, we will consider *seriatim,* as follows: *First:* "Did the court err in permitting the surveyor to testify as to the acreage in a tract of land surveyed by him in an *ex parte* survey without notice to the defendant?" We think not, under the facts and circumstances of this case. The defendant denied the execution of the contract.

The jury, in its answer to the first issue, found that the defendant executed the contract as alleged in the complaint. The contract, which we must construe, contained the following: "This land not being surveyed at the time of the sale, but i, the said D. F. Warren do hereby bind myself to a survey of said land before the final settlement is made so as to know the correct number of acres to settle on with said purchasers," etc.

Who should make the survey was not mentioned in the contract. Either party, under the contract, could have made a survey. Although defendant denied that there was such a contract, yet the disputed acreage was in evidence on the part of both plaintiffs and defendant. The county surveyor, a witness for plaintiffs, made a survey and testified that there were 34 acres in the tract. A surveyor, a witness for defendant, made a survey, and testified that there were 38 acres in the tract, and this survey was made at the request of plaintiffs. This matter was submitted to the jury under the second issue and the amount of shortage found to be six acres.

Second: "Did the court err in refusing to direct a verdict in favor of the defendant on the ground that the action was barred by the statute of limitations?" We think not.

The contract says "a survey of said land *before the final settlement is made* so as to know the correct number of acres to settle on with said purchasers," etc.

The plaintiff, T. S. Davis, testified, in part: "I had a further conversation with Mr. Warren. The last $100.00 we paid Mr. Warren was some time in August, 1930, I believe, after he made the survey, when my brother surveyed it and it fell short considerably, and he came to us and said he needed money and we paid him $100.00, with the understanding that when the final settlement came, if it was not right, he was to make it right. I think that was some time in August. The check will show. We demanded that he come up and make settlement on the shortage, about the time the note came due."

The contract is under seal and the present action was brought 1 November, 1933. The court charged the jury upon this issue, in which we

can see no error, as follows: "The third issue: 'Is the plaintiffs' claim barred by the statute of limitations?' Upon this issue, gentlemen, the court charges you that if you find the facts to be as testified by the witnesses and shown by the evidence in this case to be true, you would answer this third issue 'No.' I will write the answer for you to that issue, with your permission."

Third: "Did the court err in refusing to dismiss the action on the ground that there had been a former action between the parties plaintiffs and defendant, upon certain notes growing out of the same transaction?" Under the facts and circumstances of this case, we think not.

The defendant in its answer of further defense, if he had the right to do so, did not plead estoppel as to former action against plaintiffs on the notes, and tendered no issue to that effect.

In defendant's further defense, in his answer, is the following: "That the plaintiffs procured a loan from the Federal Land Bank, and that at the time of securing said loan, had a survey of said premises made and the land counted, and that they knew that the boundary did not contain 40 acres, but, notwithstanding said knowledge, said plaintiffs executed to the defendant their notes for the sum of $300.00, this being the balance due after applying proceeds of loan to the payment of the indebtedness owing by plaintiffs to the defendant at the time, and said execution of said notes is hereby pleaded as an estoppel against said plaintiffs."

The fourth issue is as follows: "What sum, if any, are the plaintiffs entitled to recover of the defendant?" On this issue the court below gave defendant the full benefit as to the above defense in his answer as to a final settlement and estoppel, and charged the jury as follows: "If you find that the original contract was executed as contended for by the plaintiffs, but if you further find from the evidence that when the plaintiffs borrowed the money from the land bank they agreed for the defendant's mortgage to be canceled, so as to enable them to get the loan, and in consideration of his discounting the principal and striking out all of the interest, and if you find that the plaintiffs agreed, in consideration of that, to execute the notes for $300.00 as a final settlement of the transaction between the plaintiffs and defendant, and find that was in substitution of the original agreement, you would answer the issue, 'Nothing.'"

The controversy was one mainly of fact, which the jury could have decided either way, but they decided for plaintiffs. They are the triers of fact. The defendant, in this Court, made a motion for a new trial on the ground of newly discovered evidence. We do not think this motion comes up to the rule as laid down in *Johnson v. R. R.*, 163 N. C., 431 (453-4). For the reasons given, we find

No error.

J. FRED THOMPSON, EMPLOYEE, AND F. C. THOMPSON, OCTAVIA THOMPSON, AND LUCY THOMPSON, FATHER, MOTHER, AND SISTER, RESPECTIVELY, AND NEXT OF KIN OF J. FRED THOMPSON, DECEASED, v. JOHNSON FUNERAL HOME, EMPLOYER, AND SUN INDEMNITY COMPANY, INSURANCE CARRIER.

(Filed 1 May, 1935.)

1. **Appeal and Error L a: Master and Servant F j—Superior Court may remand to Industrial Commission cause remanded by Supreme Court for judgment dismissing the proceeding for want of jurisdiction.**

Upon appeal to the Superior Court from an award of the Industrial Commission the question of jurisdiction of the Industrial Commission was raised for the first time. Defendants' challenge to the jurisdiction was not sustained and judgment was entered affirming the award of the Industrial Commission. Upon appeal to the Supreme Court the judgment was reversed and the cause remanded to the Superior Court for that the evidence of record showed that at the time of the injury in suit the employer regularly employed less than five employees, and that therefore the Industrial Commission was without jurisdiction. Before judgment was entered in the Superior Court upon the judgment of the Supreme Court, the Superior Court, upon motion supported by affidavits, remanded the cause to the Industrial Commission in order that it could hear evidence and ascertain the disputed jurisdictional fact. *Held:* The Superior Court had the power to so remand the cause.

2. **Master and Servant F i—**

A finding of the Industrial Commission in regard to the number of employees regularly employed by defendant employer, being jurisdictional, is subject to review upon appeal.

CLARKSON, J., concurring.

STACY, C. J., dissenting.

BROGDEN, J., concurs in dissent.

APPEAL by defendants from *Stack, J.*, at November Term, 1934, of IREDELL. Affirmed.

This is a proceeding for compensation under the provisions of the North Carolina Workmen's Compensation Act.

The proceeding was heard in the Supreme Court at Fall Term, 1933, on defendants' appeal from a judgment of the Superior Court of Iredell County, at May Term, 1933, affirming an award of compensation made by the North Carolina Industrial Commission on 20 February, 1933. The judgment was reversed for the reason that it did not appear on the record that there was evidence tending to support the conclusion of Commissioner Dorsett, which was approved by the full Commission, that the parties to the proceeding are subject to the provisions of the North Carolina Workmen's Compensation Act. The evidence in the record

showed that at the time the deceased employee was injured, the employer had in his employment less than five employees. For this reason it was held that the North Carolina Industrial Commission was without jurisdiction of the proceeding for compensation under the provisions of the North Carolina Workmen's Compensation Act. See *Dependents of Thompson v. Funeral Home,* 205 N. C., 801, 172 S. E., 500.

When the proceeding was remanded to the Superior Court of Iredell County for judgment in accordance with the opinion of the Supreme Court, and while it was pending in said court, the plaintiffs moved the court to remand the proceedings to the Industrial Commission in order that said Commission may hear evidence and find specifically the number of employees in the employment of the defendant Johnson Funeral Home at the time the deceased employee was injured. This motion was supported by affidavits tending to show that the defendant had in its employment at said date more than five employees.

The motion was allowed, and the defendants appealed to the Supreme Court.

Z. V. Turlington and Jack Joyner for plaintiffs.
Cochran & McClenaghan for defendants.

CONNOR, J. The only question presented by this appeal is whether the judge of the Superior Court has the power to remand a proceeding for compensation under the provisions of the North Carolina Workmen's Compensation Act, pending in said court on an appeal from an award made therein by the North Carolina Industrial Commission, after a judgment affirming said award has been reversed on an appeal to the Supreme Court, on the ground that on the record the Industrial Commission was without jurisdiction of the parties to the proceeding, in order that the Industrial Commission may hear evidence and ascertain the facts which determine its jurisdiction.

This question must be answered in the affirmative.

In the instant case, it appears from the record that the defendants did not challenge the jurisdiction of the Industrial Commission at the hearing before Commissioner Dorsett, or at the hearing before the full Commission. Its jurisdiction was challenged first in the Superior Court, where the proceeding was pending on defendants' appeal, on the ground that it appeared from the evidence set out in the record that at the time the deceased employee was injured, the employer had in its employment less than five employees. This challenge was sustained by the Supreme Court on defendants' appeal from the judgment of the Superior Court affirming the award of the Industrial Commission. When the proceeding was remanded to the Superior Court, and before

judgment was entered in said court in accordance with the opinion of the Supreme Court, the plaintiffs moved in said court that the proceeding be remanded to the Industrial Commission, in order that the facts with respect to the number of employees in the employment of the defendant at the time the deceased employee was injured might be ascertained by the Industrial Commission. The motion was allowed. In this there was no error. See *Byrd v. Lumber Co.,* 207 N. C., 253, 176 S. E., 572; *Ruth v. Carolina Cleaners, Inc.,* 206 N. C., 540, 174 S. E., 445; *Butts v. Montague Bros., post,* 186.

The question presented by this appeal was not involved in the former appeal in this proceeding. Nothing said by this Court in the opinion on the former appeal is inconsistent with the disposition of this appeal. We hold only that the judge of the Superior Court had the power to make the order remanding the proceeding to the Industrial Commission for the purpose stated in the order. When the proceeding has been remanded to the Industrial Commission, the Commission will determine, in accordance with its rules, whether it will hear evidence tending to show the number of employees in the employment of the defendant employer at the time the deceased employee was injured, and if it shall hear evidence offered by the plaintiffs, and find the facts to be as contended by the plaintiffs, will have the power to make such findings a part of the record in this proceeding. These findings of fact being jurisdictional, will be subject to review by the Superior Court. *Aycock v. Cooper,* 202 N. C., 500, 163 S. E., 569.

Affirmed.

CLARKSON, J., concurring: The record in this proceeding shows that Latta Johnson, the owner and proprietor of the Johnson Funeral Home, at the hearing before Commissioner Dorsett, was asked the following question: "How many men did you keep on duty all the time at your place of business?" His reply to this question, as shown by the record, was as follows: "I have employed three men other than myself, and I tried to keep at all times until a reasonably late hour in the evening, two men on duty to take care of the work. Mr. Thompson was on duty the night of 16 August, and I saw him that night."

This was the only evidence at the hearing tending to show the number of employees of the Johnson Funeral Home at the time the deceased employee was injured. This evidence did not show that the employer had in his employment at the time the deceased employee was injured as many as five employees. For this reason, it was held that the North Carolina Industrial Commission did not have jurisdiction of the parties to this proceeding, and the judgment of the Superior Court approving the award of the Industrial Commission was for this reason reversed.

The dependents of the deceased employee now ask that the proceeding be remanded by the Superior Court to the Industrial Commission, not that the employer may change his testimony, but that they may show the fact to be as the affidavits of the employer and his wife tend to show, that he had six regular employees in his employment at the time the deceased employee was injured. The name of each of these employees is set forth in the affidavits. I think it but just that the employer, who had complied with the provisions of the North Carolina Workmen's Compensation Act, with respect to insurance for the protection of his employees, shall have an opportunity to explain his testimony to the end that the insurance carrier shall not escape the liability which it has undertaken by reason of a technicality. I concur in the opinion of the Court, which is in accord with both the letter and the spirit of the Workmen's Compensation Act.

STACY, C. J., dissenting: An employer qualifies as administrator of the estate of one of his employees, brings a proceeding against himself before the Industrial Commission to recover of the insurance carrier, and loses on his own testimony, in consequence of which the proceeding is dismissed. *Dependents of Thompson v. Funeral Home,* 205 N. C., 801, 172 S. E., 500. He then seeks another opportunity to make out his case by changing his testimony. We said in our former opinion that the law would not assist him in this undertaking, as witness the following:

"Plaintiffs have had their day in court, and they have failed to make out their case. There was no motion in the Superior Court to remand when the jurisdiction of the Industrial Commission was first challenged. *Butts v. Montague Bros.,* 204 N. C., 389, 168 S. E., 215. Nor is the suggestion made here except as a *dernier ressort.* Ordinarily, parties to a suit are allowed but 'one bite at the cherry.' Having tried and failed, they are not entitled, as a matter of right, to go back and 'mend their licks.' Furthermore, it seems quite improbable that the plaintiffs would be able to show jurisdiction, even if given another chance, unless the employer, who appears to have qualified as administrator of the employee's estate and is now appealing from the judgment, should change his testimony. There comes a time when litigation should end."

This was said just a year ago. The Court now reverses its decision in order that the witness may change his testimony. It requires no gift of clairvoyance to perceive in advance the ultimate effect of such a *volte face.* There is no question of newly discovered evidence as in the case of *Butts v. Montague Bros., post,* 186; nor of an inadvertence or omission in the former record, as in *Roebuck v. Trustees,* 184 N. C., 611, 113 S. E., 927. It is a plain case of reversal on our part in derogation

of "the law of the case" and the stability of judicial decision, so that the plaintiff may have another chance—a privilege not usually accorded to litigants in this jurisdiction. In *Kannan v. Assad,* 182 N. C., 77, 108 S. E., 383, a party, who had sworn to his own hurt, was not permitted thereafter to change his position. Numerous cases might be cited to the same effect. *Rand v. Gillette,* 199 N. C., 462, 154 S. E., 746.

BROGDEN, J., concurs in dissent.

WESTERN CAROLINA POWER COMPANY v. R. M. YOUNT AND UNITED STATES FIDELITY AND GUARANTY COMPANY

and

MRS. J. B. (EDNA) ROBINETTE ET AL. AND J. C. RUDISILL AND CLARENCE CLAPP, RECEIVERS, v. R. M. YOUNT, INDIVIDUALLY AND AS EX-CLERK, AND THE UNITED STATES FIDELITY AND GUARANTY COMPANY AND WESTERN CAROLINA POWER COMPANY.

(Filed 1 May, 1935.)

1. **Appeal and Error L d—**

   A decision of the Supreme Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court, and on a subsequent appeal.

2. **Actions C c—**

   Consolidation of summary proceedings on bond of clerk instituted under C. S., 356, with action instituted by other creditors of clerk *held* not error.

3. **Receivers E b: Principal and Surety C c—Institution of proceedings under C. S., 356, held not to create priority over other creditors.**

   The fact that one creditor of a clerk instituted summary proceedings on his bond under C. S., 356, prior to the institution of action by other creditors of the clerk *is held* not to create a priority in favor of such creditor in the absence of laches on the part of the general creditors, where the summary proceeding was consolidated with the general creditors' bill and a receiver appointed therein, since C. S., 356, has no provision giving a preference to the party or parties first seeking such summary remedy, and the appointment of a receiver prevents a party from obtaining a preference by way of prior judgment.

4. **Receivers E b—**

   Preferences are not favored by the law and can only arise by reason of some definite statutory provision or some fixed principle of common law which creates special and superior rights in certain creditors over others.

5. Principal and Surety B c—Presumption that default occurred when funds were paid to clerk held not rebutted in this case.

The facts found by the court *held* not to warrant the conclusion that part of the funds paid by claimant to the defaulting clerk were found segregated from other funds in the clerk's hands during a subsequent term of his office so as to rebut the presumption that default was made when the funds were received by the clerk, and claimant's contention that the funds were so segregated and that claimant was entitled to assert its claim therefor against the bond for the subsequent term cannot be sustained.

APPEAL by the plaintiff Western Carolina Power Company from *Harding, J.*, at July Term, 1934, of CATAWBA. Affirmed.

The facts necessary to an understanding of the case are stated in the opinion.

W. A. Self, W. B. McGuire, Jr., and W. S. O'B. Robinson, Jr., for appellant.

J. L. Murphy, T. P. Pruitt, and E. B. Cline for Mrs. Robinette et al., and for the receivers, appellees.

SCHENCK, J. This case was before this Court at the Fall Term, 1933, and is reported in 205 N. C. Reports, at page 321, where a clear and comprehensive statement of the case as it had developed up to that time is set forth. The case was then presented to this Court on an appeal by the plaintiff Western Carolina Power Company from an order of the Superior Court dismissing the summary proceeding instituted by said plaintiff under and by virtue of C. S., 356. The defendant United States Fidelity and Guaranty Company had moved the Court to either consolidate the summary proceeding with the action instituted by Mrs. Robinette *et al.* against the clerk, to which the Guaranty Company, his bondsman, was likewise party defendant, or to dismiss said proceeding, and the Superior Court below entered an order of dismissal, and in reversing this order this Court said: "We think the action, or summary proceeding, should have been consolidated and not dismissed under the facts and circumstances of this case." Pursuant to this opinion, the Superior Court subsequently ordered the summary proceeding and the action instituted by Mrs. Robinette *et al.* consolidated.

The present appeal is from a judgment based upon facts found by the court after amended and additional pleadings had been filed and after a trial by jury had been waived. The exceptive assignments of error, which are confined to conclusions of law, assail the judgment for that (1) it consolidated the summary proceeding instituted by the plaintiff under C. S., 356, with the civil action instituted by Mrs. Robinette *et al.*, wherein a receiver was appointed to preserve the assets of the

insolvent clerk, and (2) it denied to the appellant a preference over other creditors of the clerk, and (3) it precluded the appellant from asserting a portion of its claim against the bond of the clerk for his second term of office.

The order consolidating the summary proceeding with the action instituted in behalf of other creditors, since it was made in conformity with the former opinion in this case, is binding upon the appellant and pretermits, if it does not preclude, any discussion of objections and exceptions thereto. "A decision by the Supreme Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal." *Newbern v. Telegraph Co.,* 196 N. C., 14; *Nobles v. Davenport,* 185 N. C., 162. Albeit, we here reiterate that the consolidation was in accord with the practice recognized and frequently exercised by our courts. "The object of consolidating two or more actions is to avoid a multiplicity of suits, to guard against oppression or abuse, to prevent delay, and especially to save unnecessary cost or expense; in short, the attainment of justice with the least expense and vexation to the parties litigant." N. C. Prac. and Proc. (McIntosh), par. 506, pp. 536-7.

The judgment of the Superior Court provides, *inter alia,* that the "Western Carolina Power Company is not entitled to any preference or priority in the payment of its claim, but that it is only entitled to pro rate with other creditors," and this provision is challenged by the appellant's assignments of error. The sole ground upon which the appellant claims that it is entitled to a preference is the fact that it instituted a summary proceeding under C. S., 356, one day before Mrs. Robinette instituted her action on behalf of herself and other creditors of the insolvent clerk. While C. S., 356, gave to the plaintiff the right to move for a judgment upon the bond of the clerk, this was merely one course, of several, open for the plaintiff to pursue. There is no provision in the statute giving a preference to the party or parties who first seek such summary remedy. And, withal, before any claim, preferential or otherwise, can be established under this statute, notice must be given, the court must try the cause, and judgment must be obtained. The appointment of a receiver, and the restraining of creditors from instituting or pursuing actions already instituted, prevented a movant under this statute from obtaining a preference, just as it did any plaintiff who had instituted an action under C. S., 355 and 356, or 475, from obtaining a preference by way of a prior judgment. We do not think that it was ever intended that the mere lodging of a motion under C. S., 356, established a preference, or right to establish a preference, over other creditors when such other creditors had been guilty of no laches in asserting their claims. It cannot be justly or consistently maintained by the

plaintiff that the other creditors of the insolvent clerk have been guilty of laches in instituting action for their claims, since such action was instituted by Mrs. Robinette within one day of the time in which the plaintiff moved under C. S., 356, and before the expiration of the ten days notice stipulated in the statute. Preferences are not favored by the law, and can only arise by reason of some definite statutory provision or some fixed principle of common law which creates special and superior rights in certain creditors over others.

The appellant challenges the judgment below for that it precludes it from asserting $5,500 of its claim against the bond of the clerk for his second term of office. While admitting that the money which it paid into the office of the clerk was paid during his first term of office, and while admitting that when a public officer, upon demand, fails to pay over funds deposited with him, the law presumes that the default occurred when the funds were received by him, *State ex rel. Gilmore v. Walker,* 195 N. C., 460, as to a portion of the funds deposited by it the appellant contends that this presumption has been, as may be, rebutted, *Gilmore v. Walker, supra.* While we concur in this proposition of law, we do not agree with the appellant's contention that the facts as found by his Honor warrant the conclusion that any portion of the funds deposited by it were actually found segregated from other funds in the hands of the clerk during his second term of office.

As was stated on the former appeal, this case is distinguishable from *State v. Gant,* 201 N. C., 211. In that case there was no other suit of creditors pending, either when the motion for summary judgment under C. S., 356, was lodged, or while the motion was pending, or during the trial thereon; consequently, neither the question of consolidation nor of receivership nor of preference was presented. The record in that case does reveal that the movants for summary judgment, the plaintiffs, did invite and request another large claimant, the board of county commissioners, to join in a receivership proceeding, and that the invitation and request were declined. That record further reveals that while it was urged in the Supreme Court by the defendant surety company that there should have been a consolidation of the summary proceeding with a suit in behalf of the other creditors of the clerk, no motion for such consolidation was made in the trial of the cause below, and for that reason the question of consolidation could not be considered by the Supreme Court.

The judgment of the Superior Court is

Affirmed.

JOE BUTTS, EMPLOYEE, AND LUCY BUTTS, ADMINISTRATRIX, WIDOW, NEXT OF KIN, AND DEPENDENT OF JOE BUTTS, DECEASED, v. MONTAGUE BROS., EMPLOYER, AND PUBLIC INDEMNITY COMPANY, INSURANCE CARRIER.

(Filed 1 May, 1935.)

1. **Master and Servant F d—Industrial Commission held to have the power to order a rehearing for newly discovered evidence.**

While there is no direct statutory provision giving the Industrial Commission power to order a rehearing of an award made by it for newly discovered evidence, the Commission has such power in proper instances in accordance with its rules and regulations, N. C. Code, 8081 (jjj), it being the intent of the Legislature, as gathered from the whole act, to give the Industrial Commission continuing jurisdiction of all proceedings begun before it with appellate jurisdiction in the Superior Court on matters of law only.

2. **Same—Upon remand of cause to Industrial Commission the Commission acquires jurisdiction for all purposes.**

Where a proceeding is remanded to the Industrial Commission by the Superior Court for a specific purpose in accordance with a decision of the Supreme Court upon a former appeal, the Superior Court surrenders jurisdiction and the Industrial Commission acquires jurisdiction for all purposes, and the Commission has the power, notwithstanding that the remand of the cause was for a specific purpose, to order a rehearing for newly discovered evidence in accordance with its rules and regulations.

APPEAL by defendants Montague Bros. from *Barnhill, J.*, at August Term, 1934, of WAYNE. Reversed.

This is a proceeding for compensation under the provisions of the North Carolina Workmen's Compensation Act.

The proceeding was begun before the North Carolina Industrial Commission on 20 May, 1931, by Joe Butts, an employee of Montague Bros., for compensation for an injury by accident which arose out of and in the course of his employment on 29 January, 1929.

The proceeding was first heard by Commissioner Dorsett, at Goldsboro, N. C., on 23 June, 1931. On the facts found by him, Commissioner Dorsett denied compensation, and Joe Butts, the employee, appealed to the full Commission.

The proceeding was heard on this appeal by the full Commission at Raleigh, N. C., on 22 September, 1931. The full Commission set aside the finding of fact made by Commissioner Dorsett, on which he had denied compensation, and on its finding of fact, made in lieu thereof, awarded compensation. This award was made on 6 October, 1931. Both Montague Bros., the employer, and Public Indemnity Company,

the insurance carrier, appealed from this award to the Superior Court of Wayne County.

After the proceeding was docketed in the Superior Court on said appeal, and while it was pending in said court, it was ascertained that Joe Butts had died on 21 September, 1931, and was therefore dead at the time the award was made by the Industrial Commission on 6 October, 1931. His widow, Lucy Butts, was duly appointed as administratrix of Joe Butts, deceased, and as such was made a party to the proceeding on 25 July, 1932.

The proceeding was heard at November Term, 1932, of the Superior Court of Wayne County, by Judge Grady, who rendered a judgment at said term dismissing the proceeding. From this judgment, Lucy Butts, administratrix, appealed to the Supreme Court. At the hearing of this appeal the judgment dismissing the proceeding was reversed. The proceeding was remanded by the Supreme Court to the Superior Court of Wayne County, "with direction that the Industrial Commission proceed, after notice to the parties, to hear evidence and find therefrom who are the next of kin of Joe Butts, deceased, dependent upon him for support at his death." See 204 N. C., 389, 168 S. E., 215.

At June Term, 1933, of the Superior Court of Wayne County, Judge Frizzelle ordered that the proceeding "be remanded to the North Carolina Industrial Commission with direction to said Commission, after notice, to find who are the next of kin of Joe Butts, deceased, dependent upon him for support at his death, to make said next of kin parties to this proceeding, and to transmit this proceeding back to this court for further proceedings in accordance with the opinion of the Supreme Court in this case."

Pursuant to said order, the Industrial Commission heard the proceeding and found that Lucy Butts, widow of Joe Butts, was his next of kin, dependent upon him for support at his death. Lucy Butts, as widow, next of kin, and dependent of Joe Butts, deceased, was made a party to the proceeding by the Industrial Commission.

While the proceeding was pending before the Industrial Commission, pursuant to the order of Judge Frizzelle, Montague Bros., the employer, moved for a rehearing of the proceeding on the ground that since the award was made on 6 October, 1931, new evidence had been discovered by the said employer, which was pertinent to the question involved in the proceeding, and which, if heard by the Commission, would result in an award that the plaintiff is not entitled to compensation in this proceeding. This motion was allowed by the Industrial Commission, and the plaintiff Lucy Butts, widow, next of kin, and dependent of Joe Butts, deceased, appealed to the Superior Court.

At the hearing of this appeal the order of the Industrial Commission for a rehearing on the ground of newly discovered evidence was reversed, and the award made by the Industrial Commission on 6 October, 1931, was affirmed. The defendant Montague Bros. appealed to the Supreme Court.

Kenneth C. Royall and Robert A. Hovis for plaintiffs.
Langston, Allen & Taylor and Scott B. Berkeley for defendants.

CONNOR, J. There is no provision in the North Carolina Workmen's Compensation Act for a rehearing of a proceeding in which the North Carolina Industrial Commission has made an award in accordance with the provisions of the act, on the ground of newly discovered evidence. It is provided in the act, however, that the Industrial Commission, on its own motion, or on the application of a party to the proceeding, may review an award made by the Commission, on the ground of a change of conditions since the award was made. Upon such review, the Commission may vacate and set aside an award previously made by it, or may diminish or increase the amount of compensation awarded, within the limits provided in the act. N. C. Code of 1931, sec. 8081 (bbb). The Commission also has the power to make rules not inconsistent with the act, for carrying out its provisions. N. C. Code of 1931, sec. 8081 (jjj). All the provisions of the act show that it was the purpose of the General Assembly that the Industrial Commission should have a continuing jurisdiction of all proceedings begun before the Commission for compensation in accordance with its terms. The Superior Court has jurisdiction only when a party to a proceeding has appealed to said court on matters of law involved therein. Findings of fact made by the Commission are conclusive and when supported by evidence, cannot be reviewed by the Superior Court. We think it clear that the Commission has the power, in a proper case, and in accordance with its rules and regulations, to grant a rehearing of a proceeding pending before it, and in which it has made an award, on the ground of newly discovered evidence. See *Byrd v. Lumber Co.*, 207 N. C., 253, 176 S. E., 572, and *Ruth v. Carolina Cleaners, Inc.*, 206 N. C., 540, 174 S. E., 445.

Pursuant to the order of Judge Frizzelle, at June Term, 1933, of the Superior Court of Wayne County, this proceeding was pending before the North Carolina Industrial Commission at the time the order for a rehearing on the ground of newly discovered evidence was made by the Commission. The order of Judge Frizzelle was in compliance with the order of this Court on the former appeal. When the proceeding was remanded from the Superior Court, where it was pending on appeal, to the Industrial Commission, although for a specific purpose, as stated in

the order, the Superior Court surrendered its jurisdiction, and the Industrial Commission acquired jurisdiction for all purposes. See *Finlayson v. Kirby,* 127 N. C., 222, 37 S. E., 223.

There was error in the judgment reversing the order of the Industrial Commission for a rehearing of the proceeding on the ground of newly discovered evidence, and in affirming the award made by the Commission on 6 October, 1931. The appeal from the order of the Commission to the Superior Court should have been dismissed. The judgment is

Reversed.

MRS. ELLA SAUNDERS, WIDOW OF E. W. SAUNDERS, DECEASED, CLAIMANT, v. I. M. ALLEN, SHERIFF, BOARD OF COMMISSIONERS OF CLEVELAND COUNTY, AND TRAVELERS INSURANCE COMPANY, DEFENDANTS.

(Filed 1 May, 1935.)

1. **Master and Servant F b — Evidence held to support finding that deputy was not acting in scope of employment by sheriff at time of injury.**

   The denial of liability of a sheriff for the death of his deputy is affirmed upon facts tending to show that at the time of the deputy's fatal injury by a person whom he had arrested for drunkenness the deputy was acting upon his own responsibility and contrary to the instructions of the sheriff.

2. **Master and Servant F a—**

   From the facts appearing of record in this case, a deputy sheriff *is held* not an employee of the county within the meaning of the Compensation Act, N. C. Code, 8081 (i), (a), (b), (c), and was not covered by the county's policy of compensation insurance.

3. **Master and Servant F i—**

   The findings of fact of the Industrial Commission are conclusive on appeal, unless there is not sufficient evidence to support them.

APPEAL from *Harding, J.,* by claimant and defendants Board of Commissioners of Cleveland County and Travelers Insurance Company, Summer Term, 1934, of CLEVELAND. Affirmed as to I. M. Allen, sheriff. Reversed as to Cleveland County and Travelers Insurance Company.

This was a claim filed by Ella Saunders, widow of E. W. Saunders, with the Industrial Commission of North Carolina for benefit on account of the death of her husband, E. W. Saunders. On 31 December, 1932, Buren Dedmon and E. W. Saunders, both of whom were deputy sheriffs, arrested, without a warrant, two drunks within the business section of the city of Shelby. They placed said prisoners in a car and carried them to the county jail. While in the jail yard, one of the prisoners drew a gun, which he had concealed about his person, and

fired at Deputy Saunders. A gun battle ensued between the prisoner and Deputy Saunders, as a result of which both of them died within a few hours on account of gunshot wounds received.

The case was heard by J. Dewey Dorsett, Commissioner, at Shelby, N. C., on 15 June, 1933, who rendered an opinion denying an award and holding that the defendants were not liable, from which decision the claimant appealed to the full Commission. Thereafter, the full Commission rendered an opinion deciding in favor of the claimant and granting an award against the Board of Commissioners of Cleveland County and the Travelers Insurance Company, but holding the sheriff not liable. Both parties appealed from this decision to the Superior Court of Cleveland County, and judgment was thereafter rendered by Judge Harding upon the record sustaining the award made by the Industrial Commission. From this award the Board of Commissioners of Cleveland County and the Travelers Insurance Company appealed, and the claimant appealed from that portion of the judgment which failed to include the sheriff in the award.

John P. Mull for claimant, widow of E. W. Saunders.
Peyton McSwain for Cleveland County.
Henry B. Edwards for I. M. Allen, sheriff.
Ryburn & Hoey for Travelers Insurance Company.

CLARKSON, J. N. C. Code, 1931 (Michie), sec. 8081 (i), definition (f), is as follows: "'Injury and personal injury' shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident."

First: The claimant, Ella Saunders, widow of E. W. Saunders, deputy sheriff, appeals from the portion of the judgment which fails to include the sheriff in the award. From all the facts appearing in the record, we see no error in the judgment. The deputy sheriff, Saunders, was acting on his own responsibility and contrary to the instructions of the sheriff. *Hanie v. Penland,* 194 N. C., 234; *Starling v. Morris,* 202 N. C., 564.

Second: From all the facts appearing in the record, we do not think E. W. Saunders, deputy sheriff, was an employee of Cleveland County as the term "employee" is used in the Workmen's Compensation Act. N. C. Code, 1931 (Michie), sec. 8081 (i), (a), (b), (c).

There is no sufficient evidence to base the finding of fact that E. W. Saunders was an employee of Cleveland County, nor do we think that there are any provisions in the liability policy of the Travelers Insurance Company that made it liable to indemnify Cleveland County, under the facts on this record.

The killing of Saunders, in an honest effort to enforce the law on his part, was deplorable and unfortunate, but, on the entire record, we find no sufficient evidence to hold Cleveland County or the Travelers Insurance Company liable.

The facts found by the full Commission are binding on this Court, unless the evidence is insufficient to support the findings. *Smith v. Hauser & Co.*, 206 N. C., 562 (563). From a careful perusal of the record and examination of the briefs of the litigants, we cannot hold that the facts were sufficient to support the findings of the full Commission, which were confirmed by the court below. There seems to be a *casus omissus* which this Court cannot supply.

In the judgment as to I. M. Allen, sheriff, it is

Affirmed.

In the judgment as to Cleveland County and the Travelers Insurance Company it is

Reversed.

UNION NATIONAL BANK, LENOIR FEED STORE, A. J. BRADSHAW, BERNHARDT-SEAGLE COMPANY, AND MARK SQUIRES, IN BEHALF OF THEMSELVES AND ALL OTHER CREDITORS OF THE ESTATE OF J. R. HAGAMAN, DECEASED, v. C. S. HAGAMAN, ADMINISTRATOR OF J. R. HAGAMAN, JULIA F. HAGAMAN, WIDOW, C. S. HAGAMAN, AND OTHERS, HEIRS AT LAW OF J. R. HAGAMAN, DECEASED.

(Filed 1 May, 1935.)

1. Judgments K f—Motion for order to show cause why judgment should not be set aside should be in writing and supported by affidavit.

A motion for an order requiring adverse parties to show cause why the judgment rendered in the cause should not be set aside should be in writing and should be supported by an affidavit stating the grounds of the motion, but failure to file the written motion and affidavit is not sufficient grounds for dismissal of the motion as a matter of right, since upon the hearing the court granting the motion to show cause may require movants to then file the necessary papers and allow respondents time to answer if they so request.

2. Judgments G b—Court may not enter order substantially affecting rights of parties outside the county except by consent.

The judge of the Superior Court granted a motion requiring the adverse parties to show cause why the judgment entered in the cause should not be set aside, and heard the motion and entered an order modifying the judgment, over respondents' objection, outside the county in which the action was pending. *Held:* The court had no authority to hear the motion or make the order substantially affecting the rights of the parties outside the county in which the action was pending.

APPEAL by plaintiffs Union National Bank and Mark Squires from *Harding, J.*, at Chambers in the city of Charlotte, N. C., on 31 December, 1934. Error.

This is a proceeding, begun before the clerk of the Superior Court of Caldwell County, on 24 June, 1933, for the final settlement of the estate of J. R. Hagaman, deceased. The plaintiffs are creditors, and the defendants are the administrator, widow, and heirs at law of the deceased.

The proceeding was heard at December Term, 1934, of the Superior Court of Caldwell County, Harding, Judge presiding, on the report of the commissioner who had theretofore been appointed by the court and authorized to sell certain lands belonging to the estate of J. R. Hagaman, deceased. At this hearing a judgment was rendered confirming the sale of the said lands made by the commissioner, and ordering the commissioner to apply the proceeds of said sale to the payment of the costs and expenses incurred by him in making the sale, and to the payment, pro rata, of the claims of certain creditors of the estate of J. R. Hagaman. This judgment was signed by the judge presiding, on 6 December, 1934, in open court.

After the adjournment of the December Term, 1934, of the Superior Court of Caldwell County, on the application of the defendants, or of some of them, an order was signed by Judge Harding, at Morganton, in Burke County, on 19 December, 1934, and served on the attorneys of record of the plaintiffs, commanding the plaintiffs to appear before Judge Harding at the courthouse in the city of Charlotte, in Mecklenburg County, on 31 December, 1934, at 3 o'clock p.m., and then and there show cause, if any they had, why the judgment entered in this proceeding at December Term, 1934, of the Superior Court of Caldwell County should not be set aside or modified.

In accordance with said order, the plaintiffs, as respondents, by their attorneys of record, entered a special appearance before Judge Harding, at the time and place named in said order, and moved that all proceedings under said order be dismissed for that (1) the order to show cause was not supported by a motion in writing, or by affidavits stating the grounds for the motion of the defendants, and (2) for that Judge Harding was without power to make an order in the proceeding then pending in the Superior Court of Caldwell County, at Charlotte, in Mecklenburg County. The motion was denied, and the respondents excepted to the denial of their motion.

Judge Harding thereupon considered affidavits filed by respondents and, on the facts found by him, ordered that the judgment rendered in this proceeding at December Term, 1934, of the Superior Court of Caldwell County be and the same was modified as appears in said order,

which was signed by him at his Chambers in the city of Charlotte. The plaintiffs Union National Bank and Mark Squires excepted to said order and appealed to the Supreme Court.

Mark Squires and J. T. Pritchett for plaintiffs.
Newland & Townsend for defendants.

CONNOR, J. The motion of the defendants for an order requiring the plaintiffs to show cause why the judgment rendered in this proceeding at the December Term, 1934, of the Superior Court of Caldwell County should not be set aside or modified, should have been in writing, and should have been supported by an affidavit, stating the grounds of the motion. The plaintiffs would thus have been apprised before the hearing of the grounds of the motion. The failure of the defendants, however, to put their motion in writing or to file an affidavit stating the grounds of their motion, at the time the motion was made before Judge Harding at Morganton, was not sufficient to entitle the plaintiffs to the dismissal of the motion of the defendants as a matter of right. If the plaintiffs had requested Judge Harding at the hearing to require the defendants to reduce their motion to writing, or to file an affidavit stating the grounds of their motion, he would doubtless have so ordered, and allowed plaintiffs time to answer, if they had so requested. There was no error in the refusal of Judge Harding to dismiss the motion of the defendants on the ground that same was not in writing or supported by an affidavit.

Judge Harding, however, was without authority to hear the motion, or to make the order from which the plaintiffs have appealed, at his Chambers in the city of Charlotte.

In *Bisanar v. Suttlemyre,* 193 N. C., 711, 138 S. E., 1, it is said: "It is the uniform holding in this jurisdiction that, except by consent, or unless authorized by statute, a judge of the Superior Court, even in his own district, has no authority to hear a cause or to make an order substantially affecting the rights of the parties, outside the county in which the action is pending." See cases cited.

If the facts with respect to the signing of the judgment at the December Term, 1934, of the Superior Court of Caldwell County are as the defendants contend, they are not without a remedy. See C. S., 600. The order signed by Judge Harding at his Chambers in the city of Charlotte must be set aside and vacated, for the reason that said order was signed outside Caldwell County, and affects substantial rights of the plaintiffs in this proceeding, which is pending in the Superior Court of said county.

Error.

STATE v. HARRY YATES.

(Filed 1 May, 1935.)

Automobiles F b—Evidence held insufficient to be submitted to jury in this prosecution of owner of car having smoke screen attachment.

Evidence tending to show that defendant was the owner of an automobile, and had been seen in same prior to its capture, and that when the automobile was subsequently captured it was being driven by others and had attached thereto a mechanical device for the emission of excessive smoke or gas, *is held* insufficient to resist defendant's motion as of nonsuit under C. S., 4643, in a prosecution under N. C. Code, 4506 (b).

APPEAL by defendant from *Sink, J.*, at January Term, 1935, of IREDELL. Reversed.

The defendant Harry Yates was tried and convicted upon a bill of indictment charging him and two others with violating C. S., 4506 (b), which provides that "it shall be unlawful for any person . . . to drive, operate, equip, or be in possession of any automobile . . . containing, or in any manner provided with, a mechanical machine or devise designed, used, or capable of being used, for the purpose of discharging, creating, or causing, in any manner, to be discharged, or emitted either from itself or from the automobile . . . to which it is attached, any unusual amount of smoke, gas, or other substance not necessary to the actual propulsion, care, and keep of said vehicle, . . ."

From judgment pronounced upon the verdict, the defendant Yates appealed, assigning error.

W. Vance Howard for defendant, appellant.

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

SCHENCK, J. When the State had introduced its evidence and rested its case, the appellant moved to dismiss the action and for judgment of nonsuit. C. S., 4643. This motion was denied, and the appellant excepted. The appellant introduced no evidence, and made the basis for an exceptive assignment of error the denial of the court to grant his motion for judgment of nonsuit.

An examination of the evidence in this case forces us to the conclusion that the motion for a judgment as of nonsuit should have been sustained. The evidence most favorable to the State tends only to establish that the defendant was the owner of the automobile to which was attached at the time of its capture such a mechanical device as is prohibited by the statute, and that the defendant was seen in said automobile in Char-

lotte, Mecklenburg County, where he resided, some time after 1 January, 1935, and before 19 January, 1935. The capture of the automobile took place on 19 January, 1935, near Statesville, in Iredell County. There is no evidence tending to show that the defendant was in the automobile at the time it was captured, or even that the defendant was in Iredell County at that time. There is no evidence tending to show that the defendant had any connection with the occupants of the automobile at the time it was captured, or at any other time, or that the defendant ever knew said occupants, or had any intimation of the whereabouts of the automobile at the time of its capture. There is no evidence that the prohibited device was attached to the automobile at the time the defendant was seen therein in Mecklenburg County. Even if it be conceded that the evidence was sufficient to establish the defendant's ownership of the automobile to which the prohibited device was attached, and his one-time occupancy thereof in Mecklenburg County prior to its capture, such evidence was not sufficient to be submitted to the jury upon the issue of the defendant's guilt of either actually driving, operating, equipping, or being in possession of an automobile equipped with the prohibited device, or of aiding and abetting therein.

The judgment of the Superior Court is

Reversed.

STATE v. E. T. LAGERHOLM.

(*Filed 1 May, 1935.*)

Homicide G d—Where defendant contends that deceased killed herself, testimony of declarations of suicidal intent by deceased is competent.

In a prosecution for homicide in which defendant contends and introduces evidence that deceased killed herself, testimony of declarations by deceased that she was going to kill herself is competent as tending to show the condition of the mind of the deceased, and therefore the probability of her having committed suicide.

APPEAL by the defendant from *Pless, J.*, at October Term, 1934, of MECKLENBURG. New trial.

Criminal prosecution, tried upon an indictment charging the defendant with a capital felony, to wit, murder in the first degree.

The jury returned a verdict of guilty of murder in the second degree, and from judgment pronounced thereon the defendant appealed, assigning errors.

A. A. Tarlton and J. D. McCall for defendant.
Attorney-General Seawell and Assistant Attorney-General Aiken for the State.

SCHENCK, J. The State charges, and on the trial offered evidence tending to show, that Minnie Lagerholm, on 31 July, 1934, received wounds and swallowed poison in the house in which she and the defendant, her husband, were living on North Davidson Street in the city of Charlotte, from which she died the night following in a hospital in said city. The circumstances were such as to lead the authorities to believe, and the jury to find, that the deceased came to her death as the result of blows or poison, or both, inflicted or administered by the defendant. The defendant, on the other hand, contended, and offered evidence tending to show, that the deceased caused her own death by wounds self-inflicted, or poison intentionally taken, or both. Much of the evidence, pro and con, was circumstantial in character.

As tending to support the defendant's theory of suicide, he offered to show, but was not allowed to do so, that the deceased, who was pregnant and addicted to strong drink, had on a number of occasions threatened to kill herself, and recently, when on a drunken debauch, "at eleven o'clock (at night) she (deceased) was still going on, shaking her fists in his (defendant's) face and saying, 'I am going to die, I am going to kill myself, but, old boy, you will hang for it, and it will all be laid on you.' "

We presume that the declarations of the deceased were held to be impertinent and irrelevant on the trial of the defendant for murder, and possibly violative of the rule against hearsay, and for these reasons excluded. The exclusion of these declarations is made the bases for a number of exceptive assignments of error. Practically the same questions as are here presented were presented in *State v. Prytle,* 191 N. C., 698, and this Court held that when the "case is one of homicide *versus* suicide" a declaration of suicidal intent by the deceased was competent, since it "goes to a denial of the *corpus delicti,*" and tends to show the condition of the mind of the deceased, and therefore the probability of her having committed suicide. We are therefore constrained to hold that his Honor erred in excluding the testimony offered, and that a new trial must be awarded.

New trial.

STATE v. FRED McDADE.

(Filed 1 May, 1935.)

1. **Seduction A a—**

The essential elements of seduction are the innocence and virtue of the prosecutrix, the promise of marriage, and intercourse induced by such promise. C. S., 4339.

2. **Seduction B d—**

The unsupported testimony of the prosecutrix is insufficient for a conviction of seduction.

3. **Same—Nonsuit held proper in this case for want of supporting testimony that defendant promised to marry prosecutrix.**

Testimony that prosecutrix told her mother and father that she and defendant were to be married, without supporting testimony that defendant ever told anyone or admitted to anyone that he was engaged to prosecutrix, or that he intended to marry her, is insufficient to resist defendant's motion as of nonsuit in a prosecution for seduction.

CRIMINAL ACTION, before *Harding, J.*, at November Term, 1934, of CALDWELL.

The defendant was indicted for the seduction of Katherine Anderson and sentenced to the State's Prison for a term of two years.

From judgment so pronounced he appealed.

Attorney-General Seawell and Assistant Attorneys-General Aiken and Bruton for the State.

Hunter Martin and Newland & Townsend for defendant.

BROGDEN, J. C. S., 4339, as construed in many decisions, requires the State to satisfy the jury beyond a reasonable doubt of the existence and truth of three elements, to wit: (1) The innocence and virtue of the prosecutrix; (2) the promise of marriage; and (3) intercourse induced by such promise.

Moreover, the law further provides that the "unsupported testimony of the woman shall not be sufficient to convict." *State v. Moody,* 172 N. C., 967, 90 S. E., 900; *State v. Crook,* 189 N. C., 545, 127 S. E., 579; *State v. Shatley,* 201 N. C., 83.

Much conflicting evidence was introduced at the trial, but it would serve no useful purpose to embalm all the sordid testimony for future generations.

The evidence discloses that the scene moved swiftly. The prosecutrix met the defendant "a week before Christmas, 1933." The next time she saw him was Friday night before Christmas, 1933. The next time

she saw him was Sunday night, 31 December, 1933. Prosecutrix and the defendant were not alone at any time during the aforesaid visits. The prosecutrix further testified that the defendant came to see her every Saturday and Sunday night after that time until 24 February, 1934, when, according to her contention, she first discovered that he was a married man with three children. The seduction took place, according to the testimony of prosecutrix, "about the last of January, 1934, in Fred's car at my home"; that is to say, the defendant had not been alone with the prosecutrix more than six or eight times before the seduction took place. Moreover, the seduction took place in less than four weeks from the first time the parties were alone together. Manifestly, this was fast work.

There was no evidence that the defendant had ever written the prosecutrix a line, taken her to church, or to any other public place, or to visit a friend or neighbor. The prosecutrix testified that she yielded to the defendant because of the promise of marriage and for no other reason. There was testimony that she was a girl of good character, and that she had told her mother and father that she and defendant were to be married, and that in company with them she had purchased certain dresses for the marriage, although no definite date had been set.

There was no evidence that the defendant had ever told anyone or admitted to anyone that he was engaged to the prosecutrix, or that he intended to marry her.

Consequently, the Court is of the opinion that there was no "supporting testimony" of the promise of marriage as contemplated by the statute, and the motion for nonsuit should therefore have been allowed. *State v. Moody, supra.*

Reversed.

W. W. RIMMER, ADMINISTRATOR, v. SOUTHERN RAILWAY COMPANY ET AL.

(Filed 1 May, 1935.)

1. Railroads D b—

Evidence that defendant's train approached a grade crossing at a high rate of speed, in violation of city ordinance, and that it gave no signal or warning of its approach, is sufficient to establish negligence of defendant.

2. Same—Evidence held to establish contributory negligence of intestate barring recovery for accident at crossing as matter of law.

Evidence that plaintiff's intestate ran or walked upon defendant's track at a grade crossing during the daytime, that she wore the top part of her coat around her head as protection from the drizzling rain, and that

her attention was distracted by traffic on the highway, and that she was struck and killed on the crossing by defendant's train approaching along its straight, unobstructed track, establishes contributory negligence on the part of intestate barring recovery as a matter of law, although the evidence establishes the negligence of defendant in the operation of the train.

3. Same: Negligence B b—

Where the evidence establishes contributory negligence barring recovery as a matter of law, the doctrine of the last clear chance does not apply.

APPEAL by plaintiff from *Sink, J.*, at December Special Term, 1934, of MECKLENBURG.

Civil action to recover damages for death of plaintiff's intestate, alleged to have been caused by the wrongful act, neglect, or default of the defendant.

Plaintiff's intestate, a girl seventeen years of age, was fatally injured on the afternoon of 3 December, 1933, when struck by defendant's train at Brawley Street crossing in the town of Mooresville, N. C. North of the crossing, the track is straight for a considerable distance, nearly a mile. It was misty or drizzling rain. Plaintiff's intestate, on foot, approached the crossing from the west. She had on a cloak, the top part of it being held over her head as a protection from the rain. "Without being properly attentive to her safety, due to and on account of her attention being centered and directed to the traffic on and upon the said highway," as alleged in the complaint, plaintiff's intestate walked or ran upon the tracks, in front of the approaching train, and was killed. It is in evidence that the train was running at a high rate of speed, in violation of city ordinance, and that it gave no signal or warning of its approach. There was no slackening of its speed prior to the injury.

From a judgment of nonsuit entered at the close of all the evidence, plaintiff appeals, assigning error.

Stewart & Bobbitt, Hiram P. Whitacre, and M. K. Harrill for plaintiff.

John M. Robinson for defendants.

STACY, C. J. This is another crossing accident. The negligence of the defendant may be considered as established by the evidence. *Johnson v. R. R.*, 205 N. C., 127, 170 S. E., 120.

The action was dismissed as in case of nonsuit on account of the contributory negligence of plaintiff's intestate. *Young v. R. R.*, 205 N. C., 530, 172 S. E., 177; *Tart v. R. R.*, 202 N. C., 52, 161 S. E., 720; *Eller v. R. R.*, 200 N. C., 527, 157 S. E., 800; *High v. R. R.*, 112 N. C., 385, 17 S. E., 79. It was said in *Davidson v. R. R.*, 171 N. C., 634, 88 S. E., 759, that "When a pedestrian, in the *daytime*, steps upon a

railroad track, the view of which is unobstructed, and is injured thereby, and has not looked or listened, his own negligence is the proximate cause of the injury, and such negligence will preclude his recovery." See, also, *Pope v. R. R.*, 195 N. C., 67, 141 S. E., 350, and cases there cited.

Nor is plaintiff's case saved by the doctrine of the last clear chance. This doctrine does not apply when the contributory negligence of the party injured or complaining, as a matter of law, bars recovery. *Redmon v. R. R.*, 195 N. C., 764, 143 S. E., 829.

"It is the recognized duty of a person on or approaching a railroad crossing to 'look and listen in both directions for approaching trains, if not prevented from doing so by the fault of the railroad company or other circumstances clearing him from blame,' and where, as to persons other than employees of the company, there has been a breach of this duty clearly concurring as a proximate cause of the injury, recovery therefor is barred"—*Hoke, C. J.*, in *Holton v. R. R.*, 188 N. C., 277, 124 S. E., 307.

Upon the record and the authorities apposite, the judgment of nonsuit must be upheld. It is so ordered.

Affirmed.

R. B. WILSON, JR., v. GURNEY P. HOOD, COMMISSIONER OF BANKS.

(Filed 1 May, 1935.)

1. Appeal and Error K b—

Where it is conceded on appeal that one of three defenses interposed as grounds for dismissal constitutes the only valid defense, and it appears that the court did not pass upon such defense, but dismissed the action upon another insufficient ground, the case will be remanded for further proceedings.

2. Appeal and Error B b—

Where it is admitted on appeal that there was error in dismissing the action upon the ground upon which the judgment dismissing the action is based, the judgment must be reversed, since the appeal must follow the theory of trial in the lower court.

APPEAL by plaintiff from *Grady, J.*, at September Term, 1934, of SAMPSON.

Civil action to establish claim for notary fees earned by plaintiff while in the employ of the Bank of Clinton and placed to the credit of the bank.

Plaintiff was employed by the Bank of Clinton from 1922 until its failure in 1931, first as clerk, then as teller, and later as assistant cashier.

He also owned a few shares of stock in the bank. From 1925 until the bank closed, plaintiff was a notary public and did the notarial work of the bank. Up to 1 January, 1927, he kept his notarial fees, but beginning with this date, plaintiff's salary was increased, along with other employees, and he was instructed by the cashier and managing director thereafter to place his notarial fees in the bank, crediting them to the account of undivided profits. Plaintiff complied under protest. The bank paid for the renewals of plaintiff's commission as a notary public and furnished him stationery, stamps, etc.

The fees in question amounted to $547.50 in 1927; $588.50 in 1928; $692.00 in 1929; $299.50 in 1930; $136.50 in 1931, making a total of $2,264.00 for the five years.

Plaintiff's salary ranged from $1,650.00 in 1926 to $2,200.00 in 1928 and 1929. He testified on cross-examination: "I never made demand on the bank for my fees while it was open. If the bank had remained open I don't know that I ever would have known I had any legal right to the fees."

The defenses interposed were: (1) Estoppel, (2) payment, and (3) statutes of limitations.

The court, being of opinion that plaintiff was estopped by his own testimony from bringing the action, dismissed the same as in case of nonsuit, and from this ruling plaintiff appeals, assigning errors.

J. A. McLeod and Faircloth & Fisher for plaintiff.
J. D. Johnson, Jr., for defendant.

STACY, C. J. It was conceded on the argument that, upon the record as presented, the plea of payment, if established, and not that of estoppel, constitutes the only valid defense to plaintiff's claim. Annotation: 25 A. L. R., 170. As this was not passed upon in the court below, and the evidence directed to the point is nebulous, the case will be remanded for further proceedings.

Error in dismissing the action upon the plea of estoppel having been confessed, necessarily works a reversal of the present judgment. An appeal *ex necessitate* follows the theory of the trial. *Hargett v. Lee,* 206 N. C., 536, 174 S. E., 498; *Walker v. Burt,* 182 N. C., 325, 109 S. E., 43; *Shipp v. Stage Lines,* 192 N. C., 475, 135 S. E., 339.

Reversed.

J. F. WILLIAMS, ADMINISTRATOR, v. O. B. TURNER.

(Filed 1 May, 1935.)

1. Seals A b—

A finding that executant of an instrument not required by law to be under seal, did not adopt as his seal the word "(Seal)" printed in the form on the line upon which executant wrote his name, unless he did so by writing his name on the line, *is held* a finding that executant had no intention at the time of executing a sealed instrument.

2. Same—

Whether a mark or character upon an instrument not required by law to be under seal is to be regarded as a seal depends upon the intention of the executant.

3. Limitation of Actions A c—Note not intended to be under seal held barred by three-year statute.

Upon a finding to the effect that the maker of a negotiable note did not intend to adopt as his seal the printed word "(Seal)" appearing thereon, and therefore did not intend to execute a sealed instrument, the note is a simple contract and the three-year statute of limitations is applicable to an action thereon, and where the note is payable upon demand, the statute begins to run immediately.

APPEAL by defendant from *Barnhill, J.*, at December Term, 1934, of DUPLIN.

Civil action to recover on $200 note, given by defendant to plaintiff's intestate, 6 September, 1924. Defendant pleads (1) payment, and (2) the three-year statute of limitations.

A jury was waived, and the court found the following pertinent facts:

"5. Said note is made on a printed form, the date and the amount thereof and the words 'On demand' and 'with interest from date' having been inserted when the note was made, together with the name of the payee. The line on which the maker's (defendant's) signature appears and the word enclosed in brackets, to wit, '(Seal)', at the right of said signature, are parts of said printed form.

"6. There is no reference in the body of said note to the maker's (defendant's) seal; that the defendant did not make any scroll or other substitute for his seal, nor adopt as his seal the word '(Seal)' as aforesaid, unless he did so by writing his name on said line, at the right-hand end of which is printed '(Seal)', and the defendant's name was written on the line where it would have been written in the absence of said '(Seal)'.

"7. The plaintiff produces said note without credits, and defendant admits the execution thereof, and that under the law he can offer no evidence of payment. It is, therefore, further found that said amount of $200.00, with interest from 6 September, 1924, is due and unpaid."

Judgment for plaintiff, from which defendant appeals, assigning error.

No counsel appearing for plaintiff.
Oscar B. Turner, in propria persona.

STACY, C. J. The finding that the defendant did not adopt as his seal the word "(Seal)" appearing at the end of the line, unless he did so by writing his name on said line, is a finding, as we understand it, that the maker had no intention at the time of executing a sealed instrument, which perforce renders it a simple contract. *Yarborough v. Monday,* 14 N. C., 420; *Baird v. Reynolds,* 99 N. C., 469; *Pickens v. Rymer,* 90 N. C., 282; *Caputo v. Di Loreto,* 148 Atlantic (Conn.), 367.

Whether a mark or character is to be regarded as a seal depends upon the intention of the executant. *Jacksonville, etc., Railway v. Hooper,* 160 U. S., 514; *Lynam v. Califer,* 64 N. C., 572; 3 R. C. L., 923; 24 R. C. L., 695; 1 Daniel on Negotiable Instruments, 31.

The note is one which could be, indifferently, a simple contract or a sealed instrument. Note, 19 Ann. Cas., 674. A different result might follow if it were required by law to be under seal. *Devereux v. McMahon,* 108 N. C., 134, 12 S. E., 902; *Hopkins v. Lumber Co.,* 162 N. C., 533, 78 S. E., 286.

The case of *Ducker v. Whitson,* 112 N. C., 44, 16 S. E., 854, is not authority for plaintiff's position. The question now presented was not mooted in that case. For history of seals, see *Ingram v. Hall,* 2 N. C., 193; *Cromwell v. Tate's Executors,* 7 Leigh (Va.), 305.

The defendant's plea of the statute of limitations would seem to be good. C. S., 2988; *Caldwell v. Rodman,* 50 N. C., 139.

Reversed.

WILLIAM B. REID, ADMINISTRATOR, v. LEWIS SUSTAR ET AL.

(Filed 1 May, 1935.)

Negligence A c—Doctrine of attractive nuisance held not to warrant recovery for intestate's death under evidence in this case.

Evidence that plaintiff's intestate, a thirteen-year-old boy, went to defendant's corn mill to return an implement, or take some corn to be ground, and that while there he engaged in a friendly fight with boys in the mill, wrestling and throwing corncobs, and that intestate, contrary to repeated warnings given by defendant to boys around the mill, went into the engine room, while defendant was not looking, to get more corncobs for the fight, and there came in contact with revolving machinery resulting in injury causing his death, *is held* insufficient to resist defendant's motion as of nonsuit.

APPEAL by plaintiff from *Clement, J.,* at February Term, 1935, of MECKLENBURG.

Civil action to recover damages for death of plaintiff's intestate, alleged to have been caused by the wrongful act, neglect, or default of the defendants.

The facts are these: On 20 November, 1931, plaintiff's intestate, a Negro boy, thirteen years of age, went to the corn mill operated by the defendants, either to return a scoop or shovel, which belonged to the mill, or to take some corn to be ground, or both. While there, he and three other Negro boys began playing, wrestling, and throwing corncobs at each other. 'Twas a friendly battle with corncobs. The operator of the mill frequently warned the boys to stay out of the engine room where there was a large pile of corncobs. Contrary to such warning, when the miller was not looking, plaintiff's intestate ran into the engine room to get more cobs, to be used in the juvenile war, and in reaching for them over a revolving shaft, his clothing caught on the shaft and he was thrown around it and severely injured, from which he later died.

Judgment of nonsuit entered at the close of plaintiff's evidence, from which he appeals, assigning errors.

G. T. Carswell and Joe W. Ervin for plaintiff.
Stewart & Bobbitt and James O. Moore for defendants.

STACY, C. J., after stating the case: It is not perceived upon what theory plaintiff is entitled to recover of the defendants in this case. *Briscoe v. Light & Power Co.,* 148 N. C., 396, 62 S. E., 600. The judgment of nonsuit is correct. *Boyd v. R. R.,* 207 N. C., 390.

Affirmed.

STATE v. J. H. GULLEDGE.

(Filed 1 May, 1935.)

Municipal Corporations B a: H d—Municipality held without authority to require operators of vehicles for hire to furnish personal injury and property damage insurance or bonds with solvent surety.

The municipality in question was authorized by its charter "to regulate the use of automobiles . . . or other motor vehicles," and was authorized by general law "to license and regulate all vehicles operated for hire," and "to make . . . regulations for the better government." Ch. 342, Private Laws of 1907, C. S., 2787 (36), 2673. The municipality passed an ordinance requiring all operators of motor vehicles for hire to file with the city a policy or policies of insurance or a bond with solvent surety in specified amounts for each vehicle so operated indemnifying the public for loss of life, personal injuries, and damage to property caused by the negligent operation of such vehicles. *Held:* The ordinance is invalid as being beyond the authority of the municipality to enact, since

the express authority to regulate extends to the physical operation of vehicles rather than to the imposition of conditions precedent to their operation hitherto unknown in the general legislation of the State, nor is authority to enact such ordinance necessarily or fairly implied from the express authority conferred upon the city in regard to the operation of such vehicles, nor essential to the declared objects and purposes of the corporation.

STACY, C. J., and CONNOR, J., dissent.

THIS is a criminal action, tried before *Clement, J.*, at the February Term, 1935, of MECKLENBURG, wherein the State appealed from a judgment of not guilty entered upon a special verdict.

It was admitted by the defendant and found by the jury that on 27 June, 1934, the city of Charlotte adopted the following ordinance:

"Be it ordained by the Council of the City of Charlotte.

"SECTION ONE: That the owner of every motor bus, jitney bus, or taxicab now operated over the public streets in the city of Charlotte, except such as are operating under the exclusive control of the Corporation Commission of North Carolina, shall file within fourteen (14) days after the passage of this ordinance a policy or policies of liability insurance or bonds with some solvent surety, justified according to the laws of North Carolina, in the sum of not less than five thousand ($5,000.00) dollars, indemnifying against liability for damage wrongfully done by any motor vehicle for hire used by said owner in such business for the death or injuries to any one person as the result of negligence of the said owner of said motor vehicle for hire, or any servant, agent, or employee of said owner; and in the sum of not less than ten thousand ($10,000) dollars, indemnifying against liability for damage wrongfully done by any motor vehicle for hire used by said owner in such business for the death or injuries to more than one person as the result of negligence of the said owner of said motor vehicle for hire or any servant, agent, or employee of said owner, in the same accident; and in the sum of one thousand ($1,000) dollars for any damage to property in any one accident, sustained as the result of the negligence of the owner of said motor vehicle for hire, or any servant, agent, or employee of said owner.

"SECTION TWO: There shall be filed such insurance policy or bonds covering each and every one of the said motor vehicles for hire operated and a blanket policy covering more than one motor vehicle for hire will not be allowed.

"SECTION THREE: The failure to file said bond within the time prescribed, to wit: Fourteen (14) days after the passage of this ordinance, will be ground for the cancellation of any license issued to operate said motor vehicle for hire in the city of Charlotte.

"SECTION FOUR: This act shall not and does not repeal any ordinance now in force and effect, and shall be in addition thereto.

"SECTION FIVE: Any person, firm, or corporation failing to comply with this ordinance and to furnish the insurance and bond herein provided shall be subject to a penalty of twenty-five dollars ($25.00) per day for each and every day said ordinance is violated, in addition to the cancellation of said license.

"SECTION SIX: This ordinance, being for the immediate preservation of the public peace and safety of the citizens of the city of Charlotte, is hereby declared an emergency ordinance, to take effect after 11 July, 1934, as provided by law.

"SECTION SEVEN: That all ordinances or parts of ordinances in conflict herewith are hereby repealed."

It was further admitted by the defendant, and found by the jury, that on 26 August, 1934, the aforementioned ordinance was in effect (if valid), and on said date the defendant operated a taxicab for hire on the streets of Charlotte in violation of the terms of said ordinance, in that he failed to file with the city a policy of liability insurance or bond with solvent surety justified according to the laws of North Carolina.

It was admitted by the State, and found by the jury, that the defendant operated his said taxicab under a license duly issued by the Commissioner of Revenue pursuant to C. S. (Michie), 2613 (15) to 2621 (149), inclusive, known as the Motor Vehicle Act, and that the defendant has met all of the requirements of the city of Charlotte to entitle him to operate a taxicab for hire upon its streets other than complying with the aforementioned ordinance requiring liability insurance or bond.

It is further conceded and found: That the city of Charlotte is a duly organized and existing municipal corporation, and is possessed of the usual powers and authority granted municipal corporations by the laws of the State of North Carolina, and that its charter (chapter 342, Private Laws of 1907), among other things, provides:

"SECTION 47: That the board of aldermen shall have power to make and provide for the execution thereof such ordinances for the government of the city as it may deem proper, not inconsistent herewith or with the laws of the land.

"SECTION 48: That the board of aldermen shall have control of all the finances and other property, real and personal, belonging to the city, and, among the powers hereby granted, shall have the power and authority, by ordinances duly enacted; . . . (9) to regulate the use of automobiles, motor cars, motorcycles, or other motor vehicles, to issue permits for the use of such vehicles, and require the same to be numbered."

Attorney-General Seawell, Bridges & Orr, and John M. Robinson for the State, appellant.

J. L. Delaney for the defendant, appellee.

SCHENCK, J. The sole question involved on this appeal is whether the city of Charlotte had the authority to require the defendant by ordinance to file with it a liability insurance policy or justified solvent bond indemnifying the public against loss due to personal injuries or death, or to damage to property, caused by the wrongful and negligent operation of a taxicab for hire upon the streets of said city.

The only powers granted by the Legislature upon which the city of Charlotte can rely for the authority to adopt the ordinance herein involved are contained in its charter and the general law, as follows:

"Charter, chapter 342, Private Laws 1907: Automobiles and Vehicles—To regulate the use of automobiles, motor cars, motorcycles, or any other motor vehicle, to issue permits for the use of such vehicles, to require the same to be numbered.

"General Law, C. S., 2787: Corporate Powers—In addition and coordinate with the power granted to cities in sub-chapter 1 of this chapter, and any acts affecting such cities, all cities shall have the following powers:

"32. To require the examination of all drivers of motor vehicles upon the streets and highways of the city, to prescribe fees for such examinations, and to prevent the use of such vehicles by all persons who shall not satisfactorily pass such examination.

"36. To license and regulate all vehicles operated for hire in the city.

"General Law, C. S., 2673: General power to make ordinances: The board of commissioners shall have power to make ordinances, rules, and regulations for the better government of the town, not inconsistent with this chapter and the law of the land, as they may deem necessary."

If the authority to require the filing with it by operators of taxicabs of the insurance or bond mentioned in the ordinance exists in the city, it must be found in one or more of these provisions: "To *regulate* the use of automobiles . . . or other motor vehicles, . . ." City charter, *supra;* "to license and *regulate* all vehicles operated for hire in the city," C. S., 2787, *supra;* "power to make ordinances, . . . and *regulations* for the better government of the town, . . ." C. S., 2673.

"It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." 1 Dillon Mun. Corp., sec. 89; *S. v. Webber,* 107 N. C., 962; *S. v. Darnell,* 166 N. C., 300.

"An ordinance cannot legally be made which contravenes a common right, unless the power to do so be plainly conferred by a valid and competent legislative grant; . . ." Dillon Mun. Corp., sec. 325. *S. v. Thomas,* 118 N. C., 1221.

We do not think that the authority "to regulate the use of automobiles . . . or other motor vehicles" conferred by the charter, or the authority "to license and regulate all vehicles operated for hire," or the "power to make . . . regulations for the better government" conferred by the general law, can justly be construed as intended by the Legislature to authorize the adoption of an ordinance of the kind here involved, which establishes a public policy hitherto unknown in the general legislation of the State. If the city was authorized to require liability insurance or surety bond of a taxicab operator, by virtue of the authority of the charter "to regulate . . . motor vehicles," it would seem that it was authorized to make similar requirements of any one who operates any other motor vehicle; and if the general welfare provision "to make . . . regulations for the better government" authorized the requirement of indemnity from those engaged in the operation of taxicabs, it would seem that such provision would authorize the city to require similar liability insurance or bond from, for instance, merchants against damage from foods containing deleterious substances, or from physicians against damage from malpractice, or from any one engaged in any business or profession against any damage to the public resulting from any tortious act. To place such a construction upon these provisions would be to give to the words "regulate" and "regulations" a far more extended and unrestricted scope than we apprehend the Legislature ever had in contemplation.

To "regulate," according to Webster's New International Dictionary (1935), means "to govern or direct according to rule, . . . to bring under control of law or constituted authority," and we think that the word was used in the city charter and the general Municipal Corporation Act to confer upon the city the authority to make traffic rules, designate parking places, control the manner of solicitation of passengers, and generally to govern and direct the physical operation of vehicles operated for hire, rather than to confer authority to prescribe conditions precedent to the operation of such vehicles, when such authority transcends the policy of the general law, and is not expressly granted. See *State ex rel. Johnson v. Bates, City Register* (Tenn.), 30 S. W. (2d), 248.

The power to regulate, or make regulations, certainly does not grant to the city in express words the authority to adopt an ordinance requiring the filing with it of liability insurance or justified solvent bond indemnifying the public against damage wrongfully and negligently

inflicted; and we do not think such authority can be necessarily or fairly implied from such power, or that such authority is essential to the declared objects and purposes of the corporation. Therefore, we hold that the Superior Court was correct in entering a judgment of not guilty upon the special verdict found.

This case is not governed by *Flemming v. Asheville,* 205 N. C., 765, relied upon by the appellant. In that case the question as to whether the Legislature, by charter or general law, had conferred on the city the authority to adopt such an ordinance was not raised. When it was written that "It would seem that the latter ordinance was valid," the writer was addressing his words to the fact that the "latter ordinance" was relieved of the unconstitutional provision of a former ordinance requiring surety to be given in corporate insurance companies to the exclusion of individual sureties or personal bonds.

Since we are of the opinion that the city of Charlotte was without authority, under its charter or the general law, to adopt the ordinance under which the defendant was indicted, the question of whether such ordinance is in conflict with the general law and policy of the State as contained in chapter 116, Public Laws 1931, becomes a moot one, and any discussion thereof supererogatory.

Affirmed.

STACY, C. J., and CONNOR, J., dissent.

CHARLESTON AND WESTERN CAROLINA RAILWAY COMPANY v. ROBERT G. LASSITER & COMPANY, A CORPORATION, AND LONDON AND LANCASHIRE INDEMNITY COMPANY OF AMERICA.

(Filed 1 May, 1935.)

1. **Principal and Surety C e—Judgment against principal is ordinarily prima facie evidence against surety in action against it.**

   Where there is no conflict in the interests of the principal and surety, a judgment against the principal is *prima facie* evidence against the surety, C. S., 358, although rendered against the principal in a prior action to which the surety was not a party, but in such case the surety may attack the judgment for fraud, collusion, or may set up an independent defense.

2. **Same—Surety held entitled to submission of issue of its indebtedness in action in which judgment by default was entered against principal.**

   Where the surety is a party to an action against the principal in which judgment by default final is entered against the principal, and the surety sets up the sole defense that the surety bond sued on had not been validly

executed by the surety, and its motion of nonsuit based upon such defense is granted in the lower court but reversed on appeal, the surety cannot attack the judgment against the principal for fraud or collusion, and may not set up an independent defense, but the surety is entitled to have an issue submitted to the jury as to what amount, if any, the surety is indebted to the plaintiff, the surety having denied plaintiff's allegation of indebtedness, and the judgment against the principal being only *prima facie* evidence thereof, and the entering of a summary judgment against the surety for the amount of the judgment against the principal is error. C. S., 358.

APPEAL by defendant indemnity company from *Frizzelle, J.,* Second November Term, 1934, of WAKE. Reversed.

The judgment of the court below is as follows: "This cause coming on to be heard upon the judgment of the Supreme Court of North Carolina, reversing the judgment of his Honor, H. A. Grady, judge presiding, at Second June Term, 1934, of the Superior Court of Wake County: It is now ordered and adjudged that plaintiff recover of the defendant London and Lancashire Indemnity Company of America the sum of $4,407.07, with interest thereon from 20 June, 1933, until paid, and the costs of this action, to be taxed by the clerk. J. Paul Frizzelle, Judge presiding at Second November Term, 1934."

To the foregoing judgment the defendant indemnity company excepted, assigned error, and appealed to the Supreme Court. The only exception and assignment of error was to the judgment as signed.

Murray Allen for plaintiff.
J. M. Broughton for defendant Indemnity Company.

CLARKSON, J. This action has been heretofore before this Court, 207 N. C., 408. At page 412, we said: "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," etc. . . . "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." There was a petition for rehearing in this case, which was denied on 25 March, 1935.

The record on the former appeal discloses that defendant Robert G. Lassiter & Company filed no answer, and a judgment by default final was entered as to it; further, "this cause is retained and transferred to the civil issue docket for trial upon the issues raised by the answer of the defendant London and Lancashire Indemnity Company of America to the plaintiff's complaint."

When the action came on for trial, as to the indemnity company, the following judgment was rendered: "This cause coming on to be heard and being heard at the second June Term, 1934, of Wake Superior Court, before his Honor, Henry A. Grady, judge presiding, a jury trial being waived, and at the conclusion of the plaintiff's evidence, a motion having been made by the defendant London and Lancashire Indemnity Company of America for judgment as of nonsuit, which motion was denied, and evidence having been offered by said defendant, and further evidence by the plaintiff in rebuttal, and the motion for nonsuit having been renewed by the defendant London and Lancashire Indemnity Company of America, at the conclusion of all the testimony; and it appearing to the court from all the testimony that the bond sued on herein was not validly executed as to defendant London and Lancashire Indemnity Company of America, and that said defendant is not bound thereby nor liable thereon; it is ordered, adjudged, and decreed that the motion of defendant London and Lancashire Indemnity Company of America for judgment as of nonsuit be and it is hereby allowed, and that this action be dismissed as to said defendant, and that said defendant shall recover of the plaintiff its costs herein incurred, as the same shall be taxed by the clerk of this court."

This judgment was reversed by this Court, for the reasons before given. The agreed statement of case on the former appeal is as follows: "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 under bond executed in its behalf by its agent, Stacey W. Wade, alleging that the said Stacey W. Wade did not have the power and authority to execute the same."

There was a judgment by default against the principal, Robert G. Lassiter & Company, for $4,407.07, together with interest from 20 June, 1933, until paid. Under the decisions of this Court, the issue should have been submitted to the jury: In what amount, if any, is the London and Lancashire Indemnity Company of America indebted to the plaintiff? This is the sole and only question left undetermined by the

decision of this Court. If Robert G. Lassiter & Company owed the sum of $4,407.07, and interest, as above set forth, then the indemnity company is liable to plaintiff for that sum.

In *Armistead v. Harramond,* 11 N. C., 339, it was held that a judgment against an administrator was evidence against his surety of the existence of the debt upon which the judgment was recovered, though it was not at that time evidence against the surety that the administrator had sufficient assets with which to discharge the indebtedness. In consequence of this and other decisions of this Court, chapter 38, Public Laws 1844, was passed, and in *Brown v. Pike,* 74 N. C., 531, it was held that under the statute, a judgment was evidence against the surety, both as to the existence of the debt and of assets sufficient to pay it, but by the Acts of 1881, chapter 8, the Legislature amended the Act of 1844, so as to make a judgment only presumptive evidence against the sureties, whether they were parties to the action in which the judgment was recovered or not. C. S., 358. *Miller v. Pitts,* 152 N. C., 629.

While C. S., 358, fixed the rule as to actions brought upon the official bonds of clerks of courts, sheriffs, coroners, constables, or other public officers, and also upon the bonds of executors, administrators, collectors, or guardians, the precedents were in hopeless discord as to bonds not covered by the statute, until *Associate Justice Brown* laid down the rule in *Insurance Company v. Bonding Company,* 162 N. C., 384 (392): "But an examination of the question has convinced us that the decided trend of modern authority is to the effect that such a judgment against the principal *prima facie* only establishes the sum or amount of the liability against the sureties, although not parties to the action, but the sureties may impeach the judgment for fraud, collusion, or mistake, as well as set up an independent defense."

In Stearns on the Law of Suretyship (4th Ed., p. 300, sec. 175), we find that there are three views as to the question of the effect to be given to a judgment against the principal in establishing a liability against the surety: (1) That such judgment is not admissible against the surety; (2) that a judgment against the principal is *prima facie* evidence against the surety; (3) that such judgment is conclusive against the surety.

In *Commissioners of Chowan County v. Citizens Bank,* 197 N. C., 410, it was held that since the interests of the bank and of the bonding company were in conflict as to the amount of the shortage of the principal, an administrator of an estate, the judgment rendered on admission of the defendant bank as administrator of an estate, should have been excluded as evidence notwithstanding C. S., 358. It was declared that the statute could have no application to self-serving receipts or acknowledgments under the circumstances of that case. In other words, the

administrator having a personal or corporate interest at variance with that of the surety was not permitted to create evidence favorable to its personal or corporate interest. It was pointed out further that the answer of the administrator was filed before the bank in its corporate interest, was brought in as a party defendant, but that its corporate interest was apparent at the time the judgment was rendered. This case was distinguished from *Insurance Co. v. Bonding Co., supra,* upon the ground that the latter case dealt with an unquestioned judgment against the principal, previously entered in another court and in another suit.

In the instant case there is no such conflict of interests as *Chowan v. Citizens Bank, supra,* and while the surety denied indebtedness, it relied upon its contention that under the bond it was not liable to the plaintiff in any amount, and hence did not enter a defense at the trial at which judgment by default final was taken. However, it was a party to the action and entered a defense that it was not liable under the bond as it was written. If the judgment by default final had been rendered in another court and in another suit, it would be admissible as *prima facie* evidence against the surety in an action against the latter. Under the circumstances such as the instant case, although the surety was a party, it relied upon the defense that it was not liable at all. Upon that issue, it lost, and the present action is to determine for what amount, if any, the surety is liable.

The judgment by default final may be introduced as *prima facie* evidence to establish the sum or amount of the liability of the surety. In the complaint, plaintiff alleged, section 10, that the defendants "are justly indebted to the plaintiff in the sum of $4,407.07, together with interest thereon at the rate of six per cent per annum from 20 June, 1933, until paid."

Defendant, in its answer to section 10, says: "That the allegations of paragraph ten of the complaint are denied." The defendant indemnity company, being a party to the action in which judgment was rendered against Robert G. Lassiter & Company, cannot now set up fraud, collusion, or an independent defense. The only question is: In what amount, if any, is the indemnity company indebted to plaintiff? The judgment of plaintiff against Robert G. Lassiter & Company is *prima facie* evidence against the indemnity company. For the reasons given, the judgment of the court below is

Reversed.

ORA JOHN BRADSHAW v. ÆTNA LIFE INSURANCE COMPANY.

(Filed 1 May, 1935.)

1. **Insurance R c: Trial E g—Charge on issue of total and permanent disability held without error when construed as a whole.**

   In this action on a disability clause in a policy of life insurance the court used the phrase "unable to earn a living himself" in its charge on the issue of total and permanent disability, to which defendant insurer objected for that the court failed to charge that such inability must be the result of bodily injury or disease in order for plaintiff to recover. In concluding the charge upon the issue the court instructed that the burden was on plaintiff to show that he had been permanently and totally disabled and thereby prevented from performing work or conducting any business for compensation or profit. *Held:* The charge, when construed as a whole, is without error, the closing portion of the charge being correct and not in conflict with the portion objected to, but being in explanation thereof.

2. **Trial E f—**

   Objection to the court's statement of the contentions of the parties must be made in apt time to afford opportunity for correction in order to be considered on appeal.

3. **Insurance R c: Trial E g—Appellant held not prejudiced by language of charge objected to.**

   In this action on a disability clause in a policy of life insurance insurer's objection to the charge for that the court used the phrase "disability has continued for a period of ninety days" instead of the language of the policy, "for a period of ninety consecutive days," *is held* untenable, since "period of" connotes consecutiveness, and since the issue between the parties was the totality of the disability and not its permanency.

4. **Insurance R c—**

   The testimony of insured in his own behalf is sufficient to take the case to the jury on the question of the totality of insured's disability, the permanence of insured's disability being admitted, although there is testimony *contra.*

5. **Same—**

   Conflicting evidence as to totality or permanence of insured's disability within the meaning of a disability clause in a policy of life insurance raises an issue for the determination of the jury.

APPEAL by the defendant from *Grady, J.,* at September Term, 1934, of SAMPSON. Affirmed.

This is a civil action to recover disability benefits on five policies of insurance issued to the plaintiff by the defendant on 21 October, 1925, all of which policies contained, *inter alia,* the following provisions:

"If, before default in payment of premium, the insured becomes totally and permanently disabled by bodily injuries or disease, and is thereby prevented from performing any work or conducting any business for compensation or profit, the following benefits will be available: When such disability occurs before age sixty a waiver of the payment of premiums falling due during such disability, and an income of ten dollars a month for each one thousand dollars of the sum insured payable to the life owner each month in advance during such disability.

"If before attaining the age of sixty years the insured becomes totally disabled by bodily injuries or disease and is thereby prevented from performing any work or conducting any business for compensation or profit for a period of ninety consecutive days, then, if satisfactory evidence has not been previously furnished that such disability is permanent, such disability shall be presumed to be permanent. In such a case, benefits shall accrue from the expiration of the said ninety days, but not from a date more than six months prior to the date that evidence of such disability satisfactory to the company is received at its home office. No benefit shall accrue prior to the expiration of said ninety days unless during that period evidence satisfactory to the company is received at its home office while the insured is living that the total disability will be permanent, in which event benefits will accrue from the commencement of disability."

The defendant admits that all the premiums have been paid on said policies, and that the same were in full force and effect at the time of the institution of this action.

The issues submitted and answers made thereto were as follows:

"1. Did the plaintiff Ora J. Bradshaw, on 30 November, 1931, become totally and permanently disabled, caused by bodily injury, so that he was prevented thereby from performing any work or conducting any business for compensation or profit, as alleged in the complaint? Answer: 'Yes.'

"2. If so, did such total disability continue for a period of ninety days? Answer: 'Yes.'

"3. If so, what benefits in money is plaintiff entitled to recover of the defendant under the terms of the five life insurance policies referred to in the complaint? Answer: 'Fifty dollars, beginning 1 December, 1931, up to and including 1 August, 1933, with interest on each month from date due.' (Answered by the court by consent.)

"4. What amount in premiums, if any, is plaintiff entitled to recover, paid to defendant since 30 November, 1931? Answer: '$195.85, with interest from 18 November, 1932.' (Answered by the court by consent.)"

From judgment for the plaintiff in accord with the verdict, the defendant appealed to the Supreme Court, assigning errors.

Kenneth C. Royall and Robert A. Hovis for appellant.
R. D. Johnson and A. McL. Graham for appellee.

SCHENCK, J. The appellant abandoned in his brief the exceptions taken to the admission and exclusion of evidence during the course of the trial.

We have examined those portions of the charge relating to the first issue and assigned as error and are of the opinion that when they are construed contextually with the charge as a whole that they are free from reversible error.

The appellant assails in his brief the use by the court of the phrase "unable to earn a living himself" as being too all-inclusive, and by way of argument says that one may be unable to earn a living for many reasons not in contemplation of the parties at the time the contract of insurance was entered into, such, for instance, as the depression, drought, and other unavoidable calamities. Such inability to earn a living would, however, not be due to "bodily injury or disease," and the charge nowhere disassociates the inability "to earn a living himself" from "bodily injury or disease." There is not sufficient difference to constitute prejudicial error between being "prevented from performing any work or conducting any business for compensation or profit" and being "unable to earn a living himself," when the disability in both instances is due to "bodily injury or disease."

His Honor, after giving a number of illustrations and reading excerpts from some of the opinions of this Court, closed his charge upon the first issue as follows: "But, in conclusion, upon this first issue, I will again say to you that the burden is upon Mr. Bradshaw, and by that I mean to say that in order for you to answer this issue 'Yes,' in his favor, he must offer evidence which satisfies you by its greater weight that since 30 November, 1931, he has not only been permanently disabled, but that he has been totally disabled, so that he has been thereby prevented from performing work for compensation or profit, or conducting any business for compensation or profit. And if he has done so, remembering the rule which I have laid down as to what constitutes permanent and total disability, it would be your duty to answer the first issue 'Yes.' If he has failed to do so, it would be your duty to answer it 'No.'" This closing clause of the charge is a clear and correct statement of the law, and is not in conflict with what his Honor formerly charged the jury, but is rather an explanation and resume of what he had told them.

Many of these assignments of error to portions of the charge, which it is urged are in conflict with other portions thereof, are to statements of contentions, and the court was not given the opportunity to correct such

statements by having its attention called thereto at the time they were made, as required by our practice. *Hood, Comr. of Banks, v. Cobb,* 207 N. C., 128; *Kennedy v. Telegraph Co.,* 201 N. C., 756.

The assignment as error that the court charged the jury upon the second issue that if they were satisfied by the greater weight of the evidence "that his (plaintiff's) disability has continued for a period of ninety days after 30 November, 1931, it would be your duty to answer the second issue 'Yes,'" instead of using the words of the policy "for a period of ninety consecutive days," is untenable, since the words "period of" connote consecutiveness; and this would be so for the further reason that the permanency of the plaintiff's disability is admitted by the defendant, and no question is raised throughout the record as to its duration. The extent of the disability, whether total or not, and not the length of time of its existence, was the question involved.

The defendant's principal assignments of error are based upon its motions for judgment as of nonsuit and requests for peremptory instructions upon the first and second issues. The rulings of the court upon these motions and requests raise the simple question as to whether there was sufficient evidence to be submitted to the jury upon the first and second issues. In the recent case of *Guy v. Insurance Co.,* 206 N. C., 118, wherein this Court was called upon to interpret a clause substantially the same as is involved in the instant case, it is said: "The evidence adduced on the plaintiff's examination in chief, and the testimony of his other witnesses, was sufficient to carry the case to the jury on the issue of plaintiff's alleged total and permanent disability within the meaning of the policy in suit." That statement is applicable here since, while there was considerable evidence to the contrary, the testimony of the plaintiff in his own behalf was sufficient to take the case to the jury, and in addition to this was the testimony of members of his family and of one physician at least tending to show the totality of plaintiff's disability, the permanence of which was admitted.

The class of policies to which those in suit belong are designed to provide a substitute for earning when the insured is deprived of capacity to earn by bodily injury or disease, and when the vital issue as to whether the insured has been so deprived of such capacity is raised the answer can be ascertained only by the "ancient mode of trial by jury." This case presents little more than an issue of fact upon sharply conflicting evidence, and this issue has been found in favor of the plaintiff under a fair and impartial charge, free from reversible error. Both in theory and in principle the cases of *Guy v. Ins. Co., supra,* and *Gennett v. Ins. Co.,* 207 N. C., 640, and cases therein cited, are apposite to the instant case.

The judgment is
Affirmed.

J. B. READLING, EXECUTOR OF H. H. HOBBS, DECEASED, v. TOWN OF CORNELIUS, NORTH CAROLINA.

(Filed 1 May, 1935.)

Municipal Corporations E c—Held: Evidence failed to show causal connection between injury and town's failure to have street lights burning.

Evidence tending to show that plaintiff's testate was crossing a street diagonally near an intersection as it was getting dark, and that he was struck and killed by an automobile which was running twenty miles an hour with its headlights burning, and that shortly after the accident defendant town turned on its street lights, *is held* insufficient to show a causal connection between the failure of defendant town to turn on its street lights earlier and the accident in suit, and a directed verdict in favor of defendant town was not error, there being no evidence of any defect in the street.

APPEAL by plaintiff from *Sink, J.*, and a jury, 4 September Regular Term, 1934. From MECKLENBURG. Affirmed.

This is an action, brought by plaintiff against the defendant, for actionable negligence. H. H. Hobbs, plaintiff's testate, was killed about 7 o'clock on 27 September, 1932, by being struck by a Chevrolet coach automobile driven by one Little on the paved portion of the highway, which was 18 feet wide, on Catawba Avenue, in the town of Cornelius. Little was driving west about 15 or 20 miles an hour, with lights burning on his car. The weather, at the time, was foggy and misty. It was getting dark. Hobbs was going in a northwest direction from Puckett's Store, which is located on the south side of Catawba Avenue, in the business section, about 75 or 100 yards from a street intersection. About the middle of the front of the car struck Hobbs on his right side.

C. A. Webster, a witness for plaintiff, testified in part: "There are two or three places for the people of Cornelius to pass Catawba Avenue. Mr. Hobbs was going toward one of the places or paths that lead to his house when he was stricken. He had not got across the road far enough to get in that path, but there was a path opposite this place. Mr. Hobbs was crossing Catawba Avenue at a northwest angle. He did not go straight across the road. I didn't see him look anywhere as he crossed the road. He walked like he was in a hurry. He always walked that way. He held his head stooped a little. Mr. Hobbs was two-thirds of the way across the street, walking in a northwest direction, at the time he was stricken. He was walking at an angle to the car that struck him. His back was more to the automobile than if he had been walking

straight across. I did not hear a horn blown. The car that struck him was traveling not more than 20 miles an hour. It had its lights burning. When he got to the street, he just walked on out across the street."

Near where Hobbs was struck, there was a street light, but it was not burning. Matches were struck to see whether Hobbs was hurt or bleeding—"Then the street lights came on"—also a flashlight was used. Hobbs' body was lying between 8 and 10 feet under the street light and about 2 feet from the edge of the concrete on the north side of the street. There was no defect in the street. Hobbs was 81 years of age and was employed by the Cornelius Cotton Mill and worked regularly.

The court below instructed the jury as follows: "The plaintiff having rested its cause of action, the defendant having rested, prays the court to instruct you, and the court does instruct you, if you find all the evidence favorable to the plaintiff to be true, the court instructs you that even then the plaintiff would not be entitled to recover, and it is your duty to answer the first issue, which reads as follows: 'Was the death of the plaintiff's testate caused by negligence of defendant, as alleged in the complaint?' The jury answered the issue 'No.' "

Judgment was rendered by the court below on the verdict. To the foregoing instruction, and the signing of the judgment, the plaintiff excepted and assigned error and appealed to the Supreme Court.

Hugh G. Mitchell and Z. V. Turlington for plaintiff.
Guy T. Carswell and Joe W. Ervin for defendant.

PER CURIAM. From the entire evidence in this case, we think the court below correct in the charge. The evidence indicates that plaintiff's testate was crossing Catawba Avenue in the town of Cornelius, not at an intersection and in a hurry, without looking, his head stooped. The car that struck him had its lights burning. The fact that the defendant so early in the evening had not turned on the lights of the town had no causal connection with plaintiff's testate's injury. There was no defect in the street. We think the case of *Brady v. Randleman,* 159 N. C., 434, is very nearly on "all fours" with the present case and sustains the charge of the court below. We think the case of *Speas v. Greensboro,* 204 N. C., 239, is distinguishable. The judgment of the court below is

Affirmed.

ESSIE PAPPAS v. LOUIS PAPPAS

and

MRS. ESSIE ELKIN AND DAVILLUS PAPPUS, BY HIS NEXT FRIEND, MRS. ESSIE ELKIN, v. LOUIS PAPPAS.

(Filed 1 May, 1935.)

1. Parent and Child A c—

Decree awarding custody of minor child to its mother, who had been divorced from its father and had married again, *held* correct upon the facts found by the court under the principle that the welfare of the child is the paramount consideration in determining its custody.

2. Parent and Child A b—

The duty of a father to provide for the support of his minor child is not absolute, and on the facts of the instant case, the order relieving the father of this duty while his child is in the custody of its mother *is held* within the discretion of the trial court and not subject to review.

APPEALS by both plaintiffs and defendant from *Harding, J.,* at February Special Term, 1935, of MECKLENBURG. Affirmed in both appeals.

The above-entitled actions, each involving the custody of Davillus Pappas, the minor son of Mrs. Essie Elkins and Louis Pappas, her former husband, and his support by the defendant Louis Pappas while in the custody of his mother, pursuant to an order of the Superior Court of Mecklenburg County, were consolidated, by consent, for trial.

On the facts found by him, Judge Harding remanded the said Davillus Pappas to the custody of his mother, Mrs. Essie Elkin, and refused to allow her motion that his father, the defendant Louis Pappas, be required to provide for his support while he was in her custody.

Both the plaintiffs and the defendant appealed from the order of Judge Harding to the Supreme Court.

G. T. Carswell and Joe W. Ervin for plaintiffs.
H. L. Taylor for defendant.

PER CURIAM. On the facts found by him, to which neither of the parties excepted, there was no error in the order of Judge Harding in this case. The order is affirmed.

In *Tyner v. Tyner,* 206 N. C., 776, 175 S. E., 144, it is said: "In determining the custody of children, their welfare is the paramount consideration. Even parental love must yield to the claims of another if, after due judicial investigation, it is found that the best interest of the children is subserved thereby." This well-settled principle is applicable to the facts of the instant case.

The duty, both moral and legal, of a father to provide for the support of his minor child is not absolute. On the facts of the instant case, the order relieving the father of this duty, while his child is in the custody of his mother, was within the discretion of the judge, and for that reason not subject to review by this Court.

Affirmed.

BETTIE GREENE ET AL. v. M. C. JONES ET AL.

(Filed 1 May, 1935.)

Pleadings D b — Demurrer for misjoinder of parties and causes held properly sustained in this case.

An action by a widow, individually and as administratrix of her deceased husband, and the heirs at law of the deceased husband, to recover two tracts of land, one of which had been held by the widow and her husband by entirety, upon allegations that defendants had obtained title thereto from the widow and her husband wrongfully, is properly dismissed upon demurrer for misjoinder of parties and causes of action, for that the widow as administratrix could have no interest in her husband's real estate of which he died seized, in the absence of allegation that the personalty was insufficient to pay debts; and the widow, as administratrix, and the heirs at law could have no interest in the land formerly held by the deceased and his wife by the entirety.

APPEAL by plaintiffs from order sustaining demurrer made by *Cowper, Special Judge,* at December Special Term, 1934, of WAKE. Affirmed.

J. W. Barbee and J. M. Templeton for plaintiffs, appellants.
Jones & Brassfield for defendants, appellees.

PER CURIAM. This action was instituted by Bettie Greene, Bettie Greene, next friend of Tullie Greene, Gilbert, Katie and Bettie May Greene, minors; Robert Greene, Blanie Davis and husband; Fannie Greene, Ruby, Baxter, and Vann Greene, and Bettie Greene, administratrix of A. R. Greene, against M. C. Jones and J. P. Jones, trading and doing business as M. C. Jones & Son, Durwood Vaughn, Oris Vaughn, Evelyn Paschall, Jeter Paschall, Janet Stallings, Maurice Stallings, Ione Burchette, Herman Burchette, Sadie Nichols, Ed. Nichols, K. L. Nichols, Jr., Wilma Perkins, J. P. Jones, administrator of M. C. Jones, and Hama Perkins, for the recovery of the separate values of two certain tracts of land in Cedar Fork Township, Wake County, containing 47

acres and 30 acres, respectively, titles to which it is alleged were wrongfully procured by the defendants from Bettie Greene and her late husband, A. R. Greene. It is alleged in the complaint that A. R. Greene died seized and possessed of the 47-acre tract, and that at the time of his death he and his wife, Bettie Greene, held the 30-acre tract by the entirety, and that the value of the former tract was $3,500, and that the value of the latter tract was $4,000. Bettie Greene, as administratrix of A. R. Greene, can have no interest in the real property of which her intestate died seized, in the absence of any allegation that his personal estate was insufficient to pay his debts, and as such administratrix she can have no interest in the tract of land formerly held by her and her husband by the entirety. The other plaintiffs, who are heirs at law of A. R. Greene, have no interest in the tract of land formerly held by the deceased and his wife by the entirety. It is, therefore, manifest that there can be no community of interest among the various plaintiffs as to the recovery of the different tracts of land, or of the values thereof, and that the demurrer was properly sustained for that there was a misjoinder of parties as well as causes of action. *Thigpen v. Cotton Mills,* 151 N. C., 97; *Campbell v. Power Company,* 166 N. C., 488; *Rogers v. Rogers,* 192 N. C., 50.

Affirmed.

RENNIE P. JOHNS v. TILDEN B. STEVENSON.

(Filed 1 May, 1935.)

Pleadings D c—

Where it does not appear upon the face of the complaint that the injury in suit was inflicted in another state, a demurrer upon the ground that the injury was inflicted in such other state and that under its laws plaintiff could not recover is properly overruled as a "speaking demurrer."

APPEAL by the defendant from order sustaining a demurrer made by *Harding, J.,* at February Special Term, 1934, of MECKLENBURG. Affirmed.

J. Laurence Jones for defendant, appellant.
Jake F. Newell for plaintiff, appellee.

PER CURIAM. This is an action by the plaintiff to recover damages for personal injuries alleged to have been proximately caused by the negligence of the defendant in the operation of an automobile owned by him and in which she was riding as an invited guest.

After filing answer, the defendant demurred *ore tenus* upon the ground that the complaint failed to state a cause of action for that the injuries alleged to have been suffered by the plaintiff were inflicted in the State of South Carolina, making the law of South Carolina applicable, and that the facts alleged did not state a cause of action under such law. A careful scrutiny of the complaint fails to reveal that it is anywhere therein alleged that the injuries were inflicted in the State of South Carolina, and hence the demurrer invokes a fact not appearing on the face of the complaint, and thereby becomes a "speaking demurrer," and for that reason was properly overruled. *Latham v. Highway Commission,* 185 N. C., 134.

Affirmed.

THE TRAVELLERS INSURANCE COMPANY, A CORPORATION, v. A. A. MURDOCK, INDIVIDUALLY, AND DOING BUSINESS AS CITY ICE AND COAL COMPANY, INC., AND AS CAROLINA ICE COMPANY, INC.

(Filed 22 May, 1935.)

1. **Appeal and Error F b—Where there is no exception to the findings of fact they are conclusive on appeal.**

   Where a jury trial is waived, and there is no exception to the findings of fact by the court presenting defendants' contention that certain of the findings are not supported by evidence, the findings are conclusive and defendants' contention cannot be considered on appeal.

2. **Master and Servant F e—Rates promulgated in accordance with plan approved by Insurance Commissioner prior to issuance of policy held recoverable by insurer under the terms of the policy.**

   The parties waived trial by jury, and the trial court found that the policies of compensation insurance issued by plaintiff insurer were written in accordance with the rates promulgated and approved by the Insurance Commissioner in accordance with the Compensation Act, and that the policies expressly stipulated that the rates should be subject to modification in accordance with the rating plans established and definitely made applicable to the policies and approved by the Insurance Commissioner, and that prior to the issuance of the policies a schedule of rates known as the "merit rating plan" had been approved by the Insurance Commissioner, and that thereafter the rates applicable to the policies in accordance with the "merit rating plan" so approved by the Insurance Commissioner in accordance with the Compensation Act were promulgated by the Compensation Rating Bureau. *Held:* The findings support judgment that insurer is entitled to recover premiums based upon the rates promulgated under the "merit rating plan" approved by the Insurance Commissioner prior to the issuance of the policies.

APPEAL by defendants from *Cowper, Special Judge,* at December Special Term, 1934, of WAKE. Affirmed.

This is an action to recover of the defendants the amount due to the plaintiff for premiums on two policies of insurance issued by the plaintiff to the defendants, one dated 10 August, 1931, and the other dated 10 August, 1932.

The action was begun in the city court of Raleigh, on 4 March, 1933, and was tried in said court on 20 November, 1933. From judgment of said court in favor of the plaintiff and against the defendants for thirty-nine cents, with interest and costs, the plaintiff appealed to the Superior Court of Wake County.

At the trial of the action in the Superior Court, judgment was rendered as follows:

"This cause coming on to be heard on appeal from the judgment herein in the city court of Raleigh, North Carolina, and being heard, *de novo,* by the undersigned, G. V. Cowper, Judge presiding at the Special December Term, 1934, of Wake Superior Court, a jury trial having been waived, and it being agreed that the court should find the facts and make its conclusions of law, the court finds:

"1. That the Travellers Insurance Company, under date of 10 August, 1931, issued to the defendants its policy of Workmen's Compensation Insurance No. UB-7141518 on its standard form for such policy and containing an endorsement for such policies in accordance with the North Carolina Workmen's Compensation Act; that said endorsement contains the following provision:

" 'This policy is issued by the company and is accepted by this employer with the agreement that the rates of premium are subject to modification in accordance with the rate manual and rating plans established and definitely made applicable to this policy by the Southeastern Compensation Rating Bureau and approved by the Commissioner of Insurance of the State of North Carolina, such modification, if any, to be expressed by endorsement naming the effective date thereof.'

"That said policy contained the following classifications and ratings per $100 remuneration: No. 2150-32—3.25; Nos. 8233 and 8203—2.75; No. 8810—.07.

"2. That the Travellers Insurance Company, under date of 10 August, 1932, issued to defendant City Ice and Coal Company, Inc., its policy of Workmen's Compensation Insurance No. UB-7141519 on its standard form for such policy and containing an endorsement for such policies in accordance with the Workmen's Compensation Act of North Carolina; that said endorsement provides as follows:

" 'This policy is issued by the company and is accepted by this employer with the agreement that the rates of premium are subject to

modification in accordance with the rate manual and rating plans established and definitely made applicable to this policy by the Southeastern Compensation Rating Bureau and approved by the Commissioner of Insurance of the State of North Carolina, such modification, if any, to be expressed by endorsement naming the effective date thereof.'

"That said policy contains an endorsement, No. 815, as follows:

" 'The policy to which this endorsement is attached has been issued at the manual rate because at the time of issue the adjusted rate is not available. It is agreed that the adjusted rate for this policy will be obtained as soon after its effective date as possible and, when obtained, an endorsement will be issued for attachment to this policy stating the adjusted rate, which adjusted rate shall be substituted for the manual rate temporarily used, and shall become the actual rate for this policy from and after its effective date.'

"That said policy was issued on the following classifications and ratings per $100 remuneration: No. 2150-32—3.25; Nos. 8233 and 8203—2.75; No. 8810—.07.

"3. That said rates contained in the two policies of insurance were the rates promulgated and established on 7 May, 1929, by the Insurance Commissioner of North Carolina, for the classifications therein mentioned, and that said rates were approved by the Commissioner of Insurance of North Carolina in accordance with the North Carolina Workmen's Compensation Act.

"4. That prior to the issuance of the two policies of insurance, on 7 May, 1929, there had been promulgated by the Insurance Commissioner of North Carolina a schedule of rates known as the merit rating plan, and that said schedule of rates, or merit rating plan, had been approved by the Commissioner of Insurance of North Carolina in accordance with the North Carolina Workmen's Compensation Act.

"5. That thereafter, upon inspection and in accordance with the schedule of rates or merit rating plan contained in the rate manual of the Compensation Rating and Inspection Bureau, the Compensation Rating and Inspection Bureau promulgated rates as follows for Policy No. UB-7141518: No. 2150—3.432; Nos. 8233 and 8203—2.904; No. 8810—.074; that the plaintiff thereupon issued, and caused to be attached to the policy, an endorsement containing said rates as promulgated by the Compensation Rating and Inspection Bureau.

"6. That thereafter, upon inspection and in accordance with the schedule of rates or merit rating plan contained in the rate manual of the Compensation Rating and Inspection Bureau, the Compensation Rating and Inspection Bureau promulgated rates as follows for Policy No. UB-7141519: No. 2150—4.173; No. 8233—4.699; No. 8203—3.531;

No. 8810—.090; that the plaintiff thereupon issued and caused to be attached to the policy an endorsement containing said rates as promulgated by the Compensation Rating and Inspection Bureau.

"7. That the rates were promulgated by the Compensation Rating and Inspection Bureau in accordance with the experience rating of the defendants and in accordance with the merit rating plan established by the Compensation Rating and Inspection Bureau and approved by the Commissioner of Insurance as required by the North Carolina Workmen's Compensation Act.

"8. That the defendants are indebted to plaintiff for Policy No. UB-7141518 for the balance of said premium in the amount of $118.34, and that defendants are indebted to plaintiff for policy No. UB-7141519 for the balance of said premium in the amount of $184.01.

"9. The court further finds that plaintiff and defendants by the contracts of insurance expressly stipulated that the policies were issued at the manual rates and were subject to modification in accordance with the rate manual and rating plans established and definitely made applicable to the policies, and that such modifications were made in accordance with the rate manual and rating plans established by the Commissioner of Insurance of North Carolina.

"It is therefore ordered, adjudged, and decreed that plaintiff recover of the defendants the sum of $118.34, and the further sum of $184.01, together with interest on said sums from 24 July, 1933, until paid, subject to a credit of $14.33, and that defendants pay the costs as taxed by the clerk."

The defendants excepted to the foregoing judgment, and appealed to the Supreme Court, assigning as error the signing by the court of the judgment.

J. M. Broughton and W. H. Yarborough, Jr., for plaintiff.
J. C. Little and Allen Langston for defendants.

CONNOR, J. In *Fertilizer Co. v. Godley,* 204 N. C., 243, 167 S. E., 816, it is said:

"It is well settled in this jurisdiction that where a jury trial is waived, as in this case, and the trial judge finds the facts and judgment is entered thereon, if there was any competent, sufficient evidence to support the findings of fact, and the facts support the judgment, in such case, the findings of fact and the judgment thereon are conclusive."

In the instant case there was no exception by the defendants to any finding of fact made by the judge. The findings of fact are therefore conclusive on defendants' appeal to this Court. The contention of the

defendants on their appeal to this Court that there was no evidence at the trial to support certain findings of fact made by the judge is not presented by a valid assignment of error, and for that reason cannot be considered.

The judgment is supported by the findings of fact made by the trial judge, and for that reason is

Affirmed.

STATE OF NORTH CAROLINA EX REL. B. H. HICKS, EXECUTOR, AND BELLE H. PURVIS, EXECUTRIX OF T. T. HICKS, DECEASED, E. L. ROGERS, PERRY BRAME, T. M. BRAME, AND CHARLES W. HARGROVE v. MILDRED W. PURVIS, ADMINISTRATRIX C. T. A. OF S. M. BLACKNALL, DECEASED, AND THE FIDELITY AND CASUALTY COMPANY OF NEW YORK.

(Filed 22 May, 1935.)

1. **Executors and Administrators G f—Action to recover for certain disbursements as breach of bond held not action to surcharge or falsify final account, and was improperly remanded to clerk.**

Plaintiffs, creditors of the estate, brought action against the administratrix *c. t. a.* and the surety on her statutory bond, C. S., 33, to recover for disbursements out of the assets of the estate by the administratrix to the heirs at law and distributees in settlement of a caveat proceeding instituted by them, and to certain attorneys at law for services in defending the caveat proceedings, and certain losses to the estate incurred by the administratrix in the operation of the business in which deceased was engaged at the date of his death, and commissions to the administratrix to which they contend she was not entitled. The action was referred to a referee, and upon the filing of the report of the referee the trial court ordered that the final account of the administratrix be remanded to the clerk to adjust and settle in accordance with certain rulings appearing in the order. *Held:* The action or proceeding was not to surcharge or falsify the final account of the administratrix, the correctness of the account not being disputed, but to recover of defendants the amount of the disbursements attacked as being a breach of the statutory bond, and the order in effect remanding the action to the clerk to adjust and settle the final account was error, plaintiffs being entitled to judgment in accordance with the law applicable to the findings of fact by the referee, and a new trial is awarded upon exceptions to the conclusions of law of the referee.

2. **Appeal and Error H a—**

Where both parties appeal from an order entered in the cause upon the report of the referee, and upon plaintiffs' appeal the order is reversed and set aside, the defendant's appeal must be dismissed, since there is no judgment in the record from which an appeal will lie.

APPEAL by plaintiffs and by the defendant The Fidelity and Casualty Company of New York from *Devin, J.*, at January Term, 1935, of VANCE. Error in the appeal of plaintiffs; appeal of the defendant dismissed.

This is an action to recover of the defendants damages for alleged breaches of the statutory bond executed and filed by the defendant Mildred W. Purvis, administratrix *c. t. a.* of S. M. Blacknall, deceased, as principal, and The Fidelity and Casualty Company of New York as surety. The plaintiffs are creditors of the estate of S. M. Blacknall, deceased, holding claims against said estate in the aggregate amount of $21,587.41, as evidenced by notes executed by the said S. M. Blacknall.

The action was begun in the Superior Court of Vance County on 27 January, 1933.

At October Term, 1933, of said court, by consent of the plaintiffs and of the defendant The Fidelity and Casualty Company of New York, and subject to the exception of the defendant Mildred W. Purvis, administratrix *c. t. a.*, the action was referred to a referee for trial. It was heard at January Term, 1935, of said court, upon exceptions to the report of the referee, duly filed by the plaintiffs and by the defendant The Fidelity and Casualty Company of New York. The findings of fact made by the referee, and set out in his report, were approved by the judge, and his conclusions of law, as modified, were affirmed.

It was thereupon ordered and adjudged by the court that the "Final account of said Mildred W. Purvis, administratrix *c. t. a.* of S. M. Blacknall, deceased, be and the same is remanded to the clerk of the Superior Court of Vance County to adjust and settle the same in accordance with this judgment, to wit: (a) The disallowance of the credit of $10,000 for amount paid to compromise the caveat to the will; (b) the disallowance of the credit of $7,000 for amount paid attorneys to defend the caveat to the will; and (c) for allowance of proper commissions to said administratrix, all of which has been herein specifically set out."

From this order both the plaintiffs and the defendant The Fidelity and Casualty Company of New York appealed to the Supreme Court.

B. H. Hicks, T. G. Stem, and B. S. Royster, Jr., for plaintiffs.
Ruark & Ruark for defendant.

CONNOR, J. This action was begun in the Superior Court of Vance County to recover of the defendants damages resulting from certain alleged breaches of the bond executed by the defendant Mildred W. Purvis, administratrix *c. t. a.* of S. M. Blacknall, deceased, as principal, and by the defendant The Fidelity and Casualty Company of New York as surety. The bond is in the penal sum of $80,000 and is conditioned

as required by statute. C. S., 33. The plaintiffs are creditors of the estate of S. M. Blacknall, who died in Vance County on 19 April, 1929, leaving a last will and testament, which has been duly probated and recorded. Their claims against the estate are founded upon notes executed by S. M. Blacknall, and aggregate the sum of $21,587.41. These claims have not been paid. There are no assets now in the hands of the defendant Mildred W. Purvis, administratrix *c. t. a.*, for the payment of these claims, or any part of them.

It is alleged in the complaint that the defendant Mildred W. Purvis, administratrix *c. t. a.* of S. M. Blacknall, deceased, some time during the month of June, 1929, wrongfully paid to certain heirs at law and distributees of the estate of S. M. Blacknall, out of the assets of his estate then in her possession, the sum of $10,000 in settlement of a caveat proceeding instituted by said heirs at law and distributees, before the clerk of the Superior Court of Vance County; and that such payment was a breach of her bond, in the nature of a *devistavit,* and resulted in damages to the plaintiffs.

It is further alleged in the complaint that the defendant Mildred W. Purvis, administratrix *c. t. a.* of S. M. Blacknall, deceased, some time during the month of June, 1929, wrongfully paid to certain attorneys at law, employed by her, out of the assets of the estate of the said S. M. Blacknall, deceased, the sum of $7,000, for their services in defending the caveat proceeding which was instituted by heirs at law and distributees of the estate of the said S. M. Blacknall, deceased; that such payment was a breach of her bond, in the nature of a *devistavit,* and resulted in damages to the plaintiffs.

It is further alleged in the complaint that from the date of her qualification as administratrix *c. t. a.* of S. M. Blacknall, deceased, to wit: 23 April, 1929, to some time during the summer of 1932, the defendant Mildred W. Purvis, administratrix *c. t. a.* of S. M. Blacknall, deceased, continued the operation of the business in which the deceased was engaged at the date of his death, and for that purpose wrongfully paid out large sums of money belonging to the estate; and that the use of said money for said purpose was a breach of her bond, in the nature of a *devistavit,* and resulted in damages to the plaintiffs.

It is further alleged in the complaint that because of the said breaches of her bond, the defendant Mildred W. Purvis, administratrix *c. t. a.* of S. M. Blacknall, deceased, is not entitled to commissions, but that notwithstanding this, she has wrongfully paid to herself, out of the assets of the estate, large sums as commissions, and that such payment was a breach of her bond, in the nature of a *devistavit,* and resulted in damages to the plaintiffs.

In its answer to the complaint the defendant The Fidelity and Casualty Company of New York, surety on the bond of its codefendant, denies that she has breached her bond as alleged in the complaint, in any respect, and among other defenses to plaintiffs' recovery in this action of the said defendant, pleads the three-year statute of limitations, C. S., 441 (6).

This is not an action or proceeding to surcharge or falsify the final account of the defendant Mildred W. Purvis, administratrix *c. t. a.* of S. M. Blacknall, which was filed in the office of the clerk of the Superior Court of Vance County on 9 December, 1932, and, because of the disqualification of said clerk, by reason of his interest in the estate, audited and approved by the judge of the Superior Court of Vance County. The plaintiffs do not challenge in this action the correctness of said account. They contend that disbursements shown by said account were breaches of the bond sued on, and that by reason of these breaches they are entitled to recover of both the principal and the surety on said bond, the damages which they have sustained as creditors of the estate of S. M. Blacknall, whose just claims have not been paid.

On the facts found by the referee, and approved by the judge, the plaintiffs were entitled to a judgment in accordance with the law applicable to these facts. The order made by the judge, in effect remanding the action to the clerk of the court to adjust and settle the final account of the defendant Mildred W. Purvis, administratrix *c. t. a.* of S. M. Blacknall, in accordance with certain rulings appearing in the order, was error. The order is reversed and set aside, to the end that there may be a new trial of the action on the report of the referee. The correctness of the rulings of the judge on the exceptions to the conclusions of law made by the referee cannot be considered by this Court in the present state of the record; nor should such rulings be deemed conclusive at the new trial.

As the order of the judge, in effect remanding the action to the clerk of the Superior Court of Vance County, has been reversed and set aside, it follows that the appeal of the defendant The Fidelity and Casualty Company of New York from said order must be dismissed. There is no judgment in the record from which an appeal to this Court will lie. See *Pritchard v. Spring Co.*, 151 N. C., 249, 65 S. E., 968, and cases cited.

Error in plaintiffs' appeal.

Defendant's appeal dismissed.

STATE v. JASPER TYSON.

(Filed 22 May, 1935.)

1. **Bastards B c—Warrant under N. C. Code, 276 (a), must charge defendant with wilful failure to support illegitimate child.**

   The begetting of an illegitimate child is not of itself a crime, and a warrant charging defendant with being the father of an unborn, illegitimate child is insufficient to support a prosecution under N. C. Code, 276 (a), nor is such insufficiency cured by an amendment allowing the word "wilful" to be inserted therein, in the absence of an amendment alleging the birth of the child and defendant's refusal to support the child.

2. **Indictment F a—Where warrant is insufficient to charge any crime deficiency may not be cured by charge or verdict.**

   Defendant was prosecuted under a warrant charging him with being the father of an unborn, illegitimate child. The issue submitted to the jury and the charge of the court presented to the jury the question of defendant's wilful refusal to support his illegitimate child. *Held:* The failure of the warrant to charge defendant with wilful failure to support his illegitimate child was not cured by the charge or verdict, since the warrant fails to charge any criminal offense.

3. **Criminal Law J a—**

   Where the warrant upon which defendant was tried is insufficient to charge any crime, defendant's motion in arrest of judgment should be allowed, since the defect is one appearing on the face of the record.

APPEAL by defendant from *Alley, J.*, at January Term, 1935, of ANSON. Error.

This case came on to be heard by the Superior Court upon appeal from the Anson County criminal court upon the following affidavit and warrant, *to wit:*

State of North Carolina—Anson County.

WARRANT.

State *v.* Jasper Tyson.

Mary Robinson, Superintendent of Public Welfare, being duly sworn, complains and says that Sadie Bernice Richardson is a resident of Anson County, and that she is now pregnant, and that Jasper Tyson is the father of her illegitimate, unborn child, and she prays the court to issue a warrant of attachment for the body of the said Jasper Tyson that the paternity of her said unborn illegitimate child may be determined as provided in section 276 D, Laws of 1933, and that the said father may be held by the said court to provide support and maintenance

for the said child after its birth, as is provided by law, contrary to the form of the statute and against the peace and dignity of the State.

Sworn to and subscribed before me, this the 5th day of April, 1934.

MARY ROBINSON,
Superintendent of Public Welfare.

R. E. LITTLE,
Clerk of the Superior Court.

State of North Carolina,

To the Sheriff or any other lawful officer of Anson County—Greeting:

For the cause stated in affidavit hereto attached, you are hereby commanded forthwith to arrest Jasper Tyson and him safely keep, so that you have him before Anson County Criminal Court, at Wadesboro, N. C., forthwith to answer the above complaint, and be dealt with as the law directs.

Given under my hand and seal, this the 5th day of April, 1934.

R. E. LITTLE, *Clerk of the Superior Court for the County of Anson, State of North Carolina.*

The record discloses that at the close of the State's evidence the defendant moved for a judgment as of nonsuit, "stating that the chief ground in support of the motion is that the warrant failed to charge that the refusal to support the child was wilful," and that thereupon "the solicitor for the State requests the court for permission to amend the warrant and put in the word 'wilful,' and the court allows the amendment, . . ."

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

"1. Is the defendant the father of the bastard child of Sallie Bernice Richardson?

"2. Has the defendant wilfully failed and refused to support and maintain said child, as alleged?"

Upon the coming in of the verdict the defendant moved in arrest of judgment ". . . for that the warrant under which the defendant was indicted does not allege that the defendant wilfully neglects or refuses to support and maintain his illegitimate child. . . ." This motion in arrest of judgment was overruled, and the action of the court in so doing is made the basis of an exceptive assignment of error.

The court then proceeded to pronounce judgment of imprisonment for four months, but provided that the prison sentence was "not to go into effect" if it shall be made to appear that the defendant has paid into

court one hundred dollars, in certain installments, for the "use of the plaintiff and her bastard child." From this judgment the defendant appealed, assigning errors.

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

B. M. Covington for defendant.

SCHENCK, J. While the record discloses that at the close of the State's evidence, upon motion of the solicitor for permission to amend the warrant and put in the word "wilful," the court allowed the amendment, it nowhere appears in the record that the word "wilful" was ever actually inserted in the warrant.

An examination of the warrant as set forth in the record also reveals that the word "wilful" cannot be inserted anywhere therein and make the charge that the defendant wilfully neglected or refused to support and maintain his illegitimate child. In fact, the warrant was issued before the birth of the child, and was never amended so as to allege so much as the birth, much less the neglect and refusal to support.

Notwithstanding that the question of the defendant's wilful neglect and refusal to support and maintain his illegitimate child was presented both by the issue submitted to the jury and the charge of the court, the motion in arrest of judgment should have been allowed, since, even assuming that the word "wilful" be inserted in any place or places therein, the warrant does not charge the offense against which the statute inveighs, or any other criminal offense, as the begetting of an illegitimate child in itself is not a crime. Section 1, chapter 228, Public Laws 1933 (section 276-a, 1933 Supplement of N. C. Code of 1931, Michie), reads: "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. . . ." So far as the record discloses, no attempt was made to make the warrant comply with the statute, except to have the court allow the motion to insert therein the word "wilful," with no further amendment comprehending and including the derelictions of the putative father after the birth of the illegitimate child.

The defect or omission appearing, as it does on the face of the record, may be taken advantage of by motion in arrest of judgment. *S. v. Lewis,* 194 N. C., 620, and cases there cited.

Error.

PRATER PULVERIZER COMPANY, A CORPORATION, v. F. H. JENNINGS, TRADING AS LEWISVILLE ROLLER MILLS.

(Filed 22 May, 1935.)

1. Appeal and Error E h—

Where the answers of the jury to the first two issues renders the answering of the third issue unnecessary, an exception to the admission of evidence relating to the third issue becomes immaterial and need not be considered on appeal.

2. Trial E g—

The charge in this case, when construed as a whole in the light of the issues, *is held* not to contain reversible error and to fairly present the contentions of the parties and the law applicable to the theory of trial.

3. Trial E f—

If the charge fails to fully set forth a party's contentions or incorrectly states them, it is incumbent upon the party to aptly request additional or more specific statements of the contentions.

4. Appeal and Error B b—

An appeal will be considered in the light of the theory of trial in the lower court.

APPEAL from *Hill, J.*, at July Special Term, 1934, of FORSYTH. No error.

This was a civil action, instituted by the plaintiff against the defendant in the Forsyth County court to recover the purchase price of "1 No. 30 Blue Streak custom mill complete," and accessories, and to subject said property to sale to satisfy such debt, wherein the defendant admitted the delivery of the property but set up as a defense to the action that such property was delivered to him upon the condition precedent that he should first try out the mill to ascertain if it met the guarantee of the seller that it would "grind feed better and at a lower cost per hundred pounds than any other mill on the market," before the order providing for a conditional sales contract and notes theretofore signed by the defendant should become effective. The case was tried upon the following issues, to which answers were made as indicated, to wit:

"1. Did the defendant execute the written instrument, as alleged in the complaint? Answer: 'Yes.'

"2. Was the written instrument signed by the defendant upon a condition precedent, as alleged in the answer? Answer: 'No.'

"3. If so, has the condition precedent been fulfilled? Answer: ....

"4. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: '$817.71.' "

From judgment that the plaintiff recover the sum of $817.71, and that the property be condemned and sold to satisfy the judgment, the defendant appealed from the Forsyth County court to the Superior Court, making 22 assignments of error. The case came on to be heard at term time, and the Superior Court entered judgment overruling each and every assignment of error and entered judgment affirming the Forsyth County court. Whereupon, the defendant appealed to this Court, making 13 assignments of error.

Moses Shapiro and Ira Julian for plaintiff, appellee.
Ingle & Rucker for defendant, appellant.

SCHENCK, J. The first assignment of error is to the admission of certain opinion evidence, and the last is to the court's refusal to set aside the verdict and to the signing of the judgment as set forth in the record. All of the others are to the charge.

The first assignment of error, which is to the court's refusal to strike out an opinion expressed by a certain witness as to what caused a given trouble in the operation of the mill becomes immaterial on this appeal, since the evidence relates to the third issue and the answering of that issue was rendered unnecessary by the answers to the first and second issues.

We have examined with care the many objections to the charge of the court, but upon reading the charge as a whole we are left with the impression that it was complete and fair to the defendant, and in accord with the theory upon which the case was tried. It is said in *Murphy v. Coach Company,* 200 N. C., 92, "In a long charge, we do not think technical matters contended as errors, fished out of the charge, can be held as reversible or prejudicial error, when on the whole the charge is correct." And it is further said in *Leggett v. R. R.,* 173 N. C., 698, "The charge to a jury must be considered as a whole in the same connected way in which it was given, and upon the presumption that the jury did not overlook any portion of it. If, when so construed, it presents the law fairly and correctly, it will afford no ground for reversing the judgment, though some of the expressions, when standing alone, might be regarded as erroneous."

The charge in this case, when read in the light of the issues, which were tendered by the appellant, fairly presents the contentions of the parties and correctly applies the principles of law under the theory upon which this case was tried, and if the defendant's contentions were not fully set forth at that time, or were incorrectly stated, it was incumbent upon him to have requested the court to present more specific and additional or different contentions. *Proctor v. Fertilizer Company,* 189

N. C., 243. A party is not permitted to try his case in the lower court upon one theory and then ask the Supreme Court to hear it on another and different theory. *Walker v. Burt,* 182 N. C., 325, and cases there cited.

This was a case for trial by jury. The evidence was conflicting and a finding of the facts was necessary to adjudicate the differences between the parties. Under a charge free from prejudicial error, the jury has answered the issues, tendered by the defendant, in favor of the plaintiff, and, therefore, we can see no reason for disturbing the judgment based upon the verdict.

No error.

THE WILMINGTON SAVINGS AND TRUST COMPANY, EXECUTOR AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF HANNAH P. BOLLES, DECEASED, v. MRS. BLANCHE COWAN, SARAH STONE COWAN, MARY GILES COWAN KING, AND OTHERS, DEVISEES, LEGATEES, AND BENEFICIARIES NAMED IN THE LAST WILL AND TESTAMENT OF HANNAH P. BOLLES, DECEASED.

(Filed 22 May, 1935.)

1. **Wills E f—Subject matter of void legacy held not to become part of corpus of estate but fell within the residuary clause of the will.**

Testatrix directed that all of her real property and all of her personal property, with the exception of her personal effects, furniture, and furnishings, should be sold and divided equally between named beneficiaries, and stipulated that she wished her personal effects to be disposed of by delivering them to persons whose names would appear on a memorandum which she intended filing with the will. The will contained a residuary clause. Testatrix failed to prepare and file the memorandum with the will. *Held:* The personal effects of testatrix did not become a part of the *corpus* of the estate, it being the intent of the testatrix as gathered from the whole instrument that such personal effects should not be sold by the executor or included in the provisions for equal division of the *corpus* of the estate to the named beneficiaries.

2. **Wills F h—Legacy held void because impossible of execution, and the subject matter of the legacy fell within residuary clause.**

Testatrix provided that her personal effects should be delivered to persons whose names would appear on a memorandum which she intended to file with the will. Testatrix failed to prepare and file the memorandum with the will. *Held:* The legacy was void because impossible of taking effect, and by operation of C. S., 4166, the subject matter of the void legacy is included in the residuary clause and should be delivered to the beneficiaries named therein.

APPEAL by defendants Sarah Stone Cowan and Mary Giles Cowan King, residuary legatees, from *Frizzelle, J.,* at March Term, 1935, of the Superior Court of NEW HANOVER. Reversed.

This is an action for the construction by the court of certain provisions of the last will and testament of Miss Hannah P. Bolles, who died in the city of Wilmington, N. C., on 13 February, 1933, having first made and published her last will and testament, which has been duly probated and recorded in the office of the clerk of the Superior Court of New Hanover County.

The plaintiff is the duly qualified executor of the said last will and testament, and is named therein as trustee for certain of the defendants.

The defendants are the devisees, legatees, and beneficiaries named in said last will and testament, and have been duly made parties to this action.

By Item III of her said last will and testament, the testatrix directed her executor to sell and dispose of all her real estate, wherever situate, within twelve months from the date of the probate of said last will and testament, and to that end she authorized and empowered her said executor to sell and convey the said real estate to the purchaser or purchasers by good and sufficient deed or deeds; she further directed and empowered her said executor to sell, at either public or private sale, all her personal property, "except my personal effects, furniture, and furnishings which are listed and are to be disposed of in accord with a memorandum to be deposited with this will as provided in Item IV hereof." She further directed her said executor, after the payment of her debts and taxes, and after the payment of all costs and expenses of the administration of her estate, including commissions, to divide "all the rest and residue of my estate" into thirty shares of equal value, and to deliver to the persons named in said Item III the shares of her estate as therein directed.

Items IV and V of said last will and testament are as follows:

"Item IV. I request and direct my executor to dispose of my personal belongings, my furniture and other personal effects in the manner and to the persons whose names will appear upon a memorandum which I will prepare and file with a copy of this will which I propose to place in my safe deposit box at the Wilmington Savings and Trust Company.

"ITEM V. All the rest, residue, and remainder of my said estate of whatever character and kind and wherever situate, I give, devise, and bequeath unto Sarah Stone Cowan and Mary Giles Cowan King, daughters of the late Robert H. Cowan."

No memorandum showing the names of the persons to whom the testatrix requested and directed her executor to deliver her personal belongings, her furniture, and her personal effects in accordance with the provisions of Item IV of her will, was found after her death in her safety deposit box at the Wilmington Savings and Trust Company. The testatrix had failed to prepare and file such memorandum with the copy of her last will and testament.

On the foregoing facts the plaintiff contended that the personal belongings, furniture, and personal effects of the testatrix constituted a part of the *corpus* of her estate, and should be included in the division of her property under the provisions of Item III of her will; the defendants Sarah Stone Cowan and Mary Giles Cowan King contended that said personal belongings, furniture, and personal effects should be delivered to them as residuary legatees under the provisions of Item V of the said will.

The court was of opinion that said personal belongings, furniture, and personal effects constitute a part of the *corpus* of the estate of the testatrix, and should be included in the division of her property, real and personal, and so adjudged.

The defendants Sarah Stone Cowan and Mary Giles Cowan King appealed to the Supreme Court.

Bellamy & Bellamy for plaintiff.
Herbert McClammy for defendants.

CONNOR, J. It was manifestly the intention of the testatrix at the time she executed her last will and testament that her "personal belongings, furniture, and personal effects" should not be sold by her executor, or included in the division of her estate, which she directed her executor to make for purposes of distribution. This intention appears from the "four corners" of the will, and is the pole star by which the Court must be guided in construing the provisions of the will. *Jolley v. Humphries,* 204 N. C., 672, 169 S. E., 417.

In Item III of her will the testatrix directed and empowered her executor to sell all her personal property "except her personal effects, furniture, and furnishings." In Item IV she requested her executor to dispose of her personal belongings, her furniture, and other personal effects by delivering them to the persons whose names would appear on a memorandum which she intended to prepare and file with her will. She failed to prepare and file the memorandum. For this reason, the provisions of Item IV of her will are incapable of taking effect, and the legacy is void. *Faison v. Middleton,* 171 N. C., 170, 88 S. E., 141.

Under the provisions of C. S., 4166, the property which is the subject matter of the void legacy, is included within the residuary legacy provided by Item V of the will, and should be delivered by the executor to the defendants Sarah Stone Cowan and Mary Giles Cowan King.

There is error in the judgment, which must, for that reason, be
Reversed.

BANK OF PINEHURST, TRUSTEE AND INDIVIDUALLY, ET AL., IN BEHALF OF THEMSELVES AND OTHER INTERESTED CREDITORS OF THE MID-PINES COUNTRY CLUB, INCORPORATED, v. MID-PINES COUNTRY CLUB, INCORPORATED, AND F. R. CRUIKSHANK & COMPANY.

(Filed 22 May, 1935.)

Receivers G b—Holder of conditional sales contract against insolvent held liable for pro rata part of expenses of receivership.

The assets realized by the receiver of defendant insolvent were derived from the sale of realty, the sale of personalty upon which appellant had a conditional sales contract, and the sale of other personalty of the insolvent. The court entered an order allowing the receiver to retain his fees and expenses, including fees for the attorney of the receiver, pro rata from the three funds. *Held:* The holder of the conditional sales contract, having received the benefits of the receivership in common with other creditors, and the fees and expenses of the receiver being reasonable and just, cannot complain that a pro rata part thereof was retained out of the fund realized from the sale of the personal property covered by the conditional sales contract.

APPEAL from *Clement, J.*, at December Term, 1934, of MOORE. Affirmed.

This action was instituted in behalf of the creditors of the defendant Mid-Pines Country Club, Incorporated, wherein a receiver was appointed and upon the various reports of the receiver the court entered judgment, from a portion of which the defendant F. R. Cruikshank & Company appealed.

U. L. Spence and W. B. Sabiston, Jr., for Mid-Pines Country Club and L. L. Biddle, II, receiver, appellees.

Cochran & McCleneghan for F. R. Cruikshank & Company, appellant.

SCHENCK, J. There appears in the record the following consent order:

"December Term, 1934.

"In this cause the defendant F. R. Cruikshank & Company, having appealed to the Supreme Court from that portion of the final decree adjudicating that said defendant pay a part of the costs and receiver fees and attorney for receiver fees, it is by consent of parties, but without prejudice to any of the parties, considered and adjudged that the said receiver, nevertheless, disburse all the moneys in his hands under the terms of said decree, except that he will retain in his hands, subject

to the future order of the court, $800.00 of the funds belonging to the proceeds arising from sale of real estate to await the result of such appeal. J. H. CLEMENT, *Judge Presiding.*

"Consent: U. L. SPENCE, *Attorney for Plaintiffs.*
"F. A. MCCLENEGHAN, *Attorney for F. R. Cruikshank & Company.*"

The appellant makes but one assignment of error, as follows:

"The defendant F. R. Cruikshank & Company, having appealed to the Supreme Court, makes as its only assignment of error the judgment entered, as appears in the record, and its objection and exception thereto."

The assignment of error, when read in the light of the consent order, presents but the single question as to whether the court had the right to provide in the judgment that a pro rata portion of the receiver's fees and expenses, including fees to his counsel, should be paid from funds derived from the sale of certain personal property of the defendant Mid-Pines Country Club, upon which the codefendant appellant F. R. Cruikshank & Company held a conditional sales contract.

It appears from the record that the receiver had in his hands from the sales of the various properties of the Mid-Pines Country Club, Incorporated, three funds, namely, $69,930 from real estate, and $10,000 from a sprinkler system on which the appellant held a conditional sales contract, and $10,000 from other personal property. It also appears from the record that the receiver had the care and custody of the real estate and personal property, including the sprinkler system, from the time of his appointment till the sale thereof, and that the duties of the receiver and his attorneys were well and faithfully performed. There is no suggestion in the record or brief that the allowances made to them are excessive or unreasonable. No assignment of error assails the receivership or any action of the receiver except his recommendation to the court that the expenses of the receivership be paid pro rata from the three funds mentioned. The receivership inured to the benefit of the appellant in proportion to its claim, just as it did to the other creditors of the insolvent Mid-Pines Country Club. Having received the benefits of the receivership, the appellant, according to law and equity, should pay its pro rata portion of the expense thereof. Under these circumstances, we hold that his Honor was clearly within his rights in authorizing the receiver to retain his fees and expenses, including his attorney's fees, pro rata from the three funds in his hands. The principle upon which the case of *Kelly v. McLamb,* 182 N. C., 158, was

decided is applicable here, and is authority for that portion of the judgment of the Superior Court allowing a pro rata portion of the expense of the receivership to be taxed against the funds received from the sale of the personal property upon which the appellant held a conditional sales contract.

Affirmed.

STATE v. LULA PEARL RHODES.

(Filed 22 May, 1935.)

Courts A c—No appeal lies from order of recorder's court that execution issue on suspended judgment, review being by recordari.

Where it is provided by statute that a person convicted in a recorder's court should have the right to appeal to the Superior Court, and that trial in the Superior Court should be *de novo*, there is no provision for an appeal from an order of the recorder's court that a suspended judgment against a person convicted in said court should be executed, and the Superior Court obtains no jurisdiction from a purported appeal from such order unless such appeal is treated as a return of a writ of *recordari*, and where on such appeal the Superior Court hears evidence and affirms the judgment of the recorder's court, the case will be remanded by the Supreme Court for proceedings according to law. The requisites for an order that execution issue on a suspended judgment discussed by STACY, C. J.

APPEAL by defendant from *Sinclair, J.*, at November Term, 1934, of NEW HANOVER.

Criminal prosecution, tried in the "recorder's court of New Hanover County" upon a warrant charging the defendant with a felonious assault upon one John Russ, resulting in serious injury. C. S., 4214.

The case was tried on 11 May, 1934, and resulted in a verdict of "guilty of assault with serious injury." On 26 June thereafter the following judgment was pronounced against the defendant: "3 months in jail, to be assigned to county farm; judgment suspended on payment of costs on condition that defendant report to this court on the first Monday of each month for six months and satisfy the court that she has been of good behavior."

It is stated in the record that "after the above judgment of recorder's court the defendant Lula P. Rhodes paid to the court the costs assessed in this case, and did thereafter, on the first of each succeeding month, appear in person and report to said recorder's court, as required in the foregoing judgment."

On 14 November, 1934, at a session of the recorder's court, the said Lula P. Rhodes was present as a witness for the State in the case of

S. v. John Russ, charged with abandonment and nonsupport. From the evidence elicited in the trial of this case, the solicitor prayed judgment in the case of *S. v. Lula P. Rhodes,* she being present in court though not represented by counsel at that time. The court "finding as a fact that the defendant had been living in open adultery with one John Russ, in violation of the terms of her suspended judgment, as to good behavior," ordered that the original sentence be imposed and execution issue. From this order the defendant gave notice of appeal to the Superior Court.

When the matter was reached in the Superior Court, the defendant, through her counsel, "entered a special appearance and duly moved the court to reverse the judgment of the recorder's court, or remand the cause to the recorder's court with direction that the court find the facts and certify same to the Superior Court, together with the evidence used as a basis for such findings." Motion denied, whereupon the judge of the Superior Court proceeded to hear evidence on whether the defendant had been of good behavior, and entered judgment: "The judgment of the recorder's court is affirmed."

Defendant appeals, assigning errors.

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

Hugh N. Pace, W. L. Farmer, Edgar L. Yow, and W. F. Jones for defendant.

STACY, C. J. The "recorder's court of New Hanover County" was established in 1909 as a special court for the trial of petty misdemeanors, with the right of "any person convicted in said court" to appeal to the Superior Court of New Hanover County, and it is provided that "upon such appeal the trial in the Superior Court shall be *de novo.*" Ch. 398, Public Laws 1909; *S. v. Goff,* 205 N. C., 545, 172 S. E., 407. Subsequent amendments to the statute, investing said court with limited civil jurisdiction, etc., are not now material. Ch. 217, Public-Local Laws 1911; ch. 179, Public-Local Laws, Extra Session, 1920 (repealed by ch. 2, Public-Local Laws 1921); ch. 132, Public Laws 1923.

The appeal provided for in the original act creating said recorder's court is from the conviction and judgment entered thereon, and not from an order such as here challenged. *S. v. Tripp,* 168 N. C., 150, 83 S. E., 630. Hence, the Superior Court was without authority to entertain the "appeal," unless treated as return to writ of *certiorari. S. v. Tripp, supra.*

The judgment, therefore, affirming the judgment of the recorder's court will be stricken out and the cause remanded for further proceedings as to right and justice appertain and as the law provides.

In the subsequent proceedings, the following questions, upon which we make no present rulings, may arise:

1. Does the verdict mean more than guilty of simple assault? *S. v. Lassiter, post,* 251.

2. Is the suspended judgment, as rendered, valid? *S. v. Edwards,* 192 N. C., 321, 135 S. E., 37; *S. v. Schlichter,* 194 N. C., 277, 139 S. E., 448; *S. v. Tripp, supra; S. v. Everitt,* 164 N. C., 399, 79 S. E., 274; *S. v. Hilton,* 151 N. C., 687, 65 S. E., 1011; *S. v. McAfee,* 198 N. C., 507, 152 S. E., 391; *Myers v. Barnhardt,* 202 N. C., 49, 161 S. E., 715.

3. Had the defendant fully complied with the terms of said suspended judgment at the time of the last order? *S. v. Gooding,* 194 N. C., 271, 139 S. E., 436; *S. v. Hilton, supra.*

4. Was the defendant given an opportunity to be heard in open court on the alleged violation of the terms of the suspended judgment? *S. v. Smith,* 196 N. C., 438, 146 S. E., 73.

5. Was the order of execution warranted by the evidence? *S. v. Hardin,* 183 N. C., 815, 112 S. E., 593.

Error.

NORTH CAROLINA BANK AND TRUST COMPANY v. J. F. WILLIAMS ET AL.

(Filed 22 May, 1935.)

1. Limitation of Actions A d—

The ten-year statute of limitations, C. S., 437, applies to actions upon sealed instruments against the principals thereon, but not against the sureties.

2. Limitation of Actions C b—Assignee held not entitled to peremptory instruction, based upon resolution executed by principal and sureties to third person, that action on the instrument was not barred.

Where it appears that an action upon a sealed instrument was instituted more than three years after the accrual of the cause of the action, and plaintiff, the assignee of the instrument, relies on a resolution of the corporate principal and the individual sureties, executed to a third person less than three years prior to the institution of the action, which resolution stated that the parties to the instrument agreed to remain bound thereon, a peremptory instruction in favor of plaintiff assignee on the issue of the bar of the statute is error, certainly as to one or more of the sureties, it appearing that one surety did not sign the resolution, and that another did not sign it individually.

APPEAL by defendants from *Barnhill, J.*, at December Term, 1934, of DUPLIN.

Civil action to recover on indemnity bond given by the Bank of Rose Hill, as principal, and its directors, as sureties, to the Bank of Duplin, and assigned to the North Carolina Bank and Trust Company as collateral security.

Several defenses were interposed, including a plea of the three-year statute of limitations, which latter plea, being a plea in bar, was tried before a jury, and resulted in a directed verdict for plaintiff; whereupon the cause was referred to a referee under the Code.

From the trial before the jury on the plea in bar, the defendants appeal, assigning errors.

Bryan & Campbell and George R. Ward for plaintiffs.

R. D. Johnson, Beasley & Stevens, Oscar B. Turner, and Ward & Ward for defendants.

STACY, C. J. This is the same case that was before us on demurrer at the Fall Term, 1931, reported in 201 N. C., 464, 160 S. E., 484, opinion filed 14 October, 1931.

The present record is not in very satisfactory shape, but, as we understand it, the jury finds that the losses, if any, incurred by the Bank of Duplin in the liquidation of the assets of the Bank of Rose Hill were sustained prior to 20 April, 1928. This action was instituted 21 April, 1931.

The bond in suit was executed 15 July, 1926. It seems to have been assumed that it was under seal, both as to the principal and the sureties, but there is neither admission nor finding to this effect as to the sureties. *Welfare v. Thompson,* 83 N. C., 276; *Williams v. Turner, ante,* 202.

The ten-year statute, C. S., 437, applies to actions upon sealed instruments against the principals thereto, and not against the sureties. *Welfare v. Thompson, supra; Redmon v. Pippen,* 113 N. C., 92, 18 S. E., 50.

On 27 September, 1928, the Bank of Rose Hill and its board of directors, by resolution, requested the North Carolina Corporation Commission to proceed to take possession of its assets and liquidate the same under the banking laws of the State, and, in the same resolution the principal and sureties to the indemnity bond executed to the Bank of Duplin on 15 July, 1926, agreed "to remain bound and liable on the said indemnity bond until the Bank of Duplin shall have been reimbursed for the money advanced by it," etc. The defendant Maury Ward did not sign this resolution. Nor does J. C. Williams appear to have signed it individually.

The assignment to the plaintiff of the original bond was upheld as against a demurrer (201 N. C., 464), but whether the assignee can claim any benefit from this resolution was not presented or considered.

There was error in the peremptory instruction, certainly as to one or more of the defendants.

New trial.

JOE L. ATKINS, JR., v. H. N. STEED ET AL.

(Filed 22 May, 1935.)

Pleadings D b—Held: Demurrer for misjoinder of parties and causes should have been sustained in this case.

An action brought against the driver of an automobile alleging that such driver struck the car upon which plaintiff was riding on the running board, knocking plaintiff off the car to the highway, and against the driver of a second car alleging that while plaintiff was lying or sitting on the highway in an unconscious condition as the result of the first accident, the driver of the second car negligently hit plaintiff, resulting in further injuries, *is held* properly dismissed upon demurrer for misjoinder of parties and causes of action, since the complaint alleges two separate injuries caused by different parties.

APPEAL by defendants from *Clement, J.*, at December Term, 1934, of MOORE.

Civil action to recover damages for personal injuries.

The complaint alleges:

1. That on 30 August, 1934, about 8:15 p.m., Joe L. Atkins, Jr., was standing and riding on the left running board of an automobile traveling on Highway No. 75, near the town of Carthage, when the defendant H. N. Steed, driving a Chevrolet automobile in the opposite direction on said highway, negligently "drove said Chevrolet automobile against the left side of the automobile on which plaintiff was riding, thereby bruising and knocking the said Joe L. Atkins, Jr., off the running board of said automobile on the hard-surfaced highway several feet from the car on which he was riding."

2. That the defendant Gordon Brown was driving an automobile upon the highway just a short distance back of the car driven by H. N. Steed, and that "while the said Joe L. Atkins, Jr., was about the middle of said highway sitting or lying bleeding and in an unconscious condition from the blow which he had just previously received from the automobile of the defendant H. N. Steed," the said Gordon Brown negligently "drove his automobile onto and against the said Joe L. Atkins, Jr., with great force and violence, knocking, pushing, and dragging him over the hard-surfaced highway," etc.

3. That as a result of the "negligent acts of the defendants aforesaid," the plaintiff has been greatly injured, wherefore he prays, etc.

Separate demurrers interposed by the defendants on grounds of misjoinder of parties and causes of action. Demurrer overruled; exceptions. The defendants appeal, assigning errors.

M. G. Boyette for plaintiff.
U. L. Spence and W. D. Sabiston, Jr., for defendant Steed.
W. Duncan Matthews for defendant Brown.

STACY, C. J. The plaintiff has sued for two injuries, not one. He declares on different causes of action against different parties. He incorporates these in the same complaint. The pleading is bad as against a demurrer. *Lucas v. Bank,* 206 N. C., 909, 174 S. E., 301; *Grady v. Warren,* 201 N. C., 693, 161 S. E., 319; *Shuford v. Yarbrough,* 198 N. C., 5, 150 S. E., 618; *Bank v. Angelo,* 193 N. C., 576, 137 S. E., 705; *Rose v. Warehouse Co.,* 182 N. C., 107, 108 S. E., 389; *Roberts v. Mfg. Co.,* 181 N. C., 204, 106 S. E., 664.

Where dual misjoinders occur of both parties and causes of action, and a demurrer is accordingly interposed, the decisions are to the effect that the demurrer should be sustained and the action dismissed. *Lucas v. Bank, supra.*

The case of *Hodgin v. Public Service Corp.,* 179 N. C., 449, 102 S. E., 748, cited and relied upon by plaintiff, is not in point, or controlling, as no demurrer was interposed in that case, and the question now presented was not discussed.

Reversed.

FRANCES L. CARR v. FREDERIC L. CARR, JR., ADMINISTRATOR C. T. A. OF MATTHEW L. CARR, AND FRED L. CARR.

(Filed 22 May, 1935.)

Wills F b—Devisee held entitled to rents from land where at date of testator's death no crops had been planted.

At the date of testator's death certain contracts for the cultivation of his lands by tenants had been let, but no crop planted. *Held:* Testator's sole devisee is entitled to the rents from the lands for the year, the provisions of C. S., 54, that ungathered crops should belong to the executor or administrator not applying to crops not planted at the date of testator's or intestate's death.

CIVIL ACTION, before *Daniels, J.*, at February Term, 1935, of WILSON.

Matthew L. Carr died on 10 January, 1934, leaving a last will and testament in which he devised his real estate to his wife, the plaintiff in this action. The testator owned a one-fourth undivided interest in 2,200 acres of land in Greene County. During the year 1934 the farming operations on said land were conducted according to a long-standing agreement between the heirs at law of T. W. Carr, deceased father of Matthew L. Carr. At the time of the death of Matthew L. Carr, to wit, on 10 January, 1934, certain contracts had been made with tenants to cultivate the land for 1934, but no crops had been planted, very little land, if any, prepared for cultivation, and certainly no crop of any kind was in process of planting on 10 January, 1934. The portion of rents for the land for the year 1934 claimed by plaintiff is approximately $3,000 or $4,000, as she was the owner of a one-fourth undivided interest in the land by virtue of the will of her husband, Matthew L. Carr. The plaintiff instituted this action to recover her portion of said rents, but the defendants declined to pay the rents to her by virtue of the provisions of C. S., 54.

The trial judge was of the opinion, and so ruled, that the plaintiff was entitled to recover said rents, and from such judgment defendants appealed.

Connor & Hill for plaintiff.
Fred L. Carr, Jr., for defendants.

BROGDEN, J. Does C. S., 54, control the title to crops not planted at the time of the death of the testator or devisor?

The plaintiff, as the widow of the testator, became the owner of the land on 10 January, 1934. At that time no crops were planted. It is not necessary to debate the question as to when a crop is a crop. Manifestly, in the forum of common sense, it could not be a crop until the seed were in the soil. The statute uses the expression, "crops . . . remaining ungathered at his death," etc. An ungathered crop is certainly not an unplanted crop, and the court is of the opinion that the statute has no application to the cause of action set out in the complaint, and, therefore, the ruling of the trial judge was correct.

Affirmed.

W. P. DYER, JR., v. C. A. BRAY ET AL.

(Filed 22 May, 1935.)

Bills and Notes G a—Original note is not extinguished merely by execution of renewal note, and upon default holder may sue on original note.

Where a note is given in renewal of another note and not in payment thereof, the only effect of the transaction is to extend the time for payment, and the original note is not extinguished, and upon default, the payee may sue upon the original note, and in a suit on original notes in which the plaintiff introduces evidence of ownership, that the notes were due and unpaid, and that defendant executed same for value, and that the original notes were not paid by the renewal notes, defendant's motion as of nonsuit based solely upon the contention that plaintiff could declare only upon the renewal notes, should be overruled, plaintiff having made out a *prima facie* case. C. S., 3033, 3040.

APPEAL by plaintiff from *Sink, J.*, at January Term, 1935, of GUILFORD.

Civil action to recover balance alleged to be due on four promissory notes aggregating $19,000.

Plaintiff offered the notes in evidence; proved their execution by the defendants; showed that they were given for value; were presently due and unpaid, and adduced testimony to the effect that the plaintiff "is now the owner and holder of those notes"—the notes sued upon.

The defendants showed that the notes in suit had been renewed by the execution of other notes, and contended that plaintiff could only declare upon the renewal notes and not upon the original ones.

In reply, plaintiff offered the bank note teller, who testified: "The four notes, which I have identified as defendants' Exhibits 2, 3, 4, and 5, came into the bank as renewal notes of those other notes, but the original notes were not turned loose, they were still held. . . . The original notes were never surrendered; they were held."

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

M. F. Douglas and R. M. Robinson for plaintiff.
Walter Siler and Smith, Wharton & Hudgins for defendant Bray.

STACY, C. J. Where a note is given merely in renewal of another note and not in payment thereof, the effect is to extend the time for the payment of the debt without extinguishing or changing the character of the obligation, and, in case of default, the holder may sue upon the original instrument. *Bank v. Rosenstein,* 207 N. C., 529.

Speaking to the subject in *Grace v. Strickland,* 188 N. C., 369, 124 S. E., 856, *Adams, J.,* delivering the opinion of the Court, observed: "As applied to negotiable instruments, the word 'renewal,' or 'renewed,' signifies more than the substitution of one obligation for another. It means the substitution in place of one engagement of a new obligation on the same terms and conditions—that is, the reëstablishment of a particular contract for another period of time. *Kedy v. Petty,* 54 N. E. (Ind.), 798; *National Bank v. Fickett,* 50 S. E. (Ga.), 396; *Griffin v. Long,* 131 S. W. (Ark.), 672; *Hyman v. Devereux,* 63 N. C., 624; *Kidder v. McIlhenny,* 81 N. C., 123; *Bank v. Hall,* 174 N. C., 477. 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 plaintiff made out a *prima facie* case. C. S., 3033 and 3040; *Bank v. Rochamora,* 193 N. C., 1, 136 S. E., 259; *Mayers v. McRimmon,* 140 N. C., 640, 53 S. E., 447; *Tyson v. Joyner,* 139 N. C., 69, 51 S. E., 803.

It would seem, therefore, upon the record as presented, the question of liability was one for the jury. *Hunt v. Eure,* 189 N. C., 482, 127 S. E., 593.

There was error in dismissing the action as in case of nonsuit.

Reversed.

STATE v. B. A. CAUDLE.

(Filed 22 May, 1935.)

1. Criminal Law G r—

Evidence cannot be held competent as corroborative of defendant's testimony when such evidence is offered before defendant takes the stand in his own behalf.

2. Criminal Law I g—

It is incumbent upon the appellant, if he desires more specific instruction on any point, or a more detailed and complete statement of his contentions, to make request therefor, and where the charge of the court is sufficiently full and complete to meet the requirements of C. S., 564, any omission will not be held for reversible error in the absence of such request calling the attention of the court to the desired instructions.

3. Criminal Law I k—

A general verdict of guilty upon a bill of indictment containing several counts, charging offenses of the same grade, carries with it a verdict of guilty on each count, and will support a judgment upon any valid count in the bill.

APPEAL from *Clement, J.*, at November Term, 1934, of STANLY. Affirmed.

The appellant B. A. Caudle was tried upon a two-count bill of indictment charging him and Noah Bennett and Tom Taylor with (1) larceny of pipe, pump, and gasoline engine, of value of more than $20.00, the property of the Hardaway Contracting Company, and (2) feloniously receiving said stolen property, knowing it to have been stolen.

The jury returned the following verdict: "That the said Noah Bennett is not guilty, and the said B. A. Caudle and Tom Taylor are each guilty, in the manner and form as charged in the bill of indictment."

From judgment of imprisonment pronounced upon the verdict, the defendant B. A. Caudle appealed, assigning error.

Attorney-General Seawell and Assistant Attorney-General Aiken for the State, appellee.

B. M. Covington for defendant, appellant.

SCHENCK, J. The appellant's first exception is to the court's refusal to allow one Goodman to testify that he had employed the defendant to try to discover or locate a magneto that was stolen from him. We fail to see the relevancy of this evidence to the issue involved. It could not have been considered as corroborative of the defendant's testimony, since it was offered before the defendant took the stand as a witness in his own behalf.

We have examined the defendant's several exceptions to the charge and find no reversible error. If the defendant desired more specific instructions he should have made request therefor. "It is a well understood rule of practice, upon appeals, reasserted time and again by this Court, that error cannot be assigned and become the subject of review in an omission or neglect to give specific instruction, even when proper in itself, unless asked, and thus called to the attention of the judge, in order that he may rule thereon. This is just to the court and opposing counsel, and indispensable to a fair trial and to prevent surprise." *S. v. Bailey,* 100 N. C., 528.

There was ample evidence in this case to sustain a verdict of guilty of larceny, and the charge as it relates to that count, in the absence of requests for more specific instructions or a more detailed and complete statement of the contentions of the defendant, meets the requirements

of the statute, C. S., 564, and the practice of our courts. The jury returned a general verdict of guilty, and such verdict is imputed to the first count, and the judgment must be sustained. It is said in *S. v. Toole,* 106 N. C., 736, "When there are several counts in the bill, and there is a general verdict of guilty (or not guilty), that is a verdict, as to each of the counts, of guilty (or not guilty, as the case may be). If it is a general verdict of not guilty, the defendant is entitled to his discharge. If it is a general verdict of guilty upon an indictment containing several counts, charging offenses of the same grade, and punishable alike, the verdict upon any one, if valid, supports the judgment, and it is immaterial that the verdict as to the other counts is not good, either by reason of defective counts or by the admission of incompetent evidence, or giving objectionable instructions as to such other counts, provided the errors complained of do not affect the valid verdict rendered on this count." See, also, *S. v. Cross,* 106 N. C., 650, and cases there cited.

Affirmed.

STATE v. JOE LASSITER.

(Filed 22 May, 1935.)

Intoxicating Liquor B c—Verdict of "Guilty of possession" held insufficient to support judgment where defendant contends possession was lawful.

Where, in a prosecution for the illegal possession of intoxicating liquor, defendant contends that the small quantity of liquor found in his home was for the exclusive use of himself and family, a verdict of "Guilty of possession," without reference to the count charging possession against the form of the statute, is insufficient to support a judgment, since such verdict is entirely consistent with defendant's contention that his possession was lawful.

APPEAL by defendant from *Clement, J.,* at August Term, 1934, of MOORE.

Criminal prosecution, tried upon warrant charging the defendant, in one count, with having and possessing a quantity of intoxicating liquor for the purpose of sale, and, in a second count, with having and possessing a quantity of intoxicating liquor against the form of the statute in such case made and provided, etc.

The State's evidence is to the effect that on 7 April, 1934, an officer went to the home of the defendant with a search warrant and was shown to the ice-box where he found about three pints of whiskey in a fruit jar. It was aged liquor, charred, colored.

Defendant testified: I told the officer I had about three pints of whiskey in the ice-box for my own use. I did not have it there for the purpose of sale. It was for my own use and my family.

Verdict: "Guilty of possession."

Judgment: Six months on the roads.

Defendant appeals, assigning errors.

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

W. R. Clegg for defendant.

STACY, C. J. It may be doubted whether the evidence is sufficient to warrant a conviction under the decisions in *S. v. Hege,* 194 N. C., 526, 140 S. E., 80, and *S. v. Mull,* 193 N. C., 668, 137 S. E., 866. But, however this may be, the verdict is not sufficient to support a judgment. *S. v. Barbee,* 197 N. C., 248, 148 S. E., 249. It neither alludes to the warrant nor uses language to show a conviction of the offense charged therein. *S. v. Shew,* 194 N. C., 690, 140 S. E., 621. It is entirely consistent with the defendant's contention that the possession was lawful. *S. v. Mull, supra; S. v. Hammond,* 188 N. C., 602, 125 S. E., 402.

Had the verdict been "guilty of possession as charged in the second count," or simply "guilty as charged in the second count," the situation would have been different, but when the jury undertakes to spell out its verdict without specific reference to the charge, as in the instant case, it is essential that the spelling be correct. *S. v. Parker,* 152 N. C., 790, 67 S. E., 35.

Venire de novo.

O. A. EDWARDS ET AL. v. J. B. PERRY.

(Filed 22 May, 1935.)

1. **Appeal and Error C a—Computation of time for filing case on appeal when the court leaves the bench before the end of the term.**

   When the trial court leaves the bench Friday preceding the last day of the term, stating he would not adjourn court, but would let the term expire by limitation, and no further business is transacted by the court at the term, the time for filing cases on appeals taken at the term will be computed from the Friday the court left the bench and not the Saturday following.

2. **Same—Motion to strike out purported statement of case for failure to file same within time fixed held properly allowed.**

   Where appellant is one day late in filing his statement of case on appeal, although the case would have been filed within the time allowed except for the fact that the court left the bench one day before the expiration

of the term, appellee's motion in the trial court to strike out the purported statement of case on appeal, because not filed within the time fixed, is properly allowed, though the circumstances may have justified an application for writ of *certiorari.*

3. **Appeal and Error H a—Failure to file statement of case on appeal within time fixed does not entitle appellee to dismissal of appeal.**

Where appellant's statement of case on appeal is properly stricken out for appellant's failure to file same within the time fixed, appellee is not entitled to a dismissal of the appeal, and appellant may prosecute the appeal, although it is the usual practice in such circumstances to affirm the judgment, unless error appears upon the face of the record.

APPEAL by defendant from *Frizzelle, J.*, 6 March, 1935. From WAKE.

Motion by plaintiffs to affirm judgment.

The case was tried at the Second October Term, 1934, which resulted in verdict for plaintiffs. Motion by defendant to set aside verdict was by consent continued to be heard at the Second November Term, 1934. The motion was denied and judgment signed at this latter term, from which the defendant gave notice of appeal: "Notice of appeal waived. . . . 45 days allowed to serve case on appeal," etc.

The said Second November Term was a two-weeks term, beginning 26 November, and on Friday of the second week, 7 December, the judge left the bench, stating that he would not adjourn court, but would let the term expire by limitation, and no further business was transacted by the court at this term.

On the morning of 22 January, 1935, counsel for appellant went to the office of counsel for appellees, both being residents of the town of Wake Forest, and requested an additional extension of time within which to serve statement of case on appeal. "After some discussion, Mr. J. G. Mills stated to Dr. Gulley that Mr. F. D. Flowers was leading counsel for appellee, and that he could not extend the time fixed by the court unless Mr. Flowers consented to it. That he would go see Mr. Flowers and ascertain his wishes in the matter; that upon visiting the office of Mr. Flowers it was discovered that Mr. Flowers was in Rochester, N. Y., which fact was reported by Mr. Mills to Dr. Gulley."

Counsel for appellant thereupon prepared and served his statement of case before the end of that day, 22 January, 1935.

Plaintiffs moved before the trial court to strike out appellant's statement of case on appeal, because not served within the time fixed, which motion was allowed, the court finding that there had been no agreement of extension or waiver of the time prescribed, and defendant appeals from this ruling.

E. D. Flowers and J. G. Mills for plaintiffs.
Gulley & Gulley for defendant.

STACY, C. J. Counsel for both sides were evidently under the impression that 22 January, 1935, was the last day, prescribed by the court, for the service of appellant's statement of case on appeal. They dealt with the matter on that day upon this assumption. The discovery, subsequently made perhaps, that the judge left the bench on Friday, instead of Saturday, of the second week of the term, disclosed 21 January as the last day for the service of appellant's case. *Hardee v. Timberlake,* 159 N. C., 552, 75 S. E., 799; *May v. Ins. Co.,* 172 N. C., 795, 90 S. E., 890; *Guano Co. v. Hicks,* 120 N. C., 29, 26 S. E., 650; *Delafield v. Const. Co.,* 115 N. C., 21, 20 S. E., 167. Hence, the order striking out the purported statement of case on appeal is supported by the decision in *Hicks v. Westbrook,* 121 N. C., 131, 28 S. E., 188.

The circumstances may have justified the appellant in applying for a writ of *certiorari* to bring up his case, but this was not done. *Smith v. Smith,* 199 N. C., 463, 154 S. E., 737; *Roberts v. Bus Co.,* 198 N. C., 779, 153 S. E., 398.

There being no case on appeal, legally settled, does not, however, entitle the appellee to have the appeal dismissed. *Roberts v. Bus Co., supra. Non constat* that error may not appear on the face of the record proper. *Wallace v. Salisbury,* 147 N. C., 58, 60 S. E., 713. For this reason, the appellant is permitted to pursue the appeal, even after his right to a "case on appeal" has been lost. *Roberts v. Bus Co., supra.* In such case, however, unless error appear on the face of the record proper, it is the usual practice to affirm the judgment on motion of appellee. *McNeill v. R. R.,* 117 N. C., 642, 23 S. E., 268.

The same parties were before us on another point in *Edwards v. Perry,* 206 N. C., 474.

Affirmed.

RUTH HATCHER REYNOLDS v. W. N. REYNOLDS II, ANNIE D. TOMPKINS, COMMITTEE FOR W. N. REYNOLDS II; WACHOVIA BANK AND TRUST COMPANY, TRUSTEE; HARDIN W. REYNOLDS, LOUISE REYNOLDS, MARY REBECCA REYNOLDS, AND ANNIE D. TOMPKINS.

(Filed 22 May, 1935.)

1. **Husband and Wife C d: Insane Persons D b: Trusts G b—Wife of insane beneficiary held entitled to support out of income from trust estate.**

Where the beneficiary of a trust agreement who receives a fixed income therefrom becomes insane, and such income substantially exceeds the needs of the beneficiary in providing expert medical attention and care and maintenance, the wife of such beneficiary who is otherwise without means has the right to support and maintenance from the beneficiary's income from the trust estate.

2. Trusts G b—Approval of family agreement for allotment of income to wife of insane beneficiary upheld under facts of this case.

In this case the wife of an insane beneficiary receiving an income from a trust estate created by the beneficiary's father, brought action to have allotted to her one-third of her husband's income from the estate. The trustee and all persons having an interest in the trust estate were made parties, the minors and persons not *in esse* being represented by a guardian *ad litem*, and the insane beneficiary being represented by his committee duly appointed and by a guardian *ad litem*. The parties submitted an agreement for the approval of the court which provided that certain assets of the trust estate be set apart and that the wife of the insane beneficiary receive a stipulated monthly income therefrom for her permanent support and maintenance, and relinquish all claims against her husband. The court, after judicial investigation, found that the beneficiary is incurably insane, that the agreement was fair and just, and that the wife of the beneficiary would receive therefrom less than she possibly might be entitled to in the absence of such agreement, and that the agreement was to the best interest of all the parties, and approved the agreement, retaining the cause for further orders. *Held:* Under the facts and circumstances of the case, the Superior Court properly approved the agreement under its inherent equitable jurisdiction.

APPEAL by defendants from *Pless, J.*, at January Term, 1935, of FORSYTH. Affirmed.

The following judgment was rendered in the court below: "This cause coming on to be heard before the undersigned judge of the Superior Court at the 7 January, 1935, Term of the Superior Court of Forsyth County, and being heard by the court upon the pleadings read as affidavits, upon oral evidence, and upon other affidavits submitted and read to the court, and the court having heard the arguments of counsel upon the issues of law arising, makes the following findings of fact and conclusions of law: That the plaintiff Ruth Hatcher Reynolds and the defendant W. N. Reynolds II were duly married in Washington, D. C., on 8 August, 1932, and lived together as husband and wife until the latter part of May, 1933. That during the month of May, 1933, the mind of the defendant W. N. Reynolds II became so affected that it was impossible for the plaintiff to live with him, and that since that date she has been compelled, by reason of his mental condition, to live separate and apart from her said husband. That at about the time of the separation of the plaintiff and the defendant W. N. Reynolds II, it was necessary to place him in institutions for treatment, where the physicians pronounced his ailment as dementia præcox; that during the greater part of the time since May, 1933, the defendant W. N. Reynolds II has been at Craig House at Beacon, in the State of New York, said Craig House being an institution for the treatment of persons with mental diseases. That prior to that time the defendant was confined for a time in Tucker Sanitarium in Richmond, Virginia. That all of the

physicians that have had charge of the said W. N. Reynolds II agreed that his disease is dementia præcox, and that it is impossible for his mental condition to improve. The court, therefore, finds as a fact that since May, 1933, the defendant W. N. Reynolds II has been suffering from dementia præcox, that he is still in that condition, and that the condition is incurable. That the defendant W. N. Reynolds II was domiciled, at the date that he became incompetent, within the State of Virginia, and that his domicile is still in that state; that at proceedings duly held in the Circuit Court of Patrick County, on 4 September, 1934, he was duly adjudicated insane, the court hearing evidence, and finding the said W. N. Reynolds II insane; that the defendant Annie D. Tompkins, mother of W. N. Reynolds II, was appointed by the said Circuit Court of Patrick County committee for W. N. Reynolds II, both for his person and his property, and that she has acted continuously since the said proceedings and is now acting as committee for W. N. Reynolds II in the State of Virginia. That the plaintiff was born on 26 August, 1908, and is in good health; that the defendant W. N. Reynolds II was born on 8 July, 1910, and that his physical condition is good; that the expectancy of continued life of both the plaintiff and the defendant W. N. Reynolds II is more than 38 years from the date of this hearing, and the court finds as a fact, considering the health, constitution, and habits of both the plaintiff and the defendant W. N. Reynolds II, the expectation of continued life of both of them will extend far beyond 23 November, 1941. That the plaintiff is without property and has no means of support other than such allowances as the court may make to her out of the property of her husband.

"That on or about 5 August, 1922, Harbour H. Reynolds, the father of the defendant W. N. Reynolds II, executed and delivered to the defendant Wachovia Bank and Trust Company, as trustee, two certain trust agreements conveying to the said trustee upon the trusts therein set out certain personal property consisting primarily of stocks in the R. J. Reynolds Tobacco Company, a corporation of the State of New Jersey, but having its principal business office and manufacturing plants in Winston-Salem, Forsyth County, North Carolina; that the Wachovia Bank and Trust Company, trustee, accepted the said trusts and has held the property conveyed to it by the said trust agreements, and has acted as trustee thereunder and is still acting as such trustee at the date of this hearing.

"That of the said trust agreements the following provisions defining the duties of the trustee and the rights of the beneficiaries are respectively as follows: '(1) To keep the principal of the trust estate invested in high-grade securities, including bonds of the United States or any state or political subdivision thereof, or bonds and notes secured by first

mortgages on real estate, or such stocks and bonds as shall be approved from time to time by the trust committee of the said trustee. The trustee shall have power to collect, sell, invest, reinvest, manage, and control in such manner as it shall deem best any of the property so held by it in trust. (2) To collect, receive, and receipt for all income, gains, and profits from and upon the property held in trust, and after deducting all taxes, fees, expenses, and commissions paid or incurred by the trustee in the administration and preservation of the trust estate, apply or pay over the said net income in the manner hereinafter provided: (a) To pay *one-fourth of the net income from and upon the property* held in trust in equal monthly or quarterly installments to my wife, Annie Dobbins Reynolds, during her lifetime. To pay so much as may be necessary and required for the proper support and education of my children, of the remaining net income derived from the property held in trust to the grantor during his lifetime as guardian for said children. As and when my children arrive at the age of twenty-one, to pay over so much of the net income of their share of the property held in trust as is required for their proper support and education. Any part of the net income not so paid to such children shall be invested and added to the principal of their shares. When my youngest child shall arrive at the age of twenty-seven, or if he or she shall die prior to arriving at that age, then at the time he or she would have become twenty-seven, to pay over *to my children then living, the child or children of any child that* may then be dead to represent their parent, three-fourths in value of the property held in trust, share and share alike, discharged of this trust. Upon the death of my wife, her share, a one-fourth interest in the property held in trust, shall be added to the share of the children, and either the income or the principal distributed to said children in accordance with the terms set forth.'

" '(1) To keep the principal of the trust estate invested in high-grade securities, including bonds of the United States or any state or political subdivision thereof, or bonds and notes secured by first mortgages on real estate, or such stocks and bonds as shall be approved from time to time by the trust committee of the said trustee. The trustee shall have power to collect, sell, invest, reinvest, manage, and control in such manner as it shall deem best any of the property so held by it in trust: *Provided, however,* that during the lifetime of the grantor there shall be no sales or disposition of the stocks, bonds, and securities now delivered to the trustee, and which is the subject-matter of this trust agreement, except by and with the written consent of the grantor. (2) To collect, receive, and receipt for all income, gains, and profits from and upon the property held in trust, and after deducting all taxes, fees, expenses, and commissions paid or incurred by the trustee in the administration

and preservation of the trust estate, apply or pay over the said net income in the manner hereinafter provided: (a) To pay the net income from and upon the property held in trust to the grantor during his lifetime in monthly or quarterly payments, at his option. Upon the death of the grantor, the trustee shall divide the property held in trust into a sufficient number of equal shares so as to give each child then living a share, or, if any of my children shall have died leaving issue, such issue to stand in the place of the deceased parent, and my wife, if then living, to be counted as a child and have a share allotted for her benefit, as hereinafter provided. That the net income from the share allotted for the benefit of my wife shall be paid to her during her lifetime, upon her death such share to be equally distributed for the benefit of my children, the income and principal therefrom to be distributed to them as herein provided. To pay over to each child, or his or her representative, so much of the net income from his or her share as may be required for his or her support and education, the remainder of the net income received by the trustee on the share or shares of any of the children to be added to the principal of such share and invested for the benefit of same. When my youngest child surviving me at my death shall have reached the age of twenty-seven years old, then the principal constituting the share or shares of the several children held in trust shall be paid over and delivered to such child or children by the trustee, fully discharged of the trust, the child or children of any deceased child to receive the share that his or her parent would have received if then living.'

"That the value of the property held in trust under the two several trust agreements by the Wachovia Bank and Trust Company, trustee, as of the date of the hearing in this cause is approximately $945,393.55, from which the present annual income which the trustee in its discretion may allot to the defendant W. N. Reynolds II is approximately $22,000 per year, of which it is now expending for him alone approximately $10,000 to $12,000 per year; that upon the death of the defendant Annie D. Tompkins the income of the said trust estates which may be allotted to the defendant W. N. Reynolds II will be increased to the extent of the income of her shares of the trust estates, and if all of the other beneficiaries of the said trust estates should die except the defendant W. N. Reynolds II, the allowances which may be made to him will be greatly increased as provided for in the trust instruments, and the trustee would have the power to allot such income to him.

"That at his death the said Harbour H. Reynolds was survived by his widow, Annie D. Reynolds, who has since remarried and is the defendant Annie D. Tompkins; by his son Hardin W. Reynolds; by his son, the defendant W. N. Reynolds II; and by a daughter, Lucy Ruth Reynolds, who is now dead, and left no issue. The defendant Hardin W. Reynolds

is married and his wife is now living; there are now two children of Hardin W. Reynolds, Louise Reynolds, and Mary Rebecca Reynolds, ages six and two years, respectively, and there is possibility of further issue. There is no issue of the marriage of the plaintiff and the defendant W. N. Reynolds II. Lucy Ruth Reynolds, daughter of Harbour H. Reynolds, was born on 23 November, 1914, and would have arrived at the age of 27 years on 23 November, 1941, on which date the interests in the two trust estates will vest both in title and possession, except as to the interest of the defendant Annie D. Tompkins, which does not vest in title or possession, but which consists of the right to receive income during her life. At her death the share set aside for her becomes a part of the other interests as provided in the trust agreements.

"That the defendants W. N. Reynolds II, Annie D. Tompkins, committee for W. N. Reynolds II, Wachovia Bank and Trust Company, trustee, Hardin W. Reynolds, Louise Reynolds, Mary Rebecca Reynolds, and Annie D. Tompkins, have been duly served with summons in this cause, or have duly accepted the service of summons, and have been properly subjected to the jurisdiction of this court; that the defendant W. N. Reynolds II is duly represented in this cause both by the defendant Annie D. Tompkins, committee for W. N. Reynolds II, his domiciliary guardian, and by the defendant Harvey W. Lupton, who has been duly appointed guardian *ad litem* for the said W. N. Reynolds II. The said Harvey W. Lupton has also been duly appointed guardian *ad litem* for the minor defendants Louise Reynolds and Mary Rebecca Reynolds, and for any other persons now unborn who may be interested in the determination of this cause. All of the defendants, including the guardian *ad litem,* have filed answers herein.

"The plaintiff Ruth Hatcher Reynolds has been entitled, continuously, since May, 1933, and is still entitled to support and maintenance out of the property of her husband, and particularly to proper allowances out of any amounts allotted to or for the benefit of W. N. Reynolds II, by the Wachovia Bank and Trust Company, as trustee, out of the two trust estates created by his father. The plaintiff, through her counsel, has presented argument to the effect that the trustee should be required to allot the entire share of the income to which the defendant W. N. Reynolds II might have been entitled from and after May, 1933, to him, and that she should be allowed a fair share thereof, not less than one-third of said income from and after May, 1933. This position has been disputed both by the trustee and the other defendants. The plaintiff has also contended, through her counsel, that from the date of this hearing she is entitled to have allotted to her for her support and maintenance one-third of said income. It is the desire of all of the parties, as shown by the pleadings and as argued to the court, to avoid any con-

test upon the various contentions of the parties, and prior to the commencement of this action, and subsequent thereto, the parties have considered the execution of an agreement, subject to the approval and direction of the court, which will avoid any further litigation between the parties, which agreement is attached to the complaint, and is also attached to and made a part of this judgment. This agreement has likewise been submitted by the defendant Annie D. Tompkins, committee of W. N. Reynolds II, to the Circuit Court of Patrick County, in the State of Virginia, in a proceeding duly instituted for that purpose, the said court being the court of general jurisdiction in the State of Virginia in the county of the domicile of the defendant W. N. Reynolds II, and the said court has approved the proposed agreement and has duly authorized the defendant Annie D. Tompkins, committee of W. N. Reynolds II, to accept the service of summons in this cause and to appear herein for the purpose of procuring the approval and execution of said agreement. Therefore, the court does not pass upon the various contentions of the parties as to the legal rights of the plaintiff and the several defendants, but has considered their contentions and is of the opinion that they have been presented in good faith, and that they are sufficiently doubtful to justify the court in passing upon and approving the settlement proposed. If the plaintiff Ruth Hatcher Reynolds is correct in her contentions, and the defendant W. N. Reynolds II lives during his expectancy, the plaintiff Ruth Hatcher Reynolds would eventually receive in payments from the income of the said trust estates an amount far in excess of the value of the *corpus* of the trust fund proposed to be set aside for her benefit as provided in said trust agreement. The court is of the opinion that it will be advantageous to the plaintiff, to the trust estates heretofore referred to, and to the several defendants to this cause, and especially to the defendant W. N. Reynolds II and to the minor defendants, and to any persons unborn who are represented by guardian *ad litem* herein, that the settlement proposed should be made, and finds as a fact that the settlement proposed is fair, just, and equitable, and that the said settlement will preserve the said trust estates and is in accord with the intention of the creator thereof.

"The defendant Wachovia Bank and Trust Company, trustee, since May, 1933, and up to the hearing of this cause, has already paid the actual and necessary expenses of the plaintiff, bills have been presented by her from time to time from the persons with whom said expenses have been incurred, amounting to the total sum of $9,664.10. The court has heard and considered evidence as to the amount and nature of these expenses, and adjudges them to have been fair and reasonable. It is proposed that the payment of these expenses be now approved, and the court finds that the payment thereof was fair, just, and reasonable, and

for the best interest of the said trust estates and of the several defendants to this cause and the persons whom they represent. By reason of the fact that all of the matters in controversy between the plaintiff and the defendants are being settled in this proceeding, plaintiff has made no claim for any allowances in excess of amounts heretofore paid for her, except that she does claim an allowance *pendente lite* from the date of the commencement of this action until the date of the final approval and execution of the agreement proposed. All of the parties have proposed that said allowance should be fixed at the sum of four hundred dollars ($400.00) a month, but the plaintiff reserves the right, which the court allows her to do, to claim an amount in excess of this allowance if the settlement herein be not finally approved.

"The court has also considered allowances to counsel for the plaintiff. Evidence has been heard by the court as to the time spent and services rendered, and upon the consideration thereof finds as a fact that the sum of $3,000 is fair, just, and reasonable, this allowance to include services rendered on any appeal from this judgment. It is hereby ordered, adjudged, and decreed: (1) That all of the parties be and they are hereby authorized and directed to execute and deliver the agreement attached to the complaint, a copy of which agreement is marked 'Exhibit A' and attached to this judgment and hereby made a part of this judgment and directed to be recorded upon the minutes of the court as a part thereof. (2) That upon the execution and delivery of the said agreement, the Wachovia Bank and Trust Company, trustee, is ordered and directed to set aside the securities described in Schedule A attached to said agreement and to enter upon and execute the trust provided in said agreement. (3) That the payment by the Wachovia Bank and Trust Company, trustee, prior to the hearing of this cause of the sum of $9,664.10, necessary expenses of the plaintiff Ruth Hatcher Reynolds, be and the same is hereby ratified, approved, and confirmed. (4) The Wachovia Bank and Trust Company, trustee, will pay to the plaintiff Ruth Hatcher Reynolds, as an allowance *pendente lite* the sum of $400.00 a month from 24 October, 1934, until the agreement hereby approved has been executed and delivered and the trust fund provided for therein has been actually set aside for the benefit of the plaintiff, as provided therein, to be paid out of the current income of the trust estates for the benefit of W. N. Reynolds II from and after the date on which said allowance begins, as provided herein.

"(5) That the Wachovia Bank and Trust Company, trustee, upon the execution and delivery of the said trust agreement and the actual setting aside of the trust fund provided for therein shall pay to the plaintiff's counsel the sum of $3,000 out of either the *corpus* or the income, in the discretion of the trustee, of either or both of the said

trust estates established by Harbour H. Reynolds for the benefit of W. N. Reynolds II and of which he is the first beneficiary. (6) The costs of this action shall be paid by the Wachovia Bank and Trust Company, trustee, from the same source as the allowance provided for in paragraph 5 of the judgment. (7) This cause is retained for further orders. This 18 January, 1935, J. Will Pless, Jr., Judge presiding."

Exhibit A is as follows: "North Carolina—Forsyth County. This agreement, made this.........day of................, 193...., by and between Ruth Hatcher Reynolds, party of the first part, and W. N. Reynolds II, by..................., guardian *ad litem* of W. N. Reynolds II, and Annie D. Tompkins, committee of W. N. Reynolds II, and Wachovia Bank and Trust Company, trustee under two certain trust agreements, dated 5 August, 1922, executed by Harbour H. Reynolds and Wachovia Bank and Trust Company, Hardin W. Reynolds, Louise Reynolds, and Mary Rebecca Reynolds, by................., their guardian *ad litem,* and................., guardian *ad litem* for any persons unborn interested in said trusts, Witnesseth: That whereas, on the .... day of..................., 1934, a judgment of the Superior Court of Forsyth County, North Carolina, was entered in a certain civil action entitled '*Ruth Hatcher Reynolds v. W. N. Reynolds II et al.,*' which said judgment is recorded in Book No. .... of the minute docket of said court, on page ...., directing the execution of this agreement: Now, therefore, in consideration of the mutual covenants and conditions herein contained and in obedience to said judgment, it is hereby agreed: (1) That the Wachovia Bank and Trust Company shall set aside out of the funds held in trust by it for the benefit of W. N. Reynolds II under either one or both of the two certain trust agreements, dated 5 August, 1922, executed by Harbour H. Reynolds and Wachovia Bank and Trust Company, securities as shown on the paper marked Schedule A hereto attached and hereby made a part of this agreement, to be held by it upon the following trusts: (a) To keep the principal of the said funds invested in high-grade securities, including bonds of the United States or any state or political subdivision thereof, or bonds and notes secured by first mortgages on real estate, or such stocks and bonds as shall be approved from time to time by the trust committee of the said trustee. The trustee shall have power to collect, sell, invest, reinvest, manage, and control in such manner as it shall deem best any of the properties so held by it in trust. (b) To collect, receive, and receipt for all income, gains, and profits from and upon the property held in trust, and after deducting all taxes, fees, expenses, and commissions paid or incurred by the trustee in the administration and preservation of the trust estate, apply or pay over the said trust funds in the manner hereinafter provided: (1) To pay to Ruth Hatcher Reynolds from the date of the execution of this agreement until

23 November, 1941, if she shall live so long, the sum of $250 per month, whether the net income from said trust funds shall be sufficient for that amount or not, and from and after 23 November, 1941, to pay the entire net income from and upon the property held in trust under this agreement to Ruth Hatcher Reynolds in equal monthly or quarterly installments, as she shall elect, during her lifetime. In the event that any emergency shall arise which in the sole opinion of the trustee shall require the payment of any sum in excess of the annual income to or for the benefit of the said Ruth Hatcher Reynolds, the trustee shall have the power prior to 23 November, 1941, to use any surplus or accumulated income in said trust for her benefit, as in its judgment shall be necessary. In the event of such an emergency after 23 November, 1941, the trustee may use any part of the surplus or accumulated income or principal of said trust fund. If the said W. N. Reynolds II shall die prior to 23 November, 1941, at the death of Ruth Hatcher Reynolds to pay the entire trust fund to the Wachovia Bank and Trust Company, to be held, managed, and distributed by it in accordance with that agreement between Harbour H. Reynolds and Wachovia Bank and Trust Company, under date of 5 August, 1922, relating to his share in the estate of Walter R. Reynolds from which this trust has been created. If the said W. N. Reynolds II shall die after 23 November, 1941, at the death of Ruth Hatcher Reynolds to manage, control, and distribute said funds in such manner as she shall, by her last will and testament, executed in accordance with the laws of the State of North Carolina, appoint, and in default of such appointment, to such persons as shall be her next of kin under the laws of North Carolina. If, by reason of the death of all of the children of Harbour H. Reynolds and of all the issues of the children of Harbour H. Reynolds prior to 23 November, 1941, the trusts created by the two trust agreements between Harbour H. Reynolds and Wachovia Bank and Trust Company, trustee, under date of 5 August, 1922, shall terminate, the trust hereby created shall likewise terminate and the Wachovia Bank and Trust Company, trustee, shall pay over and deliver said trust funds to such persons as may then be entitled thereto: *Provided, however,* that if, upon the termination of said trusts prior to 23 November, 1941, any person who is a party to the action approving this contract, or any other person bound by the decree in said action, shall be entitled to receive property of said trust estates equal to, or in excess of, the property herein set aside for the benefit of Ruth Hatcher Reynolds, then this trust shall not terminate, and the property herein set aside shall be deducted from that to which such person or persons shall be entitled, in proportion to their respective interests. (2) As compensation for its services, the trustee shall retain annually 2½ per cent of the gross income of each year. (3) Ruth

Hatcher Reynolds does hereby release W. N. Reynolds II from any claim that she may now or at any time hereafter have for support and maintenance, and she does hereby further release the said Wachovia Bank and Trust Company, trustee, and the beneficiaries under the two trusts created by Harbour H. Reynolds, under date of 5 August, 1922, from any claim that she may have against them, or any of them, for the payment of any sum to which she may be entitled, or which she may claim as the wife of W. N. Reynolds II, this agreement to take effect upon the execution and delivery of this instrument and the delivery of the securities herein described to the Wachovia Bank and Trust Company, as trustee hereunder, and to continue so long as this agreement shall remain in full force and effect. In witness whereof the parties hereto have set their hands and seals, all as of the day and year first above written.

Shares		*Annual Gross Income*
712	R. J. Reynolds Tobacco Common 'B'	$2,136.00
$3,000 PV	City of Winston-Salem 5s, due 4/1/52	150.00
4,000 PV	State of N. C. 4s, due 4/1/68	160.00
7,000 PV	State of N. C. 5s, due 7/1/61	350.00
4,050 PV	U. S. Treasury 3s, due 6/15/48-46	121.50
5,650 PV	U. S. Treasury 3¼s, due 4/15/46-44	183.62
	Annual gross income	$3,101.12"

The defendants excepted and assigned error to the signing of the judgment and appealed to the Supreme Court.

Ratcliff, Hudson & Ferrell for plaintiff.
Manly, Hendren & Womble for Wachovia Bank and Trust Company, trustee.
John C. Wallace for all other defendants.

CLARKSON, J. The record discloses a distressing situation. The plaintiff was married to defendant W. N. Reynolds II on 8 August, 1932, and they lived together as husband and wife until the latter part of May, 1933. In May, 1933, the mind of W. N. Reynolds II became so affected that his wife, the plaintiff, was compelled by reason of his mental condition to live separate and apart from him. It was necessary to place him in an institution for treatment, as he had dementia præcox, and it is impossible for his condition to improve—it is incurable. In Virginia, his domicile, the court in that state adjudicated him insane. The plaintiff is penniless unless this Court makes an allowance out of

the property of her husband. The defendant Wachovia Bank and Trust Company, trustee, under two trust agreements, has a *corpus* of approximately $945,393.55 from which the trustee has a present annual income with which in its discretion it may allot to W. N. Reynolds II approximately $22,000 per year, and now spending for him some $10,000 to $12,000 a year. All parties necessary to the determination of the controversy have been properly subjected to the jurisdiction of this Court.

The questions presented: *First:* Has the wife of an insane beneficiary of trust agreement the right to support and maintenance from the income of the trust, when such income substantially exceeds the needs of the beneficiary, and the propriety of the expenditures made by the trustee for such purposes? This question must be answered in the affirmative.

Second: Confirmation of proposed agreement with the plaintiff providing permanently for her support and maintenance. Under the facts and circumstances of this case, the agreement must be confirmed.

Speaking as to the first question presented, *In re Latham,* 39 N. C., 231, it has been held that the wife and infant children, if he has any, of a lunatic and the lunatic are entitled to have a sufficient fund of the lunatic's property for maintenance set aside, before the Court makes an order for the payment of debts. It is held in *McLean v. Breece,* 113 N. C., 390, that the Court would not order payment of a lunatic's debts if it would deprive him or his family of maintenance. It is also held that allowances may be made for the support of the lunatic or his wife, upon the principle that the lunatic husband owed the legal duty of supporting and maintaining his wife. *Brooks v. Brooks,* 25 N. C., 389; *In re Hybart,* 119 N. C., 359; see C. S., 1665 and 1667; 59 A. L. R., pp. 653-4.

It was said in *Read v. Turner,* 200 N. C., 773 (778): "Where, however, adequate provision has been made for the support and maintenance of a lunatic and the dependent members of his family, out of his estate in the hands of his guardian, and there remains any part of said estate which is available for the payment of his creditors, such part of said estate should be disbursed by the guardian, under an order or judgment of the Superior Court, pro rata, among the creditors, where there are no priorities by virtue of liens or mortgages." *Anderson v. Anderson,* 183 N. C., 139 (144); *Holton v. Holton,* 186 N. C., 355.

It is well settled that a husband is bound to support his wife. In the present case the income from the husband's estate is ample to support himself and his wife. The fact that the husband is a lunatic does not prevent this Court of its general equity jurisdiction, when the facts are fully found as in this case, from granting the relief prayed for by plaintiff and rendering the judgment set forth in the record.

Speaking as to the second question presented: We think, under the facts and circumstances of this case and the inherent equitable jurisdiction of the Superior Court, that the proposed agreement with the plaintiff, providing permanently for her support and maintenance, was properly approved.

It appears from the record in this case that there has been an elaborate judicial investigation of the facts upon which the judgment in this case is based, and all the facts set forth. In the judgment is the following: "Therefore, the court does not pass upon the various contentions of the parties as to the legal rights of the plaintiff and the several defendants, but has considered their contentions, and is of the opinion that they have been presented in good faith, and that they are sufficiently doubtful to justify the court in passing upon and approving the settlement proposed. If the plaintiff Ruth Hatcher Reynolds is correct in her contentions, and the defendant W. N. Reynolds II lives during his expectancy, the plaintiff Ruth Hatcher Reynolds would eventually receive in payments from the income of the said trust estates an amount far in excess of the value of the *corpus* of the trust fund proposed to be set aside for her benefit, as provided in said trust agreement. The court is of the opinion that it will be advantageous to the plaintiff, to the trust estates heretofore referred to, and to the several defendants to this cause, and especially to the defendant W. N. Reynolds II and to the minor defendants, and to any persons unborn who are represented by guardian *ad litem* herein, that the settlement proposed should be made, and finds as a fact that the settlement proposed is fair, just, and equitable, and that the said settlement will preserve the said trust estates, and is in accord with the intention of the creator thereof." *Bank v. Alexander,* 188 N. C., 667; *Spencer v. McCleneghan,* 202 N. C., 662.

In the *Spencer case, supra,* at p. 671, speaking to the subject, is the following: "The policy of the law is to encourage settlement of family disputes, like the present, so as to promote peace, good will, and harmony among those connected by consanguinity or affinity. Equity favors amicable adjustments. In the present action the contract that was made was a compromise over the provisions of the will, based on the present deflation in prices and an adjustment of other differences. The court below found the facts at length with care, and rendered judgment that it was to the best interest of all that 'the terms and provisions of said contract . . . be accepted, ratified, and approved, and carried into effect.' It was further found as a fact 'that the parties to this proceeding are all properly before the court.' "

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

Affirmed.

BELK'S DEPARTMENT STORE OF NEW BERN, NORTH CAROLINA, INCORPORATED, v. GEORGE WASHINGTON FIRE INSURANCE COMPANY.

(Filed 22 May, 1935.)

1. Insurance E b—

An insurance contract, like any other contract, is based upon an offer and acceptance, and is an agreement between the parties supported by sufficient consideration.

2. Contracts B a—

Where a contract is not ambiguous, its construction is a matter of law for the court, and its plain and unambiguous terms may not be disregarded to relieve a party of a hard bargain.

3. Same—

In construing a contract, the construction placed thereon by the parties themselves will generally be adopted by the courts, and the attendant circumstances, the relationship of the parties, and the object of the agreement may be taken into consideration.

4. Insurance E a—Evidence held properly submitted to jury on question of agent's authority from insured to cancel policy and substitute another.

The evidence favorable to plaintiff insured tended to show that plaintiff told an insurance agent to insure plaintiff's stock of goods in a specified amount for one year; that in compliance therewith the agent issued three policies in the aggregate sum requested in three separate companies represented by him, and that the policies were accepted by insured, who paid the agent the premiums on the policies for one year; that thereafter, upon information from the Insurance Commissioner that one of the companies had become insolvent, the agent, without the knowledge of insured, canceled the policy in the insolvent company and issued in substitution therefor a policy in defendant company, which he also represented, and that insured received the policy in defendant company later on the same day of the fire causing the loss in suit; that the insured accepted the substituted policy and filed claim thereunder and elected not to file claim under the policy in the insolvent company. *Held:* The evidence was sufficient to be submitted to the jury on the question of the agent's authority from insured to issue the policy in defendant company in substitution of the policy in the insolvent company, and on the question of insured's ratification thereof, it appearing that the agent was told by insured to insure the stock of goods in the stipulated amount, and that the selection of the companies was left entirely with the agent.

5. Insurance C a—Evidence that agent issuing policy was authorized agent of defendant insurer at the time the policy was issued held properly submitted to jury.

The evidence in this case tended to show that an agent representing several fire insurance companies was given power of attorney by defendant insurer to issue policies for it, that defendant insurer gave the agent blank forms of policies signed by its officers and ready for issuance, that

the agent issued several policies, but was thereafter advised by defendant insurer not to issue any more policies for it until the agent's account was paid up to date, that the agent thereupon mailed insurer check for premiums for two of the four months past due, which check was cashed by insurer, and thereafter issued the policy in suit, and that insurer did not demand and take from the possession of the agent the blank forms of policies in its company until two days after the fire causing the loss in suit, and that insurer billed the agent for the premium on the very policy in suit three months after the fire. *Held:* The evidence was sufficient to be submitted to the jury on the question of whether the policy in suit was issued by a duly authorized agent of defendant insurer.

6. **Insurance K a—Knowledge of local agent issuing fire insurance policy held waiver of provisions of policy relating to other insurance.**

The knowledge of the local agent of a fire insurance company that at the time of issuing the policy in suit insured carried other insurance on the property *is held* a waiver of the provisions of the policy that the policy would be void unless all other insurance on the property was listed in the policy, although the local agent did not have knowledge of the amount of such other insurance, it appearing that the property was worth much more than the total amount of insurance thereon, and there being no semblance of bad faith or fraud.

7. **Insurance E a—Insurer's contention that another policy for which its policy was substituted had not been validly canceled held immaterial.**

An agent representing several fire insurance companies was requested by plaintiff to insure plaintiff's stock of goods in a specified sum for one year, and in compliance with the request the agent issued three policies in the aggregate sum requested in three separate companies. Therafter, upon information from the Insurance Commissioner that one of the companies had become insolvent, the agent canceled the policy in the insolvent company and issued a policy in defendant company in substitution thereof. Defendant company contended that it was not liable because the policy in the company which became insolvent had never been validly canceled. *Held:* Defendant's contention is immaterial, since liability under the policy canceled by the agent without knowledge of insured does not affect defendant insurer's liability under the policy in suit, and it appearing further that the agent canceled the policy in the insolvent company as insured's agent, and that insured ratified the cancellation, and that the cancellation was warranted by information from the Insurance Commissioner.

8. **Insurance C b—Cancellation of one policy and substituting therefor policy in defendant company by agent acting for benefit of insured held not inconsistent with agent's duties to defendant company.**

An agent representing several fire insurance companies issued three policies in separate companies insuring plaintiff's stock of goods in compliance with plaintiff's request that the goods be insured in that sum for one year. Before the expiration of the year the agent was informed by the Insurance Commissioner that one of the companies had become insolvent, and the agent canceled the policy in the insolvent company and issued in substitution therefor the policy in defendant company, which the agent also represented. *Held:* The agent's acts in canceling the policy

in the insolvent company and issuing the policy in defendant company, done for the benefit of insured, were not inconsistent with its duties to defendant company, and was not such dual agency as to taint the transaction.

9. Insurance E a—Failure to execute policy in full name of insured held not vital defect under the facts of this case.

The policy of fire insurance in suit was issued in the name of "Belk's Department Store" instead of "Belk's Department Stores of New Bern, North Carolina, Inc.," the full name of insured. In its answer insurer admitted plaintiff is a corporation, and did not set up any defense based upon the failure of the policy to state insured's full name. *Held:* The failure of the policy to state insured's full name is not fatal, the policy having been duly received through the mail by insured and having been intended for it, and if the defect had been set up in insurer's answer, insured could have set up mutual mistake and had its full name inserted in the policy.

10. Trial F c—

The refusal to submit issues tendered will not be held for error when the issues submitted by the court are determinative of the controversy, and every aspect sought to be presented by the issues tendered is covered by the court's charge on the issues submitted.

STACY, C. J., and BROGDEN, J., dissent.

APPEAL by defendant from *Hill, J.,* and a jury, at 4 December Special Term, 1933. From MECKLENBURG. No error.

This is an action brought by plaintiff against defendant to recover $5,000 on an alleged fire insurance policy issued by defendant to plaintiff. The issues submitted to the jury, and their answers thereto, are as follows: "(1) Did the plaintiff and defendant enter into the contract of insurance, as alleged in the complaint? A. 'Yes.' (2) If so, did the plaintiff, at the time of the issuance of such contract, have other and additional fire insurance outstanding on its stock of merchandise, as alleged in the answer? A. 'Yes' (by consent). (3) If so, did the defendant, at the time of making such contract, have knowledge and notice of the existence of other and additional fire insurance on said stock of goods, as alleged in the reply? A. 'Yes.' (4) What amount, if anything, is the plaintiff entitled to recover of the defendant? A. '$5,000, with interest from 1 March, 1932.'"

There was a judgment rendered by the court below in accordance with 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.

E. McA. Currie and Stewart & Bobbitt for plaintiff.

Smith, Wharton & Hudgins and Tillett, Tillett & Kennedy for defendant.

CLARKSON, J. At the close of plaintiff's evidence, and at the close of all 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. We think the vital question in this controversy: Was there a contract entered into between plaintiff and defendant in reference to the $5,000 policy of insurance for which plaintiff sues to recover from the defendant in this action? We think so. The court below on this aspect charged the jury correctly: "A contract of insurance is the same as any other contract. That is, in order to constitute a contract of insurance there must be an offer and an acceptance. A contract is an agreement between two or more persons upon sufficient consideration to do or to refrain from doing a particular act."

In *Overall Co. v. Holmes,* 186 N. C., 428 (431-2), a contract, citing numerous authorities, is defined as follows: "A contract is 'an agreement, upon sufficient consideration, to do or not to do a particular thing.' 2 Blackstone Com., p. 442. There is no contract unless the parties assent to the same thing in the same sense. A contract is the agreement of two minds—the coming together of two minds on a thing done or to be done. '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.'" *Jernigan v. Insurance Co.,* 202 N. C., 677 (679).

It is well settled that where the contract is not ambiguous, the construction is a matter of law for the courts to determine. Courts will generally adopt a party's construction of a contract. Attendant circumstances, party's relation and object in view should be considered, if necessary, in interpreting a written contract. Neither court nor jury may disregard a contract expressed in plain and unambiguous language. The courts' province is to construe, not make contracts for parties, and courts cannot relieve a party from a contract because it is a hard one. An agent can, under certain circumstances, contract for the principal.

Hoke, J., in *Powell v. Lumber Co.,* 168 N. C., p. 635, speaking to the subject, says: "A general agent is said to be one who is authorized to act for his principal in all matters concerning a particular business or employment of a particular nature. Tiffany on Agency, p. 191. And it is the recognized rule that such an agent may usually bind his principal as to all acts within the scope of his agency, including not only the authority actually conferred, but such as is usually 'confided to an agent employed to transact the business which is given him to do,' and it is held that, as to third persons, this real and apparent authority is one and the same, and may not be restricted by special or private in-

structions of the principal unless the limitations sought to be placed upon it are known to such persons or the act or power in question is of such an unusual character as to put a man of reasonable business prudence upon inquiry as to the existence of the particular authority claimed (citing authorities). The power of an agent, then, to bind his principal may include not only the authority actually conferred, but the authority implied as usual and necessary to the proper performance of the work entrusted to him, and it may be further extended by reason of acts indicating authority, which the principal has approved or knowingly, or at times, even negligently permitted the agent to do in the course of his employment," citing numerous authorities. *Bobbitt v. Land Co.,* 191 N. C., 323 (328); *Maxwell v. Distributing Co.,* 204 N. C., 309 (317-18); *Charleston and Western Carolina Railway Co. v. Robt. G. Lassiter & Co., a Corporation, et al.,* 207 N. C., 408. The record states the corporation in some places as Hagood Realty and Insurance Co., Inc., and also The Hagood Realty Co., Inc., we will call it the Hagood Realty Company.

About 3 o'clock in the morning of 9 December, 1931, the plaintiff's stock of goods in its store at New Bern, North Carolina, value at the time of the fire about $80,000, was practically totally destroyed; only a salvage of about $50.00. Including the $5,000, the amount the insurance companies carried on the stock was $35,000. This action is brought to recover on the $5,000 policy of insurance on the stock of goods which plaintiff contended it held in the defendant company. It may not be amiss to say that the fact of the fire cannot determine the controversy, it is the contract between the parties. The different aspects of evidence bearing on the contract suggest certain questions involved. Did the Hagood Realty Company, under the terms of the contract entered into between it and the plaintiff in March, 1931, have the authority to issue the policy of insurance in the defendant company, and did plaintiff ratify the transaction for which this action is instituted? We think so. The facts in evidence bearing on this aspect: The Hagood Realty Company, in March, 1931, was a going concern in New Bern, North Carolina, dealing in real estate and insurance business. B. F. Hagood was its president, W. Mac Jordan was the manager of plaintiff's store at New Bern, North Carolina, which opened for business about 10 March, 1931. It had a full stock of goods when the store was opened, and merchandise was coming in every day. Immediately after the store opened, Jordan was instructed by plaintiff to insure the stock of goods for approximately $35,000; he met Hagood about the middle of March, 1931. Jordan testified, in part: "Q. What conversation, if any, did you have with him with reference to covering this stock of goods with fire insurance? A. *I instructed Mr. Hagood that I wished him to insure*

us for $15,000; that I would leave the companies up to him; that I wanted to be fully insured for one year. Mr. Hagood was president of the Hagood Realty Company, which was engaged in real estate and insurance together. Q. Subsequent to this conversation you have mentioned, did the Hagood Realty Company deliver to you policy of fire insurance on Belk's stock there in New Bern? A. Yes. The amount of the policies delivered to me by the Hagood Realty Company was $15,000. I don't recall the names of the fire insurance companies that issued the policies." (Italics ours.)

The premiums were paid by plaintiff company to the Hagood Realty Company—policies for $5,000 each in the Great National, United Fireman, and Royal Exchange for one year were issued and turned over to plaintiff on the stock of goods. The Hagood Realty Company was agent for all these companies. Hagood corroborated Jordan: *"He told me to write $15,000 for one year.* He did not tell me what companies to write it in. Q. What was said, if anything, as to the companies? A. Nothing was mentioned about the companies, not by him. No, I did not mention anything about the companies. Q. After that conversation, what was done by you or by the Hagood Realty Company with reference to issuing fire insurance on this stock of goods? A. We wrote $15,000—three different policies. Q. Did you render a bill to the Belk Store for the premium on the three policies? A. Yes. Q. Was that bill paid? A. Yes."

On 8 April, 1931, the George Washington Fire Insurance Company, the defendant, appointed the Hagood Realty Company, agent, to write insurance for its company: "With full power, during the pleasure of the company, to receive proposals for insurance against loss or damage on property located in New Bern, North Carolina, and vicinity, *to receive premiums therefor, and to countersign and issue policies of insurance thereon, signed by the president and secretary of the said George Washington Fire Insurance Company,* and consent to transfers thereof, make endorsements thereon, and renew the same, subject to the rules and regulations of said company, and to such instructions as may from time to time be given by its officers, general or special agents."

Hagood testified: "After the delivery of the power of attorney to me, the defendant delivered into my possession certain of its policy forms. These were delivered during that month. In other words, the stuff came along about the same time. I think I received about twenty-five. Under that power of attorney the Hagood Realty Company issued policies of insurance on behalf of the George Washington Fire Insurance Company. Q. How many of these policies were issued prior to 1 December, 1931? A. I would say some thirty-odd."

On 5 December, 1931, the Hagood Realty Company had information that the Great National Insurance Company *was broke* (the State Insurance Commissioner had informed it of this fact). Hagood further testified: "Q. Now, please state what, if anything, was done by you or by the Hagood Realty Company concerning the cancellation of this $5,000 National policy? A. We canceled that on our books and issued $5,000 in the George Washington Fire Insurance Company. That was done on 5 December, 1931, and the George Washington policy was issued on the same date. This George Washington policy is the policy which we issued on 5 December, 1931. Mr. Hall issued the policy at my instructions. I saw him issue it. I know his handwriting. The name of Charles H. Hall appearing on this policy is his genuine signature." He was manager of the Insurance Department. The Hagood Realty Company canceled the Great National Insurance Company's policy and issued immediately a policy in the defendant company to plaintiff for $5,000, and wrote the following letter: "George Washington Fire Insurance Company, Greensboro, North Carolina. Hagood Realty Co., Inc., Agents, Mr. Mac Jordan, Mgr. Belk's Department Stores, New Bern, N. C. 5 December, 1931. Dear Sir: We enclose George Washington Policy No. 173160. This policy is to replace Great National Policy No. 2409, this is being done by order of the State Insurance Commissioner. Please return Great National policy No. 2409. Very truly yours, Hagood Realty Company, Chas. H. Hall, Insurance Department." The envelope bearing the following address: "Belk's Department Stores, New Bern, N. C., Mr. Mac Jordan, Mgr.," and bearing postmark as follows: "New Bern, N. C., Dec. 7, 1931, 10 P.M." The upper left-hand corner of the envelope is torn off so that no return address appears on the envelope. The right-hand end of the envelope is cut so that no stamp appears, although there are six black marks appearing to be the ends of a stamp cancellation mark. The contention of defendant was to the effect that no such transaction ever occurred at the time and in the way and manner as alleged by plaintiff. This was left to the jury under proper instructions by the court below. The fire occurred about 3 o'clock on Wednesday morning, 9 December, after the letter and policy were mailed to plaintiff, as contended by it. On the afternoon of 9 December, 1931, Jordan testified, in part: "Yes, the first time I saw this George Washington Fire Insurance policy was the afternoon of 9 December, after the fire. It was contained in the envelope that has been put in evidence. At the time the envelope came to me, it was unopened. Mr. Brooks and I opened it that afternoon. Mr. Brooks said he got it out of the post office. I imagine he got it out of the post office a few minutes before."

The Hagood Realty Company, on 9 December, 1931, gave full notice to defendant of the loss. H. A. McLaurin, auditor for plaintiff, testified in part: "As I remember, he brought back all policies that were with the papers. These included the George Washington Fire Insurance Policy and the Great National Insurance Policy. I had no conversation that I remember with either Mr. Hagood or Mr. Mac Jordan about these policies. I did not do anything about them except keep them in my desk or safe, where, in case the others were paid, I would return them to the companies when paid. I filed proof of loss with the George Washington Fire Insurance Company. We did not file proof of loss with the Great National. Q. Why did you not file one with the Great National? A. There were loss forms prepared and sent to us for the George Washington Fire Insurance Company for execution, to be signed by Mr. Belk. After I had these signed, they were returned to the proper parties and there was no proof of loss on the Great National policy. We elected not to file proof of loss with the Great National Fire Insurance Company."

The principle governing the facts here are fully set forth in 2 Couch Cyc. of Insurance Law, part of section 480 (pp. 1361-2-3-4): "If a party insures for another as principal, without the latter's prior authority or consent, the intended principal may, if the principal has not previously withdrawn from the contract, adopt and ratify the unauthorized act, in which case the ratification is equivalent to a prior authority, and this, according to the weight of authority, even after loss, or payment of the loss to the agent, in which case the agent receiving the money holds it for the owner's benefit, and notwithstanding the premium was not paid prior to loss, although the contrary also has been held, as to the latter point. The party ratifying must be fully apprised of his rights, and have full knowledge of all the material facts; otherwise, the confirmation cannot be held binding. Again, an insurance policy can only be ratified by the person on whose account it was intentionally made. And the ratification must be established, the mere fact that the contract is beneficial not being conclusive. However, a neglect on the part of the principal to disaffirm an agent's act, on receiving notice thereof from the agent, raises a presumption of a ratification of what the agent has done, although such notice, in order for subsequent silence to effect a ratification, must not be delayed until an election to approve or disapprove would be attended with no advantage to the principal. And although the insured cannot ratify in part and reject in part, but must adopt as a whole, or not at all, yet there may be a conditional ratification dependent upon a contingency. *Acceptance and retention by the insured of policies procured by its agent, as a substitute for others previously obtained in a company deemed unstable, ratified the agent's act*

and precludes recovery on the original policies." (Italics ours.) *Rose Inn Corp. v. National Union Fire Ins. Co. et al.* (N. Y.), 179 N. E. Rep., 256.

The defendant, at the conclusion of plaintiff's evidence, introduced as a witness, J. W. McAllister, who testified as follows: "On 23 November, 1931, I was president of the George Washington Fire Insurance Company. As president, on that date, I wrote the Hagood Realty Company a letter. This is a copy of it: 'George Washington Fire Insurance Company, Greensboro, North Carolina, 23 November, 1931, Hagood Realty Company, New Bern, North Carolina. Dear Sirs: Our Special Agent, Mr. Mowery, wrote you on November 16th, also wired you on November 21st in regard to payment of your balances due the George Washington Fire Insurance Company. As we have no reply to either of these communications, we are going to have to ask that you not write any more business in the George Washington until your account is brought up to date. If you cannot send us a check promptly in payment of these balances, we must ask you to cancel sufficient liability to clear the account. We are sorry indeed to have to take the above action, but we cannot afford to have our balances accumulate in this manner, nor can we afford to have our special agents make expensive trips to New Bern in order to collect these accounts. We trust that you will give this matter your immediate attention and let us have prompt reply. Very truly yours, President. JWMcA/W.'"

"Defendant offers in evidence paragraph No. 2 of the amendment to the answer, which is as follows: 'That at the time of the alleged issuance of the policy, which is the subject of this action, the plaintiff had outstanding upon its stock of merchandise insurance for the following amounts, in the following named companies, disregarding the policy in the Great National Fire Insurance Company referred to in the complaint: Northwestern Mutual Fire Insurance Company, $10,000; Piedmont Fire Insurance Company, $10,000; Royal Exchange Assurance Company, $5,000; Dixie Fire Insurance Company, $5,000.' Defendant also offered in evidence the paragraph of the reply admitting that the plaintiff had $25,000 of other insurance." On the first aspect, the plaintiff introduced evidence to the effect that at the time the Hagood Realty Company issued the policy in defendant's company to plaintiff, it had a power of attorney from defendant, giving authority, and the policies of insurance the company sent it from defendant were not recalled until after the fire.

Hagood testified: "Q. How many of these policies were issued prior to 1 December, 1931? A. I would say some thirty-odd. Someone asked me in person to return the policy forms. The request was made on 11 December, 1931, by Wakefield Mowery. I turned the forms over to

him and he gave me a receipt for them. I have the receipt here: 'George Washington Fire Insurance Company, Greensboro, North Carolina. Hagood Realty Co., Agents, New Bern, North Carolina, December 11, 1931. Received of Hagood Realty Co. of New Bern, North Carolina, George Washington Fire Insurance Company Policies Nos. 173161 to 173175 inclusively, and Nos. FT6702 to FT6725 inclusively. Wakefield Mowery, Spec. Agt., Wakefield Mowery.' "

After receiving the letter of 23 November, 1931, Hagood testified: "I sent them a check the next day and that relieved so I could go ahead again. . . . You see when I paid that check that relieved that. Yes, the check was in payment of my June and July account. The date of the check is 24 November. There is another check that paid the August and September bills. Here it is. This check of 24 November, $48.12, was in payment of the June and July account. Yes, at that time there was still unpaid the August and September accounts. The August account, $15.24, and September account, $2.84, so on 24 November, 1931, there was outstanding and unpaid, after I had sent the $48.12 and the $18.08 check representing the August and September balances. I sent a check for August and September balances on 9 December; yes, the paper which you show me is that check, and the amount is $18.08." The witness identified these two checks, one for $48.12 and the other for $18.08. Both of these checks were cashed by the defendant.

The policy issued in the George Washington Fire Insurance Company, the defendant, by the Hagood Realty Company to plaintiff, was numbered 173160—amount $5,000, rate 1.716, premium $21.45. On 11 March, 1932, the defendant sent a statement headed *"Account Current"* to agency at New Bern, North Carolina, Hagood Realty Company, Agent. In this statement, among some four other policies issued by the Hagood Realty Company for insurance in defendant company, is the premium for the very policy in litigation on which the defendant showed that the Hagood Realty Company owed its total in premiums, $39.22, on this statement is No. 173160, amount insured $5,000, gross premium 20 per cent, $21.45. With Hagood's testimony and this *"Account Current,"* the question of Hagood's agency was properly left to the jury. The *"Account Current"* was no routine matter, it was some evidence. It is easily distinguishable from the case of *Sellers v. Insurance Co.,* 205 N. C., 355. In that case the policy was forfeited under the terms of the contract. It is said at p. 357: "Mailing notice of the regular quarterly premium due 12 August, 1932, in compliance with the provisions of the statute, was but a routine matter, and did not have the effect of waiving the intervening forfeiture and reviving the policy." It was further in evidence that Hagood offered to pay the premium to the defendant after the fire, but Mowery, agent for defendant, refused to accept it.

In regard to the other aspect, Hagood testified: "Q. On cross-examination you mentioned the fact that you had not called on Belk Brothers for any premium in connection with the George Washington policy, will you explain why you didn't call on the plaintiff for any additional premium on account of the George Washington policy? A. Because they had already paid a year's premium. Q. Prior to 5 December, 1931, state whether you knew other fire insurance was outstanding on this stock of goods. A. Yes. I cannot name the policies they had that were outstanding when we wrote the George Washington policy. I didn't know, on 5 December, 1931, how much insurance they had. I knew they had other insurance, but I didn't know how much. The Hagood Realty Company and the George Washington Fire Insurance Company had no agreement as to the length of time within which the Hagood Realty Company could make settlement for premiums on policies."

The defendant contends that the suit policy is void because of concurrent insurance not noted thereon. We cannot so hold. The policy stated "it is understood and agreed that no insurance in addition is permitted to this policy unless the total insurance, including this policy, is entered in paragraph above." In *Short v. LaFayette Life Insurance Co.,* 194 N. C., 649 (650), quoting a wealth of authorities, speaking to the subject, we find: "In *Insurance Co. v. Grady,* 185 N. C., 348, 353: 'Another principle recognized in this jurisdiction and pertinent to the inquiry is that, in the absence of fraud or collusion 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 a direct stipulation to the contrary appears in the policy, or the application for the same." *Laughinghouse v. Insurance Co.,* 200 N. C., 434; *Colson v. Assurance Co.,* 207 N. C., 581.

Before the policy of 5 December, 1931, was issued to plaintiff in defendant company, the Hagood Realty Company knew that other insurance was on the plaintiff's goods. The amount was $35,000 and $15,000 of that sum issued through the Hagood Realty Company agency. The present policy being $5,000 and the loss was $80,000. The position of defendant is untenable from the facts and circumstances of this case. There was no semblance of bad faith in the matter. There was no over-insuring. The general knowledge of Hagood indicated that the goods insured were far in excess of the insurance on the property. *Midkiff v. Insurance Co.,* 197 N. C., 139 (142).

It is contended by defendant that the Great National Insurance policy is not validly canceled. If this was correct, we do not see how it concerns defendant. This is not an action between plaintiff and the Great National Fire Insurance Company. A policy was issued in de-

fendant's company to plaintiff, and plaintiff claims under that policy, not under the Great National policy, which, it is not disputed, *was broke,* and the Hagood Realty Company canceled it as its agent, and this was ratified by plaintiff, and Hagood Realty Company was warranted in cancelling same, acting on the information from the State Insurance Commissioner and to carry out its contract with plaintiff *"to be fully insured for one year."* We think the facts in this case are distinguishable from *Jernigan v. Insurance Co.,* 202 N. C., 677. In the *Jernigan case, supra,* at p. 680, it expressly says: "The foregoing cases and many others of like tenor fully recognize the right of the insured to ratify the action of the local agent in issuing the substituted policy, for the reason that both policies were obviously issued for his benefit. Nevertheless, in the case at bar, the insured stated that she 'was looking to the National Union Fire Insurance Company, to whom she had paid her premium, to pay the loss and damage which she had sustained.' The result is that the National Union policy, not having been properly canceled, was in full force at the time of the fire, and the local agent, without the knowledge or consent of the plaintiff, had no authority to issue the Yorkshire policy. Moreover, as the insured has not ratified the issuance of the Yorkshire policy, she is entitled to recover upon the first policy issued."

We do not think the conduct of Hagood Realty Company in this transaction was inconsistent with the duties which it owed to the companies, or such a dual agency that would taint the transaction. The agent did not assume incompatible or conflicting duties. The duties are such as are usually recognized in every-day transactions with insurance agencies. "There was no bad faith." The defendant contends that the policy was ineffective as a contract, as it was incomplete in material respects when mailed and received. We cannot see how defendant can complain; it contends that there was no valid contract of insurance in any respect. It also contends that the plaintiff's name is "Belk's Department Stores of New Bern, North Carolina, Incorporated." The assured named in the policy is the "Belk's Department Store." Defendant did not in its answer make any such contention. Plaintiff was a corporation, and this was admitted in defendant's answer. If the full name of the corporation is not set out in the policy, only "Belk's Department Store," the balance can be treated as surplusage, as the policy was received by the Belk's Department Store of New Bern, North Carolina, Incorporated, and intended for it. If defendant had set up this defense, the plaintiff could have answered and set up mutual mistake, and had the full name inserted in the policy. The contention comes too late.

We see no error in refusing the prayers for instruction tendered by defendants, nor any error in the charge of the court below. We think

the issues submitted by the court below determinative of the controversy and there was no error in not submitting to the jury the issues submitted by the defendant. The court below, in its charge to the jury on the issues submitted, covered every aspect set forth in the issues tendered by defendant. In the charge of the court below, the contentions of both sides were carefully and accurately given. It may not be amiss to say that in the many important legal questions involved in this controversy, the court below gave an unusually clear and accurate charge of the law applicable to the facts. The jury has found the issues for plaintiff and against defendant.

In the record we find no prejudicial or reversible error.

No error.

STACY, C. J., and BROGDEN, J., dissent.

R. T. McNAIR v. NORTH CAROLINA BOARD OF PHARMACY.

(Filed 22 May, 1935.)

Pharmacists A a—Pharmacist licensed by another state failing to pass examination, held not entitled to stand another examination upon application therefor filed after 1 July, 1933.

The provisions of ch. 206, Public Laws of 1933, amending N. C. Code, 6658, that a pharmacist licensed by another state, and who has had fifteen years continuous experience in North Carolina under the instruction of a licensed pharmacist next preceding his application, shall be permitted to stand the examination to practice pharmacy in this State upon application filed with the board prior to 1 July, 1933, does not entitle a person meeting the qualifications of the act and being of the required age to be permitted to stand the examination upon his application therefor filed after 1 July, 1933, although he had previously made other applications therefor and had been permitted to stand examinations of the board held prior to 1 July, 1933, and had failed to pass such examinations, the request filed after 1 July, 1933, for a "reëxamination" being in legal effect an application for an examination *de novo*, nor is this result affected by the fact that the board had permitted applicants who failed to pass the examination to stand a subsequent examination without filing a new application, and the issuance of a writ of *mandamus* directing the board to permit such applicant to stand the examination upon his application filed after 1 July, 1933, is error.

APPEAL by defendant from *Phillips, J.*, at January Term, 1935, of RICHMOND. Reversed.

This is an action for a writ of *mandamus* to be directed to the defendant North Carolina Board of Pharmacy, commanding said board to examine the plaintiff on his application for license to practice pharmacy in this State, as required by statute.

At the hearing of the action, judgment was rendered as follows:

"This cause coming on to be heard before his Honor, F. Donald Phillips, resident judge of the Thirteenth Judicial District, at the regular January Term, 1935, of the Superior Court of Richmond County, upon the application of the plaintiff for a writ of *mandamus* to require the defendant to allow the plaintiff to take an examination for license to practice pharmacy in the State of North Carolina, and being heard upon the pleadings, and the affidavits filed by the plaintiff, the court finds the facts, as follows:

"1. That this action was duly and properly instituted in the Superior Court of Richmond County on 20 December, 1934, and the summons, with a copy of the verified complaint, was duly served on the defendant on 21 December, 1934, and that the action and all parties thereto are properly before the court.

"2. That the plaintiff is a citizen and resident of Richmond County, State of North Carolina, and has been such all of his life, and is now thirty-three years of age.

"3. That the defendant the North Carolina Board of Pharmacy is a board of five persons, commissioned by the Governor of the State, and that it is their duty to examine applicants for license to practice pharmacy in said State.

"4. That at the 1933 session of the General Assembly of North Carolina an act was passed, known as chapter 206 of the Public Laws of said session, and is copied verbatim in paragraph 3 of the complaint herein.

"5. That the plaintiff was and is qualified under said chapter 206 of the Public Laws of North Carolina of the 1933 General Assembly to be admitted to take the examination by the said North Carolina Board of Pharmacy for license to practice pharmacy within the State of North Carolina, the plaintiff having previously been licensed to practice pharmacy in the State of South Carolina, and having had at least fifteen years of continuous experience in North Carolina under the instruction of a licensed pharmacist next preceding the filing of his application to stand the examination to practice pharmacy in North Carolina, as hereinafter set out.

"6. That the plaintiff filed an application with the said Board of Pharmacy on 3 June, 1933, to take the examination before the said board, which application was accepted by said board, and that during

the said month of June, 1933, the plaintiff took said examination, but failed to pass and be licensed as a pharmacist, according to the report of said board.

"7. That on 27 June, 1933, the plaintiff filed a request for a reexamination under his former application, and was permitted to and did take said reëxamination during the month of June, 1934, and that he again failed to pass the examination, according to the report of said board.

"8. That on 31 October, 1934, the plaintiff again requested the said Board of Pharmacy to allow him to take another examination under the aforesaid application, said request having been made in a letter to the secretary of said board, at which time the plaintiff forwarded to said board a check in payment of the examination fee, but that the secretary of said board returned the check to the plaintiff and notified the plaintiff that he would not be given a reëxamination; that, in addition to the request in writing to the secretary of said board, the plaintiff appeared in person before said Board of Pharmacy at Chapel Hill, N. C., on 19 November, 1934, and then and there requested and demanded that he be allowed to take said reëxamination, but the defendant refused to permit the plaintiff to take said reëxamination.

"9. That it is the custom and practice of the said Board of Pharmacy, according to its interpretation of the statutes of North Carolina, under and by virtue of which it is authorized, empowered, and directed to give examinations to applicants for license to practice pharmacy, to give as many examinations to an applicant, upon his filing one application, as the said applicant may desire, and that on said application blanks are printed spaces to be used for the record of grades of several examinations.

"10. That it is the custom and practice of the said Board of Pharmacy, according to its interpretation of said statutes, to require of an applicant who desires to be given a reëxamination only an additional fee of $10.00 for each reëxamination, any and all of said examinations to be given upon the original application.

"Upon the foregoing findings of fact, the court is of the opinion that it is the ministerial duty of the defendant to allow the plaintiff an opportunity to take the examination for which he has heretofore filed a request, upon the payment of a fee of $10.00 therefor, and such other examination or examinations as the plaintiff may desire to take upon the application heretofore filed, when and if he makes a request therefor, and pays or tenders the proper fee to said board, and the court is further of the opinion that the defendant, having heretofore accepted the application of the plaintiff for an examination for license to practice pharmacy in North Carolina, and having permitted the plaintiff to take two such examinations, the defendant is now estopped to set up the plea

that the plaintiff is not qualified to take said examination as set forth in paragraph 4 of its answer and, therefore, the defendant is hereby ordered and directed to permit the plaintiff to take the reëxamination which he has heretofore requested upon the payment of the fee of $10.00 to said board, and such other examinations as the plaintiff may request, upon his payment of the proper fees therefor."

To the foregoing judgment the defendant excepted and appealed to the Supreme Court, assigning as error the signing of the judgment.

W. G. Pittman and Varser, McIntyre & Henry for plaintiff.
F. O. Bowman and S. M. Gattis, Jr., for defendant.

CONNOR, J. It is provided by statute in this State that "if any person, not being licensed as a pharmacist or assistant pharmacist, shall compound, dispense, or sell at retail any drug, medicine, poison, or pharmaceutical preparation, either upon a physician's prescription or otherwise, and any person, being the owner or manager of a drug store, pharmacy, or other place of business, who shall cause or permit any one not licensed as a pharmacist or assistant pharmacist to dispense, sell at retail, or compound any drug, medicine, poison, or physician's prescription contrary to the provisions of this article, he shall be deemed guilty of a misdemeanor, and fined not less than twenty-five nor more than one hundred dollars." N. C. Code of 1931, sec. 6668.

Prior to the enactment of chapter 206, Public Laws of North Carolina, 1933, it was provided by statute that "every person who shall desire to be licensed as a pharmacist or assistant pharmacist shall file with the secretary of the Board of Pharmacy, an application, duly verified under oath, setting forth the name and age of the applicant, the place or places at which and the time he has spent in the study of the science and art of pharmacy, the experience in the compounding of physician's prescriptions which the applicant has had under the direction of a legally licensed pharmacist, and such applicant shall appear at a time and place designated by the Board of Pharmacy and submit to an examination as to his qualifications for registration as a licensed pharmacist or assistant pharmacist. The application referred to above shall be prepared and furnished by the Board of Pharmacy.

"In order to become licensed as a pharmacist, within the meaning of this article, an applicant shall be not less than twenty-one years of age, he shall present to the Board of Pharmacy satisfactory evidence that he has had four years experience in pharmacy under the instruction of a licensed pharmacist, and that he is a graduate of a reputable school or college of pharmacy, and he shall also pass a satisfactory examination by the Board of Pharmacy: *Provided, however,* that the actual time of

attendance at a reputable school or college of pharmacy, not to exceed two years, may be deducted from the time of experience required." N. C. Code of 1931, sec. 6658.

By chapter 206, Public Laws of North Carolina, 1933, the foregoing statute was amended by adding thereto the following:

"*Provided,* that any person legally registered or licensed as a pharmacist by another state board of pharmacy, and who has had fifteen years continuous experience in North Carolina under the instruction of a licensed pharmacist next preceding his application, shall be permitted to stand the examination to practice pharmacy in North Carolina upon application filed with said board prior to the first day of July, 1933."

The plaintiff in the instant case filed his application to be examined for license as a pharmacist by the defendant Board of Pharmacy prior to 1 July, 1933. At the time said application was filed, the plaintiff was more than twenty-one years of age; he had been licensed as a pharmacist by the Board of Pharmacy of the State of South Carolina; and he had had fifteen years continuous experience as a pharmacist in North Carolina under the instruction of a licensed pharmacist. He was therefore, under the provisions of the statute as amended, entitled to stand and was permitted by the defendant board to stand its examination of applicants for license to practice pharmacy in this State. This examination was held during the month of June, 1933. The plaintiff failed to pass the examination, and on 27 June, 1933, again applied to the defendant board for an examination. This application was filed prior to 1 July, 1933, and for that reason the plaintiff was entitled under the provisions of the statute, as amended, to stand and was permitted by the defendant Board of Pharmacy to stand its examination held next after the filing of the application. This examination was held during the month of June, 1934. The plaintiff again failed to pass, and on 31 October, 1934, again applied to the defendant board for an examination. This application was denied because it was made after 1 July, 1933. The plaintiff was not entitled under the provisions of the statute, as amended, to stand the examination, and for that reason is not entitled to a writ of *mandamus* directed to the defendant Board of Pharmacy, commanding the said board to permit him to stand an examination for license to practice pharmacy in this State.

The fact that the defendant Board of Pharmacy has permitted applicants for license to practice pharmacy in this State, who have failed to pass its examination, to stand a subsequent examination without filing a new application, is immaterial in this case. On the facts found by the judge, the plaintiff was entitled to an examination only because he had filed both the original and the subsequent application prior to 1 July, 1933. He was not entitled to an examination on the application filed

subsequent to 1 July, 1933. His request for a "reëxamination" was in legal effect an application for an examination *de novo,* and the examination made on the first request after the original application was a new examination, and not a "reëxamination."

There is error in the judgment directing a writ of *mandamus* to be issued in this action, and for that reason the judgment is

Reversed.

BROADFOOT IRON WORKS, INC., v. EUGENE B. BUGG AND E. I. BUGG, TRADING AS WILMINGTON HOTEL.

(Filed 22 May, 1935.)

Mechanics' Liens A b—Mechanic's lien under C. S., 2435, is based upon retention of possession of property by mechanic.

Where a mechanic repairs certain personal property at the request of the lessee, and without request or knowledge on the part of the owner, and the mechanic never has possession of the property, but possession is returned to the owner by the lessee upon the termination of the lease, the mechanic may not hold the owner liable for the reasonable value of the repairs, the statute relating to mechanics' liens, C. S., 2435, being applicable only where the mechanic retains possession of the property.

APPEAL by defendants from *Grady, J.,* at October Term, 1934, of NEW HANOVER. Reversed.

This is an action to recover of the defendants for certain repairs made by the plaintiff on articles of personal property owned by the defendants.

At the time the repairs were made the property was in the possession of a lessee of the defendants. The repairs were made at the request of the lessee, and not at the request or with the knowledge of the defendants. The reasonable value of the repairs was $55.50. The lessee admitted his liability to the plaintiff for this amount.

At the date of the commencement of the action the property which had been repaired by the plaintiff was in the possession of the defendants, to whom it had been delivered by the lessee after the repairs were made, upon the expiration of the lease. The property had at no time been in the possession of the plaintiff.

At the close of all the evidence the defendants moved for judgment as of nonsuit. The motion was denied, and the defendants excepted.

Issues were submitted to the jury, and judgment was rendered that plaintiff recover of the defendants the sum of $55.50, with interest and costs. The defendants appealed to the Supreme Court.

Stevens & Burgwin for plaintiff.
McNorton & McIntire for defendants.

PER CURIAM. There was error in the refusal of defendants' motion for judgment as of nonsuit at the close of all the evidence. There was no evidence tending to show that the defendants are liable to the plaintiff for the repairs made on their property by the plaintiff, at the request of their lessee, and while the property was in his possession.

This is not an action to recover on a lien on personal property under the provisions of C. S., 2435. The statute is applicable only when the property repaired by an artisan or mechanic is in his possession. In such case, the artisan or mechanic may retain possession of the property which he has repaired, at the request of "the owner or legal possessor," until his just and reasonable charges for his work and materials have been paid. *Johnson v. Yates,* 183 N. C., 24, 110 S. E., 630, is readily distinguished from the instant case. In that case it was held that the mechanic who had repaired an automobile at the request of a mortgagor had the right to retain possession of the automobile as against the mortgagee until his reasonable charges had been paid.

The judgment is
Reversed.

FRANK STAGG, MRS. TYRE GLENN, AND MISS KATE WURRESCHKE v. GEORGE E. NISSEN COMPANY, INC.

(Filed 26 June, 1935.)

1. Taxation B b—Corporation is liable for franchise tax for years during which its business is continued by receiver under orders of court.

A corporation organized and doing business under the laws of this State for profit, as authorized by its charter, is liable for an annual franchise tax assessed and levied by the Commissioner of Revenue under the provisions of N. C. Code, 7880 (118), for the years prior to its dissolution, during which a receiver of the corporation, appointed by a court of competent jurisdiction, continues the business of the corporation under orders of the court, since the statute expressly provides that a corporation is liable for the tax for each year during which it enjoys the privilege of the continuance of its charter, and therefore liability for the tax does not cease until the corporation surrenders or forfeits its corporate existence.

2. Receivers G b—Franchise tax for years during which business of corporation is continued by receiver is proper expense of receivership.

The amount of a franchise tax for which a corporation is liable for the years during which its business is continued by its receiver under orders of court is properly paid by the receiver out of assets of the corporation in his hands as an expense of the receivership.

APPEAL by C. W. Williams, receiver of the defendant George E. Nissen Company, Inc., from *Parker, J.,* at November Term, 1934, of FORSYTH. Affirmed.

This action was begun in the Superior Court of Forsyth County on 27 January, 1931.

The plaintiffs are stockholders of the defendant George E. Nissen Company, Inc., a corporation organized and doing business under the laws of this State, with its principal place of business in the city of Winston-Salem, N. C.

In their complaint the plaintiffs allege: "3. That the plaintiffs are informed, advised, and believe that the defendant, if not at present insolvent, is in imminent danger of insolvency, and has decreased its operations to such an extent that it has practically suspended its ordinary operation and business; that the liabilities of the defendant approximate one hundred and fifty thousand ($150,000) dollars; that no dividends whatever have been earned or paid on the common stock of the defendant corporation, or on its preferred stock, for three years or more; that by the appointment of a receiver and the conservation of its assets by prudent management under a receivership, creditors will be able to secure a substantial payment on their indebtedness, and possibly a residue of assets will be conserved for stockholders.

"4. That the plaintiffs are informed, advised, and believe, and so allege, that a receiver should be appointed by the court to take in charge the assets of the defendant corporation, and to reduce the same to cash as rapidly as possible; that creditors should be required to prove their claims as required by statute; that such receiver do such other things and acts as are provided by law, and to this end the said receiver should be authorized to continue the business of the defendant corporation under the order of the court for the purpose of preserving the estate and of obtaining a purchaser or purchasers of the assets, to the end that the greatest amount of money possible may be had for the benefit of creditors, and also for the benefit of stockholders."

The defendant in its answer admits these allegations, and joins the plaintiffs in their prayer for the appointment of a receiver of the defendant.

Upon the hearing of the action it was ordered, adjudged, and decreed by the court that "C. W. Williams be and he is hereby appointed receiver of the defendant corporation, and that said receiver be and he is hereby authorized and directed to take into his charge and custody all the assets and property of the defendant wheresoever located and of whatever nature, reduce the same to money, and liquidate the affairs of the defendant by the distribution of the proceeds of the sale or sales of its assets and property to its creditors, and to do all such other and further acts as provided by law."

It was further ordered, adjudged, and decreed by the court that "the said receiver be and he is authorized in his discretion to continue the business of the defendant corporation on behalf and in the interest of its creditors by the necessary and conservative replenishing of its stock from time to time, and by working up said stock into finished material, to the end that the assets of said corporation may be disposed of in the most advantageous way for the benefit of its creditors and stockholders, and to that end the said receiver be and he is hereby authorized to employ such assistants and such help as may be in his judgment needed for the limited operations of the business as aforesaid."

Pursuant to this order, the receiver took into his possession all the assets of the defendant corporation, and is now engaged in the performance of his duties as the receiver of the defendant corporation.

At November Term, 1934, of the Superior Court of Forsyth County the action was heard upon the petition of the receiver for instructions by the court with respect to the claim of the Commissioner of Revenue of the State of North Carolina, for the payment by the receiver, out of the assets of the defendant in his hands, of the franchise tax for the years 1931, 1932, and 1933, assessed and levied by said Commissioner on the defendant corporation.

At said hearing the court found the following facts:

"1. The defendant George E. Nissen Company, Inc., a corporation organized under the laws of the State of North Carolina, and engaged in the business of manufacturing and selling wagons in the city of Winston-Salem, N. C., was placed in the hands of C. W. Williams as receiver, on 27 January, 1931, by an order made in this action by the Hon. John H. Clement, resident judge of the Superior Court for the Eleventh Judicial District.

"2. At the time of the appointment of the said receiver, the defendant George E. Nissen Company, Inc., had on hand about one hundred and twenty-six thousand dollars worth of wooden wagon parts, which could not be used to advantage for any purpose except for building wagons; that during the years 1931, 1932, and 1933, the receiver was engaged in the business of building and selling wagons, under the orders of the Superior Court of Forsyth County, and is still so engaged; and that in the manufacture of wagons during said time, the receiver has purchased parts, consisting mostly of iron tires, which were necessary for the utilization of parts included in the stock on hand at the time of his appointment.

"3. Since his appointment, and while engaged in the performance of his duties under the orders of the court, the receiver has settled a large part of the liabilities of the defendant corporation by paying from six to eight per cent of such liabilities, not including interest, and is now of

the opinion that if the receivership is continued by the court, he will be able to pay dividends to the stockholders."

On the foregoing facts the court was of opinion that the claims of the Commissioner of Revenue for the payment by the receiver of the franchise taxes for the years 1931, 1932, and 1933, assessed and levied by said Commissioner on the defendant corporation, is a valid claim, and there being no controversy as to the correct amount of said taxes, it was ordered by the court that the receiver pay to the Commissioner of Revenue of the State of North Carolina the sum of $277.82 for the franchise tax of the defendant corporation for the year 1931; the sum of $250.86 for the franchise tax of said defendant for the year 1932; and the sum of $170.97 for the franchise tax of said defendant for the year 1933.

It was further ordered by the court that said sums, when paid by the receiver, should be allowed as expenses of the receivership and credited as such in the accounts of the receiver.

The receiver, having first obtained the permission of the court so to do, appealed from the said order to the Supreme Court.

Parrish & Deal for the receiver.

Attorney-General Seawell and Assistant Attorney-General Bruton for the Commissioner of Revenue.

CONNOR, J. Two questions of law are presented by this appeal. The answers to both questions require only a consideration of the statute applicable to the facts as found by the court below. The questions are as follows:

1. Is a domestic corporation, organized under the laws of this State and doing business for a profit as authorized by its charter or certificate of incorporation, liable for an annual franchise tax assessed and levied by the Commissioner of Revenue of this State, under the provisions of section 210, chapter 427, Public Laws of North Carolina, 1931; N. C. Code of 1931, sec. 7880 (118), after the appointment by a court of competent jurisdiction of a receiver of the corporation, and prior to its dissolution as provided by law, where the receiver, under the orders of the court, is continuing to do the business which the corporation was authorized to do by its charter or certificate of incorporation, and which it was doing at the time of his appointment?

2. If so, is it the duty of the receiver who, under the orders of the court, has in his possession all the assets of the corporation for administration, as directed by the court, to pay such franchise tax out of the assets of the corporation in his hands as an expense of the receivership?

The statute [N. C. Code of 1931, sec. 7880 (118)] provides that on or before the first day of August of each year the Commissioner of

Revenue, having first ascertained and determined from reports made to him by the corporation, or from his official investigation of the corporation, the correct amount of its capital stock, surplus, and undivided profits, shall assess and levy a franchise tax for the "privilege of carrying on, doing business, and/or the continuance of its charter within the State, on each and every such corporation," at the rate prescribed by the statute.

By the express terms of the statute, the corporation is liable for the annual franchise tax for each year during which it enjoys the privilege of the continuance of its charter. It is immaterial whether or not the corporation exercises its privilege of doing or carrying on the business authorized by its charter or certificate of incorporation; it is liable so long as it enjoys the privilege granted by the State of "being" a corporation. When it surrenders or forfeits this right it ceases to be liable for the tax.

Both questions presented by this appeal are answered in the affirmative. See *Michigan v. Michigan Trust Co.*, 76 L. Ed., 1134, and annotation. The judgment is

Affirmed.

DR. R. F. HOLLAND v. SOUTHERN PUBLIC UTILITIES COMPANY, INC., AND O. O. KEESLER.

(Filed 26 June, 1935.)

Torts C a—Defendant is entitled to credit of amount paid injured party by another, regardless of whether parties are joint tort-feasors.

There can be but one recovery for the same injury or damage, and a sum paid the injured party in consideration for a covenant not to sue the party making the payment should be deducted from the amount recoverable by the injured party for the same injury in his action against another tort-feasor upon allegations that the negligence of such tort-feasor proximately caused the injury, regardless of whether the party making payment and the party sued are joint tort-feasors, the injured party being entitled to recover only the amount of his damage, however many sources of compensation there may be.

APPEAL by defendants from *Hill, Special Judge,* at June Special Term, 1934, of MECKLENBURG. New trial.

This is a civil action instituted by the plaintiff to recover damages for personal injuries resulting from a collision between a street car and a truck, alleged to have been proximately caused by the negligence of the defendants in the operation of the street car owned by the corporate defendant and driven by the individual defendant on West First Street, between Church and Mint streets, in the city of Charlotte, Mecklenburg

County, North Carolina, on 18 September, 1933. The defendants deny that the plaintiff's injuries were caused by any negligence on their part, and, as a further defense, aver that such injuries were the result of a collision between a truck of the Southeastern Express Company and the street car of the defendants at the time and place alleged in the complaint, and that said collision was proximately caused by the negligence of said express company; and further aver that "prior to the institution of this action the plaintiff made claim against the Southeastern Express Company for the injuries sustained by him, and said company settled with the plaintiff and paid him in full for said injuries."

The plaintiff admitted, in the course of his examination as witness in his own behalf, that on 9 December, 1933, and prior to the institution of this action, he executed and delivered to the Southeastern Express Company an instrument in the following language:

"Know All Men By These Presents: That I, R. F. Holland, of Charlotte, Mecklenburg County, North Carolina, for myself, my heirs, executors, administrators, successors, and assigns, for and in consideration of the sum of five hundred and no/100 dollars to me paid, the receipt of which is hereby acknowledged, by this instrument agree to forever refrain from instituting, procuring, or in any way aiding any suit, cause of action, or claims against the Southeastern Express Company and all persons, firms, and/or corporations for whose acts or to whom said party or parties might be liable, for damages, costs, or expenses growing out of an accident occurring on or about 18 September, 1933, on West First Street, between Church and Mint streets, in the city of Charlotte, Mecklenburg County, North Carolina, and to save harmless and indemnify the parties aforesaid from all loss and/or expense resulting from any such suit, cause of action, or claim.

"Expressly reserving to the undersigned, however, all rights to proceed against any person or persons other than the parties aforesaid for all loss and/or expense arising out of said accident."

The plaintiff further admitted that he received $500.00 from the Southeastern Express Company upon delivery of this instrument.

Issues were submitted to the jury and answered as follows:

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

"2. If so, did the Southeastern Express Company, by its negligence, jointly and concurrently contribute to plaintiff's injuries, as alleged in the answer? Answer: 'No.'

"3. Did the plaintiff covenant to refrain from suing the said express company, or any person to whom it would be liable, on account of the collision, as set forth in the complaint, and as alleged in the answer? Answer: 'Yes.'

"4. What damage, if any, has the plaintiff sustained on account of his alleged injuries? Answer: '$500.00.'"

From a judgment that the plaintiff have and recover of them $500.00, the defendants appealed to the Supreme Court, assigning errors.

W. S. O'B. Robinson, Jr., W. B. McGuire, Jr., and John S. Cansler for defendants, appellants.

Enos T. Taylor and H. L. Taylor for plaintiff, appellee.

SCHENCK, J. The record discloses that the defendants, in apt time and in due form, requested the court to charge the jury as follows: "If you find that the $500.00 paid the plaintiff by the Southeastern Express Company was full and adequate compensation for his injuries, then, no matter what your answer may be to the other issues, the plaintiff would not be entitled to recover any further damages in this action, and you will answer the fourth issue 'Nothing.' In other words, if the plaintiff has already been fully and adequately compensated for any injury which he may have sustained at the time of this accident by the $500.00 which was paid him by the Southeastern Express Company, then he is not entitled to recover anything more, and, in such event, as I have already instructed you, it would be your duty to answer the fourth issue 'Nothing.'" The court refused to give this special instruction, or the substance thereof, and we think in so doing the court erred.

All of the authorities are to the effect that where there are joint tort-feasors there can be but one recovery for the same injury or damage, and that settlement with one of the tort-feasors releases the others; and, further, that when merely a covenant not to sue, as distinguished from a release, is executed by the injured party to one joint tort-feasor for a consideration, the amount paid for such covenant will be held as a credit on the total recovery in actions against the other joint tort-feasors. *Slade v. Sherrod,* 175 N. C., 346.

It was admitted by the parties that on 9 December, 1933, before the institution of this action, a covenant not to sue was executed by the plaintiff in this case to the Southeastern Express Company, and that the express company paid and the plaintiff received $500.00 for said covenant, and that the covenant and the amount paid therefor grew out of "an accident occurring on or about 18 September, 1933, on West First Street, between Church and Mint streets, in the city of Charlotte, Mecklenburg County, North Carolina."

The plaintiff, however, argues that the answer to the second issue establishes the fact that the Southeastern Express Company was not a joint tort-feasor with the defendants, and that therefore the authorities

to the effect that an amount paid for a covenant not to sue will be held as a credit on the total recovery are not here applicable.

Conceding, but not deciding, that the answer to the second issue established, for the purposes of the trial had, that the express company and the defendants were not joint tort-feasors, we think the weight of both authority and reason is to the effect that any amount paid by anybody, whether they be joint tort-feasors or otherwise, for and on account of any injury or damage should be held for a credit on the total recovery in any action for the same injury or damage.

In an exhaustive and well-considered opinion, the Supreme Court of Errors of Connecticut, in *Dwy v. Connecticut Company,* 92 Atlantic Reports, pp. 883, 890, held that it was unnecessary to discuss a proposition predicated upon the contention that a third party, who, for a cash payment, had obtained from the plaintiff a covenant not to sue, was not a joint tort-feasor with defendant, and said: "When the right of action is once satisfied it ceases to exist. If part satisfaction has already been obtained, further recovery can only be had of a sufficient sum to accomplish satisfaction. Anything received on account of the injury inures to the benefit of all, and operates as payment *pro tanto.* This is the familiar rule where consideration has been received in return for covenants not to sue or in part payment, and it is the logical and reasonable one. *Snow v. Chandler,* 10 N. H., 92, 95, 34 Am. Dec., 140; *Chamberlin v. Murphy,* 41 Vt., 110, 119; *Bloss v. Plymale,* 3 W. Va., 393, 409, 100 Am. Dec., 752; *Ellis v. Eason,* 50 Wis., 138, 154, 6 N. W., 518, 36 Am. Rep., 830; *Musolf v. Duluth, etc., R. R. Co.,* 108 Minn., 369, 122 N. W., 499; 24 L. R. A. (N. S.), 451."

As negativing the argument that payment must be made by one of the joint tort-feasors in order to release the others, the Supreme Court of the United States, in *Lovejoy v. Murray,* 3 Wall., 1-19, 18 L. Ed., 129, 134, says: "But when the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience, that the law will not permit him to recover again for the same damages." If the payment in full for damages by one other than a joint tort-feasor operates as a full release of the joint tort-feasors, by the same token the payment in part for damages by one other than a joint tort-feasor should operate as a release *pro tanto* of the joint tort-feasors. Both reason and justice decree that there should be collected no double compensation, or even over compensation, for any injury, however many sources of compensation there may be.

Since the instrument executed by the plaintiff was merely a covenant not to sue the Southeastern Express Company on account of injuries suffered by him in the accident occurring on West First Street, between Church and Mint streets, in the city of Charlotte, on 18 September,

1933, the plaintiff is free to prosecute his action against the defendants for the recovery of such sum, when taken with that already received by him from the express company for said covenant, namely $500.00, as will afford him full satisfaction, and no more, for the injuries suffered by him in the same accident.

New trial.

MRS. OCTAVIA MYERS v. SOUTHERN PUBLIC UTILITIES COMPANY AND W. M. JOHNSON.

(Filed 26 June, 1935.)

1. **Negligence D c—**

Where the evidence is conflicting on the issue of whether the accident in suit was caused by the negligence of defendant, defendant's motion as of nonsuit is properly overruled.

2. **Torts B a—**

When the accident in suit is caused solely by the negligence of another, defendant may not be held liable, but when the negligence of defendant is the cause of the accident, either solely or concurrently, defendant is liable to plaintiff for the resulting injury.

3. **Evidence K a—**

A witness' statement that if the defendant had not moved his car the accident would not have occurred *is held* competent as a "shorthand statement of a fact," or a statement of a "composite or compound fact," and objection thereto on the ground that the testimony invaded the province of the jury *is held* untenable.

4. **Appeal and Error J e—**

An exception to the admission of testimony will not be sustained when the witness is allowed to testify to substantially the same effect without objection at other times during his examination.

5. **Trial E g—**

Appellant's exceptions to the charge *held* untenable when the charge is read contextually as a whole.

APPEAL by the defendants from *Hill, J.*, at July Special Term, 1934, of FORSYTH. Affirmed.

Parrish & Deal for plaintiff, appellee.
Manly, Hendren & Womble for defendants, appellants.

SCHENCK, J. This is an action for personal injuries to the plaintiff, alleged to have been proximately caused by the negligence of the defendants. It is admitted that the plaintiff suffered injuries as a result of a collision between a street car owned by the corporate defendant and operated at the time by the individual defendant and a Ford automobile

operated by one John Chambers. The plaintiff alleged and contended that the collision was caused by the negligence of the defendants, either solely, or concurrently with the negligence of Chambers, and the defendants alleged and contended that the collision was caused solely by the negligence of Chambers. These adverse allegations and contentions gave rise to the first issue submitted by the court to the jury, namely, "Was the plaintiff injured by the negligence of the defendants, as alleged in the complaint?"

The evidence of the plaintiff tended to show that on 20 October, 1931, she was standing on the sidewalk at the southwest corner of the intersection of Fifth Street and Patterson Avenue, in the city of Winston-Salem, awaiting an opportunity to cross to the east side of Patterson Avenue, and that while she was so standing the Ford automobile operated by Chambers started in a southern direction across Fifth Street and collided with the street car of the defendants as the street car turned to the left into Fifth Street, and that this collision caused the Ford automobile to run upon the sidewalk and strike the plaintiff and push her back and pin her against the building contiguous to the sidewalk. The evidence of the plaintiff further tended to show that the signal light was green on Patterson Avenue, signifying "Go" when Chambers entered the intersection, and that he was driving in a careful manner and had gotten past the center of Fifth Street when the street car of the defendant, which had been standing still, moved forward, without giving any signal, and turned to the left and struck the left side of the Ford automobile behind the front wheel, and thereby diverted the course of the automobile to the sidewalk, where it struck and injured the plaintiff.

The evidence of the defendants tended to show that the street car was standing still on Patterson Avenue, in obedience to the red light, signifying "Stop" on said avenue, and that Chambers entered the intersection in disregard of the red light, and came all the way across Fifth Street and collided with the street car, while it was yet still, and that the Ford automobile was diverted by the collision thus caused to the sidewalk where it struck and injured the plaintiff.

The jury, by answering the issue in the affirmative, adopted the plaintiff's version of how the collision occurred, and, since the evidence was conflicting, the motions of the defendants for a judgment as of nonsuit were properly denied, and the assignments of error based upon such denial cannot be sustained.

His Honor charged the jury, in effect, that if the plaintiff's injuries were caused solely by the negligence of John Chambers, the driver of the Ford automobile, they should answer the issue in the negative, in favor of the defendants; but, if the jury should find by the greater weight of the evidence, that such injuries were caused by the negligence

of W. M. Johnson, the driver of the street car, either solely or concurrently with the negligence of Chambers, they should answer the issue in the affirmative, in favor of the plaintiff. This was in accord with *White v. Realty Co.*, 182 N. C., 536, where it is held: "Where an injury to a third person is proximately caused by the negligence of two persons, to whatever degree each may have contributed to the result, the negligence of the one may not exonerate the other, each being a joint tort-feasor, and the person so injured may maintain his action for damages against either one or both."

We have examined the assignments of error which assail a portion of the testimony of John Chambers upon the theory that it allowed the witness to express an opinion about material facts, and thereby invaded the province of the jury. In response to the question, "Why didn't you get across?" the witness answered, "That's my trouble, I started across and I didn't have a chance. If he had stayed still I would have went through, that's what I mean." We think the assignments are untenable, as the testimony was but a " 'shorthand statement of a fact,' or, as the statement of a 'composite or compound fact,' several circumstances combining to make another fact," as held competent in *Marshall v. Telephone Co.*, 181 N. C., 292, and cases there cited, and for the further reason that the same witness was permitted to testify to substantially the same effect without objection at other times during his examination.

We have also examined the assignments of error which assail certain portions of the charge, but are left with the impression that when these segregated portions are read contextually with the whole charge these assignments are likewise untenable.

There are no assignments of error relating to the second issue as to the measure of damages.

Affirmed.

C. D. KENNY COMPANY AND OTHERS v. HINTON HOTEL COMPANY.

(Filed 26 June, 1935.)

1. Usury B b: Mortgages H b—Where equitable relief of enjoining foreclosure is sought, neither forfeiture nor penalty for usury may be had.

Where the creditors of the mortgagor seek to enjoin the foreclosure of a deed of trust on their creditor's property, and pray for an accounting to ascertain the amount of the debt upon allegations that usurious interest was charged thereon, *it is held*, upon sale of the property under orders of the court, the mortgagee is entitled to the principal amount of his debt, plus six per cent interest thereon, since the plaintiffs, seeking equitable relief, must do equity, and the mortgagee is entitled to the amount of the debt, plus the legal interest, unaffected by the forfeiture or penalty for usury. C. S., 2306.

2. Appeal and Error A f—

Where receivers are not authorized by the court, expressly or by implication, to appeal from a judgment adverse to them, their appeal will be dismissed in the Supreme Court.

APPEAL by plaintiffs and by the receivers of the defendant, Hinton Hotel Company, from *Grady, J.*, at December Term, 1934, of the Superior Court of NEW HANOVER. Affirmed.

This action was begun in the Superior Court of New Hanover County on 27 October, 1933.

The plaintiffs are creditors of the defendant Hinton Hotel Company, a corporation organized and doing business under the laws of this State, and began this action in behalf of themselves and all other creditors of said corporation.

On the allegations of the complaint which are admitted in the answer, William A. French and J. B. McCabe were appointed by the court, first as temporary and later as permanent receivers of the defendant Hinton Hotel Company. They were ordered by the court to give notice of their appointment and qualification as such receivers to all creditors of the defendant to file their claims with the said receivers, as provided by C. S., 1212.

Thereafter, J. N. Bryant, a creditor of the Hinton Hotel Company, filed a petition in the action in which he alleged that on or about 1 June, 1931, the defendant Hinton Hotel Company executed and delivered to him its bond in the sum of $15,000; that the consideration for said bond was money loaned by him to said defendant, and that said bond was secured by a deed of trust executed by said defendant to George H. Howell, trustee, and duly recorded in the office of the register of deeds of New Hanover County. He further alleged in said petition that default had been made by the defendant in the payment of said bond according to its terms, and that by reason of such default, the trustee in the deed of trust was authorized and empowered to foreclose the same by selling the property described therein under the power of sale contained therein. He prayed the court to make an order in the action authorizing the trustee to foreclose the deed of trust in accordance with its terms.

The plaintiffs and the receivers appointed by the court in this action filed answers to the petition, in which they admitted the allegations therein; they alleged, however, that the petitioner had knowingly charged and received interest on the money loaned by him to the defendant at a rate in excess of six per cent per annum, and had thereby incurred the statutory penalties for usury. C. S., 2306. They prayed the court to deny the prayer of the petitioner, to enjoin the sale by the trustee of the property described in the deed of trust, and for an accounting with the petitioner in this action to ascertain what amount, if any,

is now due the petitioner as a creditor of the defendant on account of his claim against the defendant.

At the hearing of the petition it was ordered by the court that the trustee in the deed of trust be and he was authorized to foreclose the same by selling the property described therein under the power of sale.

On 8 January, 1934, George H. Howell, trustee, filed in this action a report showing that he had sold the property described in the deed of trust, under the power of sale contained therein, in accordance with its terms, and that J. N. Bryant was the last and highest bidder at said sale in the sum of $17,500, and that said sum was the fair market value of the property described in the deed of trust. The trustee recommended that said sale be confirmed by the court.

The action was heard by Judge Grady at the December Term, 1934, of the Superior Court of New Hanover County, on the motion of the plaintiffs and of the receivers of the defendant Hinton Hotel Company for an accounting with the petitioner J. N. Bryant, and on the motion of the petitioner for the confirmation of the sale made by George H. Howell, trustee. At this hearing the sale of the property described in the deed of trust by the said trustee was confirmed, and by consent of the parties Judge Grady heard the evidence, and on his findings of fact adjudged that the petitioner J. N. Bryant recover of the defendant Hinton Hotel Company the sum of $17,731.29, with interest from 1 December, 1934, and his costs, to be taxed by the clerk, and decreed that said sum was a lien on the property described in the deed of trust, subject only to the taxes due and unpaid on said property.

The plaintiffs duly excepted to the judgment and appealed to the Supreme Court, assigning errors in said judgment.

The receivers, William A. French and J. B. McCabe, subsequently but within ten days from the docketing of the judgment, caused notice of their appeal from the judgment to the Supreme Court, to be served on counsel for J. N. Bryant and George H. Howell, trustee.

John D. Bellamy & Sons and Kellum & Humphrey for plaintiffs and the receivers.

Bryan & Campbell for J. N. Bryant and George H. Howell, trustee.

CONNOR, J. The plaintiff and the receivers of the defendant Hinton Hotel Company, on their appeal to this Court, contend that there is error in the judgment of the Superior Court in this action for that in the accounting by which the amount now due to J. N. Bryant by the Hinton Hotel Company was ascertained, Judge Grady has allowed interest at the rate of six per cent per annum on the sum of money loaned by the said J. N. Bryant to the said Hinton Hotel Company, notwithstanding his finding of fact that the said J. N. Bryant know-

ingly charged and has knowingly received from the said Hinton Hotel Company interest on his debt at a rate in excess of six per cent per annum. They contend that under the statute J. N. Bryant has forfeited all interest on his debt, and that the receivers of the Hinton Hotel Company are entitled to a credit on said debt of twice the amount of interest paid thereon by said hotel company. C. S., 2306.

If this was an action in which J. N. Bryant was seeking to recover of the defendant Hinton Hotel Company the amount due on his bond, these contentions would be sustained. In such case, he would be liable for the statutory penalties for usury. This, however, is an action in which the plaintiffs are seeking equitable relief. They seek to enjoin J. N. Bryant and George H. Howell, trustee, from foreclosing the deed of trust by which the bond, which they allege is tainted with usury, is secured, and pray for an accounting to ascertain the amount due on the bond. They must, therefor, abide by the maxim that "He who seeks equity must do equity." This maxim has been uniformly applied in this jurisdiction in actions in which parties seek equitable relief from a usurious transaction. In order that such parties may invoke the equitable jurisdiction of the court, they must consent, at least, that the creditor recover of his debtor the principal of his debt, with interest at the rate prescribed by law. See *Thomason v. Swenson,* 207 N. C., 519, 177 S. E., 647, and cases cited in support of the decision in that case. The contention that there was error in allowing interest at six per cent per annum on the amount loaned by J. N. Bryant to the defendant Hinton Hotel Company cannot be sustained.

It does not appear from the record in this appeal that the receivers of the Hinton Hotel Company were authorized by the court to appeal from its judgment to this Court. In the absence of such authority, express or implied, their appeal is dismissed. See *In re Trust Company,* 206 N. C., 251, 173 S. E., 340.

There is no error in the judgment. It is

Affirmed.

J. A. TAYLOR, ADMINISTRATOR OF HARVEY TAYLOR, DECEASED, v. J. T. CAUDLE, EXECUTOR OF GEORGE B. CAUDLE, DECEASED, AND HUNTER BYRUM.

(Filed 26 June, 1935.)

Judgments K d—When executor dies prior to trial, judgment against estate is irregular, and is properly set aside upon motion.

The executor of an estate employed counsel to defend a suit against the estate, but the executor died prior to the time of trial. The attorneys, without knowledge of the death of the executor, tried the case, and judg-

ment for plaintiff was rendered upon the verdict of the jury. Upon motion to set aside the judgment thereafter made by the executor *c. t. a.*, appointed to succeed the deceased executor, the trial court found that attorneys for plaintiff and attorneys purporting to represent defendant had argued the case and had introduced the testimony of all available witnesses for both sides. *Held:* The trial court's order setting aside the judgment as a matter of law is without error, it appearing that at the time of trial there was no one authorized to represent the estate, which in itself constitutes a meritorious reason for setting aside the judgment, and this result is not affected by the payment of the fees to the attorneys purporting to represent defendant by the executor *c. t. a.*, under order of court, since the executor *c. t. a.* was not made a party to the suit, C. S., 462, and did not appear therein.

CIVIL ACTION, before *Harding, J.*, at February, 1935, Special Term of MECKLENBURG.

Harvey Taylor, plaintiff's intestate, was killed on or about 2 October, 1932, while riding as a guest in a car owned by George B. Caudle. A suit for damages for wrongful death was instituted by plaintiff as administrator of said deceased against George B. Caudle and Hunter Byrum. It was alleged that Byrum was driving the automobile at the time, with the consent and approval and as agent of George B. Caudle, the owner. Caudle filed an answer denying that Byrum was his agent, and alleging that in fact the deceased was himself driving the car and in control thereof at the time the wreck occurred, and that the car was not being operated with his consent and approval.

The defendant Caudle died 24 October, 1933, leaving a last will and testament, and J. T. Caudle qualified as executor. J. T. Caudle, executor, died 23 October, 1934, and thereafter, on or about 2 November, 1934, the cause was tried in the Superior Court upon issues submitted to the jury. The issues were answered in favor of the plaintiff, and there was an award of $6,000 damages.

Thereafter, on 15 November, 1934, H. T. Caudle qualified as administrator *c. t. a.* of George B. Caudle, and subsequently filed a petition praying that the judgment be set aside on the ground that the executor J. T. Caudle was dead at the time of the trial, and that such death was unknown both to counsel for plaintiff and the defendants. The plaintiff filed an answer to the petition, and the cause was heard and certain pertinent facts found by the judge. Capitulating these facts, it appears that J. D. McCall was counsel originally employed by George B. Caudle during his lifetime, and after his death J. F. Newell and M. K. Harrill were employed in the cause by J. T. Caudle, executor, prior to his death. J. T. Caudle, executor, died 23 October, 1934, and the trial of the case was begun in the Superior Court of Mecklenburg County on 1 November, 1934. The death of the executor at the time of the trial was

unknown to both parties and their counsel. At the trial "all available witnesses in behalf of both the plaintiff and the defendants of record testified. That attorneys purporting to appear on behalf of the estate of George B. Caudle, subpœnaed witnesses from Montgomery County, where occurred the fatal accident on which this cause was instituted, . . . and that the jury's verdict was reached after hearing all witnesses and after argument of counsel for the plaintiff and all members of counsel purporting to appear for the estate of George B. Caudle. That at the time of the trial herein, and the rendering of said judgment, the said J. T. Caudle, executor as aforesaid, was dead, and there was no one authorized to represent the estate of the said George B. Caudle, deceased. The judgment was based on the verdict reached by the jury after the defense had been fully presented."

Upon the facts found, the trial judge was of the opinion that the motion in the cause to set aside the judgment should be allowed as a matter of law, and so ruled.

From such judgment the plaintiff appealed.

H. C. Jones and Brock Barkley for plaintiff.
J. L. DeLaney and J. Laurence Jones for defendants.

BROGDEN, J. Did the trial judge rule correctly when he set aside a judgment for damages rendered against the estate of a dead man, when the administrator *c. t. a.* of the deceased was not a party to the suit, although the cause was fully presented to the jury upon evidence and argument of counsel?

The cases dealing with the subject are cited and discussed in *Wood v. Watson,* 107 N. C., 52, 12 S. E., 49; *Knott v. Taylor,* 99 N. C., 512, and *Lynn v. Lowe,* 88 N. C., 478. There was some vacillation of judicial thinking upon the question and contradictory declarations, but the proposition seems to have been brought to rest in *Knott v. Taylor, supra,* and *Wood v. Watson, supra,* which are apparently the last utterances of this Court.

In the *Knott case, supra,* it was held that a judgment rendered against a dead person when the fact of death was unknown, was irregular and voidable. The writer of the opinion in *Wood v. Watson, supra,* quotes from Freeman on Judgments, sec. 153, as follows: "Judgments for or against deceased persons are not generally regarded as void on that account." Commenting upon the Freeman utterance, the opinion proceeds: "And this view of the law seems to be in accord with the current authorities upon the subject, though, as has been said, there is want of unanimity in the adjudications, and in this State it may be regarded as settled that the death of a party defendant to an action before trial be

suggested, and the proceedings suspended until the real or personal representatives, as the case may be, can be made parties, and the action continued against them, and if this be not done, and the plaintiff takes judgment against a dead defendant, it may be set aside."

Plaintiff asserts that the judgment ought not to be set aside for two major reasons, to wit: First, that it appears from the findings of fact that the cause was properly and fairly tried and every phase of the case fully presented to the jury, and that the petition to set the judgment aside does not allege merit. Second, that after H. T. Caudle was appointed administrator *c. t. a.* upon order of court, he paid $250.00 to attorneys who tried the case, and said attorneys prepared and served statement of case on appeal to the Supreme Court.

The court is of the opinion that these contentions ought not to prevail. The trial judge found as a fact that "there was no one authorized to represent the estate of said George B. Caudle, deceased." Moreover, as there was no administrator or executor present at the trial, or a party to the suit at the time of the trial, the dead man had no one authorized to speak for him. The law contemplates that a defendant shall have the right to be heard, and manifestly such right was denied in this case. That very fact constitutes merit, even if a showing of merit were necessary. While the administrator *c. t. a.*, in obedience to an order of court, paid counsel certain fees, it is not disclosed by the record that he appeared in the action or was made a party thereto, as required by C. S., 462, and the Court is of the opinion that the trial judge ruled correctly.

Affirmed.

DR. J. H. WHITE v. AUBREY G. McCABE, ADMINISTRATOR, ET AL.

(Filed 26 June, 1935.)

1. Appeal and Error J c—Error must be prejudicial to defendant in order to entitle him to a new trial upon appeal.

When the negligence of the driver of an automobile is clearly established by the evidence as the proximate cause of the accident in suit, which resulted in the death of the driver and personal injuries to plaintiff, a guest in the car, and it is admitted by defendant administrator that the damages awarded by the jury are not excessive, error, if any, in allowing plaintiff to bring to the jury's attention the question of liability insurance on the automobile does not entitle the administrator to a new trial upon appeal, since the administrator could not have been prejudiced thereby, and the basis for a new trial is to afford relief for material, prejudicial error, or error except for which a different result would likely have ensued.

2. **Automobiles C j—Driver may be held liable to guest for ordinary negligence resulting in injury to the guest.**

A guest in an automobile, injured in a collision, may recover of the driver, under the laws of this State, if the collision is the result of want of ordinary care on the part of the driver, and it is not necessary that the driver be guilty of gross or wanton negligence, and the law of this State is applicable to an action to recover for injuries to a guest in a collision occurring in this State.

3. **Automobiles D c—Owner of car held not liable for negligence of father in driving car as a matter of law.**

The evidence tended to show that defendant, a *feme sole*, was the owner of the automobile involved in the collision in suit, and that she lived in the house with her father and managed his house, and that her brother and his family also lived in the house, and that the car was used by the adult members of the house, especially by defendant's father, for pleasure, and that defendant owned another car for her exclusive personal use. Plaintiff, a guest in the car, was injured in a collision resulting from the negligence of defendant's father, who was driving the car at the time, defendant not being present. *Held:* An instruction that the negligence of the father was imputed to the daughter, the defendant, as a matter of law is erroneous, ownership alone being insufficient to establish liability, and defendant not being liable under the family-purpose doctrine as a matter of law.

BROGDEN, J., dissents.

APPEAL by defendants from *Moore, Special Judge,* at September Term, 1934, of PASQUOTANK.

Civil action to recover damages for an alleged negligent injury caused by a collision between two automobiles, one a Pontiac sedan owned by Margaret McCabe and driven at the time by her father, J. T. McCabe; the other owned and operated by R. J. Morse. The plaintiff was a guest in the McCabe car. The allegations of negligence in the present action are all leveled against the driver and owner of the car in which the plaintiff was riding.

The collision occurred Sunday, 3 September, 1933, about 7:30 p.m., near Campbell's filling station on the highway between Moyock and Sligo, in Currituck County, and as a result J. T. McCabe was killed and the other occupants were injured. The deceased had invited the plaintiff and two other friends to go with him on a pleasure drive from Elizabeth City to Virginia Beach. They were on the return trip. The car was being used with the owner's consent, though she was not present.

It is in evidence that the car was being driven on the wrong side of the road and at a high rate of speed, between 50 and 60 miles an hour, at the time of the impact. The defendants, on the other hand, offered evidence of somewhat equivocal character that the Morse car was responsible for the collision. It was not quite dark—just getting dark—and cars then upon the highway were being driven without lights.

In selecting the jury, the plaintiff, over objection, asked if any juror was employed by or interested in any liability insurance company. (Motion for mistrial; overruled; exception.) The court found that these questions were propounded in good faith.

M. T. Bohannon, an attorney of Norfolk, who investigated the accident, testified for the defendants. He was asked on cross-examination if he did not represent the Liability Insurance Corporation, Ltd., of London. He answered that he represented the Employers Liability Insurance Corporation. Then, further: "Q. You know the interest you had in coming down here was because you knew your company was liable on account of that accident, potentially, up to a total sum of forty thousand dollars? That the policy written on this car is what is known as a $20,000-$40,000 policy? (Objection overruled; exception.) A. That is what I was told." (Motion to strike; overruled; exception.) The court found that these questions were propounded in good faith to show the partiality and bias of the witness. It further appears in the agreed statement of case on appeal: "Upon the issue of damages, the plaintiff offered evidence . . . sufficient to justify the verdict rendered by the jury. . . . Defendants made no contention in the court below, and make none here, that the damages awarded were excessive."

With respect to the liability of Margaret McCabe, adult daughter of J. T. McCabe and owner of the car, it is in evidence that she lived with her father and managed his house. The father paid all the expenses of the home. Her brother, A. G. McCabe, and his family also lived in the same household. The Pontiac sedan was used by adult members of the household, thus constituted, at their pleasure, without immediate permission from the *feme* defendant, this being particularly true of her father, who used the car more frequently than any other member of the family.

The *feme* defendant owned still another car, which was reserved for her own personal use. She was away from home on 3 September, 1933. J. T. McCabe went driving practically every Sunday. He was on his own pleasure the day he was injured. "He was not going on any business for Margaret or any pleasure for her; just for himself and his friends."

Upon the foregoing evidence, the court instructed the jury to answer the issue of negligence against the *feme* defendant, if the negligence of her father was found to be the proximate cause of plaintiff's injury. Exception.

In apt time, the defendant administrator asked the court to instruct the jury that the McCabe estate would not be liable for simple or ordinary negligence on the part of J. T. McCabe, and would only be liable for gross or wanton negligence on his part. (Prayer refused; exception.)

Separate issues of negligence were submitted to the jury and answered in the affirmative as to each defendant, and damages awarded. Judgment accordingly, from which the defendants appeal, assigning errors.

McMullan & McMullan for plaintiff.
L. T. Seawell and Worth & Horner for defendants.

STACY, C. J., after stating the case: It may be conceded that the question of liability insurance was brought to the attention of the jury in excess of any manner heretofore approved by our decisions. *Fulcher v. Lumber Co.,* 191 N. C., 408, 132 S. E., 9. The limitation upon such references is clearly marked in this jurisdiction. *Bryant v. Furniture Co.,* 186 N. C., 441, 119 S. E., 823. Nevertheless, in the instant case, it is conceded that the evidence offered by the plaintiff, on the issue of damages, is sufficient to justify the award, and that the amount is not excessive. In the face of this concession and the evidence of negligence against the driver of the car, it would seem that the defendant administrator is in no position to complain at the rulings in respect to such information being given to the jury. Annotation, 56 A. L. R., 1418.

The foundation for the application of a new trial is the allegation of injustice arising from error, except for which a different result would likely have ensued, and the motion is for relief upon this ground. Unless, therefore, some wrong has been suffered, there is nothing to relieve against. The injury must be positive and tangible and not merely theoretical. To be reversible it must appear that the error was material and prejudicial to appellant's rights. *S. v. Beal,* 199 N. C., 278, 154 S. E., 604.

With the negligence of J. T. McCabe clearly established and the non-excessiveness of the damages admitted, the references to liability insurance would seem to be without material significance or bearing on the case so far as the administrator's appeal is concerned. *Allen v. Garibaldi,* 187 N. C., 798, 123 S. E., 66. And in view of the subsequent disposition to be made of the *feme* defendant's appeal, further consideration of these exceptions may be pretermitted.

There was no error in refusing to instruct the jury, as requested by defendant, that plaintiff could not recover except for gross or wanton negligence on the part of J. T. McCabe. Such is the law of Virginia (*Wise v. Hollowell,* 205 N. C., 286, 171 S. E., 82), but the collision occurred in this State, and it has been held with us that a guest riding in an automobile may recover of his host for actionable negligence, or want of ordinary care, which proximately produces the injury. *Norfleet v. Hall,* 204 N. C., 573, 169 S. E., 143; *King v. Pope,* 202 N. C., 554, 163 S. E., 447. See, also, *S. v. Cope,* 204 N. C., 28, 167 S. E., 456.

The injury having occurred here, the case is governed by the law of this State. *Wise v. Hollowell, supra.*

There was error, however, in the instruction that the negligence of J. T. McCabe is imputable to Margaret McCabe as a matter of law. This exception must be sustained. "The owner of an automobile is not liable for personal injuries caused by it merely because of his ownership." *Linville v. Nissen,* 162 N. C., 95, 77 S. E., 1096. Nor would she be liable as a matter of law under the family-purpose doctrine. *McGee v. Crawford,* 205 N. C., 318, 171 S. E., 326; *Allen v. Garibaldi, supra.*

It follows, therefore, that the judgment must be affirmed as against the administrator of the estate of J. T. McCabe and reversed as to the *feme* defendant.

On administrator's appeal,
No error.

On Margaret McCabe's appeal,
New trial.

BROGDEN, J., dissents on grounds stated in *Norfleet v. Hall,* 204 N. C., 573.

EVA ENLOE v. CHARLOTTE COCA-COLA BOTTLING COMPANY.

(Filed 26 June, 1935.)

1. **Food A a—**

   The liability of a manufacturer of food or drink in sealed containers for injury to ultimate consumers resulting from unwholesomeness of the product is predicated upon negligence and not implied warranty.

2. **Same—Consumer must establish failure of manufacturer to use due care as cause of unwholesomeness of product in order to recover.**

   In order for an ultimate consumer to recover of the manufacturer for noxious substances in food or drink purchased by the consumer in sealed containers it is necessary for the consumer to establish negligence on the part of the manufacturer in failing to use due care under the circumstances, and that such negligence was the cause of the unwholesomeness of the product resulting in the injury, and in establishing such negligence the consumer may not rely upon the doctrine of *res ipsa loquitur,* although such negligence need not be directly established, but may be inferred from relevant circumstances, but the installation by the manufacturer of modern machinery and appliances, such as are in general and approved use, does not *ipso facto* negative negligence on its part.

3. Same: Evidence D h—Competency of evidence that noxious substances had been found by others in product of manufacturer.

In establishing negligence on the part of the manufacturer as the cause of unwholesomeness of its product resulting in injury to an ultimate consumer, it is competent for the consumer to show by evidence that others had found noxious substances in the product of the manufacturer, when such other occurrences are so substantially similar, and within such reasonable proximity of time, as to show the likelihood of a similar occurrence at the time of plaintiff's injury, but proof of the explosion from gas pressure of a single bottle of a drink put up by the defendant, without more, is insufficient to carry the case to the jury on the issue of negligence.

4. Same—

Testimony of a witness of finding a like deleterious substance in the product of the defendant manufacturer *is held*, under the facts of this case, too remote in point of time to be competent as tending to show a like occurrence at the time of plaintiff's injury.

5. Same—

Plaintiff alleged that she was injured by drinking coca-cola from a bottle which contained a dead mouse. Evidence that others had found glass in bottles of coca-cola prepared by defendant *is held* incompetent, since it tends to establish a dissimilar rather than a similar source of deleteriousness from that of which plaintiff complains, and was too remote in point of time.

CLARKSON, J., dissents.

APPEAL by defendant from *Hill, Special Judge,* at October Special Term, 1934, of MECKLENBURG.

Civil action by ultimate consumer to recover of manufacturer or bottler damages resulting from drinking bottled beverage containing noxious substance.

On 8 April, 1933, the plaintiff purchased from a retail grocery store in the city of Charlotte a bottle of coca-cola, which had been manufactured or bottled and placed on the market by the defendant. She became ill from drinking part of its contents, and, upon investigation, it was found that the bottle contained a rat or mouse. Negligence is alleged against the manufacturer or bottler, and the action is to recover in tort.

The plaintiff was allowed to show, over objection of defendant, that on five other occasions coca-cola bottled by the defendant was found to contain foreign substances. These instances were as follows:

1. Mrs. Henrietta Courtney testified that she bought a bottle of coca-cola from a store in Charlotte in February, 1931, "drank a swallow and it burned her throat."

2. B. W. Williams testified that on 29 August, 1932, he purchased a bottle of coca-cola at a Greek cafe in Charlotte which contained "some kind of green-looking thing. I don't know what it was."

3. L. D. Yerton testified that on 7 April, 1934, he bought a bottle of coca-cola from Tom Kutches' cafe in Charlotte which "had a dead fly in it."

4. Bertha Lee testified that on 26 June, 1934, she bought a bottle of coca-cola at Yancey's Drug Store in Charlotte which contained "three or four pieces of glass."

5. J. R. Moore testified that on 27 August, 1934, he bought a bottle of coca-cola from a cafeteria in Charlotte and "found some glass in it."

It is in evidence that the defendant placed on the market all the bottled coca-cola sold in the Charlotte territory or district.

The defendant offered the inspector for the State Food Department, who testified in part as follows: "I made five inspections (of the defendant's plant) in 1933—2 February, 19 May, 6 June, 2 October, and 16 November. I found the plant in good condition every time. . . . I am familiar with the methods approved and in general use for safeguarding drinks bottled in bottling plants in this territory, and was familiar with those methods in 1933. The method used by the Charlotte plant, including machinery and building, is considered to be of the highest standard. . . . The machinery in the Charlotte Coca-Cola Bottling Company is the latest model, standard, and up to date."

There was other evidence to the same effect, none of which was controverted.

The issue of negligence was found against the defendant, and plaintiff was awarded damages in the sum of $1,500.

Defendant appeals, assigning errors.

D. E. Henderson, G. T. Carswell, and Joe W. Ervin for plaintiff.
John M. Robinson and Hunter M. Jones for defendant.

STACY, C. J. In considering the questions presently presented, it may be helpful to plot again the course of the decisions in this jurisdiction respecting the liability of one who manufactures or prepares in cans, sealed packages, or bottles, foods, medicines, drugs, or beverages and places them on the market, for injuries sustained by the ultimate consumer or user who purchases such goods from a dealer or middle-man and not from the manufacturer, bottler, or packer.

These propositions are established:

1. That the basis of liability is negligence rather than implied warranty. *Thomason v. Ballard, ante,* 1; *Perry v. Bottling Co.,* 196 N. C., 175, 145 S. E., 14; *Grant v. Bottling Co.,* 176 N. C., 256, 97 S. E., 27; *Ward v. Sea Food Co.,* 171 N. C., 33, 87 S. E., 958.

2. That the standard of vigilance required of the manufacturer, bottler, or packer, is due care, *i.e.,* commensurate care under the circum-

stances. *Broadway v. Grimes,* 204 N. C., 623, 169 S. E., 194; *Corum v. Tobacco Co.,* 205 N. C., 213, 171 S. E., 78; *Small v. Utilities Co.,* 200 N. C., 719, 158 S. E., 385.

3. That the installation by the manufacturer, bottler, or packer, of modern machinery and appliances, such as is in general and approved use, does not *ipso facto* or perforce exculpate the defendant from liability. *Grant v. Bottling Co., supra.*

4. That the unwholesomeness of the product which proximately results in injury to the consumer must be traced to the negligence of the manufacturer, bottler, or packer. *Keith v. Tobacco Co.,* 207 N. C., 645.

5. That in establishing the alleged negligence of the manufacturer, bottler, or packer, the plaintiff is not entitled to call to his aid the doctrine of *res ipsa loquitur. Lamb v. Boyles,* 192 N. C., 542, 135 S. E., 464; *Cashwell v. Bottling Works,* 174 N. C., 324, 93 S. E., 901; *Perry v. Bottling Co., supra; Dail v. Taylor,* 151 N. C., 284, 66 S. E., 135; Note, 47 A. L. R., 148.

6. That proof of the explosion from gas pressure of a single bottle of coca-cola (*Dail v. Taylor, supra*), pepsi-cola (*Cashwell v. Bottling Works, supra*), ginger ale (*Lamb v. Boyles, supra*), without more, is not sufficient to carry the case to the jury on the issue of negligence. *Broadway v. Grimes, supra.*

7. That a way of escape is to be left open for the careful and prudent manufacturer, bottler, or packer. *Thomason v. Ballard, supra; Lamb v. Boyles, supra; Grant v. Bottling Co., supra; Dail v. Taylor, supra.*

8. That direct proof of actionable negligence on the part of the defendant is not required. Such negligence may be inferred from relevant facts and circumstances. *Broadway v. Grimes, supra; Dail v. Taylor, supra.*

9. That as tending to establish the principal fact in issue, to wit, the alleged actionable negligence of the defendant, it is competent for the plaintiff to show that like products manufactured under substantially similar conditions and sold by the defendant "at about the same time" contained foreign or deleterious substances. *Perry v. Bottling Co., supra; Dail v. Taylor, supra; Ward v. Sea Food Co., supra; Davis v. Packing Co.,* 189 Ia., 775, 176 N. W., 382, 17 A. L. R., 649.

10. That such similar instances are allowed to be shown as evidence of a probable like occurrence at the time of plaintiff's injury, when accompanied by proof of substantially similar circumstances and reasonable proximity in time. *Perry v. Bottling Co., supra; Broadway v. Grimes, supra; Grant v. Bottling Co., supra; Etheridge v. R. R.,* 206 N. C., 657, 175 S. E., 124; 22 C. J., 750, *et seq.*

Tested by the foregoing standards, or established rules, it would seem that insufficient predicate was laid for the introduction, at least, of

some of the evidence tending to show other occurrences in which deleterious substances were found in the bottles of coca-cola placed on the market by the defendant. *Broadway v. Grimes, supra.* The testimony of Mrs. Henrietta Courtney related to a transaction too remote in point of time, there being nothing to show that it was one of a series of similar occurrences preceding or following the date of plaintiff's injury or that the circumstances were substantially the same as in the instant case. *Perry v. Bottling Co., supra.* Likewise, the testimony of Bertha Lee and J. R. Moore related to substances, particles of glass, suggestive of a dissimilar, rather than a similar, source of deleteriousness from that of the substance of which the plaintiff complains; and it is not disclosed by the record that the testimony of L. D. Yerton was properly safeguarded, if, indeed, all these occurrences were not merely isolated instances, widely separated, and too remote in point of time. 22 C. J., 750. At least, the admission of this evidence was in excess of the liberality allowed, upon rulings, in *Dry v. Bottling Co.,* 204 N. C., 222, 167 S. E., 801, and *Broom v. Bottling Co.,* 200 N. C., 55, 156 S. E., 152.

The limitation on the admissibility of this kind of evidence was considered in the recent case of *Etheridge v. R. R.,* 206 N. C., 657, 175 S. E., 124.

New trial.

CLARKSON, J., dissents.

CHARLOTTE CONSOLIDATED CONSTRUCTION COMPANY v. THE CITY OF CHARLOTTE.

(Filed 26 June, 1935.)

1. Municipal Corporations E g: Eminent Domain A c—Evidence held sufficient to support finding that city appropriated private water main to its own use under power of eminent domain.

Evidence that plaintiff constructed and owned certain water mains, and that defendant municipality remained in permissive possession thereof for a number of years, until shortly before the institution of the action, when defendant municipality refused to recognize plaintiff's ownership and right to forbid the city to use same, and retained possession of the water mains, and continued to use same as a part of its municipal water system adverse to plaintiff's claim of title, *is held* sufficient to support a finding that defendant municipality took possession of the water mains and appropriated them to its own use under the power of eminent domain.

2. Evidence E e—Where it is admitted in the pleadings that no contract existed between the parties, defendant is bound thereby, although plaintiff introduces contract in evidence for restricted purpose.

Where plaintiff brings action in tort against a city to recover the value of plaintiff's water mains appropriated by the city, and plaintiff alleges in its complaint that there was no contract between the parties in respect thereto, which is admitted by the city, and plaintiff introduces a contract between the parties solely for the purpose of showing that the city's possession of the water mains prior to their appropriation by the city was permissive, the city's contention that plaintiff should be nonsuited for that a cause of action under the contract for the contract price of the water mains had not yet accrued cannot be sustained.

3. Limitation of Actions B a—Right of action against city for appropriation of plaintiff's water mains held to have accrued when city refused to recognize plaintiff's title thereto.

The evidence tended to show that defendant municipality was in the permissive possession of water mains owned by plaintiff, that thereafter, less than two years prior to the institution of the action, the municipality refused to recognize plaintiff's ownership of the water mains and appropriated same to its own use as a part of the municipal water system. *Held:* Plaintiff's right of action for defendant's wrongful appropriation of plaintiff's property accrued, not at the time of the construction and permissive use of same by the city, but at the time defendant municipality took possession of same adversely to plaintiff, and plaintiff's cause of action was not barred by the statutes of limitation.

4. Municipal Corporations J b—

The provisions of the charter of a municipality requiring the filing of notice of claim for damages does not apply to an action to recover the value of private property appropriated by the city under the power of eminent domain.

APPEAL by defendant from *Cowper, Special Judge,* at the February Special Term, 1935, of MECKLENBURG. Affirmed.

This is an action to recover compensation for certain water mains in the city of Charlotte, North Carolina, which were owned by the plaintiff on 15 August, 1934, and were taken from the plaintiff by the defendant, a municipal corporation, at or about said date, under its power of eminent domain, and thereafter appropriated by the defendant to its use as a part of its municipal water system.

The action was begun in the Superior Court of Mecklenburg County on 5 September, 1934.

A trial by a jury of the issues raised by the pleadings was duly waived by the parties to the action, when the same was called for trial. Pursuant to their agreement, the court heard the evidence offered by both the plaintiff and the defendant, and from all the evidence found as facts:

1. That the water mains described in the pleadings were owned by the plaintiff on and prior to 15 August, 1934.

2. That on or about 15 August, 1934, the defendant, a municipal corporation, under its power of eminent domain, which was conferred by statute, took the said water mains from the plaintiff, and thereafter appropriated the same to its use as a part of its municipal water system, and has since failed and refused to pay to plaintiff compensation for said water mains, although requested so to do by the plaintiff.

3. That the fair and reasonable market value of said water mains was on or about 15 August, 1934, and is now, $16,500.

On these facts the court concluded, as a matter of law, that the defendant, having taken and appropriated to its own use the water mains which were owned by the plaintiff, under its power of eminent domain, is now liable to the plaintiff for the fair and reasonable market value of said water mains, with interest from the date of the filing of the complaint in this action.

It was accordingly considered, ordered, and adjudged by the court that the plaintiff recover of the defendant the sum of $16,500, with interest on said sum from 23 October, 1934, and the costs of the action.

From the judgment the defendant appealed to the Supreme Court, assigning errors as set out in the case on appeal.

Taliaferro & Clarkson for plaintiff.
Bridges & Orr for defendant.

CONNOR, J. At the close of all the evidence at the trial of this action, the defendant moved for judgment as of nonsuit, and excepted to the refusal of the court to allow its motion. On its appeal to this Court, in support of its assignment of error based on this exception, the defendant contends:

1. That there was no evidence from which the court could find that the defendant had taken from the plaintiff and appropriated to its own use the water mains owned by the plaintiff, as alleged in the complaint;

2. That all the evidence showed that plaintiff's right of action, if any, to recover for the water main constructed by the defendant at the request of the plaintiff and paid for by the plaintiff, in accordance with its agreement, in 1916, had not accrued at the date of the commencement of this action;

3. That all the evidence showed that plaintiff's right of action, as alleged in the complaint, is barred by the statute of limitations, which had been duly pleaded in the answer.

1. All the evidence showed that at the time they were constructed the plaintiff was the owner of the water mains described in the complaint. There was no evidence tending to show that the defendant had thereafter, and prior to 15 August, 1934, acquired title to the said water mains. There was evidence tending to show that prior to 15 August,

1934, the defendant had been in possession of the water mains owned by the plaintiff continuously from the dates on which they were constructed; that such possession was with the permission of the plaintiff, and was at no time adverse to the plaintiff; and that such possession was pursuant to agreements with respect to said water mains by and between the plaintiff and the superintendent of the defendant's municipal water system.

There was evidence tending to show further that on or about 15 August, 1934, the defendant refused to recognize plaintiff's ownership of said water mains, and right to their possession; that since said date the defendant has remained in possession of said water mains, and continued to use the same as part of its municipal water system; and that defendant is now and has been since 15 August, 1934, in the adverse possession of said water mains.

This evidence is sufficient to sustain the finding by the court that on or about 15 August, 1934, under its right of eminent domain, the defendant took the water mains described in the complaint from the plaintiff, and thereafter appropriated the same to its use as part of its municipal water system. The instant case is distinguishable from *Farr v. City of Asheville,* 205 N. C., 82, 170 S. E., 125. In that case it was held that the evidence was not sufficient to show that the defendant had appropriated the water mains owned by the plaintiff.

2. This is not action on a contract. The defendant in its answer alleges that there was no contract between the plaintiff and the defendant with respect to any of the water mains described in the complaint. This is admitted by the plaintiff. For that reason, the second contention of the defendant with respect to its motion for nonsuit cannot be sustained. The evidence tending to show agreements between the parties with respect to the water mains was offered, not for the purpose of establishing contractual rights on the part of the plaintiff against the defendant, but solely for the purpose of showing that the possession by the defendant of the water mains, prior to 15 August, 1934, was with the permission of the plaintiff, and was not adverse.

3. The cause of action alleged in the complaint, and supported by the evidence at the trial, accrued, if at all, on or about 15 August, 1934. For that reason the action is not barred by the statute of limitations pleaded by the defendant, or subject to the provision in the defendant's charter with respect to notice of claims against the defendant. See *Stephens v. City of Charlotte,* 201 N. C., 258, 159 S. E., 414.

Other assignments of error relied upon by the defendant are based upon exceptions to evidence admitted by the court over objections by defendant. These assignments of error cannot be sustained.

We find no error in the trial of this action. The judgment is

Affirmed.

STATE v. RALPH DILLS AND LUTHER E. OSBORNE.

(Filed 26 June, 1935.)

1. **Criminal Law G 1—**

In order for defendant's silence in the face of accusations of guilt to be competent as an implied confession, it is necessary that the circumstances be such as to call for a denial by him.

2. **Same—Circumstances held not such as to call for denial by defendants of accusation of guilt.**

Defendants, arrested on a charge of murder, had denied to the officers that they were present at the scene of the crime. Thereafter defendants were forced by the officers to hear read affidavits of codefendants charging them with complicity in the crime. *Held:* Defendants' silence in the presence of the officers upon the reading of the affidavits was not under circumstances calling for a denial by them, since they might well have thought that nothing further could be accomplished by again denying their guilt to the same parties, and evidence of their silence was improperly admitted as an implied confession by them.

3. **Constitutional Law F a—Under circumstances of this case, defendants were within constitutional rights in remaining silent in face of accusations against them.**

Defendants, charged with murder, were forced by officers to hear read affidavits of codefendants charging them with complicity in the crime. *Held:* If the accusations were true, defendants were within their constitutional rights in remaining silent in the face of the accusations, since no one should be forced to incriminate himself, or to make false statements to avoid so doing.

4. **Criminal Law G 1—Under circumstances of this case implied confessions were not voluntary, and testimony thereof was incompetent.**

Defendants, under arrest upon a charge of murder, were forced by officers to hear read affidavits of codefendants charging them with complicity in the crime. *Held:* Evidence of defendants' silence in the face of the accusations was not competent as being implied confessions by defendants for that they were forced to hear the affidavits read, and therefore their failure to speak were not voluntary actions, and confessions are competent only when voluntarily made.

APPEAL from *Alley, J.*, at November Term, 1934, of GUILFORD. New trial.

The appellants Ralph Dills and Luther E. Osborne were tried jointly with Paul Sams, Robert Smith, and Reuben Varner, upon a bill of indictment charging them with the murder of one William Davis. Sams and Smith were acquitted, Varner was convicted of second degree murder and sentenced to imprisonment, and Dills and Osborne were convicted of first degree murder and from judgment of death appealed to the Supreme Court, assigning errors.

J. A. Myatt for appellant Ralph Dills.

Gold, McAnally & Gold for appellant Luther E. Osborne.

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

SCHENCK, J. Since they are decisive of this appeal, it becomes necessary for us to discuss only those assignments of error which assail the admission of certain evidence offered by the State.

While all five of the defendants named in the bill were under arrest, two of them, Sams and Smith, made separate voluntary affidavits which exculpated the affiants and inculpated the appellants. The appellant Osborne, while under arrest, was taken by the high sheriff of Guilford County from his cell into a private room adjoining the city jail and was then and there in the presence of the sheriff, his deputies and others compelled to hear read the affidavit of Sams, and to hear Sams say it was correct. The sheriff and others were permitted, over objections and exceptions duly taken, to testify that under these circumstances the defendant Osborne "said nothing." Substantially the same procedure was followed as to the appellant Osborne with reference to the affidavit of the codefendant Smith. Also substantially the same procedure was followed as to the appellant Dills with reference to both affidavits and both affiants. Neither of the affiants, Sams or Smith, was introduced as a witness at the trial of the cause.

The rule generally followed is that statements made to or in the presence and hearing of a person accusing him of the commission of or complicity in a crime are, when not denied, admissible in evidence against him as warranting an inference of the truth of such statements. 1 R. C. L., 479. However, the occasion must be such as to call for a reply or denial. "It is not sufficient that the statement was made in the presence of the defendant against whom it is sought to be used, even though he remained silent; but it is further necessary that the circumstances should have been such as to call for a denial on his part, and to afford him an opportunity to make it." 16 C. J., 659; *S. v. Wilson,* 205 N. C., 376.

We are of the opinion that the instant occasions were not such as to make a reply from the appellants necessary. They had already been arrested and placed in jail, and had denied to the officers that they were present at the scene of the crime, and nothing more could be accomplished, or at least they might readily have thought nothing more could be accomplished, by again denying to the same parties their guilt.

To have made their failure to deny the accusations of their complicity in the murder of William Davis contained in the affidavits of

their codefendants competent against the appellants, it must have been made to appear that such failure occurred upon such an occasion as to call for a reply. "To make the statements of others evidence against one on the ground of his implied admission of their truth by silent acquiescence, they must be made on an occasion when a reply from him might be properly expected. . . . But where the occasion is such that a person is not called upon or expected to speak, no statements made in his presence can be used against him on the ground of his presumed assent from his silence." *Guy v. Manuel,* 89 N. C., 83.

There could have been but one purpose in forcing the appellants to hear read the affidavits in the presence of the affiants, and that was to procure evidence against them; and, if the accusations were true, the appellants had one of three courses to pursue, either admit their truth and thereby admit their own guilt, or deny them and thereby make false statements, or remain silent. We think in remaining silent the appellants acted within their legal rights, since no man should be forced to incriminate himself, or to make false statements to avoid so doing.

The admission of the testimony to the effect that the appellants remained silent in the face of hearing read the affidavits was also error for the reason that to render any confession admissible in evidence it must be voluntarily made. "Confessions are of two kinds, voluntary and involuntary. Voluntary confessions are admissible in evidence against a defendant; involuntary confessions are not. A confession is voluntary in law when—and only when—it was in fact voluntarily made. *Ziang Sung Wan v. United States,* 266 U. S., 1, 69 L. Ed., 131. The voluntariness of a confession is a preliminary question to be determined by the judge in passing upon its competency as evidence. *S. v. Andrew,* 61 N. C., 205. And in deciding the question of its admissibility in evidence, the judge may hear the testimony of witnesses pro and con. *S. v. Whitener,* 191 N. C., 659, 132 S. E., 603. If an alleged confession is excluded, its competency cannot arise on appeal; but, if admitted, it may." *S. v. Newsome,* 195 N. C., 552, 566. We cannot hold that the appellants' failure to speak were voluntary actions, when they were forced by the officers of the law, who had them in custody, to hear the affidavits read.

For the reasons assigned, the appellants are entitled to have their cause tried before another jury, and it is so ordered.

New trial.

STATE v. Z. H. DUNCAN.

(Filed 26 June, 1935.)

1. **Criminal Law K a—**

Where the judgment does not provide to the contrary, a prison sentence imposed on each conviction on separate counts in the indictment will run concurrently.

2. **Criminal Law L e—**

Where defendant is convicted on each of two counts in the bill of indictment and sentences of equal length are imposed on each conviction, the sentences to run concurrently, the granting of a new trial on one count would seem futile where there is no contention that there was error in respect to the other count.

3. **Homicide E a—Defendant's own testimony held to negative contention that defendant shot deceased in self-defense.**

Where defendant's own testimony tends to show that he shot and killed deceased in a fit of uncontrollable anger immediately after defendant had shot and killed another, the charge of the court that if the jury should find the facts to be as testified by defendant to return a verdict of guilty of manslaughter, at least, will not be held for error on defendant's exception based upon his contention of self-defense, there being nothing in defendant's testimony tending to show that he killed deceased because of apprehension, real or apparent, that deceased was going to kill him or do him serious bodily harm.

APPEAL by defendant from *Barnhill, J.*, at September Term, 1934, of HARNETT. No error.

At May Term, 1934, of the Superior Court of Harnett County, the grand jury returned as a true bill a bill of indictment in which the defendant Z. H. Duncan was charged with the murder in Harnett County, on 13 May, 1934, of Jarvis Stephens.

At September Term, 1934, of said court, the grand jury returned as a true bill a bill of indictment in which the defendant Z. H. Duncan was charged with the murder in Harnett County, on 13 May, 1934, of Jeff Moore.

Without objection by the defendant, the actions founded on these two indictments were consolidated by an order of the court at September Term, 1934, of said court, for trial as upon one indictment containing two counts, the first for the murder of Jeff Moore, and the second for the murder of Jarvis Stephens. A plea of not guilty as to each count was entered by the defendant.

At the trial there was a verdict that the defendant is guilty of murder in the second degree on the first count, and is guilty of manslaughter on the second count.

The evidence, if the testimony of witnesses for the State was believed by the jury, was sufficient to sustain both verdicts. The defendant contended that the evidence offered by him was sufficient to support his plea of self-defense as to both counts. The court instructed the jury that if they found the facts to be as testified by the defendant, they should return a verdict on the second count of guilty of manslaughter. The defendant excepted to this instruction.

It was adjudged by the court that the defendant be confined in the State's Prison at hard labor for a term of not less than fifteen or more than twenty years, on each verdict. The defendant excepted to the judgment and appealed to the Supreme Court.

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

Otis L. Duncan, J. R. Young, and I. R. Williams for defendant.

CONNOR, J. At the trial of this action the defendant was convicted on both counts in the consolidated indictment—on the first count, of murder in the second degree, and on the second count of manslaughter. He was sentenced by the court to imprisonment in the State's Prison, on each verdict, for a term of not less than fifteen or more than twenty years. It is not ordered in the judgment that one term shall commence at the expiration of the other. The terms of the sentences on both convictions are concurrent. In *In re Black,* 162 N. C., 457, 78 S. E., 273, it is said: "It seems to be well settled by many decisions and with entire uniformity that where a defendant is sentenced to imprisonment on two or more indictments on which he has been found guilty, sentence may be given against him on each successive conviction; in the case of the sentence of imprisonment, each successive term to commence at the expiration of the term next preceding. It cannot be urged against a sentence of this kind that it is void for uncertainty; it is as certain as the nature of the matter will admit. But the sentence must state that the latter term is to begin at the expiration of the former; otherwise, it will run concurrently with it."

In view of this principle, which is applicable to the judgment in the instant case, it would seem that a new trial on the second count in the indictment would be futile. The defendant does not contend on his appeal to this Court that there was error in the trial of the issue involved in the first count, or that there was no evidence to support the contention of the State on the second count. He admits that he killed Jarvis Stephens with a deadly weapon, as alleged in the second count, but contends that the homicide was in his self-defense. He excepted to the instruction of the court to the jury, in effect, that if the jury should find the facts to be as the defendant, as a witness in his

own behalf, had testified, they should find that the defendant is guilty of manslaughter, at least, on the second count. This exception cannot be sustained.

It does not appear from the testimony of the defendant as set out in the case on appeal that he shot and killed Jarvis Stephens, as charged in the second count, because of his apprehension that the deceased was about to kill him, or do him serious bodily harm. The defendant's testimony shows that he shot and killed the deceased, immediately after he had shot and fatally wounded Jeff Moore and while he was beside himself with anger and passion. There is nothing in defendant's evidence which shows any necessity, real or apparent, for the homicide, and for that reason there was no error in the instruction which the defendant assigns as error. The judgment is affirmed.

No error.

STATE v. CLINTON BEASLEY, SARAH BEASLEY, ALIAS SARAH KRANE, ILA BEASLEY, ARTHUR I. KRANE, ALEX BEASLEY, NELLIE BEASLEY, PEARL BEASLEY, MARGARET LEE KEEN, AND ALMON KEEN.

(Filed 26 June, 1935.)

1. Indictment A a—

When the indictment charging defendants with the commission of crime is invalid, defendants' motion to dismiss the action for want of jurisdiction should be allowed. N. C. Const., Art. I, sec. 12.

2. Indictment A b—Grand jury held to have no jurisdiction to charge commission of crime in another county, and indictment was void.

The jurisdiction of a grand jury, with certain statutory exceptions, extends only to crimes committed within the county, and where the bill of indictment avers that the crime, not within the statutory exceptions, was committed in another county, and the court, upon the finding of a true bill, transfers the case to the county in which the indictment avers the offense to have been committed, the Superior Court of such county acquires no jurisdiction, and defendants' motion to dismiss should be allowed, since the indictment is void for want of jurisdiction in the grand jury returning same, and cannot confer jurisdiction upon the Superior Court of any county.

3. Criminal Law F b—

A trial and conviction upon a void indictment will not support a plea of former jeopardy upon a subsequent trial after the Supreme Court has reversed the judgment upon the void indictment.

4. Criminal Law L f—New trial is awarded some of defendants for admission of evidence predicated upon void indictment of codefendants.

Where defendants, charged in various indictments with the same offense, are tried together, and judgment of conviction of some of the de-

fendants is reversed because the indictment upon which they were tried is void, a new trial will be awarded the other defendants upon their appeal upon their exception to the admission of evidence on the joint trial which depended for its competency upon the void indictment.

APPEAL from *Daniels, J.*, at December Term, 1934, of JOHNSTON.

James R. Pool, E. J. Wellons, and L. L. Levinson for defendants.
Simms & Simms for Pearl Beasley only.
Attorney-General Seawell and Assistant Attorney-General Aiken for the State.

SCHENCK, J. Nine defendants were jointly tried upon three bills of indictment charging that they "did unlawfully and wilfully and feloniously forcibly, fraudulently kidnap and carry away" Camelia Price, Ogolia Barber, and Josephine Smith, respectively. C. S., 4221. The defendants Sarah Beasley, alias Sarah Krane, Arthur I. Krane, Clinton Beasley, and Ila Beasley were charged in one bill with kidnapping Camelia Price in Johnston County, on 12 May, 1934; Alex Beasley, Sarah Beasley, alias Sarah Krane, Nellie Beasley, Pearl Beasley, Margaret Lee Keen, and Almon Keen were charged in one bill with kidnapping Ogolia Barber in Johnston County, on 12 August, 1934; and the said last six named defendants were charged in another bill with kidnapping Josephine Smith in said county on said last named date. A general verdict of guilty was returned as to all of the defendants, except Almon Keen, who was acquitted. From judgments of imprisonment pronounced upon the verdict, the defendants (except Almon Keen) appealed to the Supreme Court, assigning errors.

The bill of indictment charging the kidnapping of Camelia Price was found by the grand jury of Wayne County, and alleged that the kidnapping was done in Johnston County. The judge holding the courts of Wayne County transferred the case to the Superior Court of Johnston County, notwithstanding the defendants named in the bill lodged no motion and made no appearance in Wayne Superior Court.

Upon the consolidated cases coming on for trial in Johnston Superior Court the defendants named in the bill found in Wayne County, charging the kidnapping of Camelia Price, in apt time, challenged the jurisdiction of the Superior Court of Johnston County to try them by lodging a motion to dismiss the action in so far as it related to the charge in said bill, which motion was disallowed.

When in the Superior Court a defendant is tried without a valid indictment, and moves to dismiss the action for want of jurisdiction, the motion should be allowed. N. C. Const., Art. I, sec. 12; *S. v. Rawls*, 203 N. C., 436. We are therefore confronted with the simple question

as to whether the bill found in Wayne County and transferred to Johnston County conferred jurisdiction upon the Superior Court of Johnston County to try the defendants named in the bill for the kidnapping of Camelia Price in Johnston County. If it did confer such jurisdiction, then the motion to dismiss was properly disallowed; if it did not confer such jurisdiction, then said motion was improperly disallowed.

It appears from the bill that it was found in Wayne County, and that the averment is that the offense was committed in Johnston County. The territorial jurisdiction of the Superior Court of Wayne County, with certain statutory exceptions which have no application here, is Wayne County. Therefore, the grand jury of Wayne County was without jurisdiction to indict the defendants for a breach of the criminal law averred to have been committed in Johnston County, and since the grand jury that found the bill—the grand jury of Wayne County—had no jurisdiction over an offense averred to have been committed in another county—Johnston County—the bill was void, and could confer no jurisdiction anywhere, even in the county in which the offense is averred to have been committed. *S. v. Mitchell et al.,* 202 N. C., 439.

We conclude that the Superior Court erred in disallowing the motion to dismiss the action in so far as it relates to the charge contained in the bill of indictment found in Wayne County and transferred to Johnston County; and the defendants in so far as the charge contained in this indictment is concerned are discharged. This discharge, however, does not preclude the said defendants from being tried upon an indictment by a grand jury of Johnston County, since jeopardy attaches only when, *inter alia,* the defendant is placed on trial upon a valid indictment or information. *S. v. Bell,* 205 N. C., 225; nor does it deny the authority of the court to hold said defendants until a valid bill can be found.

Since the admission of much of the evidence in the joint trial upon the various bills of the indictment was predicated upon the charge contained in the void indictment returned in Wayne County, and was competent only upon the theory that such indictment was a valid one, and since objections and exceptions were duly lodged thereto, it behooves us to award a new trial as to the appellants named in the other two indictments.

Reversed as to the charges contained in the indictment found in Wayne County and transferred to Johnston County.

New trial as to the charges contained in the other bills.

GURNEY P. HOOD, COMMISSIONER OF BANKS, ET AL. v. H. S. RICHARDSON ET AL.

(Filed 26 June, 1935.)

1. Removal of Causes C b—Complaint in action against several defendants for statutory bank stock liability held to state separable controversies.

A complaint against a corporation and several individuals, alleging that the corporation was the owner of stock of a domestic bank at the time the bank was closed because of insolvency, and that the corporation was a mere "dummy," and that the individual defendants were the beneficial or equitable owners of the shares of stock, and alleging liability for the statutory assessment on the bank stock on the part of the corporation and proportionately on the part of the individuals, *is held* to state a separable controversy as to the corporation and the individuals within the meaning of the Judicial Code, and motions of the nonresident defendants for removal to the Federal Court upon petitions showing the requisite jurisdictional amount should be allowed.

2. Removal of Causes E a—

A single separable controversy between citizens of different states, upon motion to remove, carries the whole cause to the Federal Court, and, therefore, when one such separable controversy exists it is unnecessary to consider additional alleged separable controversies.

3. Removal of Causes C b—

The fact that a complaint is good as against a demurrer for misjoinder of parties and causes is not a test of whether the complaint alleges separable controversies within the meaning of the Judicial Code.

APPEAL by defendants from *Alley, J.*, at October Term, 1934, of GUILFORD.

Civil action to determine liability of defendants for certain alleged stock assessments by reason of alleged ownership, legal or equitable, of shares of stock in the North Carolina Bank and Trust Company, brought by the Commissioner of Banks against three nonresident and six resident defendants.

Motions by nonresident defendants, Mrs. C. F. Chapin, Piedmont Financial Company, Inc., and H. S. Richardson, to remove cause to the District Court of the United States for the Middle District of North Carolina for trial. Motions allowed by the clerk of the Superior Court and reversed on appeal by the judge of the Superior Court.

From this latter ruling the movants appeal, assigning errors.

Brooks, McLendon & Holderness for plaintiffs.

James F. Hoge, Clyde R. Hoey, Frazier & Frazier, and Huger S. King for defendants.

STACY, C. J. The petitions for removal, in addition to showing the presence of the requisite jurisdictional amounts, assert rights of removal on grounds of diverse citizenship and separable controversies.

The complaint, in part, in substance alleges:

1. That H. S. Richardson is a resident of Connecticut; Mrs. C. F. Chapin a resident of New York; Piedmont Financial Company, Inc., a Delaware corporation, and that the remaining defendants are residents of this State.

2. That the North Carolina B: nk and Trust Company, a banking institution, was organized under the laws of this State by the merger of certain other banking institutions, etc. That it ceased to do business on 20 May, 1933.

3. That on 22 June, 1933, the plaintiff Commissioner of Banks, by authority of law, levied a 100 per cent stock assessment against all the stockholders of the North Carolina Bank and Trust Company, including an assessment of $274,580 against the Piedmont Financial Company, it appearing as the owner of 27,458 shares of stock upon the books of the bank.

4. That in reality the said Piedmont Financial Company was never anything more than a "dummy," that it is insolvent, and that the defendants H. S. Richardson, Piedmont Financial Company, Inc., and L. Richardson are the real owners of 22,208 shares of said stock, and, as such, are liable for $222,080 of said assessment; Mrs. C. F. Chapin is the real owner of 1,500 shares of said stock, and, as such, is liable for $15,000 of said assessment, and the other defendants are the real owners of the remainder of said stock in varying amounts, and, as such, are liable for the balance of said assessment.

The gravamen of the complaint against Mrs. C. F. Chapin is, that she is the equitable owner of 1,500 shares of stock in the North Carolina Bank and Trust Company, standing in the name of Piedmont Financial Company upon the books of the bank, and, as such, is liable to the plaintiff for the stockholders' assessment levied thereon. The prayer is, that the plaintiff recover of her the sum of $15,000 by reason of such ownership and assessment. This is a separable controversy within the meaning of the Judicial Code. *Wright v. Ankeny,* 217 Fed., 985; *Calderhead v. Downing,* 103 Fed., 27. It is between citizens of different states. Hence, the cause is removable. *Timber Co. v. Ins. Co.,* 190 N. C., 801, 130 S. E., 864.

Likewise, the allegation against the Piedmont Financial Company, Inc., is that it is the real owner of 22,208 shares of stock in the North Carolina Bank and Trust Company, standing in the name of Piedmont Financial Company upon the books of the bank, and, therefore, liable to the plaintiff for the stockholders' assessment levied thereon. The prayer

is, that the plaintiff recover of it the sum of $222,080 by reason of such ownership and assessment. This is also a separable controversy between citizens of different states within the meaning of the Judicial Code.

A single separable controversy between citizens of different states, upon motion to remove, carries the whole cause to the Federal Court for trial. *Brown v. R. R.,* 204 N. C., 25, 167 S. E., 479. Therefore, consideration of additional alleged separable controversies is pretermitted as being presently supererogatory.

The fact that the complaint tells a connected story and may be good as against a demurrer, *Trust Co. v. Peirce,* 195 N. C., 717, 143 S. E., 524, is not the test of inseparability on motion to remove.

Reversed.

SOPHIA GOODMAN v. QUEEN CITY LINES, INC., ET AL.

(Filed 26 June, 1935.)

1. **Carriers C d—Bus lines not lessees of station held not liable for injuries from fall sustained by passenger of another bus line.**

   Certain of defendant bus companies using in common with other of defendants a central bus station, but who were not lessees of the station, may not be held liable to a person, a passenger on another bus line, but not a passenger on their lines, nor a prospective passenger thereon, for personal injuries sustained by such person from a fall occurring when such person stepped down a slight depression in the station upon the wet floor.

2. **Same—Lessee bus lines held not liable for injuries from fall in station sustained by passenger of another line, in absence of wanton negligence.**

   Certain defendant bus companies who were lessees of a common station *are held* not liable to a passenger of another bus company who was not a passenger on their lines, nor a prospective passenger thereon, for personal injuries sustained by such person from a fall occurring when such person stepped down a slight depression in the station upon the wet floor, in the absence of evidence of wilful or wanton negligence on the part of such bus lines, the injured person being a mere permissive licensee in relation to such companies.

3. **Carriers C a—Under facts of this case, plaintiff did not lose status as passenger by temporarily alighting from bus.**

   Plaintiff was a passenger on a bus line. The bus stopped at an intermediate point, and plaintiff was told that the bus would stop at such terminal for thirty minutes for rest and lunch. Plaintiff left the bus and went into the bus station, through the ladies' rest room to the toilet, and sustained a personal injury from a fall while returning to the rest room. *Held:* Plaintiff left the bus for the purpose stated with the express or implied consent of the bus company, and did not lose her status as a passenger by temporarily alighting from the bus under the circumstances.

4. Same—Question of bus company's negligence in failing to furnish passenger reasonably safe accommodations held for jury under the evidence.

Plaintiff, without losing her status as a passenger, left the bus and went to the toilet in the station at an intermediate point, and was injured in a fall occurring when she stepped down a depression of about six inches in the floor of the station, upon her return from the toilet to the ladies' rest room. The evidence was conflicting as to whether there was sufficient light at the place, and as to whether the floor was slippery and wet. *Held:* Defendant's motion as of nonsuit was properly refused, the question of negligence being for the jury, upon the principle that defendant was under duty to furnish its passenger reasonably safe accommodations.

APPEAL by defendants from *Cowper, Special Judge,* at August Special Term, 1934, of MECKLENBURG.

Civil action to recover damages for personal injuries alleged to have been caused by the negligence of the defendants.

On 15 January, 1933, the plaintiff purchased a ticket in Charlotte, N. C., and became a passenger on a bus of the Queen City Lines, Inc., for Atlanta, Ga. When the bus reached the Union Station in Greenville, S. C., the driver made the general announcement that the bus would stop at said terminal for thirty minutes for lunch and rest. Whereupon the plaintiff left the bus, went into the station, through the ladies' rest room, into the toilet, and, on returning from the toilet to the rest room, she stepped down a slight depression of about six inches on to the wet floor—unnoticed at the time because of the dimness of the light—which caused her to slip and fall, causing serious injuries.

The defendants' evidence is in sharp conflict with that of the plaintiff's, both as to the sufficiency of the light and also as to the slippery condition of the floor.

It is in evidence that under a regulation of the South Carolina Railroad Commission only one bus station is permitted in the city of Greenville, and all bus lines carrying passengers in and out of said city are required by said regulation to discharge and take on passengers at this central station.

The defendant Queen City Lines, Inc., used the Union Bus Station of Greenville for taking on and discharging passengers, and, on the particular occasion had a stop-over at this station of thirty minutes.

The defendants Camel City Coach Company, Skyland Stages, Inc., and Queen City Coach Company were lessees of the bus station in question, according to the lease introduced in evidence by the plaintiff.

The defendants Atlantic Greyhound Lines of North Carolina, Inc., Eagle Bus Lines, Inc., and W. M. Shelton, trading as The Red Top Bus Lines, were neither lessees of the station, under the evidence, nor carriers of the plaintiff as a passenger.

Charles F. Nimmo testified that he was agent and manager of the Union Bus Station in Greenville on 15 January, 1933, and sold tickets over all the bus lines that stopped or passed there.

The defendants seasonably demurred to the evidence and moved for judgments as of nonsuit under the Hinsdale Act, C. S., 567. Overruled; exceptions.

The usual issues of negligence, contributory negligence, and damages were submitted to the jury and answered in favor of the plaintiff.

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

Charles W. Bundy, Arthur Goodman, and Plummer Stewart for plaintiff.

Kenneth J. Kindley and Cansler & Cansler for defendant Queen City Lines, Inc.

John M. Robinson and Hunter M. Jones for defendants other than Queen City Lines, Inc.

STACY, C. J. It is not perceived upon what theory the defendants Atlantic Greyhound Lines of North Carolina, Inc., Eagle Bus Lines, Inc., and W. M. Shelton, trading as The Red Top Bus Lines, can be held liable for plaintiff's injuries. These lines were not lessees of the station in which she was injured, nor was the plaintiff a passenger on any of them, either actual or prospective. She did not intend to become such. The demurrer to the evidence, interposed by these defendants, should have been sustained.

The defendants Camel City Coach Company, Skyland Stages, Inc., and Queen City Coach Company were lessees of the building in which plaintiff was injured. As to them, the plaintiff was a permissive licensee. *Quantz v. R. R.*, 137 N. C., 136; *Railway v. Thompson*, 77 Ala., 448; *Union Depot, etc., R. Co. v. Londoner*, 50 Colo., 22, 114 Pac., 316, 33 L. R. A. (N. S.), 433. She was not, and did not intend to become, a passenger on any of these lines. So far as they were concerned, the plaintiff entered the station for her own convenience. *Peterson v. R. R.*, 143 N. C., 260, 55 S. E., 618, 8 L. R. A. (N. S.), 1240, 118 Am. St. Rep., 799. In *Louisville, etc., Ry. Co. v. Treadway*, 142 Ind., 475, 40 N. E., 807, it was held (as stated in 3d headnote, which accurately digests the opinion): "Where intersecting railroads use a common depot, and a person at the depot at night, for the purpose of taking passage on one of the roads, is injured on account of the failure to properly light the platform, the other road, which ran no trains during the night, is not liable for the injuries."

The case of *Peters v. Detroit, etc., R. Co.*, 178 Mich., 481, cited and relied upon by plaintiff, is not authority for the position taken. The

point for which the case is cited is expressly not decided, as witness the following: "Whether, if plaintiff's business there had been with the Pere Marquette Railroad Company only, the Detroit and Mackinac Railway Company would have owed him a duty is a question not presented."

There is no evidence of any wilful or wanton negligence on the part of the lessees of the premises. Hence, the demurrer to the evidence, interposed by these defendants, should have been sustained. *Monroe v. R. R.,* 151 N. C., 374, 66 S. E., 315; *Gibbs v. R. R.,* 200 N. C., 49, 156 S. E., 138.

With respect to the Queen City Lines, Inc., the plaintiff did not lose her status as a passenger by temporarily alighting at an intermediate station, for the purpose stated, with the express or implied consent of the carrier. 10 C. J., 628. It has been held that the duty to furnish reasonably safe platforms and the like does not apply to a passenger who leaves a train at an intermediate station. 10 C. J., 923. It is otherwise, however, where the passenger, as in the instant case, does so at the express or implied invitation of the carrier. *Mangum v. R. R.,* 145 N. C., 152, 58 S. E., 913, 13 L. R. A. (N. S.), 589, 122 Am. St. Rep., 437; *Pineus v. R. R.,* 140 N. C., 450, 53 S. E., 297.

The demurrer to the evidence was properly overruled as to the Queen City Lines, Inc. *Dean v. Yelloway Pioneer System,* 259 Ill. App., 180; *Sanchez v. Pacific Auto Stages,* 2 Pac. (2d) (Cal.), 845.

It follows, therefore, that the judgment must be affirmed as to the Queen City Lines, Inc., and reversed as to the other defendants.

On appeal, Queen City Lines, Inc.,
No error.

On appeal, other defendants,
Reversed.

GURNEY P. HOOD, NORTH CAROLINA COMMISSIONER OF BANKS, EX REL. THE MERCHANTS BANK OF DURHAM, N. C., v. JAMES H. COLLINS, JR., AND WIFE, CAROLINE FULLER COLLINS.

(Filed 26 June, 1935.)

Indemnity B a—Under facts of this case, suffering of loss by party indemnified held not prerequisite to action by assignee against security.

The makers of notes executed a deed of trust to secure the endorser on the note from any loss resulting from the endorsement, but the deed of trust recited that it was given to secure payment of principal and interest on the notes, and provided that upon default in the payment of any of the

notes, all the notes should become due and payable, and that the trustee should foreclose upon demand of the *cestui qui trust* or the holder of the notes. The endorser assigned the note to the payee bank in consideration of the bank's releasing him of liability on the endorsement. Upon default in payment of the note the deed of trust was foreclosed, the property bought in by the bank, and a purchaser from the bank secured, who refused to accept deed on the ground that the foreclosure was void because no loss had been suffered by the endorser, the beneficiary in the deed of trust. *Held:* The suffering of loss was not a prerequisite to foreclosure of the deed of trust by the assignee bank, since from the provisions of the deed of trust it was intended to secure the entire debt as well as to save the endorser from loss, and since the bank assignee for value held same as security for the debt, and had the right to foreclosure upon default.

CIVIL ACTION, before *Harris, J.,* at April-May Term, 1935, of DURHAM.

A jury trial was waived and the trial judge found the facts. From such findings it appears that on 9 March, 1930, Clyde D. Vickers and wife executed and delivered to the Merchants Bank of Durham, N. C., two promissory notes aggregating $5,448.14. Both of these notes were endorsed by Claude T. Vickers. Thereafter, on 21 March, 1930, the said Clyde D. Vickers and wife made and executed a deed of trust to L. P. McLendon, trustee. This deed of trust recites that "whereas, said parties of the first part desire to secure and provide for the payment of said notes at their maturity, and to also provide for the prompt payment of interest thereon, as it matures according to the tenor of said notes." Said deed of trust further provides that "said parties of the first part are justly indebted to said party of the third part in the sum of $5,448.14." It was further provided: "But if default be made in the payment of any of said notes, or any part thereof, . . . then and in any such case all of said notes shall immediately mature and fall due and become collectible, anything herein or in said notes to the contrary notwithstanding. Said party of the second part shall, upon being so requested to do by said party of the third part, or holder of said notes, sell any or all of said land at public auction, for cash, . . . and convey the land so sold to the purchaser in fee." In said deed of trust Claude T. Vickers was named as party of the third part, and it was stipulated therein that "this deed of trust being given to secure Claude T. Vickers by reason of his endorsement of said notes, and any renewal or extension of them, or either of them." Claude T. Vickers assigned and delivered the deed of trust to the Merchants Bank in consideration of the promise on the part of the bank to release him from all liability on account of his said endorsement. Claude T. Vickers never paid anything on said notes on account of his endorsement, and has in no respect been damaged as a result thereof. There was default

in the payment of the note, and L. P. McLendon, trustee, upon demand of the plaintiff, holder of the notes, duly advertised and sold the property under a power of sale contained in the instrument, and at such sale Gurney P. Hood, Commissioner of Banks, became the purchaser of a portion of the property in controversy at the price of $4,000. Thereafter, on or about 30 March, 1935, the Commissioner of Banks offered to sell a portion of the property to the defendants for the sum of $1,500. The defendants were willing to pay $1,500 for the property, but refused to accept the deed tendered by the plaintiff upon the ground that the plaintiff could not convey a good title by reason of the fact that the deed of trust was given to secure the endorsement of Claude T. Vickers, and that as Claude T. Vickers had suffered no loss, the sale by the trustee was invalid.

Upon the facts found the trial judge was of the opinion that a sale of the land by McLendon, trustee, and the purchase thereof by the plaintiff was in all respects legal and valid, and that the deed tendered by plaintiff to the defendants would convey a good and marketable title to the land described in such deed.

From the foregoing judgment the defendants appealed.

Brawley & Gantt for plaintiff.
Fuller, Reade & Fuller and F. C. Owen for defendants.

BROGDEN, J. The defendants rely upon an intimation contained in the case of *Brower v. Buxton,* 101 N. C., 419, 8 S. E., 116, as authority for the position that the trustee had no power to make a valid sale of the land by reason of the fact that the endorser had suffered no loss. Even if it be granted that the intimation is sound law, the facts in the case at bar distinguish it from the *Buxton case, supra.* An examination of the provisions and stipulations in the deed of trust carry the conviction that the instrument was intended to secure the entire debt as well as to save the endorser from loss. Moreover, when the endorser for valuable consideration assigned and delivered the deed of trust to the Merchants Bank, it thereupon held the same as security for the debt, and had the right, in the event of default, to require a sale of the property. The sale was properly and regularly made, and thereby invested the plaintiff as Commissioner of Banks with a valid title to the property. Therefore, it necessarily follows that the deed tendered by the plaintiff to the defendants will convey a valid and marketable title.

Hence, the judgment is approved.

Affirmed.

C. J. INGRAM AND WIFE, BERNICE INGRAM, AND THE MECHANICS AND FARMERS BANK, A CORPORATION, v. THE HOME MORTGAGE COMPANY, MORTGAGE SERVICE CORPORATION, AND V. S. BRYANT, SUBSTITUTED TRUSTEE.

(Filed 26 June, 1935.)

1. **Mortgage H b—Restraining order is properly dissolved upon finding that balance was due and unpaid on debt, and that no tender had been made.**

Where, upon the hearing of a temporary order restraining the foreclosure of a deed of trust upon allegations of usury, and that the full amount of the debt had been paid, and that plaintiff was entitled to recover a certain sum as the penalty for usury, the trial court finds that there is a balance due and unpaid on the debt, and that no tender of any amount had been made defendant on the past-due balance, judgment that the temporary order be dissolved and that the trustee foreclose the property is supported by the findings of fact, and an exception to the judgment cannot be sustained.

2. **Appeal and Error F b—**

Where appellant requests no findings of fact, his exception to the findings of fact without specific exception to any particular finding cannot be sustained on appeal.

CIVIL ACTION, before *Moore, Special Judge,* at January Civil Term, 1935, of DURHAM.

The plaintiff alleged that in September, 1927, Mason Kearney and wife, who were the owners of the land in controversy, borrowed from the defendant Mortgage Company $1,900 and executed and delivered a deed of trust securing the same, and that thereafter Kearney and wife conveyed the land to the plaintiff, subject to said deed of trust, which constituted a first lien upon the property. Plaintiff further alleged that approximately $1,558.69 has been paid on the indebtedness, and that no default had occurred. Plaintiff further alleged that there was usury in the transaction, and that they are entitled to recover $190.00 penalty therefor. It was further alleged that the trustee has advertised the property for sale by virtue of the power in said deed of trust contained, and thereupon the plaintiff prayed an injunction restraining said sale, pending the litigation.

The defendants filed answers denying the allegations of the complaint with respect to usury, and that the indebtedness was not in default.

The cause was submitted to the trial judge, who found the following facts:

"That on or about 15 September, 1927, one Mason Kearney and wife, . . . negotiated a loan through the Home Mortgage Company in the amount of $1,900, . . . and executed and delivered a deed of trust

which was recorded in the office of the register of deeds for Durham County. . . . It is further found that the plaintiff C. J. Ingram purchased the land described in the aforementioned deed of trust, and that the legal title to said property is now in him, subject to said deed of trust; that there has been paid on said indebtedness of $1,900 approximately $1,558.69, and that the balance of said debt, with interest thereon, is past due and unpaid, and that neither Mason Kearney and his wife, nor the plaintiff, nor any of them, have offered to pay or tendered to the defendant any amount whatsoever in satisfaction of the balance due and owing on said note and deed of trust. . . . Now, therefore, it is considered, ordered, and adjudged and decreed that the said restraining order heretofore signed . . . be and the same is hereby dissolved, and that V. S. Bryant, substituted trustee, is hereby authorized, directed, and empowered to advertise said property and sell the same," etc.

The appeal entry is as follows: "To the signing of the foregoing order the plaintiff objects and excepts, and gives notice in open court of the appeal to the Supreme Court of North Carolina."

Two exceptions appear in the record:

First, "plaintiffs object and except to the rendition of judgment dissolving temporary restraining order and the signing of said judgment by his Honor."

Second, "to the finding and signing of the order of the finding of facts."

C. J. Cates for plaintiffs.
Fuller, Reade & Fuller for defendants.

BROGDEN, J. The first exception is to the judgment itself. This judgment is regular upon its face, and the facts found by the trial judge are sufficient to support the decree. Consequently, the first exception must fail. *Warren v. Bottling Co.*, 207 N. C., 313; *Moreland v. Wamboldt, ante,* 35.

The second exception is "to the finding and signing of the order of the findings of facts." It is to be observed that the plaintiff requested no finding of facts, and there is no specific exception to any particular finding of fact. Obviously, some of the findings of fact are necessary and beyond question. The Court is not endowed with the gift of prophecy, and, therefore, is unable to determine which particular finding of fact is objectionable to the plaintiff.

Hence, the second exception must likewise fail.

Affirmed.

LULA HAMPTON v. THOMASVILLE COCA-COLA BOTTLING COMPANY.

(*Filed 26 June, 1935.*)

1. **Food A a—**

The manufacturer of food or drink is required to exercise due care in the preparation of these commodities, and may be held liable by the ultimate consumer for injury resulting from breach of this duty upon a proper showing.

2. **Same—Res ipsa loquitur does not apply to finding of noxious substance in drink by consumer, but direct proof of negligence is not necessary.**

In establishing negligence on the part of a manufacturer in the preparation of a bottled drink, the ultimate consumer, injured by a foreign, deleterious substance in the bottle, may not rely upon the doctrine of *res ipsa loquitur*, but direct proof of negligence is not necessary, since negligence may be established by other relevant facts and circumstances from which it may be inferred, and similar instances are competent as tending to show a probable like occurrence at the time of plaintiff's injury, when accompanied by proof of substantially similar circumstances and reasonable proximity of time.

3. **Same—Evidence of negligence on part of bottler held sufficient to overrule nonsuit in action by ultimate consumer.**

Evidence that plaintiff was injured by drinking coca-cola from a bottle which had paint or varnish inside on its bottom and side, and that shortly after the injury in suit another had discovered a substance resembling white paint on the inside of another bottle prepared by the defendant, *is held* sufficient to be submitted to the jury on the issue of defendant's actionable negligence.

APPEAL from *Alley, J.*, at September Term, 1934, of DAVIDSON. Affirmed.

This is an action by the ultimate consumer to recover of the bottler damages from drinking bottled beverage containing deleterious substance.

The issues submitted and the answers made thereto were as follows:

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

"2. What damages, if any, is the plaintiff entitled to recover? Answer: '$200.00.' "

From judgment based upon the verdict the defendant appealed to the Supreme Court, assigning errors.

D. L. Pickard and P. V. Critcher for plaintiff, appellee.
Don A. Walser for defendant, appellant.

SCHENCK, J. The exceptive assignments of error urged upon appeal assail the action of the court in refusing to grant the defendant's motion

of judgment as of nonsuit made upon the plaintiff's resting her evidence and renewed at the close of all the evidence. C. S., 567.

There was evidence tending to show that on 30 September, 1933, the plaintiff bought from Deaton's Store coca-cola which had been bottled and sold for the retail trade by the defendant, the Thomasville Coca-Cola Bottling Company; that upon drinking a small portion thereof the plaintiff became nauseated and sick; and that upon examination it was found that the bottle containing the coca-cola bought and drank by the plaintiff had in it a foreign substance that had not mixed with the coca-cola, and that looked and smelled like paint or varnish, and that this substance was thick upon the bottom of the bottle, and on one side of the bottle inside there was a lump about the size of the end of the thumb.

The decisions of this Court are to the effect that one who prepares in bottles or packages foods, medicines, drugs, or beverages, and puts them on the market, is charged with the duty of exercising due care in the preparation of these commodities, and under certain circumstances may be liable in damages to the ultimate consumer. *Corum v. Tobacco Co.,* 205 N. C., 213, and cases there cited.

The decisions of this Court are also to the effect that while in establishing actionable negligence on the part of the manufacturer, bottler, or packer, the plaintiff is not entitled to call to his aid the doctrine of *res ipsa loquitur,* he is nevertheless not required to produce direct proof thereof, but may introduce evidence of other relevant facts from which actionable negligence on the part of the defendant may be inferred. Similar instances are allowed to be shown as evidence of a probable like occurrence at the time of the plaintiff's injury, when accompanied by proof of substantially similar circumstances and reasonable proximity in time. *Broadway v. Grimes,* 204 N. C., 623; *Enloe v. Bottling Co., ante,* 305, and cases there cited.

One R. C. Liverman testified as follows: "I have never seen any coca-cola manufactured by the Thomasville Coca-Cola Bottling Company shortly before or after this occasion with matches in it, but did see some looked like white paint splashed in the inside. It was white, white splotches. It was inside the bottle." The sole question involved in the instant case is whether this testimony of Liverman, when read in connection with the evidence tending to show other pertinent facts, was sufficient to carry the case to the jury on the issue of the defendant's actionable negligence. Since in our opinion this testimony, when considered in connection with other testimony, furnishes more than a scintilla of evidence tending to establish the plaintiff's contentions, and since all of the evidence must be interpreted most favorably for the plaintiff, we are constrained to hold that the case was properly submitted to the jury. *Gates v. Max,* 125 N. C., 139; *Lamb v. Perry,* 169 N. C., 436; *Corum v. Tobacco Co., supra.*

Affirmed.

STATE v. CHARLIE DUNN.

(Filed 26 June, 1935.)

1. Obstructing Justice B c—Evidence held sufficient for jury on issue of defendant's suppression of evidence of son's guilt of manslaughter.

Evidence that defendant's son, driving defendant's car at night, presumably with defendant's consent, drove recklessly and unlawfully, and struck and killed a pedestrian on the highway, that the occupants of the car fled the scene of the accident, that defendant was informed of the accident and immediately drove the car with its occupants in a roundabout way from the place where he was visiting to his home in another town, and that before daylight he was driving his car from his home to a city some hundred miles distant to have the car repaired, and all telltale marks removed therefrom, *is held* sufficient to be submitted to the jury on the issue of defendant's guilt of aiding and abetting his son in avoiding arrest and in undertaking to conceal the crime, although defendant testified that he did not know that a man had been struck or killed, and that he was taking the car to the city for repairs because he understood there were expert mechanics there, since more than one inference can be drawn from the evidence.

2. Criminal Law D b—

A motion to quash the indictment upon the trial in the Superior Court for that the crime charged was a misdemeanor, and that the recorder's court had exclusive jurisdiction, is properly refused where the record does not show that there was a recorder's court for the county, or that such court had exclusive jurisdiction of misdemeanors.

3. Criminal Law C d: Homicide A c—Involuntary manslaughter is a felony and not a misdemeanor.

The amendment to N. C. Code, 4201, by ch. 249, Public Laws of 1933, which added a proviso that in cases of involuntary manslaughter the defendant shall be punishable by fine or imprisonment, or both, in the discretion of the court, does not constitute involuntary manslaughter a misdemeanor instead of a felony, the effect of the proviso being to mitigate punishment in cases of involuntary manslaughter, and not to set up involuntary manslaughter as a separate offense.

CRIMINAL ACTION, before *Clement, J.*, at October Term, 1934, of RICHMOND.

Clarence Dunn, a son of the defendant, while using the defendant's car, struck and killed a person, and thereafter the defendant was indicted as an accessory after the fact for "aiding, assisting, procuring, and counseling the said Clarence Dunn to flee from the scene of said felony, and did aid, assist, counsel, and abet the said Clarence Dunn in evading arrest and apprehension upon said charge of said felony, with the intent thereby to obstruct, hinder, and delay the administration of justice," etc. The evidence tended to show that on the night of 30

November, 1933, Clarence Dunn, while driving his father's car, unlawfully and recklessly struck and killed J. T. Smith on a public highway. The defendant was not in the car at the time of the killing, but immediately thereafter Clarence Dunn returned to the house where the other members of his family were visiting and informed his father that "he had struck some man." In addition, he pointed out to his father the damage done to the car. The father then got into the car and drove back home about two o'clock in the morning. About daylight on the same morning the father took the car to Durham to have it repaired. The father contended that he did not know that any person had been killed by his son, and that he took the car to Durham to be repaired because he had information that there were expert mechanics at that point.

The charge of the court is not in the record, and hence it is assumed that correct instructions were given upon all phases of the case. There was a verdict of guilty, and from judgment sentencing the defendant to work on the roads for a term of six months, he appealed.

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

Fred W. Bynum for Charlie Dunn.

BROGDEN, J. The questions of law presented are:

1. Was there any competent evidence that the defendant aided and abetted his son in avoiding arrest, or that he undertook to conceal the crime?

2. Is the crime of involuntary manslaughter, as contained in the proviso to C. S., 4201, of the 1933 supplement to the North Carolina Code of 1931, a misdemeanor or a felony?

Upon the first proposition there was evidence tending to show that the son, using the father's car in the nighttime, presumably with the father's consent, recklessly and unlawfully ran over and killed the deceased on a public highway. The occupants of the car made no attempt to render aid, but fled from the scene. Immediately they returned to the place where the father was visiting and informed him that a man had been hit in the road. The father got into the car with his son and his companions and drove to his home at Raeford. There is evidence tending to support the inference that he drove to his home in a round-about way. Before daylight the father is on his way to Durham, a point about one hundred miles distant from where he lived, to have his car repaired and to remove therefrom the tell-tale dents and damage thereto.

Obviously a jury would have been warranted in finding, if they believed the father's admission to the sheriff, that he did not know a man had been killed or seriously injured; but, upon the other hand, more than one inference could have been drawn from the evidence, and the jury was warranted in drawing the inference that the father was seeking to cover up the crime by removing the evidence of the collision. Therefore, the trial judge properly submitted the question to the jury.

The second question of law involves the amendment to C. S., 4201, of the Code of 1931. Said section, before the enactment of chapter 249 of the Laws of 1933, read as follows: "If any person shall commit the crime of manslaughter he shall be punished by imprisonment in the county jail or State Prison for not less than four months nor more than twenty years." Thereafter, on 10 April, 1933, the General Assembly enacted chapter 249, Public Laws of 1933, in the following words: "Section 1. That section 4201 of Consolidated Statutes be and the same is hereby amended by adding a sentence to said section as follows: '*Provided, however,* that in cases of involuntary manslaughter, punishment shall be in the discretion of the court, and the defendant may be fined or imprisoned, or both.' " The defendant contends that the proviso added by the Legislature was designed to make involuntary manslaughter a misdemeanor instead of a felony, and that, therefore, the recorder's court of Richmond County had jurisdiction, and hence no indictment could lie in the Superior Court. This contention, however, cannot be maintained for two reasons: First, it does not appear from the record that there is any recorder's court in Richmond County, or that such court had exclusive jurisdiction of misdemeanors. Second, the proviso did not purport to create a new crime, to wit, that of involuntary manslaughter. Chapter 249 states in plain English that it is designed as an amendment to C. S., 4201. Discussing the function of a proviso in *Supply Co. v. Eastern Star Home,* 163 N. C., 513, 79 S. E., 964, the Court declared: "It has long been held that if a proviso in a statute be directly contrary to the purview of the statute, the proviso is good and not the purview, because the proviso speaks the later intention of the Legislature." It is not thought that by enacting the proviso the Legislature intended to repeal the manslaughter statute and to set up in its stead involuntary manslaughter as a misdemeanor. Indeed, the Court is of the opinion, and so holds, that the proviso was intended and designed to mitigate the punishment in cases of involuntary manslaughter, and to commit such punishment to the sound discretion of the trial judge.

No error.

HOVSEP PUSHMAN v. E. P. DAMERON, ADMINISTRATOR OF BARRUR H. SERUNIAN, DECEASED.

(Filed 26 June, 1935.)

Venue C a—Trial court has discretionary power to grant motion for change of venue in action instituted against personal representative.

While an action against an executor or administrator must be instituted in the county in which defendant gave bond, C. S., 465, the statute does not preclude the court from changing the venue to another county, in his discretion, for the convenience of witnesses and the promotion of the ends of justice, upon motion properly made under C. S., 470 (2), and since plaintiff is bound to institute the action in the county in which defendant gave bond, his act in so doing cannot be imputed to him as a voluntary choice of venue, so as to prevent the lodging of a motion under C. S., 470 (2).

CIVIL ACTION, before *McElroy, J.*, at February Term, 1935, of GUILFORD.

The plaintiff instituted this action against the defendant to recover damages for personal injuries resulting from the reckless driving of an automobile by defendant's intestate. The action was instituted in Guilford County. The accident occurred near Fletcher, in Henderson County, and defendant's intestate was killed. After the action had been filed and the cause at issue, the plaintiff made a motion "to transfer and remove the above-entitled cause from the Superior Court of Guilford County to the Superior Court of Buncombe County for trial, for that: '(1) Convenience of witnesses will thereby be greatly promoted, and (2) the ends of justice will thereby best be served.' " After hearing affidavits and argument of counsel, the trial judge found "as a fact that the convenience of witnesses and the ends of justice would be promoted by a removal of this cause to Buncombe County for trial."

Notwithstanding, his Honor was of the opinion that "under the provision of the statute of the State of North Carolina it is mandatory that this cause be retained for trial in Guilford County, and that, therefore, the court is without power to grant the plaintiff's motion for removal," etc.

From judgment retaining the cause in Guilford County the plaintiff appealed.

Adams & Adams for plaintiff.
Smith, Wharton & Hudgins for defendant.

BROGDEN, J. When an action has been instituted against a personal representative of decedent, in the proper county, to recover damages for

personal injuries due to the negligence of such decedent, has the trial judge, upon proper motion made in apt time, the power to remove the cause for trial to another county?

It does not appear from the record that the administrator of deceased ever gave bond in Guilford County, where the action was begun. But this seems to be admitted in the briefs, and the question of law involved will be discussed upon the assumption that the defendant duly qualified and gave bond in Guilford County.

The solution of the legal proposition depends upon the construction to be given C. S., 465. This statute provides that all actions "against executors and administrators in their official capacity must be instituted in the county where the bonds were given," etc. C. S., 470, provides that "the court may change the place of trial in the following cases: 'Subsection 2. When the convenience of witnesses and the ends of justice would be promoted by the change.'" Obviously, the excerpt from C. S., 470, would warrant the court in changing the place of trial for either party, if it should be found that the convenience of witnesses and the ends of justice will be promoted by such change. The defendant, however, insists that the wording of C. S., 465, requiring that actions against administrators "must be instituted in the county," etc., is mandatory. Consequently, a judge would have no power to change the place of trial for any purpose. Furthermore, it is contended that a contrary holding would make it possible that an administrator or executor could be harried about the State from one county to another for purposes of trial.

This Court is not disposed to adopt that view of the law. It was held in *Latham v. Latham,* 178 N. C., 12, 100 S. E., 131, that the words of C. S., 465, "must be instituted in the county" did not necessarily mean that the cause should be actually tried in such county. While such distinction may not have been absolutely pertinent to the decision of the *Latham case, supra,* nevertheless such distinction appears to be sound.

The plaintiff was compelled to institute his action in the Superior Court of Guilford County by reason of the mandate of the statute, and his act in so doing could not therefore be imputed to him as a voluntary choice of venue so as to prevent him from lodging a motion for removal.

The Court is of the opinion, and so holds that the trial judge in the exercise of a sound discretion, had the power, upon finding the necessary facts, to remove the cause to another county for trial.

Reversed.

ESSIE MAY HUDSON v. J. S. HUDSON.

(Filed 26 June, 1935.)

Wills E b—Devisee held not to have acquired indefeasible fee under the devise and facts of this case.

Plaintiff's father devised the land in question to plaintiff "to be hers and to her heirs, if any, and if no heirs, to be equally divided with my other children." At the time plaintiff executed deed to defendant, which was refused by him, plaintiff was married, but had been abandoned by her husband, and had no children. *Held:* Plaintiff's deed did not convey the indefeasible fee to the land free and clear of the claims of all persons, whether the limitation over be regarded as a limitation over on failure of issue, C. S., 1737, or as not coming within the rule in *Shelley's case.*

APPEAL by plaintiff from *Pless, J.,* at February Term, 1935, of ROCKINGHAM.

Civil action for specific performance, heard upon an agreed statement of facts.

Plaintiff, being under contract to convey a certain tract of land to defendant, duly executed and tendered deed therefore and demanded payment of the purchase price as agreed, which the defendant declined to accept and refused to make payment of the purchase price, claiming that the title offered was defective.

It was agreed if the plaintiff is the owner in fee of the land described in the complaint, and capable of conveying title thereto, free and clear of the claims of all persons, judgment should be entered decreeing specific performance.

The court, being of opinion that the plaintiff only held a defeasible fee to the land in question, gave judgment for the defendant, from which the plaintiff appeals, assigning error.

D. F. Mayberry for plaintiff.
Hunter K. Penn for defendant.

STACY, C. J. Plaintiff acquired title to the *locus in quo* under the will of her father. The testator first devised all of his property to his wife for her life and after her death "to my daughter, Essie May Hudson (the plaintiff), . . . to be hers and to her heirs, if any, and if no heirs to be equally divided with my other children."

The case states that the testator's widow, the life tenant, died 7 September, 1927; that the plaintiff was in the undisputed possession of the land described in the complaint at the time of the execution of the contract sought to be specifically enforced (17 October, 1934); that plaintiff was married in April, 1929, abandoned by her husband soon thereafter, since which time he has lived apart from her; that "on

account of said abandonment, the written consent of her husband, as above described, is not necessary to the validity of same" (deed), under C. S., 2530, and that at the time of the execution of the contract of sale plaintiff had no children.

We agree with the trial court that the deed tendered by plaintiff was not sufficient to convey an indefeasible fee to the land, described therein, free and clear of the claims of all persons, whether the ulterior limitation in plaintiff's father's will be regarded as a limitation over on failure of issue, C. S., 1737, or as coming under the principle announced in *Puckett v. Morgan,* 158 N. C., 344, 74 S. E., 15; *Walker v. Butner,* 187 N. C., 535, 122 S. E., 301; *Brown v. Mitchell,* 207 N. C., 132, 176 S. E., 258; *Massengill v. Abell,* 192 N. C., 240, 134 S. E., 641; *Willis v. Trust Co.,* 183 N. C., 267, 111 S. E., 163. Hence, the title offered was properly rejected.

Affirmed.

CARL C. SHARPE v. SHELL EASTERN PETROLEUM PRODUCTS COMPANY, INC., R. B. GANTT AND HIS WIFE, ELLA H. GANTT, ALLEN STEELE, AND HAROLD BRAWLEY.

(Filed 26 June, 1935.)

Removal of Causes C b—Motion for removal should have been allowed in this case upon petition showing fraudulent joinder of resident defendants.

Upon the facts alleged in the petition in this case, plaintiff's motion for removal to the Federal Court should have been allowed for that the facts alleged in the complaint are not sufficient to state a cause of action against the resident defendants, or either of them, and it appearing that the joinder of the resident defendants was fraudulent in that it was made solely to prevent a removal.

APPEAL by the defendant Shell Eastern Petroleum Products Company, Inc., from *Sink, J.,* at January Term, 1935, of IREDELL. Reversed.

This action was heard by the judge of the Superior Court of Iredell County on the appeal of the defendant Shell Eastern Petroleum Products Company, Inc., a nonresident corporation, from an order of the clerk of said court denying the petition of said defendant for its removal from said court to the District Court of the United States for the Western District of North Carolina for trial.

The order of the clerk was affirmed, and the defendant appealed to the Supreme Court of North Carolina.

Buren Jurney for plaintiff.
Scott & Collier and John M. Robinson for defendant.

CONNOR, J. There is error in the order of the judge of the Superior Court of Iredell County in affirming the order of the clerk of said court denying the petition of the nonresident defendant in this action for its removal from the Superior Court of Iredell County to the District Court of the United States for the Western District of North Carolina.

On the facts alleged in its petition, the nonresident defendant is entitled to the removal of this action in accordance with its petition, for the reason that the facts alleged in the complaint are not sufficient to constitute a cause of action against the resident defendants, or either of them. *Brown v. R. R.*, 204 N. C., 25, 167 S. E., 479; *Smith v. Ins. Co.*, 204 N. C., 770, 169 S. E., 658; *Culp v. Ins. Co.*, 202 N. C., 87, 161 S. E., 717.

In *Cox v. Lumber Co.*, 193 N. C., 28, 136 S. E., 254, it is said: "The right of removal by a nonresident defendant with whom the plaintiff has joined a resident defendant cannot be defeated, if such joinder is fraudulent, in that the resident defendant has no real connection with the controversy, but was joined as a defendant with the purpose of preventing a removal from the State to the Federal Court. If in such case a resident defendant is joined, the joinder, although fair upon its face, may be shown to be only a sham or fraudulent device to prevent a removal; but the showing must be made by a statement in the petition for removal of facts rightly leading to the conclusion apart from the pleader's deductions. *Swain v. Cooperage Co.*, 189 N. C., 528, 127 S. E., 538."

The order in this action is

Reversed.

STATE v. DOWNING VERNON, ALIAS SCRAP VERNON, AND ROBERT WATKINS.

(Filed 26 June, 1935.)

1. Criminal Law B b—

Evidence in support of defendants' pleas of insanity or mental irresponsibility, superinduced by drunkenness at the time, *held* properly submitted to the jury, and found adversely to defendants' contentions.

2. Homicide B a—

Voluntary drunkenness and insanity, as negativing premeditation and deliberation, *held* properly submitted to the jury in this prosecution for murder in the first degree.

3. Criminal Law I c—

Motion for mistrial for that defendants' expert witness became enraged at the solicitor and "started as if to assault him as he left the witness chair," and was conducted from the courtroom by officers, *held* addressed to the sound discretion of the trial court.

4. Criminal Law B c—Testimony of nonexpert that defendants were "of extremely low mentality" held competent in support of expert testimony.

Where defendants introduce expert testimony in support of their pleas of mental irresponsibility, the exclusion of testimony of the sheriff that from his conversations with defendants he judged them to be "of extreme low mentality" is erroneous, the testimony being competent in support of the expert testimony on the question of mental capacity and felonious intent involved in the case, and its exclusion being prejudicial in view of the fact that defendants did not testify in their own behalf.

5. Criminal Law L e—

Where defendants are awarded a new trial for error in the exclusion of testimony, other exceptions relating to matters not likely to arise on another hearing need not be considered on appeal.

APPEAL by defendants from *Pless, J.*, at January Term, 1935, of ROCKINGHAM.

Criminal prosecution, tried upon indictment charging the defendants Robert Watkins and Downing Vernon, alias Scrap Vernon, with the murder of one C. B. Fulp.

Verdict: Guilty of murder in the first degree.

Judgment: Death by electrocution.

The defendants appeal, assigning errors.

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

Brown & Trotter and Floyd Osborne for defendants.

STACY, C. J. It is disclosed by the confessions of the defendants that on 21 November, 1934, they assaulted and killed C. B. Fulp under circumstances which the jury found to be murder in the first degree. The *corpus delicti,* with all of its attendant atrociousness, is admitted. The deceased was a farmer living in Rockingham County. The defendants are Negro boys of the same neighborhood who had worked for Mr. Fulp from time to time. They knew the deceased had sold some tobacco the day before, and that he had been drinking. So, upon meeting him on the highway, they first engaged him in friendly conversation, danced for him, shared his liquor, then started on their way only to turn around in a short while and overtake him, to cut his throat, and to rob him. The defenses interposed by the prisoners amount to pleas of insanity, or mental irresponsibility, superinduced by intoxication or drunkenness at the time. *S. v. Keaton,* 206 N. C., 682, 175 S. E., 296; *S. v. Walker,* 193 N. C., 489, 137 S. E., 429. The evidence tending to support these pleas was properly submitted to the jury, and was rejected or found to

be unsatisfactory. *S. v. Campbell,* 184 N. C., 765, 114 S. E., 927; *S. v. Terry,* 173 N. C., 761, 92 S. E., 154.

Dr. William Wilson, of Cascade, Va. (witness for the defendants), testified that in his opinion the defendants were mentally deficient and incapable of distinguishing right from wrong. This was qualified on cross-examination: "I said they were mentally deficient, that is all I am willing to say about it. . . . I don't know whether they could distinguish right from wrong or not." This witness was called in to examine the defendants. He had never seen them prior to that day. The examination lasted about fifteen minutes. Dr. C. H. Wharton, who was also present at the examination, testified that in his opinion both defendants had sufficient mental capacity to know the difference between right and wrong. Dr. Wilson became enraged at the solicitor, while upon the stand, "started as if to assault him as he left the witness chair," and was conducted from the courtroom by officers. Whereupon, the defendants lodged a motion for a mistrial "because of Dr. Wilson's conduct." Overruled; exception. This was a matter resting in the sound discretion of the trial court. *S. v. Stafford,* 203 N. C., 601, 166 S. E., 734.

The sheriff was asked, on cross-examination, if he had not gathered the impression from observation and conversations had with the defendants that "they were very illiterate" and "of extremely low mentality." He would have answered both questions in the affirmative if permitted to do so. The first question may have been properly excluded (*S. v. Spivey,* 132 N. C., 989, 43 S. E., 475), but the second was competent (*S. v. Turner,* 143 N. C., 641, 57 S. E., 158) as tending to support the opinion of the doctor that the defendants were mentally irresponsible (*S. v. Keaton,* 205 N. C., 607, 172 S. E., 179), and as bearing upon the question of felonious intent. *S. v. Ross,* 193 N. C., 25, 136 S. E., 193. It is true this evidence, standing alone, would not be sufficient to make out the defenses interposed by the defendants, nevertheless, it was a competent link in the chain of evidence. *S. v. Allen,* 186 N. C., 302, 119 S. E., 504.

The defendants did not go upon the witness stand. This was their right. C. S., 1799; *S. v. Tucker,* 190 N. C., 708, 130 S. E., 720. The testimony of the sheriff, therefore, that they were "of extremely low mentality," was all the more important to the defendants, and its exclusion constitutes reversible error. *S. v. Ross, supra.*

The remaining exceptions worthy of consideration, especially those relating to the charge, are not likely to arise on another hearing, hence further consideration and rulings are pretermitted.

New trial.

CONNIE JARRETT v. WINSTON MUTUAL LIFE INSURANCE COMPANY.

(Filed 26 June, 1935.)

Appeal and Error J a—Order granting new trial for newly discovered evidence in exercise of discretionary power is not reviewable.

A motion for a new trial for newly discovered evidence, made in the Superior Court on appeal from judgment of the county court, is addressed to the discretion of the court, and an appeal from the court's order allowing the motion and remanding the cause to the county court for a new trial will be dismissed.

APPEAL by plaintiff from *Pless, J.*, at February Term, 1935, of FORSYTH.

Civil action to recover on policy of life insurance, instituted in the Forsyth County Court, where verdict and judgment for $285.00 were rendered in favor of the plaintiff, from which the defendant appealed to the Superior Court of Forsyth County, assigning errors.

Defendant also lodged motion in the Superior Court for new trial on ground of newly discovered evidence. This motion was allowed, and the cause was remanded to the Forsyth County Court for new trial. From this ruling the plaintiff appeals, assigning errors.

Slawter & Wall for plaintiff.
Ingle & Rucker for defendant.

STACY, C. J. The Forsyth County Court was established in 1915, as an inferior court for the trial of civil cases only, with the right of appeal by "either the plaintiff or the defendant" to the Superior Court of Forsyth County "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." Chapter 520, Public-Local Laws 1915; *Chappel v. Ebert,* 198 N. C., 575, 152 S. E., 692. Subsequent legislation affecting the court is not presently pertinent. *Chemical Co. v. Turner,* 190 N. C., 471, 130 S. E., 154.

The appellate jurisdiction of the Superior Court is not questioned; its authority in the exercise of such jurisdiction to grant new trials on the ground of newly discovered evidence is not mooted; nor is the sufficiency of the evidence to invoke a discretionary ruling challenged on the present record. *Crane v. Carswell,* 204 N. C., 571, 169 S. E., 160. These are all conceded or taken for granted. *S. v. Edwards,* 205 N. C., 661, 172 S. E., 399; *S. v. Lea,* 203 N. C., 316, 166 S. E., 292; *S. v. Casey,* 201 N. C., 620, 161 S. E., 81.

It is the uniform holding that no appeal lies to this Court from a discretionary determination of an application for a new trial on the ground of newly discovered evidence. *Crane v. Carswell, supra; S. v. Ferrell,* 206 N. C., 738, 175 S. E., 91.

Speaking to the subject as far back as *Vest v. Cooper* (1873), 68 N. C., 131, *Reade, J.,* delivering the opinion of the Court, said: "There seems to be an impression that there may be an appeal from every motion for a new trial; and the fact is overlooked that it must 'involve a matter of law or legal inference,' and not a mere matter of discretion. This will illustrate: Plaintiff recovers of defendant $1,000. Defendant files affidavit that since the trial he has discovered that he can prove the debt has been paid. His Honor says, I believe your affidavit and I grant a new trial, or I do not believe it, and I refuse a new trial. This is a matter of discretion, and no appeal lies." This has been cited with approval in subsequent decisions: *S. v. Riddle and Huffman,* 205 N. C., 591, 172 S. E., 400; *S. v. Lea, supra.*

It follows, therefore, that the appeal must be dismissed. It is so ordered.

Appeal dismissed.

D. B. WILLETT v. NATIONAL ACCIDENT AND HEALTH INSURANCE COMPANY.

(Filed 26 June, 1935.)

1. **Insurance I b—Evidence held to support verdict that insured did not obtain policy by false and fraudulent misrepresentations.**

Evidence in behalf of plaintiff insured was to the effect that he told defendant insurer's agent at the time of applying for the policy that he had sustained a fractured skull from which he had entirely recovered, that he offered to tell more of his illnesses, and that the agent declared that since insured had recovered from the fracture, it would be unnecessary to give further information. Evidence in behalf of insurer tended to show that insured had suffered injuries other than the fracture, and that insured made no attempt to disclose such other injuries. *Held:* The evidence was sufficient to support the finding by the court, a jury trial having been waived, that insured did not obtain the policy by means of false and fraudulent representations or concealments, the evidence being conflicting, and the burden of proof on the issue being on insurer.

2. **Same: Evidence J a—Where instrument is attacked for fraud, parol evidence is competent to establish and refute allegation of fraud.**

Where insurer alleges fraud in the procurement of a policy of insurance by false and fraudulent misrepresentations or concealments in insured's application for the policy, parol evidence for insurer is competent to establish such fraud, and for insured to refute the alleged fraud, and

insurer's contention that insured's testimony that insurer's agent stated that other information required by the application would not be necessary was incompetent, as being in contradiction of the written instrument, cannot be sustained.

STACY, C. J., and BROGDEN, J., dissent.

APPEAL by defendant from *Cowper, Special Judge,* at the December Special Term, 1934, of WAKE. Affirmed.

This is a civil action for the recovery of benefits under a policy of accident insurance issued by the defendant to the plaintiff, and was heard *de novo* by the judge of the Superior Court upon an appeal from the justice of the peace.

It was stipulated and agreed that if the plaintiff was entitled to recover at all, he was entitled to recover the sum of $196.00; $80.00 per month for disability for two months and $36.00 for twenty-seven days' hospital benefits. A jury trial was waived by the parties, C. S., 568; and the following issue was tendered by the defendant, and agreed to by both parties as the proper issue in the cause, to wit:

"1. Was the policy of insurance in controversy obtained from the defendant insurance company by means of false and fraudulent representations or concealments, as alleged in the answer?"

After hearing the evidence for both the plaintiff and defendant and argument of counsel of both parties, the court answered the issue in the negative, and entered judgment for $196.00 in favor of the plaintiff. From this judgment the defendant appealed to the Supreme Court, assigning errors.

R. L. McMillan for plaintiff, appellee.
J. M. Broughton and W. H. Yarborough, Jr., for defendant, appellant.

SCHENCK, J. By tendering the issue as appears in the record the defendant admitted the plaintiff's right to recover, unless the policy sued upon was obtained by means of false or fraudulent representations or concealments, and also assumed the burden of establishing the fraud. The evidence is sharply in conflict. The plaintiff's evidence tends to show that he told the agent of the defendant at the time the application for the insurance was made that he had a fracture of the skull from which he had entirely recovered, and that when the plaintiff offered to tell more of his illnesses, the agent of the defendant declared that since the plaintiff had recovered from the fracture, it would not be necessary for him to give other information. The evidence of the defendant tends to show that the plaintiff had suffered other illnesses not shown in the application for insurance, and made no effort to make known any other

illnesses than the fracture of the skull from which he said he had recovered. The court answered the issue in favor of the plaintiff and against the defendant, and since there was sufficient evidence to sustain such answer, the assignments of error based upon the court's refusal to grant a judgment as of nonsuit are untenable.

The assignments of error based upon the court's refusal to strike out the parol evidence as to what was said and done at the time the application for insurance was signed by the plaintiff for the reason that it varied the terms of a written contract are likewise untenable, since when it is sought to invalidate a written instrument for fraud in its procurement, parol evidence of the fraud is admissible, and not objectionable on the ground that it varies or contradicts the written instrument; *Hunter v. Sherron,* 176 N. C., 226; and if parol evidence is competent to establish such an allegation of fraud, it follows that parol evidence is likewise competent to refute such an allegation.

The judgment below is

Affirmed.

STACY, C. J., and BROGDEN, J., dissent.

STATE v. W. P. LEONARD.

(Filed 26 June, 1935.)

Criminal Law C d: D b—Involuntary manslaughter is a felony and not a misdemeanor.

The amendment of C. S., 4201, by ch. 249, Public Laws of 1933, does not make involuntary manslaughter a misdemeanor, and the Superior Court has jurisdiction of a prosecution under the statute although the fatal accident occurred within the territorial jurisdiction of a city court having exclusive original jurisdiction of misdemeanors.

CRIMINAL ACTION, before *Alley, J.,* at October Term, 1934, of GUILFORD.

The defendant was indicted for killing Ralph Jones. The evidence tended to show that the defendant was drinking and that the deceased, Ralph Jones, was a passenger in his car. The defendant drove the car in a reckless manner and upon approaching a curve the car overturned, killing Jones and seriously injuring another passenger. When the case was called for trial in the Superior Court the defendant filed a plea in abatement upon the theory that the municipal court of the city of Greensboro had jurisdiction for the reason that at the preliminary hear-

ing all the evidence tended to show that the defendant was guilty of involuntary manslaughter. The trial judge found as a fact that the evidence offered before the committing magistrate tended to prove "the defendant guilty of involuntary manslaughter, and that the offense charged occurred within one mile of the corporate limits of the city of Greensboro, and that the municipal court of the city of Greensboro has final and exclusive original jurisdiction of all misdemeanors occurring or committed within Guilford County, except at High Point, Deep River, and Jamestown," etc. The court refused to dismiss the indictment. The defendant was convicted of involuntary manslaughter, and from sentence imposed appealed to the Supreme Court.

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

Gold, McAnally & Gold, Silas B. Casey, and Walser & Wright for defendant.

BROGDEN, J. The question of law presented by the record is whether by virtue of the amendment of C. S., 4201, contained in chapter 249 of the Public Laws of 1933, involuntary manslaughter is a misdemeanor.

The trial judge found that the municipal court of the city of Greensboro had original and exclusive jurisdiction of all misdemeanors committed within Guilford County with certain exceptions not applicable to this case. This Court has heretofore, at this term, held, in *S. v. Dunn, ante,* 333, that chapter 249 of the Public Laws of 1933 does not make involuntary manslaughter a misdemeanor, and this cause is determined by the decision in the *Dunn case, supra.*

No error.

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

(Filed 26 June, 1935.)

1. ***Judgments M a*—Judgment held to have adjudicated all claims of respondent in land condemned, and to preclude subsequent motions in the cause in respect thereto.**

Judgment was entered in proceedings in eminent domain that upon payment by petitioner of the sum of money stipulated in the judgment title to the lands should *eo instanti* pass to petitioner, free from all adverse claims, liens, and encumbrances, and by later paragraph the judgment stipulated that the items of taxes, insurance, and maintenance incurred *pendente lite* were expressly reserved to be later passed upon by the court. Thereafter petitioner paid the sum stipulated into court

and respondent accepted said sum. *Held:* Upon the payment and acceptance of the stipulated sum the provision of the judgment that petitioner acquire the land free from all claims, liens, and encumbrances immediately took effect, and the reservation in the judgment in conflict therewith was void, and the court was thereafter without jurisdiction to hear a motion in the cause requesting that respondent be restrained from further claiming any amounts from petitioner for the items attempted to be reserved in the judgment, and respondent's cross-petition asking that said amounts be determined and awarded, since the former cannot be regarded as an action to remove cloud from title, not the latter as a suit upon the judgment.

2. Appeal and Error A a—

When the lower court has no jurisdiction of motions made in the cause after judgment, the orders of the court upon such motions do not determine the rights of the parties, nor can such rights be adjudicated in the Supreme Court upon appeal.

PETITION by respondent Ravensford Lumber Company to rehear this case, reported in 207 N. C., 47, 175 S. E., 713.

This was a special proceeding, instituted under authority of ch. 48, Public Laws 1927, to condemn lands for park and recreational purposes in the Great Smoky Mountains of North Carolina. The jury of view made its award, from which the respondent appealed to the Superior Court, where the issue of damages was tried *de novo* before a jury at the November Special Term, 1933, Cowper, Special Judge, presiding.

Judgment was duly entered upon the verdict, it being provided in paragraph five of said judgment that "upon the payment into court by the petitioner of the sum of money aforesaid," the title to the lands described in the petition "shall *eo instanti* pass to and vest in the petitioner, . . . free and discharged of and from all adverse claims, liens, and encumbrances whatsoever, and the respondent and all other persons . . . are forever barred from claiming or asserting any manner of estate or interest in said lands, either legal or equitable, whatsoever"; and further, in paragraph seven, "that the items of taxes, insurance, and maintenance," incurred *pendente lite,* "are hereby expressly reserved to be hereafter passed upon and determined by the court."

Both sides gave notice of appeal from this judgment, but subsequently abandoned said appeals. On 30 April, 1934, the petitioner paid into court the amount of the award according to the terms of the judgment, which was accepted by the respondents.

Thereafter, at the May Term, 1934, the petitioner lodged a motion to have the court restrain the respondents from further claiming any amounts from petitioner for the items attempted to be reserved in the judgment. The respondent filed a counter-petition, and asked that the said amounts be determined and awarded. Whereupon, the court found

certain facts from "the record of the trial of this cause at the Special October-November Term, 1933, of the Superior Court of Buncombe County," and granted the prayer of the petitioner. Respondent appeals, assigning error.

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

STACY, C. J. The parties have assumed that by reason of the attempted reservation in paragraph seven of the final judgment entered at the November Special Term, 1933, the court retained jurisdiction to dispose of said alleged reserved matters by motion or subsequent petition in the cause. *Moses v. Morganton,* 195 N. C., 92, 141 S. E., 484; 34 C. J., 825. The assumption is a *non sequitur.* *Sloan v. Hart,* 150 N. C., 269, 63 S. E., 1037.

In the first place, the attempted reservation is in direct conflict with paragraph five of the judgment, which became immediately operative upon acceptance by the respondents of the moneys paid under the judgment, and thereby cut off any supposed reservation.

Secondly, the court was without authority to entertain either the motion of the petitioner or the counter-petition of the respondent. The former cannot be regarded as an action to remove cloud from title, nor the latter as a suit upon the judgment.

No rights were determined by the proceedings upon said motion and counter-petition, and none can be adjudicated here. The appeal will again be dismissed.

Petition allowed.

STATE v. BERT LANCASTER.

(Filed 26 June, 1935.)

Automobiles F a—

Defendant was indicted for assault with a deadly weapon growing out of injury to bicyclists struck by defendant's car. A new trial is awarded upon defendant's exception to the charge for the court's failure to observe and apply the difference between criminal and civil negligence.

CRIMINAL ACTION, before *Small, J.,* at January Term, 1935, of WAYNE.

The defendant was indicted in separate bills for assault upon Claude Lane and Robert Paschall. There was also a count for driving an automobile while in a drunken condition. The bills were consolidated for trial.

The evidence tended to show that Lane and Paschall were riding bicycles on a public highway, and that the defendant, traveling in the same direction and zig-zagging from one part of the road to another, struck Lane and Paschall when they were on the shoulder of the road and on the proper side thereof, inflicting serious and permanent injuries.

There was a verdict of guilty, and from a sentence of imprisonment the defendant appealed.

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

J. Faison Thomson for defendant.

BROGDEN, J. The trial judge charged the jury as follows:

"If you are satisfied beyond a reasonable doubt . . . that Claude Lane was struck, and further are satisfied beyond a reasonable doubt that he was struck by the automobile driven by the defendant, . . . and that at the time Bert Lancaster struck Claude Lane, and if you are further satisfied beyond a reasonable doubt that Bert Lancaster was driving in a reckless and careless manner, without due regard to the width of the highway and the condition thereof, and without due regard to other pedestrians thereupon, or people riding in vehicles, or on bicycles, and while so driving was reckless, careless, and heedless, and without due regard to the rights of others; if you are satisfied beyond a reasonable doubt that he struck and injured Claude Lane with an automobile driven by Bert Lancaster in said manner, you would return a verdict of guilty of assault with a deadly weapon."

The instruction given the jury with reference to the assault upon Robert Paschall was substantially in the same language as that quoted above.

The question of law arising upon the instruction is whether it correctly applied the rule of culpable or criminal negligence.

In recent decisions this Court has definitely and unequivocally declared that in criminal cases involving negligent injuries and killings that the difference between culpable and criminal negligence and civil negligence must be observed and applied in the trial. See *S. v. Whaley,* 191 N. C., 387, 132 S. E., 6; *S. v. Agnew,* 202 N. C., 755, 164 S. E., 578; *S. v. Cope,* 204 N. C., 28, 167 S. E., 456. The various aspects of the distinction are pointed out in the *Cope case, supra.* The Court declared: "Culpable negligence in the law of crimes is something more than actionable negligence in the law of torts. Culpable negligence is such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless

indifference to the safety and rights of others. An intentional, wilful, or wanton violation of a statute or ordinance, designed for the protection of human life or limb, which proximately results in injury or death, is culpable negligence."

The Court is of the opinion that the formula heretofore approved has not been correctly applied, and a new trial is awarded.

New trial.

STATE v. DORTCH WALLER.

(Filed 26 June, 1935.)

Criminal Law L a: L d—

Upon failure of appellant to file a brief in his appeal from conviction of a capital felony, the motion of the Attorney-General to dismiss the appeal will be allowed in the absence of error appearing upon the face of the record.

APPEAL by defendant from *Harris, J.*, at February Term, 1935, of GRANVILLE.

Criminal prosecution, tried upon indictment charging the defendants Dortch Waller and Willie Fields with the murder of one John Harris. There was a motion for severance, which was allowed, and the case was continued as to Willie Fields. *S. v. Donnell,* 202 N. C., 782, 164 S. E., 352.

Verdict: Guilty of murder in the first degree.

Judgment: Death by electrocution.

Defendant gave notice of appeal.

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

STACY, C. J. At the February Term, 1935, Granville Superior Court, the defendant herein, Dortch Waller, was tried upon indictment charging him with the murder of one John Harris, which resulted in a conviction of murder in the first degree and sentence of death. From the judgment thus entered the defendant gave notice of appeal to the Supreme Court. The case on appeal was prepared and settled by agreement of counsel. It contains only two exceptions, and no assignments of error. Counsel evidently concluded, upon reflection and after sifting the exceptions taken on the trial, that no error had been committed in the case. The motions to nonsuit were properly overruled. At the

close of all the evidence the defendant tendered a plea of guilty of murder in the second degree, which was rejected by the State.

No brief has been filed by either side, and the Attorney-General has lodged a motion to dismiss the appeal. *S. v. Hooker,* 207 N. C., 648. As no error appears on the face of the record, the motion must be allowed. *S. v. Etheridge,* 207 N. C., 801; *S. v. Watson, ante,* 70.

Appeal dismissed.

STATE v. TAFT WILLIAMS, ALIAS WILLIAM TAFT WILLIAMSON.

(Filed 26 June, 1935.)

Criminal Law L a—

Where defendant, convicted of a capital felony, fails to make out and serve his statement of case on appeal within the time fixed, he loses his right to prosecute the appeal, and the appeal will be dismissed upon motion of the Attorney-General when no error appears upon the face of the record proper.

MOTION by State to docket and dismiss appeal.

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

STACY, C. J. At the January Term, 1935, Columbus Superior Court, the defendant herein, Taft Williams, alias William Taft Williamson, was tried upon indictment charging him with the murder of one Blanch Williams, which resulted in a conviction of murder in the first degree and sentence of death. From the judgment thus entered the defendant gave notice of appeal to the Supreme Court, and was allowed thirty days within which to make out and serve statement of case on appeal. The clerk certifies that 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 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 failed to make out and serve statement of case on appeal within the time fixed, has lost his right to prosecute the appeal, 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. It is customary, however, in capital cases, where the life of the prisoner is involved, to examine the record to see that no error appears upon its face.

S. v. Goldston, 201 N. C., 89, 158 S. E., 926. This we have done in the instant case without discovering any error on the face of the record. *S. v. Hamlet,* 206 N. C., 568, 174 S. E., 451.

The motion of the Attorney-General must be allowed. *S. v. Watson, ante,* 70.

Appeal dismissed.

ANNYE U. ALEXANDER v. WILL ED THOMPSON ET AL.

(Filed 26 June, 1935.)

1. **Judgments L f—**

   It is not error for the court to dismiss plaintiff's action upon his finding, unchallenged, that the matters sought to be litigated therein are *res judicata.*

2. **Same—Dismissal of action on plea of res judicata is error where defendant is granted affirmative relief upon prayer in answer.**

   When plaintiff's suit to restrain foreclosure is dismissed upon the plea of *res judicata,* and defendants' cross-action for foreclosure in equity is allowed, and a commissioner appointed to sell the lands and report the sale for confirmation, it is error to defendants' prejudice for the court to dismiss the action, and the action should be retained for further orders.

APPEAL by plaintiff from *Cranmer, J.,* 12 October, 1934. From DURHAM.

Civil action to restrain foreclosure under power of sale in deed of trust, and for general relief.

In answer, the defendants plead *res judicata,* and by way of further plea ask for foreclosure in equity.

On the hearing, the court found that: (1) "The subject-matter of this action has previously been adjudicated in separate and distinct judgments . . . adversely to the plaintiff;" (2) granted the defendants' prayer for foreclosure in equity; (3) appointed commissioners to make sale; (4) required that they report sale to the court for confirmation; and (5) dismissed the action.

Plaintiff appeals and assigns as error "the action of the court in dismissing the action."

S. J. Bennett for plaintiff.
Bryant & Jones for defendants.

STACY, C. J. The dissolution of the temporary restraining order is not challenged by the appeal; nor is the foreclosure in equity questioned; the only assignment of error relates to the dismissal of the action.

There was no error in dismissing plaintiff's alleged cause of action upon the finding, which is unchallenged, that the matters therein sought to be litigated are *res judicata.* 14 R. C. L., 469.

There was error to the prejudice of the defendants in dismissing the action after granting their prayer for foreclosure in equity. To this end the cause should have been retained for further orders. *Warlick v. Reynolds,* 151 N. C., 606, 66 S. E., 657.

Modified and affirmed.

W. REID MARTIN, A CITIZEN AND TAXPAYER OF WAKE COUNTY, NORTH CAROLINA, IN BEHALF OF HIMSELF AND ALL OTHER CITIZENS AND TAXPAYERS OF WAKE COUNTY, NORTH CAROLINA, v. THE BOARD OF COMMISSIONERS OF WAKE COUNTY, NORTH CAROLINA; WAKE COUNTY, NORTH CAROLINA, A BODY CORPORATE AND POLITIC; AND O. L. RAY, CHAIRMAN, FLOYD T. ADAMS, GEORGE E. UPCHURCH, D. B. HARRISON, AND JOHN P. SWAIN, COMPRISING THE BOARD OF COMMISSIONERS OF WAKE COUNTY, NORTH CAROLINA.

(Filed 26 June, 1935.)

1. **Counties A a—A county is a body politic and corporate for the local administration of certain governmental functions of the State.**

A county is not, in a strict legal sense, a municipal corporation, but is a body politic and corporate, deriving its powers, express and implied, from statute, and is an instrumentality for the performance of certain of the governmental functions of the State.

2. **Same: State B a—Care of indigent sick is function of the State which it may require counties to perform as administrative agencies.**

In accordance with express constitutional declaration, Art. XI, sec. 7, the care of the indigent sick and afflicted poor is a proper function of the State Government, and the General Assembly may by statute require the counties, as administrative agencies of the State, to perform this function, at least within their territorial limits.

3. **Hospitals A a—Hospital in this case held public hospital, maintained primarily as a charitable institution.**

A hospital owned and maintained for the medical treatment and hospital care of the indigent sick and afflicted poor, and supported by donations from individuals and the county and city in which it is located, is a public hospital maintained primarily as a charitable institution, although it is partly supported by sums paid by nonindigent patients for services rendered to them.

4. **Taxation A b—Tax in this case held for special purpose, with special approval of Legislature, and not subject to limitation on tax rate.**

The General Assembly passed an act authorizing a county to levy a tax for the purpose of raising revenue in the sum of $10,000 a year to pay a public hospital for the care and hospitalization of the indigent sick of

the county under a contract with the hospital whereby the hospital agreed to care for such indigent sick for a period of thirty years in consideration of the payment by the county of the stipulated sum yearly for the period of the contract. *Held:* The tax contemplated is for a special, necessary purpose, with special approval of the General Assembly, and is not, therefore, subject to the limitation on the tax rate. Art. V, sec. 6.

5. **Taxation A a—County tax to provide funds for care of indigent sick held for necessary expense not requiring approval of voters.**

A tax to provide funds necessary for the medical care and hospitalization of the indigent sick of a county is for a necessary expense of the county, and may be levied without the approval of the qualified voters of the county. Art. VII, sec. 7.

6. **Counties C a—Validity of county contract held not affected by fact that its duration is for period of thirty years.**

Where the General Assembly has authorized a county to enter into a contract with a public hospital for the care of its indigent sick for a period of thirty years, and the board of commissioners of the county, in the exercise of the discretion vested in the board by the statute, has agreed to contract for that period, the contract will not be held invalid because of its duration.

STACY, C. J., dissenting.

APPEAL by plaintiff from *Williams, J.*, at April Term, 1935, of WAKE. Affirmed.

This is an action to enjoin the execution by the defendant the Board of Commissioners of Wake County, on behalf of the defendant Wake County, of a contract with the trustees of Rex Hospital, pursuant to resolutions duly adopted by the said Board of Commissioners and the said trustees, on the ground that the defendant Board of Commissioners has no lawful power to bind the defendant Wake County by the execution in its name of said contract, and that its execution by the said Board of Commissioners will result in irreparable damages to the plaintiff and all other citizens and taxpayers of Wake County.

The contract which the defendant Board of Commissioners proposes to execute on behalf of the defendant Wake County is in writing, and is in words and figures as follows:

"NORTH CAROLINA—WAKE COUNTY.

"This contract, made this......................., 1935, by and between Wake County, a *quasi*-municipal corporation of North Carolina, organized under the laws of said State, party of the first part, and trustees of Rex Hospital, a corporation duly chartered under the laws of the State of North Carolina, party of the second part;

"Witnesseth: That whereas, the trustees of Rex Hospital, a corporation, party of the second part, has offered to provide adequate hospital care for the indigent sick and afflicted poor of Wake County for a

period of thirty years, beginning 1 July, 1935, and continuing for thirty years thereafter, for a consideration of ten thousand dollars annually to be paid by Wake County, party of the first part, on the first day of July, 1935, and the first day of July of each succeeding year thereafter for a period of thirty years from and after 1 July, 1935; and whereas, the care and maintenance of the indigent sick and afflicted poor of Wake County is a necessary expense of the county; and whereas, the county is obligated by the Constitution of North Carolina, and the laws of the State to provide for the care and maintenance of its indigent sick and afflicted poor; and whereas, the county is expressly authorized and empowered to enter into this contract by an act of the General Assembly of North Carolina, 1935, it being House Bill 289.

"Whereas, trustees of Rex Hospital, a corporation, propose to build and construct a new, modern, and up-to-date hospital, with proper facilities for the adequate care and maintenance of the indigent sick and afflicted poor of the county through a loan to be obtained through the Federal Emergency Administration of Public Works of the United States;

"Now, therefore, it is mutually agreed between the parties hereto as follows:

"1. That the trustees of Rex Hospital, a corporation, will construct, equip, and maintain a modern, up-to-date hospital with proper and necessary facilities for the care and maintenance of the indigent sick and afflicted poor of the county of Wake; and hereby agree to care for and provide proper hospital facilities in said hospital for the indigent sick and afflicted poor of the county of Wake, for a period of thirty years, beginning 1 July, 1935, and continuing for a period of thirty years thereafter, in consideration of Wake County paying to the trustees of Rex Hospital the sum of ten thousand dollars annually for said services, said consideration to be paid on 1 July, 1935, and on the first day of July of each succeeding year thereafter for said thirty-year period.

"2. And the said party of the first part, Wake County, in consideration of said services to be rendered, hereby agrees and binds itself to pay to the trustees of Rex Hospital, said party of the second part, the sum of ten thousand dollars annually, for a period of thirty years, the first payment of ten thousand dollars to be made on 1 July, 1935, and the remaining twenty-nine annual payments in the sum of ten thousand dollars are to be paid on the first day of July of each succeeding year thereafter for said period of thirty years.

"In testimony whereof, Wake County, party of the first part, has caused these presents to be signed in its name by the chairman of its Board of County Commissioners, and its corporate seal to be hereto affixed and attested by the clerk to said Board of County Commissioners,

all by order of a resolution of its Board of County Commissioners, this day duly passed and carried, a copy of which is attached to this contract, marked Exhibit 'A,' and made a part hereof; and the trustees of Rex Hospital, a corporation, party of the second part, has caused these presents to be signed in its corporate name by the chairman of its board of trustees, and its corporate seal to be hereto affixed and attested by the secretary to said board of trustees, all by order of a resolution of its board of trustees, this day duly passed and carried, a copy of which is attached to this contract, marked Exhibit 'B,' and made a part of this contract, the day and year first above written.

"COUNTY OF WAKE,

By ....

Chairman of the Board of County Commissioners.

"Attest:

....

Clerk to the Board of County Commissioners.

"TRUSTEES OF REX HOSPITAL,

By ....

Chairman of the Board of Trustees of Rex Hospital.

"Attest:

....

Secretary to the Board of Trustees of Rex Hospital."

The resolution adopted by the defendant Board of Commissioners of Wake County, and referred to in said contract as Exhibit "A," is as follows:

"Whereas, trustees of Rex Hospital, a corporation, have filed an application with the Federal Emergency Administration of Public Works for aid in the construction of a new, modern, and up-to-date hospital, to be built in Wake County, North Carolina, by way of a loan and grant in the aggregate amount of not in excess of three hundred fifty thousand dollars, of which not in excess of thirty per cent of the amount expended for the labor and material employed in the construction of the hospital shall be made by way of grant, and the balance by the purchase of the United States of America of bonds to be issued by the trustees of Rex Hospital, a corporation; and

"Whereas, the Federal Emergency Administration of Public Works has indicated that it will not make an allotment of funds for the construction of the hospital unless and until the county of Wake shall have entered into a valid and enforceable contract with the trustees of Rex Hospital, a corporation, in substantially the form attached to this resolution, which form of contract is satisfactory to the Federal Emergency Administration of Public Works; and

"Whereas, the hospital operated by trustees of Rex Hospital has been extending charitable relief and service to the sick, afflicted, and indigent poor of Wake County for many years; and whereas, the Commissioners of Wake County have for years made annual appropriations in part payment of services rendered by trustees of Rex Hospital in the care and maintenance of the indigent sick and afflicted poor of Wake County; and

"Whereas, under the Constitution and laws of North Carolina, the Commissioners of Wake County are obligated and in duty bound to provide for the maintenance and care of the indigent sick and afflicted poor of the county; and

"Whereas, the present facilities of Rex Hospital, as has been found by the Supreme Court of North Carolina, are inadequate to properly care for the indigent sick and afflicted poor of the county; and whereas, it has become necessary to construct a new, modern, and up-to-date hospital for the care and maintenance of the sick and afflicted poor of the county; and whereas, the care and maintenance of the indigent sick and afflicted poor of the county is a necessary expense of the county; and whereas, the Federal Emergency Administration of Public Works, acting upon the application of the trustees of Rex Hospital, has indicated that it will lend to said corporation the sum of three hundred fifty thousand dollars, of which not in excess of thirty per cent of the amount expended for labor and material employed in the construction of the hospital shall be by way of grant; and whereas, the Federal Emergency Administration of Public Works requires as a condition precedent to the closing of said loan and the making of funds available for the construction of said hospital, that the Commissioners of Wake County enter into a contract in substantially the form hereto attached, marked Exhibit 'A,' and made a part of this resolution, whereby the Commissioners of Wake County, in consideration of the trustees of Rex Hospital providing adequate and proper care and facilities for the indigent sick and afflicted poor of the county that may be sent to said hospital, agree to pay to the trustees of Rex Hospital the sum of ten thousand dollars annually over a period of thirty years for said services to be rendered in care and maintenance of the indigent sick and afflicted poor of the county; and whereas, this agreement is satisfactory to the trustees of Rex Hospital; and

"Whereas, the charge of ten thousand dollars per annum for said services is reasonable, and in fact less than fifty per cent of the actual cost of caring for the sick and afflicted poor of the county of Wake during the past few years; and whereas, the Commissioners of Wake County are in duty bound and obligated by law to make provisions for the care and maintenance of the indigent sick and afflicted poor; and

"Whereas, the charge of ten thousand dollars per annum for said services is reasonable, and in fact less than fifty per cent of the actual

cost of caring for the sick and afflicted poor of the county of Wake during the past few years; and whereas, the Commissioners of Wake County are in duty bound and obligated by law to make provision for the care and maintenance of the indigent sick and afflicted poor of the county; and whereas, an emergency exists which makes it imperative for the Commissioners of Wake County to enter into said contract in order to provide for the care and maintenance of the sick and afflicted poor of the county, for that the hospital cannot be built without this contract; and

"Whereas, the Commissioners of Wake County have been duly authorized and empowered to enter into said contract with the trustees of Rex Hospital by an act of the General Assembly of North Carolina, 1935, said act being House Bill No. 289.

"Now, therefore, be it resolved by the Commissioners of Wake County that said contract hereto attached and marked Exhibit 'A' be in all respects approved and confirmed and the proper officers of this board are hereby ordered and directed to execute said contract according to law, and the same is hereby declared a legal and binding obligation of Wake County; and said officers are authorized to do any and all things necessary to make said contract the legal and binding obligation of Wake County.

"Be it further resolved, that there shall be levied annually, at the time other taxes are levied, a special tax upon all the taxable property within said county of sufficient rate and amount to provide for the payments called for under said contract, as the same mature."

The resolution adopted by the trustees of Rex Hospital, and referred to in said contract as Exhibit "B," is as follows:

"Whereas, the trustees of Rex Hospital contemplate the construction of a new, modern, and up-to-date hospital by and through the aid of the Federal Emergency Administration of Public Works; and whereas, said Government corporation has required as a consideration precedent to the closing of said loan that the trustees of Rex Hospital enter into a contract with the county of Wake and State of North Carolina, whereby said trustees of Rex Hospital will furnish hospital facilities to the indigent sick and afflicted poor of said county for a period of thirty years, beginning 1 July, 1935, and continuing for thirty years thereafter, in consideration of the county of Wake paying to the trustees of Rex Hospital the sum of ten thousand dollars annually for a period of thirty years for said services.

"Now, therefore, be it resolved by the trustees of Rex Hospital that said contract be executed and entered into in such form as is approved by and required by the Federal Emergency Administration of Public Works of the United States; and the proper officers of this corporation

are hereby ordered and directed to execute said contract and do any and all things necessary to make the same a legal and binding obligation of this corporation."

The act of the General Assembly of North Carolina, referred to in said contract, and in the resolution adopted by the defendant Board of Commissioners of Wake County, is as follows:

"H. B. 289. An act to amend section one thousand three hundred thirty-five of the Consolidated Statutes of North Carolina, relating to the county poor in the various counties of the State.

"*The General Assembly of North Carolina do enact:*

"SECTION 1. That section one thousand three hundred thirty-five of the Consolidated Statutes of North Carolina be and the same is hereby amended by adding at the end thereof the following:

" 'The board of commissioners of each county, when deemed for the best interest of the county, is hereby given authority to contract, for periods not to exceed 30 years, with public or private hospitals or institutions located within or without the county to provide for the medical treatment and hospitalization of the sick and afflicted poor of the county upon such terms and conditions as may be agreed, provided the annual payments required under such contract shall not be in excess of $10,000. The full faith and credit of each county shall be deemed to be pledged for the payment of the amounts due under said contracts, and the special approval of the General Assembly is hereby given to the execution thereof and to the levy of a special *ad valorem* tax in addition to other taxes authorized by law for the special purpose of the payment of the amounts to become due thereunder. The contracts provided for in this act and the appropriations and taxes therefor are hereby declared to be for necessary expenses and for a special purpose within the meaning of the Constitution of North Carolina, and for which the special approval of the General Assembly is hereby given, and shall be valid and binding without a vote of the majority of the qualified voters of the county, and are expressly exempted and excepted from any limitation, condition, or restriction prescribed by the County Fiscal Control Act, and acts amendatory thereof: *Provided,* that the County Commissioners of Lincoln County shall not enter into any such contract except after a public hearing at the county courthouse, notice of which hearing shall be published for two successive weeks in a newspaper published in the county.'

"SEC. 2. That the Commissioners of Catawba County shall not act under this bill until a majority of the people of the county have voted favorably.

"SEC. 3. This act shall not apply to the counties of Ashe, Avery, Buncombe, Clay, Cumberland, Durham, Gates, Haywood, Henderson, Jackson, Lee, Macon, Moore, Nash, Pasquotank, Robeson, Sampson, Transylvania, Wilkes, Yadkin, Rowan, Gaston, Iredell, Surry, New Hanover, Washington, Bertie, Brunswick, Union, Stanly, Yancey, Warren, Vance, Chowan, Currituck, Forsyth, McDowell, Johnston, Halifax, Edgecombe, Pitt, Richmond, Rockingham, Columbus, Guilford, and Mecklenburg.

"SEC. 4. That all laws and clauses of laws in conflict with the provisions of this act are hereby repealed.

"SEC. 5. That this act shall be in force and effect from and after its ratification.

"In the General Assembly, read three times, and ratified this 6 March, 1935."

When the action was called for trial at the April Term, 1935, of the Superior Court of Wake County, judgment was rendered by the court as follows:

"This cause coming on to be heard before the undersigned, Clawson L. Williams, judge presiding over the courts of the Seventh Judicial District, at the regular April Term, 1935, of the Wake County Superior Court, and a jury trial having been waived, and it having been agreed between Banks Arendell, attorney for the plaintiff, and Thomas W. Ruffin, attorney for the defendants, that the court might hear the evidence, find the facts, and render judgment; and evidence having been offered by both plaintiff and defendants, and the court having heard the argument of counsel, the following facts are found to be true.

"1. That this action was brought by the plaintiff, a citizen and taxpayer of Wake County, North Carolina, in behalf of himself and all other citizens and taxpayers of Wake County, North Carolina, against the Board of Commissioners of Wake County, Wake County, and the individual defendants comprising the Board of Commissioners of Wake County; and the court finds that all persons interested in this controversy, who are necessary and proper parties for a determination of the questions presented, are before the court and represented by counsel.

"2. That this action was brought for the purpose of securing a restraining order against the defendants, prohibiting them from executing and carrying out a contract which the defendants propose to enter into with the trustees of Rex Hospital, a corporation, unless restrained by the court.

"3. That said contract provides briefly that the trustees of Rex Hospital will furnish hospital facilities for the care and maintenance of the sick and afflicted poor of Wake County for a period of 30 years, in consideration of the county of Wake paying to said hospital corporation

the sum of $10,000 annually therefor, beginning 1 July, 1935, and payable annually thereafter until said 30-year period has expired.

"4. That the purpose of said contract is to assist the trustees of Rex Hospital in amortizing a $350,000 Government loan, which in turn will result in modern hospitalization for the poor of Wake County, and all of its citizens. And the court finds as a fact that $10,000 annual consideration called for in said contract, to be paid by Wake County, is a necessary expense of the county within the meaning of the Constitution; and is necessary to provide and care for the sick and afflicted poor of the county.

"And the court further finds as a fact that the consideration of ten thousand dollars per annum, as provided for in said contract, to be paid by Wake County, is less than 50 per cent of the actual cost of caring for the sick and afflicted poor of the county, according to the experience of the county during the past three years; and that the consideration is fair and reasonable and to the great benefit of the taxpayers of the county, who without said contract would have to pay more for the care and maintenance of the sick and afflicted poor; that an emergency exists which makes it imperative for the Commissioners of Wake County to enter into said contract in order to provide proper care and maintenance for the sick and afflicted poor of the county for that the hospital cannot be built without this contract.

"5. That the Commissioners of Wake County, and Wake County, are duly and legally authorized to enter into said contract by the Constitution of North Carolina, the statutes, and particularly by an act of the 1935 Legislature briefly designated as House Bill No. 289, and are duly and legally empowered and authorized to levy a special *ad valorem* tax, in addition to other taxes authorized by law, for the special purpose of the payment of the amounts to become due under said contract, and to pledge the full faith and credit of the county in the payment of the same.

"CONCLUSIONS OF LAW.

"Upon the foregoing findings of fact the court concludes:

"1. That all persons interested in this controversy are now within the jurisdiction of the court and properly before the court.

"2. The consideration set forth in said contract is for a necessary expense of the county, and is fair and reasonable and to the great benefit of the taxpayers and the county, and is for a special purpose within the meaning of the Constitution of North Carolina. That the taxes to be levied for the payment of the same are necessary expense of Wake County, and for special purposes within the meaning of the Constitution, and are valid and binding without a vote of the people, and are expressly exempted and excepted from any limitation, condition, or restriction prescribed by the County Fiscal Control Act and acts amend-

atory thereof. That the act of the Legislature hereinbefore referred to is constitutional.

"3. That the contract is binding and legal and, when properly executed, will be binding and legal obligation of Wake County, North Carolina.

"It is, therefore, on motion of Thomas W. Ruffin, attorney for the defendants, by the court ordered, considered, adjudged, and decreed:

"1. That the Board of Commissioners of Wake County, Wake County, and the individual defendants comprising the Board of Commissioners of Wake County be and they are hereby fully authorized and empowered to enter into the contract described in the pleadings, and do any and all things necessary to make said contract the legal and binding obligation of Wake County.

"2. That said contract, when properly executed, shall be and is adjudged to be the legal and binding obligation of Wake County.

"3. The Board of Commissioners of Wake County, and their successors in office are hereby adjudged to have the authority and are authorized and empowered to levy special taxes for the special purpose of the payment of the amounts to become due under said contract, and in an amount and rate sufficient to provide for the payments called for under said contract, as the same mature.

"4. That the plaintiff's prayer for a restraining order is hereby denied, and the plaintiff's cause of action is hereby dismissed, it being found as a fact that this action was brought solely for the purpose of restraining the defendants from executing said contract.

"5. That the defendants recover their costs, to be taxed against the plaintiff."

The plaintiff excepted to the foregoing judgment and appealed to the Supreme Court of North Carolina, assigning as error the holding in said judgment that on the facts found by the court the contract referred to therein, when duly executed on its behalf, will be valid and binding on Wake County, in all respects.

Banks Arendell for plaintiff.
Thomas W. Ruffin for defendants.

CONNOR, J. On his appeal to this Court, the plaintiff contends that there is error in the judgment of the Superior Court of Wake County in this action, for that it is adjudged therein that the contract referred to in said judgment, when duly executed pursuant to the resolution of the defendant Board of Commissioners of Wake County, will be a valid and legal obligation of the defendant Wake County, and that for that reason the plaintiff is not entitled to judgment in this action enjoining the execution of said contract.

The plaintiff contends that said contract, although duly executed in its behalf pursuant to the resolution of the defendant Board of Commissioners of Wake County, will not be valid and binding on the defendant Wake County, (1) for that said contract on its face purports to obligate the defendant Wake County to pay to the trustees of Rex Hospital, the sum of $10,000 annually for a period of time in excess of the terms of office of the members of the present Board of Commissioners of Wake County, to wit, for thirty years from and after 1 July, 1935; (2) for that said contract on its face purports to obligate the defendant Wake County to pay, in part at least, the expense of the medical treatment and hospital care of the indigent sick and afflicted poor of said county for a period of thirty years from and after 1 July, 1935; and (3) for that said contract, by the reference therein to the resolution of the defendant Board of Commissioners of Wake County authorizing its execution, purports to bind succeeding Boards of Commissioners of Wake County to levy an annual special tax on the taxable property in said county sufficient to raise each year for thirty years, from and after 1 July, 1935, the sum of $10,000, for a purpose which is not special, and is not a necessary expense of Wake County, without the approval of a majority of the qualified voters of said county.

The Board of Commissioners of Wake County is expressly authorized and empowered by the statute, which was duly enacted by the General Assembly of North Carolina, at its regular session in 1935, in its discretion, to contract for a period not to exceed thirty years with a public or private hospital or institution located within or without Wake County, for the medical treatment and hospital care by such hospital or institution of the indigent sick and afflicted poor of said county, upon such terms and conditions as may be agreed upon by said Board of Commissioners and said hospital or institution, provided the annual payment required by such contract to be made by Wake County shall not exceed the sum of $10,000. It is expressly declared by said statute that the full faith and credit of Wake County shall be deemed pledged to the faithful performance of said contract by Wake County. To give assurance that Wake County will be able fully to perform said contract, if and when the same shall be made by its Board of Commissioners, the said Board of Commissioners is expressly authorized and empowered by the statute to levy each year during which said contract shall be in force a special *ad valorem* tax, in addition to other taxes authorized by law, on the taxable property in Wake County. It is declared by the statute that such tax, if and when the same shall be levied, shall be a special tax, for a special purpose, and for a necessary expense of Wake County, and shall be valid without the approval of a majority of the qualified voters of Wake County. All laws and clauses of laws in conflict with the pro-

visions of the statute are expressly repealed. The statute is now and has been since the date of its ratification, to wit, 6 March, 1935, in full force and effect. It appears from the Journal of each house of the General Assembly that the statute was enacted in accordance with the requirements of section 14, Article II, of the Constitution of North Carolina. See *Frazier v. Commissioners,* 194 N. C., 49, 138 S. E., 433.

Wake County is a body politic and corporate, created by the General Assembly of North Carolina for certain public and political purposes. Its powers as such, both express and implied, are conferred by statutes, enacted from time to time by the General Assembly, and are exercised by its Board of Commissioners, C. S., 1290, which is composed of five members, each of whom is elected by the voters of said county for a term of four years. C. S., 1293. It is not, in a strict legal sense, a municipal corporation, as a city or town. It is rather an instrumentality of the State, by means of which the State performs certain of its governmental functions within its territorial limits. *Bell v. Comrs.,* 127 N. C., 85, 37 S. E., 136. Speaking of the counties of this State, this Court has said, in *Jones v. Comrs.,* 137 N. C., 579, 50 S. E., 291: "These counties are not, strictly speaking, municipal corporations at all in the ordinary acceptance of that term. They have many of the features of such corporations, but they are usually termed *quasi*-public corporations. In the exercise of ordinary governmental functions, they are simply agencies of the State, constituted for the convenience of local administration in certain portions of the State's territory, and in the exercise of such functions they are subject to almost unlimited legislative control, except when the power is restricted by constitutional provisions." In *O'Berry, State Treasurer, v. Mecklenburg County,* 198 N. C., 357, 151 S. E., 880, it is said: "The weight of authority is to the effect that all the powers and functions of a county bear reference to the general policy of the State, and are in fact an integral portion of the general administration of State policy."

The people of the State of North Carolina, in their Constitution, section 7 of Article XI, have declared that beneficent provision for the poor, the unfortunate, and the orphan is one of the first duties of a civilized and Christian state. In accordance with this principle, it has been uniformly held in this State that the care of the indigent sick and afflicted poor is a proper function of the government of this State, and that the General Assembly may by statute require the counties of the State to perform this function at least within their territorial limits.

The trustees of Rex Hospital, as a corporation created by the General Assembly of North Carolina, own and maintain a hospital in the city of Raleigh, Wake County, North Carolina, for the medical treatment and hospital care of the indigent sick and afflicted poor of the city of Raleigh and of Wake County. This hospital is supported by donations of prop-

erty and money by individuals and by the city of Raleigh and Wake County, and also by sums paid by patients who are able to pay for services rendered to them. It is a public hospital, and is maintained, primarily, as a charitable institution. See *Raleigh v. Trustees,* 206 N. C., 485, 174 S. E., 278.

The contract which the defendant Board of Commissioners of Wake County proposes to make with the trustees of Rex Hospital is in all respects authorized by the statute enacted by the General Assembly of North Carolina, and when executed pursuant to the resolution of said Board of Commissioners will be a legal and binding obligation of the defendant Wake County, unless the statute itself, in some of its provisions, is invalid, for the reason that its enactment is in violation of provisions of the Constitution of North Carolina, or for other reasons.

The statute does not violate the provisions of section 6 of Article V of the Constitution of North Carolina, for the reason that the tax which the Board of Commissioners of Wake County is authorized to levy on the taxable property in Wake County is a special tax for a special purpose, and will be levied with the special approval of the General Assembly. The tax will not be levied for a general county purpose, as for the purpose of providing for the poor and infirm of the county (see *R. R. v. Cherokee County,* 195 N. C., 756, 143 S. E., 467), but for the special purpose of providing medical treatment and hospital care for the indigent sick and afflicted poor of the county. The tax, although it may exceed the Constitutional limitation, will not be void for that reason. The rate of the tax cannot, however, exceed the rate required to raise each year the sum of $10,000.

The statute does not violate section 7 of Article VII of the Constitution of North Carolina, for the reason that the tax which the Board of Commissioners of Wake County is authorized to levy on the taxable property in Wake County is for a necessary expense of the county, and therefore is valid, although not approved by the majority of the qualified voters of the county. See *Commissioners v. Spitzer Company,* 173 N. C., 147, 91 S. E., 707.

The contentions of the plaintiff that the proposed contract contravenes a sound public policy because of its duration presents no question of law affecting the validity of the contract. In that respect it is sufficient to say that the General Assembly of North Carolina has authorized the contract for a period not to exceed thirty years, and that the Board of Commissioners of Wake County, in the exercise of the discretion vested in the said board by the statute, has agreed to contract for that period. Its reasons for so doing are obvious from the record, and will not be reviewed by this Court.

We find no error in the judgment.

Affirmed.

STACY, C. J., dissenting: Under the Constitution, as heretofore interpreted, the obligation here sought to be assumed requires the approval of a vote of the people to make it binding or enforceable. As the annual payments are to continue over a period of thirty years, it is all the more important that a plebiscite be taken. *Hudson v. Greensboro,* 185 N. C., 502, 117 S. E., 629.

It is provided by Article VII, section 7, of the Constitution that "No county, city, town, or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, . . . except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein."

It is further provided in Article V, section 6, of the Constitution that "The total of the State and county tax on property shall not exceed fifteen cents on the one hundred dollars value of property, except when the county property tax is levied for a special purpose and with the special approval of the General Assembly."

In interpreting these provisions of the organic law, it is fully established by the decisions:

1. That *within the limitations fixed in Article V, section 6, the county* commissioners of the several counties may levy taxes for the "necessary expenses" of the county without a vote of the people or special legislative approval. *Glenn v. Comrs.,* 201 N. C., 233, 159 S. E., 439.

2. That for a special purpose and with the special approval of the General Assembly the county commissioners of the several counties may exceed the limitations set out in Article V, section 6, without a vote of the people: *Provided,* the special purpose so approved by the General Assembly is for a necessary expense of the county. *R. R. v. Lenoir County,* 200 N. C., 494, 157 S. E., 610.

3. That for a purpose other than a necessary expense, whether special or general, a tax may not be levied by the commissioners of any county, either within or in excess of the limitations fixed in Article V, section 6, except by a vote of the people under special legislative authority. *R. R. v. Comrs.,* 148 N. C., 220, 61 S. E., 690.

Summing up the decisions in *Henderson v. Wilmington,* 191 N. C., 269, 132 S. E., 25, *Adams, J.,* speaking for the Court, said: "(1) That for necessary expenses the municipal authorities may levy a tax up to the constitutional limitation without a vote of the people and without legislative permission; (2) that for necessary expenses they may exceed the constitutional limitation by legislative authority, without a vote of the people; (3) that for purposes other than necessary expenses a tax cannot be levied either within or in excess of the constitutional limitation except by a vote of the people under special legislative authority," citing *Herring v. Dixon,* 122 N. C., 420; *Tate v. Comrs.,* 122 N. C., 812.

There are three recent cases directly in point:

1. *Armstrong v. Comrs.,* 185 N. C., 405, 117 S. E., 388, where it was insisted that a hospital for tubercular patients should be declared a necessary governmental expense for Gaston County. The Court answered: "We cannot so hold."

2. *Burleson v. Board of Aldermen,* 200 N. C., 30, 156 S. E., 241, where it was held that "for the purpose of raising money for the construction, maintenance, and operation of a public hospital" in the town of Spruce Pine, "the bonds will not be valid, unless their issuance was authorized by the General Assembly and approved by a majority of the qualified voters of the town of Spruce Pine."

3. *Nash v. Monroe,* 198 N. C., 306, 151 S. E., 634, where it was categorically declared: "The maintenance of a municipal hospital is not a necessary governmental expense." In this case, a note given by the city of Monroe for hospital equipment, without popular approval, was held to be unenforceable through the courts.

Nor should it be overlooked that what is now judicially declared a necessary expense for Wake County, is, by the Act of Assembly, limited to nearly half the counties of the State. The Constitution, which applies equally to every county in the State, recognizes no such difference in the essential governmental requirements, if such it be, "of providing medical treatment and hospital care for the indigent sick and afflicted poor of the county."

So, unless these cases are now overruled or rendered apocryphal, the law is different in Wake from what it is in Gaston; different in Raleigh from what it is in Monroe and Spruce Pine. This ought not to be.

The theory in the court below was that an emergency exists which justifies a departure from established principles. It was pointed out by *Chief Justice Hughes,* in *Home Building and Loan Association v. Blaisdell,* 290 U. S., 398, that "emergency does not create power." It may furnish the occasion for the exercise of dormant power, but it is not to override constitutional limitations. *Schechter Poultry Corp. v. U. S.,* 79 L. Ed., 888.

The Constitution is the protector of all the people. It stands as their shield and buckler in fair weather and foul; and in periods of panic and depression, it is to them "as the shadow of a great rock in a weary land, a shelter in the time of storm." *Glenn v. Comrs., supra.*

The theory of the majority here is, that a vote of the people may be dispensed with by invoking the aid of Article XI, section 7, of the Constitution, which recommends the appointment of a board of public charities to care for "the poor, the unfortunate, and orphan," and *Comrs. v. Spitzer Co.,* 173 N. C., 147, 91 S. E., 707, is cited as authority for the position. It is a matter of common knowledge that within sight of the city of Raleigh stands the commodious "Wake County Home,"

which is the kind of institution considered in the *Spitzer case, supra.* Having otherwise amply complied with this provision of the Constitution, it is not contended by the parties that it may be called in aid of the present undertaking. Indeed, it is found by consent that "the purpose of said contract is to assist the trustees of Rex Hospital in amortizing a $350,000 governmental loan, which in turn will result in modern hospitalization for the poor of Wake County *and all of its citizens.*" (Italics added.)

It should also be observed that Rex Hospital is not a municipally owned, operated, or controlled institution. *Ketchie v. Hedrick,* 186 N. C., 392, 119 S. E., 767.

W. REID MARTIN, A CITIZEN AND TAXPAYER OF THE CITY OF RALEIGH, WAKE COUNTY, NORTH CAROLINA, IN BEHALF OF HIMSELF AND ALL OTHER CITIZENS AND TAXPAYERS OF THE CITY OF RALEIGH, WAKE COUNTY, NORTH CAROLINA, v. THE CITY OF RALEIGH, AND GEORGE A. ISELEY, G. M. BARTON, AND J. H. BROWN, COMPRISING THE BOARD OF COMMISSIONERS OF THE CITY OF RALEIGH.

(Filed 26 June, 1935.)

1. **Taxation A a—Purpose for which municipal debt is incurred determines whether it is for necessary municipal expense.**

The declaration of the General Assembly in a statute authorizing a municipality to levy a tax and the finding of the municipal commissioners that the tax is for a necessary municipal expense within the meaning of Art. VII, sec. 7, is not controlling, but, when made in good faith, such declaration and finding are persuasive, and are entitled to serious consideration by the courts in determining whether the purpose for which the tax is proposed to be levied is for a necessary municipal expense within the meaning of term as used in the Constitution.

2. **Same—Municipal tax for purpose of raising revenue necessary for care of indigent sick held for necessary municipal expense.**

In accordance with the provisions of an act of the General Assembly, the commissioners of a city proposed to enter into a contract with a public hospital providing for the payment by the city of the sum of $10,000 a year for thirty years, in consideration of the agreement of the hospital to give medical care and hospitalization to the indigent sick and afflicted poor of the city, and to levy a tax to raise revenue sufficient to meet such payments. *Held:* Under the facts found by the trial court, the proposed tax is for a necessary municipal expense, and the approval of the qualified voters of the city is not a prerequisite to the validity of the tax. Art. VII, sec. 7.

STACY, C. J., dissenting.

APPEAL by plaintiff from *Williams, J.,* at April Term, 1935, of WAKE. Affirmed.

This is an action to enjoin the execution by the defendant Board of Commissioners of the city of Raleigh, in behalf of the defendant, the city of Raleigh, of a contract with the trustees of Rex Hospital, pursuant to resolutions duly adopted by the said Board of Commissioners and the said trustees, on the ground that the said Board of Commissioners has no lawful power to bind the defendant, the city of Raleigh, by the execution in its name of said contract, and that its execution by the said Board of Commissioners will result in irreparable damages to the plaintiff and all other citizens and taxpayers of the city of Raleigh.

The contract which the defendant Board of Commissioners proposes to execute on behalf of the defendant, the city of Raleigh, is in writing and is in words and figures as follows:

"NORTH CAROLINA—WAKE COUNTY.

"This contract made this .... day, 1935, by and between the city of Raleigh, a municipal corporation of North Carolina, organized under the laws of said State, party of the first part, and the trustees of Rex Hospital, a corporation duly chartered under the laws of the State of North Carolina, party of the second part;

"Witnesseth: That whereas the trustees of Rex Hospital, a corporation, party of the second part, has offered to provide adequate hospital care for the indigent sick and afflicted poor of the city of Raleigh for a period of thirty years, beginning on 1 July, 1935, and continuing for thirty years thereafter, for a consideration of ten thousand dollars annually to be paid by the city of Raleigh, party of the first part, on the first day of July, 1935, and on the first day of July of each succeeding year thereafter for a period of thirty years from and after 1 July, 1935; and whereas, the care and maintenance of the indigent sick and afflicted poor of the city of Raleigh is a necessary expense of the said city; and whereas the city of Raleigh is obligated by the Constitution of North Carolina and the laws of said State to provide for the care and maintenance of its indigent sick and afflicted poor; and whereas the city of Raleigh is expressly authorized and empowered to enter into this contract by an act of the General Assembly of North Carolina, 1935, it being House Bill No. 288, and

"Whereas, the trustees of Rex Hospital, a corporation, propose to build and construct a new, modern, and up-to-date hospital with proper facilities for the adequate care and maintenance of the indigent sick and afflicted poor of the city of Raleigh, through a loan to be obtained from the Federal Emergency Administration of Public Works of the United States;

"Now, therefore, it is mutually agreed between the parties hereto, as follows:

"1. That the trustees of Rex Hospital, a corporation, will construct, equip, and maintain a modern, up-to-date hospital with proper and necessary facilities for the care and maintenance of the indigent sick and afflicted poor of the city of Raleigh, and hereby agree to care for and provide proper hospital facilities in said hospital for the indigent sick and afflicted poor of the city of Raleigh for a period of thirty years, beginning on 1 July, 1935, and continuing for a period of thirty years thereafter, in consideration of the payment by the city of Raleigh to the trustees of Rex Hospital of the sum of ten thousand dollars annually for said services, said sum to be paid on 1 July, 1935, and on the first day of July of each succeeding year thereafter for said thirty-year period.

"2. And the said city of Raleigh, party of the first part, in consideration of said services to be rendered by the trustees of Rex Hospital, party of the second part, hereby agrees and binds itself to pay to the trustees of Rex Hospital the sum of ten thousand dollars annually, for a period of thirty years, the first payment of ten thousand dollars to be made on 1 July, 1935, and the remaining twenty-nine annual payments each in the sum of ten thousand dollars to be paid on the first day of July of each succeeding year thereafter for said period of thirty years.

"In testimony whereof, the city of Raleigh, party of the first part, has caused these presents to be signed in its name by its mayor, and to be attested by its city clerk, and its corporate seal to be hereto affixed, all by authority of a resolution of its Board of Commissioners, this day duly passed and carried, a copy of which is attached to this contract, marked Exhibit 'A,' and made a part hereof;

"And the trustees of Rex Hospital, a corporation, party of the second part, has caused these presents to be signed in its corporate name by the chairman of its board of trustees, and its corporate seal to be hereto affixed and attested by the secretary of said board of trustees, all by order of a resolution of its board of trustees this day duly passed and carried, a copy of which is attached to this contract, marked Exhibit 'B,' the day and year first above written.

"CITY OF RALEIGH,

By...

"Attest: *Mayor.*

....

Clerk of the City of Raleigh.

"TRUSTEES OF REX HOSPITAL,

By...

Chairman of the Board of Trustees of Rex Hospital.

"Attest:

....

Secretary to the Board of Trustees of Rex Hospital."

The resolution referred to in the foregoing contract as Exhibit "A" was passed and adopted by the Board of Commissioners of the city of Raleigh, the governing body of said city, pursuant to the provisions of an act of the General Assembly of North Carolina, and expressly provides "that there shall be levied annually at the time other taxes are levied a special tax upon all the taxable property within said city of sufficient rate and amount to provide for the payments called for under said contract, as the same mature." The said act was passed by the General Assembly of North Carolina at its regular session in 1935, in accordance with the requirements of section 14 of Article II of the Constitution of North Carolina, and is as follows:

"H. B. 288. An act to amend section two thousand seven hundred and ninety-five of the Consolidated Statutes of North Carolina, relating to ordinances for the public health of the State.

"*The General Assembly of North Carolina do enact:*

"SECTION 1. That section two thousand seven hundred and ninety-five of the Consolidated Statutes of North Carolina be and the same is hereby amended by adding at the end thereof the following:

"The governing body of any city or town, when deemed for the best interest of the city or town, is hereby given authority to contract, for periods of not to exceed thirty years, with public or private hospitals or institutions within or without the city or town, for the medical treatment and hospitalization of the sick and afflicted poor of the city or town upon such terms and conditions as may be agreed: *Provided,* that the annual payments required under such contract shall not be in excess of ten thousand ($10,000) dollars. The full faith and credit of each city or town shall be deemed to be pledged for the payment of the amounts due under said contracts. The contracts provided for under this act, and the appropriations and taxes therefor, are hereby declared to be for necessary expenses within the meaning of the Constitution of North Carolina, and shall be valid and binding without a vote of the majority of the qualified voters of each city or town, and are hereby expressly exempted from any limitation, restriction, or provision contained in the County Fiscal Control Act, and acts amendatory thereof, as it may be applicable to cities or towns by virtue of section sixty-five, chapter sixty, Public Laws of North Carolina, 1931.

"No limitation, restriction, or provision contained in any general, special, private, or public-local law, or charter of any city or town, relating to the execution of contracts and the appropriation of money, and levying of taxes therefor, shall apply to contracts authorized and executed under this act: *Provided,* that the town of Lincolnton shall not enter into any such contract except after a public hearing at the county

courthouse in Lincoln County, notice of which hearing shall be published for two successive weeks in a newspaper published in the county. The provisions of this act shall not apply to the municipalities of Salisbury, Spencer, East Spencer, Rocky Mount, Reidsville, Leaksville, Madison, Asheville, Charlotte, Edenton, Gibsonville, Greensboro, Hamlet, High Point, Jamestown, Rockingham, Tarboro, and Wilmington.

"SEC. 2. This act shall not apply to the city of High Point, in Guilford County; to the city of Elizabeth City, in Pasquotank County; nor to the counties of Beaufort, Camden, and Lee, or to any city or town therein; nor to any city or town in the counties of Ashe, Avery, Columbus, Davidson, Durham, Gates, Jackson, Martin, and Rockingham; nor to the counties of Ashe, Alexander, Brunswick, Clay, Cumberland, Forsyth, Haywood, Henderson, Jones, Macon, Montgomery, Moore, Pasquotank, Robeson, Sampson, Transylvania, Wilkes, Catawba, Lincoln, Surry, Washington, Rowan, Warren, Vance, Johnston, Edgecombe, Halifax, Cumberland, Davie, Forsyth, Gaston, Harnett, Iredell, Pitt, Stanly, Union, and Yadkin.

"SEC. 3. That before this act shall apply to any city or town in Catawba County, it must be submitted to a vote of the people of said Catawba County.

"SEC. 4. That all laws and clauses of laws in conflict with the provisions of this act are hereby repealed.

"SEC. 5. This act shall be in force and effect from and after the date of its ratification."

The act was duly ratified on 6 March, 1935.

When the action was called for trial at the April Term, 1935, of the Superior Court of Wake County, judgment was rendered as follows:

"This cause coming on to be heard before the undersigned, Clawson L. Williams, judge presiding over the courts of the Seventh Judicial District, at the regular April Term, 1935, of the Superior Court of Wake County, and a jury trial having been waived, and it having been agreed by and between Banks Arendell, attorney for the plaintiff, and Thomas W. Ruffin, attorney for the defendants, that the court might hear the evidence, find the facts, and render judgment; and evidence having been offered by both the plaintiff and the defendants, and the court having heard the arguments of counsel, the following facts are found to be true:

"1. That this action was brought by the plaintiff, a citizen and taxpayer of the city of Raleigh, in Wake County, North Carolina, in behalf of himself and all other citizens and taxpayers of the city of Raleigh, and the city of Raleigh and the individual defendants composing the Board of Commissioners of the city of Raleigh; and the court finds that all persons interested in this controversy who are necessary and proper parties for a determination of the questions presented are before the court and are represented by counsel.

"2. That this action was brought for the purpose of securing a restraining order against the defendants, prohibiting them from executing and carrying out a contract which the defendants propose to enter into with the trustees of Rex Hospital, a corporation, unless restrained by the court.

"3. That said contract provides briefly that the trustees of Rex Hospital will furnish hospital facilities for the care and maintenance of the sick and afflicted poor of the city of Raleigh for a period of thirty years in consideration of said city paying to said hospital corporation the sum of $10,000 annually therefor, beginning on 1 July, 1935, and continuing thereafter until said thirty-year period has expired.

"4. That the purpose of said contract is to assist the trustees of Rex Hospital in amortizing a $350,000 Government loan, which in turn will result in modern hospitalization for the poor of the city of Raleigh, and all of its citizens. And the court finds as a fact that the $10,000 annual payment called for in said contract to be made by the city of Raleigh is a necessary expense of the city within the meaning of the Constitution of North Carolina; and that said contract is necessary to provide for the sick and afflicted poor of said city. The court further finds as a fact that the sum of $10,000 per annum as provided in said contract to be paid by the city of Raleigh is less than fifty per cent of the actual cost to the city of Raleigh of caring for the sick and afflicted poor of said city during the past few years, as shown by the experience of said city; and that said sum of $10,000 is a fair and reasonable sum for the services to be rendered by the trustees of Rex Hospital under said contract; and that an emergency now exists which makes it imperative for the city of Raleigh to enter into said contract, and thereby provide for the proper care and maintenance of its indigent sick and afflicted poor who require medical treatment and hospital care.

"5. That the commissioners of the city of Raleigh and the city of Raleigh are duly and legally authorized to enter into said contract by the Constitution of North Carolina, the laws of said State, and particularly by an act of the General Assembly of said State at its regular session in 1935, known as House Bill No. 288, and are duly and legally authorized and empowered to levy taxes for the purpose of paying the sums to become due annually under said contract, and to pledge the full faith and credit of the city of Raleigh to the payment of said sums.

"CONCLUSIONS OF LAW.

"Upon the foregoing findings of fact the court concludes:

"1. That all persons interested in this controversy are now within the jurisdiction of the court, and are properly before the court.

"2. That the consideration set forth in said contract is for a necessary expense of the city of Raleigh, and that said contract is fair and reasonable, and is in the interest of the city of Raleigh and all its citizens and taxpayers; that the taxes to be levied annually for the payment of the annual sum to be paid under said contract by the city of Raleigh will be for the necessary expenses of the city of Raleigh, and will be valid without the approval of a majority of the qualified voters of the city of Raleigh; that the levying of said taxes are expressly exempted and excepted from any limitation, restriction, or provision contained in the County Fiscal Control Act and acts amendatory thereof, as it may be applicable to cities or towns by virtue of section 65, chapter 60, Public Laws of North Carolina, 1931; and that the levying of said taxes is likewise expressly exempted and excepted from any limitation, restriction, or provision contained in any general, special, private, or public-local law, or in the charter of the city of Raleigh, relating to the execution of contracts, the appropriation of money, and the levying of taxes therefor. That the act of the General Assembly hereinabove referred to is constitutional.

"3. That the contract is binding and legal and, when properly executed, will be the binding and legal obligation of the city of Raleigh.

"It is, therefore, on motion of Thomas W. Ruffin, attorney for the defendants, by the court ordered, considered, adjudged, and decreed:

"1. That the city of Raleigh and the individual defendants composing the Board of Commissioners of the city of Raleigh be and they are hereby fully authorized and empowered to enter into the contract described in the pleadings, and do any and all things necessary to make said contract the legal and binding obligation of the city of Raleigh.

"2. That said contract, when properly executed, shall and it is adjudged to be a legal and binding obligation of the city of Raleigh.

"3. That the commissioners of the city of Raleigh, and their successors in office, are hereby adjudged to have the authority and are hereby authorized and empowered to levy taxes for the payment of the amounts to become due under said contract, in an amount and at a rate sufficient to provide for the payments called for under the said contract as the same mature.

"4. That the plaintiff's prayer for a restraining order is hereby denied, and the plaintiff's cause of action is hereby dismissed, it being found as a fact that this action was brought solely for the purpose of restraining the defendants from executing said contract.

"5. That the defendants recover their costs, to be taxed against the plaintiff."

The plaintiff excepted to the foregoing judgment, and appealed to the Supreme Court of North Carolina, assigning as error the signing of the judgment.

Banks Arendell for plaintiff.
Thomas W. Ruffin for defendants.

CONNOR, J. The contract which the defendant Board of Commissioners of the city of Raleigh proposes to make with the trustees of Rex Hospital is in all respects authorized by the statute which was enacted by the General Assembly of North Carolina at its regular session in 1935, and for that reason, when duly executed pursuant to the resolution of said Board of Commissioners, will be a legal and binding obligation of the defendant city of Raleigh, unless the statute itself, in some of its provisions, is invalid because it was enacted in violation of some provision of the Constitution of North Carolina. See *Martin v. Board of Commissioners of Wake County, ante,* 354.

The statute declares that contracts made in accordance with its provisions, and taxes levied under its authority, are for a "necessary expense" within the meaning of these words as used in the Constitution of North Carolina, and that such contracts and taxes shall be valid without the approval of a majority of the qualified voters of the city or town.

The only question presented by this appeal which seems to require consideration by this Court is whether the provision of the statute contravenes the provision of the Constitution of North Carolina found in section 7, Article VII, which is as follows:

"No county, city, town, or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein."

If the contract which the Board of Commissioners of the city of Raleigh proposes to make with the trustees of Rex Hospital, and the taxes which the said Board of Commissioners agrees to levy, if necessary to provide funds to enable the city of Raleigh to carry out said contract, are for a necessary expense of the city of Raleigh, then said contract, when duly executed, and said taxes, when duly levied, will be valid.

The declaration by the General Assembly and the finding by the Board of Commissioners of the city of Raleigh, that both the contract and the tax are for an expense which is necessary for the city of Raleigh to incur is not conclusive upon the courts of this State; both, however, are persuasive, and it appearing that both are made in good faith, such declaration and finding are entitled to serious consideration by the courts in deciding the question presented by this appeal. See *Wilson v. Charlotte,* 74 N. C., 748.

In *Henderson v. Wilmington,* 191 N. C., 269, 132 S. E., 25, it is said: "The decisions heretofore rendered by this Court make the test of a nec-

essary expense, the purpose for which the expense is to be incurred. If the purpose is the maintenance of the public peace or the administration of justice; if it partakes of a governmental nature or purports to be an exercise by the city of a portion of the State's delegated sovereignty; if, in brief, it involves a necessary governmental expense—in these cases the expense required to effect the purpose is necessary within the meaning of Article VII, section 7, and the power to incur such expense is not dependent on the will of the qualified voters."

In *Fawcett v. Mount Airy,* 134 N. C., 125, 45 S. E., 1029, it is said: "It is almost impossible to define in legal phraseology the meaning of the words 'necessary expenses' as applied to the wants of a city or town government, a precise line cannot be drawn between what are and what are not such expenses. The consequence is that, as municipalities grow in wealth and population, as civilization advances with the habits and customs of necessary changes, the aid of the courts is constantly invoked to make decisions on this subject. In the nature of things it could not be otherwise; and it is not to be expected, in the changed conditions which occur in the lives of a progressive people, that things deemed necessary in the government of municipal corporations in one age should be so considered for all future time. In the effort of the courts to check extravagance and to prevent corruption in the government of cities and towns, the judicial branch of the government has probably stood by former decisions from too conservative a standpoint, and thereby obstructed the advance of business ideas which would be most beneficial if put into operation; and this conservatism of the courts, outgrown by the march of progress, sometimes appears at a serious disadvantage."

Applying the test law laid down by *Justice Adams* in *Henderson v. Wilmington, supra,* and approving the principle stated by *Justice Montgomery* in *Fawcett v. Mount Airy, supra,* we are of the opinion, and so hold, that on the facts found by the Superior Court, the expense of providing for the medical treatment and hospital care of the indigent sick and afflicted poor of the city of Raleigh is a necessary expense of the said city, and that for that reason the contract appearing in the record, when duly executed, will be a legal and binding obligation of the city of Raleigh, and that the taxes provided for therein, when duly levied, will be valid and collectible.

The judgment is accordingly

Affirmed.

STACY, C. J., dissents upon the grounds stated in the dissent filed in the companion case of *Martin v. Commissioners of Wake County, ante,* 354.

STATE v. I. B. McLAMB AND JAMES RAYNOR.

(Filed 26 June, 1935.)

1. Criminal Law I m—Order vacating judgment and ordering new trial is binding upon defendants failing to object to the order.

The valid discretionary order of the trial court vacating a judgment, setting aside the verdict and ordering a new trial, to which order defendants do not object, although present in court, is binding on defendants and is not subject to challenge by them upon the subsequent trial ordered, and evidence offered by them in support of their plea in abatement upon the subsequent trial tending to show that the order vacating the judgment was entered so that incriminating evidence of codefendants might be introduced upon such new trial, is properly excluded.

2. Criminal Law K h: L c—During term all matters are in fieri, and court may vacate judgment although appeal had been taken.

During the term of court all matters before the court at the term are *in fieri*, and the court has the power during the term to vacate a judgment, set aside the verdict, and order a new trial, in his discretion, although an appeal had been taken by defendants from such judgment.

3. Criminal Law F c—Judgment which has been vacated by discretionary order will not support a plea of former conviction.

Where the court in its discretion has vacated a judgment and set aside the verdict and ordered a new trial, a plea of former conviction entered upon the subsequent trial ordered is properly overruled, since the former judgment having been vacated, and the verdict set aside, there is nothing to support the plea.

4. Bribery B b—

Evidence of defendants' guilt of bribing a witness to give false testimony *held* sufficient to support the verdict of the jury upon which defendants were sentenced to imprisonment in the State's Prison.

STACY, C. J., and BROGDEN, J., dissent.

APPEALS by defendants from *Sink, J.*, at August Special Term, 1934, of SCOTLAND. No error in either appeal.

At August Special Term, 1934, of the Superior Court of Scotland County, the following bill of indictment was duly returned by the grand jury as a true bill:

"NORTH CAROLINA—SCOTLAND COUNTY.

IN THE SUPERIOR COURT, AUGUST TERM, 1934.

"The jurors for the State, upon their oaths, present that Derwood Hicks, L. A. Hodges, I. B. McLamb, and James Raynor, late of the county of Scotland, on 5 May, 1933, with force and arms, at and in the county aforesaid, being persons of evil minds and dispositions, and seeking to defeat the ends of justice in the Superior Court of Scotland

County, by dishonest practices, in secrecy and with deceit and felonious intent to hinder, obstruct, delay, and defeat justice in the Superior Court of Scotland County, among themselves, unlawfully, wilfully, fraudulently, feloniously, deceitfully, and corruptly did combine, conspire, confederate, and agree together to bribe the said L. A. Hodges and Derwood Hicks to falsely testify in the Superior Court of Scotland County in a certain case in which the State of North Carolina was plaintiff and I. B. McLamb was defendant, with the felonious and fraudulent intent thereby to hinder, obstruct, delay, and defeat the ends of justice, and the orderly administration of the laws of the State of North Carolina, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the State.

"Second count: The jurors for the State, upon their oaths, do further present that Derwood Hicks, L. A. Hodges, I. B. McLamb, and James Raynor, late of the county of Scotland, on 5 May, 1933, being persons of fraudulent minds and evil dispositions, and wickedly devising and intending to hinder, obstruct, delay, and defeat justice in the Superior Court of Scotland County, and in furtherance of an unlawful conspiracy among themselves to commit bribery and to defeat justice in the said county of Scotland, unlawfully, wilfully, feloniously, wickedly, fraudulently, and corruptly, the said James Raynor, acting for himself and as agent and attorney for the said I. B. McLamb, L. A. Hodges, and Derwood Hicks, did pay to the said L. A. Hodges and Derwood Hicks the sum of $500.00 in money, currency of the United States, the same being in denominations of twenty dollars bills, and the said L. A. Hodges and Derwood Hicks received the said $500.00 so delivered by the said James Raynor as a bribe, and the said money was delivered as aforesaid, and received as aforesaid for the purpose and in payment for false testimony by the said L. A. Hodges and Derwood Hicks on behalf of the said I. B. McLamb in a certain case pending in the Superior Court of Scotland County, wherein the State of North Carolina was plaintiff and I. B. McLamb was defendant, contrary to the form of the statutes in such cases made and provided and against the peace of the State."

Upon their arraignment on the foregoing indictment, the defendants I. B. McLamb and James Raynor, each for himself, entered a plea in writing as follows:

"The defendant, before pleading guilty or not guilty to the bill of indictment returned by the grand jury at the Special Term of the Superior Court of Scotland County, which convened on 20 August, 1934, in Laurinburg, North Carolina, enters the following plea in abatement:

"1. That at the March Term, 1934, of the Superior Court of Scotland County the defendant was tried, convicted, and sentenced on the following bill of indictment:

" 'STATE OF NORTH CAROLINA—SCOTLAND COUNTY.
SUPERIOR COURT, JUNE TERM, 1933.

" 'The jurors for the State, upon their oaths, present that I. B. McLamb, L. A. Hodges, Derwood Hicks, and James Raynor, late of the county of Scotland, on 5 May, 1933, with force and arms, at and in the county aforesaid, wilfully, unlawfully, feloniously, maliciously, and corruptly, did conspire and confederate together with the intent and purpose to hinder, obstruct, delay, and defeat the ends of justice and the orderly procedure of the Superior Court of Scotland County, in an action therein pending wherein the State of North Carolina was plaintiff and I. B. McLamb, Derwood Hicks, and L. A. Hodges were defendants, and did corruptly, in furtherance and in pursuance of said conspiracy of the said I. B. McLamb, did offer to pay and did pay as a bribe to said Derwood Hicks and L. A. Hodges the sum of $500.00 in money, and in return for said money and as an acceptance of said bribe the said Hicks and Hodges agreed to and did falsely testify as witnesses in said case in said court on behalf of the said McLamb, and the said James Raynor, in pursuance of said unlawful conspiracy, did feloniously deliver and pay for the said McLamb to the said Hodges and Hicks the said sum of $500.00 in money for the purpose of and with the intent of bribing the said Hodges and Hicks and with the further intent of hindering, delaying, obstructing, and defeating the orderly procedure of justice in said court, against the form of the statute in such case made and provided and against the peace and dignity of the State.'

"2. That from the judgment upon the verdict therein the defendant appealed to the Supreme Court of North Carolina; that entry of appeal was made and appearance bond was fixed by the court; that the said appearance bond was duly executed and filed with the clerk and said defendant was discharged from custody; that the appeal of the defendant from said judgment was perfected, and thereafter a statement of the case on appeal was duly served on the solicitor for the State of the Thirteenth Judicial District, as required by law, and the same is now pending in the Supreme Court.

"3. That after the said appeal had been entered the court, of its own motion, ordered that the judgment be vacated and that the verdict of the jury be set aside and that a new trial be had.

"4. That the court was without power to vacate the said judgment and set aside the said verdict after appeal from the said judgment, and to direct a new trial for that said appeal stopped all further proceedings in the Superior Court, and the defendant objects and excepts to any further proceedings in said court.

"5. That the bill of indictment to which the defendant now pleads charges the same crimes and is based upon the same facts, conditions, and circumstances as the said bill of indictment upon which the defendant was tried, convicted, and sentenced at the March Term, 1934, of the Superior Court of Scotland County.

"6. That the defendant now pleads to the bill of indictment returned by the grand jury at the Special Term, 1934, of the Superior Court of Scotland County, former jeopardy, trial, conviction, and sentence at the March Term, 1934, of the Superior Court of Scotland County, upon the same or a similar bill of indictment, based upon the same facts, conditions, and circumstances."

The record of the trial at March Term, 1934, of the Superior Court of Scotland County of the defendants in this action on the indictment referred to and made a part of said plea was submitted to the court for its inspection. This record shows that upon their arraignment on said indictment, the defendants I. B. McLamb and James Raynor each entered a plea of not guilty; that the jury duly returned a verdict of guilty as to each defendant; that on said verdicts there were judgments that each defendant be confined in the State's Prison at Raleigh, N. C., for a term of not less than five or more than seven years, and that he be assigned to work on the highways of the State, as provided by law; that upon the coming in of the verdicts, each defendant moved that the verdict against him be set aside and that a new trial be ordered, for errors assigned or to be assigned in the trial, and that each defendant excepted to the refusal of the court to allow his motion; and that each defendant excepted to the judgment against him, and gave notice in open court of his appeal to the Supreme Court. After such notice, the court adjudged that an appeal bond in the sum of $50.00 and an appearance bond in the sum of $3,000 for each defendant was sufficient. These bonds were given by each defendant, and both defendants were thereupon discharged from custody, during the pendency of his appeal to the Supreme Court.

The record further shows that on a subsequent day during said March Term, 1934, after notice to each of said defendants, in their presence and in the presence of their counsel, the court, in its discretion and of its own motion, ordered that the judgment against each of said defendants be and the same was vacated; that the verdict of guilty as to each of said defendants be and the same was set aside; and that a new trial be had as to each of said defendants on said indictment at the next term of the court. Each defendant was required by the court to give and did give a bond for his appearance at the next term of the court, the defendant I. B. McLamb in the sum of $7,000, and the defendant James Raynor in the sum of $6,000. Neither of the defendants excepted

to or appealed from said order. Both defendants, upon giving the said appearance bonds, were discharged from further attendance upon said term of court.

In support of their several pleas in abatement and of former jeopardy, the defendants offered to introduce evidence tending to show that at March Term, 1934, of the Superior Court of Scotland County, L. A. Hodges and Derwood Hicks were tried together with the defendants on the indictment referred to and made a part of the several pleas, and that both the said L. A. Hodges and the said Derwood Hicks, upon their arraignment on said indictment, entered pleas of not guilty; that both the said L. A. Hodges and the said Derwood Hicks were convicted by the jury at said trial, and were sentenced by the court to imprisonment in the State's Prison, at Raleigh, N. C., each for a term of not less than five or more than seven years; that after they were convicted and sentenced at said term, and while they were in the custody of the sheriff of Scotland County, awaiting their transfer to the State's Prison, both the said L. A. Hodges and the said Derwood Hicks sought a conference with the judge who had presided at said trial, and that said conference was granted by the judge; and that at said conference the said L. A. Hodges and the said Derwood Hicks each made a statement to the judge, which was reduced to writing and signed by the said L. A. Hodges and the said Derwood Hicks. These statements were confessions by the said L. A. Hodges and the said Derwood Hicks each of his guilt of the crimes charged in said indictment, and tended to show that both the defendants in this action were also guilty of said crimes. The defendant contended that it was in consequence of these statements that the judge made the orders in the action vacating the judgments and setting aside the verdicts against these defendants, and that said orders were made in order that at a new trial of these defendants the testimony of L. A. Hodges and Derwood Hicks might be available to the State as evidence against these defendants.

The defendants further offered evidence tending to show that at the time he made the orders vacating the judgments and setting aside the verdicts against these defendants at the March Term, 1934, of the Superior Court of Scotland County, the judge made certain statements to counsel for these defendants as to his purpose in making said orders.

The court declined to hear the evidence which the defendants offered to introduce, and the defendants each excepted.

The court thereupon found from the record of the trial of the defendants at March Term, 1934, of the Superior Court of Scotland County that the defendants I. B. McLamb and James Raynor, with their counsel, were both present in court when the orders vacating the judgments

and setting aside the verdicts against said defendants were entered at said March Term, and that neither of said defendants then objected or excepted to said orders, but that both defendants complied with the terms of said orders, and thereby acquiesced in the same.

On these facts, the court was of opinion that the orders entered at the March Term, 1934, of the Superior Court of Scotland County vacating the judgments and setting aside the verdicts against these defendants at said term were made in the lawful exercise of power vested in the court at said term, and accordingly denied the defendants' pleas in abatement of this action, and of former conviction. Each of the defendants excepted to the denial of his plea.

The court then ordered that a plea of not guilty be entered as to each defendant.

At the trial evidence was offered by the State tending to show that both the defendants are guilty as charged in the indictment. The defendant I. B. McLamb offered evidence tending to contradict the evidence for the State, and to support his plea of not guilty. No evidence was offered by the defendant James Raynor.

The jury returned a verdict of guilty as to each defendant.

From judgments that the defendants be confined in the State's Prison at Raleigh, N. C., the defendant I. B. McLamb for a term of not less than six or more than ten years, and the defendant James Raynor for a term of not less than five or more than seven years, each to be assigned to work on the State Highways, as provided by law, the defendants appealed to the Supreme Court.

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

Ezra Parker, Canady & Wood, E. H. Gibson, and McLean & Stacy for defendant I. B. McLamb.

L. L. Levinson for defendant James Raynor.

CONNOR, J. There was no error in the refusal of the judge presiding at the trial of this action at the August Special Term, 1934, of the Superior Court of Scotland County to hear evidence which the defendants offered to introduce in support of their pleas in abatement and of former conviction, tending to show statements made by the judge presiding at the March Term, 1934, of said court to counsel for the defendants as to his purpose in making the orders vacating the judgments and setting aside the verdicts against the defendants at said term. Nor was there error in the refusal of the judge to hear evidence tending to show that said orders were made, as contended by the defendants, in conse-

quence of statements made by L. A. Hodges and Derwood Hicks, after the judgments had been rendered, and the verdicts returned against the defendants, at said March Term, 1934. The record shows that the orders were made by the judge at said March Term in his discretion, and that neither of the defendants, both of whom were present in court with their counsel, objected or excepted to said orders. Unless the orders vacating the judgments and setting aside the verdicts at the March Term, 1934, of the court are void for the reason that the judge was without power to make them, the said orders are binding on the defendants, and were not subject to challenge by the defendants at the August Special Term, 1934, of the court.

In *Allison v. Whittier,* 101 N. C., 490, 8 S. E., 338, it is said by *Smith, C. J.:* "It is a settled rule that the court retains control of cases pending at any term for its actions, and may recall, reverse, or modify anything done previously before its close. Until its termination everything is *in fieri,* and this liability to correction or revocation underlies any action it may have taken in the cause. It involves an exercise of discretion unrestrained by what may have been previously done, and its efficacy depends alone upon the legal capacity of the judge to do the act, and this alone is open to an inquiry in the reviewing Court. Of this litigants and counsel are required to take notice, and nothing is beyond recall until the session ends with the completion of its business. In the language of this Court in *Branch v. Walker,* 92 N. C., 87, spoken in reference to the power of a presiding judge, 'the action was not ended when the judgment was entered. The record stood open for motions like the one before us, and other motions that might be made.' "

In *S. v. Chestnutt,* 126 N. C., 1121, 36 S. E., 278, it is said by *Faircloth, C. J.:* "A court has power during the term to correct, modify, or recall an unexecuted judgment in either criminal or civil cases. *S. v. Warren,* 92 N. C., 825. The proceedings of a court are *in fieri* until the close of a term, and the judge may modify or vacate any order made during the term, and his action is not reviewable unless it appears that he has grossly abused his power, resulting in oppression. This is not only the rule, but it is reasonable and often corrects mistakes made without full information. We think it common practice after verdict and judgment in criminal cases to change the judgment as may seem just to the court. *Allison v. Whittier,* 101 N. C., 490; *Gwinn v. Parker,* 119 N. C., 19. These authorities refer to the power and control of the court over its own judgments."

Under these authorities, the judge presiding at the March Term, 1934, of the Superior Court of Scotland County, had the power, in the exercise of his discretion, to make the orders vacating the judgment and

setting aside the verdicts against the defendants at said term, and granting the defendants a new trial at the next term of the court.

There was no error in the refusal of the judge at the August Special Term, 1934, of the Superior Court to sustain the defendants' pleas in abatement and of former conviction at the March Term, 1934, of said court.

In *S. v. Lee et al.*, 114 N. C., 845, 19 S. E., 375, the defendants were convicted at December Term, 1893, of the Superior Court of Forsyth County of an attempt to burn a dwelling-house. After the verdict and judgment, the defendants moved in arrest of the judgment. The judge, in his discretion, vacated the judgment, set aside the verdict, and ordered a new trial. A new bill of indictment was sent by the solicitor for the State to the grand jury, and was returned a true bill. The defendants were then tried and convicted on the new indictment. On their appeal to this Court from the judgment it was said by *Clark, C. J.*: "As to the plea of former conviction, the former verdict was against the defendants, and having been set aside in the discretion of the court, nothing remains to support the plea of former conviction."

The evidence for the State at the trial of this action tended to show that during the May Term, 1933, of the Superior Court of Scotland County, the defendant James Raynor delivered to L. A. Hodges and Derwood Hicks the sum of $500.00 as a bribe for false testimony given by them in behalf of the defendant I. B. McLamb, who was tried at said term of court on an indictment charging him with feloniously receiving stolen property knowing the same to have been stolen; and that the said sum of $500.00 was delivered to the said James Raynor by the said I. B. McLamb for the purpose of bribing the said L. A. Hodges and the said Derwood Hicks, in pursuance of a conspiracy theretofore entered into by the said L. A. Hodges, Derwood Hicks, James Raynor, and I. B. McLamb. This evidence, together with evidence offered by the defendant I. B. McLamb tending to contradict the evidence of the State against him, was submitted to the jury, and was sufficient to support the verdict on which the defendants were sentenced to imprisonment in the State's Prison.

We find no error in the trial. The judgments are affirmed.

No error.

STACY, C. J., and BROGDEN, J., dissent.

CITY OF SALISBURY v. GEORGE M. LYERLY AND HARTFORD ACCIDENT AND INDEMNITY COMPANY.

(Filed 26 June, 1935.)

1. **Reference C b: Appeal and Error F a—Findings of fact by referee are conclusive in absence of exceptions thereto.**

Where there are no exceptions to the findings of fact by the referee, an appeal upon exceptions to his conclusions of law must be determined in accordance with his findings of fact, the findings, in the absence of exceptions thereto, being conclusive both in the Superior Court and in the Supreme Court upon further appeal.

2. **Principal and Surety B c—Bond of individual as city treasurer held not to cover default of such individual as city tax collector.**

The findings of fact by the referee, unexcepted to, were to the effect that the same individual performed the duties of both city treasurer and city tax collector, and that defendant was surety on his bond as city treasurer, and that the city held another large bond in a different surety company covering default of the individual in the capacity of city tax collector, that the respective duties of the two offices were set forth by the city council, and that the defalcations in suit were of moneys received by the official in his capacity as city tax collector and not in his capacity as city treasurer. *Held:* Since the duties of the two offices were separate and distinct, the surety on the bond designating the official as city treasurer cannot be held liable for defalcations of such officer in his capacity as city tax collector, and upon the finding that the defalcations in suit were made by the official in his capacity as city tax collector, defendant surety's motion for judgment as of nonsuit should have been allowed.

3. **Same—**

Upon default of a public officer, there is a legal presumption that the funds were misappropriated at the time of their receipt.

4. **Same—Acts of principal outside his official duties covered by his surety bond cannot be made the basis of liability on the bond.**

Defendant was surety on a bond in which the principal was designated as city treasurer. It appeared from the findings of fact by the referee that the principal accepted the office of treasurer when he was still filling the office of city tax collector. *Held:* The contention of the city in a suit upon the bond that the principal vacated the office of city tax collector by accepting the office of treasurer, and that all his official acts thereafter were in the capacity as city treasurer, and therefore covered by the bond, is untenable, for, even conceding that the office of city tax collector was so vacated, the unauthorized acts of collecting taxes and fees, constituting the moneys misappropriated, were not covered by the bond of the principal as treasurer, it appearing from the findings that the duties of the treasurer were specifically defined by the city council, and that they did not include the collection of taxes or fees of any kind; and *further held:* That the defendant surety, in writing the bond in suit, had a right to rely upon the designation of the duties of the principal as contained in the minutes of the governing body of the city.

5. Estoppel C b—An estoppel does not apply where everythng is equally well known to the parties.

Defendant surety *is held* not estopped to deny liability on the bond of a city official in suit by having joined the city and another surety in bringing suit against the official in an attempt to recover the funds misappropriated, it appearing that defendant surety joined in the suit upon information furnished it by the city, that the facts were equally known to the city, and that therefore the surety's joinder in the suit against the official did not constitute a deception of the city in respect to the surety's liability on the bond.

APPEAL from *Stack, J.*, at September Term, 1934, of ROWAN. Reversed and remanded.

J. W. Ellis and Stahle Linn for city of Salisbury, plaintiff, appellee.
A. J. Fletcher and Hayden Clement for Hartford Accident and Indemnity Company, defendant, appellant.

SCHENCK, J. This was an action instituted by the plaintiff city of Salisbury against George M. Lyerly, as principal, and the Hartford Accident and Indemnity Company, as surety, upon certain bonds given to the city of Salisbury to secure an honest accounting of moneys coming into the hands of Lyerly. The bonds were surety not only for Lyerly but for other officers and employees of the city of Salisbury, and the position of Lyerly is therein designated as treasurer. The bonds were each conditioned as follows: "Now, therefore, if the said 'principals' shall, during the period beginning ...., and ending..................., well and faithfully discharge all the duties and trusts imposed upon them by reason of their appointment or employment as said officers and/or employees, except as hereinafter limited, and honestly account for all moneys coming into their hands as said officers and/or employees, according to law, then this obligation shall be null and void; otherwise, to be and remain in full force and virtue." The first bond was for the period from 1 June, 1929, to 1 June, 1930, and the second for the period from 1 June, 1930, to 1 June, 1931, which was extended by "continuation certificate" from 1 June, 1931, to 1 June, 1932.

The case was referred by consent, and the referee heard the evidence and reported his findings of fact and conclusions of law, among the latter being that the evidence was insufficient to establish liability of the Hartford Accident and Indemnity Company, and that a motion for a judgment as of nonsuit made at the close of all the evidence by said indemnity company should be sustained, and that the plaintiff should recover of the defendant George M. Lyerly the sum of $17,748.25, with interest thereon, less a credit of $250.25. The plaintiff city appealed from the report of the referee, after having filed four exceptions to the

conclusions of law. No exceptions were filed to the findings of fact. When the case came on to be heard at term time, the judge of the Superior Court reversed the conclusions of law reached by the referee and entered judgment not only against the principal, Lyerly, but also against the surety, the defendant indemnity company, for the amount of $17,748.25, with interest, less $250.25. From this judgment the defendant Hartford Accident and Indemnity Company appealed to the Supreme Court, assigning as error the signing of the judgment as set out in the record. In an "agreement of counsel," signed by the judge, as to the case on appeal, the following appears: "As no exceptions were filed to the findings of fact by the referee, and no exceptions were filed on the referee's ruling on evidence, it is agreed that it is unnecessary to send up the referee's ruling on evidence as a part of the case on appeal."

Although the judgment of the Superior Court contains the following clause: "The plaintiff's exceptions to the referee's conclusions of law, numbered 1, 2, 3, and 4, are sustained and judgment given against both defendants, (and) any and all findings of fact and conclusions of law by the referee inconsistent with this judgment are hereby expressly reversed," since there are no exceptions to the findings of fact by the referee, the case must be determined upon such findings, as the Superior Court can affirm, modify, set aside, or disaffirm the report of the referee only upon the exceptions taken to it. *Wallace v. Benner,* 200 N. C., 124. The findings of fact made by the referee, in the absence of exceptions thereto, were conclusive on the hearing in the Superior Court, as they are on appeal to this Court. *Bank v. Graham,* 198 N. C., 530.

The referee's findings of fact establish that from 1 June, 1929, to 12 December, 1931, George M. Lyerly acted as both treasurer and city tax collector of the city of Salisbury, and that during this time he collected and failed to account for the sum of $17,748.25, less $250.25, and that during all of this period he was covered by the several bonds conditioned as hereinbefore set forth. These findings further establish that the city of Salisbury held an indemnity bond in the sum of $35,000 with the National Surety Company indemnifying said city against any failure to account for moneys collected by George M. Lyerly as city tax collector, and that this bond was in full force and effect from 2 June, 1928, to 2 June, 1930, and that in a purported settlement of liability under this bond the city was paid by the National Surety Company the sum of $13,480.68 on 11 November, 1932.

The referee's finding of fact numbered 17 is as follows: "The said Lyerly occupied the position of city tax collector during the entire period beginning 1 June, 1929, and ending 12 December, 1931, and collected all the sums shown on Exhibits 'A,' 'B,' 'C,' 'D,' 'E,' and 'F,' while acting as city tax collector, even though after 27 November, 1929,

he did so in violation of instructions of other city officials." The items shown by these exhibits were the items for which judgment was awarded.

The question presented to us is whether George M. Lyerly received the moneys, for which he failed to account, as treasurer or as tax collector, since if he received said moneys as treasurer the defendant indemnity company is liable to the plaintiff city in the sum of the judgment rendered by the Superior Court, and such judgment should be affirmed, but, on the other hand, if he received the moneys as tax collector, the said defendant indemnity company is not liable, and the judgment of the Superior Court should be reversed and the case remanded for judgment for the appellant in accord with the conclusions of law reached by the referee.

We hold, upon the findings of fact of the referee, particularly upon the finding numbered 17 above quoted, that his Honor erred in reversing the conclusions of law reached by the referee. This finding specifically states that Lyerly "collected all the sums" for which judgment was awarded "while acting as city tax collector." In the bonds upon which this action was instituted the defendant Lyerly is designated as follows: "Name, George M. Lyerly; position, Treasurer." We think this designation, when construed in the light of the fact that another indemnity bond for a large portion of the period involved was held by the city upon the same George M. Lyerly as tax collector, clearly establishes that the office of treasurer and the office of tax collector were separate and distinct. This distinction also appears from the finding of the fact that on 27 November, 1929, the city manager and city council set forth in detail in the minutes of the council the respective duties of the treasurer and of the tax collector. Since the duties of the two offices were separate and distinct, the defendant indemnity company could not be held liable for misappropriations of Lyerly as tax collector upon a bond indemnifying the city against misappropriation by Lyerly as treasurer.

From the findings of fact it appears that there were no shortages in the funds of Lyerly as treasurer, and that all of the shortages were in funds collected by him as tax collector. The legal presumption is that when funds collected are not paid upon demand, that such funds were misappropriated at the time of their receipt. *Gilmore v. Walker,* 195 N. C., 460; *Power Co. v. Yount, ante,* 182. Therefore, since the bonds upon which this action was instituted designated the principal as treasurer, the surety could only be held liable for misappropriation of the principal in the capacity of treasurer. "The contract as written, and not otherwise, fixes the rights and determines the liability of the surety. Sureties have a right to stand on the terms of their contract, and, having consented to be bound to the extent expressed therein, their liability must be found therein, and strictly construed." *Insurance Co.*

v. Durham County, 190 N. C., 58, and cases there cited. In this case, in so far as it relates to liability for misappropriation of moneys collected as tax collector, the appellant might pertinently propound the question: "Is it so nominated in the bond?"

The appellee contends that since it appears from the findings of fact that Lyerly accepted the office of treasurer when he was still filling the office of tax collector, the latter office was *ipso facto* vacated, and that thereafter all the acts committed by Lyerly were committed by him as treasurer. We think this contention is untenable. If it be conceded that the acceptance of the office of treasurer vacated the office of tax collector, it is a *non sequitur* that the unauthorized acts of collecting taxes and license fees became the acts of Lyerly as treasurer, especially in view of the finding of fact that the duties of the treasurer were determined by the city manager and city council and placed upon the minutes of the council, and these duties consisted mainly in paying out funds by checks countersigned by the city manager. The liability of a surety is limited to the official acts of the principal, and is by no means an undertaking against every act he may by chance commit, and the appellant, in writing the bonds in suit, had a right to rely upon the designation of the duties of Lyerly as treasurer, as contained in the minutes of the governing body of the city. The duties of the treasurer are made more definite and distinct by the findings of fact that in the same minutes in which they are set forth the collection of taxes and license fees is made the specific duty of another city officer, namely, the cashier, and also in the same minutes the duties of the tax collector are likewise definitely and distinctly set forth and do not include the collection of taxes or fees of any kind, but are confined mainly to receiving tax returns, making tax reports, and keeping tax books.

The appellee further contends that the appellant is estopped to deny its liability upon the bonds in suit by reason of the appellant's having joined with the appellee and the National Surety Company in a former action against Lyerly and his wife for the appointment of a receiver and the recovery of funds misappropriated by him as treasurer and as tax collector. We think this contention is also untenable, since it appears from the findings of fact that the appellant in joining such action did so upon information furnished it by the appellee, or furnished its agents by the appellee's agents. As was written by *Shepherd, J.,* in *Estis v. Jackson,* 111 N. C., 145, ". . . in order to work an estoppel *in pais,* 'there must be conduct—acts, language, or silence—amounting to a representation or a concealment of material facts,' and that 'the truth concerning these facts must be unknown to the party claiming the benefit of the estoppel.' 2 Pom. Eq., 264. 'The estoppel is removed by proof that the party claiming its existence, even though

mistaken in regard to his rights at law, had notice of the actual state of the facts at the time of acting upon the representation, and this, though the representation was made under oath.' Bigelow Est., 520. 'The estoppel does not apply where everything is equally well known to both parties.' Herman Est., sec. 957." In this case it appears that no deception was practiced upon the appellee by the appellant in connection with the former action, and that everything was equally well known to both parties, since the appellant joined in the former action solely upon information given to it by the appellee. The appellant made no representation to the appellee that caused the appellee to enter suit against Lyerly and his wife, but, on the contrary, the appellant entered the suit on account of representations made to it by the appellee.

We conclude that the Hartford Accident and Indemnity Company, upon the findings of fact of the referee, is entitled to have its motion for judgment as of nonsuit sustained, and the judgment of the Superior Court is therefore reversed and the case remanded for judgment in accord with this opinion.

Reversed and remanded.

STATE v. W. B. WALTERS, JR.

(Filed 26 June, 1935.)

Constitutional Law F d—Defendant pleading not guilty may not waive constitutional right to jury trial without changing his plea.

Defendant was convicted of a misdemeanor in the mayor's court upon his plea of not guilty. Upon appeal to the Superior Court the case was submitted upon an agreed statement of facts, and the court adjudged the defendant guilty. *Held:* Defendant, without changing his plea, could not waive his constitutional right to a jury trial, and there was error in the judgment.

APPEAL by defendant from *Harris, J.*, at March Term, 1935, of ORANGE. Error.

This is a criminal action in which the defendant is charged with the commission of a misdemeanor, to wit, the violation of an ordinance of the town of Hillsboro, N. C. C. S., 4174.

The action was begun by a criminal warrant issued by the mayor of the town of Hillsboro, and was tried in the mayor's court of said town, on defendant's plea of not guilty. The defendant was convicted, and appealed from the judgment at said trial to the Superior Court of Orange County.

After the action was docketed in the Superior Court of Orange County, and while it was pending in said court for trial, *de novo,* the attorney for the town of Hillsboro and the attorney for the defendant submitted to the judge of said court an agreed statement of facts, and agreed that said judge should consider said facts agreed, and render judgment thereon, expressly waiving a trial by jury.

The judge was of opinion that on the facts agreed the defendant is guilty, and thereupon adjudged that defendant pay a fine of $1.00 and the costs of the action.

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

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

Gilbert B. Swindell and Jones & Brassfield for defendant.

PER CURIAM. In *S. v. Straughn,* 197 N. C., 691, 150 S. E., 330, it is said: "It has been held in a number of cases that where a defendant in a criminal prosecution, on trial in the Superior Court, enters a plea of not guilty to the charge preferred against him, he may not thereafter, without changing his plea, waive his constitutional right of trial by jury. *S. v. Hartsfield,* 188 N. C., 357, 124 S. E., 629. And this applies to misdemeanors as well as to more serious offenses. *S. v. Pulliam,* 184 N. C., 681, 114 S. E., 394."

A judgment against a defendant in a criminal action who has entered a plea of not guilty of the crime with which he is charged, and who has not withdrawn said plea, is erroneous when there was no verdict, either general or special, to support the judgment. *S. v. Beasley,* 196 N. C., 797, 147 S. E., 301.

It is ordered that this action be remanded to the Superior Court of Orange County for trial in said court, as provided by law. *S. v. Pulliam, supra.*

Error.

MINNIE SOUTHARD v. J. O. SOUTHARD.

(Filed 26 June, 1935.)

Divorce E a—Court need not find facts supporting order for alimony pendente lite when complaint alleges facts sufficient to support order.

Where the complaint alleges facts sufficient to entitle plaintiff to alimony *pendente lite* under C. S., 1667, it is not error for the court to grant plaintiff's motion therefor and refuse to find the facts upon which the order is based, since it will be presumed that the court found the facts as alleged in the complaint for the purposes of the hearing.

APPEAL by defendant from *Pless, J.*, at February Term, 1935, of ROCKINGHAM. Affirmed.

This is an action for alimony without divorce. C. S., 1667.

The action was begun in the Superior Court of Rockingham County on 14 November, 1934, and was heard at the February Term, 1935, of said court on plaintiff's motion that pending the trial of the issues raised by the pleadings the defendant be ordered by the court to pay to plaintiff reasonable sums for her support, *pendente lite,* and for her counsel fees.

From an order that he pay to plaintiff, out of his earnings, the sum of $3.50 per week for her support until the further order of the court, and the sum of $25.00 as her counsel fees, the defendant appealed to the Supreme Court, assigning as error the refusal of the court to find the facts on which the order was made, and the signing of the order.

D. F. Mayberry and Hunter K. Penn for plaintiff.
Sharp & Sharp for defendant.

PER CURIAM. It is alleged in the complaint, and admitted in the answer, that the plaintiff and the defendant were married to each other on or about 25 January, 1913; that they lived together as husband and wife until 17 September, 1934, and that they are now living separate and apart from each other.

It is further alleged in the complaint that on or about 17 September, 1934, the defendant, without cause or justification, abandoned the plaintiff, and has since failed and refused to provide for her support. This allegation is denied in the answer. The defendant alleged that the plaintiff, without cause or justification, abandoned him on or about 17 September, 1934, and has since refused to return to his home or to live with him.

By virtue of the provisions of C. S., 1667, pending the trial of the issue raised by the pleadings, on the facts alleged in the complaint, the plaintiff is entitled to an order of the court that defendant pay to her, out of his earnings, a reasonable sum for her support, *pendente lite,* and for her counsel fees.

There was no error in the refusal of the court to find the facts on which the order was made. *Price v. Price,* 188 N. C., 640, 123 S. E., 264. The presumption is that the court, for the purposes of the hearing, found that defendant had wrongfully abandoned the plaintiff, as alleged in the complaint. *Byerly v. Byerly,* 194 N. C., 532, 140 S. E., 158. The order is

Affirmed.

W. T. EFIRD, GUARDIAN OF W. T. EFIRD, JR., JOHN EFIRD, DOROTHY EFIRD, RUTH EFIRD, JANE EFIRD, COLUMBUS EFIRD, AND THOMAS EFIRD, AND W. H. EFIRD AND J. J. EFIRD, v. R. L. SMITH, CHARLES A. CANNON, AND WACHOVIA BANK AND TRUST COMPANY, TRUSTEES UNDER THE WILL OF JOHN S. EFIRD, DECEASED.

(Filed 26 June, 1935.)

1. **Trusts F b—Plaintiff beneficiaries must make out prima facie case against trustees to be entitled to their removal.**

   Where the court finds that the plaintiffs, beneficiaries under a trust created by will, have not made out a *prima facie* case that defendant trustees were guilty of misconduct or bad faith in the administration of the trust or of damage to plaintiffs in the administration thereof, the findings support the court's order refusing plaintiffs' prayer for the removal of the trustees.

2. **Appeal and Error F b—**

   Where the only assignment of error is based on appellants' exception to the judgment, and the judgment is supported by the findings of fact, the judgment will be affirmed on appeal.

3. **Appeal and Error J d—**

   The burden is on appellant to show error upon appeal.

4. **Appeal and Error F a—**

   Only questions presented by exceptions duly taken can be reviewed by the Supreme Court on appeal.

STACY, C. J., dissents.

APPEAL by plaintiffs from *Clement, J.*, at Chambers, in the town of Albemarle, on 9 October, 1934. Affirmed.

This is an action for an accounting by the defendants as trustees under the will of John S. Efird, deceased, to the plaintiffs as beneficiaries under said will. See *In re Will of Efird,* 195 N. C., 76, 141 S. E., 460.

The action was heard on affidavits submitted by both the plaintiffs and the defendants.

On the facts found by the judge, the motion of the plaintiffs for the relief prayed for in their complaint was denied. The action was dismissed, and the plaintiffs excepted and appealed to the Supreme Court, assigning as error the signing of the judgment.

Vann & Milliken and Varser, McIntyre & Henry for plaintiffs.

Manly, Hendren & Womble, Wm. H. Beckerdite, and Cansler & Cansler for defendants.

PER CURIAM. After hearing the affidavits submitted by both plaintiffs and defendants, and arguments of their counsel, the judge found as a fact, and held as a matter of law, that the plaintiffs had failed to make out a *prima facie* case against the defendant trustees, or any of them, to the effect that they have been guilty of any bad faith, misconduct, or other breach of trust in the administration of their trust, as alleged in the complaint, or that the plaintiffs or other beneficiaries of said trust have suffered any loss or damage on account of the administration of said trust by the defendant trustees.

On these findings of fact and conclusions of law, the motion of the plaintiffs for the relief prayed for in their complaint was denied, and the action dismissed.

The only assignment of error in this appeal is based on plaintiff's exception to the judgment. This assignment of error cannot be sustained, because the judgment is supported by the findings of fact. Manifestly, if the plaintiffs failed to show at least a *prima facie* case at the hearing of their motion, they are not entitled to the relief sought by their action.

The judgment is affirmed on the authority of *Wilson v. Charlotte,* 206 N. C., 856, 175 S. E., 306. In that case it is said:

"It is elementary law that upon appeal to the Supreme Court the appellant must show error. Moreover, this Court can only review such questions as are presented by exceptions duly taken and assignments of error duly made."

Affirmed.

STACY, C. J., dissents.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1935

STATE OF NORTH CAROLINA Ex Rel. A. J. MAXWELL, Commissioner of Revenue, v. NORFOLK AND WESTERN RAILWAY COMPANY.

(Filed 18 September, 1935.)

1. **Taxation C c—Commissioner of Revenue must follow statute in levying taxes.**

   In assessing income taxes against a corporation the Commissioner of Revenue must follow the statute, leaving the question of whether the result is arbitrary or unwarranted to the determination of the courts upon appeal of the corporation.

2. **Taxation C f—The burden is on the appealing taxpayer to show alleged unconstitutionality of levy.**

   On appeal to the courts from the levy of taxes by the Commissioner of Revenue, on the ground that the result reached by the Commissioner is unconstitutional, the burden is on the appealing taxpayer to show such unconstitutional result.

3. **Appeal and Error J d—The findings of the trial court are conclusive on appeal when supported by any competent evidence.**

   Where the trial court hears the evidence, overrules the findings and conclusions of the referee, and makes contrary findings in support of his judgment, the Supreme Court, on appeal, will not weigh the evidence, but will affirm the findings of the trial court if they are supported by any competent evidence.

4. **Reference C a—Trial court may review the evidence and make findings of fact contrary to those of the referee.**

   In reviewing a report of a referee, the trial court is not bound by the findings of fact by the referee, but may review the evidence and make

contrary findings, which findings by the trial court are conclusive upon appeal to the Supreme Court if supported by any competent evidence.

5. **Taxation C f—Where taxpayer contends that result of computation of income for taxation is unconstitutional he may not prevail by assailing method of computing taxable income.**

Defendant railroad corporation operated its railroad partly within and partly outside the State. The Commissioner of Revenue assessed its income taxable by the State in accordance with the statutory formula. Section 312 of the Revenue Act of 1927 and 1929. Defendant contended that the acts, as interpreted and applied by the Commissioner, operated unconstitutionally in defendant's case. *Held:* Defendant cannot prevail merely by assailing the Commissioner's method of computing deductible items in ascertaining the taxable income, but must show that the result of the Commissioner's computation of taxable income was unconstitutional as alleged, and in this case defendant *is held* to have failed to make apparent any reversible error in the trial court's conclusion, upon supporting findings of fact, that defendant had failed to show want of due process, or lack of equal protection of the laws.

APPEAL by defendant from *Grady, J.*, at June Term, 1934, of WAKE.

Proceeding to recover taxes paid under protest, and alleged to have been erroneously or illegally assessed.

The Norfolk and Western Railway Company, hereafter called the defendant, duly filed with the North Carolina Commissioner of Revenue income tax returns for the years 1927, 1928, and 1929. None of these returns showed any taxable income for the specified period. On 27 October, 1930, the Commissioner of Revenue made reassessments against the defendant, upon the basis of said returns, which resulted in tax levies, with interest thereon, for the respective years, as follows:

Year	*Tax*
1927	$25,737.70
Interest	3,989.34
Total	$29,727.04
1928	$25,097.32
Interest	2,384.25
Total	$27,481.57
1929	$28,225.22
Interest	987.88
Total	$29,213.10

Under protest, duly filed, the defendant paid these assessments, aggregating $86,421.71, and proceeded, agreeably to the terms of the statute, to recover them back. Its protest having been overruled by the Commissioner, the defendant appealed from said ruling to the Superior Court of Wake County. Here the matter was referred, on motion of defendant, to Hon. J. Crawford Biggs, as referee, to find the facts and report the same, together with his conclusions of law, to the court.

The defendant contended that the pertinent parts of the Revenue Acts of 1927 and 1929, as interpreted and applied by the Commissioner, "operated unconstitutionally upon protestant." With this contention, the referee, upon the facts found by him, agreed, largely upon authority of *Southern Ry. Co. v. Kentucky,* 274 U. S., 76. On exceptions duly filed, the judge of the Superior Court disagreed with the defendant's contention, overruled the determinative findings and conclusions of the referee, upheld the constitutionality of the statutes, as had already been done in *A. C. L. R. Co. v. Doughton,* 262 U. S., 413, found supporting facts, and concluded that the defendant had failed to show want of due process, or lack of equal protection of the laws.

From judgment dismissing defendant's protest, it appeals, assigning errors.

Attorney-General Seawell and Assistant Attorneys-General Aiken and Bruton for A. J. Maxwell, Commissioner of Revenue.

Theodore W. Reath, F. M. Rivinus, W. W. Coxe, Murray Allen, and Burton Craige for defendant.

STACY, C. J., after stating the case: It may be conceded, as appellant alleges, that, from a procedural standpoint, the record is not in very satisfactory shape. Much of it is beside the point. However, as we understand it, the issues involved are comparatively simple. The case easily falls upon one side or the other of the constitutional line.

The defendant is a railroad, or public service corporation, operating in part within and in part without this State. It has three branch lines of railroad in North Carolina, with termini at Winston-Salem, Durham, and Elkland. Each of the three branches connects directly with the defendant's main line in Virginia at Roanoke, Lynchburg and Abingdon respectively.

The statutory formula for ascertaining the net taxable income for such a corporation is set out in section 312 of the Revenue Act, 1927, and substantially repeated in the same numbered section of the 1929 act, as follows: "When their business is in part within and in part without the State, their net income within this State shall be ascertained by taking their gross 'operating revenues' within this State, including in their gross

'operating revenues' within this State the equal mileage proportion within this State of their interstate business and deducting from their gross 'operating revenues' the proportionate average of 'operating expenses,' or 'operating ratio,' for their whole business, as shown by the Interstate Commerce Commission standard classification of accounts. From the net operating income thus ascertained shall be deducted 'uncollectible revenue' and taxes paid in this State for the income year, other than income taxes, and the balance shall be deemed to be their net income taxable under this act. That in determining the taxable income of a corporation engaged in the business of operating a railroad under this section, . . . when any railroad is located partly within and partly without this State, then said net operating income shall be increased or decreased to the extent of an equal mileage proportion within this State of any credit or debit balance received or paid, as the case may be, on account of car or locomotive hire."

The defendant filed its returns for the years in question under the Revenue and Machinery Acts applicable at the time. They showed no taxable or net income, and no tax was tendered with the returns. Upon examination and investigation, the Commissioner of Revenue found that the statutory method of determining deductions from gross operating revenues within the State had not been followed by the defendant in making out its returns. He thereupon applied the "yardstick" of the statute and revised the returns by deducting from "gross 'operating revenues' within this State," as ascertained by him, "the proportionate average of 'operating expenses,' or 'operating ratio,' for their (its) whole business, as shown by the Interstate Commerce Commission standard classification of accounts," thus producing a net taxable income for each of the years in question.

It is stated in paragraph three of the judgment, to which no exception is taken, that no question is raised as to the Commissioner's method of computing the "gross operating revenues" of the defendant in this State. Only the method of computing the "gross operating expenses," or "operating ratio," as deductible items, is challenged. "Neither is any question raised as to the correctness of the taxes paid by the defendant, if the Commissioner be correct in his interpretation of the statute."

We may say, in passing, that the Commissioner of Revenue was under the necessity of following the statute, whatever the consequences. *A. C. L. R. Co. v. Doughton,* 262 U. S., 413. If this produced an arbitrary or unwarranted result, by placing an unreasonable burden upon the defendant, the fault was not his, but that of the law. The burden of showing this alleged unconstitutional result was on the defendant. It carried the burden to the satisfaction of the referee (*Hans Rees Sons v. Maxwell,* 283 U. S., 123), but not to the satisfaction of the judge of

the Superior Court, who heard the matter on exceptions. *Maxwell v. Kent-Coffey Mfg. Co.*, 204 N. C., 365, 168 S. E., 397, 291 U. S., 642. In this state of the record, according to our uniform practice, the finding of the judge of the Superior Court prevails over that of the referee. *Pickler v. Pinecrest Manor*, 195 N. C., 614, 143 S. E., 8; *Kenney v. Hotel Co.*, 194 N. C., 44, 138 S. E., 349; *State v. Jackson*, 183 N. C., 695, 110 S. E., 593; *Justice v. Boone Fork Lumber Co.*, 181 N. C., 390, 107 S. E., 232.

It was said in *Dumas v. Morrison*, 175 N. C., 431, 95 S. E., 775, that the "findings of fact by a referee, though entitled to weight, are not conclusive, and if not justified by the evidence may be disregarded, or set aside by the court and a decree entered according to its own view of the evidence. It must be remembered that a judge of the Superior Court in reviewing a referee's report is not confined to the question whether there is any evidence to support his findings of fact, but he may also decide that while there is some such evidence, it does not preponderate in favor of the plaintiff, and thus find the facts contrary to those reported by the referee. The rule is otherwise in this Court, when a referee's report is under consideration. We do not review the judge's findings, if there is any evidence to support them, and do not pass upon the weight of the evidence." See, also, *Wilson v. Allsbrook*, 205 N. C., 597, 172 S. E., 217, and *Thompson v. Smith*, 156 N. C., 345, 72 S. E., 379 (opinion in the latter case by *Walker, J.*, pointing out the difference between the duties of the trial court and the appellate court in dealing with exceptions to reports of referees).

Nor would the defendant be entitled to succeed by simply assailing the method of computing deductible items in ascertaining net income. It must show the unreality of the resultant taxable income. Such was the holding in *Underwood Typewriter Co. v. Chamberlain*, 253 U. S., 113, and *Bass, Ratcliff & Gretton, Ltd., v. State Tax Com.*, 266 U. S., 271.

On the record as presented, the defendant has failed to make apparent any reversible error.

Affirmed.

STATE v. ARTHUR GOSNELL, ORIES GUNTER, AND ROBERT THOMAS.

(Filed 18 September, 1935.)

1. Indictment A b—Motion to quash for that grand juror was not resident of the county held properly overruled upon court's findings.

Defendants move to quash the bill of indictment for that a member of the grand jury which returned the bill was not a resident of the county. Upon a hearing duly had, the trial court found from the evidence that at the time of serving the juror was a resident of the county, and overruled

the motion. *Held:* The court's ruling was without error and is directly supported by *S. v. Vick*, 132 N. C., 995.

2. **Same: Public Officers B c—Objection that jury commission was not competent for that members held other offices held untenable.**

Defendants moved to quash the bill of indictment for that the members of the jury commission which drew the grand jury was not competent to act, since the act creating the jury commission provided that persons holding county offices should also serve on the commission. The trial court overruled the motion. *Held:* The court's ruling is without error and is supported by *McCullers v. Comrs.*, 158 N. C., 75.

3. **Criminal Law L d—Questions discussed in briefs held not supported by the record and were not properly presented for review.**

The record failed to show that the grand jury was drawn by the jury commission, as contended, or that the grand jury was impaneled. *Held:* The competency of the jury commission and the alleged disqualification of a grand juror, discussed in appellant's brief, were not properly presented for review, it being the duty of appellants to see that the record is properly made up and transmitted to the Supreme Court.

4. **Criminal Law G l—**

Where the trial court duly hears the evidence *pro* and *con* as to the competency of alleged confessions, and rules that they are voluntary and competent, and there is abundant evidence to support its findings, the court's rulings as to their competency will not be disturbed on appeal.

5. **Same—**

Voluntary confessions are admissible in evidence against the party making them, but involuntary confessions are inadmissible, and a confession is voluntary in law when, and only when, it is in fact voluntarily made.

6. **Criminal Law B c—**

Defendant's plea of insanity *held* determined adversely to defendant by the jury upon the evidence submitted by defendant.

7. **Homicide G d—**

Evidence of conspiracy among defendants to rob the deceased is competent under the general allegation of premeditation, and it need not be supported by an allegation that the murder was committed in the perpetration of a robbery, previously designed.

8. **Criminal Law C a—**

When two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty without regard to any previous confederation or design.

9. **Homicide H c: Criminal Law I l—**

Where all the evidence is to the effect that the murder was committed in the perpetration of a robbery, 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.

APPEAL by defendants from *Warlick, J.*, at February Term, 1935, of MADISON.

Criminal prosecution, tried upon indictment charging the defendants with the murder of one William Thomas.

The evidence on behalf of the State tends to show that on the morning of 15 February, 1935, about the hour of dawn, the defendants, pursuant to design previously formed, waylaid William Thomas, an elderly merchant of Madison County, as he was going along his customary route from his sleeping quarters to his daughter's home for breakfast, struck him over the head with an automobile "iron tire tool," robbed him, dragged his body to an adjacent field and left him to die, which he did in a short time thereafter. All the evidence tends to show that the defendant Arthur Gosnell struck the fatal blows. The other defendants were present, however, aiding and abetting, and they all shared in the booty and participated in the robbery.

While in jail, awaiting trial, each defendant signed a written confession giving his version of the crime. They were all to the same effect. The competency of these confessions was challenged by objections duly entered. After a full preliminary hearing, the court ruled that they were voluntarily made, and admitted them in evidence. Exceptions.

The defendant Ories Gunter took the witness stand in his own behalf, and, on cross-examination, corroborated the State's case in all of its essential particulars.

In addition to pleading not guilty, the defendant Arthur Gosnell entered a plea of mental irresponsibility or insanity. He did not testify as a witness in his own behalf. Nor did Robert Thomas go upon the witness stand.

The court instructed the jury that only one of two verdicts—murder in the first degree or not guilty—might be returned under the evidence in the case. Exception.

Verdict: "Guilty of murder in the first degree as to all of the defendants."

Judgment as to each defendant: Death by electrocution.

The defendants appeal, assigning errors.

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

John A. Hendricks, Mack Ramsey, and Carl Stewart for defendants.

STACY, C. J. There was a motion to quash the bill of indictment on the alleged ground that the grand jury, which returned the true bill, was drawn by a jury commission not competent to act, and a nonresident of the county was allowed to serve on the grand jury. *S. v. Wilcox,* 104 N. C., 847, 10 S. E., 453. Upon a hearing, duly had, the facts were found against the defendants on their motion to quash and with respect

to the legality of the grand jury. In this there was no error. The two rulings are directly supported by the decisions in *S. v. Vick,* 132 N. C., 995, 43 S. E., 626, and *McCullers v. Comrs.,* 158 N. C., 75, 73 S. E., 816.

Moreover, the questions are not properly before us. It nowhere appears on the record that a grand jury was impaneled, or that it duly returned the bill of indictment upon which the defendants were convicted. Indeed, the record fails to show that a petit jury was sworn and impaneled to try the defendants. Why debate the competency of the jury commission or the alleged disqualification of a grand juror, when it does not appear that the jurors were drawn by the commission, or that a grand jury was impaneled? These were matters devolving upon the appellants. *S. v. Golden,* 203 N. C., 440, 166 S. E., 311. It is the duty of appellants to see that the record is properly made up and transmitted to the Supreme Court. *Payne v. Brown,* 205 N. C., 785, 172 S. E., 348; *S. v. Frizell,* 111 N. C., 722, 16 S. E., 409; *S. v. Currie,* 206 N. C., 598, 174 S. E., 447; *S. v. McDraughon,* 168 N. C., 131, 83 S. E., 181.

The holding in *Spence v. Tapscott,* 92 N. C., 576 (as stated in first headnote), was that: "In order for the Supreme Court to acquire jurisdiction, it must appear in the transcript of the record that an action was instituted, that proceedings were had and a judgment rendered from which an appeal could be taken, and that an appeal was taken from such judgment." See, also, *Weaver v. Hampton,* 206 N. C., 741, 175 S. E., 110, and *S. v. Stafford,* 203 N. C., 601, 166 S. E., 734.

In view of the testimony given on trial by the defendant Gunter, which amounts to a confession of guilt, and inculpates the other defendants, it would seem supererogatory to discuss the alleged involuntariness of the confessions previously made by the defendants. *S. v. Green,* 207 N. C., 369, 177 S. E., 120. The trial court, after hearing the evidence *pro* and *con,* according to the procedure pointed out in *S. v. Whitener,* 191 N. C., 659, 132 S. E., 603, ruled that the confessions were voluntary, and admitted them in evidence. There was abundant evidence to support the findings. No error appears in these rulings. *S. v. Whitener, supra; S. v. Gray,* 192 N. C., 594, 135 S. E., 535.

A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, but a confession wrung from the mind by the flattery of hope, or by the torture of fear, comes in such questionable shape as to merit no consideration. *S. v. Patrick,* 48 N. C., 443.

Speaking to the subject in *S. v. Roberts,* 12 N. C., 259, *Henderson, J.,* said: "Confessions are either voluntary or involuntary. They are called voluntary when made neither under the influence of hope or fear, but are attributable to that love of truth which predominates in the breast of

every man, not operated upon by other motives more powerful with him, and which, it is said, in the perfectly good man cannot be countervailed. These confessions are the highest evidences of truth, even in cases affecting life. But it is said, and said with truth, that confessions induced by hope or extorted by fear are, of all kinds of evidence, the least to be relied on, and are therefore entirely to be rejected."

Voluntary confessions are admissible in evidence against the party making them; involuntary confessions are not. A confession is voluntary in law when—and only when—it was in fact voluntarily made. *S. v. Newsome,* 195 N. C., 552, 143 S. E., 187.

The evidence of the defendant Gosnell, tending to support his plea of insanity, was submitted to the jury and rejected by them, or found to be unsatisfactory. *S. v. Jones,* 203 N. C., 374, 166 S. E., 163. The prisoner is in no position to complain at the action of the court in this respect, for his own witnesses were somewhat equivocal in their testimony as to his alleged mental irresponsibility. *S. v. Walker,* 193 N. C., 489, 137 S. E., 429.

It was not necessary to allege that the murder was committed in the perpetration of a robbery, previously designed, in order to show the conspiracy. *S. v. Donnell,* 202 N. C., 782, 164 S. E., 352. The evidence was competent under the general allegation of a premeditated murder.

The principle is likewise well established that without regard to any previous confederation or design, when two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty. *S. v. Donnell, supra; S. v. Beal,* 199 N. C., 278, 154 S. E., 604; *S. v. Hart,* 186 N. C., 582, 120 S. E., 345; *S. v. Jarrell,* 141 N. C., 722, 53 S. E., 127.

Nor was there error in limiting the jury to one of two verdicts—murder in the first degree or not guilty. *S. v. Satterfield,* 207 N. C., 118, 176 S. E., 466. It is provided by C. S., 4200, that a murder which shall be committed in the perpetration of a robbery, as was the case here, shall be deemed to be murder in the first degree. *S. v. Donnell, supra.* 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.

Out of the many tragedies of the hills, this is perhaps one of the saddest. It is full of moving pathos. Three mountain boys, poor, unlettered, and with nothing to do, set out to take what they can by hold-up and robbery. A murder ensues. The community is aroused to indignation. They are quickly overtaken by the law, tried, convicted, and sentenced to death. Such are the wages of sin, and sin pays its wages. To the extent, however, that the judgments imposed are sacri-

ficial in nature, or deterrent in purpose, a civilized State might well pause and ponder their plight. Are there no preventives for such crimes? *S. v. Phifer,* 197 N. C., 729, 150 S. E., 352.

No reversible error having been made to appear, the verdict and judgments will be upheld.

No error.

SALLIE JENKINS ET AL. v. A. T. CASTELLOE, TRUSTEE, ET AL.

(Filed 18 September, 1935.)

1. **Courts A c—Upon appeal from county court, Superior Court should specifically state rulings on exceptions upon which new trial is awarded.**

   When an appeal is taken from the general county court to the Superior Court for errors assigned in matters of law, as authorized by C. S., 1608 (cc), and a new trial is granted by the Superior Court, it is essential that the rulings upon exceptions granting the new trial be specifically stated, so that in case of appeal to the Supreme Court, they may be separately assigned as error in accordance with Rule 19 (3) of the Rules of Practice in the Supreme Court, and properly considered on appeal. In this case numerous exceptions to the charge were assigned as error on appeal to the Superior Court, and the Superior Court granted a new trial for error in the charge "as set out in the exceptions." The cause is remanded by the Supreme Court for proceedings in accordance with the rule.

2. **Same: Appeal and Error F c—Where Superior Court affirms judgment of county court, appellant should bring forward only rulings deemed erroneous.**

   When an appeal is taken from the general county court to the Superior Court for errors assigned in matters of law, as authorized by C. S., 1608 (cc), and the judgment of the general county court is affirmed by the Superior Court, it follows that each and all of the exceptions, properly presented, were overruled; hence, in assigning errors on appeal to the Supreme Court, it is necessary for appellant to bring forward such of the rulings, but only such, as he deems erroneous, in accordance with the requirements of Rule 19 (3) of the Rules of Practice in the Supreme Court.

APPEAL by plaintiffs from *Small, J.*, at November Term, 1934, of BERTIE.

Civil action (1) to restrain foreclosure under power of sale in deed of trust, (2) to have plaintiffs declared the owners of the note and deed of trust, and (3) to foreclose in equity, instituted and tried in the general county court of Bertie County, resulting in verdict and judgment for plaintiffs. On appeal to the Superior Court, on matters of law, thirty-eight exceptions were assigned as error, nine being to por-

tions of the charge. The following judgment was entered in the Superior Court:

"The court finds error in the charge of the court, as set out in the exceptions noted."

The cause was thereupon remanded to the General County Court for a new trial.

Plaintiffs appeal, assigning as error the supposed rulings upon each and all of the exceptions taken to the charge by the defendants on their appeal to the Superior Court.

J. H. Matthews for plaintiffs.
J. A. Pritchett for defendants.

STACY, C. J. In order to sustain the judgment of the Superior Court it would be necessary for us to assume that the judge intended to find, and did find, error in each and all of the nine exceptions taken to the charge. Manifestly, this was not his intention. Some of the exceptions are too attenuate to warrant such assumption. Yet, on the record as presented, we are called upon to consider each and all of them as having been sustained.

It was said in *Smith v. Winston-Salem,* 189 N. C., 178, 126 S. E., 514, that when the Superior Court is sitting as an appellate court, subject to review by the Supreme Court, and a new trial is awarded, it is desirable for the judge to state separately the rulings which he considers erroneous and which induced his judgment. *Davis v. Wallace,* 190 N. C., 543, 130 S. E., 176. This suggestion has been generally followed, with only a few exceptions. It now seems appropriate that it be made a requirement to insure uniformity in the practice. *Smith v. Texas Co.,* 200 N. C., 39, 156 S. E., 160.

When a case is tried originally in the Superior Court, and a new trial is there awarded for errors of law committed during the trial, and not in the court's discretion, the judge is required to state separately the matters which he considers erroneous and which induced his action. *Powers v. City of Wilmington,* 177 N. C., 361, 99 S. E., 102. If this were not the rule, a "fishing expedition" or excursion through the record would be required in all such cases on appeal. This is contrary to the rule of practice in the Supreme Court. *Rawls v. Lupton,* 193 N. C., 428, 137 S. E., 175; *McKinnon v. Morrison,* 104 N. C., 354, 10 S. E., 513; *S. v. Bittings,* 206 N. C., 798, 175 S. E., 299; *In re Will of Beard,* 202 N. C., 661, 163 S. E., 748; *Cecil v. Lumber Co.,* 197 N. C., 81, 147 S. E., 735.

The rule, then, may be stated as follows:

1. When an appeal is taken from the general county court to the Superior Court for errors assigns in matters of law, as authorized by

C. S., 1608 (cc), and a new trial is granted by the Superior Court, it is essential that the rulings upon exceptions granting the new trial be specifically stated, so that in case of appeal to the Supreme Court they may be separately assigned as error in accordance with Rule 19 (3) of the Rules of Practice in the Supreme Court, and properly considered on appeal. *Smith v. Texas Co., supra; Davis v. Wallace, supra.*

2. When an appeal is taken from the general county court to the Superior Court for errors assigned in matters of law, as authorized by C. S., 1608 (cc), and the judgment of the general county court is affirmed by the Superior Court, it follows that each and all of the exceptions, properly presented, were overruled; hence, in assigning errors on appeal to the Supreme Court, it is necessary for appellant to bring forward such of the rulings—but only such as he deems erroneous in accordance with the requirements of Rule 19 (3) of the Rules of Practice in the Supreme Court. *Bakery v. Ins. Co.,* 201 N. C., 816, 161 S. E., 554; *Smith v. Texas Co., supra; Harrell v. White, post,* 409.

Speaking generally to the subject in *Baker v. Clayton,* 202 N. C., 741, 164 S. E., 233, it was said:

"It is provided by 3 C. S., 1608 (cc), that appeals in civil actions may be taken from the general county court to the Superior Court of the county in term time for errors assigned in matters of law 'in the same manner as is now provided for appeals from the Superior Court to the Supreme Court'; and from the judgment of the Superior Court an appeal may be taken to the Supreme Court 'as is now provided by law.' This means that in hearing civil cases on appeal from the general county court, the Superior Court sits as an appellate court, subject to review by the Supreme Court. *Cecil v. Lumber Co.,* 197 N. C., 81, 147 S. E., 735.

"On appeal to this Court, it is neither essential nor desirable that the entire record in the Superior Court should be sent up, but only such parts thereof as may be necessary to present the questions sought to be reviewed. Rule 19 (1); *Hilton v. McDowell,* 87 N. C., 364; *Sigman v. R. R.,* 135 N. C., 181, 47 S. E., 420. In other words, the record on appeal to the Superior Court from the judgment of the county court is not, and, except perhaps in rare instances, *e. g.,* nonsuit or demurrer, ought not to be made the record on appeal to the Supreme Court. *Smith v. Texas Co.,* 200 N. C., 39, 156 S. E., 160; *Davis v. Wallace,* 190 N. C., 543, 130 S. E., 176. The purpose of the 'case on appeal' is to set forth clearly and succinctly the matters assigned as error. *Mfg. Co. v. Barrett,* 95 N. C., 36.

"Objections, which, upon reflection, can readily be seen to have no substantial merit, should be omitted from appellant's assignments of error (*Thompson v. R. R.,* 147 N. C., 412, 61 S. E., 286), and only such

rulings of the Superior Court as are challenged should be brought forward, in accordance with Rule 19 (3), for consideration by the Supreme Court. *Porter v. Lumber Co.*, 164 N. C., 396, 80 S. E., 443. 'In this way the scope of our inquiry is narrowed to the identical points which the appellant thinks are material and essential, and the Court is not sent scurrying through the entire record to find the matters complained of.' *Byrd v. Southerland*, 186 N. C., 384, 119 S. E., 2." See, also, *Kindler v. Cary*, 203 N. C., 807, 167 S. E., 226, and *McMahan v. R. R.*, 203 N. C., 805, 167 S. E., 225.

Let the judgment of the Superior Court be vacated and the cause remanded for further proceedings not inconsistent herewith.

Error and remanded.

BERTHA M. HARRELL v. LORA B. WHITE, ADMINISTRATRIX, ET AL.

(Filed 18 September, 1935.)

Appeal and Error F c—When Superior Court affirms the judgment of the county court, appellant must bring forward exceptions relied upon.

Where, on appeal from judgment of the general county court to the Superior Court on matters of law, the Superior Court overrules each of the exceptions relied upon by appellant, upon further appeal to the Supreme Court the appellant should bring forward each ruling of the Superior Court on the exceptions deemed erroneous, and properly group them and assign same as error, Rule 19 (3), and where appellant merely assigns as error "the judgment of the Superior Court," the appeal will be dismissed or the judgment affirmed.

APPEAL by defendants from *Small, J.*, at November Term, 1934, of BERTIE.

Civil action in trover to recover personal property in possession of defendants, both parties claiming title thereto, instituted and tried in the general county court of Bertie County, where verdict and judgment were rendered for plaintiff. On appeal to the Superior Court, on matters of law, eighteen exceptions were assigned as error. All exceptions and assignments of error were overruled, and the judgment of the general county court was affirmed. Whereupon the defendants appeal, assigning as error "the judgment of the Superior Court."

J. B. Davenport for plaintiff.
J. A. Pritchett for defendants.

STACY, C. J. The situation presented by the record in this case is identical with that appearing in the case of *Smith v. Texas Co.*, 200

N. C., 39, 156 S. E., 160. There, the transcript contained no grouping of exceptions or assignments of error as required by Rule 19 (3) of the Rules of Practice in the Supreme Court. 200 N. C., 824. It was said that upon motion of appellee the appeal would be dismissed or the judgment affirmed. The same may be repeated here.

The judgment will be affirmed on authority of the *Smith case*. See converse of proposition in *Jenkins v. Castelloe, ante,* 406.

Affirmed.

LAURA BETTS, ADMINISTRATRIX, v. WILSON JONES ET AL.

(Filed 18 September, 1935.)

1. **Appeal and Error L a: L d—**

A decision by the Supreme Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal.

2. **Public Officers C d—Evidence that public officers acted maliciously in performing official act held sufficient to be submitted to jury.**

While a public officer may not be held personally liable to a third person for an injury resulting from the performance of an official act in the absence of malice or corruption, in this action against the members of a school committee in their individual capacity to recover for the death of plaintiff's intestate caused by an accident resulting from the negligence of a driver of a school bus selected by the committee, evidence that the driver was a nephew of one of the members of the committee, and that he was selected by the committee over the protest of the patrons of the school, and that the driver had the general reputation of being an incompetent and reckless driver, *is held* sufficient to warrant an inference of malice, and the submission of the issue to the jury, malice in law being presumed from a tortious act, deliberately done without just cause, excuse, or justification, which is reasonably calculated to injure another or others.

APPEAL by plaintiff from *Clement, J.,* at September Term, 1934, of ANSON.

Civil action to recover damages for death of plaintiff's intestate, alleged to have been caused by the neglect, default, or wrongful act of the defendants.

Plaintiff's intestate was a school girl, riding in a school bus on the morning of 10 March, 1932, when it overturned and fatally injured her. Wilson Jones was the driver of the bus at the time. The other defendants are members of the Peachland School Committee, who selected the driver of the bus.

It is in evidence that Wilson Jones is the son of the defendant Shepherd Jones, and lives with his father; that he is a reckless and incompe-

tent driver; that he has the general reputation of being a "rough, reckless driver, dissipated, wild and rattling boy, rough and drinking"; that he was elected over the protest of patrons of the school; that he had the habit of frightening the children by "driving as fast as he could, going from one side of the road to the other, rocking them together on the truck, this way, backwards and forward; making a dodge, throwing them together so they would quit singing and be quiet"; that on the day in question the bus was heavily loaded with forty or forty-five pupils—"a bitter cold morning and the ground frozen hard"; that it was being operated at a rate of speed in excess of that allowed by C. S., 2618; that it failed to take the curve between the two bridges in the swamp on the Mineral Springs Road, ran into the canal, turned over, and, as a result, plaintiff's intestate was fatally injured.

At the close of plaintiff's evidence, the defendants jointly and severally moved to dismiss, or for judgment of nonsuit under the Hinsdale Act, C. S., 567, which was allowed. Plaintiff appeals, assigning errors.

Carswell & Ervin, Taliaferro & Clarkson, and F. E. Thomas for plaintiff.

B. M. Covington for defendants.

STACY, C. J. This is the same case that was before us, upon demurrers, at the Fall Term, 1932, opinion filed 30 November, 1932, reported in 203 N. C., 590, 166 S. E., 589.

The "law of the case" is established by the decision on the first appeal. *Power Co. v. Yount, ante,* 182. "A decision by the Supreme Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal." *Harrington v. Rawls,* 136 N. C., 65, 48 S. E., 571. Compare *Thompson v. Funeral Home, ante,* 178.

We then said that "if the committeemen were not actuated by malice or corruption, there can be no recovery," and it is not now for us to say whether the evidence engenders such a conviction. It appears sufficient to warrant the inference, hence the case is one for the jury. *James v. Coach Co.,* 207 N. C., 742, 178 S. E., 607.

Malice in law, as distinguished from malice in fact, is presumed from tortious acts, deliberately done without just cause, excuse, or justification, which are reasonably calculated to injure another or others. 18 R. C. L., 4; 38 C. J., 348.

Speaking to the subject in *Brown v. Brown,* 124 N. C., 19, 32 S. E., 320, *Montgomery, J.,* delivering the opinion of the Court, quoted with approval the following: "The term 'malice,' as applied to torts, does not necessarily mean that which must proceed from a spiteful, malignant, or

revengeful disposition, but a conduct injurious to another, though proceeding from an ill-regulated mind not sufficiently cautious before it occasions an injury to another. 11 Serg. & R., 39, 40. If the conduct of the defendant was unjustifiable and actually caused the injury complained of by the plaintiff, which was a question for the jury, malice in law would be implied from such conduct, and the court should have so charged."

Corruption is more nearly akin to malignancy, hatred, ill-will, or spite, and flows from improper motives. *Downing v. Stone,* 152 N. C., 525, 68 S. E., 9.

The committeemen knew, as Crowder is quoted as having said: "Wilson ain't fitten for a truck driver." They also persisted in selecting him over the protest of patrons of the school, who openly charged him with recklessness and incompetency. They knew, too, that they were practicing nepotism, which goes to the *bona fides* of their action. *Brown v. Brown, supra.* Let a jury of the vicinage say how it is. 10 R. C. L., 938, *et seq.*

Reversed.

JOSEPH JAMES v. SARTIN DRY CLEANING COMPANY.

(Filed 18 September, 1935.)

1. Justices of the Peace C a—

A justice of the peace has jurisdiction of an action on contract to recover the amount by which the salary paid plaintiff failed to equal the amount stipulated in the "President's Reëmployment Agreement," voluntarily signed by defendant employer, when the amount demanded does not exceed two hundred dollars. C. S., 1475.

2. Courts C a—

Our State courts have jurisdiction of an action to recover the amount by which the salary paid an employee fails to equal the amount stipulated in the "President's Reëmployment Agreement," the Federal Courts not having been given exclusive jurisdiction either by the Constitution or Act of Congress.

3. Master and Servant B a: Contracts F a—

An employee may sue upon the "President's Reëmployment Agreement," voluntarily signed by the employer, either in equity, under the doctrine of subrogation, or at law, as upon a contract made for the benefit of a third person.

4. Master and Servant A a: Contracts A d—

The benefit, *inter alia,* which an employer derives from others in the industry signing similar agreements is sufficient consideration to support his agreement voluntarily entered into under the National Recovery Act.

5. Master and Servant B a—

The evidence in this case that defendant employer had failed to pay plaintiff employee the amount due plaintiff under the agreement voluntarily entered into by the employer under the National Recovery Act, although conflicting, *is held* sufficient to support the verdict awarding plaintiff a portion of the amount claimed.

APPEAL by defendant from *Pless, J.*, at February Term, 1935, of FORSYTH.

Civil action "for $200.00 due by back salary," instituted in a court of a justice of the peace; dismissed in the court of first instance; tried *de novo* on appeal to the Superior Court.

Plaintiff testified that he worked for defendant in 1933 as a "dry cleaner" at a wage less than that stipulated in the "President's Reemployment Agreement," made pursuant to section 4 (a) of the National Industrial Recovery Act (15 U. S. C. A., section 704 [a]), voluntarily signed by defendant; and he sues to recover the difference between what he was paid and what he alleges the defendant agreed with the President to pay him for the time he was employed. This difference, plaintiff contends, really amounted to $240.00, but he only seeks to recover $200.00.

Plaintiff says he was first paid $6.00 a week, later $9.00 a week; whereas, under the terms of the President's Reëmployment Agreement, relative to hours and wages, he should have been paid not less than $12.00 a week, or 30 cents an hour for a 40-hour week. "I received $6.00 a week until about three weeks before Christmas, and from that time I received $9.00 a week until the Saturday before Christmas, when I got drunk and lost my job." Suit was instituted 26 May, 1934.

The defendant, on the other hand, offered evidence tending to show that the plaintiff was not a "dry cleaner," but a general utility boy, engaged on part-time basis, and that the schedule of wages paid him was accordant with the terms of the President's Reëmployment Agreement.

The jury awarded the plaintiff $20.00.

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

Ira Julian for plaintiff; Richard M. Chamberlain of counsel.
Webster & Little for defendant.

STACY, C. J. As the principal sum demanded in the complaint (summons) does not exceed $200, the justice of the peace had jurisdiction of the action. C. S., 1475; *Brantley v. Finch,* 97 N. C., 91, 1 S. E., 535; *Brock v. Scott,* 159 N. C., 513, 75 S. E., 724.

The matter is likewise cognizable in the courts of this State, the jurisdiction of the Federal Courts not having been made exclusive, either by

the Constitution or Act of Congress. *Claflin v. Houseman,* 93 U. S., 130; *Robb v. Connolly,* 111 U. S., 624; *Mondou v. R. R.,* 223 U. S., 1.

That the plaintiff is entitled to sue upon the "President's Reëmployment Agreement," voluntarily signed by the defendant, either in equity, under the doctrine of subrogation, or at law, as upon a contract made for the benefit of a third person, is fully established and supported by the decisions in this jurisdiction. *Rector v. Lyda,* 180 N. C., 577, 105 S. E., 170; *Gorrell v. Water Co.,* 124 N. C., 328, 32 S. E., 720, 70 Am. St. Rep., 598, 46 L. R. A., 513; *Baber v. Hanie,* 163 N. C., 588, 80 S. E., 57.

It is said in some of the cases that the plaintiff occupies the position of a "donee beneficiary," or, at least, that he is no less advantageously circumstanced. *Bank v. Page,* 206 N. C., 18, 173 S. E., 312. See annotations: 81 A. L. R., 1271, and 95 A. L. R., 42-43.

The benefit, *inter alia,* which defendant derived from others in the industry signing similar agreements was sufficient consideration to make it enforceable. *Fryns v. Fair Lawn Fur Dressing Co.,* 114 N. J. Eq., 462; *Supply Co. v. Whitehurst,* 202 N. C., 413, 163 S. E., 446; *Rousseau v. Call,* 169 N. C., 173, 85 S. E., 414; *University v. Borden,* 132 N. C., 476, 44 S. E., 47; *Pipkin v. Robinson,* 48 N. C., 152; *N. J. Orthopedic Hospital v. Wright,* 95 N. J. L., 462. See 60 C. J., 956.

While the jury rejected most of plaintiff's testimony, and might well have found against him on the merits of the case—it appearing that he was strongly contradicted as to the facts—still there is some evidence to support the verdict, and the trial court declined to set it aside as contrary to the weight of the evidence. *Goodman v. Goodman,* 201 N. C., 808, 161 S. E., 686.

No action or ruling of the court has been called to our attention which we apprehend should be held for reversible error. The verdict and judgment will be upheld.

No error.

H. G. DOZIER v. W. P. WOOD.

(Filed 18 September, 1935.)

1. **Frauds, Statute of, A a—Evidence held for jury on question of whether promise was original one not coming within provisions of C. S., 987.**

Plaintiff furnished defendant's tenants fertilizer and supplies which were used on defendant's farm. Evidence of defendant's statements to plaintiff at the time plaintiff agreed to furnish the merchandise *is held* susceptible of the interpretation that defendant's promise to pay therefor was an original promise not coming within the statute of frauds, C. S.,

987, and not a superadded one barred by the statute, and the question of interpretation should have been submitted to the jury, and the granting of defendant's motion for judgment as of nonsuit was error.

2. Trial D a—

On a motion of nonsuit the plaintiff is entitled to a liberal view of the evidence, and discrepancies and contradictions, even in plaintiff's evidence, are matters for the jury, and not the court.

3. Frauds, Statute of, A a—

Whether a promise is an original one not coming within the provisions of C. S., 987, or a superadded one required by the statute to be in writing, does not depend altogether on the form of expression, but the situation of the parties, and whether they understood the promise to be direct or collateral, should also be considered.

APPEAL by plaintiff from *Cranmer, J.*, at March Term, 1935, of CURRITUCK.

Civil action to recover for fertilizer and supplies sold by plaintiff and used by tenants on defendant's farm.

The plaintiff is a merchant in Currituck County. The defendant is a resident of Pasquotank County and the owner of a farm in Currituck, which was rented to W. E. Davis and W. B. Davis, on shares, during the year 1931.

On 13 January, 1931, the defendant, in company with his tenants, had a conversation with the plaintiff relative to supplies for the farm.

Plaintiff testified: "Mr. Wood said he wanted the Davises to buy everything from me that I handled that they could buy and had to have. He said their bills would have to be paid for whatever was furnished to that farm. Mr. Wood had to get some mules for the boys, which he paid for. With reference to the seed and fertilizer, he said it would be paid for. He said that he would pay for it if they didn't, and later he gave me a check for $305.00. The balance due on that account is $742.05. I furnished the credit to Mr. Wood. I would not have furnished the seed and fertilizer to W. E. and W. B. Davis . . . The Davis boys used them (seed and fertilizer), but my understanding was Mr. Wood would pay for them. . . . I furnished the stuff to Mr. Wood for the Davis boys. . . . (Cross-examination): Mr. Wood said that the fertilizer would be paid for by that farm. I do not recall the exact words. I told Mr. Morris that besides the Davis boys being liable, Mr. Wood was liable by virtue of this conversation. That is what I say now."

W. E. Davis testified: "I heard Mr. Wood tell him that he would see that he was taken care of."

W. B. Davis testified: "Mr. Wood told Mr. Dozier that he would see he got his money for anything furnished us."

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

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

STACY, C. J. Little can or need be added to what was said in the two opinions filed in the case of *Peele v. Powell,* 156 N. C., 553, 73 S. E., 234, on rehearing, 161 N. C., 50, 76 S. E., 698, on the difference between an original promise, which is not within the statute of frauds, and a superadded one, which is within the statute. C. S., 987. The difference in statement is clear enough. Difficulty often arises, however, in determining whether the evidence in a given case places it in the one category or the other. *Gennett v. Lyerly,* 207 N. C., 201, 176 S. E., 275; *Garren v. Youngblood,* 207 N. C., 86, 176 S. E., 252. The solution, in such instances, generally lies in summoning the aid of a jury. *Whitehurst v. Padgett,* 157 N. C., 424, 73 S. E., 240. And so, in the instant case, we think the evidence is susceptible of an interpretation which requires its submission to the twelve. *Taylor v. Lee,* 187 N. C., 393, 121 S. E., 659.

On demurrer to the evidence or motion to nonsuit under the Hinsdale Act, C. S., 567, the plaintiff is entitled to a liberal view of evidence. *Lincoln v. R. R.,* 207 N. C., 787, 178 S. E., 601. Discrepancies and contradictions, even in 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.

The true character of a promise, whether original or superadded, does not depend altogether on the form of expression. The situation of the parties should be considered and whether they understood it to be collateral or direct. *Dale v. Lbr. Co.,* 152 N. C., 651, 68 S. E., 134; *Davis v. Patrick,* 141 U. S., 479; *Emerson v. Slater,* 63 U. S., 28.

Reversed.

BEULAH B. GOODMAN v. L. VICTOR GOODMAN.

(Filed 18 September, 1935.)

Appeal and Error E a—Appeal will be dismissed when the record does not contain necessary parts.

The pleadings, issues, and judgment appealed from are necessary parts of the record proper, Rule 19 (1), and where the judgment alone appears of record, the appeal will be dismissed, since the pleadings are essential

to advise the Court as to the nature of the action or proceedings, the judicial knowledge of the Court being limited to matters properly appearing of record.

APPEAL by defendant from *Warlick, J.*, at June Term, 1935, of BUNCOMBE.

Motion in the cause to require defendant to pay alimony according to terms of decree entered at July Term, 1931, Buncombe Superior Court, affirmed on appeal, *Goodman v. Goodman,* 201 N. C., 794, 161 S. E., 688.

The motion was heard upon affidavits, none of which appears in the record. Compliance is resisted presumably upon the grounds that in a subsequent action brought by the defendant against the plaintiff, it is alleged a decree of absolute divorce was entered under the two-years separation statute, C. S., 1659 (a), at the December Term, 1933, Buncombe Superior Court.

It was apparently the contention of movant that this subsequent divorce, even if properly granted, was no defense to plaintiff's motion under the decision in *Howell v. Howell,* 206 N. C., 672, 174 S. E., 921.

It further appears that at the February Term, 1934, the alimony decree was by consent modified and reduced in amount, payable in installments of $20.00 each, with the understanding: "In the event of the failure of the said L. V. Goodman to make any of the foregoing payments at the time and place provided, the said plaintiff, Beulah Goodman, shall by such failure be restored to all the rights for the payment of any moneys due her by the said L. V. Goodman that she had prior to the entering of this consent judgment, it being the intent and purpose of this judgment to secure the payment of the $350.00 and to provide against the waiver of nothing by the said Beulah Goodman in event that the said L. V. Goodman does not live up to the letter and spirit thereof."

From an order allowing the plaintiff's motion, the defendant appeals, assigning errors.

Zeb F. Curtis and Ellis C. Jones for plaintiff.
W. A. Sullivan for defendant.

STACY, C. J. We are precluded from considering or determining the question sought to be presented by defendant's appeal for the reason that the case, as sent up, consists entirely of the judgment, and no other part of the record proper appears in the transcript. *Ins. Co. v. Bullard,* 207 N. C., 652, 178 S. E., 113; *S. v. Lbr. Co.,* 207 N. C., 47, 175 S. E., 713.

It is provided by Rule 19, section 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,* 199 N. C., 667, 155 S. E., 564. Judicial knowledge arises only from what properly appears on the record. *Walton v. McKesson,* 101 N. C., 428, 7 S. E., 566.

Failure to send up necessary parts of the record proper has uniformly resulted in dismissal of the appeal. *Payne v. Brown,* 205 N. C., 785, 172 S. E., 348; *Riggan v. Harrison,* 203 N. C., 191, 165 S. E., 358; *Ins. Co. v. Bullard, supra; S. v. Lumber Co., supra.*

Appeal dismissed.

BRAXTON B. DAWSON v. WILLIS S. WRIGHT.

(Filed 18 September, 1935.)

1. Evidence J a—Competency of parol evidence to explain written instrument.

Parol evidence is inadmissible to vary or contradict the terms of a written instrument, but where a contract is not required by law to be in writing, and a part of it is written and a part is not, parol evidence of the unwritten part, if it does not contradict the writing, is admissible to establish the contract in its entirety.

2. Same—Parol evidence held competent in this case as tending to establish unwritten part of agreement.

Parol evidence that credit memorandum given by an automobile dealer was to be used only in the purchase of a new car and not a used car ***held*** competent, the parol evidence not contradicting the writing, but tending to establish the unwritten part of the agreement.

APPEAL by plaintiff from *Cranmer, J.,* at March Term, of PASQUOTANK.

Civil action to recover for alleged breach of "Credit Memorandum."

On 14 September, 1933, the plaintiff delivered to the defendant a wrecked Chevrolet car and took in exchange credit memorandum which was to be allowed as a credit or reduction "on the list price or prevailing price of $200.00 on a two-ton Dodge truck (short wheel base) or either $135.00 on a Plymouth four-door sedan. It being optional with the holder of this Credit Memorandum which car or truck he or she wishes to buy."

Thereafter, the plaintiff transferred said credit memorandum to his brother, W. C. Dawson, who presented it as a cash item in an exchange

of automobiles with the defendant. The defendant declined to honor the memorandum, contending that it was only to be used in the purchase of a new car or truck; and that such was the understanding of the parties at the time of its issuance. Objection; overruled; exception.

This action is to recover damages for defendant's failure or refusal to honor the credit memorandum under the circumstances of its tender.

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

McMullan & McMullan for plaintiff.
M. B. Simpson for defendant.

STACY, C. J. The appeal presents the single question whether reversible error was committed in allowing the defendant to state in his oral testimony, over objection, that it was a part of the understanding between the parties the credit memorandum was to be used and allowed only in the purchase of a new car or truck.

That parol evidence is inadmissible to vary or contradict the terms of a written instrument is so well established in the law of evidence as to be well nigh axiomatic. *Carlton v. Oil Co.,* 206 N. C., 117, 172 S. E., 883; *Coral Gables v. Ayers, post,* 426. On the other hand, it is equally well established that where a contract is not one which the law requires to be in writing, and a part of it is written and a part is not, evidence of the unwritten part, if it does not contradict the writing, is admissible for the purpose of rounding out the agreement or establishing the contract in its entirety. *Henderson v. Forrest,* 184 N. C., 230, 114 S. E., 391; *Palmer v. Lowder,* 167 N. C., 331, 83 S. E., 464; *Typewriter Co. v. Hdwre. Co.,* 143 N. C., 97, 55 S. E., 417; *S. v. McClure,* 205 N. C., 11, 169 S. E., 809.

In *Evans v. Freeman,* 142 N. C., 61, 54 S. E., 847, the two rules are succinctly stated by *Walker, J.,* as follows: "It is very true that, when parties reduce their agreement to writing, parol evidence is not admissible to contradict, add to, or explain it; and this is so, although the particular agreement is not required to be in writing, the reason being that the written memorial is considered to be the best, and therefore is declared to be the only evidence of what the parties have agreed, as they are presumed to have inserted in it all the provisions by which they intended or are willing to be bound. *Terry v. R. R.,* 91 N. C., 236. But this rule applied only when the entire contract has been reduced to writing, for if merely a part has been written, and the other part has been left in parol, it is competent to establish the latter part by oral evidence, provided it does not conflict with what has been written."

On the trial, the latter rule was thought to be applicable to the facts of the instant case. With this we agree. It is not discernible in what particular the testimony of defendant runs counter to the terms of the written instrument. Indeed, some of its language lends color to the defendant's understanding. The matter was properly submitted to the jury. The verdict and judgment will be upheld.

No error.

WILMA E. FERRELL v. METROPOLITAN LIFE INSURANCE COMPANY.

(Filed 18 September, 1935.)

1. **Trial D a—**

A motion as of nonsuit must be made at the close of plaintiff's evidence, and, if overruled, at the conclusion of all the evidence, or question of the sufficiency of the evidence will be deemed waived. C. S., 567.

2. **Same—**

A judgment as of nonsuit entered by the trial court of its own motion will not be held for error when the evidence would justify a directed verdict, a nonsuit and a directed verdict having the same legal effect.

3. **Appeal and Error L a: L d—Decision on former appeal constitutes the law of the case upon subsequent hearing and appeal.**

Where it is determined on appeal that the evidence warranted the submission of the case to the jury, and the case is remanded, upon a subsequent hearing upon substantially the same evidence, the refusal of the trial court to submit the case to the jury is error, the former decision constituting the law of the case both in subsequent proceedings in the trial court and on a subsequent appeal.

APPEAL by plaintiff from *Cranmer, J.*, at March Term, 1935, of CURRITUCK. Reversed.

This is an action by plaintiff to recover of defendant the sum of $2,000.00 on a life insurance policy.

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

CLARKSON, J. At the close of plaintiff's evidence, the defendant did not make a motion for judgment as in case of nonsuit. C. S., 567. The record discloses "at the conclusion of all the testimony the Court, of its own volition, ordered that judgment of nonsuit be entered."

In *Nowell v. Basnight,* 185 N. C., 142 (147), "The following may be considered as fairly interpretative of C. S., 567 . . . Time of making motion—It must be made first at the close of plaintiff's evidence and before defendant introduces any evidence." By the failure of defendant to follow strictly C. S., 567, the question of the insufficiency of evidence is waived. *Harrison v. Ins. Co.,* 207 N. C., 487 (490).

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. of Banks, v. Bayless,* 207 N. C., 82.

On the former appeal, 207 N. C., 51 (51-2), this Court said: "The plaintiff made out a *prima facie* case. The defendant offered evidence tending to show that the policy in suit lapsed for nonpayment of semi-annual premium due 26 October, 1932. The credibility of defendant's defense was challenged by plaintiff's denial of assured's signature to the written acknowledgement. This made it a case for the jury."

In *Power Co. v. Yount and Robinette v. Yount, ante,* 182 (184), it is written: "'A decision by the Supreme Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal.' *Newbern v. Telegraph Co.,* 196 N. C., 14; *Nobles v. Davenport,* 185 N. C., 162."

We do not set forth the evidence as the case is to be heard again. As stated in the former opinion, "This made it a case for the jury."

The judgment of the court below is

Reversed.

T. C. CLARK v. J. H. DILL.

(Filed 18 September, 1935.)

Boundaries A a: Appeal and Error J e—Occupation is sufficient to sustain special proceeding to establish boundary.

In a special proceeding under C. S., ch. 9, to establish the dividing line between adjoining tracts of land, title is not a prerequisite, C. S., 362, and where it is admitted in the case on appeal that plaintiff's title was not in dispute, and that defendant's title was not in dispute except as to the true boundary line, the refusal of the court to submit an issue as to plaintiff's title, in addition to the issue as to the true boundary line, will not be held for error.

APPEAL by defendant from *Warlick, J.*, at April Term, 1935, of MADISON.

Special proceeding to establish the dividing line between the lands of plaintiff and defendant, adjoining landowners.

From a verdict and judgment in accordance with plaintiff's contention, the defendant appeals, assigning errors.

Roberts & Baley and Calvin R. Edney for plaintiff.
John H. McElroy for defendant.

STACY, C. J. Plaintiff brings this special proceeding under Chapter 9 of the Consolidated Statutes to establish the dividing line between his land and an adjoining tract owned by the defendant. He alleges that the boundary line between the two tracts is in dispute, and further, that the defendant has trespassed across the line and committed waste upon plaintiff's land, the territory in dispute.

The defendant answered and denied plaintiff's title; whereupon the proceeding was transferred to the civil issue docket. *Brown v. Hutchinson,* 155 N. C., 205, 71 S. E., 302.

Upon the trial, the defendant tendered issues of title, as well as of boundary, and excepted to the refusal of the court to submit the former. *Smith v. Johnson,* 137 N. C., 43, 49 S. E., 62.

The merit in appellant's exception is dissipated by the following statement in the case on appeal: "From the testimony of both plaintiff and defendant, the title to the J. H. Dill land was never in dispute and the title to the Clark land was not brought into dispute except as to the question of where the true line should run between them."

The case was tried purely as a proceeding to establish the boundary line between the land admittedly occupied by the plaintiff and the adjoining land admittedly occupied by the defendant. It is provided by C. S., 362, that the "occupation of land constitutes sufficient ownership for the purposes of this chapter." *Williams v. Hughes,* 124 N. C., 3, 32 S. E., 325. The title was not really in dispute. *Woody v. Fountain,* 143 N. C., 67, 55 S. E., 425.

The record contains no exceptive assignment of error which can be sustained. The verdict and judgment will be upheld.

No error.

J. M. BROWN ET AL. v. NORFOLK SOUTHERN RAILROAD COMPANY ET AL.

(Filed 18 September, 1935.)

Torts C a—Judgment debtors held entitled to have judgment credited with sum paid by joint tort-feasors for covenant not to sue.

Where some of defendants, sued as joint tort-feasors, pay plaintiff a sum in consideration of a covenant not to sue, and as to them plaintiff takes a voluntary nonsuit, and thereafter the action is prosecuted against the other defendants, and judgment recovered against them, the defendants against whom judgment was entered are entitled to have the judgment credited with the amounts paid by the other defendants for the covenant not to sue upon their motion made prior to execution, the motion coming within the spirit if not the letter of C. S., 620, and movants not being barred by their laches either in failing to bring the matter to the trial court's attention at the time of rendition of judgment, since the matter appeared on the face a judgment in the cause, or in waiting until issuance of execution, the execution still being in the hands of the sheriff.

APPEAL by defendants, Fry and Garner, from *Shaw, Emergency Judge,* at February Term, 1935, of MOORE.

Motion to credit judgment with partial payment and modify execution accordingly.

The plaintiffs instituted an action against D. B. Archbell, Norfolk Southern Railroad Company, C. F. Garner, and C. C. Fry, alleging an unlawful conspiracy in restraint of trade, C. S., 2563, which action was nonsuited at the September Term, 1929, Moore Superior Court, and reversed on appeal. *Lewis v. Archbell,* 199 N. C., 205, 154 S. E., 11.

Thereafter, on 15 September, 1931, the plaintiffs came into court and suffered a voluntary nonsuit as to D. B. Archbell and Norfolk Southern Railroad Company, agreeing in open court not to sue said defendants "for any matter or thing growing out of or alleged in the complaint in this cause."

The cause then came on for trial against the defendants, C. C. Fry and C. F. Garner, at the September Term, 1933, Moore Superior Court, and resulted in verdict and judgment for plaintiffs. The jury fixed the damages at $600 and judgment was rendered for treble this amount as provided by C. S., 2574. On appeal, the judgment was affirmed. *Lewis v. Fry,* 207 N. C., 852.

The present motion was filed 29 December, 1934, while execution was in the hands of the sheriff, and heard at the February Term, 1935, Moore Superior Court. From judgment dismissing the motion, defendants appeal, assigning errors.

H. F. Seawell, Jr., for plaintiffs.
W. R. Clegg, J. H. Scott, and L. B. Clegg for defendants.

STACY, C. J., after stating the case: His Honor was evidently of the opinion that the failure to bring the matter to the attention of the court at the time of trial, as was done in *Holland v. Utilities Co., ante,* 289, deprived movants of their right to have the judgment (not verdict) credited with the amount paid plaintiffs by their codefendants for the covenant not to sue. *Homans v. Tyng,* 67 N. Y. Supp., 792. Ordinarily, this view might prevail (*lex reprobat moram, Battle v. Mercer,* 188 N. C., 116, 123 S. E., 258) but for the fact that the matter appears on the face of a judgment entered in the cause.

It is provided by C. S., 620, that payments made upon docketed judgments and not entered of record, may be credited upon motion and hearing. True, the amount received by plaintiffs for the covenant not to sue some of the defendants was not strictly within the terms of this statute, nevertheless it would seem to be within its spirit. The payment inured to the benefit of movants. *Holland v. Utilities Co., supra,* It was said in *Homans v. Tyng, supra,* that where a party entitled to enforce a judgment, on which execution has issued, consents to an amendment of the judgment, reducing the amount of recovery, the proper procedure is not to vacate the execution but reduce it in accordance with the agreement.

That movants are not entirely out by their laches—the execution being still in the hands of the sheriff—is supported, in tendency at least, by what was said, and the authorities cited, in *Williams v. Dunn,* 158 N. C., 399, 74 S. E., 99.

Error.

C. I. CALHOUN ET AL. V. STATE HIGHWAY AND PUBLIC WORKS COMMISSION.

(Filed 18 September, 1935.)

1. Appeal and Error B b—

A point of law debated on brief, but not mooted in the trial court nor supported by the record, will not be decided on appeal, but in this case, as a new trial is awarded upon exception to the court's refusal to give instructions requested, the parties will have opportunity to be heard on the matter upon the subsequent hearing.

2. Eminent Domain C c—

An abutting property owner may not recover for damages to his land caused by changing the grade of an established street or road when such

change is made pursuant to lawful authority and there is no negligence in the manner or method of doing the work.

3. **Trial E e—**

When a party tenders a request for a specific instruction, correct in itself and supported by the evidence, the failure of the trial court to give such instruction, in substance at least, either in response to the prayer or in some portion of the charge, is reversible error.

APPEAL by defendant from *Alley, J.*, at June Term, 1935, of CHEROKEE.

Civil action for assessment of damages to plaintiffs' lot in the Town of Murphy, caused by the regrading of Highway No. 28, leading into said town from the west.

It is in evidence that the defendant relocated the road in question, raised the grade in front of plaintiffs' house 3 or 4 feet, and encroached upon plaintiffs' property by spreading the base of the road in elevating the grade.

In apt time, the defendant requested the court to instruct the jury as follows:

"The petitioner is entitled to have compensation for the reasonable market value of any part of his property which was taken for the public use, and for any damage to the remaining property caused by such taking, but the petitioner is not entitled to recover damages for raising the grade of the old highway. The old highway already belonged to the public, and the State could either raise or lower the grade of that road without answering to the petitioners in damage. You should not, therefore, allow the petitioners any damage for raising the grade within the limits of the old road, but should confine yourselves to such property as you may find the defendants to have taken, if any, and such damages, if any, as were occasioned the petitioners' property by such taking." Prayer refused; exception.

From verdict and judgment for plaintiffs, the defendant appeals, assigning errors.

Moody & Moody and D. Witherspoon for plaintiffs.
Charles Ross and Gray & Christopher for defendant.

STACY, C. J. The principal matter debated on brief is whether the action was commenced within six months from the completion of the project as provided by C. S., 3846 (bb). The question was not mooted in the court below and there is nothing on the record to show whether the action was, or was not, brought within the requisite time. In this state of the record, it would seem that, with justice to all, the question might well be left undecided, as a new trial must be awarded for failure

to give the special instruction requested by defendant. This will afford both sides equal opportunity to be heard on the point at the next hearing.

With respect to the special instruction, requested by the defendant, it is the rule with us, and very generally held elsewhere, that, unless otherwise provided by statute or constitutional provision, an abutting property owner may not recover for damages to his land caused by changing the grade of an established street or road when such change is made pursuant to lawful authority and there is no negligence in the manner or method of doing the work. *Wood v. Land Co.,* 165 N. C., 367, 81 S. E., 422; *Harper v. Lenoir,* 152 N. C., 723, 68 S. E., 228; *Dorsey v. Henderson,* 148 N. C., 423, 62 S. E., 547; *Jones v. Henderson,* 147 N. C., 120, 60 S. E., 894; *Wolfe v. Pearson,* 114 N. C., 621, 19 S. E., 264; *Meares v. Wilmington,* 31 N. C., 73. Compare *Bost v. Cabarrus,* 152 N. C., 531, 67 S. E., 1066.

The prayer being properly presented, in apt time, and containing a correct legal request, pertinent to the evidence and the issue in the case, it was error to refuse it. *Michaux v. Rubber Co.,* 190 N. C., 617, 130 S. E., 306. The rule of practice is well established in this jurisdiction that when a request is made for a specific instruction, correct in itself and supported by evidence, the trial court, while not obliged to adopt the precise language of the prayer, is nevertheless required to give the instruction, in substance at least, and unless this is done, either in direct response to the prayer or otherwise in some portion of the charge, the failure will constitute reversible error. *Parks v. Trust Co.,* 195 N. C., 453, 142 S. E., 473; *Marcom v. R. R.,* 165 N. C., 259, 81 S. E., 290; *Irvin v. R. R.,* 164 N. C., 5, 80 S. E., 78; C. S., 565.

The defendant is entitled to a new trial. It is so ordered.

New trial.

CORAL GABLES, INC., v. NETTIE C. AYRES.

(Filed 18 September, 1935.)

1. Appeal and Error C b—

When appellee fails to return appellant's statement of case on appeal with objections within the time prescribed, the appellant's statement of case on appeal prevails by operation of law. C. S., 643.

2. Evidence J a—Parol evidence that maker was not to be called upon for further payments on note held incompetent as contradicting writing.

Plaintiff declared on a note executed by defendant for the balance of the purchase price of land. Defendant offered parol evidence to the effect that it was agreed that plaintiff should resell the land within two months,

and that defendant would never be called upon for further payments, that the land was resold, and that plaintiff understood that her note would thereupon be canceled. *Held:* The parol evidence was incompetent as being in contradiction of the written instrument, and its admission constitutes reversible error, although plaintiff would not have been precluded from showing an agreement that her note was to be delivered up and canceled upon the resale of the land by plaintiff, if such was the agreement and the meaning of her allegation.

3. **Appeal and Error B b—**

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

APPEAL by plaintiff from *Clement, J.,* at December Term, 1934, of MOORE.

Civil action to recover $1,827.50 balance alleged to be due on a sealed promissory note, executed by the defendant to the Coral Gables Corporation, 4 June, 1925, and now owned and held by the plaintiff.

The defendant alleges that on 4 June, 1925, she bought two lots, or parcels of land, from the Coral Gables Corporation through W. J. Kearney, its authorized agent, "who promised absolutely to resell her said contract within two months, and that she, the defendant, would never be called upon to make further payments thereon"; that the lots were resold by the said W. J. Kearney, and the defendant thereby relieved of any further liability by reason of said transaction.

Over objection, the defendant was allowed to testify that she bought two lots "with the understanding that those lots were to be resold for me before I was ever called on for another payment"; that upon the resale of the property "I supposed when I sent my papers back that cancelled my note and obligation to Coral Gables."

The Judge charged the jury that according to the alleged parol agreement, "they guaranteed to resell the lots at a profit and that she (defendant) would not have to pay the note."

The jury answered the issue of indebtedness "None," and from the judgment thereon, plaintiff appeals, assigning errors.

H. F. Seawell, Jr., for plaintiff.
W. Duncan Matthews for defendant.

STACY, C. J. As appellant's statement of case on appeal was not returned by appellee with objections within the time prescribed, it thereby became the statement of case on appeal by operation of law. C. S., 643; *S. v. Ray,* 206 N. C., 736, 175 S. E., 109; *Carter v. Bryant,* 199 N. C., 704, 155 S. E., 602. The transcript is not very full or clear, but, as we understand it, the defendant was permitted to offer parol evidence in contradiction of the terms of her written instrument. This is

at variance with the established rule. *Bank v. Dardine,* 207 N. C., 509, 177 S. E., 635; *Roebuck v. Carson,* 196 N. C., 672, 146 S. E., 708.

In *Manufacturing Co. v. McCormick,* 175 N. C., 277, 95 S. E., 555, it was said a contemporaneous oral agreement "that defendant would not be required to pay his note according to its terms," and that payment of the principal would be extended at maturity upon payment of interest, could not be allowed as a defense because in direct contradiction of the written promise to pay.

Similarly, in *Hilliard v. Newberry,* 153 N. C., 104, 68 S. E., 1056, an alleged contemporaneous oral agreement to extend the time of payment beyond that appearing on the face of the note, was not allowed to be shown in evidence. To like effect are the decisions in *Thomas v. Carteret,* 182 N. C., 374, 109 S. E., 384; *Boushall v. Stronach,* 172 N. C., 273, 90 S. E., 198; *Rousseau v. Call,* 169 N. C., 173, 85 S. E., 414; *Woodson v. Beck,* 151 N. C., 144, 65 S. E., 751; *Walker v. Cooper,* 150 N. C., 128, 63 S. E., 681; *Walker v. Venters,* 148 N. C., 388, 62 S. E., 510; *Mudge v. Varner,* 146 N. C., 147, 59 S. E., 540; *Bank v. Moore,* 138 N. C., 529, 51 S. E., 79; *Ray v. Blackwell,* 94 N. C., 10.

Of course, the defendant would not be prohibited from showing, if such be the fact and the meaning of her allegation, that, upon a resale of the land by Kearney, her note was to be delivered up and cancelled. *Galloway v. Thrash,* 207 N. C., 165, 176 S. E., 303; *Bank v. Rosenstein,* 207 N. C., 529, 177 S. E., 643; *Williams v. Turner, ante,* 202; *Furr v. Trull,* 205 N. C., 417, 171 S. E., 641. However, as now presented, the case seems not to have been tried upon this theory. An appeal *ex necessitate* follows the theory of the trial. *Hargett v. Lee,* 206 N. C., 536, 174 S. E., 498; *Holland v. Dulin,* 206 N. C., 211, 173 S. E., 310. "The theory upon which a cause is tried must prevail in considering the appeal, and in interpreting a record and in determining the validity of exceptions"—*Brogden, J.,* in *Potts v. Ins. Co.,* 206 N. C., 257, 174 S. E., 123.

The plaintiff is entitled to a new trial. It is so ordered.

New trial.

ROBERT A. REYNOLDS v. EMMA REYNOLDS.

(Filed 18 September, 1935.)

1. **Divorce A d—Where separation is result of criminal act of plaintiff he may not maintain action for divorce on ground of separation.**

Plaintiff was living separate and apart from his wife and paying certain sums to her from time to time under the terms upon which judgment for abandonment and assault upon her was suspended. *Held:* Plaintiff may

not maintain an action for divorce upon the grounds of two years separation, C. S., 1659 (a), the law not permitting the maintenance of an action based in whole or in part upon the violation by the plaintiff of the criminal laws of the State. *Campbell v. Campbell*, 207 N. C., 859, and *Long v. Long*, 206 N. C., 706, cited and distinguished.

2. Actions A c—

A plaintiff may not maintain a civil action based upon his own violation of the criminal law of the State.

APPEAL by defendant from *Warlick, J.*, at April Term, 1935, of BUNCOMBE.

Civil action for divorce on the ground of two-years separation, tried upon the usual issues, resulting in verdict for the plaintiff.

In bar of plaintiff's right to maintain the action, the defendant alleges:

"1. That the plaintiff's alleged cause of action as set forth in his complaint, to wit, two years of separation from his wife as grounds for absolute divorce, is based solely and exclusively upon a violation by himself of the criminal laws of the State of North Carolina and to the judgment of the court imposed upon the plaintiff in consequence of his conviction of the crimes of assault and battery upon his wife and for the wilful abandonment and nonsupport by the plaintiff of his wife and their infant children, for which said violations of the criminal laws the plaintiff has heretofore been tried and convicted by a court of competent jurisdiction and is now undergoing execution of the sentence imposed by the court upon him for said crimes, that is to say: the plaintiff herein, as a condition imposed by the court upon which prayer for judgment would be continued or a sentence to imprisonment would be suspended, is living separate and apart from his wife and is paying into court from time to time certain sums of money for the support and maintenance of his said wife and their infant children.

"2. That the plaintiff, in violation and disregard of the orders of the court made in the criminal actions referred to in the preceding paragraph, has failed and neglected to make full payment of the amounts required to be paid for the support of his wife and their infant children, and at the time of the commencement of this action, the plaintiff was in arrears to the extent of more than $140.00 on that account, as well as $220.00 for hospital and medical bills."

The court ruled that the defense pleaded was no bar to the plaintiff's right to prosecute the action, and excluded the evidence offered by the defendant to prove her allegations. Exception.

From a judgment on the verdict dissolving the bonds of matrimony existing between the parties, the defendant appeals, assigning errors.

Worth McKinney for plaintiff.
James E. Rector for defendant.

STACY, C. J. May a husband ground an action for divorce, under C. S. 1659 (a), on his own criminal conduct towards his wife? The answer is, No. *Teasley v. Teasley,* 205 N. C., 604, 172 S. E., 197. Any other holding would be a reproach to the law. *Bean v. Detective Co.,* 206 N. C., 125, 173 S. E., 5. The decisions in *Campbell v. Campbell,* 207 N. C., 859, and *Long v. Long,* 206 N. C., 706, 175 S. E., 85, are not authorities to the contrary, for in neither of these cases was there a plea in bar based upon plaintiff's alleged criminal conduct towards the defendant.

"It is very generally held—universally, so far as we are aware—that an action never lies when a plaintiff must base his claim, in whole or in part, on a violation by himself of the criminal or penal laws of the State"—*Hoke, J.,* in *Lloyd v. R. R.,* 151 N. C., 536, 66 S. E., 604. In Waite's Actions and Defenses, Vol. 1, p. 43, the principle is broadly stated, as follows: "No principle of law is better settled than that which declares that an action cannot be maintained upon any ground or cause which the law declares to be illegal," citing *Davidson v. Lanier,* 4 Wallace, 447; *Rolfe v. Delmar,* 7 Rob., 80; *Stewart v. Lothrop,* 12 Gray, 52; *Howard v. Harris,* 8 Allen, 297; *Pearce v. Brooks,* L. R. 1 Exch., 213; *Smith v. White,* L. R. 1 Eq. Cases, 626.

To say that civil rights, enforceable through the courts, may inure to one out of his own violation of the criminal law, and against the very person injured, would be to blow hot and cold in the same breath, or, Janus-like, to look in both directions at the same time. The law is not interested in such double dealing or slight-of-hand performances; it sets its face like flint in the opposite direction.

There was error in declining to hear the defendant's plea. Let the verdict and judgment be set aside and the cause remanded for another hearing.

New trial.

ROBERT D. COLEMAN, EXECUTOR, ETC., v. GURNEY P. HOOD, COMMISSIONER OF BANKS.

(Filed 18 September, 1935.)

1. Appeal and Error J c: Reference C a—

Where a finding by the referee is fully supported by evidence appearing of record, the inadvertence of the trial court in striking it out for want of evidence must be held for error on appeal.

2. Same—

Where plaintiff introduces documentary evidence for the purpose of attack, the inadvertence of the trial court in striking out the finding of the referee in plaintiff's favor supported thereby because the evidence was introduced by plaintiff, must be held for error.

3. Appeal and Error K b—

In this case the trial court erroneously struck out certain findings of the referee. On appeal the court's rulings on the exceptions are stricken out, and the facts thus being left in doubt, and the record being in unsatisfactory shape to enable the Court to pass upon the questions sought to be presented, the case is remanded for further proceedings.

APPEAL by plaintiff from *Alley, J.*, at July Term, 1935, of HAYWOOD.

Civil action for an accounting and to establish a preference.

As the case involves a long and intricate accounting, with charges of breaches of trust, etc., the matter was referred at the January Term, 1935, to Hon. S. W. Black, as referee, to find the facts, state the account, and report the same, together with his conclusions of law, to the court.

The referee duly filed a full and exhaustive report, to which both sides filed exceptions, and the matter came on for hearing at the July Term, 1935, upon these exceptions.

It does not appear that the judge passed upon plaintiff's exceptions, unless he did so inferentially.

In ruling upon defendant's exceptions, the 20th finding of fact of the referee, which related to alleged breaches of trust on the part of the trustee, was stricken out, "the court being of opinion that there is no evidence in the record to sustain such finding." The 33d finding of fact of the referee, which related to the failure of the trustee to file proper reports, was likewise stricken out and modified because the reports filed by the trustee with the Clerk of the Superior Court "were introduced in evidence on the trial of this cause by the plaintiff."

From judgment overruling the conclusions of the referee, plaintiff appeals, assigning errors.

Smathers, Martin & McCoy for plaintiff.

C. I. Taylor, Morgan, Stamey & Ward and F. E. Alley, Jr., for defendant.

STACY, C. J. The trial court was in error in striking out the 20th finding of fact of the referee for want of evidence to sustain it. This was doubtless an inadvertence, as the finding is fully supported by the record, at least inferentially, if not by direct proof. And in ruling on defendant's exception to the 33d finding of fact, the court evidently overlooked the purpose for which the plaintiff introduced the trustee's reports in evidence, to wit, for attack. This was likewise an inadvertence.

With the facts thus left in doubt, and perhaps with somewhat contradictory findings, the record is not in satisfactory shape or condition for us to pass upon the questions sought to be presented. Hence, to insure consistency, the rulings upon defendant's exceptions modifying the referee's report will be stricken out and the cause remanded for further proceedings as to justice appertains and the rights of the parties may require.

Error and remanded.

STATE v. ROBERT DUNLAP.

(Filed 18 September, 1935.)

Criminal Law L a—Appeal in this case is dismissed for defendant's failure to make out and serve statement of case on appeal.

Where a defendant fails to make out and serve his statement of case on appeal within the time fixed, he loses his right to prosecute the appeal, and the motion of the Attorney-General to docket and dismiss must be allowed, but where defendant is convicted of a capital felony, this will be done only after an inspection of the record for error appearing upon its face.

MOTION by State to docket and dismiss appeal.

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

STACY, C. J. At the March Term, 1935, Buncombe Superior Court, the defendant herein, Robert Dunlap, was tried upon indictment charging him with the murder of one Pauline McMellan, alias Ola McMellan, which resulted in a conviction of murder in the first degree and sentence of death. From the judgment thus entered, the defendant gave notice of appeal to the Supreme Court, and by consent was allowed sixty days within which to make out and serve statement of case on appeal. The clerk certifies that nothing has been done towards perfecting the appeal; that the time for serving statement of case has expired, and that no extension of time for filing same has been recorded in his office. *S. v. Williams, ante,* 352; *S. v. Brown,* 206 N. C., 747, 175 S. E., 116.

The prisoner, having failed to make out and serve statement of case on appeal within the time fixed, has lost his right to prosecute the appeal, and the motion of the Attorney-General to docket and dismiss must be allowed. *S. v. Williams, supra; S. v. Johnson,* 205 N. C., 610, 172 S. E., 219. It is customary, however, in capital cases, where the

life of the prisoner is involved, to examine the record to see that no error appears upon its face. *S. v. Williams, supra; S. v. Goldston,* 201 N. C., 89, 158 S. E., 926. This we have done in the instant case without discovering any error on the face of the record. *S. v. Williams, supra; S. v. Hamlet,* 206 N. C., 568, 174 S. E., 451.

The motion of the Attorney-General must be allowed. *S. v. Williams, supra,* and cases there cited.

Appeal dismissed.

SOVEREIGN CAMP, WOODMEN OF THE WORLD, v. THE BOARD OF COMMISSIONERS OF LENOIR COUNTY, N. C.

(Filed 18 September, 1935.)

1. Mandamus A a—

Mandamus will not lie except to enforce a clear legal right against a party under legal obligation to perform the act sought to be enforced.

2. Counties F b—Action held one to enforce money demand against county and mandamus would not lie in absence of judgment against county.

Plaintiff alleged ownership of certain county bonds, and sought *mandamus* to compel the county to levy taxes sufficient to pay same. *Held:* The effect of the action is to enforce a money demand, and N. C. Code, 867, as amended by ch. 349, Public Laws of 1933, providing that *mandamus* should not lie in an action *ex contractu* to enforce a money demand against a county, city, town, or taxing district, unless the claim has been reduced to judgment, is applicable, and a demurrer to the complaint for its failure to state a cause of action is properly sustained.

3. Constitutional Law E b—Ch. 349, Public Laws of 1933, held not to impair obligations of contract, but merely to change procedure.

Ch. 349, Public Laws of 1933, providing that *mandamus* should not lie in an action *ex contractu* to enforce a money demand against a county, city, town, or taxing district, unless final judgment had been obtained against defendant, is constitutional, since it does not impair the obligations of a contract, U. S. Const., Art. I, sec. 10; N. C. Const., Art. I, sec. 17, the effect of the statute being merely to alter the method of procedure in which there can be no vested right, and the change not being so radical as to take away all methods of procedure for the enforcement of contractual obligations.

APPEAL by plaintiff from *Grady, J.,* at September Term, 1934, of LENOIR. Affirmed.

This is an action brought by the plaintiff to compel the county of Lenoir to levy taxes with which to pay bonded indebtedness alleged by the plaintiff appellant to be due it by said county. The plaintiff sought

a writ of *mandamus* to compel the commissioners of Lenoir County to include in its levy for 1934 a sufficient amount, in addition to all other taxes, to pay certain bonded indebtedness of said county, some of which the plaintiff appellant claimed in its complaint to have owned.

Summons in this action was returnable before the resident judge of the Sixth Judicial District at Chambers on 19 September, 1934, having been issued by the clerk of the Superior Court of Lenoir County, on 6 September, 1934. The defendant appellee demurred to the complaint on the grounds that the court had no jurisdiction and on the ground that the complaint did not state facts sufficient to constitute a cause of action, for that the action is in effect an application for a writ of *mandamus* against the county of Lenoir to enforce a money demand on alleged action *ex contractu* against said county of Lenoir, and for that an action will not lie until the plaintiff has complied with chapter 349 of the Public Laws of 1933, and for other grounds as set out in demurrer.

Upon hearing of the matter at Chambers, judgment was rendered, sustaining the demurrer on 25 September, 1934, by his Honor, Henry A. Grady, from which the plaintiff excepted, assigned error, and appealed to the Supreme Court.

Ruark & Ruark for plaintiff.
Guy Elliott and Wallace & White for defendant.

CLARKSON, J. The following judgment was rendered in the court below: "This cause coming on to be heard at Clinton, N. C., by consent of the parties, and defendant having demurred on the grounds that the complaint does not state facts sufficient to constitute a cause of action, and the court being of the opinion that this action cannot be maintained in view of chapter 349, Public Laws of 1933, it is therefore considered and adjudged that the demurrer be sustained, and the action is dismissed, at the costs of the plaintiff, to be taxed by the clerk." We think the judgment of the court below correct.

The extraordinary writ of *mandamus* is never issued unless the party seeking it has a clear legal right to demand it, and the defendant must be under a legal obligation to perform the act sought to be enforced. *John v. Allen,* 207 N. C., 520.

N. C. Code, 1931 (Michie), section 867, is as follows: "In application for a writ of *mandamus,* when the plaintiff seeks to enforce a money demand, the summons, pleadings, and practice are the same as prescribed for civil actions."

Public Laws 1933, ch. 349, is as follows: "SECTION 1. That section 867 of the Consolidated Statutes of 1919 be and the same is hereby amended by adding the following: '*Provided,* that in all applications

seeking a writ of *mandamus* to enforce a money demand on actions *ex contractu* against any county, city, town, or taxing district within the State, the applicant shall allege and show in the complaint that the claim or debt has been reduced to a final judgment establishing what part of said judgment, if any, remains unpaid, what resources, if any, are available for the satisfaction of the judgment, including the actual value of all property sought to be subjected to additional taxation and the necessity for the issuing of such writ.' "

In *August Belmont & Co. v. Reilly, Auditor,* 71 N. C., 260 (262), we find: "The plaintiffs are the holders and owners of certain bonds for the payment of money which they allege the State of North Carolina owes them and has refused to pay, wherefore they resort to this action for the enforcement of this demand, which is the most direct and efficacious remedy for collecting the money which the law affords them. The purpose of the action is the collection of the debt through and by means of this proceeding, either as a direct result or as one necessarily incident to and flowing out of the action. In a legal sense, it is as much a money demand as the old action of debt was, and in some respects it is more so, for here the party seeks to lay hold of a specific fund and appropriate it to the satisfaction of the demand. There is now, in this State, Art. IV, sec. 1, Const., but one form of action, and the writ of *mandamus* is but a process of the court in that action, the purpose of which writ is, in actions for money demands, to give the plaintiff a more speedy and effectual recovery of his debt than could be had in the ordinary way. The plaintiffs are seeking in this action, as the final result, termination, and fruit thereof, to collect the money due on their bonds. In every sense, then, practical and legal, this is, in the language of the Code, an 'application where the plaintiff seeks to enforce a money demand.' "

The plaintiff is seeking by writ of *mandamus* to enforce a money demand, which it cannot do, as it does not come within the terms of the statute above quoted of 1933.

The statute, ch. 349, Public Laws of 1933, does not impair the obligation of contracts, which is prohibited by the Constitutions of the U. S. and State of North Carolina. Const. of U. S., Art. I, sec. 10; Const. of N. C., Art. I, sec. 17.

The statute only effects the method of procedure. In *Martin v. Vanlaningham,* 189 N. C., 656 (658), the principle is laid down as follows: " 'No person can claim a vested right in any particular mode of procedure for the enforcement or defense of his rights, where a new statute deals with procedure only, *prima facie* it applies to all actions—those which have accrued or are pending, and future actions.' 2 Lewis' Edition Southerland Statutory Construction, p. 1226." *High Point v. Brown,* 206 N. C., 664 (668).

In *Bateman v. Sterrett,* 201 N. C., 59 (62-3), it is said: "It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces those which affect its validity, construction, discharge, and enforcement. . . . The result of the decisions on the subject is, that a change in the statutory method of procedure for the enforcement or exercise of an existent right is not prohibited by any constitutional provision, unless the alteration or modification is so radical as to impair the obligation of contracts or to divest vested rights. 6 R. C. L., 356."

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

Affirmed.

ROBERT J. POWELL, RECEIVER OF THE CUMBERLAND NATIONAL BANK OF FAYETTEVILLE, v. K. A. McDONALD AND J. A. BYNUM AND WIFE, GERTRUDE H. BYNUM.

(Filed 18 September, 1935.)

Banks and Banking C d—Pledge of security for note held to cover only joint obligations of pledgors to bank.

A husband and wife executed a note to a bank, and to secure payment, pledged certain collateral, the pledge stipulating that the bank might hold same as security for any other obligation, primary or secondary, etc., "under which the undersigned shall be in any way bound." *Held:* Construing the pledge to ascertain the intention of the parties, the pledge covered only such obligations to the bank upon which the husband and wife were jointly liable, and the bank, or its receiver upon insolvency, is not entitled to hold the pledged security for the individual liability of the husband as endorser on a note of a third person, the bank, which selected the language of the pledge, having failed to stipulate that the security should be pledged to secure the joint or several liabilities of the pledgors.

APPEAL from *Grady, J.,* at March Term, 1935, of CUMBERLAND. Reversed.

The undisputed facts presented by the present appeal are that on 17 October, 1931, K. A. McDonald executed to the Cumberland National Bank of Fayetteville his promissory note for $275.00, upon which a balance of $208.80 was due at the time of the institution of this action, which note at the time of its delivery and negotiation was endorsed by J. A. Bynum. J. A. Bynum and wife, Gertrude H. Bynum, on 9 December, 1931, signed and delivered to the Cumberland National Bank

of Fayetteville their collateral note for $800.00, reading in part as follows:

"60 days after date we promise to pay to the order of the Cumberland National Bank of Fayetteville, . . . Eight Hundred Dollars, . . . Value received . . . and to secure the payment of this, or any other obligation to said bank, due or to become due .... hereby pledge to the said Bank, or its assigns, holders of the same, the collaterals described on back, or herein enclosed, and it is hereby agreed that upon the nonpayment of this obligation said Bank or the holder thereof, may sell the same . . . and after deducting all costs of sale the balance of the proceeds shall be applied to this obligation, and any surplus to any other note, obligation, bill, overdraft or open account under which the undersigned shall be in any way bound, primarily or secondarily, absolutely or contingently, due or to become due. Such application to be made in the manner and proportions as said Bank or holder may see fit. Upon the discharge of this obligation said Bank or holder may deliver the same to the undersigned, or order, but shall have the right to retain the same to secure any other obligation, note, etc., as above described, just as if specifically pledged under an agreement in the exact terms of this, . . ."

As security for said collateral note, said Bynum and wife transferred, assigned, and delivered to said bank three life insurance policies in which they were the insured and beneficiary, respectively, with the right reserved in the insured to change the beneficiary therein. Said collateral note was subsequently paid in full on 12 March, 1932, without the beneficiary in the life insurance policies ever having been changed, and upon such payment J. A. Bynum and wife, Gertrude H. Bynum, demanded the surrender to them of said life insurance policies, which demand was refused by the plaintiff receiver—he contending that as security for a collateral note containing the above quoted clause, the cash surrender value of said policies should be applied to the payment of the obligation of the defendant J. A. Bynum by virtue of his endorsement of the note of K. A. McDonald.

The plaintiff, as receiver of the Cumberland National Bank of Fayetteville, instituted this action on 11 January, 1935, and, at the March Term, 1935, of Cumberland County Superior Court, Grady, J., adjudged, on the pleadings, that the plaintiff have and recover of K. A. McDonald and J. A. Bynum the sum of $208.80, with interest, and declared the judgment to be a specific lien upon the life insurance policies pledged as security for the collateral note and empowered the receiver to subject them to the satisfaction thereof; and from this judgment the defendants J. A. Bynum and wife, Gertrude H. Bynum, appealed to the Supreme Court, assigning error.

Rose & Lyon for plaintiff, appellee.
Malcolm McQueen and Dye & Clark for defendants, appellants.

SCHENCK, J. The single question presented is as to the proper interpretation of the collateral pledge of the life insurance policies as security for the joint note of the insured and beneficiary therein, J. A. Bynum and wife, Gertrude H. Bynum, respectively.

We are of the opinion that the liability created by the collateral note is a joint liability of the makers thereof. We think the words of the pledge, following the provision for the application of the funds derived from the sale of the securities, "shall be applied to this obligation, and any surplus to any other note, obligation, bill, overdraft, or open account under which *the undersigned* shall be bound" connote that the intention of the parties to the contract or note was to pledge the securities to the payment of only such other notes and obligations as were of the same character as the joint liability under the collateral note. "It is well recognized that the object of all rules of interpretation is to arrive at the intention of the parties as expressed in the contract, and, in written contracts which permit of construction, this intent is to be gathered from the entire instrument, and, . . . to ascertain the intention, regard must be had to the nature of the instrument itself, the condition of the parties executing it, and the objects they had in view, and the words employed, if capable of more than one meaning, or to be given that meaning which it is apparent the parties intended them to have." *Bank v. Furniture Co.,* 169 N. C., 180. The natural inference to be drawn from the words "under which *the undersigned* shall be in any way bound" is that the securities were pledged only for the joint liabilities of the makers. The bank, the payee, framed this pledge, and if it desired to have the pledge extend to the individual and several obligations of the makers of the collateral note, it should have had inserted the words "or either of them," or words of similar import.

Entertaining, as we do, the opinion that the pledge contained in the collateral note extends only to the joint liabilities of the makers to the payee thereof, we hold that the judgment of the Superior Court which extended the pledge to the individual and several obligations of J. A. Bynum was erroneous.

While the facts are not altogether analogous, the reasoning in *Bank v. Furniture Co., supra,* and *Newsome v. Bank,* 169 N. C., 534, is apposite to this case. To the same effect is the case of *Bank v. Scott,* 123 N. C., 538, which is also authority for holding that the words "we" and "our" used in a collateral note, as in this case, import joint obligations. See, also, *Heffner v. Bank,* 311 Pa., 29, 87 A. L. R., 610, and *Torrance v. Bank* (C. C. A., 3d Cir.) 210 Fed. Reporter, 806.

The judgment below is reversed.

Under the stipulation contained in the record, the cases wherein G. C. Barbour and L. C. Jackson, respectively, are codefendants with J. A. Bynum and wife, Gertrude H. Bynum, will be governed by this opinion and judgments therein will be entered accordingly.

Reversed.

STATE OF NORTH CAROLINA EX REL. SWAIN COUNTY AND SWAIN COUNTY v. ELBERT WELCH, EX-TREASURER OF SWAIN COUNTY, AND HIS BONDSMEN, D. A. DEHART ET AL.

(Filed 18 September, 1935.)

Set-offs and Counterclaims A b: Counties E e—Defendants held entitled to offset debt due county with past-due bonds of county in this case.

Defendants were indebted to plaintiff county as principal and sureties on the bond of the county treasurer for funds of the county which the treasurer had not accounted for because of the failure of the bank in which the funds were deposited. Defendants tendered as an offset past-due bonds of the county owned by them, according to the agreed facts and stipulations, prior to the institution of the action by the county. *Held:* Defendants were entitled to offset their debt to the county with the past-due county bonds, since the respective obligations of the county and defendants arose out of contract, and either party might have recovered judgment against the other on their respective obligations, and the county's obligation to defendants existed prior to the institution of the action, C. S., 521. In this case it did not appear of record that the funds deposited in the bank represented collection of taxes levied for specific purposes, or that the bonds held by defendants were other than general obligations of the county.

APPEAL by plaintiff Swain County from *Alley, J.*, at Chambers in Murphy, on 21 June, 1935. From SWAIN. Affirmed.

This is a controversy without action submitted under C. S., 626, *et seq.* It was agreed and stipulated (1) that the defendant Elbert Welch was treasurer of Swain County from December, 1928, to December, 1932; (2) that D. A. DeHart and the other defendants other than Elbert Welch, executed as sureties and delivered to Swain County a bond in the sum of $111,000, conditioned upon the faithful performance of the duties of such treasurer by Elbert Welch; (3) that said Welch, as treasurer, "deposited the money and funds coming into his hands belonging to said county, in the Citizens Bank of Bryson City," and that no depository was designated by the commissioners of said county; (4) and (5) that on 21 November, 1930, said Welch, as treasurer, "held funds belonging to said county amounting to the sum of $57,452.56," which were deposited in said Citizens Bank when it closed its doors on

account of insolvency on said date; (6) and (7) that, subsequently, by virtue of an order of court, dated 23 January, 1931, said bank was reopened and continued to operate its business until 8 February, 1932, when it was finally closed and taken over by the Commissioner of Banks for liquidation, and that at said time said bank "had on deposit to the credit of Elbert Welch, treasurer of Swain County, money and funds belonging to Swain County in the sum of $43,224.19, for which sum Swain County has never had settlement, and to recover which this suit was instituted," and that the failure to settle has not been due to default, neglect, or misappropriation by Elbert Welch, but to the failure of said bank; (8), (9), and (10) that in the liquidation of the bank, there was delivered to the defendant Welch certain real estate, personal property, notes, and other evidence of indebtednesses from the assets of the bank, to be applied on his deposit as treasurer, and that the defendant is now in possession of said properties and has tendered them to Swain County in settlement of the indebtedness of $43,224.19 of the defendants to the plaintiff, which tender has been refused; (11) that this action was instituted on 24 October, 1933, to recover of the defendants said sum of $43,224.19; (12) that prior to the institution of this action, certain of the defendants had purchased and are now the owners and holders of "certain past-due Swain County bonds and attached coupons, which were issued by Swain County and for which said county is liable," aggregating $10,000; (13) that subsequent to the institution of this action, said defendants purchased and are now the holders and owners of "certain other past-due bonds and attached coupons issued by Swain County, and for which said county is liable," aggregating $33,500.00; (14) "that if the court is of the opinion, and shall hold as a matter of law, that the defendants are entitled to offset the bonds and coupons issued by Swain County, purchased, owned, and held by them prior to the institution of this action, against the claim of the plaintiff in this action, then it is agreed that judgment may be rendered allowing said defendants to offset, in like manner, all bonds and coupons issued by Swain County, purchased, and now owned and held by them, subsequent to the institution of this action, against the claim of the plaintiffs herein"; (15) that the defendants have proposed to offset their indebtedness due Swain County with the bonds and coupons held by them, which are past due, but the plaintiff Swain County has refused said offer; (16) that all the property in Swain County is valued for taxation for the year 1934 at $5,888,045, that said county has an outstanding indebtedness of $1,532,-000, and is in default in the payment of said indebtedness in the sum of $278,500, which latter amount is included in the former, and said county is in default of interest payments as of 1 January, 1935, not included in said outstanding indebtedness, $224,690; (17) that the County of Swain

at the date of the aforementioned tender of bonds and coupons, did not have, nor has it had at any time since said date, sufficient funds or assets to pay its outstanding indebtedness; (18) and (19) that it is further agreed that if the court is of the opinion that the defendants are entitled to offset their indebtedness to Swain County with the aforesaid bonds and coupons, the real estate and personal property received by the defendant Elbert Welch from the Citizens Bank of Bryson City shall become the property of said Welch, and that judgment shall be rendered in favor of the plaintiff for the sum of $43,500 and costs, to be satisfied upon delivery to the plaintiff by the defendants of the aforementioned past-due bonds and coupons for cancellation, it being stipulated that the interest on said bonds shall offset the interest due on account of the claims set up in the complaint; and that in the event the Court should hold that the defendants are not entitled to offset said past-due bonds and coupons against the claims set up in the complaint, then judgment shall be entered against the defendants and each of them for the sum of $111,000, the penalty of the treasurer's bond, to be discharged upon the payment to the plaintiff of the sum of $43,224.19 with interest from 8 February, 1932.

Upon the foregoing agreed facts and stipulations, the court adjudged that the plaintiff have and recover of the defendants and each of them the sum of $43,500; and that the "defendants are entitled, as a matter of law, to offset and settle said indebtedness due and owing by them to the plaintiff with the past-due bonds and all attached coupons issued by Swain County and owned and held by said defendants, said bonds being in the principal sum of Forty-three Thousand and Five Hundred ($43,500) Dollars."

From the judgment of the Superior Court, the plaintiff appealed to the Supreme Court, assigning error.

B. C. Jones and Black & Whitaker for plaintiff, appellant.
Edwards & Leatherwood for defendants, appellees.

SCHENCK, J. The single exceptive assignment of error is to the signing of the judgment as appears in the record, and this presents the single legal proposition as to whether the defendants, the treasurer of Swain County and his official bondsmen, can successfully set up as a counterclaim past-due bonds and coupons of the county against the amount admittedly due Swain County by them on the official bond signed by them by reason of the failure of said treasurer to pay said county the full amount due by him to it.

This action arises upon the official bond of the treasurer, a contract. The counterclaim of the defendants arises upon the past-due bonds of the plaintiff county, also contracts. The counterclaim, according to the

agreed facts and stipulations, existed in favor of the defendants and against the plaintiff at the commencement of this action, and several judgments might have been had between the plaintiff and defendants. The plaintiff might have recovered judgment on the treasurer's bond, and the defendants might have recovered judgment on the county's past-due bonds. Therefore, the counterclaim set up by the defendants falls clearly within the provision of C. S., 521, which reads: "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) . . . (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 reasoning in *Bourne v. Board of Financial Control,* 207 N. C., 170, is apposite to this case.

There is nothing in the agreed state of facts to indicate that the amounts for which the treasurer had failed to account "represented collected taxes which were levied for certain specific purposes," as contended in appellant's brief. All that appears in the record is that such amounts were "money and funds coming into his hands belonging to said county." Nor does it appear that the bonds held by the defendant are other than general obligations of the county, payable out of its general funds.

The judgment of the Superior Court is
Affirmed.

B. C. HARE v. D. R. HARE, JOHN C. BADHAM, AND W. S. PRIVOTT, TRUSTEE.

(Filed 18 September, 1935.)

1. **Frauds, Statute of, B a—Agreement of vendor to remove prior lien upon payment of purchase money note held not required to be in writing.**

Plaintiff alleged that his vendor agreed to procure a release of the land from a prior deed of trust upon the payment by the plaintiff of a note given for the balance of the purchase price of the land, and secured by a deed of trust to his vendor. *Held:* The agreement is not one to sell or convey land, or any interest in or concerning same, and does not come within the provisions of the statute of frauds. C. S., 988.

2. **Evidence J a—Parol evidence held competent to show agreement that prior lien was to be removed upon payment of purchase money note for land.**

The deed conveying the land to plaintiff excepted a prior encumbrance from the covenant against encumbrances, but did not except such prior

encumbrance from the general warranty of title. Plaintiff executed a deed of trust to secure his note for the balance due on the purchase price. Plaintiff offered evidence of a parol agreement between him and his vendor that the vendor should remove the prior encumbrance upon the payment of the purchase money note by plaintiff. *Held:* The alleged parol agreement was not in conflict with the written instruments, but in accord with them, and parol evidence of the agreement was competent.

3. **Bills and Notes C a—When assignee does not obtain endorsement of note assigned until after it is past due, he is not a holder in due course.**

Where a note is assigned as collateral security for another note, and the assignee holds the collateral note without procuring the endorsement of the assignor until after the collateral note is past due, the assignee is not a holder in due course of the collateral note, and takes same subject to all equities existing in favor of the maker of the collateral note as against the payee who assigned same. C. S., 3030.

4. **Bills and Notes C d: Estoppel C a—Maker of note held not estopped to set up equities against holder not a holder in due course.**

Where the maker of a note for the balance of the purchase price of land alleges that the payee agreed that upon payment of the note, a prior encumbrance against the land should be removed, a person obtaining the note from the payee as collateral security, but who is not a holder in due course thereof, may not maintain that, as he took the note in good faith for value, and as the maker failed to have the parol agreement included in the writing, the maker should not be allowed to enforce the parol agreement as against him, since a holder who is not a holder in due course should first ascertain if there are any equities existing against the note, and since the holder of equities against a note is under no duty to notify a purchaser thereof.

APPEAL by defendant John C. Badham from *Moore, Special Judge,* at May Special Term, 1934, of CHOWAN. Affirmed.

In this case, which was formerly before us and reported in 207 N. C., 849, the plaintiff B. C. Hare obtained judgment restraining the defendant John C. Badham from procuring the foreclosure of a deed of trust executed by the plaintiff to W. S. Privott, as trustee, to secure a note of $955.00 due by him to the defendant D. R. Hare, which note was delivered, but not endorsed, to the defendant John C. Badham by the defendant D. R. Hare as collateral security for a note due by said D. R. Hare to said Badham.

The plaintiff B. C. Hare alleged that there was a parol agreement between him and the defendant D. R. Hare, the payee in the note and *cestui que trust* in the deed of trust, that D. R. Hare was to procure a release of the land upon which said deed of trust was given from another and prior deed of trust, to the Southern Trust Company, when payment was made by B. C. Hare of said note, and that John C. Badham took said note subject to said agreement, and that said agreement has not

been effected, notwithstanding the plaintiff B. C. Hare is ready, able, and willing to pay said note when such release is procured.

The appealing defendant, John C. Badham, for the want of knowledge and information, denied the existence of any oral agreement between the plaintiff B. C. Hare and the defendant D. R. Hare as alleged in the complaint; and alleged that if such parol agreement did exist, it was void under the statute of frauds, since it was a contract concerning land, and that such a parol agreement would be inconsistent and in conflict with the written agreement between plaintiff and defendant D. R. Hare contained in the deed of trust and deed executed by them, respectively, and therefore unenforceable, and, further, that if said parol agreement did exist, the plaintiff was negligent in not having it included in the written agreement, and is therefore estopped to assert any rights thereunder against the appellant, who took the note and deed of trust in good faith and for a valuable consideration.

The jury returned the following verdict:

"1. Did the defendant D. R. Hare, at the time of accepting the deed of trust and note of $955.00 from B. C. Hare, promise and agree to cause the lands conveyed to B. C. Hare to be released from the deed of trust to the Southern Trust Company when said note of $955.00 was paid? Answer: 'Yes.'

"2. Did defendant John C. Badham take said note of $955.00 subject to the agreement aforesaid? Answer: 'Yes.'"

From judgment upon the verdict for the plaintiff the defendant John C. Badham appealed to the Supreme Court, assigning errors.

R. C. Holland and Worth & Horner for plaintiff, appellee.
W. D. Pruden for defendant John C. Badham, appellant.

SCHENCK, J. The exceptive assignments of error assail the admission of all of the evidence which tended to establish the parol agreement between the plaintiff B. C. Hare and the defendant D. R. Hare, to the effect that D. R. Hare would have the land conveyed by him to B. C. Hare released from a prior deed of trust when payment was made by B. C. Hare of the note now in the hands of John C. Badham as collateral security for a past-due note given to said Badham by D. R. Hare.

In one group of assignments of error the appellant takes two positions to assail the admission of such evidence. The first position is that such a parol agreement would have been void under the statute of frauds, C. S., 988. This position, we think, is untenable. "The general rule appears to be that an oral agreement by a grantor or grantee to remove existing encumbrances is valid and enforceable, and is not required by the statute of frauds to be in writing." 25 R. C. L., 556. While the

facts in *Stevens v. Turlington,* 186 N. C., 191, are not in all respects analogous, we think the reasoning therein, and in the cases there cited, is apposite to the case at bar. The parol agreement now under consideration was a contract between the grantor and the *cestui que trust* in a deed of trust (to all intents and purposes between mortgagor and mortgagee), and was made to terminate such relationship after it had been established between them, and is clearly distinguishable from a contract "to sell or convey any lands, . . . or any interest in or concerning them," required by C. S., 988, to be put in writing. *Faw v. Whittington,* 72 N. C., 321.

The second position taken by the appellant to assail the competency of the evidence tending to establish the parol agreement alleged in the complaint is that such an agreement would be inconsistent and in conflict with the written agreement between the parties as contained in the deed and deed of trust executed by them respectively. We think this position is also untenable for the reason that such inconsistency and conflict does not appear. The deed from D. R. Hare and wife to B. C. Hare contains the following: "And the said first parties, for themselves, their executors and administrators, to and with the said second party, his heirs and assigns, covenant: That they are seized of said premises in fee; have the right to convey the same in fee simple; that the same is free from any and all encumbrances, except a deed of trust to the Southern Trust Company given by the said Hare and wife; and that they will forever warrant and defend the title to the same against the lawful claims of all persons whomsoever." It will be noted that while the prior deed of trust to the Southern Trust Company is excepted in the covenant against encumbrances, such deed of trust is not excepted from the general warranty of title. So it appears that the alleged parol agreement, instead of being in conflict with, is in accord with the written agreement, the aforesaid deed.

The other group of assignments of error, which assail the court's holding that the appellant John C. Badham was bound by the parol agreement had between B. C. Hare and D. R. Hare, cannot be sustained, since Badham was not a holder of the note in due course. From all of the evidence it appears that the note of B. C. Hare to D. R. Hare which is held by John C. Badham as collateral was past due when this action was instituted, and that said note has never been endorsed by the transferrer (D. R. Hare) to the transferee (John C. Badham). Therefore, by virtue of C. S., 3030, the appellant was not a holder in due course, but held said note subject to all the equities that existed in favor of the original payor against the original payee.

The appellant contended, and requested the court to so hold, that since the failure to have the parol agreement included in the writing

was caused by the negligence of the plaintiff, he, the appellant, should not be made to suffer thereby. The answer to this contention is that when one takes a note otherwise than in due course he should first investigate and ascertain if there are any equities existing against the holder thereof. It has never been held to be the duty of those holding equities against a note to put purchasers of such note on notice of such equities. The fact that the appellant took the note in good faith and for a valuable consideration does not make him a purchaser in due course, or entitle him to the protection afforded such purchasers. When the appellant took and held the note without procuring the endorsement of the transferrer, he did so subject to all the equities existing in favor of B. C. Hare against D. R. Hare, the original payor and payee therein. C. S., 3030.

The judgment below is
Affirmed.

ERNEST W. MOORE AND WIFE, KATHLEEN JAMES MOORE, v. J. M. SHORE.

(Filed 18 September, 1935.)

1. **Husband and Wife B c—**

The husband has the right, during coverture, to deal with the possession of land held by him and his wife by entireties without the consent of the wife, but neither may make a contract affecting title, so as to defeat the right of the survivor in the whole estate, without the consent of the other.

2. **Same: Deeds and Conveyances C d—Male tenant by entireties may not release other lots of restrictive covenants without wife's consent.**

Where lots are conveyed with restrictive covenants limiting buildings to residences, the owner of each lot has a negative covenant in respect to the other lots in the development, and where one of such lots is owned by a husband and wife by the entireties, the husband may not convey or contract in respect to the negative easement of such lot over the other lots without the consent of his wife, since the wife has the right to such negative easement as a part of the estate if she should survive her husband, and the easement would be lost by its violation and the resulting change in character of the development.

APPEAL by defendant from *Shaw, J.*, at January Term, 1935, of FORSYTH. Affirmed.

The plaintiffs are man and wife, and hold as tenants by the entireties lots Nos. 12 and 13 in the A. I. Shouse property on the Yadkin and Buena Vista roads, plat of which is registered in the record of deeds for Forsyth County. The defendant holds title to lots Nos. 42, 43, and 45 in said property.

The plaintiffs and defendant derive title to their respective lots of land from a common source, namely, the heirs at law of A. I. Shouse. The deeds to the plaintiffs and to the defendant, as well as the *mesne* conveyances, contain the following restriction: "That the property herein described shall be used for residential purposes only, except that buildings for domestic purposes may be constructed." The defendant procured written permission to erect a service station on the lots owned by him from the owners of all the lots affected by the restriction in the deeds, except the plaintiffs', and, construing the evidence most favorably to the defendant, procured oral permission from the male plaintiff to the same effect.

The plaintiffs instituted this action in the Forsyth County Court, and there obtained judgment restraining the defendant from erecting a service station on his lots, which judgment was affirmed on appeal to the Superior Court. From the judgment of the Superior Court the defendant appealed to the Supreme Court, assigning errors.

Parrish & Deal for plaintiffs, appellees.
R. Glenn Key and Elledge & Wells for defendant, appellant.

SCHENCK, J. This case presents the following determinative question: "Is the wife a necessary party to a contract relinquishing rights under a negative easement where such rights are created by deed establishing an estate by the entirety and held as such at the time of the agreement?" The county court and the Superior Court held that the wife was a necessary party to such contract.

Since the plaintiffs, Ernest W. Moore and his wife, Kathleen J. Moore, are tenants by the entireties, their rights must be determined by the common law, according to which the possession of the property during their joint lives rests in the husband. *Dorsey v. Kirkland,* 177 N. C., 520. Therefore, the male plaintiff could, during coverture, by deed or oral agreement, contract or deal with the possession of lots in question, without the consent of the *feme* plaintiff. Estates by entireties have never been destroyed or changed by statute in North Carolina, *Davis v. Bass,* 188 N. C., 200, and "the properties and incidents of this estate are not changed or affected by Art. X, sec. 6, of our State Constitution as to rights of married women. *Bank v. Gornto,* 161 N. C., 341."

It is contended, however, by the plaintiffs that the relinquishment of the rights which they enjoy under the restriction contained in the deeds herein involved would affect more than the mere possession that rests in the husband during coverture, in that it affects an interest which they hold in the freehold, and thereby defeats certain rights which the survivor would have in the estate. "An easement always implies an inter-

est in land. It is real property and is created by grant. . . . A building restriction is a negative easement." *Davis v. Robinson,* 189 N. C., 589.

While it is settled law with us that the husband, during coverture, may make valid conveyances and contracts affecting his right of possession in land held by him and his wife as tenants by the entireties, it is equally well settled as to tenants by the entireties that "neither can convey during their joint lives so as to bind the other, or defeat the right of the survivor to the whole estate," *Bank v. Gornto, supra,* and that "neither could encumber it or convey it so as to destroy the right of the other, if survivor, to receive the land itself unimpaired." *Bynum v. Wicker,* 141 N. C., 95.

Since the restriction in the deeds involved in this case created a negative easement in the lots upon which the defendant seeks to erect a service station, and thereby gave the plaintiffs as tenants by the entireties an interest in the freehold of said lots, it follows that the husband alone could not convey or contract with relation to this interest, so as to defeat the right of the wife, if she be the survivor, to receive such interest unimpaired. We think the erection of such service station would tend to defeat such rights of the wife, since under the holdings of this Court the right to enforce a restrictive building covenant will be lost where substantial and radical changes take place in the affected area. *Starkey v. Gardner,* 194 N. C., 74; *Higgins v. Hough,* 195 N. C., 652. The change from residential use to use for a service station is both substantial and radical, and the loss of the restriction would defeat the right of the survivor to receive the lots, now held by the entireties, with a residential restriction extending to the other lots in said area.

Affirmed.

C. I. T. CORPORATION v. C. M. WATKINS AND ROBERT R. TUCKER.

(Filed 18 September, 1935.)

1. Judgments F c—

A judgment may not be rendered in favor of a defendant who alleged no further defense, counterclaim, or cross action.

2. Claim and Delivery G a—Where defendant recovers judgment in claim and delivery, measure of damages is value of property at time of taking.

Where defendant in claim and delivery recovers judgment and the property cannot be returned to him, the measure of damages is the value of the property at the time of its seizure, and an instruction that defendant, from whom an automobile had been taken in claim and delivery by

the assignor of a chattel mortgage thereon, would be entitled to recover, if plaintiff's seizure of the property were wrongful, the amount paid on the purchase price of the car less the value of the use obtained from the car by defendant, is held for error. C. S., 833.

APPEAL from the municipal court of the city of Greensboro, heard *de novo* upon amended pleadings by *Alley, J.*, at December Term, 1934, of GUILFORD. New trial.

This was a civil action, instituted by the C. I. T. Corporation, as assignee of Studebaker Sales of North Carolina, Incorporated, to recover a balance of $698.56 due on a note, secured by a conditional sale agreement on a certain Studebaker automobile, wherein resort was had to the ancillary remedy of claim and delivery. C. S., 830, *et seq.*

The plaintiff alleged that it was the assignee and holder in due course of said note and conditional sale agreement, and that there had been a breach of the agreement by the defendant Watkins, who was the maker of said note and agreement, in that he had failed to meet the deferred payments as they became due, and in that he had rendered the debt insecure by wrongfully disposing of said automobile to his codefendant Tucker. The automobile was taken in claim and delivery and sold at public auction for the amount of the balance claimed by the plaintiff to be due.

The defendants filed separate answers. The defendant Watkins in his answer admits the execution by him of the note and conditional sale agreement, and that the plaintiff is the holder thereof in due course, but denies that he breached the agreement in either failing to meet the deferred payments or in wrongfully disposing of the automobile, and alleges that he did all that was required by the agreement to make tender of the deferred payments when due, and that the delivery of the automobile by him to his codefendant Tucker was not wrongful in that it was done with the knowledge and consent of the plaintiff and its assignor; and for a further defense and by way of counterclaim and cross action the defendant Watkins avers that the plaintiff, the C. I. T. Corporation, breached the terms of the conditional sale agreement in attempting to declare the entire amount of the note due under the acceleration clause therein, and in seizing and selling the automobile under claim and delivery, and demands the return to him of the automobile, together with damages for deterioration and loss of use thereof, or, if such return cannot be had, damage in the sum of $416.32.

The defendant Tucker in his answer admits that the plaintiff is the holder in due course of the note and conditional sale agreement in suit, but denies that he, Tucker, is in the wrongful possession of the automobile. The defendant Tucker does not plead a further defense, counterclaim, or cross action.

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

"1. Is the plaintiff the owner of and entitled to the immediate possession of the Studebaker coupe automobile, as alleged in the complaint? Answer: 'No.'

"2. What amount, if any, is plaintiff entitled to recover of the defendants? Answer: ....

"3. What was the reasonable market value of said Studebaker coupe automobile at the time of repossession? Answer: ....

"4. Did the plaintiff breach its contract with the defendant Watkins, as alleged in the answer? Answer: 'Yes.'

"5. If so, what amount of damages are the defendants entitled to recover of plaintiff? Answer: '$416.32, plus six per cent interest, less $50.00 for use of car.'"

Upon the foregoing verdict, the court adjudged "that the defendants, on their counterclaim in this cause, have and recover of plaintiff the full sum of $366.32, with interest thereon at the rate of six per cent per annum until paid, . . . ," from which judgment the plaintiff appealed, assigning errors.

Huger S. King for plaintiff, appellant.
Younce & Younce for defendants, appellees.

SCHENCK, J. Manifestly the judgment of the court below, in so far as it relates to the defendant Tucker, must be reversed, since the answer of this defendant contains no further defense, counterclaim, or cross action. "The counterclaim is substantially the allegation of a cause of action on the part of a defendant against the plaintiff, and it ought to be set forth with the same precision and certainty," *Bank v. Hill,* 169 N. C., 235, and the court ought to disregard a counterclaim not alleged in the pleadings, *Smith v. McGregor,* 96 N. C., 101.

The following portion of his Honor's charge is made the basis of one of the plaintiff's exceptive assignments of error, to wit: "But if you answer the fourth issue 'Yes,' then your answer to the fifth issue would be what damages you find the defendant sustained by reason of the wrongful breach of the contract and the repossession and sale of the car by the plaintiff, and the measure of damages, as I have already indicated the defendants would be entitled to recover, would be the amount paid on the purchase price of the car, with legal interest, to be reduced by any additional sum you say the car was worth to the defendants while they had the use of it, and the driving of the mileage they admit they did drive it."

We are of the opinion, and so hold, that the foregoing instruction was erroneous, since the measure of damage upon the fifth issue was the reasonable market value of the Studebaker automobile at the time it was seized by the plaintiff. This has been so held by this Court, *Barbee v. Scoggins,* 121 N. C., 135; *Epley v. Credit Co.,* 192 N. C., 661, and is so nominated in the bond which is written in accord with the statute, C. S., 833, in the following words: ". . . if for any cause return cannot be had for the payment to him of such sum as may be recovered against the plaintiff for the value of the property at the time of the seizure, with interest thereon, as damages for such seizure and detention."

For the errors assigned there must be a

New trial.

MRS. KATHERINE STEPHENSON v. DUKE S. LEONARD,

AND

MISS KATHERINE STEPHENSON, BY HER NEXT FRIEND, T. SPRUILL THORNTON, v. DUKE S. LEONARD.

(Filed 18 September, 1935.)

(Consolidated for trial.)

Negligence D d—

Contributory negligence is negligence of plaintiff which proximately causes the injury, and an instruction that fails to charge, in any manner, that the acts of plaintiffs complained of must have produced the injury in order to bar recovery, must be held for reversible error.

APPEAL from *Pless, J.,* at February Term, 1935, of FORSYTH. New trial.

These were civil actions, instituted by Mrs. Katherine Stephenson and Miss Katherine Stephenson, by her next friend, to recover damages for personal injuries received in a collision between two automobiles alleged to have been proximately caused by the negligence of the defendant Duke S. Leonard. By consent the actions were consolidated for the purposes of trial.

The plaintiffs were passengers in an automobile owned and operated by B. T. Stephenson, their husband and father, respectively, which collided with an automobile owned and operated by the defendant. The defendant, after denying his own negligence, pleaded as contributory negligence the failure of the plaintiffs to see and warn the driver of the car in which they were riding of the impending danger.

Separate but identical issues were submitted in the respective cases, to which identical answers were made, as follows:

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

"2. Did the plaintiff, by her own negligence, contribute to her injury, as alleged in the answer? Answer: 'Yes.'

"3. What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: ...."

From judgments, based upon the verdicts, that they recover nothing, the plaintiffs appealed to the Supreme Court, assigning errors.

Manly, Hendren & Womble and Wood, Chitwood, Coxe & Rogers for plaintiffs, appellants.

Fred S. Hutchins and H. Bryce Parker for defendant, appellee.

SCHENCK, J. The following portion of the charge of the court is made the basis of one of the plaintiffs' exceptive assignments of error, to wit: "If you find, the burden being upon the defendant, Mr. Leonard, to satisfy you by the greater weight of the evidence, that these ladies failed to observe the rule of ordinary care in keeping a lookout and in warning the driver of any approaching danger from a car traversing the intersection, and you find that under all those circumstances they failed to exercise ordinary care, then, gentlemen of the jury, it would be your duty to answer the second issue, that is, the issue of contributory negligence, 'Yes,' that is, in favor of Mr. Leonard." The foregoing instruction was erroneous, for that it failed to make any reference to the requisite that the jury find that the negligence of the plaintiffs was a proximate cause of their injuries before answering the issue in favor of the defendant. We have carefully read his Honor's charge, and the words "proximate cause," or any words of the same import, are nowhere used with reference to the second issue.

Upon an issue of contributory negligence, "The test is: Did the plaintiff fail to exercise that degree of care which an ordinarily prudent man would have exercised or employed, under the same or similar circumstances, and was his failure to do so the proximate cause of his injury?" *Moore v. Iron Works,* 183 N. C., 438, and an instruction on such an issue which assumes that if the plaintiff failed to exercise reasonable care, her negligence was the proximate cause of her injury, is erroneous. *Brewster v. Elizabeth City,* 137 N. C., 392.

In order to show contributory negligence, the defendant must prove that the plaintiff has committed a negligent act, and that such negligent act was the proximate cause of the injury. The first requisite of proximate cause is the doing or omitting to do an act which a person of ordinary prudence could foresee might naturally or probably produce

the injury complained of, and the second requisite is that such act or omission did actually cause the injury. *Brewster v. Elizabeth City, supra.*

The defendant appellee in his brief cites the case of *Parker v. Railroad,* 181 N. C., 95, and quotes, as charge approved by this Court, the following: "If you should find from the evidence that the plaintiff in approaching the crossing could have seen, by looking, this moving train, and could have known the train was moving towards the crossing, by listening, and that she could have seen it in time to have requested the driver of the car to stop, and you find that if she had requested the driver of the car to stop she would have stopped in time to avoid the injury, that would be the proximate cause of the injury, and not the negligence of the defendant, . . ." It will be noted that the charge quoted clearly instructed the jury that if the passenger (the plaintiff) had requested the driver of the car to stop, and that as a result of such request the driver would have stopped in time to have avoided the injury, the failure to so request the driver would have been the proximate cause of the injury, and that under those circumstances the jury would answer the issue of contributory negligence in favor of the defendant. The judge in the instant case omitted to instruct the jury that before they could answer the second issue in favor of the defendant they must find that the driver of the Stephenson car would have stopped such car had he been warned by the passengers therein, the plaintiffs in these cases, and thereby have avoided the collision and its resultant injuries. This omission, we think, constituted prejudicial error.

For the errors assigned there must be a

New trial.

S. R. PATTERSON v. SWAIN COUNTY.

(Filed 18 September, 1935.)

1. Appeal and Error K e—A new trial is awarded in this case for that the facts agreed are insufficient for review of judgment.

Where, in an action by a sheriff to recover compensation for transportation of prisoners under the provisions of C. S., 3908, it does not appear from the facts agreed how many prisoners were conveyed to jails in other counties by the sheriff or how many miles such prisoners were conveyed, a new trial will be awarded on appeal in order that the facts necessary to a determination of the question may be found and a proper adjudication made thereon.

2. Sheriffs B d—

Under the provisions of C. S., 3908, a sheriff is entitled to compensation for conveying prisoners to the State Penitentiary, but such compensation is not to be computed upon a mileage basis.

3. Sheriffs B b—Held: Sheriff was not entitled to fees under C. S., 8009, in addition to salary as tax collector.

Plaintiff sheriff was paid a fixed salary for his services as tax collector under the provisions of ch. 329, Public-Local Laws of 1925. *Held:* His services in advertising and selling land for delinquent taxes, and preparing land-sale certificates, and entering land sales upon the land-sale register, were performed in pursuit of his duties as tax collector, and the sheriff is not entitled to receive, in addition to his salary, fees for such services under C. S., 8009.

APPEAL by defendant from *Alley, J.*, at August Term, 1935, of SWAIN.

Moody & Moody for plaintiff, appellee.
Frye & Jones for defendant, appellant.

SCHENCK, J. In this case, which was heard upon an agreed statement of facts, two questions were presented, namely: (1) Is the plaintiff, as sheriff of Swain County, for transporting prisoners to the State Prison, other persons to other State institutions, and prisoners from one county to another, entitled to collect from said county, the defendant, ten cents per mile both ways, going and returning, or for only one way; and (2) is the plaintiff, as sheriff of Swain County, entitled to collect from said county, the defendant, in addition to his salary as tax collector, the fees allowed for advertising and selling land for delinquent taxes, for preparation of land-sale certificates, and for entering land sales upon land-sale register, as provided by C. S., 8009? The court held that both questions should be answered in the affirmative, and entered judgment accordingly.

It appears from the record that both parties contended, and that the court made its adjudication upon the theory, that the answer to the first question presented depends upon an interpretation of C. S., 3908. We find that there is no reference in this statute to compensation for transporting persons other than prisoners to institutions other than jails and the penitentiary, that there is a provision for compensation for conveying prisoners to the penitentiary, but not upon a mileage basis, and that while there is a provision in the statute for payment for conveying a prisoner to jail to another county of ten cents per mile, there is no finding of fact of how many prisoners were conveyed to jails in other counties, or how many miles such prisoners were conveyed.

The only portions of C. S., 3908, which relate to the transportation of prisoners or others by the sheriff read as follows: "Sheriffs shall be

allowed the following fees and expenses, and no other, namely: . . . Conveying a prisoner to jail to another county, ten cents per mile. For prisoner's guard, if any necessary, and approved by the county commissioners, going and returning, per mile for each, five cents. Expense of guard and all other expenses of conveying prisoner to jail, or from one jail to another for any purpose, or to any place of punishment, or to appear before a court or justice of the peace in another county, or in going to another county for a prisoner, to be taxed in the bill of costs and allowed by the board of commissioners of the county in which the criminal proceedings were instituted. . . . For conveying prisoners to the penitentiary, two dollars per day and actual necessary expenses; also one dollar a day and actual necessary expenses for each guard, not to exceed one guard for every three prisoners, as the sheriff upon affidavit before the clerk of the Superior Court of his county shall swear to be necessary for the safe conveyance of the convicts, to be paid by the board of commissioners of the county in which the criminal proceedings were instituted." It is manifest that there must be a new trial awarded upon the first question presented in order that proper facts may be found and proper adjudication made thereon, not necessarily on a mileage basis.

The answer to the second question presented depends upon an interpretation of chapter 329, Public-Local Laws of 1925, the pertinent portion of which reads: "SECTION 1. That the compensation of the officers of Swain County shall be as follows: . . . The sheriff shall receive for his services as sheriff the fees of his office, and for his services as tax collector he shall receive three thousand two hundred and fifty dollars per annum, payable in equal monthly installments; . . ." We think it is clear that the services for which the plaintiff asks judgment, namely, advertising and selling land for delinquent taxes, preparation of land-sale certificates, and entering land sales upon land-sale register, were performed in pursuit of his duties as tax collector, and that compensation therefor was included in his salary as tax collector, and for that reason the plaintiff is not entitled to recover the fees provided for such services by C. S., 8009. The judgment of the Superior Court as it relates to the second question presented must therefore be reversed.

New trial in part.

Reversed in part.

STATE v. GEORGE STATHOS.

(Filed 18 September, 1935.)

Receiving Stolen Goods A b—In order to conviction under C. S., 4250, it is necessary that defendant have guilty knowledge, express or implied.

In order for a defendant to be convicted of receiving stolen goods under the provisions of C. S., 4250, it is necessary that defendant have knowledge, express or implied, that at the time of the receiving the goods had been stolen, and a charge that such knowledge would be imputed to defendant if the circumstances at the time were sufficient to put a reasonably prudent man upon inquiry which would have disclosed the facts, is erroneous, the rule of the prudent man being applicable to civil actions but not to criminal prosecutions, and it being necessary for conviction that defendant himself have guilty knowledge, express or implied.

APPEAL by defendant from *Pless, J.*, at January Term, 1935, of FORSYTH. New trial.

The defendant was tried and convicted upon a bill of indictment charging that on 21 December, 1934, he "unlawfully, wilfully, feloniously did receive and conceal stolen goods, to wit: a certain violin, valued at about $300.00, the property of one Elizabeth Hanaman, he, the said George Stathos, well knowing the same to have been feloniously stolen, taken, and carried away, against the form of the statute in such case made and provided," and from judgment of imprisonment appealed to the Supreme Court, assigning errors.

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

Ingle & Rucker for defendant, appellant.

SCHENCK, J. The appellant makes several exceptive assignments of error, but under the view we take of the case it is necessary to consider only that assignment which imputes error to that portion of the charge as follows: "If the State has convinced you beyond a reasonable doubt from the evidence that at the time he bought the violin the circumstances, facts, and the knowledge of the defendant were such as to let him know *or* to cause an honest man who intended to be reasonably prudent in his business transactions to inquire further before he received the violin, and he failed to do so and took the violin without making inquiry, although in possession of such facts, then, gentlemen of the jury, if you should find those facts, and find them beyond a reasonable doubt, it would be your duty to render a verdict of guilty."

C. S., 4250, under which the bill of indictment was drawn, makes guilty knowledge one of the essential elements of the offense of receiving

stolen goods. This knowledge may be actual, or it may be implied when the circumstances under which the goods were received were sufficient to lead the party charged to believe they were stolen. However, while it is true that it is not necessary that the person from whom the goods are received shall state to the person charged that the goods were stolen, and while the guilty knowledge of the person charged may be inferred from the circumstances of the receipt of the goods, still it is necessary to establish either actual or implied knowledge on the part of the person charged of the facts that the goods were stolen. The question involved is whether the person charged had knowledge of the fact that the goods had been stolen at the time he received them, and not whether a reasonably prudent man in the transaction of his business would have gained such knowledge under the circumstances. The test is as to the knowledge, actual or implied, of the defendant, and not what some other person would have believed from the facts attending the receipt of the goods. *S. v. Hamilton* (S. C.), 164 S. E., 639; *S. v. Alpert,* 88 Vermont, 191; 53 C. J., 510-11.

While we recognize that there is a conflict in the authorities as to whether, in the absence of proof that the defendant actually knew the property was stolen, it is sufficient to sustain a conviction that at the time of receiving the stolen property the defendant had knowledge of facts sufficient to satisfy a man of ordinary prudence and intelligence that the property had been stolen, we are of the opinion that the knowledge of such facts is not sufficient to establish that the defendant did "receive any . . . property . . . knowing the same to have been feloniously stolen or taken," which is an essential element of the offense against which the statute inveighs. Although it may be the rule in civil actions that knowledge of such facts as are sufficient to put a reasonably prudent man on inquiry is equivalent to notice, and that a defendant may be held to know that which he would have known had he exercised that degree of care which a reasonably prudent man would have exercised under similar circumstances, such has never been declared to be the rule with us in criminal cases.

New trial.

F. J. GUERIN v. GERTRUDE GUERIN.

(Filed 18 September, 1935.)

1. Process B c—

Where service of summons is had by publication, and the notice, as published, erroneously states that the action is pending in a county other than the one in which the action is in fact pending, the service by publication is void.

2. Judgments K c—

Where judgment is rendered by default final upon a fatally defective service of summons by publication, the judgment is void, since jurisdiction of defendant is necessary to enable the court to render a valid judgment against him.

3. Judgments K f—

The proper procedure to set aside a void judgment is by a motion in the cause.

THIS is an appeal by the plaintiff from an order of *Hill, Special Judge,* at November Term, 1934, of ALAMANCE, allowing the motion of the defendant to set aside a judgment of divorce theretofore entered in said cause at the April Term, 1934, of Alamance. Affirmed.

Duke & Bridges for plaintiff, appellant.
M. W. Nash and E. H. Smith for defendant, appellee.

SCHENCK, J. It appears from the record that the only service of summons attempted in this case was service by publication. It further appears that the notice of summons, as published in *The Alamance Gleaner,* was in the following words: "The defendant Gertrude Guerin will take notice that an action entitled as above has been started in the Superior Court of Durham County, North Carolina, and a duly verified complaint has been filed there. The purpose of said action is to secure an absolute divorce from the defendant, and the said defendant will further take notice that she is required to be and appear at the office of the clerk of the Superior Court of Alamance County, North Carolina, on 25 March, 1934, and answer or demur to the complaint or the relief therein prayed for will be granted."

It is manifest that the defendant has never been given notice of any action by her husband against her in Alamance County. The notice is that such action "has been started in the Superior Court of *Durham County,* . . ." Unless the defendant had come in by answer in the Superior Court of Alamance County, where the case was actually pending, she would not be in court at all, and any judgment against her would be without warrant of law. As was said by *Merrimon, J.,* in *Stancill v. Gay,* 92 N. C., 462, "Jurisdiction of the party, obtained by the court in some way allowed by law, is essential to enable the court to give a valid judgment against him." Since the defendant, the movant, has never been given notice of any action pending against her in Alamance County, she has never been served with process, and for that reason the judgment entered against her was void and her motion to set the same aside was properly allowed. "A void judgment is no judgment, and may always be treated as a nullity. A nullity is a nullity,

and out of nothing nothing comes. *Ex nihilo nihil fit* is one maxim that admits of no exceptions." *Harrell v. Welstead,* 206 N. C., 817.

Since the judgment was void for want of valid service of process, a motion in the cause to set said judgment aside was the proper procedure, and the order allowing said motion was properly entered. *Fowler v. Fowler,* 190 N. C., 536.

Affirmed.

STATE v. C. E. SIMMS.

(Filed 18 September, 1935.)

Criminal Law I j: Arson C c—Evidence held insufficient to identify defendant as perpetrator of crime of arson.

Evidence that defendant's car was driven away from defendant's house shortly before defendant's personal property therein was destroyed by fire, and that the car had been driven to the house several times during the days preceding the fire, and that the occupants of the car were heard in the house, *is held* insufficient, in the absence of evidence that defendant was one of the occupants of the car, to resist defendant's motions for judgment as of nonsuit in a prosecution under C. S., 4245 (a), *although* there was ample evidence that the fire was of incendiary origin and destroyed personal property of defendant which had been insured by him.

APPEAL by defendant from *Warlick, J.,* at May Term, 1935, of BUNCOMBE. Reversed.

The defendant C. E. Simms was tried and convicted upon a bill of indictment charging him with violating C. S., 4245 (a), which provides that "any person who shall wilfully or maliciously burn, . . . or procure the burning of any goods, . . . or personal property of any kind, . . . with intent to injure or prejudice the insurer, . . . shall be guilty of a felony."

From judgment of imprisonment pronounced upon the verdict the defendant appealed to the Supreme Court, assigning error.

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

Redden & Redden for defendant, appellant.

SCHENCK, J. When the State had produced its evidence and rested its case the defendant moved to dismiss the action, which motion was denied, and the defendant excepted, and then the defendant introduced evidence tending to establish an alibi, and after all of the evidence in the case was concluded he again moved to dismiss the action, which motion was also denied, and the defendant again excepted. C. S., 4643. The

defendant made the denial of these motions the bases for exceptive assignments of error.

While there was ample evidence for the jury to have found that certain personal property belonging to the defendant, and insured by him, was destroyed by fire, and that the fire was of an incendiary origin, there was not sufficient evidence to have been submitted to the jury of the defendant's having burned or procured the burning of said property. The evidence most favorable to the State tended to establish that the defendant closed up and left his house, in which the burned property was located, on Friday, about noon, 18 December, 1931, and that the automobile of the defendant was seen at his house at 5:30 Friday afternoon, and remained there until 11:30 that night, during which time noises were heard in the house, and that said automobile was seen to leave said house about 5:30 the following Saturday morning; and that the automobile of the defendant was driven to the house of the defendant, wherein the property was located, between 9 and 9:30 o'clock Monday night, 21 December, and remained near there until between 12:30 and 1:00 o'clock the next morning, when it was driven away, and that the fire was observed about ten or fifteen minutes thereafter. None of the witnesses who saw the automobile, which they identified as that of the defendant, were able to identify the defendant as one of the persons in said automobile, and no witness testified to having seen the defendant at the place of the fire after noon of the Friday preceding the conflagration on Monday night or early Tuesday morning. While this evidence may have been sufficient to establish that insured property was burned by those persons who came and left in defendant's automobile, it fails to establish the essential fact that one of those persons was the defendant. This failure was fatal to the State's case, and the motions to dismiss the action should have been sustained. *S. v. Yates, ante,* 194.

The judgment of the Superior Court is

Reversed.

A. G. BOBBITT, J. T. BOBBITT, MRS. ARTELIA HIGHT, AND MRS. CORA H. HOWELL *v.* OXFORD NATIONAL BANK, R. R. HERRING, E. N. CLEMENT, JOHN S. WATKINS, E. A. HUNT, AND A. H. POWELL, TRUSTEES FOR FIRST NATIONAL BANK OF GRANVILLE, ITS CREDITORS AND STOCKHOLDERS.

(Filed 18 September, 1935.)

1. Banks and Banking C b—National bank receiving trust deposit must keep same segregated or secured by bonds.

It is the duty of a national bank to segregate all assets held by it in any fiduciary capacity from its general assets, and to keep separate books

and records showing in proper detail all transactions engaged in by it in its fiduciary capacities, and if any of such funds are used in the conduct of the bank's business, the bank must first secure such funds by Government bonds or other securities set aside in its trust department. U. S. Code, Anno., Title 12, Banks and Banking, sec. 248.

2. **Banks and Banking C e—Held: National bank accepted trust created by will by accepting deposit and discharging duties under the trust.**

Testator directed that a portion of his estate be deposited in a designated national bank in trust for his daughter for her life, and the income therefrom be paid to her, and that upon her death the principal be paid to designated beneficiaries. The bank accepted the deposit and paid the daughter four per cent on the deposit per year, and used the funds in its general banking business by depositing securities in its trust department. *Held:* The bank, by its acts, accepted the trust created by the will and exercised control over the funds as trustee, and neither the bank nor its trustees in liquidation can successfully contend that such deposit was a time deposit.

3. **Banks and Banking H e—Claimants held entitled to lien on bonds set apart as security in trust department by national bank.**

A national bank accepted a trust deposit under the terms of a will, and later transferred the deposit to its trust department and used the funds in its general banking business, but set aside in its trust department bonds and securities sufficient to cover trust funds so used, as required by U. S. Code, Anno. Title 12, Banks and Banking. *Held:* Upon the bank's insolvency, the beneficiaries of the trust are entitled to a lien on the bonds so set aside in the trust department, in addition to their claim against the estate of the bank.

APPEAL from *Sinclair, J.,* at April Term, 1934, of GRANVILLE. Reversed.

This case was heard upon the following agreed statement of facts:

"1. That the plaintiffs are the devisees and legatees under the last will and testament of T. E. Bobbitt, late of Granville County, which said last will and testament was duly probated and is of record in the office of the clerk of the Superior Court of said county of Granville.

"2. That the defendant Oxford National Bank is a banking institution, chartered under the laws of the United States, and the defendants R. R. Herring, E. N. Clement, John S. Watkins, E. A. Hunt, and A. H. Powell are liquidating trustees, to whom have been transferred certain assets of the First National Bank of Granville, now in process of liquidation.

"3. That the Oxford National Bank purchased certain assets of the said First National Bank of Granville under an agreement signed by unsecured creditors of said bank owning more than seventy-five per cent of the unsecured claims against said bank, and agreed to pay in cash to the unsecured creditors of the said First National Bank of Granville

sixty per cent of the claims, and in its answer filed in this cause has signified both its ability and willingness to pay sixty per cent of the amount hereinafter mentioned.

"4. That the plaintiffs have brought this action for the purpose of establishing against said Oxford National Bank and/or said liquidating trustees of the First National Bank of Granville, as a preferred claim, the deposit hereinafter described.

"5. That Item Three of the last will and testament of T. E. Bobbitt, deceased, is in words and figures as follows, to wit:

" 'ITEM THREE.

" 'All of the residue and remainder of my estate I direct to be divided into four equal parts or shares: I give and bequeath unto each of my sons, A. G. Bobbitt and J. T. Bobbitt, and to my daughter, Artelia Hight, their heirs and assigns, one of said shares in fee simple, and should either of my said sons, or my said daughter, die before I do, leaving issue, then the issue of such deceased child or children shall take the part or share to which the parent, if living, would be entitled; the other one-fourth share I direct my executors to deposit in the National Bank of Granville, of Oxford, N. C., to be held by said bank in trust for the use and benefit of my daughter, Cora H. Howell, for and during the term of her natural life, the annual income and interest on the same to be paid over to her, and at the death of my said daughter, Cora H. Howell, the said amount or share so deposited in the said bank shall be equally divided between my two sons, A. G. Bobbitt and J. T. Bobbitt, and my daughter, Artelia Hight, share and share alike, and should either of my said sons or my said daughter die before the said Cora H. Howell, then the share, or interest, of such deceased son or daughter shall pass to the issue of said deceased child, and such issue shall be entitled to receive the part or share thereof to which the parent, if living, would be entitled; and it is expressly stipulated and directed by me that each of my sons and daughters shall pay over to my beloved wife, or to someone for her use and benefit, four per cent. annual interest on the amounts received by them from my estate for the purpose of meeting the expenses of the support, maintenance, care, and attention of my beloved wife, and if said four per cent. on said amounts shall not be sufficient to meet said expenses, then each of my children shall contribute pro rata to make up the amount of said deficiency, and the said National Bank of Granville, in the disbursement of the interest and income on the amount deposited therein for my said daughter, Cora H. Howell, shall pay said four per cent. and the pro rata share, which may be required to be paid under the terms above set out.'

"6. That on 1 February, 1928, the executors of T. E. Bobbitt, deceased, drew a check in the sum of $4,401.59 on their account as executors in the National Bank of Granville, and deposited the same in said bank under the following styled deposit: 'The National Bank of Granville, Trustee for Cora H. Howell.'

"7. That a pass book was issued by said bank and delivered to said executors, showing said deposit.

"8. That said deposit was set up by the bank as an interest-bearing deposit, or account, and the National Bank of Granville paid, until its merger with the First National Bank of Oxford, interest on said account to the said Cora H. Howell at the rate of four per cent from the date of such deposit until and including 4 March, 1933.

"9. That after the date of said deposit, as aforesaid, in the National Bank of Granville, said bank and the First National Bank of Oxford merged under the style of the First National Bank of Granville, which said bank succeeded to the property and property rights of both the National Bank of Granville and the First National Bank of Oxford.

"10. That on 11 February, 1932, the principal of this deposit, to wit, $4,401.59, was transferred by the First National Bank of Granville from the individual ledger of said bank to the trust ledger kept by said bank.

"11. That after said transfer this account and all other accounts on said trust ledger were secured at all times by bonds set aside for the purpose, having at all times a fair market value in excess of the total amounts appearing on said trust ledger.

"12. That officers of the First National Bank of Granville on numerous occasions made statements to the plaintiffs that this account had been transferred to the trust ledger, and that all amounts appearing on said trust ledger were adequately secured by bonds set aside for the purpose.

"13. That the First National Bank of Granville was closed by proclamation of the President of the United States on 4 March, 1933, since which time it has not been able to open and perform general banking functions; that said bank is now in process of liquidation.

"14. That the total deposits appearing on the trust ledger of said bank at the time said bank was closed amounted to $21,118.45.

"15. That said bank had in cash at the time it closed the sum of $29,386.95.

"16. That the National Bank of Granville and the First National Bank of Granville were authorized and empowered to act in all fiduciary capacities and relationships.

"17. That the funds in controversy in this action were immediately upon their deposit in said bank commingled with other assets belonging to said bank, and were at all times used by said bank in the conduct of the bank's business generally.

"18. That the plaintiffs contend that said deposit constitutes a preferred claim against the First National Bank of Granville, and is entitled to payment in full, and the defendants contend that such deposit is an ordinary interest-bearing deposit and entitled to participate in the distribution of the assets of the First National Bank of Granville as an unsecured claim only."

His Honor signed the following judgment:

"This cause coming on to be heard before the undersigned judge presiding at the April Term, 1934, of the Superior Court of Granville County, and attorneys representing the plaintiffs and defendants having agreed to waive a jury trial, and having also agreed upon the facts, a statement of which is hereto attached and made a part hereof:

"It is now, upon such agreed facts, considered, adjudged, and decreed that the plaintiffs' claim declared on in this action is neither a preferred nor a secured claim against the First National Bank of Granville, and the plaintiffs are entitled only as other unsecured creditors of the First National Bank of Granville to participate in the assets of said bank transferred and assigned to R. R. Herring, E. N. Clement, John S. Watkins, E. A. Hunt, and A. H. Powell, trustees for said bank.

"It is further considered, adjudged, and decreed that the plaintiffs have and recover of the defendant Oxford National Bank sixty per cent of the sum of $4,401.59, together with such costs as accrued up to the time of the filing by said Oxford National Bank of its answer, to wit, on 21 February, 1934, said judgment as to said Oxford National Bank to be discharged by payment by said Oxford National Bank of said sixty per cent of said $4,401.59, and such costs, into the office of the clerk of the Superior Court of Granville County.

"This judgment shall in no wise prejudice any rights that the plaintiffs may have to participate as other unsecured creditors may participate in any and all assets formerly belonging to the First National Bank of Granville, and transferred and assigned for the purpose of liquidation to R. R. Herring, E. N. Clement, John S. Watkins, E. A. Hunt, and A. H. Powell, liquidating trustees of said bank."

To the foregoing judgment the plaintiffs excepted and appealed to the Supreme Court, assigning errors.

J. P. and J. H. Zollicoffer and T. Lanier for plaintiffs, appellants.
Royster & Royster for defendants, appellees.

SCHENCK, J. It is contended by the plaintiffs, appellants, that since the banks involved in this case were all national banks, the funds in controversy, namely, one-fourth of the residue of the estate of the late T. E. Bobbitt, deceased, were funds held in trust by the bank and used

by the bank in the conduct of its own business, and that upon failure of the First National Bank of Granville, they, as beneficiaries of said funds, had a lien upon the United States bonds and other securities set aside for the protection thereof; and they invoke section 248, subsection (k), of the chapter entitled "Federal Reserve System," United States Code Anno., Title 12, Banks and Banking, at page 319, sec. 248, which, after making provision for national banks to act as trustees, executors, administrators, guardians, and in other fiduciary capacities in which State banks come in competition with national banks, reads as follows:

"(k) . . . National banks exercising any or all of the powers enumerated in this subsection (k) shall segregate all assets held in any fiduciary capacity from the general assets of the bank, and shall keep a separate set of books and records showing in proper detail all transactions engaged in under authority of this subsection. . . .

"No national bank shall receive in its trust department deposits of current funds subject to check, or the deposit of checks, drafts, bills of exchange, or other items for collection or exchange purposes. Funds deposited or held in trust by the bank awaiting investment shall be carried in a separate account and shall not be used by the bank in the conduct of its business unless it shall first set aside in trust department United States bonds or other securities approved by the Federal Reserve Board.

"In the event of the failure of such bank, the owners of the funds held in trust for investment shall have a lien on the bonds or other securities so set apart, in addition to their claim against the estate of the bank."

It was the duty of the First National Bank of Granville to segregate all of the assets held by it in any fiduciary capacity, including the funds in controversy, from the general assets of the bank, and to keep a separate set of books and records showing in proper detail all transactions engaged in by it in its fiduciary capacities; and if any of the trust funds were used in the conduct of the bank's business, it was the duty of the bank to first set aside in its trust department United States bonds or other securities to secure the fund so used, so that, in the event of failure, the owners of the fund so used should have a lien on such bonds or securities, in addition to their claim against the estate of the bank.

The bank did not keep the funds in controversy separate from its general assets, but elected to use them in the conduct of its business by depositing United States bonds or other securities to secure the same. The bank and its successor trustees are therefore bound by its acts in depositing security therefor and using the funds in its business.

The intention of the statute invoked is to protect beneficiaries of trust funds, by having the bank to either keep the trust funds segregated from its general assets or by securing such trust funds with proper securities.

The bank received the funds in controversy and deposited the same to its own credit, and paid interest to the beneficiaries as provided in the will of T. E. Bobbitt. In so doing the bank accepted the trust created by the terms of the will and exercised control over the funds in controversy as trustee; and, to enable it to use such funds in the conduct of its own business, it set aside in its trust department United States bonds and other securities to secure the same.

The funds in controversy were funds accepted by the bank as trustee under the terms of the will, and were used by the bank in the conduct of its business, after having been secured by securities set aside for that purpose, and we, therefore, conclude that the plaintiffs have a lien on the bonds and other securities set apart as security in the trust department of the First National Bank of Granville, in addition to their claim against the estate of the bank, and that there was error in adjudging that "the plaintiffs' claim declared on in this action is neither a preferred nor a secured claim against the First National Bank of Granville."

The case is remanded to the Superior Court that there may be there entered a judgment that the plaintiffs have and recover $4,401.59 as a preferred and secured claim against the First National Bank of Granville, together with costs in this behalf incurred.

Reversed.

TOM PEMBERTON ET AL. v. CITY OF GREENSBORO.

(Filed 18 September, 1935.)

1. Eminent Domain C e: Municipal Corporations E f—Value of business as going concern is not element of damage for taking land.

Plaintiffs brought this action against a municipality to recover damages to their land and personal property by reason of the discharge of sewage by the city through a bi-pass into a creek adjoining plaintiffs' lands, and plaintiffs introduced evidence that by reason of the city's alleged wrongful acts they had been forced to discontinue their dairy business theretofore conducted by them on the land. *Held:* Although the rendering of plaintiffs' land unfit for dairying might be an element of damage as tending to diminish the value of the land, the value of plaintiffs' dairy as a going concern is not a recoverable element of damage for the partial taking of the land under the power of eminent domain, and a new trial is awarded on defendant's exceptions to the admission of evidence and the charge of the court relating to this aspect of the case, it being apparent from the record that the value of plaintiffs' dairy business was considered by the jury in awarding the recovery.

2. Municipal Corporations H d—Individual may not recover damage to property resulting from enforcement of health ordinance.

Where the owners of a dairy are prohibited from selling milk in a city because of danger to the public health arising from the fact the city emptied sewage in a stream contiguous to the pasture, causing disease among the cattle, the owners of the dairy, in an action against the city for the partial taking of the land, may not recover damages resulting from the loss of their dairy business by reason of the enforcement of the valid ordinance, the health ordinance being governmental in character and function, and grounded in the police power.

3. Appeal and Error J g—

Where a new trial is awarded upon exceptions duly taken, other exceptions relating to matters which may not arise on a subsequent hearing need not be considered.

APPEAL by defendant from *Alley, J.*, at October Term, 1934, of GUILFORD.

Civil action to recover damages for alleged nuisance or wrongful appropriation of plaintiffs' properties.

Plaintiffs own a dairy farm on the outskirts of the City of Greensboro. On 6 December, 1930, defendant completed the installation of a "plain sedimentation trickle filter" type of sewerage disposal plant with supposed capacity of 7½ million gallons per day. A spill-way or bi-pass, with levee or dike, to take care of any overflow, due to impediment of operation, freshet, snow, ice, etc., was constructed from the plant, along the edge of plaintiffs' property, and empties into Buffalo Creek. When sewage is bi-passed, it sometimes overflows, gets upon plaintiffs' lands, and is injurious to their pasture, farming operations, etc. In the summer of 1931, plaintiffs' lands became inoculated with anthrax germs which passed through defendant's sewerage system, and their entire dairy business was destroyed. This suit is to recover for the resultant damages.

Over objections and exceptions, duly entered, the plaintiff was allowed to testify as follows:

"Q. Did you have Dr. Hudson (City Health Officer) come out there and see the conditions around your place?

"A. No, sir, he came on his own hook. He told me I could not sell any more milk.

"Q. After this group died, did Dr. Hudson make any new order about selling milk?

"A. Yes, sir, that we could start again on the first Monday in September, I think it was. We started to deliver milk on Monday morning, and on Monday night we found another dead cow, and we immediately got in touch with Dr. Moore and Dr. Hudson, and they said sell no more milk. We have not sold any since."

And further:

"Q. Now, Mr. Pemberton, about what was the capacity per day of your dairy in the production of milk?

"A. About 225 gallons. I have been selling that milk in Greensboro. (By the court: Gentlemen, that evidence is admitted, not for the purpose of showing the measure of damages, but is limited to the purpose that you may have before you the entire situation.)

"Q. What was the approximate monthly earning of your dairy, immediately prior to the act complained of?

"A. From $1,200 to $1,500 a month.

"Q. And after the acts complained of, what were you able to earn in the prosecution of the dairy business referred to?

"A. Nothing."

At the close of plaintiffs' evidence, the court made the following ruling for the guidance of the jury: "As to plaintiffs' production, the amount of milk, etc., that they received from their dairy . . . and their earnings, I will let my former ruling stand. You are to consider that, not as any measure of damages, but only to the end that you may have before you . . . the entire situation."

As bearing on the same matters, the following excerpts, taken from the charge, are assigned as errors:

1. "Now, the plaintiffs have offered evidence tending to show that following those instructions from Dr. Hudson, which they did not feel like other than to obey, their dairy business was stopped . . . virtually destroyed, and the plaintiffs commenced to get rid of such of their cattle as had not died, etc."

2. "So, the plaintiffs contend, gentlemen, that their business was destroyed and the value of their land impaired so that it is practically worthless now, and that you ought to award them permanent damages in the amount claimed by them as the direct and proximate result of defendant's wrong."

3. "Our court has held, with respect to evidence tending to show the earnings and production of plaintiffs' dairying proposition, that it is not admissible as tending to show the measure of damages, but to aid the jury in estimating the extent of the injury sustained. It is admissible and relevant when, from the nature of the case, the amount of the damages cannot be estimated with certainty, or only a part of them can be so estimated, so that the jury may have before them all the facts and circumstances of the case having any tendency to show damages or their probable amount, so as to enable the jury to make the most intelligible and probable estimate which the nature of the case will permit."

The court refused to give the following instruction, duly requested by the defendant:

"The court instructs the jury that the plaintiffs are not entitled to recover any damages in this action by reason of any act of any public official in connection with the exercise of public authority in declaring a quarantine of plaintiffs' herd or even the destruction thereof."

The plaintiffs have cultivated their farm since 1931, raising corn, wheat, vegetables, and pasturing cattle, but their dairy business has been abandoned. The evidence is conflicting as to whether the complete abandonment of the dairy business was advisable or necessary.

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

"1. Are the plaintiffs the owners of the lands described in the complaint? A. Yes.

"2. Are the plaintiffs, Tom Pemberton and wife, Jeanie Pemberton, the owners of the personal property mentioned and described in the complaint? A. Yes.

"3. Was the plaintiffs' property injured and damaged by reason of the creation and maintenance of a nuisance by the defendant, as alleged in the complaint? A. Yes.

"4. Did the plaintiffs, within 6 months from the time the first substantial injury to their property was sustained, give notice to the defendant of their claim for damages as required by law? A. Yes.

"5. What permanent damages, if any, are the plaintiffs entitled to recover of defendant?

"(A) For the taking in whole or in part of the plaintiffs' lands by reason of the construction or the operation of the defendant's sewer system and disposal plant? A. $12,825.

"(B) For the taking in whole or in part of the personal property of the plaintiffs, Tom Pemberton and wife, Jeanie Pemberton, by reason of the construction or operation of its sewer system and disposal plant? A. $20,000."

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

Frazier & Frazier, Smith, Wharton & Hudgins and James S. Duncan for plaintiffs.

Andrew Joyner, Jr., and Sapp & Sapp for defendant.

STACY, C. J. This is the same case that was before us, on procedural questions, on two former appeals, reported in 203 N. C., 514, 166 S. E., 396, and 205 N. C., 599, 172 S. E., 196.

It is manifest from the court's rulings and the jury's verdict that plaintiffs have been awarded compensation for the loss of their dairy business. True, the judge told the jury the earnings and production of plaintiffs' dairy were not admissible as tending to show the measure of damages, still such evidence was received in order to place before the jury "the entire situation, . . . all the facts and circumstances having any tendency to show damages, or their probable amount," and "to aid the jury in estimating the extent of the injury sustained." This would seem to be at variance with the rule for the admeasurement of damages in compensation cases. *Gray v. High Point,* 203 N. C., 756, 166 S. E., 911; *Cook v. Mebane,* 191 N. C., 1, 131 S. E., 407; *Moser v. Burlington,* 162 N. C., 141, 78 S. E., 74; *Metz v. Asheville,* 150 N. C., 748, 64 S. E., 881; *Williams v. Greenville,* 130 N. C., 93, 40 S. E., 977.

There are instances, of course, *e.g.,* breach of special contract, *Oil Co. v. Burney,* 174 N. C., 382, 93 S. E., 912, rental contract, *Brewington v. Loughran,* 183 N. C., 558, 112 S. E., 257, when the value of an established and going business may properly constitute an element of recoverable damages, but not so in cases of injury to "property" growing out of the exercise of the right of eminent domain. *Sawyer v. Commonwealth,* 182 Mass., 245, 65 N. E., 52, 59 L. R. A., 726.

Speaking to the subject in the cited case, *Holmes, C. J.,* delivering the opinion of the Court, said: "It generally has been assumed, we think, that injury to a business is not an appropriation of property which must be paid for. There are many serious pecuniary injuries which may be inflicted without compensation. It would be impracticable to forbid all laws which might result in such damage, unless they provided a *quid pro quo.* No doubt a business may be property in a broad sense of the word, and property of great value. It may be assumed for the purposes of this case that there might be such a taking of it as required compensation. But a business is less tangible in nature and more uncertain in its vicissitudes than the rights which the Constitution undertakes absolutely to protect. It seems to us, in like manner, that the diminution of its value is a vaguer injury than the taking or appropriation with which the Constitution deals. A business might be destroyed by the construction of a more popular street into which travel was diverted, as well as by competition, but there would be as little claim in the one case as in the other. See *Smith v. Boston,* 7 Cush., 254; *Stanwood v. Malden,* 157 Mass., 17. It seems to us that the case stands no differently when the business is destroyed by taking the land on which it was carried on, except so far as it may have enhanced the value of the land. See *New York, New Haven & Hartford Railroad v. Blacker,* 178 Mass., 386."

And in *State v. Lumber Co.,* 199 N. C., p. 202, 154 S. E., 72, it was said: "Neither is it controverted that, unless sanctioned by statute, loss of profits from a business conducted on the property or in connection therewith, is not to be included in the award for the taking," citing *Mitchell v. U. S.,* 267 U. S., 341, and *Joslin Mfg. Co. v. Providence,* 262 U. S., 668.

The case of *Jones v. Call,* 96 N. C., 337, 2 S. E., 647, is not directly in point, as it involves no taking of property by eminent domain, still it may be cited as illustrative of one of the reasons for the rule. There, the plaintiff's business of manufacturing and selling certain patented machines was interfered with and stopped by the alleged wrong of the defendant. At the time of the interference, plaintiff's profit derived from such manufacture and sale was $6,000 per annum. It was held that an assessment which awarded to plaintiff this profit from the time of the interference to the time of the making of the referee's report was erroneous; its basis being, of necessity, partly speculative, and there being no certainty that the business would have continued to yield such profit. See, also, *Coles v. Lumber Co.,* 150 N. C., 183, 63 S. E., 736.

Again, the defendant seasonably requested the court to instruct the jury that any loss occasioned by the order of quarantine, issued by the Health Department, should not be confused with that arising out of the alleged nuisance, for which the plaintiffs sue. This was declined. On the contrary, attention was directed to the evidence tending to show that plaintiffs' "dairy business was stopped, virtually destroyed," by the order of quarantine. It seems inescapable that the value of plaintiffs' dairy business was made an element of recoverable damages in the case.

Health ordinances are governmental in character and function. They are grounded in the police power. A municipality, therefore, is not liable in damages to the citizen who sustains an injury, or suffers a loss, by reason of their valid enactment and enforcement. *Mack v. Charlotte,* 181 N. C., 383, 107 S. E., 244; *McIlhenney v. Wilmington,* 127 N. C., 146, 37 S. E., 187; *Prichard v. Morganton,* 126 N. C., 908, 36 S. E., 353; *Moffitt v. Asheville,* 103 N. C., 237, 9 S. E., 695; *Annotation,* 12 A. L. R., 247.

Of course, if plaintiffs' farm has been rendered unfit for dairying purposes, or any other to which it is adaptable, by the construction and maintenance of defendant's sewage disposal plant, as plaintiffs allege, this diminished value of the land, presupposing liability, constitutes a proper item for inclusion in the award, but a business *per se* is not "property" within the meaning of the law requiring compensation for its taking under the power of eminent domain. *S. v. Lumber Co., supra; Gray v. High Point, supra; Power Co. v. Hayes,* 193 N. C., 104, 136 S. E., 353.

If this were not so, one engaged in a business rendered unlawful by some prohibitory act, *e.g.*, prohibition law, health or sanitation ordinance, might, with propriety, ask to be compensated for the loss of his business by reason of the passage of such law or ordinance. It is not thought that this position would be regarded as tenable. *Salus populi suprema lex. S. v. Hay,* 126 N. C., 999, 35 S. E., 459. *Privatum incommodum publico bono pensatur. Daniels v. Homer,* 139 N. C., 219, 51 S. E., 992. A careful perusal of the record leaves us with the impression that the loss of plaintiffs' dairy business was one of the principal matters considered by the jury.

There are other exceptions appearing on the record worthy of consideration, but as they may not arise on another hearing, present rulings thereon, which could only be anticipatory, and perhaps supererogatory, are pretermitted.

For the errors, as indicated, a new trial must be awarded. It is so ordered.

New trial.

F. C. SHERRILL v. GURNEY P. HOOD, COMMISSIONER OF BANKS, W. B. TYER, LIQUIDATING AGENT OF THE INDEPENDENCE TRUST COMPANY, A CORPORATION; INDEPENDENCE TRUST COMPANY, TRUSTEE; AND J. A. ABERNETHY ET AL., ACTING AS TRUSTEES FOR THE CERTIFICATE HOLDERS OF THE TRUST CERTIFICATE FUND OF THE INDEPENDENCE TRUST COMPANY.

(Filed 18 September, 1935.)

1. **Usury A a—Conflicting evidence held properly submitted to the jury on the issue of whether transaction was usurious.**

A corporation was indebted to a bank in the sum of $100,000, secured by a mortgage on its property. Upon default, the mortgage was foreclosed and the property bid in by an officer of the bank. The officers of the corporation organized a new corporation, which issued its bonds in the sum of $50,000, which were bought by the trust department of the bank at par, and the new corporation paid the bank $10,000 simultaneously with the purchase of the bonds. With the net $40,000 and $60,000 raised by the officers of the corporation in cash, the new corporation bought an assignment of the bank's bid at the foreclosure sale. Plaintiff contended and offered supporting evidence that the bank advised the officers of the corporation that it could no longer carry the indebtedness, but if the corporation would reorganize and raise $60,000 in cash, the bank would loan it $40,000, but would require payment of $10,000, in addition to legal interest on the amount so loaned, and that the whole transaction was a scheme to avoid the usury laws. Defendant contended that the transaction was made in good faith and that the $10,000 was paid the bank as a *bona fide* commission for the sale of the bonds, and was within the proviso of C. S.,

2306. *Held:* The evidence in support of the conflicting allegations and contentions of the parties was properly submitted to the jury, and was sufficient to support its verdict in plaintiff's favor.

2. Mortgages E b: Usury A c—Where senior mortgage is usurious, junior lienor may compel assignment upon payment of amount due without interest.

A junior lienor is entitled to have the amount due under a senior mortgage ascertained, and the lien and notes assigned to him upon the payment to the senior lienor of the amount so determined, and when the senior lien is affected with usury, the amount that must be paid by the junior lienor before he can compel an assignment is the principal sum due without interest, and in this case the conflicting evidence as to whether plaintiff was a junior lienor was properly submitted to the jury, and its verdict in plaintiff's favor was amply supported by the evidence.

3. Usury A a—The law will look to the substance and not the form in determining whether a transaction is usurious.

When a transaction is in reality a loan of money, and the lender charges a sum in excess of interest at the legal rate, the transaction will be held usurious, regardless of what the excessive charge may be called, since the law will look to the substance and not the form, and upon conflicting allegations and evidence the question of whether the transaction is usurious is for the determination of the jury.

4. Trial E e—

If a party desires fuller or more specific instructions on any point, he should aptly tender request therefor, and any omissions or errors in the court's statement of the contentions should be brought to the court's attention in time to afford an opportunity to supply the omissions or make correction.

APPEAL by defendants from *Oglesby, J.,* at September Term, 1934, of ALEXANDER. Affirmed.

This is a civil action instituted by the plaintiff, F. C. Sherrill, wherein he alleges that he is the owner of certain notes totalling approximately $36,000 issued by the Carolina Spinning Company, a corporation, and secured by a second mortgage executed by said corporation upon its real estate, plant and machinery, and that the balance due on a prior bond issue of $50,000 secured by a prior and first deed of trust executed by said corporation upon said property, is approximately $15,265, and that bonds representing this balance are owned and held by the defendants, the liquidating agent of the Independence Trust Company and J. A. Abernethy et al., trustees for certificate holders of the Trust Certificate Fund of the Independence Trust Company, and prays the court to determine the balance due of the bonds secured by the first deed of trust, and to require the holders thereof to transfer and assign the same, together with said deed of trust, to him upon the payment to them by him of the amount so determined.

The plaintiff further alleges that the bonds secured by the first deed of trust are tainted with usury because they were issued in return for a loan of $40,000 to the Carolina Spinning Company by the Independence Trust Company, in the making of which loan the Independence Trust Company charged and required the payment of $10,000 in excess of the legal rate of interest, and for that reason said bonds draw no interest, and that when all of the amounts paid thereon are credited on the principal thereof, the balance due is approximately $15,265.

The defendants, the liquidating agent of the Independence Trust Company and J. A. Abernethy et al., trustees for the certificate holders of the Trust Certificate Fund of the Independence Trust Company, filed separate answers wherein they each deny that the plaintiff is the owner of the notes secured by the second mortgage executed by the Carolina Spinning Company, and, while admitting that they together own the unpaid bonds secured by the first deed of trust executed by said company, they allege that these unpaid bonds amount to $40,000 (less $1,179.05 credit by sale of machinery), plus interest from 1 February, 1934; and they both specifically deny that these unpaid bonds secured by the first deed of trust held by them are tainted with usury, or that their interest-bearing qualities have been in any way destroyed or impaired.

The issues submitted and answers made thereto were as follows:

"1. Did the Independence Trust Co., either for itself or as agent of the trust department of the Independence Trust Company, or the trust certificate fund of the Independence Trust Company, loan to the Carolina Spinning Company the sum of $40,000 and knowingly take, receive, reserve, or charge thereon a greater rate of interest than six per cent, as alleged in the complaint? Answer: Yes.

"2. If so, what amount has been paid on the indebtedness evidenced by the first mortgage bonds? Answer: $24,714.05, including $2,500 paid by M. M. Rudisill for purchase of a bond in that amount.

"3. Is the plaintiff the owner and holder of an indebtedness secured by the second mortgage or deed of trust, referred to in the complaint? Answer: Yes."

From judgment adjudicating that the balance due on the bonds secured by the first deed of trust is $15,285.95 ($40,000 less $24,714.05), and that upon the payment of said amount, the plaintiff is entitled to have said bonds held by the liquidating agent of the Independence Trust Company and J. A. Abernethy, trustee for the Trust Certificate Fund of the Independence Trust Company assigned to him, and ordering and requiring said defendants to transfer and assign said bonds to said plaintiff upon the payment to them by him of said amount, the defendants appealed to the Supreme Court, assigning errors.

Burke & Burke and Carswell & Ervin for plaintiff, appellee.
Stewart & Bobbitt for Liquidating Agent of Independence Trust Company and Independence Trust Company, Trustee, defendants, appellants.
John M. Robinson and Hunter M. Jones for J. A. Abernethy et al., Trustees for the certificate holders of the Trust Certificate Fund of Independence Trust Company, appellants.

SCHENCK, J. The allegations and contentions of the plaintiff, denied and controverted by the defendants, which gave rise to the first issue as to the taking and receiving from the Carolina Spinning Company of usurious interest on a loan of $40,000 to it by the Independence Trust Company, either for itself or as trustee, are that prior to 1928 the North State Cotton Mills Company, a corporation, had executed a deed of trust to the Independence Trust Company, trustee, on its real estate, plant, and machinery, securing an indebtedness of $100,000 to said trust company which was due in December, 1928, and that the president of the Independence Trust Company had notified the officers and stockholders of the North Carolina Cotton Mills Company that said indebtedness could not be carried longer than the due date, and that said mill company was unable to meet said loan on said date; and that the president of the Independence Trust Company stated to the officers of the mill company that if they could raise $60,000, the trust company would loan them $40,000, with which to pay off the indebtedness of $100,000 due the trust company, but that the trust company would require the payment of $10,000, in addition to 6% per annum on the $40,000 so loaned, to which the officers of the cotton mill company acquiesced; and that the president of the trust company suggested that in order to evade the appearance of usury, that the officers and stockholders form another corporation and have the new corporation issue its 6% coupon bonds in the sum of $50,000 which he, said president, would sell to the trust department of the trust company for par, and that the new corporation could pay the trust company $10,000 for negotiating such sale of such bonds; that this suggested plan was carried out by securing the charter of the Carolina Spinning Company and having it issue $50,000 in 6% coupon bonds secured by first deed of trust on its real estate, plant, and machinery, which said bonds were delivered to the Independence Trust Company upon delivery to said Carolina Spinning Company of a check for $50,000, and that simultaneously with the delivery of the bonds and check aforesaid, the Carolina Spinning Company delivered to the Independence Trust Company a check for $10,000, and with the net $40,000 thus obtained, and $60,000 theretofore raised by the officers and stockholders, the Carolina Spinning Company purchased an assignment of a bid of $98,000 made by one J. A. Watson, an officer thereof, for the

Independence Trust Company, at the foreclosure sale of the deed of trust securing the $100,000 indebtedness to the trust company by the former corporation, the North Carolina Cotton Mills Company, and took deed for the real estate, plant, and machinery of said corporation from the trustee therein, namely, the Independence Trust Company.

The plaintiff contends that the suggested plan that a new charter be procured, and that bonds be issued in the sum of $50,000, and that $10,000 be paid as a commission for negotiating the sale thereof, was a scheme and subterfuge to evade the laws against usury, and to collect more than six per centum per annum on a loan of $40,000 to the Carolina Spinning Company by the Independence Trust Company; and that in collecting the $10,000 check, in addition to the 6% per annum provided in the bonds, the Independence Trust Company took and received on a loan of $40,000, a greater rate of interest than is allowed by law.

The defendants, on the contrary, allege and contend that the plan followed in abandoning the old corporation, the North Carolina Cotton Mills Company, and in organizing of a new corporation, the Carolina Spinning Company, to buy the assets of the old corporation by taking an assignment of the bid of the highest bidder at the foreclosure sale under the deed of trust securing the $100,000 indebtedness of the old corporation to Independence Trust Company, and financing such plan by raising $60,000 among the officers and stockholders, and $40,000 from a sale at par of a $50,000 coupon bond issue of the new corporation, secured by a first deed of trust, procured by paying a $10,000 commission to the Independence Trust Company for negotiating such sale, was a legitimate sale of coupon bonds of a private corporation, made in good faith, and within the provision of the last sentence of the statute against taking and receiving usury (C. S., 2306), which reads: "Nothing contained in the foregoing section, however, shall be held or construed to prohibit private corporations from paying a commission on or for the sale of their coupon bonds, nor from selling such bonds for less than the par value thereof."

These adverse allegations and contentions of the parties, plaintiff and defendants, gave rise to the first issue submitted, which clearly presented the determinative question as to whether the transaction between the Carolina Spinning Company and the Independence Trust Company was a loan of $40,000 upon which usurious interest was charged, or was a bona fide sale of coupon bonds in the sum of $50,000, for the negotiation of which $10,000 was honestly paid. There was evidence tending to support the allegations and contentions of both parties, the issue was presented under a clear and impartial charge, and the jury found in favor of the plaintiff.

The second issue was answered by the court by consent.

The third issue arose upon the plaintiff's allegation that he was the owner of notes secured by a second mortgage of the Carolina Spinning Company on the same property as that upon which the first deed of trust securing the bonds for $50,000 was given, namely, the real estate, plant, and machinery of said company, and the denial of such allegation by the defendants. This issue was likewise submitted to the jury under a fair and impartial charge, and was likewise answered in favor of the plaintiff. There was ample evidence to support such answer.

The appellants stress their objections and exceptions to the denial by the court of their motions for judgment as of nonsuit, and address their argument more particularly to the evidence as it relates to the first issue.

It is well settled in this jurisdiction that a junior mortgagee, or the holder of notes secured by a second mortgage, has the right to have the amount due under a senior mortgage, or deed of trust, ascertained and definitely determined, and upon the payment of the sum so determined, to take an assignment of the senior mortgage or deed of trust, and of the notes or bonds secured thereby; and that when the senior mortgage or deed of trust is affected by usury, the amount to be paid by the junior mortgagee or holder of notes secured by a junior mortgage, before he can require the assignment, is the principal sum due, without interest, *Broadhurst v. Brooks,* 184 N. C., 123, and that when an issue is raised by the pleadings involving the exaction of usury, that such issue should be submitted to a jury for determination, *Wilson v. Trust Co.,* 200 N. C., 788. It is also a well settled principle of law with us that when a transaction is in reality a loan of money, whatever may be its form, and the lender charges for the use of his money a sum in excess of interest at the legal rate, by whatever name the charge may be called, the transaction will be held to be usurious, and in determining the nature of the transaction, the law considers the substance and not the mere form or outward appearances. *Pratt v. Mortgage Company,* 196 N. C., 294.

There are no exceptions taken to the admission or exclusion of evidence, and we have carefully examined the assignments of error which assail the charge of the court, and are of the opinion that they should not be sustained. If the defendants desired fuller or more specific instructions than those given in the general charge, they should have asked for them, and not waited until the verdict had gone against them, *Simmons v. Davenport,* 140 N. C., 407, and if their contentions were not properly stated, the defendants should have called the attention of the court to any omissions or errors, so that they could have been supplied or corrected. *Manufacturing Company v. Building Company,* 177 N. C., 103.

The judgment of the Superior Court, which is in accord with the verdict, must be

Affirmed.

H. L. GHORMLEY AND WIFE, BETTIE J. GHORMLEY (ORIGINAL PARTIES PLAINTIFF), AND A. F. GHORMLEY, ADMINISTRATOR OF THE ESTATE OF H. L. GHORMLEY, DECEASED, AND THE HEIRS AT LAW OF THE SAID H. L. GHORMLEY, VIRGIL GHORMLEY, VOLA GHORMLEY PATTERSON, ANNIE GHORMLEY BLANTON, MELLIE GHORMLEY TILLERY, BERTIE GHORMLEY WIGGINS, C. C. GHORMLEY, AND MATTIE BELL GHORMLEY SMITH (ADDITIONAL PARTIES PLAINTIFF), v. ABRAHAM HYATT AND T. A. MORPHEW, TRUSTEE.

(Filed 18 September, 1935.)

1. **Fraud B b—Each of the essential elements of fraud must be pleaded.**

The essential elements of fraud are a representation, its falsity, *scienter*, deception, and injury, and each of the essential elements of fraud must be clearly alleged in order for the pleader to avail himself of the defense.

2. **Fraud A e—Evidence held insufficient to show deception, and refusal to submit issue of fraud was not error.**

All the evidence tended to show that plaintiffs' son, acting as agent for his parents, negotiated a loan for plaintiffs, that the son paid ten per cent interest on the loan for nine and a half years, and that thereafter plaintiffs voluntarily executed a renewal note and mortgage bearing six per cent interest, and that their acknowledgment of the renewal mortgage was properly taken without semblance of fraud. *Held:* Plaintiffs' contention that the renewal note and mortgage were obtained by false and fraudulent representations of the lender that the principal of the debt was still due cannot be sustained, and the trial court's refusal to submit an issue of fraud was not error, the jury having found, upon a subsequent issue under correct instructions from the court, that the plaintiffs knew their son paid the interest on the original note.

3. **Mortgages H b: Usury A b—**

Where plaintiff seeks to enjoin the foreclosure of a mortgage and pleads usury, plaintiff must tender the principal of the debt, plus six per cent interest, since, upon invoking equity, the only forfeiture he may demand is the amount of interest in excess of the legal rate.

4. **Limitation of Actions B a—**

A cause of action to recover the penalty for usury accrues immediately upon the payment of the usurious charge, and when there is a series of such payments the cause of action as to each payment is barred upon the expiration of two years from the date of payment. C. S., 442 (2).

5. **Limitation of Actions B b—Held: More than three years elapsed after payment of usury should have been discovered, and action was barred.**

Plaintiffs contended that usurious interest was paid defendant by their agent without their knowledge, and that therefore their action to recover the penalty for usury was not barred although instituted more than two years after the last usurious payment, C. S., 441 (9). *Held:* Plaintiffs are not entitled to invoke the statute, it appearing that plaintiffs did not institute action until more than three years after they had executed a note

bearing six per cent interest in renewal of the original note upon which usury was paid, and that plaintiffs were negligent in asserting their rights if any they had.

6. **Usury C c—Held: Plaintiffs waived benefit of usury statutes by executing renewal note at legal rate of interest.**

Plaintiffs' son negotiated a loan for plaintiffs, and paid usurious interest thereon for plaintiffs to the lender for nine and a half years. Thereafter plaintiffs voluntarily executed a renewal note and mortgage at the legal rate of interest for the principal amount originally borrowed, and plaintiffs' acknowledgments of the renewal mortgage were properly taken. Upon default in the payment of the renewal note, and advertisement of the property, plaintiffs sought to restrain foreclosure and pleaded usury. *Held:* By executing the renewal note and acknowledging the debt in the principal amount of the renewal note, plaintiffs are precluded from setting up usury in the original transactions, since the party paying usury may waive the benefit of the usury statutes, and the cause of action to recover the penalty for usury being barred, defendant is entitled to judgment for the amount of the renewal note plus the legal interest called for by it upon the verdict of the jury for this amount under instructions that plaintiffs would not be bound by the payment of usurious interest by their son unless they had knowledge of such payments.

APPEAL by plaintiffs from *Rousseau, J.*, and a jury, at June Term, 1935, of GRAHAM. No error.

Since the beginning of this action the original parties plaintiff have died, and their legal representatives were duly made parties to this action.

(1) On 26 February, 1917, the plaintiff H. L. Ghormley (Bettie J. Ghormley was the wife of H. L. Ghormley) borrowed from the defendant Abraham Hyatt the sum of $1,200, and executed a note bearing six per cent interest, and to secure same made a deed of trust on certain land to R. B. Slaughter, and the same was duly recorded. The negotiations for the loan were made through C. C. Ghormley, a son of plaintiffs.

(2) On 5 July, 1926, a renewal note was made by the same parties for $1,200, and a deed of trust to secure same on the land was made to T. A. Morphew, and duly recorded. Two payments of interest, $72.00 each, were made on this note.

(3) C. C. Ghormley paid each quarter $30.00 on the original note, or $120.00 a year, for nine and a half years before the renewal note was made for the $1,200 on 5 July, 1926.

The land was advertised for nonpayment of the note, under the terms of the deed of trust, by T. A. Morphew, as trustee, and this action was brought to restrain the sale. Plaintiffs' prayer is: "Wherefore, plaintiffs pray that the sale of said premises be enjoined, and for such other and further relief as to the court may seem just."

It is alleged by plaintiffs that the $1,200 note of 26 February, 1917, was reduced to $380.53 ($385.50), if only the legal rate of six per cent was charged; and as to the renewal note of 5 July, 1926, "the defendant Abraham Hyatt fraudulently, with intent to deceive, misrepresented to these plaintiffs that there was still due on said note the sum of $1,200, upon which fraudulent misrepresentation these plaintiffs relied, and executed a renewal mortgage, dated 5 July, 1926, and that said renewal mortgage was secured and obtained by the false and fraudulent representation of the said Abraham Hyatt and, as these plaintiffs are advised and believe, is void."

It is alleged by plaintiffs that as to the note of 26 February, 1917, "said Abraham Hyatt caused and required these plaintiffs and the said C. C. Ghormley to pay interest on said note at the rate of ten per cent, which payments were made quarterly, and which payments were usurious and unlawful, and that said payments were made for a period of 9½ years, to wit: $30.00 each quarter for the said period of years, and that the said defendant Abraham Hyatt charged and received said usurious interest, and that these plaintiffs demand that the interest on said note be forfeited, and that said mortgage having been fully paid, these plaintiffs demand judgment against the defendant for the excess paid on said note over said amount due. . . . If the court be of the opinion that said note should not be stripped of its interest, which these plaintiffs insist that it should be, then the defendant took, received, and charged on the said note of 26 February, 1917, the sum of ten per cent, without knowledge or acquiescence of plaintiffs, and that said payments made by plaintiffs on said note were made practically every ninety days of $30.00 per payment, and that by charging the legal rate of interest the plaintiffs were only due and owing the defendant $380.53 ($385.50), and that these plaintiffs demand an account to be taken, and stand ready, willing, and able to pay into court any and all sums due by the plaintiffs to the defendant. . . . The said Abraham Hyatt required, charged, demanded, and received interest thereon at the rate of ten per cent for ten years, which said interest was unlawful, and for which these plaintiffs are advised and believe they are entitled to recover double the amount of usurious interest paid, to wit: the sum of $1,200. Wherefore, plaintiffs demand judgment for the sum of $1,200, and for the cost of this action."

The defendant Abraham Hyatt denied the material allegations of the complaint, and in his answer says: "And for a further answer and defense to plaintiffs' alleged cause of action, and particularly to that alleged in the preceding paragraph wherein plaintiffs demand judgment against the defendant for the sum of $1,200 on account of usurious interest alleged to have been paid by plaintiffs to defendant, the defendants

aver that said interest of ten per cent paid, as aforesaid, was paid by plaintiffs to defendant Abraham Hyatt in the years 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, and 1926, which payments were made and received more than two years prior to the institution of this action, and the defendant here pleads the statute of limitations as set out in section 442, and subsection 2 and subsection 3 of said section 442, of the Consolidated Statutes in bar of plaintiffs' right to recover against the defendant. . . . The defendant here shows the court that each item of usurious interest was paid to him by the plaintiffs more than three years prior to the institution of this action by plaintiffs, and here pleads the three-year statute of limitations, as set out in section 441, and subsection 1 and subsection 2 of said section 441, of the Consolidated Statutes in bar of plaintiffs' right to recover against him in this action."

The defendant Abraham Hyatt prays: "(1) That the plaintiffs' alleged cause of action be dismissed. (2) That he have and recover judgment against the plaintiffs H. L. Ghormley and Bettie Ghormley on the aforesaid note in the sum of $1,200, with interest thereon at six per cent from ...... July, 1929. (3) That the temporary restraining order heretofore issued at the instance of the plaintiffs be dismissed, and that the trustee, T. A. Morphew, be directed to readvertise said property for sale and expose same for sale to the highest bidder for cash, in accordance with the terms and conditions of said deed of trust."

This action was commenced on 1 July, 1933.

The issue submitted to the jury and their answer thereto was as follows: "What sum, if any, are the plaintiffs indebted to the defendant A. Hyatt? Answer: '$1,200, with interest from 31 July, 1929.' "

The court below rendered judgment on the verdict. The plaintiffs 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. L. Phillips for plaintiffs.
T. M. Jenkins and Edwards & Leatherwood for defendants.

CLARKSON, J. The court below refused to submit the following issue tendered by plaintiffs: "Was the note and mortgage of 5 July, 1926, obtained by fraud and misrepresentation, as alleged in the complaint?" We think the court below correct.

In *Electric Co. v. Morrison,* 194 N. C., 316 (317), it is said: "The essential elements of actionable fraud or deceit are the representation, its falsity, *scienter,* deception, and injury. The representation must be definite and specific; it must be materially false; it must be made with knowledge of its falsity or in culpable ignorance of its truth; it must

be made with fraudulent intent; it must be reasonably relied on by the other party; and he must be deceived and caused to suffer loss." *Stone v. Milling Co.*, 192 N. C., 585; *Peyton v. Griffin,* 195 N. C., 685; *Willis v. Willis,* 203 N. C., 517; *Plotkin v. Bond Co.*, 204 N. C., 508.

It is well settled in this jurisdiction that facts constituting fraud must be clearly alleged in order that all necessary elements of fraud may affirmatively appear. If the allegations of fraud in the complaint came within the rule, there is no evidence on the record to support same. The testimony of the clerk of the Superior Court who took the acknowledgments of H. L. Ghormley and wife, Bettie J. Ghormley, and the latter's privy examination, is to the effect that there was no semblance of fraud in the transaction. *Bank v. Dardine,* 207 N. C., 509.

It was contended by plaintiffs that C. C. Ghormley, the son of plaintiffs, was not the agent of plaintiffs in the transactions. We do not think the record bears out this contention, but this matter was left to the jury. The trial judge charged, in part: "But if you find C. C. Ghormley himself agreed to pay the interest, and that H. L. Ghormley and his wife, Bettie J. Ghormley, knew nothing about it and executed the deed of trust, then you would answer it in favor of the plaintiffs in the amount they claim is due the defendant." All the evidence was to the effect that C. C. Ghormley was acting for the plaintiffs in the entire transactions, and the renewal note for $1,200, dated 5 July, 1926, was executed voluntarily.

This is an injunctive proceeding. In *Mortgage Co. v. Wilson,* 205 N. C., 493 (494-5), it is said: "It is a familiar principle that a borrower of money who seeks equitable relief must himself deal equitably with his adversary by paying the principal and lawful interest. The only forfeiture he may enforce is the excess of the legal rate of interest. *Wilson v. Trust Co.,* 200 N. C., 788; *Edwards v. Spence,* 197 N. C., 495; *Miller v. Dunn,* 188 N. C., 397; *Adams v. Bank,* 187 N. C., 343." On the note of 5 July, 1926, there was no illegal interest charged or accepted.

There is no dispute that the plaintiffs paid usury on the note of 26 February, 1917, but the defendant Abraham Hyatt pleaded the statute of limitations.

N. C. Code, 1931 (Michie), sec. 442: "Within two years . . . 2. An action to recover the penalty for usury. 3. The forfeiture of all interest for usury."

The cause of action for the penalty of each payment of usury arises immediately and accrues upon the date of the payment. The action to recover the penalty for each usurious transaction is therefore barred under this section, upon the expiration of two years from the date of the payment. *Sloan v. Piedmont Fire Ins. Co.,* 189 N. C., 690.

C. S., 441: "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."

The usury transactions are long since barred by the statute. Sec. 441 (9) is as follows: "For relief on the ground of fraud or mistake; the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake."

The plaintiffs contend that this statute can be invoked. Not so; what rights they had, they have been negligent in asserting them.

We have examined the charge of the court below with care. We think the able and conscientious judge throughout the charge applied the law applicable to the facts. The court charged the jury clearly on the very gist of plaintiffs' rights under the facts: "The court instructs you they would not be bound by what the agent did if they did not know it, and if you find the $120.00 a year was paid to retire the interest and principal, and that would reduce it to about $385.50 in 1930, and the plaintiffs contend you ought to find it is $385.50, with interest from 1930. Defendant contends plaintiffs were bound to know what was happening, that the son got the money for the use of himself and his brother, and that when the new note was taken up there it was for $1,200, and that they knew it was being paid at the rate of ten per cent per annum. It is a matter for you. Take the case and say in what amount, if any, the defendant is entitled to recover of the plaintiffs."

It is said in *Ector v. Osborne,* 179 N. C., at p. 669: "A borrower is not, however, compelled to plead usury, and as the defense is personal to him it may be waived. . . . (p. 670). 'The statutes of usury being enacted for the benefit of the borrower, he is at liberty to waive his right to claim such benefit and pay his usurious debt, if he sees fit to do so. It is, therefore, held that when the debtor becomes a party to a general settlement of preceding usurious transactions, made fairly and without circumstances of imposition, his recognition and the amount agreed to be due as a new obligation will preclude his setting up the old usury in defense of the new debt. This rule is not held to apply, however, unless it is clear that the debtor has fully accepted the settlement as a just debt, separate and distinct from the preceding usurious obligations.' 39 Cyc., 1024." *Dixon v. Osborne,* 204 N. C., 480 (485-6).

We think the issue submitted correct, and in the numerous exceptions and assignments of error we see no prejudicial error.

The defendant Abraham Hyatt testified: "C. C. Ghormley agreed to pay ten per cent interest and I agreed to accept it. I did not know that was illegal rate. I learned that it was illegal before this note was renewed. . . . I learned that ten per cent was an illegal rate later

on. That is the reason I renewed the note." The renewal note bore six per cent interest, and the two payments for two years' interest was $72.00 each year.

The charging and accepting of illegal interest has always been looked upon by the courts with disfavor. Usury is a source of untold wrong and oppression. The only court now to appeal to is one of conscience—in the breast of the defendant Abraham Hyatt. On the trial of the action, we find

No error.

W. H. ROWE v. THE ROWE-COWARD COMPANY, EMPLOYER, AND UNITED STATES FIDELITY AND GUARANTY COMPANY, CARRIER.

(Filed 18 September, 1935.)

1. Master and Servant F a—Where employee does not obtain judgment on his counterclaim in action by third person, he may proceed under the act.

Claimant filed proceedings for compensation before the Industrial Commission, and pending an award, filed a counterclaim in a suit at law instituted against him by a third person, which suit involved the same accident resulting in the injuries for which he sought compensation. Claimant recovered nothing on his counterclaim, but judgment was rendered in favor of the third person in the suit at law. *Held:* Claimant was not barred by filing the counterclaim from thereafter prosecuting his claim before the Industrial Commission, since claimant recovered no judgment on the counterclaim, and the intent of the statute, N. C. Code, 8081 (r), being that an injured employee should be compensated either by an award or by the "procurement of a judgment in an action at law," and the rights of the parties being determined by the act prior to its amendment by ch. 449, Public Laws of 1933, the accident having occurred prior to the effective date of the amendment.

2. Same—

The Compensation Act will be liberally construed to afford employees compensation for injuries sustained by them, and technicalities and refinements are not looked on with favor by the courts.

3. Master and Servant F h—

In this case *held:* There was sufficient competent evidence to sustain the Industrial Commission's finding that claimant was totally disabled for a period of forty-eight weeks.

4. Master and Servant F i—

The findings of fact by the Industrial Commission will be sustained on appeal when they are supported by any competent evidence.

5. Master and Servant F a—Evidence held sufficient to support finding that claimant, at time of injury, was an employee and not an executive.

The evidence tended to show that claimant, the secretary-treasurer of defendant employer, went to another city to inspect a job which defendant employer was completing, that claimant did manual labor on the job in installing radiators, and that claimant was injured in an automobile accident occurring while he was returning home from the job. The Industrial Commission affirmed the finding of the hearing Commissioner that claimant, at the time of his accidental injury, had not been off on a mission of a purely executive nature, but at the time was doing the work of an ordinary laborer or employee, and awarded compensation. *Held:* The evidence was sufficient to support the Commission's finding that claimant, at the time of the injury, was an employee, which finding is conclusive upon the courts upon appeal.

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

APPEAL by defendants from *Devin, J.*, at February Term, 1935, of DURHAM. No error.

This was a claim under the Workmen's Compensation Act of North Carolina, in which the claimant sought to recover compensation for injuries which he alleges were sustained by him in the course of his employment.

The agreed facts are as follows: On 29 March, 1933, about 11 P. M., the claimant, while returning to his home in Durham from Lexington, North Carolina, where he had been on business for his company, received injuries when the car which he was driving collided with an automobile being driven by one C. H. Humphreys.

On 13 July, 1933, the claimant, through his counsel, Guthrie & Guthrie, filed claim for compensation, etc., and request for hearing with the North Carolina Industrial Commission; and pursuant to which a hearing was set by the Commission for 5 September, 1933, and all parties duly notified.

On 25 August, 1933, the claimant addressed a letter to the North Carolina Industrial Commission stating, among other things, the following: "I understand the hearing has been set for 5 September. For the present, I do not desire to press this claim, and therefore, withdraw it until further notice to you if I shall conclude later on to renew my claim before your Commission. I have a suit pending in Durham Superior Court against Mr. Humphreys which I shall press, and I do not desire, unless you are otherwise notified, to press my claim before the Commission."

C. H. Humphreys had brought suit against the claimant in the Superior Court of Durham County. On 22 May, 1933, the claimant filed answer to this suit, and set up a counterclaim for the sum of $15,000, which was $5,000 in excess of his insurance liability, for damages sus-

tained by him as the direct and proximate result of the alleged careless, reckless, and negligent acts of the said C. H. Humphreys causing the collision.

The case came on for hearing before the Superior Court of Durham County at the April Term, 1934. The claimant being represented by Fuller, Reade & Fuller, counsel for the Insurance Company, which carried liability on the claimant's car; and Guthrie & Guthrie, special counsel employed by the claimant himself. Upon issues properly submitted to the jury, an adverse judgment was entered against the claimant, allowing him nothing on his counterclaim and awarding damages in favor of Humphreys against the claimant in the sum of $1,625.

Thereafter, on 17 July, 1934, the claimant addressed a letter to the North Carolina Industrial Commission, referring to his previous correspondence and stating the following: "The suit in question has been tried in the Superior Court and I did not recover against Mr. Humphreys, and have received no compensation for my injuries by virtue of the suit, and I desire please to now proceed with the prosecution of my claim before the Commission."

Pursuant to his request, notices were sent out by the Commission to parties interested, to the effect that the case had been set for hearing in Durham on 4 September, 1934, on which date the case duly came on for hearing before Commissioner Dorsett. Commissioner Dorsett denied compensation and dismissed the case. The claimant appealed from the award of the Commissioner Dorsett, to the Full Commission, and, upon review, the Full Commission reversed and set aside the award of Commissioner Dorsett, and directed the payment of compensation. Whereupon the defendants appealed to the Superior Court of Durham County.

The case was duly heard upon the record before his Honor, W. A. Devin, who approved and confirmed the award of the Full Commission; thereupon, the defendants excepted, assigned error, and appealed to the Supreme Court.

Guthrie & Guthrie and E. C. Bryson for plaintiff.
Thomas A. Banks for defendants.

CLARKSON, J. The *first* question presented: "Did the filing of a counterclaim in an action at law brought by a third party against the employee bar the employee from later proceeding under the Workmen's Compensation Act when the judgment on counterclaim was unfavorable to the employee?" We think not, under the facts and circumstances of this case.

N. C. Code 1931 (Michie), sec. 8081 (r), (Public Laws 1929, ch. 120, sec. 11) in part is as follows: "The rights and remedies herein granted

to an employee where he and his employer have accepted the provisions of this chapter, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employees, his personal representative, parents, dependents, or next of kin, as against employer at common law, or otherwise, on account of such injury, loss of service, or death: *Provided, however,* that when such employee, his personal representative, or other person may have a right to recover damages for such injury, loss of service, or death, from any person other than such employer, he may institute an action at law against such third person or persons before an award is made under this chapter, and prosecute the same to its final determination; but either the acceptance of an award hereunder, or the procurement of a judgment in an action at law, shall be a bar to proceeding further with the alternate remedy," etc.

It was admitted by defendants that "the defendant employer had five or more employees, and that the U. S. F. & G. Company was the insurance carrier, and admitted that the plaintiff suffered an injury by accident on 29 March, 1933."

It will be noted that the plaintiff filed his claim for compensation with the N. C. Industrial Commission. A suit was instituted by C. H. Humphreys against plaintiff, growing out of the automobile collision, claiming damage, and the plaintiff in this action sets up a counterclaim for damage. Humphreys recovered a judgment of $1,625 against plaintiff, and plaintiff was allowed nothing on his counterclaim. Thereafter, plaintiff pursued his remedy before the Industrial Commission.

"It is generally conceded by all courts that the various compensation acts were intended to eliminate the fault of the workman as a basis for denying recovery." *Chambers v. Oil Co.,* 199 N. C., 28 (33); *Michaux* v. *Bottling Co.,* 205 N. C., 786 (788).

In the *Humphrey case,* being an action at law, fault would bar a recovery, as it no doubt did, as the plaintiff recovered nothing in that case.

The act to be construed says, "but either the acceptance of an award hereunder, or the procurement of a judgment in an action at law, shall be a bar to proceeding further with the alternate remedy." Plaintiff did not procure a judgment in the *Humphreys case*—an action at law.

The section in controversy has been heretofore considered by this Court. In *Brown v. R. R.,* 202 N. C., 256 (264), is the following: "It is further provided in sec. 11 of ch. 120, Public Laws 1929 (N. C. Code, 1931, sec. 8081 [r]), that when 'such employee, his personal representative, or other person may have a right to recover damages for such injury, loss of service, or death, from any person other than such employer, he may institute an action at law against such third person or persons before an award is made under this chapter, and prosecute the

same to its final determination; but either the acceptance of the award hereunder, or the procurement of a judgment in an action at law, shall be a bar to proceeding further with the alternate remedy.' This provision manifestly precludes an employee who has been awarded and paid compensation by his employer for an injury under the provisions of the North Carolina Workmen's Compensation Act, from prosecuting an action against a third person for damages for the same injury; and also precludes an employee who has recovered damages for his injury from a third person, from claiming compensation from his employer under the act."

In *Phifer v. Berry,* 202 N. C., 388 (392), we find: "The first provision restricts the employee, his personal representative, or other person, to recovery by one of the alternate remedies. If he has a right to recover damages from any person other than the employer, he may institute an action at law before an award is made, and may prosecute his suit to its final determination; but if he procures a judgment in the action at law, he is barred of his remedy for an award under the Workmen's Compensation Law, and if he accepts an award, he is barred of his remedy in the action at law. He may recover by one of the alternate remedies, but not by both. Though he may proceed concurrently against the employer and a third person, he cannot recover both compensation under the act, and damages in an action at law. Honnold on Workmen's Compensation, 154, sec. 41; *Horsman v. Richmond, F. & P. R. Co.,* 157 S. E. (Va.), 158. But, as pointed out by *Connor, J.,* in *Brown v. R. R., ante,* 256, 264, this does not affect the right of the employer or of the insurance carrier who has paid the award, to maintain an action against a third party who has wrongfully caused the injury for which compensation was given."

We think the statute clearly indicates that the injured employee should be compensated either by an award under the provisions of the act, *"or the procurement of a judgment in an action at law."* The acts of this nature are usually liberally construed so that injured employees are compensated, and technicalities and refinements are not looked on with favor by the courts. The accident involved occurred on 29 March, 1933. The amendment to sec. 11, as originally written, was ratified on 12 May, 1933 (Public Laws N. C., 1933, ch. 449). It is conceded by all parties that the rights are to be determined under the section existing prior to the amendment of 1933.

The *second* question presented: "Is there competent evidence that the plaintiff was totally disabled for a period of forty-eight (48) weeks?" We think so.

The plaintiff testified: "I lost in time, 48 weeks, or 11 months." Dr. L. S. Booker testified: "I would say it was about 12 weeks before he

could resume the type of work which he has testified that he did. For the balance of the 12 months, I would say that he was partially disabled."

The Full Commission found: "According to the uncontradicted testimony of the claimant as to it, he was wholly and totally incapacitated during a period of 48 weeks, and the Full Commission so finds. The claimant received a broken nose, a broken jaw, a broken arm, two scalp wounds requiring six stitches, the loss of four teeth, and several cuts and bruises. As a result of these injuries, he incurred extensive hospital and medical bills."

It is settled in this jurisdiction that where there is any competent evidence to support findings of Industrial Commission, such findings will be sustained though reviewing court may disagree with them. *Smith v. Hauser & Co.,* 206 N. C., 562 (563).

In *Morgan v. Cloth Mills,* 207 N. C., 317 (322), we find: "It is settled by a wealth of authorities that the Industrial Commission's findings of fact on competent evidence are conclusive."

The *third* question presented: "Was the plaintiff an employee of the Rowe-Coward Construction Company within the meaning of the Compensation Act, rather than an executive officer at the time of the injury?" We think there was sufficient competent evidence for the Commission to find that plaintiff was an employee.

The plaintiff testified, in part: "I was superintendent and secretary-treasurer of the Rowe-Coward Company. On 29 March, 1933, . . . I was secretary-treasurer of the corporation, and also general superintendent of construction. I looked after plumbing and heating myself; that is in addition to my duties as officer of the company. I classified myself as an employee of the company—I was both an officer and an employee; fixed salary. . . . On the day I was injured, I had gone to Lexington for the purpose of closing out the proposition there and making final settlement. I got final payment that day. I had been there several times during the job, before the day I was injured. At the starting of the contract, I was actually on the job about two weeks, until they got the work well under way; then I left and went back at intermittent times, once or twice a week. I have been in this business since 1904. In the way of work, I have done everything from apprenticeship up. . . . The day I was injured, I had gone to Lexington for final inspection and final settlement. We were there from 2:30 to 7:30. . . . It was both an inspection tour and a labor job. I helped carry in two radiators that day; helped carry them in and connect them. I performed manual labor in connecting the radiators."

From the evidence in this case, Commissioner Dorsett found that the claimant, at the time of his accidental injury, had not been off on a

mission of a purely executive nature, but at the time was doing the work of an ordinary laborer or employee. This finding of fact was sustained and approved by the Full Commission.

In *Hunter v. Auto Co.,* 204 N. C., 723 (725), it is said: "The boundary line between employee and executive in compensation cases was sketched, by implication at least, in the case of *Hodges v. Mortgage Co.,* 201 N. C., 701. The Court said: 'The majority of the decided cases adhere to what may be called the dual capacity doctrine; that is to say, that executive officers of a corporation will not be denied compensation merely because they are executive officers if, as a matter of fact, at the time of the injury they are engaged in performing manual labor or the ordinary duties of a workman. Hence, one of the fundamental tests of the right to compensation is not the title of the injured person, but the nature and quality of the act he is performing at the time of the injury.' "

We think the evidence sufficient for the Industrial Commission to base the finding of fact that the plaintiff was an employee. "The findings of fact of a member of the Industrial Commission in a hearing before him under the Workmen's Compensation Act, approved by the Full Commission upon appeal, is conclusive upon the courts when supported by any sufficient evidence." *Southern v. Cotton Mills,* 200 N. C., at p. 165; *West v. East Coast Fertilizer Co.,* 201 N. C., 556 (558); *Morgan v. Cloth Mills, supra; Holmes v. Brown,* 207 N. C., 785 (786).

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

Affirmed.

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

GRACE W. LERTZ v. HUGHES BROTHERS, INCORPORATED, ET AL.

(Filed 18 September, 1935.)

1. **Master and Servant D b—Evidence held sufficient to be submitted to jury on issue of whether employee was acting in scope of his employment.**

The evidence, considered in the light most favorable to plaintiff upon defendant's motion as of nonsuit, tended to show that an employee of a filling station was given a ten dollar bill and instructed to get small change and get his supper, and in order to hurry back to relieve another employee, was instructed to use the car of a customer of the station, that the employee took a circuitous route and took women passengers into the car with him, but that at several places on the circuitous route he said

he was getting out to get change for his employer, and that at the time of his collision with the car in which plaintiff was riding, he was returning to the filling station for the purpose of delivering the change, which the uncontradicted evidence showed he had in his possession at the time of the accident. *Held:* There was more than a scintilla of evidence tending to show that the act complained of was within the scope of the employee's employment and in furtherance of the employer's business, and defendant employer's motion as of nonsuit on the issue was properly refused.

2. **Same—Rule of master's liability for acts of servant will be liberally construed.**

The modern tendency is to give the rule that holds a master liable for the acts of his servant when about his master's business a liberal and practical application, especially where the business of the master entrusted to the servant involves a duty owed by him to the public or third persons.

3. **Corporations K c—**

Where a corporation has been served with summons and has filed answer, the action against it does not abate upon its subsequent dissolution, C. S., 1199, and its directors are made trustees of its property by statute, C. S., 1193, 1194.

STACY, C. J., dissenting.

APPEAL by the defendant from *Frizzelle, J.,* at February Term, 1935, of NEW HANOVER. No error.

This was a civil action instituted by the plaintiff to recover damages for personal injuries alleged to have been caused by the negligence of one Joe Campbell, an employee of the defendant corporation, while acting within the scope of his employment. The issues submitted and the answers made thereto were as follows:

"1. Was Joe Campbell, at the time of the collision, acting within the scope of his employment, and in furtherance of his employer's business? Answer: Yes.

"2. Was the plaintiff injured by the negligence of the defendant, as alleged? Answer: Yes.

"3. What damage, if any, is the plaintiff entitled to recover? Answer: $2,500."

From a judgment upon the verdict, the defendant corporation appealed to the Supreme Court, assigning errors.

Kellum & Humphrey and R. M. Kermon for plaintiff, appellee.
John D. Bellamy & Sons for defendant, appellant.

SCHENCK, J. Upon the plaintiff's resting her case, and at the close of all the evidence, the defendant corporation moved to dismiss the action and for a judgment as of nonsuit, and contended that there was

not sufficient evidence upon which to submit the first issue to the jury, and upon this appeal, seeks to have the order denying this motion reversed.

The plaintiff's evidence is to the effect that the defendant corporation operated a filling station at the corner of Eleventh and Market streets in the City of Wilmington, where gasoline, oil, and other supplies were sold and cars were greased, washed, and otherwise serviced; and where one Mr. D. B. Hill, a traveling salesman, was in the habit of leaving his car over Sunday to be serviced, and that such car was left at such filling station for such purpose over Sunday, 23 February, 1930; and that at about twenty minutes of five o'clock in the afternoon of that day, Joe Campbell, a colored employee at said filling station, upon announcing his intention of going to get his supper in order to get back by five o'clock to relieve Roger Williams, a coemployee, was given by J. G. Farley, who was in charge of the filling station at that time, a ten dollar bill and a one dollar bill, and instructed to procure change therefor and to obtain as many as one hundred pennies; and that to enable Campbell to make the trip more quickly, Farley instructed him to take the car of Hill. That Campbell took the Hill car and went to his boarding place, seven blocks away, and then took a circuitous route of some three or four miles by the airport, and on Little Gordon Road drove the Hill car into the rear of the car of Mrs. Julia McLaurin, overturning it and causing serious injuries to the plaintiff, who was a passenger therein.

Since there was sufficient evidence of negligence on the part of Joe Campbell, and of serious injuries to the plaintiff proximately caused thereby, and since the jury have answered the second and third issues in favor of the plaintiff, the determinative question on this appeal is whether there was sufficient evidence to submit the first issue to the jury. The answer to this question depends upon whether there was sufficient evidence to be submitted to the jury that Campbell was acting within the scope of his employment and in furtherance of his employer's business at the time the injuries were inflicted. The contention of the defendant is that Campbell deviated from his original mission and was, therefore, not acting within the scope of his employment. The contention of the plaintiff is that Campbell, while he may have taken a circuitous route and may have taken passengers into the car while on such route, was still in pursuit of the original purposes he was sent to accomplish, namely, to get his supper and to obtain change, and to hurry back to relieve Roger Williams.

The evidence is conflicting and may have justified the answering of the first issue in the negative, but since there was more than a scintilla of evidence tending to show that the act complained of was within the

scope of the servant's employment, it was properly submitted to the jury. *Sawyer v. R. R.*, 142 N. C., 1.

"A servant is acting within the course of his employment when he is engaged in that which he was employed to do, and is at the time about his master's business. He is not acting in the course of his employment if he is engaged in some pursuit of his own. Not every deviation from the strict execution of his duty is such an interruption of the course of employment as to suspend the master's responsibility; but, if there is a total departure from the course of the master's business, the master is no longer answerable for the servant's conduct." Tiffany on Agency, p. 270. *Robertson v. Power Co.*, 204 N. C., 359.

Notwithstanding the fact that Campbell took a circuitous route, and notwithstanding the further fact that he took women passengers into the car with him to give them an "airing out," we do not think the evidence establishes, as a matter of law, that there was "a total departure from the course of the master's business." There is evidence tending to show that at more than two places on the circuitous route, Campbell said he was out getting change for his employer, and the uncontradicted evidence is that he had not as yet delivered the change at the filling station and still had it in his possession at the time of the collision, and there was evidence tending to show that at that time he was on his way to the filling station for the purpose of delivering the change.

Construing the evidence most favorably to the plaintiff, as we must do on a motion to nonsuit, we have substantially the following fact situation: Joe Campbell, a Negro employee of a filling station, whose duties required him to work about the station and at times to drive automobiles for his employer, leaves the filling station at twenty minutes of five o'clock for the purpose of getting supper, and is instructed by his employer to take a car which had been left in the custody of his employer, that he might get change and "hurry back" to relieve another employee, at five o'clock; and that while on the mission of getting supper and change and hurrying back, Campbell takes a circuitous route and picks up women passengers, and while driving with the passengers and the change back to the filling station, negligently runs the car furnished him by his employer, into the car in which the plaintiff was riding, thereby injuring her.

In view of the modern tendency to give to the rule that holds a master liable for the acts of his servant when about his master's business, a liberal and practicable application, especially where the business of the master entrusted to his servant involves a duty owed by him to the public or third persons, *Robertson v. Power Co., supra,* we are constrained to hold that there was evidence to support the finding of facts sufficient to

furnish a basis for the jury to infer that the automobile which Campbell was driving was, at the time of the collision, being operated in the scope of his employment and in the furtherance of his master's business. It follows that the plaintiff, by such a showing, made out a *prima facie* case, and it became the function of the jury to determine the weight and credibility of the evidence offered by the parties. *Jeffrey v. Mfg. Company,* 197 N. C., 724.

The defendant's contention that the action should have been dismissed for that Hughes Brothers, Incorporated, had been dissolved, and that suit could not, therefore, be entertained against it, is untenable. C. S., 1199, expressly provides that such action does not abate. The evidence in this case shows that the dissolution of the defendant corporation, if there has been a dissolution thereof, took place after the institution of this action and after said corporation had filed answer therein, and that the directors, who are made trustees of the corporation by the statute, had notice of the entering of the judgment, since they were made parties to the action. C. S., 1193 and 1194.

We have examined those exceptive assignments of error which relate to the admission and exclusion of evidence, and also those which assail the charge, and find no prejudicial or reversible error.

No error.

STACY, C. J., dissenting: Joe Campbell had twenty-five minutes to go seven city blocks in a southerly direction, eat his supper, get some change on the way, if he could, and return by 5 o'clock to relieve Roger Williams. His principal mission was to get his supper and "hurry back"; changing the bills was only incidental. The collision occurred an hour later, out in the country, four or five miles north of the filling station. In the meantime, Joe had taken two women on a "joy ride," going by the airport, two miles north of the City of Wilmington, and thence out into the country. He was drinking. To say that he was still in pursuit of change is "a little the 'rise of the fact," nowithstanding his statements, and makes Brobdingnagian that which is hardly Lilliputian. At any rate, Joe had greatly exceeded his instructions. He was not about his master's business at the time of plaintiff's injury. *Martin v. Bus Line,* 197 N. C., 720, 150 S. E., 501; *VanLandingham v. Sewing Machine Co.,* 207 N. C., 355, 177 S. E., 126.

GRACE W. LERTZ v. HUGHES BROTHERS, INCORPORATED, JAMES B. HUGHES, J. W. HUGHES, MRS. NELSON HUGHES, MRS. ANNIE T. HUGHES, AND MISS JULIA McLAURIN.

(Filed 18 September, 1935.)

APPEAL by plaintiff from judgment of nonsuit as to the defendant Julia McLaurin, entered by *Frizzelle, J.*, at February Term, 1935, of NEW HANOVER. Affirmed.

Kellum & Humphrey and R. M. Kermon for plaintiff, appellant.
Carr, Poisson & James, and Robert D. Cronly, Jr., for defendant, appellee.

SCHENCK, J. This was a civil action instituted to recover damages for personal injuries alleged to have been caused by the negligent operation by the defendant, Julia McLaurin, of an automobile in which the plaintiff was a guest passenger.

Julia McLaurin, the appellee, was a codefendant with Hughes Brothers, Incorporated, appellants in *Lertz v. Hughes Brothers, Inc., et al.*, argued jointly with this appeal in this Court. On the argument it was stated by counsel for the plaintiff, appellant herein, that if the plaintiff's judgment against Hughes Brothers, appellant in the other appeal, was upheld, she would be no longer interested in this appeal. Said judgment has been affirmed, *ante,* 490. We have, nevertheless, examined the record and think that his Honor ruled correctly in allowing Miss McLaurin's motion for judgment as of nonsuit.

Affirmed.

J. K. STOVER v. SOUTHERN RAILWAY COMPANY AND C. W. SAILOR.

(Filed 18 September, 1935.)

1. **Railroads D c—Contributory negligence of person struck and injured while on track held to bar recovery against railroad.**

Where a person is in full possession of his faculties and, while walking, standing, or arising from a sitting position on the track, is struck by a locomotive, and there is no indication that he is helpless upon the track, the contributory negligence of such person will bar recovery for injuries sustained by him although the locomotive is negligently operated, and,

the engineer having the right to assume up to the last moment that he would step from the track, the doctrine of last clear chance has no application.

2. Negligence B b—

The doctrine of last clear chance is not applicable when the contributory negligence of the person injured continues up to the moment of the accident resulting in the injury.

APPEAL by plaintiff from judgment of nonsuit entered by *Rousseau, J.*, at January Term, 1935, of CHEROKEE. Affirmed.

Moody & Moody for plaintiff, appellant.
R. C. Kelly and Jones & Ward for defendants, appellees.

PER CURIAM. This action was instituted by the plaintiff to recover damages for personal injuries alleged to have been proximately caused by negligence of the defendants. The defendant Sailor was an engineer operating a locomotive of the defendant railway company. The plaintiff was on the railway tracks of the corporate defendant, and his leg was so injured by said locomotive as to require amputation. According to the plaintiff's allegations and evidence, he was either walking on the track, or standing on the track, or rising from a sitting position he had assumed on the track to read a letter, at the time he was stricken by said locomotive. He was in the full possession of all his faculties unimpaired, his sight, his hearing, and his power of locomotion.

Even if it be conceded that the defendants were negligent in the operation of the locomotive, it clearly appears that the plaintiff was guilty of contributory negligence which continued up to the moment of the impact, and that the doctrine of "the last clear chance," urged in the argument and brief of the plaintiff, is not applicable. The plaintiff was not only in possession of all of his faculties, but did nothing to put the defendants on notice that he could not or would not get out of the way of the oncoming engine, or to render apparent that he was in any danger. The defendants had a right to assume up to the last moment, that the plaintiff would step from the railway track. See *Redmon v. R. R.*, 195 N. C., 764, and cases there cited, and the more recent case of *Rives v. R. R.*, 203 N. C., 227.

The judgment as of nonsuit at the close of the plaintiff's evidence was properly entered.

Affirmed.

F. B. INGLE v. LUCRETIA CASSADY.

(Filed 9 October, 1935.)

1. States A a—

An action may be instituted in the courts of this State on a transitory cause of action arising in another state unless forbidden by public policy or the laws of this State, but the right to recover will be determined by the laws of the state in which the cause of action arose.

2. *Automobiles* C f—Evidence held insufficient to show negligence of driver of car in acts done when confronted with sudden emergency.

Plaintiff brought this action in the courts of this State to recover for injuries sustained in an accident occurring in another state while plaintiff was riding as a passenger in a car driven by defendant. The evidence tended to show that while defendant was driving in a careful and prudent manner the car suddenly started to wobble on the highway because of a rear tire becoming flat, and that defendant in attempting to recover control of the car first speeded up the car and then stepped on the brake, resulting in the car turning over, causing the injuries in suit. *Held:* The act of defendant in applying the brake in the sudden emergency is insufficient to show negligence under the rule that a person confronted with a sudden emergency is not held to the wisest choice of conduct, but only to such choice as a person of ordinary care and prudence, similarly situated, would have made, and defendant's motion for judgment as of nonsuit should have been allowed, the *lex loci* being controlling.

3. Negligence A b—

A person confronted with a sudden emergency is not held by the law to the same degree of care as in ordinary circumstances, but only to that degree of care which a person of ordinary care and prudence, similarly situated, would have exercised.

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

CLARKSON, J., dissenting.

APPEAL by plaintiff from *Warlick, J.*, at March Term, 1935, of BUNCOMBE.

Civil action to recover damages for an alleged negligent injury.

The facts are these: On 16 September, 1933, the plaintiff and two others left Asheville with the defendant, in the defendant's Plymouth car, to attend the World's Fair in Chicago, and possibly to return via Canada and Niagara Falls. The understanding was, that the defendant would furnish the car, while the other three were to bear the expenses of transportation, oil, gas, etc., which they did. The plaintiff was also to do part of the driving. The plaintiff and the defendant rode on the front seat, and took time about at driving, while the others occupied the rear seat. On the return trip, near Lodi, Ohio, while Miss Cassady was driving, "she was driving carefully and prudently about the time the

trouble started," the car began to swerve backwards and forward from one side of the road to the other ("shimmying"). It increased its speed from a safe and normal rate (35 to 40 miles an hour) to 55 or 60 miles an hour, and "as it went down the long slope of concrete road, perhaps twenty feet wide, it got faster and faster until finally something caused it to reverse itself in the road, and as it did, it went over a bank seven to ten feet high into a ditch partially filled with water. . . . There was no traffic on the road at the time. . . . Miss Cassady was trying to hold the car in the road, but she certainly was not able to do it, or did not do it."

The plaintiff testified: "At the time the trouble started, Miss Cassady was driving about 38 miles per hour—she had just taken the wheel from me about 12 miles this side of Cleveland. I was sitting on her right-hand side. She had her foot on the accelerator and she speeded the car up to 50 or 60 miles an hour. When the car began to swerve, I knew there was something wrong. . . . She was gripping the wheel and struggling. . . . She took her foot off the accelerator and applied the hydraulic brakes with force, and that turned the car around and turned it over. She applied the brakes just as quickly as she could take her foot off the accelerator and change it over to the brake, and then the car turned completely over on its back with the wheels up. . . . She was doing the wrong thing, but I did not open my mouth because I did not have time, and that is the truth. . . . The next day the garage man said they found a nail in one of the rear tires; it was flat. . . . All the occupants of the car were injured. Miss Cassady was very badly cut. I went to the hospital several times to see her. She had to stay in the hospital ten days or two weeks, and I came away and left her there."

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

Ford, Coxe & Carter for plaintiff.
Harkins, Van Winkle & Walton for defendant.

STACY, C. J. The plaintiff sues to recover for injuries sustained in an automobile accident occurring in the State of Ohio. Liability is to be determined by the law of that State, for unless the plaintiff is entitled to recover there, he is not entitled to recover here. If, however, under the *lex loci,* a transitory cause of action accrues, it may be prosecuted in another jurisdiction, unless forbidden by public policy or the *lex fori.* This is conceded. *Wise v. Hollowell,* 205 N. C., 286, 171 S. E., 82; *Steele v. Telegraph Co.,* 206 N. C., 220, 173 S. E., 583.

The defendant was not an insurer of plaintiff's safety while on the trip in question, and we agree with the trial court that the evidence

offered fails to show such conduct on her part as imports liability under the law applicable. *S. v. Cope,* 204 N. C., 28, 167 S. E., 456. The plaintiff was injured in an unfortunate accident, it is true, but an accident it was, pure and simple. *Thomas v. Lawrence,* 189 N. C., 521, 127 S. E., 585; *Patterson v. Ritchie,* 202 N. C., 725, 164 S. E., 117. He himself testified: "I do not know what I would have done had I been at the wheel." He later said he would have applied the brakes rather than put his foot on the accelerator, but he was then speaking in the light of subsequent events. "Hindsight is usually better than foresight."

While the defendant may not have pursued the safest course or acted with the best judgment or the wisest prudence, in the light of what occurred, still it is not thought that this should be imputed to her for negligence, because with a flat tire and "shimmying" car she was faced with an emergency which required instant action without opportunity for reflection or deliberation. *Smith v. R. R.,* 200 N. C., 177, 156 S. E., 508. She was "trying to hold the car in the road, gripping the wheel and struggling," when it suddenly went over the embankment and into the ditch. Some allowance must be made for the excitement of the moment and the strain of nerves. One who is required to act in an emergency is not held by the law to the wisest choice of conduct, but only to such choice as a person of ordinary care and prudence, similarly situated, would have made. *Poplin v. Adickes,* 203 N. C., 726, 166 S. E., 908; *Pridgen v. Produce Co.,* 199 N. C., 560, 155 S. E., 247; *Odom v. R. R.,* 193 N. C., 442, 137 S. E., 313; *Parker v. R. R.,* 181 N. C., 95, 106 S. E., 755; *Norris v. R. R.,* 152 N. C., 505, 67 S. E., 1017. In *Hinton v. R. R.,* 172 N. C., 587, 90 S. E., 756, it is said: "It is well understood that a person in the presence of an emergency is not usually held to the same deliberation or circumspect care as in ordinary conditions." In other words, the standard of conduct required in an emergency, as elsewhere, is that of the prudent man. *Jernigan v. Jernigan,* 207 N. C., 831, 178 S. E., 587; *Small v. Utilities Co.,* 200 N. C., 719, 158 S. E., 385. "If the peril seemed imminent, more hasty and violent action was to be expected than would be natural at quieter moments, and such conduct is to be judged with reference to the stress of appearances at the time, and not by the cool estimate of the actual danger formed by outsiders after the event"—*Holmes, J.,* in *Gannon v. R. R.,* 173 Mass., 40.

Had the emergency been brought about by defendant's own carelessness, as was the case in *Luttrell v. Hardin,* 193 N. C., 266, 136 S. E., 726, a different situation might have arisen. Annotation, 79 A. L. R., 1277. But plaintiff's testimony is to the effect that the defendant "was driving carefully and prudently about the time the trouble started."

The judgment of nonsuit is correct.

Affirmed.

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

CLARKSON, J., dissenting: The testimony of the plaintiff and his witnesses indicated an emergency or sudden peril immediately before the wrecking of the automobile which the defendant was driving at the time, and the court below held as a matter of law that this was a sufficient defense. Otherwise, the case would have gone to the jury, for there was testimony by the plaintiff, corroborated by other witnesses for the plaintiff, that the defendant negligently put her foot on the accelerator instead of the brakes when the automobile began to "shimmy" or swerve from one side of the road to the other. Certainly, when considered in the light most favorable to the plaintiff, this was more than a scintilla of evidence. *Tinsley v. Winston-Salem,* 192 N. C., 597.

It was held in *Jernigan v. Jernigan,* 207 N. C., 831 (see, also, *Jernigan v. Jernigan,* 207 N. C., 851), that the defense of sudden emergency is one for the jury. This is the universal holding among American courts. As was said in *Combs v. Markley* (Me.), 143 Atl., 261 (263): "The law as to drivers of motor vehicles is not different from that which governs other persons. Whether the conduct measured up to the standard of common caution for the driver of a motor vehicle under like conditions and circumstances was a question of fact. *Massie v. Barker,* 224 Mass., 420, 113 N. E., 199. Where an automobilist, to avoid striking a pedestrian, swerved to one side and struck a wagon, it was for the jury to determine whether his act was the result of an emergency, and whether, if there was an emergency, defendant acted with becoming prudence, not necessarily with the same degree of deliberation and heed as in an affair of human life elsewhere but there. *Kosrofian v. Donnelly* (R. I.), 117 A., 421. The driver is exonerated if the course which he takes in an emergency is one which an intelligent and prudent man would take. Whether he did this was a question for the jury. *Gravel v. Roberge,* 125 Me., 399, 134 A., 375. See, too, *Brown v. Rhoades,* 126 Me., 186, 137 A., 58, 53 A. L. R., 834; *Lammers v. Carstensen,* 109 Neb., 475, 191 N. W., 670; *Richards v. Rifenbery,* 108 Okl., 56, 233 P., 692; *Lee v. Donnelly,* 95 Vt., 121, 113 A., 542; *Donker v. Powers,* 230 Mich., 237, 202 N. W., 989; *Henderson v. Dimond,* 43 R. I., 60, 110 A., 388. When the facts are such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. *Larrabee v. Sewall, supra; Parker v. Smith,* 100 Vt., 130, 135 A., 495. That is this case."

The *Jernigan case, supra,* is abundantly supported by decisions in other jurisdictions. *Combs v. Markley, supra,* and cases there cited; *Hansen v. Bedell Co.* (Or.), 268 P., 1020; *Oginskas v. Fredsal* (Conn.),

143 Atl., 888; *Casey v. Sicilliano* (Pa.), 165 Atl., 1; *Watkins v. Watkins* (Wis.), 245 N. W., 695; *Hatcher v. Cantrell* (Tenn.), 65 S. W. (2d), 247.

It is well established that if different men can draw different conclusions from the evidence, it is a question for the jury. *Fowler v. Underwood,* 193 N. C., 402. The jury is charged with the duty of passing upon the credibility of witnesses, so long as they do not testify to the impossible. *Hanes v. Southern Public Utilities Co.,* 188 N. C., 465. In cases where there is any substantial evidence in the record to support allegations, the question of negligence is properly submitted to the jury. *Jernigan v. Jernigan, supra; Fields v. Brown,* 205 N. C., 543.

In this case there was testimony by the plaintiff and other witnesses that an emergency or sudden peril arose, that the defendant was negligent in failing to slow down and in speeding up after the emergency arose.

It is a matter of grave concern to those who travel on the highways of the State to take away from the jury the rule of the prudent man, even in an emergency. This Court would soon become an autocracy of five, and trial by jury a misnomer. The American authorities are, I might say, almost unanimous against the position taken in the main opinion.

SOUTHERN REAL ESTATE LOAN AND TRUST COMPANY, A CORPORATION, v. THE ATLANTIC REFINING COMPANY, A CORPORATION.

(Filed 9 October, 1935.)

Judicial Sales A a—Commissioner appointed to make judicial sale held without authority to insert restrictions in deed to purchaser.

A commissioner was authorized by the court to sell part of the lands of an estate for reinvestment under the provisions of N. C. Code, 1744. There were no restrictions in regard to the use of the property of the estate, and in the commissioner's report and recommendation of the offer to purchase no authority to restrict the use of the property was asked, and none granted in the order of the court. The commissioner executed deed to the purchaser upon the order of the court, but inserted restrictions in the deed limiting the use of the property to white people and residence purposes. *Held:* The commissioner was without authority to insert the restrictions in the deed to the purchaser, his authority being limited under the order of the court to the sale of the property and the disposition of the proceeds of sale, and the restrictions were null and void and the purchaser at the sale may transfer title free of the restrictions.

APPEAL by defendant from *McElroy, J.,* at Regular April Term, 1935, of MECKLENBURG. Affirmed.

The plaintiff brings this action to enforce specific performance of a contract made by defendant to purchase a certain piece of land, a part of the "Dotger Estate," which originally consisted of about 90 acres of land, a large portion fronting on East 7th Street, in the city of Charlotte, N. C. The case was heard on an agreed statement of facts. The material portions of the agreed statement of facts for the determination of this controversy are as follows: "The 90-acre tract of land known as the Dotger Estate, which tract of land is described and referred to in Covenant to Stand Seized executed by Andrew J. Dotger and wife, Clara L. Dotger, to Henry C. Dotger and others, and recorded in the Mecklenburg Registry, in Book 134, page 497. That in 1911 a civil action was instituted in the Superior Court of Mecklenburg County by Henry C. Dotger and others against Fidelity Trust Company, executor, and others, all of the parties interested in the Dotger Estate being made parties thereto, for the purpose of selling the land of the Dotger Estate for reinvestment under what is now section 1744 of the North Carolina Code. That thereafter, in January, 1912, an order was entered in said action appointing the American Trust Company as commissioner for the purpose of making sale of said lands and reinvestment of the proceeds from such sale, said commissioner being clothed with full power and authority to sell said lands, or any parts or parcels thereof, subject to confirmation of the court. . . . On 8 February, 1919, the American Trust Company, commissioner, filed a report setting forth an offer of A. W. Burch to purchase that part of the second tract shown as Burch lot on Exhibit 'A' for his wife, Freda L. Burch; the price to be paid, manner of payment and recommended acceptance of said offer. Thereafter, on 19 February, 1919, an order was entered by the judge presiding confirming said proposed sale and directing the American Trust Company, commissioner, to make title to said property to the said Freda L. Burch upon the terms therein set forth. No authority to restrict the property was asked in the report or granted in the order. Pursuant to said order, deed was executed by the American Trust Company, commissioner, to Freda L. Burch, recorded in Book 402, page 354, of the Mecklenburg Registry, which deed contained the following restrictions: '(a) The property shall be used for residential purposes only and shall be occupied and owned by people of the white race only. (b) No residence shall be erected on the property at a cost of less than $4,000.'"

The defendant in its answer and as a defense to the complaint of plaintiff says: "That said deed from the American Trust Company, commissioner, to Mrs. Freda L. Burch (now Nisbet) is recorded in the office of the register of deeds for Mecklenburg County, North Carolina,

in Book 402, page 354, which deed contains the following conditions and restrictions: [Naming the above (a) and (b)]. That the defendant is informed and believes, and so alleges, that said restrictions are valid, binding, and enforceable restrictions against said lot, and that the said Mrs. Freda L. Burch Nisbet and husband, C. R. Nisbet, cannot, therefore, convey said lot free and clear of said restrictions."

The judgment of the court below is as follows: "This cause coming on to be heard before his Honor, P. A. McElroy, judge presiding over the April, 1935, Regular Term of Superior Court of Mecklenburg County, and the parties having expressly waived a jury trial and agreed upon a statement of facts to be found by the court, and having agreed that his Honor could render judgment as to the validity of the title offered by the plaintiff upon the admission in the pleadings and the agreed statement of facts, which agreed statement of facts is made a part hereof. Now, therefore, his Honor, P. A. McElroy, being of the opinion upon the admissions in the pleadings and the agreed statement of facts that Mrs. Freda L. Burch Nisbet is vested with the fee-simple title to the tract of land described in paragraph 1 of the complaint, free and clear of any and all conditions, reservations and restrictions, and the deed of Mrs. Freda L. Burch Nisbet and husband, C. R. Nisbet, is sufficient to convey a fee-simple title to said land to the defendant, free and clear of any and all conditions, reservations, and restrictions: It is therefore ordered that the defendant be and it hereby is required to accept the deed tendered to it for said land and to pay the plaintiff the purchase price agreed to by it, together with the cost of this action. This 1 April, 1935. P. A. McElroy, Judge Presiding."

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

J. M. Shannonhouse for plaintiff.
R. Paul Jamison for defendant.

CLARKSON, J. N. C. Code, 1931 (Michie), section 1744, in part, is as follows: "In all cases where there is a vested interest in real estate, and a contingent remainder over to persons who are not in being, or when the contingency has not yet happened which will determine who the remaindermen are, there may be a sale or mortgage of the property by a proceeding in the Superior Court, which proceeding shall be conducted in the manner pointed out in this section. . . . The court shall, if the interest of all parties require or would be materially enhanced by it, order a sale of such property or any part thereof for reinvestment," etc.

In the 90-acre Dotger Estate land sold under this act there were no restrictions. The land was sold for reinvestment under the statute. The action under this section is to give the purchaser a fee-simple title.

In the sale of the lot in question an offer was made by A. W. Burch on behalf of his wife, Freda L. Burch (now Nisbet), to the commissioner to purchase the land in controversy, the price to be paid and manner of payment. The commissioner recommended acceptance of this offer. "No authority to restrict the property was asked in the report or granted in the order."

The judge presiding made an order confirming the proposed sale and directed the commissioner to make title to said property to the said Freda L. Burch. The commissioner had no power or authority to put the following restrictions in the fee-simple deed made to Freda L. Burch: "(a) The property shall be used for residential purposes only, and shall be occupied and owned by people of the white race only. (b) No residence shall be erected on the property at a cost of less than $4,000." The restrictions are null and void. Thompson on Real Property, 1929 Supplement, section 2719, p. 934, speaking of the rights of purchaser at judicial sale, says: "The purchaser is entitled to a sound and marketable title."

In *Meroney v. Tannehill,* 215 Pac. Rep. (Okla.), 939 (943), citing numerous authorities, we find: "It may be contended, however, that the doctrine of *caveat emptor* applies, and that plaintiffs in error, purchasers at the judicial sale, must be content with whatever title they acquired. This position is not sound. The doctrine has been so relaxed that the purchaser at a judicial sale is entitled to expect and obtain a sound and marketable title to the property sold."

In *Horton v. Jones,* 167 N. C., 664 (668), it is said: "Among cases of judicial sales that are void, Judge Freeman instances those 'where the property was not described in the pleadings upon which the judgment or order was based.' Void Judicial Sales, page 19, par. 4 A. Again: 'A license to sell, granted without any petition therefor, is void.' Par. 11, page 53. Again, at page 58: 'The property sold must be described in the petition. No jurisdiction is obtained over that which is not described.' To same effect is *Verry v. McClellan,* 6 Gray (Mass.), 535; *Colligan v. Cooney,* 107 Tenn., 214; *Wakefield v. Camel,* 37 Am. Dec., 60; *Falls v. Wright,* 55 Ark., 562; Black on Judgments, sec. 242, *et seq.*"

In *Peal v. Martin,* 207 N. C., 106 (108), speaking to the subject, it is 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."

In the agreed case there are other matters debated *pro* and *con* in the able briefs of the litigants in reference to the validity and invalidity of the restrictions. It is not necessary to consider them from the view we take of this case.

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

Affirmed.

JAMES S. LATHAM, ADMINISTRATOR OF THE ESTATE OF DONALD LATHAM, DECEASED, v. SOUTHERN FISH AND GROCERY COMPANY (EMPLOYER) AND THE TRAVELERS INSURANCE COMPANY (CARRIER).

(Filed 9 October, 1935.)

1. **Master and Servant F b—Evidence held sufficient to sustain finding that accident arose out of and in course of employment.**

   There was evidence to the effect that two employees were hired to ride on defendant employer's truck to help the driver unload at the place of delivery, that on the occasion in question the driver, the employer's *alter ego*, changed his mind, after leaving defendant's warehouse, and decided he would not need help in unloading on this particular trip, which was the last for the day, and that the driver consented to let the employees off the truck at the place on his route nearest their homes, in accordance with established custom, and that when the driver slowed up at the appointed place to let the employees get off, one of the employees, claimant's intestate, attempted to alight before the truck had completely stopped, contrary to express orders, and fell to his mortal injury. *Held:* The evidence was sufficient to sustain the finding of the Industrial Commission that the accident arose out of and in the course of the employment. N. C. Code, 8081 (i).

2. **Master and Servant F i—**

   Where there is any competent evidence in support of the finding of the Industrial Commission that the accident in question arose out of and in the course of the employment, the finding is conclusive on the courts upon appeal.

APPEAL by defendants from *Oglesby, J.*, at August Term, 1935, of BUNCOMBE. Affirmed.

On the appeal from the hearing commissioner, the Full Commission found the facts, and on the facts found made an award in favor of plaintiff.

From the evidence the Full Commission found the following facts:

"Upon all the facts in the record, the Full Commission finds that the deceased was employed to assist in loading the employer's truck and unloading it at the place of delivery at the A. & P. warehouse, and

that the contract of employment contemplated that the deceased should stay with the said truck while making delivery of the said produce, whether it required one or more loads to complete the delivery which the employer then contemplated making. After loading the produce on the truck at the store, the deceased and fellow employee, the colored boy, William Fleming, rode on said truck to the A. & P. warehouse. After reaching the warehouse the produce was unloaded from the truck. It was then found that at the A. & P. warehouse the produce delivered did not correspond with the order given for same, as there was a shortage in weight. The A. & P. warehouse also desired to order additional produce not included in the first order. The employer's truck, in charge of Mr. F. J. Monday, returned with the two colored boys to the store in the city of Asheville, with the purpose of securing the balance of the said produce ordered by the A. & P. Company. A part of this produce was loaded on the truck. It was found to be impossible to complete the full order. After this produce was loaded on the truck the deceased, Donald Latham, and his coemployee, William Fleming, got back on the truck for the purpose of returning to assist in unloading it at the warehouse of the A. & P. Company, at which the first delivery had been made. The driver of the truck, F. J. Monday, after starting the truck up and while proceeding away from the store of the employer, and having gotten fifty feet therefrom, decided that it would be unnecessary to carry the two boys with him back to make the delivery. While the truck was in motion the driver of the truck, F. J. Monday, turned and talking to the two boys in the back of the truck, said: 'There ain't no use for you all to go up there with me. I will just go up there and cut around through the tunnel hole and would not have to come back by the depot and would go on home and go back to sleep.' The boys were then told that their services would not be needed any longer. The boys, including the deceased, Donald Latham, requested the driver, F. J. Monday, to let them off at French Broad Avenue, the nearest point to the home of the deceased, Donald Latham, which point also was nearer a B. Y. P. U. meeting, which the colored boy, William Fleming, desired to attend. The truck proceeded to the said point and slowed down to permit the two boys to alight therefrom. Before the truck stopped, and contrary to the instructions of the driver, F. J. Monday, the deceased, Donald Latham, attempted to step from the moving truck. In stepping from the truck he fell on the pavement, receiving a fracture of the skull, from which he shortly thereafter died. It is found as a fact that the deceased left no dependents, either total or partial. It is found as a fact that James S. Latham, father of the deceased, is qualified as administrator of the deceased."

The defendants made numerous exceptions and assignments of error, and in apt time, in open court, duly excepted to the confirmation of said findings of fact, reading as follows: "(a) It is further found as a fact that the death of the deceased, resulting from an injury by accident, arose out of and in the course of the deceased's employment with the Southern Fish & Grocery Company. (b) While en route to this point and until the employee had alighted from the truck he was in the course of his employment, and an injury received by him in falling from the truck was an accident arising out of his employment."

The court below rendered the following judgment: "This cause coming on to be heard before his Honor, John M. Oglesby, judge presiding and holding the August Term, 1934, of the Superior Court of Buncombe County, on appeal by employer and its carrier on the findings of fact and conclusions of law of the Industrial Commission: It is therefore ordered, adjudged, and decreed that the findings of fact 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 9 August, 1935. John M. Oglesby, Judge Presiding."

Exceptions and assignments of error were duly made from the judgment of the court below, and appeal taken to the Supreme Court.

Ford, Coxe & Carter for plaintiff.
Smathers, Martin & McCoy for defendants.

CLARKSON, J. We do not think the exceptions and assignments of error made by defendants can be sustained.

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," etc.

In *Conrad v. Foundry Co.,* 198 N. C., 723 (726), it is said: "It follows from what precedes that the meaning of the phrase 'out of and in the course of the employment' is not to be determined by the rules which control in cases of negligent default at common law; for one of the purposes of the recent act is to increase the right of employees to be compensated for injuries growing out of their employment. *Sundine's case,* 218 Mass., 1, L. R. A., 1916A, 318. The words 'out of' refer to the origin or cause of the accident and the words 'in the course of' to the time, place, and circumstances under which it occurred. *Raynor v. Sligh Furniture Co.,* 146 N. W., 665; *Hills v. Blair,* 148 N. W., 243."

The only question involved in this action: Did the injury by accident arise "out of and in the course of the employment"? We think there was sufficient competent evidence from which the Commission found it

did. This is conclusive on us on appeal. Public Laws N. C., 1929, ch. 120, sec. 60; N. C. Code, 1931 (Michie), sec. 8081 (ppp); *Morgan v. Cloth Mills,* 207 N. C., 317 (322).

We think there was sufficient competent evidence for the Full Commission to find the facts, and we think in law there was no error in the Commission making the award to plaintiff administrator.

Donald Latham was on the truck for the purpose of unloading and going on it for that reason, as a part of his employment. The *alter ego* of the employer, F. J. Monday, driver of the truck, testified when about 50 feet from the store, "Then I turned and told the boys I would let them off at French Broad and would go there myself and finish unloading and come home." "Q. What is the custom in taking the boys out to make a delivery, you either brought them back to the store or the nearest point to their home? A. It has been the custom. (By the court): That custom applied to taking them out and then letting them out nearest their home? A. Yes, the only time we made that was on Sunday." It was Sunday and French Broad was near Donald Latham's home.

William Fleming testified, in part: "Mr. Sorrells had employed Donald and me to help Fred deliver some stuff to Biltmore. I went the first trip and helped unload. Donald went, too, and helped unload. On the second trip he said there wouldn't be any need for us to go back, and we told him to let us off at French Broad, as we lived near there. I was going to B. Y. P. U. Donald lived near there. I had worked there before on Sundays. They would take us to the point nearest our home. That was a custom. That had been going on ever since I had been working there. They employed other boys at different times as spare hands, and he would leave them at the place nearest their home when they had finished their work."

Donald Latham was on the truck going to unload it in the course of his employment, the *alter ego* of the defendant grocery company relieved him of his duty and promised to let him off the truck at French Broad, near his home. This was the custom and a natural and implied obligation, and fully sustains the finding of the Commission. *Konopka v. Jackson County Road Commission,* 97 A. L. R., 552.

We think that this case is similar to that of *Massey v. Board of Education,* 204 N. C., 193, and cases therein cited.

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

Affirmed.

IN RE GURNEY P. HOOD, COMMISSIONER OF BANKS, EX REL. CAROLINA STATE BANK OF GIBSON, UPON MOTION OF MRS. A. P. (SALLIE) BULLARD.

(Filed 9 October, 1935.)

1. Judgments K b—Only parties against whom order is entered may move to set aside for surprise, excusable neglect, etc.

Judgment was obtained upon the statutory liability of a holder of stock in a bank in course of liquidation. The liquidating agent obtained an order of the court for the sale of the judgment, C. S., 218 (c) (7), and in accordance with the order the judgment was assigned to a purchaser. The stockholder made a motion in the cause to set aside the order for the sale of the judgment under C. S., 600, for surprise, excusable neglect, etc. *Held:* Movant was without authority to intervene and move to set aside the order, since she was not a party against whom the order was taken, and her rights were not thereby adversely affected, since the rights of a judgment debtor are not affected by the assignment of the judgment, and she may not maintain that her rights as a creditor of the bank were adversely affected by the disposition of its assets by the liquidating agent in the absence of allegation of fraud, bad faith, or neglect on the part of the liquidating agent.

2. Judgments P c—

A judgment debtor has no interest in the assignment of the judgment since the assignee takes it subject to and charged with all equities which could be asserted against the assignor at the time of the assignment.

3. Banks and Banking H c—

A creditor of a bank may not maintain an action to interfere with the disposition of its assets by the liquidating agent in the absence of any allegation of fraud, bad faith, or neglect on the part of the liquidating agent, and a showing that a greater return would result from the disposition of the assets as contended for by the creditor.

APPEAL from *Alley, J.*, at Chambers in Monroe, 29 January, 1935. From SCOTLAND. Reversed.

This cause came on to be heard upon the motion of Mrs. A. P. (Sallie) Bullard to have set aside an order made by his Honor, A. M. Stack, resident judge of the 13th Judicial District, pursuant to C. S., 218 (c) (7), authorizing the sale to S. J. T. Quick of a stock assessment judgment in the sum of $1,000, theretofore taken against her by the Corporation Commission. Mrs. Bullard, according to her petition upon which her motion is predicated, seeks to have the order of Stack, J., set aside upon the ground that it deprived her of an opportunity to purchase said judgment, and was entered through her mistake, inadvertence, surprise, and excusable neglect.

On 19 December, 1930, the Carolina State Bank of Gibson, North Carolina, closed its doors, and since that time has been in the process

of liquidation. On ...... February, 1931, the Corporation Commission, under authority of what is now C. S., 218 (c) (13), levied a stock assessment against Mrs. Bullard for $1,000, and filed copy of such levy in the office of the clerk of the Superior Court and docketed judgment thereon in Scotland County. On 8 October, 1932, Gurney P. Hood, Commissioner of Banks, as successor of the Corporation Commission, obtained judgment upon said stock assessment in the Court of Common Pleas of Marlboro County, South Carolina, and had said judgment docketed in said county, where Mrs. Bullard resided and owned property. On 17 October, 1934, the Commissioner of Banks, pursuant to an order of court, advertised for sale at public auction, on 20 November, 1934, the remaining uncollected assets of the bank, including said stock assessment judgment against Mrs. Bullard, the amount of which had then been reduced to $893.28 by being credited with the amount of her deposit in said bank. On 10 November, 1934, the Commissioner of Banks, upon receiving an offer of $200.00 in cash for said judgment from S. J. T. Quick, presented a petition to his Honor, A. M. Stack, as resident judge, and obtained from him the order authorizing the sale of said stock assessment judgment to said Quick, and, upon payment by Quick to the Commissioner of the sum of $200.00 in cash, said Commissioner duly assigned, without recourse, said judgment to said Quick. On 25 January, 1935, Mrs. Bullard, upon motion and affidavit, obtained an order from his Honor, Felix E. Alley, the judge then presiding in the 13th Judicial District, setting aside the order authorizing the sale of the stock assessment judgment to Quick, made by the resident judge of said district, and ordered a sale at public auction of said judgment. To the order of Alley, J., the Commissioner of Banks and S. J. T. Quick excepted and appealed to the Supreme Court, assigning errors.

Thomas J. Dunn for Hood, Commissioner of Banks, appellant.
J. K. Owen for S. J. T. Quick, appellant.
John G. Carpenter and J. E. Dudley for Mrs. A. P. Bullard, appellee.

SCHENCK, J. From the facts set forth in the record, it appears that Mrs. Bullard, the movant, was without authority to intervene to have set aside the order involved in this proceeding, since she was not a party against whom such order was taken. Her motion was not lodged to set aside the stock assessment judgment taken against her in a proceeding to which she was a party, but was lodged to set aside the order authorizing the sale of said judgment to S. J. T. Quick, entered in a proceeding in which she was not a party; and was lodged under C. S., 600, which provides that: "The judge shall, upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judg-

ment, order, verdict, or other proceeding taken against him, through his mistake, inadvertence, surprise, or excusable neglect, . . ."

The order of Stack, J., authorizing the sale by the Commissioner of Banks of the stock assessment judgment, as provided by C. S., 218 (c) (7), was not an order taken against Mrs. Bullard. This order authorizing the sale of the stock assessment judgment affected only the liquidating agent and whomever purchased by virtue thereof, and so far as Mrs. Bullard was concerned, the order was *res inter alios acta*. In the sight of the law, at least, it matters not to the judgment debtor who the judgment creditor is. "Since a judgment is an assignable chose in action, the assignee takes it subject to and charged with all the equities which could be asserted against it in the hands of the assignor at the time of the assignment." 15 R. C. L., 779.

In *Smith v. New Bern*, 73 N. C., 303, it was held that the remedy now provided under C. S., 600, is restricted to the parties aggrieved by the judgment or order sought to be set aside, and that the Superior Court had no power under C. C. P., 133, brought forward in part as C. S., 600, to set aside a judgment or order once rendered upon motion of a stranger to the cause. This holding was reiterated in *Edwards v. Phillips*, 91 N. C., 355, wherein it was said: "No other person can complain as he (the defendant) alone is affected by it (the judgment). This is expressly held when the application is made under section 133 of C. C. P. (The Code, sec. 274), in the case of *Smith v. New Bern*, 73 N. C., 303." See an interesting discussion of the general rule that strangers cannot have judgments vacated, annulled, or set aside in note to *Tyler v. Aspinwall* (Conn.), 54 L. R. A., 758, 768; also *Rollins v. Henry*, 78 N. C., 342, and *Walton v. Walton*, 80 N. C., 26.

Mrs. Bullard, the movant, makes the further contention that, since the liquidated bank has paid its depositors in full, any amount above $200.00 which could be obtained for the stock assessment judgment against her would inure to the benefit of the stockholders, of whom she is one, by way of credit on such judgments, and for that reason the order authorizing the sale of said judgment for $200 was against her interest and "taken against her," and therefore entitled her to relief under C. S., 600. This contention is untenable for two reasons, first, Mrs. Bullard, as a creditor of the bank, cannot question the manner of the disposition of the assets of the bank by the Commissioner as receiver of the bank, in the absence of any allegation of fraud, bad faith, or neglect on the part of the receiver, *Bickley v. Green*, 187 N. C., 772, 774; and, second, there is no allegation or finding of fact that the stock assessment judgment would bring more than $200.00 and costs if exposed to sale at public auction. In fact, the order of Alley, J., rather indicates that there would be no increase in the amount obtained for

such judgment, since it provides that the judgment be sold to Mrs. Bullard for $200.00 in the event no higher bid is made therefor at a resale.

Since we are of the opinion, and so hold, that the Superior Court was without authority to entertain the motion of Mrs. Bullard, upon which the order setting aside the order of Stack, J., was predicated, the order of Alley, J., is

Reversed.

REX LEWIS v. J. R. PATE AND HIS WIFE, KITTIE PATE.

(Filed 9 October, 1935.)

1. **Trial F c—Refusal to submit issue tendered, which arose upon the pleadings and was supported by evidence, held error.**

Where defendant tenders an issue arising on the pleadings and supported by evidence elicited on cross-examination of plaintiff's witness, the refusal of the trial court to submit the issue must be held for reversible error where the question involved in the issue is not presented for the determination of the jury under the issues submitted.

2. **Reformation of Instruments C e—Defendant pleading mutual mistake and eliciting supporting evidence held entitled to submission of issue.**

Plaintiff contended that defendant, plaintiff's judgment debtor, inserted the words "and wife" in a deed after it had been executed to defendant by a third person, and that such alteration was made without the knowledge of the grantor in order to create an estate by entirety and defraud defendant's creditors. Defendants contended that even if the insertion was made after the execution of the deed, they were entitled to reformation of the deed for mutual mistake for that the draftsman failed to carry out the intention of the grantor and defendants to create an estate by entirety in defendants. *Held:* Defendants are entitled to the submission of the question of mutual mistake for the determination of the jury upon their evidence in support of their allegations, but defendants' right to the equitable relief sought might be determined by an issue of whether defendant made the alteration with the purpose of cheating and defrauding his creditors, as alleged in the complaint.

3. **Reformation of Instruments C a—**

In an action between the grantees and a judgment creditor of one of the grantees to reform a deed, the grantors are proper, if not necessary, parties to the action, and may be joined upon motion.

APPEAL by defendants from *Devin, J.*, at February Term, 1935, of the Superior Court of YANCEY. New trial.

At April Term, 1934, of the Superior Court of Yancey County, the plaintiff recovered a judgment against the defendant J. R. Pate for the sum of $421.91, which has been duly docketed in the office of the clerk

of the Superior Court of said county, and is now a lien on lands owned by the said defendant situate in Yancey County. The indebtedness for which said judgment was recovered was contracted during the year 1928 or the year 1929.

On 28 October, 1933, S. W. McIntosh and his wife executed a deed by which they conveyed to the defendant J. R. Pate the land described therein for a recited consideration of $6,000. After the execution and delivery of said deed, but before its registration, the defendant J. R. Pate caused the said deed to be altered by the insertion therein, after his name as the party of the second part, of the words, "and wife, Kittie Pate." The deed, as registered in the office of the register of deeds of Yancey County, contains the names "J. R. Pate and wife, Kittie Pate," as parties of the second part, and conveys the lands described therein to the parties of the second part, their heirs and assigns.

The plaintiff alleges in his complaint that "the defendant J. R. Pate, with intent to cheat and defraud his creditors, and especially this plaintiff, as plaintiff is informed and believes and now alleges, after he had procured the said deed, and after said deed had been executed, had the name of his wife, Kittie Pate, inserted so as to be able to make the claim that said land was owned not by J. R. Pate individually, but by J. R. Pate and his wife, Kittie Pate, by the entirety." This allegation is denied in the answer filed by the defendants.

The defendants in their answer allege that the purchase money for said land, to wit, the sum of $6,000, was the proceeds of a policy of insurance in which the defendant Kittie Pate was the beneficiary; that prior to the execution of the deed described in the complaint, the grantors therein, S. W. McIntosh and his wife, had executed a deed by which they conveyed the land described in said deed to the defendants J. R. Pate and his wife, Kittie Pate; that after said deed had been executed, it was discovered that by reason of an error in the description, the land conveyed thereby was not all the land which the grantors had contracted to convey to the grantees; that for this reason the first deed was returned to the grantors, with the request that they cause a new deed to be prepared, containing a proper description; that by reason of a mistake of the draftsman the second deed contained only the name of J. R. Pate as the grantee; and that after the second deed had been delivered, and the mistake of the draftsman discovered, but before the same was registered, the defendants caused the name of Kittie Pate to be inserted in said deed as a party of the second part.

The plaintiff prays in his complaint that the deed from S. W. McIntosh and wife, dated 28 October, 1933, as registered in the office of the register of deeds of Yancey County, be reformed by striking from said deed the words "and wife, Kittie Pate."

The defendants in their answer pray that if it shall be held by the court that the words "and wife, Kittie Pate," were improperly inserted in said deed, the same be reformed by inserting the said words in said deed, thereby correcting the mistake made by the draftsman of said deed.

At the trial, the defendants tendered the following issue:

"Was the name of Kittie Pate omitted from the deed of 28 October, 1933, by reason of the mistake of the draftsman of said deed, as alleged in the answer?"

The court refused to submit this issue, and the defendants excepted.

The court thereupon submitted issues, which were answered as follows:

"1. Were the words 'and wife, Kittie Pate,' inserted in the deed of 28 October, 1933, after the execution and delivery of said deed by S. W. McIntosh and wife to J. R. Pate, and without the knowledge of said grantors? Answer: 'Yes.'

"2. Is the defendant J. R. Pate the owner of the lands described in the complaint? Answer: 'Yes.'"

From judgment in accordance with the verdict, the defendants appealed to the Supreme Court, assigning errors as appear in the case on appeal.

Watson & Fouts for plaintiff.
Charles Hutchins for defendants.

CONNOR, J. The issue tendered by the defendants at the trial of this action arises on the pleadings. There was evidence elicited by the defendants on their cross-examination of the grantor in the deed referred to in the complaint, to wit, S. W. McIntosh, tending to sustain the affirmative of the issue. For these reasons there was error in the refusal of the court to submit the issue tendered by the defendants, for which the defendants are entitled to a new trial. See McIntosh N. C. Prac. & Proc., page 545, and cases cited in the notes. In the absence of the issue, the defendants were deprived of an opportunity to offer evidence in support of their prayer for affirmative relief in this action.

When the action is called for trial in the Superior Court, the plaintiff, if he is so advised, may tender an issue arising upon his allegation, which is denied in the answer, that the alteration in the deed was made by the defendant J. R. Pate with the purpose to cheat and defraud his creditors. An affirmative answer to such issue will be pertinent to the right of the defendants to equitable relief as prayed by them in their answer. See *Respass v. Jones,* 102 N. C., 5, 8 S. E., 770.

The grantors in the deed which both parties to this action seek to have reformed are proper, if not necessary, parties to this action. See *Sills v. Ford,* 171 N. C., 733, 88 S. E., 636; *Moore v. Moore,* 151 N. C.,

555, 66 S. E., 598. If either of the parties desires to have said grantors made parties to the action, before a new trial, they may by proper motion in the Superior Court have an order entered to this effect.

For the error in the refusal of the court to submit the issue tendered by the defendants, the defendants are entitled to a new trial. It is so ordered.

New trial.

RALPH B. ARBOGAST v. BUNCOMBE COUNTY AND ROBERT C. COLLINS, TAX COLLECTOR FOR BUNCOMBE COUNTY.

(Filed 9 October, 1935.)

Municipal Corporations G c: Constitutional Law I b—Service by publication is sufficient notice of street assessments.

Ch. 334, Public-Local Laws of 1923, relating to assessments for public improvements, is constitutional, and objection that the statute fails to provide for personal service upon abutting landowners as to the date of final settlement is untenable, service by publication, as provided for in the act, being sufficient, since the act provides for notice and an ample opportunity to be heard.

CIVIL ACTION, before *Finley, J.*, at December Term, 1934, of BUNCOMBE.

The facts as agreed upon by the parties are substantially as follows: "In accordance with the provisions of chapter 334 of the Public Laws of North Carolina for 1923, there was levied and charged against the land of plaintiff in Haw Creek Township, Buncombe County, . . . a certain paving assessment amounting to the sum of $973.15, with interest. Although the same is all due and payable, no part thereof has been paid. . . . After due advertisement, and in accordance with the provisions of said act, . . . the defendant Collins, tax collector of Buncombe County, sold said property at public auction . . . on 6 November, 1933, at which time Buncombe County became the last and highest bidder for the amount of . . . $973.15; and in further compliance with the provisions of said act a certificate covering said sale was issued to the county, dated 6 November, 1933. No objections to said paving assessment were filed by the plaintiff or any other person in the office of the clerk of the board of county commissioners prior to the first meeting of the board, at which the report of said assessment was approved and confirmed, and that no appeal to the Superior Court has been made by the plaintiff or any other person from said assessment, as is provided by the act hereinbefore referred to. That in the paving of

the street adjacent to said property, in the levying of assessment against said property, in the sale of said property as hereinbefore referred to, and in the issuing of said certificate, and in all other things done by the defendants in regard to the matters here involved, the terms and conditions of said act have been fully complied with."

Upon the foregoing facts the trial judge was of the opinion that chapter 334 of the Public-Local Laws of 1923 "is constitutional, and that Buncombe County is entitled, at the proper time, to have a deed made to it for the property described in the complaint."

From the foregoing judgment the plaintiff appealed.

DeVere C. Lentz and W. A. Sullivan for plaintiff.
Clinton K. Hughes for defendant.

BROGDEN, J. As it is admitted that the paving of the street, the levying of the assessment, and the sale of the property complied in all respects with the provisions of chapter 334 of the Public-Local Laws of 1923, only one question of law can be presented, and that is whether said statute is constitutional.

The statute provided for a petition to be signed by two-thirds of "the abutting property owners." It further provided that an accurate map of the various lots and lands abutting on the highway should be filed in the office of the county clerk, "to be subject to public inspection," etc. The statute proceeds as follows: "And upon the filing of said report the said board of commissioners shall cause ten days notice to be given by publication in some newspaper published in the city of Asheville, stating that such report has been filed in the office of the county clerk, and that at the first regular meeting of the said board of commissioners to be held after the expiration of said ten days notice, the said board of commissioners would consider said report, and, if no valid objection be made thereto, the same would be adopted and approved by said board. Any owner of land affected by said lien for assessments shall have the right to be heard concerning the same before the said board of commissioners by filing objections thereto in writing, in the office of the county clerk, prior to the first meeting of the board at which said report may be approved and confirmed, and any person so objecting to the confirmation or approval of said report shall state in said objections in writing what part, if any, of said assessments he admits to be lawfully chargeable to his said land. . . . Any person shall have the right, within ten days after the approval or confirmation of the same by the said board, and not after that time, to appeal from the said decision of the said board of commissioners to the next term of the Superior Court of Buncombe County," etc.

The only ground of assault upon the constitutionality of the statute set forth in the brief of plaintiff is "that the act does not provide for a personal notice to be served on the property holder as to the date of final settlement, and only provides that notice published in a newspaper is sufficient," etc. Newspaper notices in street assessment cases have heretofore been declared adequate by this Court. *Vester v. Nashville,* 190 N. C., 265, 129 S. E., 593; *Jones v. Durham,* 197 N. C., 127, 147 S. E., 824. Adopting the words of the concluding paragraph in *Vester v. Nashville, supra,* "The record presents a case in which the plaintiffs were duly notified and given ample opportunity to be heard; and if they saw fit not to avail themselves of the opportunity thus afforded, they cannot now be heard to impeach the validity of the ordinance or the assessment."

The principles invoked in *Beaufort County v. Mayo,* 207 N. C., 211, with reference to the rights of lienholders in tax foreclosures, have no bearing on the issues involved in this case.

Affirmed.

JOE FRANCIS, BY HIS NEXT FRIEND, EVE FRANCIS, v. CAROLINA WOOD TURNING COMPANY ET AL.

(Filed 9 October, 1935.)

Master and Servant F a—Compensation Act held a bar to plaintiff employee's right to maintain suit at common law.

Plaintiff and his employer were bound by the provisions of the Workmen's Compensation Act. On the morning of plaintiff's injury he was not working for his employer, but was allowed by his employer to use the machinery for his own personal ends. Compensation was denied under the Compensation Act for that the accident did not arise out of and in the course of the employment. Thereafter plaintiff instituted this action, alleging negligence on the part of the employer. *Held:* Judgment as of nonsuit was properly entered at the close of all the evidence, for even conceding that the evidence established negligence of defendant employer, the Compensation Act barred all other rights and remedies of defendant employee except those provided in the act.

APPEAL by plaintiff from *Hill, Special Judge,* at January Term, 1935, of SWAIN. Affirmed.

This is an action to recover damages for personal injuries suffered by the plaintiff while he was operating a cut-off or rip saw in the plant of the defendant. It is alleged in the complaint that plaintiff's injuries were caused by the negligence of the defendant.

At the date of his injuries, and for about one year prior thereto, plaintiff was and had been an employee of the defendant, and as such employee had worked for the defendant in its wood turning plant. Both the plaintiff and the defendant were subject to the provisions of the North Carolina Workmen's Compensation Act.

The plaintiff was injured on or about 4 September, 1931. He went into the plant of the defendant during the morning of the day he was injured, and, upon being informed by his foreman that there was no work in the plant for him that morning, he requested the foreman to permit him to use the cut-off or rip saw for the purpose of making a table for his own use. The request was granted. While using the saw, plaintiff's hand was caught in the saw and was injured.

Shortly after he was injured, plaintiff instituted a proceeding before the North Carolina Industrial Commission for compensation under the provisions of the North Carolina Workmen's Compensation Act. Compensation was denied by the Industrial Commission on its finding that plaintiff's injuries were not the result of an accident which arose out of and in the course of his employment. Plaintiff did not appeal from the award denying compensation.

This action was begun in the Superior Court of Swain County. At the close of the evidence, on the motion of the defendant, the action was dismissed by judgment as of nonsuit. Plaintiff appealed to the Supreme Court.

Moody & Moody and I. C. Crawford for plaintiff.
Johnston & Horner for defendants.

CONNOR, J. The judgment in this action is affirmed on the authority of *Pilley v. Cotton Mills,* 201 N. C., 426, 160 S. E., 479. The facts alleged in the complaint and admitted by the demurrer in that case are identical with the facts shown by all the evidence in the instant case. The demurrer was sustained by the Superior Court, and its judgment was affirmed by this Court on plaintiff's appeal.

In the opinion in that case it is said: "Under the Workmen's Compensation Law every employer and employee, except as therein stated, is presumed to have accepted the provisions of the act, and to pay and accept compensation for personal injuries or death as therein set forth. The plaintiff, not being in the excepted class, is bound by the presumption. P. L. 1929, ch. 120, sec. 4. It follows by the express terms of the statute (sec. 11) that the rights and remedies thus granted to an employee exclude all other rights and remedies of such employee as against his employer at common law, or otherwise, on account of the injury, loss of service, or death. The appellant's suggested distinction between an

injury by accident and an injury resulting from a negligent act cannot avail him. By mutual concession between the employer and employee who are subject to the compensation law the question of negligence is eliminated. *Conrad v. Foundry Co.*, 198 N. C., 723."

Conceding without deciding that there was evidence at the trial of the instant case tending to show that plaintiff was injured by the negligence of the defendant, as alleged in the complaint, he cannot recover in this action for the reason that both he and the defendant were bound by the provisions of the North Carolina Workmen's Compensation Act. One of the provisions of this act is that "the rights and remedies herein granted to an employee when he and his employer have accepted the provisions of this chapter, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employees, his personal representatives, parents, dependents, or next of kin, as against the employer, at common law or otherwise, on account of such injury, loss of service, or death."

Affirmed.

CHARLES M. BRITT v. CHESTER R. HOWELL AND HARRIS, GIBSON, HOWELL COMPANY, INC.

(Filed 9 October, 1935.)

1. Corporations G i—Complaint held sufficient to state cause of action against corporation for slander.

The complaint alleged that plaintiff and the individual defendant were organizers and officers of competitive business corporations, that a person seeking to make a connection with one or the other of the corporations called at the office of the corporate defendant, and that while there the individual defendant, acting for himself and his corporate codefendant, said that plaintiff was a thief, and that therefore the prospect would not want to do business with plaintiff's corporation. *Held:* The demurrer of the corporate defendant, on the ground that the complaint failed to state a cause of action against it, was properly overruled, a corporation being liable *civiliter* for slanderous words spoken by its officers or agents in its service with its authority, express or implied, and the complaint being sufficient to support the introduction of evidence of its liability within the rule.

2. Same: Parties B b—

A corporation is liable for torts committed by its agents and servants precisely as a natural person, and a corporation may be joined as a party defendant with its officer or agent in an action for slander for words spoken by its officer or agent in the service of the corporation and with its express or implied authorization.

APPEAL in civil action for slander by the corporate defendant from judgment overruling its demurrer, entered by *Warlick, J.*, at May Term, 1935, of BUNCOMBE. Affirmed.

Lee & Lee for plaintiff, appellee.
Heazel, Shuford & Hartshorn for defendant, appellant.

SCHENCK, J. The corporate defendant assigns as its first ground for demurrer that the complaint "does not contain any allegation that this defendant spoke or caused to be spoken the words alleged in the complaint to have been spoken by the defendant Chester R. Howell, or that the speaking of such words by said Howell was either authorized or ratified by this defendant, and, therefore, that the said complaint does not state a cause of action against this defendant."

The complaint alleges that prior to the slanderous utterance the plaintiff Britt and the individual defendant Howell were engaged together in the general food brokerage business as the Charles M. Britt Company, that their company had been put into receivership, and that plaintiff, with others, had organized a new corporation, the Britt, Shiver, Norcom Company, to engage in the same business in the same locality as the old company, and that the defendant Howell, with other associates, had formed the defendant corporation for the purpose of engaging in the same business in the same locality, and that the representatives of the principal accounts of the old company were calling upon both of the new corporations with the view of investigating and recommending the appointment of brokers for their respective products in the Asheville territory, and that when H. M. Phelps, a representative of the C. H. Musselman Company, called on the defendant corporation, recently organized by the defendant Howell, that he, the said Howell, "who was at that time acting for himself and his codefendant, the Harris, Gibson, Howell Company, being at that time an officer of said codefendant company, to wit, its vice-president and treasurer, and did, in the interest of himself and his said company, solicit the brokerage account of the C. H. Musselman Company, and at said time, in an effort to and with the deliberate intention of discrediting this plaintiff, and the Britt, Shiver, Norcom Company, the said Chester R. Howell made and uttered, and did falsely and maliciously speak and publish, of the plaintiff and of his said business the following words: 'That Charles M. Britt sold merchandise from the consigned stock of the C. H. Musselman Company, collecting for same, and kept the money for his own personal use, and that the Charles M. Britt Company had to pay for same, and (the said Howell) felt sure that my company (the company represented by the said H. M. Phelps) would not want to do business with a thief.' "

A corporation is liable in an action for slander, or other tort, although the act may have been *ultra vires* and foreign to the objects of its creation, and this liability extends to the tortious acts of its servants done in its service, and whether such acts were committed by the servants in the service of the corporation or solely for their own purposes, or whether the corporation authorized or participated in the tortious act are questions of fact for the jury, *Hussey v. R. R.,* 98 N. C., 34, and a corporation may be held liable for slander when the defamatory words are uttered by one of its officers or agents either by its express authority or in the course of his employment and under such circumstances as to fairly and reasonably warrant the inference that such words were so authorized. *Cotton v. Fisheries Products Company,* 177 N. C., 56.

We think the allegations in the complaint are sufficient to permit the introduction of proof of such facts as might support the inference that the alleged slanderous and defamatory words were spoken by the individual defendant in the service of the corporate defendant and by its authority, and that his Honor, in overruling the first ground assigned for demurrer, made a correct application of the principles of the law enunciated by this Court and the text-writers.

The corporate defendant assigns as its second ground for demurrer that it "appears from the face of the complaint there is a misjoinder of parties defendant in this action." The question here presented is answered adversely to the demurrant by both *Cotton v. Fisheries Products Company, supra,* and *Hussey v. R. R., supra.* In the latter case the following is quoted as applicable to an action for slander instituted against a railroad corporation and its general manager: "The result of the modern cases is, that a corporation is liable *civiliter* for torts committed by its servants or agents, precisely as a natural person; and it is liable as a natural person for the acts of its agents, done by its authority, express or implied, . . . The corporation, and its servant, by whose act the injury was done, may be joined in an action of tort in the nature of trespass."

Affirmed.

CAROLINE DOWLING v. J. CHARLES WINTERS, EXECUTOR.

(Filed 9 October, 1935.)

Process B e—Service may not be had on personal representative of deceased auto owner under C. S., 491 (a).

The statute, C. S., 491 (a), providing that summons may be served on a nonresident automobile owner in an action involving an accident occurring in this State, by service through the Commissioner of Revenue, and that automobile owners who use our public highways shall be deemed to

have appointed the Commissioner of Revenue their process agent, makes no provision for service on the personal representative of a deceased automobile owner who dies after an accident occurring in this State and before service of process, and service under the statute upon such personal representative confers no jurisdiction on our courts, since an agency, unless coupled with an interest, is terminated by the death of the principal.

APPEAL by plaintiff from *Devin, J.*, at March Term, 1935, of VANCE.

Transitory action brought by nonresident in the Superior Court of Vance County against personal representative of nonresident decedent to recover damages for alleged negligent injury growing out of automobile accident or collision occurring on public highway in this State.

It appears from the complaint that the plaintiff is a resident of the State of New Jersey; that the defendant is the duly appointed representative of the estate of George P. Dowling, deceased, having qualified as such in the Orphans' Court of Camden, New Jersey, and that the cause of action, upon which plaintiff sues, is one in tort to recover damages for personal injuries alleged to have been caused by defendant's testate, a resident of New Jersey, while operating a motor vehicle on one of the public highways in Vance County, this State.

Service of process was had upon the defendant through the Commissioner of Revenue, as provided by ch. 75, Public Laws 1929.

The defendant appeared specially and moved to quash the summons on the ground that he had not been brought into court on any valid and binding service of process. The motion was allowed, and from this ruling plaintiff appeals, assigning error.

A. A. Bunn, J. H. Bridgers, and J. B. Hicks for plaintiff.
Perry & Kittrell for defendant.

STACY, C. J. The plaintiff is a nonresident; the defendant, a nonresident executor of a nonresident decedent; the cause of action, transitory, growing out of a motor vehicle accident or collision, occurring on a public highway in this State. Plaintiff alleges she was riding as a guest of defendant's testate at the time of the injury.

Is service of summons through the Commissioner of Revenue, as provided by C. S., 491 (a), for service of process on nonresident operators of motor vehicles on the public highways of this State, sufficient to bring the defendant into court in the instant case so as to confer jurisdiction over the person of the defendant? The answer is, No. *Smith v. Haughton,* 206 N. C., 587, 174 S. E., 506.

It is provided by the statute in question that a nonresident who accepts the benefits of our laws by operating a motor vehicle on the public highways of this State shall be deemed to have appointed the

State Commissioner of Revenue "his true and lawful attorney upon whom may be served all summonses or other lawful process in any action or proceeding against him, growing out of any accident or collision in which said nonresident may be involved by reason of the operation by him, for him, or under his control or direction, express or implied, of a motor vehicle on such public highway of this State," etc. Then follows provision as to how service may be obtained through the office of Commissioner of Revenue. The validity of the act was upheld in *Ashley v. Brown,* 198 N. C., 369, 151 S. E., 725; *Bigham v. Foor,* 201 N. C., 14, 158 S. E., 548.

It will be observed the statute makes no provision for service of process upon the executor, administrator, or personal representative of the nonresident motorist, who, if living, might have been served with process under the act. Nor is it provided that such "appointment" shall be irrevocable.

In considering a similar statute, the Wisconsin Supreme Court held that it did not provide for service of process upon the executor, administrator, or personal representative of a deceased nonresident, who, in his lifetime, had operated a motor vehicle on the highways of Wisconsin, but who died prior to service of summons through the designated state official. *State ex rel. Ledin v. Davison,* 216 Wis., 216, 96 A. L. R., 589. The language of our statute suggests a like interpretation.

It is also the general holding that an appointment or agency, unless it be a power coupled with an interest, is terminated by the death of the principal. *Fisher v. Trust Co.,* 138 N. C., 90, 50 S. E., 592; *Wainwright v. Massenburg,* 129 N. C., 46, 39 S. E., 725.

The rule that death revokes a simple agency was held to preclude substituted service in case of death of the defendant, a nonresident, under a provision making the commissioner agent for the acceptance of process in *Lepre v. Trust Co.,* 11 N. J. Misc. R., 887, 168 Atl., 858.

The motion to dismiss was properly allowed.

Affirmed.

RAYMOND HARRIS ET AL. v. JENSIE AYCOCK ET AL.

(Filed 9 October, 1935.)

1. Executors and Administrators F f—Heirs at law held entitled to maintain action without showing executor's refusal under facts of this case.

Insured attempted to change the beneficiary in policies of life insurance to his sister. After his death, his heirs at law instituted this action to set aside the purported change of beneficiary, and it appeared that plaintiffs had previously challenged the right of insured's executor to act in

the premises by filing a caveat, and that the executor was joined as a defendant in the action, and that he denied the allegations of the complaint and supported the contentions of his codefendant. *Held:* Failure of plaintiffs to show a demand on the executor to bring the action and his refusal to do so is not sufficient cause for dismissing the action as in case of nonsuit, it clearly appearing that the executor was in opposition to plaintiffs, and the law not requiring the doing of a vain or useless thing.

2. Evidence K b—

A nonexpert witness who has had opportunity of knowing and observing a person may testify from his own personal observation as to his opinion of the sanity or insanity of such person.

3. Appeal and Error L b—

Where judgment of nonsuit against plaintiffs is reversed on appeal, subsequent proceedings in the trial court after the entering of the judgment as of nonsuit which adversely affected the interests of plaintiffs, are vacated.

APPEAL by plaintiffs from *Small, J.*, at April Term, 1935, of WAYNE.

Civil action to recover for the estate of Cicero Harris, deceased, the proceeds of two life insurance policies.

The facts are these:

1. The plaintiffs are children of Cicero Harris, deceased.

2. On 17 July, 1922, two life insurance policies were taken out by plaintiffs' father, both made payable to his estate.

3. In 1925, as permitted by the terms of the policies, the beneficiary in the policies was changed to Cora Harris, wife of the insured and mother of plaintiffs.

4. Cora Harris died in 1926.

5. Prior to his death, and between the years 1926 and 1931, Cicero Harris again changed, or attempted to change, the beneficiary in each of his life insurance policies to his sister, Jensie Aycock.

6. Cicero Harris died in 1933, leaving a last will and testament in which he appointed his brother-in-law, Luby Aycock, executor of his estate.

7. Plaintiffs filed a caveat to the will of Cicero Harris in July, 1933. Thereafter, this action was instituted to annul the last change of beneficiary in the life insurance policies on the grounds of undue influence and mental incapacity at the time of said purported change.

The plaintiffs offered two witnesses, W. W. Spivey and Florence Harris, brother-in-law and daughter of the deceased, who, after proper predicate, would have testified, if permitted to do so, that in their opinions Cicero Harris was not mentally competent to execute the last change of beneficiary in his insurance policies. On objection, this evidence was excluded. Exception.

At the close of plaintiffs' evidence, motion for judgment as of nonsuit was allowed. Thereafter, the court proceeded to try title to the insurance funds (which had been paid into the clerk's office by consent), and the plaintiffs were not allowed to cross-examine witnesses or to take part in the subsequent proceedings. Exceptions.

From the judgment of nonsuit and from the judgment declaring Jensie Aycock entitled to the insurance funds, the plaintiffs appeal, assigning errors.

J. Faison Thomson, W. A. Dees, and Needham W. Outlaw for plaintiffs.

Scott B. Berkeley and Kenneth C. Royal for defendants.

STACY, C. J., after stating the case: Plaintiffs were nonsuited and barred from participation in the proceedings ostensibly upon the ground that no showing of demand upon the executor to bring the action and refusal on his part had been made at the time the evidence of mental incapacity was offered. Plaintiffs had, however, previously challenged the right of the executor to act in the premises by filing caveat to the will, and it appears that the executor has joined with his wife and codefendant in the present action in supporting her claim and denying the allegations of the complaint. The executor is clearly in opposition to the plaintiffs. This was sufficient under the principle that the law will not require a vain or useless thing to be done. *Shuford v. Cook,* 164 N. C., 46, 80 S. E., 61; *McGuire v. Williams,* 123 N. C., 349, 31 S. E., 627; *Woolen Co. v. McKinnon,* 114 N. C., 661, 19 S. E., 761; *Nixon v. Long,* 33 N. C., 428.

The matters pleaded in defense, upon proper showing, may be amply sufficient to defeat the plaintiffs' claim. This, however, would not seem to justify the exclusion of their evidence or the judgment of nonsuit. The competency of the evidence is not seriously questioned. It is well established that anyone who has observed another, or conversed with him, or had dealings with him, and a reasonable opportunity, based thereon, of forming an opinion, satisfactory to himself, as to the mental condition of such person, is permitted to give his opinion in evidence upon the issue of mental capacity, although the witness be not a psychiatrist or expert in mental disorders. *S. v. Keaton,* 205 N. C., 607, 172 S. E., 179; *White v. Hines,* 182 N. C., 275, 109 S. E., 31. "One not an expert may give an opinion, founded upon observation, that a certain person is sane or insane." *Whitaker v. Hamilton,* 126 N. C., 465, 35 S. E., 815.

Any witness who has had opportunity of knowing and observing the character of a person, whose sanity or mental capacity is assailed or

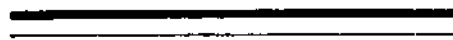
brought in question, may not only depose to the facts he knows, but may also give in evidence his opinion or belief as to the sanity or insanity of the person under review, founded upon such knowledge and observation, and it is for the jurors to ascribe to his testimony that weight and credibility which the intelligence of the witness, his means of knowledge and observation, and all the circumstances attending his testimony, may in their judgment deserve. *Clary v. Clary,* 24 N. C., 78.

After sustaining the demurrer to the evidence, Jensie Aycock was permitted to proceed to try her claim of title to the insurance funds, and the plaintiffs were barred from further participation in the proceedings. At this, counsel for plaintiffs complain, because, they say, they were thereby involuntarily required to play a rôle somewhat similar to that of Abner Dean in Bret Harte's "The Society Upon the Stanislaus":

> "Then Abner Dean of Angel's raised a point of order—when
> A chunk of old red sandstone took him in the abdomen,
> And he smiled a kind of sickly smile, and curled up on the floor,
> And the subsequent proceedings interested him no more."

If counsel were thus embarrassed, as they doubtless facetiously suggest, it is enough to say a reversal of the judgment of nonsuit *ex necessitate* vacates all that transpired thereafter which adversely affected their interests. *Hargett v. Lee,* 206 N. C., 536, 174 S. E., 498. This gives them another opportunity to be heard.

Reversed.



E. E. WEST, Administrator of OLIVER WEST, Deceased, v. COLLINS BAKING COMPANY, CECIL POPE, and O. V. PRESSLEY.

(Filed 9 October, 1935.)

1. Evidence E e—

Where the material allegations of a paragraph of the complaint are admitted in the answers, defendants' exception to the admission of the paragraph in evidence cannot be sustained.

2. Master and Servant D b—

An admission that on the day of the accident one of defendants was an employee of his codefendant, and as such employee was authorized and directed from time to time to drive defendant employer's truck, is evidence tending to show that at the time of the injury in suit the employee was driving the truck within the scope of his employment.

3. **Negligence D c—**

Where there is evidence tending to show that plaintiff's intestate was injured as a result of defendants' negligence, and no evidence of contributory negligence, defendants' exception to the refusal to grant their motions for judgment as of nonsuit cannot be sustained.

4. **Torts B a—Evidence held to show that intestate's injuries resulted from joint negligence of defendants.**

Evidence that plaintiff's intestate was struck and injured by a car driven by one of defendants, and that as he was attempting to rise from the pavement where he had been knocked by the impact, he was struck and injured by a truck driven by another defendant in the course of his employment by the third defendant, and that the negligence of the drivers of both cars caused the respective accidents, and that intestate died from the injuries thus inflicted, *is held* to show that the proximate cause of the injuries was the joint and concurrent negligence of defendants, and the doctrine of intervening negligence has no application.

APPEAL by defendants from *Warlick, J.*, at April Term, 1935, of BUNCOMBE. Affirmed.

This is an action to recover damages for the death of plaintiff's intestate, who, while he was crossing a street in the city of Asheville, was struck, knocked down, and injured by an automobile driven by the defendant O. V. Pressley. After he was knocked down and injured, and while he was attempting to rise, plaintiff's intestate was struck and injured by a truck owned by the defendant Collins Baking Company, and driven by the defendant Cecil Pope. The truck driven by the defendant Cecil Pope was following immediately behind the automobile driven by the defendant O. V. Pressley, and both the truck and the automobile were being driven on said street, approaching an intersection, at an excessive rate of speed, at the time they struck and injured plaintiff's intestate. He died in a hospital in the city of Asheville shortly after he was injured. His death was the result of his injuries.

The action was begun and tried in the general county court of Buncombe County.

The issues arising upon the pleadings were submitted to the jury and answered as follows:

"1. Was the plaintiff's intestate, Oliver West, injured and killed by reason of the negligence of the Collins Baking Company, as alleged in the answer? Answer: 'Yes.'

"2. Was the plaintiff's intestate, Oliver West, injured and killed by reason of the negligence of Cecil Pope, as alleged in the complaint? Answer: 'Yes.'

"3. Was the plaintiff's intestate, Oliver West, injured and killed by reason of the negligence of the defendant O. V. Pressley, as alleged in the answers of his codefendants? Answer: 'Yes.'

"4. Did the plaintiff's intestate, Oliver West, by reason of his own negligence contribute to his injury and death, as alleged in the answers? Answer: 'No.'

"5. What damages, if any, is the plaintiff entitled to recover? Answer: '$6,250.'"

From judgment that plaintiff recover of the defendants, jointly and severally, the sum of $6,250, with interest and costs, the defendants appealed to the Superior Court of Buncombe County, assigning errors in the trial.

At the hearing of defendants' appeal by the judge of the Superior Court, each and all of their assignments of error were overruled, and the judgment of the general county court was affirmed.

The defendants appealed to the Supreme Court, assigning as errors the rulings of the judge of the Superior Court overruling their assignments of error on their appeal from the judgment of the general county court.

George F. Meadows and Jones & Ward for plaintiff.
Johnston & Horner for defendant Collins Baking Company.
Sanford W. Brown for defendant Cecil Pope.
O. K. Bennett for defendant O. V. Pressley.

CONNOR, J. On their appeal to this Court, the defendants contend that there was error in the refusal of the judge of the Superior Court to sustain their exception to the admission of a paragraph of the complaint at the trial in the general county court as evidence. The material allegations of the paragraph are admitted in the answers. For this reason the contentions of the defendants cannot be sustained.

The admission in the answer that on the day plaintiff's intestate was injured by the truck which was owned by the defendant Collins Baking Company, and driven by the defendant Cecil Pope, the defendant Cecil Pope was an employee of his codefendant, and as such employee was authorized and directed from time to time to drive said truck, was evidence tending to show that at the time plaintiff's intestate was injured, the defendant Cecil Pope was driving the truck within the scope of his employment. See *Jeffrey v. Mfg. Co.*, 197 N. C., 724, 150 S. E., 503.

The defendants further contend that there was error in the refusal of the judge of the Superior Court to sustain their exception to the refusal of the general county court to allow their motion for judgment as of nonsuit at the close of all the evidence. There was evidence at the trial in the general county court tending to show that plaintiff's intestate was killed by the negligence of the defendant. There was no evidence tending to show that plaintiff's intestate by his own negligence contributed to his injuries which resulted in his death. For this reason, the contention

of the defendants cannot be sustained. There was no error in the refusal of the trial court to allow defendants' motion for judgment as of nonsuit.

The principle applied in *Hinnant v. R. R.,* 202 N. C., 489, 163 S. E., 555, and in *Ballinger v. Thomas,* 195 N. C., 517, 142 S. E., 761, that when two defendants have been negligent, but the negligence of one is insulated by the negligence of the other, which is the sole proximate cause of the injury suffered by the plaintiff, the former is not liable to the plaintiff for damages resulting from the injury, is not applicable to the facts shown by all the evidence at the trial of the instant case. Here, all the evidence shows that the proximate cause of the injuries which resulted in the death of plaintiff's intestate, was the joint and concurrent negligence of the defendants. For this reason the defendants are jointly liable to the plaintiff, on the principle stated in *White v. Carolina Realty Company,* 182 N. C., 536, 109 S. E., 564, and applied in *Myers v. Southern Public Utilities Co., ante,* 293 (295), 180 S. E., 695, as follows: "Where an injury to a third person is proximately caused by the negligence of two persons, to whatever degree each may have contributed to the result, the negligence of one may not exonerate the other, each being a joint *tort-feasor,* and the person so injured may maintain his action for damages against one or both."

As neither of the assignments of error on this appeal can be sustained, the judgment is

Affirmed.

GAITHER CARTER v. N. P. ANDERSON AND H. C. ANDERSON, ADMINISTRATOR OF THE ESTATE OF W. C. ANDERSON, DECEASED.

(Filed 9 October, 1935.)

1. Appeal and Error J c—

The findings of fact by the trial court upon the hearing of a motion to set aside a judgment for excusable neglect, N. C. Code, 600, are conclusive on appeal when supported by any competent evidence.

2. Judgments K b—Judgment held taken upon neglect of client present at time of refusal of his attorney's motion for continuance.

Although the neglect of an attorney employed to defend an action will not ordinarily be imputed to his client, and will not, therefore, prevent the setting aside of a judgment by default upon a showing of excusable neglect and a meritorious defense, N. C. Code, 600, where the trial court finds upon supporting evidence that defendants and their attorney were present in court at the beginning of the term at which the judgment was rendered, that defendants' motion for a continuance was refused, and that defendants and their attorney thereupon left the court room without definite agreement with the court or opposing counsel, and did not return to

defend the case, and that both defendants and their attorney had failed to exercise due diligence, the court's refusal of the motion to set aside the judgment will be affirmed on appeal.

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

APPEAL by defendants from *Warlick, J.,* at March Term, 1935, of MADISON. Affirmed.

This was a motion made by defendants to vacate and set aside a judgment rendered against them at the March, 1934, Term of court of Madison County. After due notice, the matter regularly came on to be heard before his Honor, Wilson Warlick, judge presiding at the March, 1935, Term of Madison Superior Court, and after hearing the reading of affidavits and argument of counsel, the court refused to grant the motion of defendants, and judgment was rendered as follows:

"The above entitled matter coming on for a hearing before his Honor, Wilson Warlick, judge presiding, and being heard upon the verified motion to set aside and vacate the judgment heretofore rendered in said cause at the March, 1934, Term of the Superior Court of Madison County, and being heard upon said verified motion, together with affidavits submitted by both the plaintiff and the defendants, the court finds the following facts:

"That this action, as above entitled, was duly commenced and was pending and at issue prior to the March, 1934, Term of the Superior Court of Madison County; that said case was duly placed upon the civil calendar for trial at said March Term, 1934, and that the defendants, represented by their attorney, I. C. Crawford, were in attendance upon said court during Monday and Tuesday of said term; that the defendants, through their attorney, made a motion for a continuance of said case, which motion was denied.

"That thereafter, without obtaining permission of the court, the defendants, together with their attorney, left the court without any definite agreement with the court or the attorneys in opposition that said case would not be reached for trial, did not return to defend said case; that said case was duly reached for trial on Friday, during the March Term, 1934, and a jury was regularly impaneled, issues submitted and answered by the jury in favor of the plaintiff, and judgment pronounced thereon.

"Upon the above findings of facts, the court being of the opinion that the defendants and their attorney had not exercised due diligence in the defense of their cause,

"It is therefore, upon motion of Guy V. Roberts and John H. McElroy, attorneys for plaintiff,

"Ordered, adjudged, and decreed that the defendants' motion to vacate and set aside the judgment heretofore rendered be and the same is hereby

denied. All affidavits are herewith incorporated herein. Wilson Warlick, Judge Presiding."

The only exception and assignment of error is that "The court erred in overruling defendants' motion to vacate and set aside the judgment rendered against them."

John H. McElroy and Guy V. Roberts for plaintiff.
J. Y. Jordan, Jr., and Calvin R. Edney for defendants.

CLARKSON, J. The question presented: Did appellants, defendants in the trial court, exercise due care and diligence in the preparation and trial of the case against them sufficient to justify the vacating and setting aside of the judgment rendered against them in the Superior Court of Madison County, N. C.? We think not.

This is a motion by defendants to set aside a judgment for excusable neglect, under N. C. Code, 1931 (Michie), sec. 600, which, in part, is as follows: "The judge shall, upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, verdict, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, and may supply an omission in any proceeding," etc.

A judgment may be set aside under this section if the moving party can show excusable neglect, and that he has a meritorious defense. *Dunn v. Jones,* 195 N. C., 354; *Bowie v. Tucker,* 197 N. C., 671.

In *Helderman v. Mills Co.,* 192 N. C., 626 (629), it is said: "The negligence of the attorney, upon the facts found, even if conceded, will not be imputed to defendant, who was free from blame. *Edwards v. Butler,* 186 N. C., 200."

In the present cause the court below found the facts. There was sufficient competent evidence to support these findings of fact, and therefore conclusive upon appeal by defendants to this Court. *Helderman v. Mills Co., supra,* p. 628.

Upon the facts found, we do not think the judgment should be set aside on the most liberal construction of the act. The court below found that defendants were to blame. "That the defendants and their attorney had not exercised due diligence in the defense of their cause." The case was calendared for trial at the March Term, 1934, of the Superior Court of Madison County, N. C. Defendants brought their attorney with them from another county. A motion was made to the court by their attorney, the defendants being present, to continue the case. The court denied this motion. The defendants and their attorney left the court without any definite agreement with the court or the attorneys for the opposition and never returned to defend the case.

We do not think *Sutherland v. McLean et al.,* 199 N. C., 345, cited by defendants, applicable to the facts in this case. In that case the client was relying on his attorney and had no personal knowledge of the situation. In the present case, the defendants were in court and knew that the court had refused to continue their case; notwithstanding this, they and their attorney left the court without any definite agreement with the court or with the opposing counsel.

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.

CHARLES BAILEY, BY HIS NEXT FRIEND, E. D. BAILEY, v. TOM ROBERTS AND WIFE, ELIZABETH ROBERTS, AND ED ROBERTS.

(Filed 9 October, 1935.)

1. Appeal and Error G c—Appellant held to have abandoned some of exceptions on appeal.

Where defendant takes no exception to the portion of the judgment holding adversely to him on a point of law constituting one of his grounds for demurrer, and on appeal from the judgment overruling the demurrer, fails to discuss this aspect of the case in his brief or cite authorities, Rule 28, defendant will be deemed to have abandoned his contention in respect to this aspect of the case.

2. Pleadings E c—

The trial court has the discretionary power to allow plaintiff to amend his complaint, upon the hearing of defendants' demurrer thereto, so as to allege that the negligence complained of was the proximate cause of the injury. C. S., 547.

APPEAL by defendants from *Phillips, J.,* at July Term, 1935, of MITCHELL. Affirmed.

The defendants demurred to the complaint. The demurrer is as follows: "1st. For the reason that plaintiff has not legal capacity to sue. It appears upon the face of the complaint that the plaintiff is a minor under the age of 21 years, and his next friend, E. D. Bailey, is a nonresident of the State. It does not appear that any next friend or guardian has been appointed in Tennessee, the state of the residence of the plaintiff, and that no ancillary guardian or next friend has been appointed in this State. 2d. For the reason that the complaint does not state a cause of action, in that no particular negligence is alleged or

sufficiently described, and no allegation is made that such negligence is the proximate cause of any injury which the plaintiff alleges he received."

The court below made the following order: "After hearing the arguments of counsel for both plaintiff and defendants, upon the demurrer of the defendants, the court, upon its own motion, made the following order: Demurrer of the defendants heard and the court, upon the hearing, in its discretion, allowed the plaintiff to amend paragraph nine of the complaint so as to allege that the negligent acts complained of in the preceding paragraphs were the proximate cause of the injury."

The court below signed the following judgment: "This cause coming on to be heard before his Honor, F. D. Phillips, judge presiding at the July Term, 1935, of the Superior Court of Mitchell County, upon the demurrer filed to the complaint in this action, and after reading the pleadings and argument of the counsel, the court being of the opinion that E. D. Bailey has been properly appointed as the next friend, and as such is entitled to prosecute this cause on behalf of the infant, Charles Bailey; and the court being further of the opinion that the acts of negligence complained of are sufficiently set forth, but in its discretion permitting an amendment as shown by an order made in this cause: Now, therefore, it is ordered, adjudged, and decreed that the demurrer be and the same is hereby overruled, and the defendants allowed the statutory time within which to answer; that the plaintiff be allowed to amend his complaint by adding after the word 'negligence' in the first line of paragraph nine the words 'which negligence was the proximate cause of the injury.' F. Donald Phillips, Judge Presiding."

The defendants excepted and assigned errors and appealed to the Supreme Court, as follows: "1st. For that the court, in his discretion upon the hearing of the demurrer, allowed the plaintiff to amend paragraph nine of the complaint so as to allege that the negligent acts complained of in the preceding paragraph were the proximate cause of the injury. 2d. For that the court overruled the demurrer and signed the judgment of record."

Alden P. Honeycutt and Watson & Fouts for plaintiff.
W. C. Berry and Charles Hutchins for defendants.

CLARKSON, J. The first contention made by defendants in the demurrer is to the effect that the plaintiff has no legal capacity to sue. We think this position taken by defendants has been abandoned.

In the judgment of the court below is the following: "The court being of the opinion that E. D. Bailey has been properly appointed as the next friend and, as such, is entitled to prosecute this cause on behalf

of the infant, Charles Bailey." The defendants, as to this aspect, filed no exception and assignment of error, nor did they comply with Rule 28 (200 N. C., 831), which, 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."

The question involved: Did the court err in permitting the plaintiff to amend his complaint upon the hearing of the demurrer? We think not.

In *Hood, Comr., v. Love,* 203 N. C., 583 (585), it is said: "In the case of *S. v. Bank,* 193 N. C., at pp. 527-8, citing numerous authorities, we find: 'When a case is presented on demurrer we are required by the statute, C. S., 535, to construe the complaint liberally "with a view to substantial justice between the parties," and in enforcing this provision we have adopted the rule "that if in any portion of it, or to any extent, it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading will stand, however inartificially it may have been drawn, or however uncertain, defective, and redundant may be its statements. For, contrary to the common-law rule, every reasonable intendment and presumption must be made in favor of the pleader." ' " (Citing numerous authorities.) "The trial court has plenary power, without consent, to amend pleadings, so far as the amendment did not allege substantially a new cause of action. *Bridgeman v. Ins. Co.,* 197 N. C., 599. Allowing all amendments in pleadings is in the sound discretion of the court. *Sheppard v. Jackson,* 198 N. C., 627. The trial court can, in its discretion, amend pleadings before or after judgment to conform to facts proved. *Finch v. R. R.,* 195 N. C., 190." N. C. Code (Michie), 1935, sec. 547.

We do not discuss the allegations of the complaint, as the matter goes back for a trial on the merits. The allegations as to the liability as joint *tort-feasors* are sufficient in law. *Moses v. Morganton,* 192 N. C., 102; *Lineberger v. City of Gastonia,* 196 N. C., 445; *Glazener v. Transit Lines,* 196 N. C., 504. The allegations of fact in *Ballinger v. Thomas et al.,* 195 N. C., 517, are different and the case is distinguishable from the present one, but the law therein stated is the same as in the above cited cases. *Rountree v. Fountain,* 203 N. C., 381, and *White v. Charlotte,* 207 N. C., 721, are not in point.

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

Affirmed.

IN RE WILL OF MRS. ALETHEA P. NEAL.

(Filed 9 October, 1935.)

Wills D h—Evidence held insufficient to show undue influence or mental incapacity and directed verdict should have been given.

Where the only evidence on the issues of undue influence and mental capacity involved in caveat proceedings is that testatrix had made certain bequests to caveators, relatives of her deceased husband, that prior to her last illness she was in good health and sound mind, and that during her last illness, while she was attended by her brother, a physician, she executed a codicil revoking the bequests to her husband's relatives and that the unrevoked bequests in the will and the bequests in the codicil were to children of her brother and her other nieces and nephews, that when she became ill she expressed her desire to change her will to friends and relatives, and that her brother named as executor in the codicil prepared same at her request according to her instructions, and that she executed same and requested friends in the room to witness same, and that her relations with her brother were intimate and affectionate, and that she often consulted him on matters of business, without evidence that he attempted to influence her in any way, *is held* insufficient to show undue influence or mental incapacity in the execution of the codicil, and propounders' request for a directed verdict in their favor on the issues should have been given.

APPEAL by propounders from *Cowper, Special Judge,* at May Term, 1935, of PASQUOTANK. New trial.

This is a proceeding for the probate in solemn form of a paper-writing, dated 24 May, 1934, and purporting to be a codicil to the last will and testament of Mrs. Alethea P. Neal, deceased.

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

"1. Was the paper-writing now offered for probate, bearing date 24 May, 1934, executed in manner and form as required by law, as alleged by the propounders? Answer: 'Yes.'

"2. Was the execution of said paper-writing procured by undue influence, as alleged by the caveators? Answer: 'Yes.'

"3. At the time of the execution of said paper-writing, did Mrs. Alethea P. Neal have sufficient mental capacity to make a will? Answer: ...."

From judgment that the paper-writing, dated 24 May, 1934, is not a codicil to the last will and testament of Mrs. Alethea P. Neal, deceased, the propounders appealed to the Supreme Court, assigning as error the refusal of the trial court to instruct the jury as requested in apt time by the propounders.

J. H. Hall and J. H. LeRoy, Jr., for propounders.
M. B. Simpson and McMullan & McMullan for caveators.

CONNOR, J. Mrs. Alethea P. Neal died at her home in Elizabeth City, N. C., on Sunday, 27 May, 1934. At the date of her death she was a widow, about seventy-five years of age. Her husband, A. S. Neal, had been dead about nine years. No children were born of their marriage. She had been a resident of Elizabeth City for many years.

On 1 June, 1934, Dr. A. L. Pendleton, her brother, a resident of Elizabeth City, as the executor named in the paper-writing purporting to be a codicil to her will, filed with the clerk of the Superior Court of Pasquotank County, for probate in common form, two paper-writings, one purporting to be her last will and testament, the other purporting to be a codicil to said will. Both paper-writings were duly probated by the clerk in common form.

In her last will and testament, which was executed by her several years before her death, Mrs. Neal bequeathed to William A. Neal, a brother of her deceased husband, the sum of $1,000, and to Lonnie Cuthrel, and Alethia Fites, relatives of her said husband, each the sum of $500.00. In the codicil, which was executed by her on 24 May, 1934, a few days before her death, she revoked and canceled these legacies. No executor is named in the will. Dr. A. L. Pendleton, the brother of Mrs. Neal, is named in the codicil as her executor. The devisees and legatees named in both the will and the codicil are children of Dr. Pendleton, and other nephews and nieces of the testatrix.

On 8 February, 1935, a caveat to the codicil was duly filed with the clerk of the Superior Court of Pasquotank County, by William Neal, Lonnie Cuthrel, and Alethia Fites. Citations were duly issued by the clerk to the executor and to the devisees and legatees named in the codicil, and after the service of said citations, answers were filed to the caveat.

At the trial the caveators consented that the first issue should be answered in the affirmative. At the close of all the evidence the propounders, in apt time and in writing, requested the court to instruct the jury that if they believed the evidence and found the facts to be as all the evidence showed, they should answer the second issue "No," and the third issue "Yes." To the refusal of the court to so instruct the jury, the propounders excepted, and on their appeal to this Court assign such refusal as error.

The evidence pertinent to the second issue tended to show that prior to her last illness, which began about two weeks before her death, the deceased was in good health and of sound mind; that after she became ill, she informed her relatives and friends that she had made a will, disposing of her property, but that because of losses sustained by her, which had greatly diminished her estate, she wished to change this will; and that on Thursday, before her death on the following Sunday, she

requested her brother, Dr. A. L. Pendleton, who had called to see her because of her illness, to prepare a codicil to her will, which he did. After he had prepared the codicil, in accordance with her instructions, and had read it to her in the presence of relatives and friends, she executed the codicil, and requested two of her friends, who were in the room, to witness its execution. There was evidence tending to show that the relations between Mrs. Neal and her brother, Dr. Pendleton, were intimate and affectionate, and that she frequently consulted him about her business. Dr. Pendleton is a man of high character, and at one time had been president of a bank in Elizabeth City. There was no evidence tending to show that Dr. Pendleton influenced or attempted to influence his sister, unduly or otherwise, with respect to her will. All the evidence shows that in preparing the codicil to her will he acted solely upon her instructions.

There was error in the refusal of the court to instruct the jury with regard to the second issue, as requested by the propounders. See *In re Hurdle's Will,* 190 N. C., 221, 129 S. E., 589. For this error, the propounders are entitled to a

New trial.

STATE v. WILL WHITE.

(Filed 9 October, 1935.)

Criminal Law I j: Assault B c—Evidence held insufficient to identify defendant as the perpetrator of the crime charged.

Evidence that on a certain day poison was put in the flour in the kitchen of the prosecuting witness, that the presence of the poison was discovered in an attempt to bake biscuits made from the flour, and that defendant had an opportunity on the day in question to have committed the act, without evidence of motive or that defendant ever had the poison in his possession, *is held* insufficient to establish the identity of the defendant as the perpetrator of the crime, and his motion for judgment as of nonsuit should have been allowed, and on appeal the judgment is reversed under the provisions of C. S., 4643.

APPEAL by defendant from *Sinclair, J.,* at August Term, 1935, of HALIFAX. Reversed.

This is a criminal action, in which the defendant Will White was tried on his plea of not guilty to an indictment in which he was charged with a felonious assault upon Mr. and Mrs. George T. Daniel, by secretly "putting poisonous arsenic in the dough from which biscuits were made for consumption by Mr. and Mrs. George T. Daniel, thereby inflicting serious injury to Mrs. George T. Daniel, not resulting in death." There was a verdict of guilty.

From judgment that he be confined in the State's Prison for a term of not less than seven or more than ten years, the defendant appealed to the Supreme Court, assigning as error the refusal of the trial court to allow his motion for judgment as of nonsuit, at the close of all the evidence. C. S., 4643.

Attorney-General Seawell and Assistant Attorneys-General Aiken and Bruton for the State.

George C. Green and E. L. Travis for defendant.

CONNOR, J. On or about 1 January, 1934, George T. Daniel and his wife, with their child, about five years of age, moved into a house, near Scotland Neck, in Halifax County, which was owned by Frank White, the father of the defendant Will White, and lived in said house until some time shortly after 12 February, 1934. The house contained nine rooms, and had been occupied by Frank White as his home prior to the death of his wife. Under an arrangement made by and between Frank White and George T. Daniel, Frank White reserved a room in said house for his own use, and had his meals with the family of George T. Daniel.

On Wednesday before Monday, 12 February, 1934, Will White, then about 22 years of age, who had been visiting relatives in Washington, D. C., returned to this State, and went to the house occupied by George T. Daniel and his family, to visit his father, Frank White, for a few days. He remained with his father, taking his meals with the family of George T. Daniel until Saturday night, when he went to Rocky Mount, N. C., to visit his wife, who was employed there as a nurse. The defendant and his wife were married to each other on or about 1 January, 1934. On Monday morning, 12 February, 1934, between 11 and 12 o'clock, the defendant returned from Rocky Mount, in his automobile, to the house in Halifax County, which was owned by his father and occupied by George T. Daniel and his family. The defendant parked his automobile in the front yard, at the usual place for parking automobiles, and went into the house. He went first into his father's room, and then into the kitchen. After he went into the kitchen, and while he was standing near the sink, washing his hands, George T. Daniel came into the kitchen and spoke to the defendant. At this time George T. Daniel observed an empty paper bag on a chair in the kitchen, and started to take it up, thinking that his son, who was in the kitchen, had left it on the chair. The defendant told Daniel that the paper bag belonged to him. The defendant, after he had washed his hands at the sink, took the paper bag and went to his father's room. He there changed his clothes and left the house.

Mrs. Daniel came into the kitchen about 2 o'clock to prepare supper for the family. She made biscuits from flour which was in a barrel in the kitchen and put the biscuits into the stove to bake. When she found that the biscuits would not bake, she notified her husband, who examined the biscuits and the flour in the barrel. There was evidence tending to show that there was a large quantity of arsenate of lead in the flour, and that for this reason the biscuits made from the flour would not bake. There was also evidence tending to show that arsenate of lead had been put in the flour in the barrel since Mrs. Daniel had made biscuits for breakfast that morning. There was no evidence tending to show that the defendant had arsenate of lead or any other poisonous substance in his possession when he went into the kitchen. Nor was there any evidence tending to show any motive on the part of the defendant to commit the crime charged in the indictment. The evidence tended to show only that the defendant had an opportunity, while in the kitchen on the morning of 12 February, 1934, to put poison in the flour from which the biscuits were made.

There was error in the refusal of defendant's motion for judgment as of nonsuit. See *State v. Johnson,* 199 N. C., 429, 154 S. E., 750, and cases cited in the opinion in that case. The judgment is reversed, and action remanded to the Superior Court of Halifax County to the end that a verdict of "Not guilty" may be entered, as provided by statute. C. S., 4643.

Reversed.

STATE EX REL. R. B. McLEOD v. R. W. PEARSON.

(Filed 9 October, 1935.)

Process A a—Signature of clerk is essential part of summons and must appear on summons served under the provisions of C. S., 881.

In order for a valid service of summons in *quo warranto* proceedings under the provisions of C. S., 881, it is necessary that a true copy of the summons be left at the last address of the defendant, and where the summons so served is not signed by the clerk, but is a true copy of the original, it is fatally defective, since the signature of the clerk is an essential part of the summons, C. S., 476, and if the summons so served is not a true copy of the original, it is insufficient under the statute for the substituted service therein provided for.

APPEAL by defendant from *Harding, J.,* at Chambers in Avery County, 23 April, 1935. From WILKES.

Civil action to try title to office of clerk Superior Court of Alexander County, instituted in the Superior Court of Wilkes County, and service

of summons sought to be obtained under C. S., 881, by leaving copy at last residence of the defendant.

The copy of the summons left at defendant's residence did not purport to be signed by the clerk or to be under seal, nor did it contain any copy of the prosecution bond.

The defendant appeared specially and moved to quash the summons and dismiss the action on the ground that he had not been brought into court on any valid and binding service of process. The motion was allowed by the clerk, and reversed by the judge of the Superior Court on appeal.

From this latter ruling the defendant appeals, assigning errors.

Baxter M. Linney, Trivette & Holshouser, and Tressie J. Pierce for plaintiff.

J. H. Whicker, Burke & Burke, and Parrish & Deal for defendant.

STACY, C. J. It must be held, we think, that the purported service of process was not sufficient to bring the defendant into court. *Dowling v. Winters, ante,* 521; *Harrell v. Welstead,* 206 N. C., 817, 175 S. E., 283; *Graves v. Reidsville,* 182 N. C., 330, 109 S. E., 29.

It is provided by C. S., 881, that service of summons and complaint in *quo warranto* proceedings "may be made by leaving a copy at the last residence or business office of the defendant or defendants, and service so made shall be deemed a legal service." This, we apprehend, means a true copy of the summons and complaint.

If the copy of summons left at defendant's residence be a true copy of the original, then the summons was fatally defective, for it was neither signed by the clerk nor under seal. It is provided by C. S., 476, that "summons must . . . be signed by the clerk," and if addressed to the sheriff or other officer of a county other than that from which it is issued, it "must be attested by the seal of the court." The omission of the seal from the copy may not have been capitally important. *Elramy v. Abeyounis,* 189 N. C., 278, 126 S. E., 743. But the signature of the clerk is an essential part of the summons. *McArter v. Rhea,* 122 N. C., 614, 30 S. E., 128; *Perry v. Adams,* 83 N. C., 266; *Taylor v. Taylor, ibid.,* 118; *Freeman v. Lewis,* 27 N. C., 91; *Finley v. Smith,* 15 N. C., 95; *Seawell v. Bank,* 14 N. C., 279; *Shackleford v. McRae,* 10 N. C., 226; *Buchannan v. Kennon,* 1 N. C., 593.

On the other hand, if the copy of summons left at defendant's residence be not essentially a true copy of the original, then it would be insufficient under the statute, for only by virtue of C. S., 881, is substituted service allowable in this way. *Dowling v. Winters, supra.*

There was no request to amend *nunc pro tunc,* as in *Casualty Co. v. Green,* 200 N. C., 535, 157 S. E., 797; *Calmes v. Lambert,* 153 N. C., 248, 69 S. E., 138; *Vick v. Flournoy,* 147 N. C., 209, 60 S. E., 978; *Cook v. Moore,* 100 N. C., 294, 6 S. E., 795; *Henderson v. Graham,* 84 N. C., 496.

It also appears that the action was instituted without proper indemnity bond. *Cooper v. Crisco,* 201 N. C., 739, 161 S. E., 310; *Midgett v. Gray,* 158 N. C., 133, 73 S. E., 791; *S. c.,* 159 N. C., 443, 74 S. E., 1050.

Error.

H. G. MINTON v. T. W. FERGUSON.

(Filed 9 October, 1935.)

Libel and Slander D d: Evidence K a—In action for libel witnesses may not testify they understood defendant to be actuated by malice.

It is incompetent for plaintiff's witnesses, in an action for slander, to testify, in response to questions of what they understood the article in question to mean, that they understood it as actuated by malice, and defendant's motion to strike out should have been allowed, since the answers were not responsive to the questions and the opinion evidence invaded the province of the jury, the question of malice being one of the issues involved.

APPEAL by defendant from *Clement, J.,* at June Term, 1935, of WILKES.

Civil action for libel, tried upon the following issues:

"1. Did the defendant cause to be published of and concerning the plaintiff the article appearing in *The Wilkes Journal,* as set out in Paragraph IV of the complaint? Answer: 'Yes.'

"2. Were the matters and things published of and concerning the plaintiff in said article true? Answer: 'No.'

"3. Did the defendant maliciously write and publish said article containing the charges therein? Answer: 'Yes.'

"4. What amount of actual damage, if any, is the plaintiff entitled to recover of the defendant? Answer: '$300.00.'

"5. What amount of punitive damage, if any, is the plaintiff entitled to recover of the defendant? Answer: '$100.00.' "

The following testimony was admitted over objection of the defendant:

"Q. Captain Williams, when you read the article that was published on 16 July, 1931, what did you take the article to mean with reference to Mr. Minton?

"A. I just thought it was malice. I thought it was done through malice, that is all." Motion to strike; overruled; exception.

"Q. Mr. Jones, will you state now what you understood the article to mean when you read it?

"A. Well, knowing that Mr. Ferguson was mad at Mr. Minton—I thought that the article was written to damage and slander Mr. Minton. That was the way I understood it." Motion to strike; overruled; exception.

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

J. H. Whicker and Trivette & Holshouser for plaintiff.
Charles G. Gilreath and Parrish & Deal for defendant.

STACY, C. J. The testimony of Captain Williams and Mr. Jones as to their understanding or interpretation of the alleged libelous article was incompetent and should have been excluded. *Trust Co. v. Cash Store,* 193 N. C., 122, 136 S. E., 289; *Marks v. Cotton Mills,* 135 N. C., 289, 47 S. E., 432. Even if the questions propounded were proper (which may be doubted, as the language of the article seems clear, *Pitts v. Pace,* 52 N. C., 558), the answers were not responsive to the questions, and they violate the rule against lay witnesses invading the province of the jury. *Stanley v. Lumber Co.,* 184 N. C., 302, 114 S. E., 385; *Marshall v. Tel. Co.,* 181 N. C., 292, 106 S. E., 818. Whether the defendant was actuated by malice or ill will was one of the issues in the case. *Potts v. Ins. Co.,* 206 N. C., 257, 174 S. E., 123; *Stevenson v. Northington,* 204 N. C., 690, 169 S. E., 622. The motions to strike should have been allowed. *Denton v. Milling Co.,* 205 N. C., 77, 170 S. E., 107.

New trial.

STATE v. TOM HUGHES AND LEONARD VANCE.

(Filed 9 October, 1935.)

1. Criminal Law G f—Evidence of acts of corporate agent relative to alleged authorization of robbery of corporation's store held incompetent.

Defendants were prosecuted for burglary of a store owned by a corporation. Defendants contended that an officer of the corporation consented to the robbery in order to apprehend defendants in the commission of the crime. *Held:* There was no error in excluding evidence of statements and acts of the corporate officer offered by defendants in support of their contention in the absence of evidence that the corporate officer was author-

ized to consent to the robbery of the store, evidence of the acts or statements of an agent being incompetent against the principal, unless such acts or statements were authorized or were made in the course of the employment, express or implied.

2. **Criminal Law G u: Robbery A a—Fact that trap was laid for defendants after they had expressed intent to rob held no defense.**

Evidence for the State showed that one of the defendants broke into and robbed a store owned by a corporation, and that the other defendant aided and abetted in the robbery. Defendants offered evidence which tended to show that one of defendants went to an employee in the store and suggested that the employee give him the combination to the safe, and that the loot be divided with the employee, that the next morning the employee reported the conversation to his superior officer, and that the corporate officer instructed the employee to give defendant a purported combination to the safe, that thereafter the employee gave the defendant a combination and advised defendant how to break into the store and when the safe would contain a large sum of money, and that officers of the law apprehended defendants when they attempted to carry out the plans for the robbery. *Held:* The exclusion of the evidence offered by defendants in support of their contention was not prejudicial, since defendants' contention would not have been a defense to the prosecution if established. The distinction is pointed out between tempting and procuring the commission of a crime for the purpose of punishing the perpetrators, and taking steps to apprehend persons in the execution of a felonious intent, previously formed, to commit the crime, and the evidence in this case failing to show consent to the robbery or temptation of defendants to commit the crime, but merely the apprehension of defendants in the execution of their felonious intent, previously formed.

APPEAL by defendants from *Harding, J.*, and a jury, at March Term, 1935, of MITCHELL. No error.

The bill of indictment charged that the defendants Tom Hughes and Leonard Vance, on 8 January, 1935, "with force and arms, at and in the county aforesaid, did unlawfully, wilfully, and feloniously, in the nighttime, break and burglariously enter the Spruce Pine Store Company, Inc., store building, with the criminal intent to commit a felony therein, to wit: take, steal, and carry away money in the Spruce Pine Store Company, Inc., safe, and other articles of value in said store, with intent to deprive the owner thereof, said store building being at that time used as sleeping quarters for one of the employees of said Spruce Pine Store Company, Inc., said store being entered at nighttime, about eight o'clock p.m., against the form of the statute in such cases made and provided and against the peace and dignity of the State."

The evidence on the part of the State: Sheriff W. G. Honeycutt testified, in part: "I know Tom Hughes and Leonard Vance. I do not recollect the exact date that they are charged with breaking in the store of the Spruce Pine Store Company, at Spruce Pine, but some time ago

I was in the store of the Spruce Pine Store Company, about 8:00 o'clock p.m., and it was raining very hard, and a window was punched out on the back side of the building. The glass fell within six or eight feet of where I was standing, and whoever did it remained out of the building. A little later Tom Hughes came through the window and went to the safe in the office of the Spruce Pine Store Company, and was trying to work the combination. I remained quiet for three to five minutes and let him work at it, and finally I decided he was not going to be able to open it, and might possibly break the combination and damage the safe. I was right up over him in the balcony and I started down the steps, and there was a carpet and it didn't make any noise until I got two-thirds of the way down the steps and one of the steps squeaked and made a noise, and he recognized the noise and looked up at me. He had a flashlight in his left hand and was working at the combination with his right hand. He turned the light on me and then I put mine on him and told him to consider himself under arrest. C. C. Garland, deputy sheriff, and J. L. Folger, State Highway Patrolman, were with me in the building. Tom Hughes made a statement to me that if I would let him, he could go back and open the safe, and if I would let him go back he would show me, and I let him go back to the safe and make the second try after I arrested him, and he failed to open it. When I first told him to put his hands up he failed to do it, and I put my gun on him and told him to put his hands up, and afterwards I made an apology and told him he was the second man I had put my gun on, and I hated to do it, and told him he was carrying a gun and that more than likely he would kill anybody before they could arrest him, and he said if he had a gun he would have done like I did. He said he heard the Harris Clay Company would have a pay roll in that safe between $1,200 and $1,800, and he was figuring on getting that. The Harris Clay Company owns the Spruce Pine Store is my information. The Harris Clay Company operates the mine, and their pay roll comes through the Spruce Pine Store Company. He said he understood the pay roll would be between $1,200 and $1,800, and he was going to get that. That was about eight o'clock at night. It was raining very hard. After Tom got in there, I didn't give any alarm to anyone. I didn't quite understand your question about giving an alarm. I went to explain a while ago. I took the boy in the back, at the back of the Spruce Pine Company Store, Mr. Berry and Mr. Carver, if anyone else came on the outside that they would be outside and that whenever I accomplished my purpose on the inside that I would shoot my gun off one time inside, and they could apprehend whoever was on the outside when I shot. Two officers were outside, Cas Carver and Reed Berry. I came to be there because I was called by telephone to come to Spruce Pine

and was given information that this robbery was going to take place that night, or was thought it would take place."

The evidence of Sheriff Honeycutt was corroborated by Chris C. Garland, and in part by Reed Berry. In regard to defendant Leonard Vance, Reed Berry testified: "Tom Hughes came up there behind the Spruce Pine Store and took a little lath or piece of lumber that was there, about 1½ square piece, about eight feet long, and he punched the window and broke part of it out, the large part of the light, and then he ran around down toward the shed, and we waited about ten or fifteen minutes, maybe, or not quite so long, and he came back, and that time Leonard Vance was with him, and they both came down next to the store and looked at the window and it was not all broken out, and Vance turned and walked up to the window corner of the store, where there was a door, and he looked around the building, and Tom Hughes picked up the stick and punched the remainder of the glass out, and they both ran down to the front street. We waited a little bit and they came back and came back to the upper side of the store, and about that time a car came around the street and turned and the light flashed on them, and they run back to the platform close to where we were, and they repeated that three times. Every time a car would come they would run, and they did that three times, and then Tom Hughes got up to the window and went through the window and Leonard Vance turned and ran around below Spruce Pine Store. Someone made a remark, 'What is the matter? Are you yellow?' and the other one said, 'Wait and see.' The conversation passed between the two men, but I don't know which one said which, and Tom Hughes went in and Leonard Vance whirled and ran down in front of the Spruce Pine Company Store, and we caught him, and Mr. Carver caught him in front of the Spruce Pine Company Store."

C. J. Carver testified, in part: "In a little while he came back, but I didn't know him at that time, but I know him now. It was Tom Hughes, and in a little while he came back and picked up the lath again and punched the window out. Then he ran off and was gone a few minutes and him and Leonard Vance came back together, and Reed Berry called their names and said it was Tom Hughes and Leonard Vance. He said that to me. I was at the door and Mr. Berry was next to the window, and Hughes didn't get enough of the window punched out, and came back and he took a piece of car or truck bed and set it up against the building and examined to see if they could go in, so they couldn't get in, and a car came along and they ran under the floor right up next to me and Mr. Berry, in about 5 feet from the door when they ran under the feed store, or the feed department or platform, and after that they went back down and they both climbed up together on this

piece they set up there. Tom Hughes went in and Leonard Vance came out on the corner."

The defendant Leonard Vance denied that he had anything to do with the burglary, and testified, in part: "I am one of the defendants in this case. I have known Tom Hughes about a year and a half or two years. I live in Spruce Pine. Have lived there about nine years. I remember the night that Mr. Hughes entered the Spruce Pine Store Company's store. I was on the street that night. I was up at the hot-dog stand and Mr. Hughes came in and asked me if I knew where I could get a pint of whiskey and I said I might find some, and I got it and he said let's go and take a drink, and we started in the post office and it was locked and we went to the back of the Spruce Pine Store and started to take a drink, and a car came and flashed the light and we went back under the floor and took a drink of whiskey and came on out and came down the street. I came on down the street and I don't know where Mr. Hughes went. I know nothing about his breaking out the glass. I had nothing to do with robbing the store at all and didn't know anything about it until afterwards."

The defendant Tom Hughes testified, in part: "Yes, I admit going into the store. No, Leonard Vance had nothing to do with it and did not help me. As to what happened between Leonard Vance and me on the night of 8 January, I was in Spruce Pine, in a little cafe, and saw Leonard Vance and I asked him if he knew where any whiskey was, and he said he didn't know, but thought he could find some, and I told him to go and get me a pint, and he said he would see and would be back in a few minutes, and he went and came back and gave me a pint of whiskey and it was raining pretty hard and I asked him to take a little and he said No, and I went with him and we tried to get in the post office to get out of sight to drink the pint of whiskey, and he couldn't get in and we cut right straight across, and between Spruce Pine Store and—there is an alley, and we ran in and started to take a drink of whiskey and a light flashed about that time and I ran in under the porch and Leonard came in after me, and it was raining pretty hard, and I got under there and stayed five or six or ten minutes and drank the rest of that short pint of whiskey and came out and went down the street and he went ahead of me, and I left him and never saw him any more that night until the law brought him in the Spruce Pine Store and he was handcuffed. No, I don't deny going through the window. No, Leonard Vance did not have anything to do with helping me break that light out of the window. He did not aid me in any way. He knew nothing about it so far as I know."

S. B. Cannon, a witness introduced by defendants, testified in part on cross-examination by the State: "I was at home at the time the store

was entered; was not present in the store when it was robbed. Q. Did you give your consent to either one of these defendants to rob the Spruce Pine Store Company's store? Or did you conspire, confederate, or agree with these defendants to enter this store and rob the safe? A. I did not. I told Scott Hickey he could go fox hunting that night. The Spruce Pine Store Company is incorporated under that name, and was incorporated at the time it was entered. Q. Have you any authority to rob that store, or to give anyone else authority to rob it? A. No, I have not. Q. Has the Hickey boy got any right to rob that store or to give anyone else authority to rob it? A. No, he has not. I had nothing to do with punching out that window or entering the store that night. The sash punched out was a pane in the upper sash in the window over part of the office. There was a footprint on the top of the desk on a book that was laying there to show where he stepped on the desk. Q. I will ask you if this window light had not been punched out just a few weeks before, on 13 December, and if there was not a footprint on this desk at the same identical place that you found it after the store was broken into? A. The same window was broken into, and there was a footprint on the desk. It was on top of the desk. I couldn't say exactly how close it was to the place where the footprint appeared on 13 December, but it was on top of the desk. The Spruce Pine Store Company has a board of directors and they meet and transact the business of the company when they want to. I get my authority from the president and vice-president. Neither of them have ever authorized me to permit anyone to rob the store, or to rob the safe, or to give the combination of the safe to anyone. Yes, I have seen Tom Hughes in the store. He was there on Saturday before he entered it. He was standing there, looking at the window that they entered, or that he entered on that night, 13 December, last. He had focused on the same window. He was looking right at the window. I don't know how long he stood there. When I saw him at the store he was looking at it. The depot is located diagonally across the street from the store, a distance of about 60 feet from the sidewalk. It is a concrete pavement between the store and depot. Going from the sidewalk back up the store to where the window was entered is a distance of 90 feet. It is not concrete back of the store, but there is a concrete sidewalk up the side of the store. The feed store has a loading platform from the ground. A man could not stand under it to take a drink. I saw the frame that was put up at the window laying on the ground. I did not look at it for signs of mud on it. I know Tom Hughes when I see him. Have known him for two years. I couldn't swear about his general character. I don't know. I have heard the public say it is bad. When I started home that night, I met Tom Hughes and Leonard Vance on the sidewalk.

They were together. That was about 7:00 o'clock. The store was closed and I had walked down to the drug store and met them between the drug store and our store. I wanted the officers in the store that night to catch these robbers that were out robbing the country. That was the reason I got them to come there. My store has been robbed three or four times. I had nothing to do with robbing the store or getting anyone else to rob it. No, I never encouraged anyone else to rob the store. Yes, I advised Mr. Hickey what to do in regard to the robbery that Tom Hughes has admitted. No, I did not advise him to encourage these two defendants to rob the store. I did not want the store robbed. I think I know just exactly what aiding and abetting means."

Certain evidence of defendant Hughes, Hickey, and Cannon was excluded by the court below, to which the defendants excepted. The evidence on this aspect is as follows:

Tom Hughes: "Q. Go ahead and state what that conversation was? A. I went to him on the night of the 3d or 4th and asked him—I said, 'Scott, a fellow told me you had the combination to the safe in the store, and wanted somebody to break in and get the money. What about it?' I first said, 'I want to ask you a question, and don't want you to say anything about it,' and he said, 'I won't say anything about it,' and we shook hands and then I told him about this fellow wanting to go in, and he wanted to know who this fellow was that told me about the combination. I didn't tell him and he said, 'Well, I don't know. I don't think I can do the old man or the boss that way,' and I said, 'If you don't want to do it, drop it and nothing will be said about it,' and he said, 'I will think it over,' and I left and went on home. Next day I came back up there and Mr. Hickey was in the window working, and he motioned for me to come over to the store and he said, 'What time are you going home tonight?' and I said I guessed it would be pretty late, and he said for me to come in before I went, that he wanted to see me and I said 'All right,' and then when I came back by there he told me to go up to the cafe and wait and he would come up there, and I waited for him and he came in and sat down where I was and said, 'I decided to take you up on that proposition.' Then he said he could get the combination. He said he didn't know whether he could get the four numbers or not, but that he could get three numbers of the combination, and I told him I thought I could get it open, and we figured out about how much money would be in the safe that night, and I went on back home and came back on Saturday. I came back and walked in the store, and Hickey asked me to be in the cafe that night, and I did, and that was on Saturday. Well, about 6:30 or 7:00 o'clock we had supper, and he said, 'I happened to the damnedest luck this morning ever was,' and he

said that morning early a man came in with a big order, and that he had a check, and that he filed the order and ran up to the office to get it cashed, and that Bill had not opened the safe, and that he missed it the first time, and he said he went back over the combination slowly and that he stood behind him and that he had the combination, and he handed me the combination, and also told me where to break in, and I suggested one place and he suggested another. I suggested that I would go in at the front and he said that would never do, and for me to go in at the back. He said there was an old piece of truck laying there and it would be easy to crawl in the window, and that right under the window there was a desk, and that I could step right down on the desk, and he told me there was a bar went down behind the door, and said I could pull the bar out and go out that way, and he said the boy that was sleeping in there, that he would take him home with him. Said he would make out like he would go fox hunting and they would go out and listen to the fox hunt, and he would stay at his house and come back to the store the next morning. We figured out about how much the pay roll in the safe would be, the pay roll of the Harris Clay Company. I didn't know at the time that the pay roll was there, and he said the pay roll would be in Monday or Tuesday, said they had to pay on the 10th, or about that time, and he didn't know exactly what it would be, but it would be from $1,200 to $3,000. That before the depression it had run as high as $5,000 a month, the pay roll did. Q. State whether or not he said anything about a division of the money after the robbery. A. Yes, I said, 'Where will we split the money?' and he said he didn't know. I asked him if it would be all right for me to go to his house, and he said, 'Hell, no,' and I said if I robbed the store I would meet him the following night on the C. C. & O. Railroad, where the bridge goes across the— Q. State whether or not he took Jack Dale out of the store that night. A. Yes, I saw Jack Dale and Scott Hickey on the street that night."

Scott Hickey: "I live at Spruce Pine and work for the Spruce Pine Store Company, under Mr. Cannon. He is manager of the Spruce Pine Store Company. Yes, I remember the night that Tom Hughes is alleged to have entered the Spruce Pine Store. I had a conversation with Tom Hughes prior to the time the store was entered. Q. What was that conversation? A. It was on 2 January, on the evening of the second day. Tom Hughes came into the store and said he wanted to ask me a question and wanted to know where we could get, and I told him right there was all right, and he said he wanted me not to say anything about it, and I told him it was all right, to go ahead and that I would not say anything about it, and he said a fellow sent him to me and he asked if I knew where he could get the combination to the safe

of the Spruce Pine Store Company, and I told him I thought that would be a mighty nice way for me to treat my company and the boss, and about that time a lady came in and I had to wait on her, and leave him, and he said, 'If you ever get hard up sometime, let me know,' and I didn't see him any more for three or four days, or maybe two days, and he came back up the street and I motioned for him to come in the store, and I told him I wanted to see him before he left town, so he came back that afternoon, and I told him that I would meet him up at the cafe, and I went in and he was sitting in a booth at the cafe, and I walked up and he said, 'D——n you, I knew you would take me up,' or something to that effect. So he asked me if I could get the combination, and I told him I thought I could, and he wanted to know how much the pay roll would be, the Harris Clay Company, and told me if I would get the combination, he would split fifty-fifty, and he also told me if I would get the combination, he would tell me lots of other things that would make the hair stand up on my head. I believe that was about all that was said that day. I had another conversation with him on Saturday night, and I met him in the cafe and we had supper and I gave him a combination. Then he told me about a number of other things he had done in Tennessee in regard to the robbery. He told me about holding up a man and robbing a safe that was connected with the Bimberg Plant. I don't remember his name. He also told me about a man and his wife and about his buddy holding out on him, and he told me about another robbery of a safe that he had been connected with at Elizabethton and he and his partner got $1,600 and they hid it pretty close to where they stayed and some school children found it and they got hot on him and he had to leave. He also told me about the A. & P. Store being broken into, and that in Spruce Pine, and I asked him where the law was when the store was being broken into, and he said, 'Where they always are.' I believe that was about all that was said at that time. Q. This paper, marked 'Exhibit A,' are these the numbers you gave to Mr. Hughes? A. Yes, I think so. Q. Where did you get it, did Mr. Cannon give you that? A. After I had my first conversation with Tom Hughes, I saw Mr. Cannon about it. I had a conversation with Mr. Cannon soon after I saw Tom Hughes and had the conversation with him that I related a while ago. Q. Will you state the conversation that you had with Mr. Cannon? A. After the night I first saw Tom Hughes, I had a conversation with the boss, Mr. Sam Cannon, the first thing next morning. I didn't see him that night. In that conversation I told him what Mr. Hughes had told me in regard to the safe. He told me if Mr. Hughes wanted the combination of the safe we would try to give him one, or something to that effect. He said that we would give him a combination to the safe and go ahead and let him rob the

store if he wanted to. When I first went up I told him about this. I told him that Mr. Hughes came to me in regard to the safe and he said we had been having a good many robberies and there was only one way to break it up, and we would give Mr. Hughes a combination to the safe. I believe that was all that was said. The next time I saw Mr. Hughes, I told him I wanted to see him before he left town. That is when I saw him up in the cafe. No, Mr. Cannon did not say anything to me about helping Jack Dale out of the way at that time, but before the robbery happened, he said that Jack Dale and I could go fox hunting that night. I took Jack Dale fox hunting according to instructions. I got the combination to give to Mr. Hughes. Mr. Cannon gave me the numbers to write down, and directed me to give it to Tom Hughes, and I gave it to him. I informed Mr. Cannon of the night that Tom Hughes was to break into the store. No, I didn't hear Mr. Sam Cannon's conversation with the officers after the robbery occurred." Like evidence of S. B. Cannon was excluded.

The jury rendered the following verdict: "Tom Hughes is guilty of burglary in the second degree, and that the defendant Leonard Vance is guilty of aiding and abetting the defendant Tom Hughes in the commission of the crime of burglary in the second degree."

Judgment of the court was rendered on the verdict. 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.

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

M. L. Wilson and J. W. Ragland for defendants.

CLARKSON, J. There was no exception to the charge of the court below, the exclusion of evidence on the trial in the court below is the bone of contention. The defendants contend: The real, controlling question involved in this case is: Whether or not the principle laid down in the opinion in the case of *State v. Goffney,* 157 N. C., 624, applies to the facts of this case. We think the facts in this case differ materially from the *Goffney case,* as will be hereafter shown.

The defendants are charged with the burglary of the Spruce Pine Store Company, Inc. The defendant Tom Hughes admitted going into the store, and testified: "Yes, I tried to work the combination, tried awfully hard. I meant to take every dollar in the safe. My purpose in going there was to rob that safe. Yes, I was trying to work the combination when the sheriff came up. He put his gun on me. Afterwards he apologized and told me that I was the second man he had ever

put his gun on. I told him I didn't blame him for it, and that I would have done the same way. I don't know if I had had a gun if I would have put my gun on him."

There is no evidence that Cannon had any authority to consent to the defendants burglarizing the Spruce Pine Store Company, Inc., nor was it in the course of his employment, express or implied. Before the acts or statements of an agent are admissible against the owner, it must be shown that they are authorized, or in the course of the employment, or such facts as would indicate implied authority. *Gazzam v. Union Fire Ins. Co.*, 155 N. C., 330; *Rangeley v. Harris,* 165 N. C., 358; *Bank v. Boone-Fork Mfg. Co.,* 186 N. C., 744; *O'Donnell v. Carr,* 189 N. C., 77; *Elmore v. R. R.,* 189 N. C., 658 (672); *Bixler v. Britton,* 192 N. C., 199. In fact, Cannon testified, and we think it competent: "I was at home at the time the store was entered; was not present in the store when it was robbed. Q. Did you give your consent to either one of these defendants to rob the Spruce Pine Store Company's store? Or did you conspire, confederate, or agree with these defendants to enter this store and rob the safe? A. I did not."

The exclusion of defendants' evidence on the record was not error, and we think if it had been admitted it would have been no defense. There is a vast distinction in law and morals in cases of this kind, (1) where an agent or servant under authority of the owner leads another into temptation to commit the crime, and (2) one who has the guilty intent previously formed to commit the particular crime and steps are taken to detect the perpetrator.

In 18 A. L. R., p. 174, the principle is stated thus, citing numerous authorities: "Where the owner, in person or by his duly authorized agent, suggests to the accused the criminal design, and actively urges, coöperates with, and assists the accused in the taking of the goods, such conduct amounts to a consent to the taking, and the criminal quality of the act is wanting." In the old English case of *Reg. v. Lawrence* (1850), 4 Cox C. C., 438, it is said: "The reason is obvious, viz.: The taking in such cases is not against the will of the owner, which is the very essence of the offense, and hence no offense, in the eye of the law, has been committed. The offender may be as morally guilty as if the owner had not consented, but a necessary ingredient of legal guilt is wanting." See *U. S. v. Whittier* (1878), 5 Dill., 35, Fed. Cas. No. 16,688. 66 A. L. R., 506, *et seq.*

In *State v. Adams,* 115 N. C., 775, we find: "The court correctly told the jury that 'if there was the guilty intent previously formed by the defendant to steal certain property, and he carried out such design previously formed, he is guilty, notwithstanding the owner of the property was advised of the intended larceny, appointed agents to watch him,

and could have prevented the theft, but did not do so, and allowed him to commit the theft, with a view of having him subsequently punished.' It was error, however, further to tell them that if there was the previous intent to steal, the defendant would be guilty, notwithstanding the owner's agent had told a servant to go to defendant's house and persuade him to come and steal the sack. *Dodd v. Hamilton,* 4 N. C., 471; *State v. Jernagan,* 4 N. C., 483. It was also error to refuse the fifth prayer for instruction. 'That larceny cannot be committed when the owner, through his agent, consents to the taking and asportation, though such consent was given for the purpose of apprehending the felon,' and likewise the sixth prayer, 'That larceny cannot be committed unless the thing be taken against the will of the owner.' The object of the law is to prevent larceny by punishing it, not to procure the commission of a larceny that the defendant may be punished. The evidence of the State was that the owner's agent (Wilson), having information of an intended theft of cotton by the defendants, watched the cotton house Monday and Tuesday nights without anyone coming. That he returned Wednesday night and watched till very late, and, no one coming, he filled up a couple of sacks with cotton, and leaving one of the sacks in the cotton house, he gave the other sack to one Julia Harris, and told her to go to the defendant's house, three hundred yards distant, and give it to him and tell him that he could get some more cotton. Julia did as directed, and in a little while she returned with the defendant, who entered the cotton house, took the other sack of cotton upon his shoulder and carried it home. The court should have sustained the demurrer to the evidence." In *State v. Adams, supra,* the agent of the owner sent one Julia Harris to Adams' house with a bag of cotton with an invitation "tell him he can get some more cotton." The agent of the owner procured Adams to get the cotton and sent a party to assist him in doing so. The writer of this opinion appeared for Adams in the above case, some 40 years ago, and obtained a new trial.

It is the contention of the defendants that the case of *State v. Goffney, supra,* is on all fours with the present one. We do not think so. There the owner of a store instructed Richard (his servant) to induce defendant to break in his store. (P. 626): "It appears that Barnes, the owner of the building entered, directed his servant Richard Farmer to induce the defendant to break in his (Barnes') store; that the servant obeyed his orders, and that he and defendant entered the store together, and that Barnes was present watching them, and arrested defendant after he entered." The Court rightfully held there was no burglary, saying, "If it were possible to hold the defendant guilty of a felony under such circumstances, then Barnes could be likewise convicted of feloniously breaking and entering his own store, for he was

present aiding and abetting the entry of the defendant and induced him to enter. That would of course be a legal absurdity."

In Vol. 1, Wharton's Criminal Law, sec. 190, at pp. 240-1, we find: "When a person or those officers of the law who are charged with its enforcement have reason to believe that a crime is about to be committed or attempted, there is nothing legally or morally wrong in laying a trap, setting out a decoy, or placing a detective in observation, or in entering into a conspiracy with others to detect and punish the offenders; and the waylaying and watching to detect the commission of crime by the prosecutor or witnesses, in order to obtain evidence with which to convict, will not constitute a defense, in a prosecution for the commission of the crime or offense." To sustain the text numerous authorities are cited, including the *Adams case, supra.* See *State v. Smith,* 152 N. C., 798.

In *Sorrells v. U. S.,* 287 U. S., 435 (441-2), *Chief Justice Hughes* lays down this sound doctrine in law and morals: "It is clear that the evidence was sufficient to warrant a finding that the act for which defendant was prosecuted was instigated by the prohibition agent, that it was the creature of his purpose, that defendant had no previous disposition to commit it, but was an industrious, law-abiding citizen, and that the agent lured defendant, otherwise innocent, to its commission by repeated and persistent solicitation in which he succeeded by taking advantage of the sentiment aroused by reminiscences of their experiences as companions in arms in the World War. Such a gross abuse of authority given for the purpose of detecting and punishing crime, and not for the making of criminals, deserves the severest condemnation, but the question whether it precludes prosecution or affords a ground of defense, and, if so, upon what theory, has given rise to conflicting opinions. It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises. (Citing numerous authorities.) The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design; to expose the illicit traffic, the prohibited publication, the fraudulent use of the mails, the illegal conspiracy, or other offenses, and thus to disclose the would-be violators of the law. A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."

We see no error in the court excluding the evidence of Hughes and others in the court below. If it had been admitted, we do not think it

would be a defense for the defendants. There were many robberies being committed from the Spruce Pine Store Company, Inc. Scott Hickey, an employee in the store, was approached by defendant Hughes. He wanted the combination to the safe so that he could break in the store and steal the pay roll of the Harris Clay Company, amounting to $1,200 or more, which would be in the safe on a certain day. Cannon gave Hickey a paper with a combination on it and Hickey gave it to Hughes. Hughes, instead of being enticed, tried to get Hickey, an honest employee, as the evidence discloses, to join with him in the burglary and larceny, which Hickey refused to do and reported the matter to his employer, Cannon—as he should have done. Hughes was not let in the store by any person connected with the store, but broke in and was attempting to open the safe when captured. He said: "I meant to take every dollar in the safe. My purpose in going there was to rob that safe." We think there was no violation in law or morals in catching the defendant Hughes in the manner in which it was done. Hughes admitted he burglarized the store and Vance was convicted as an aider and abetter. The exclusion of the evidence of Hughes, Hickey, and Cannon we do not think prejudicial to the defendant Vance. For the reasons given, we find in the judgment of the court below

No error.

STATE OF NORTH CAROLINA, ON RELATION OF RALPH C. STEPHENS, CLERK OF THE CITY COURT OF RALEIGH, BRINGING AN ACTION BY LEAVE OF THE ATTORNEY-GENERAL OF THE STATE OF NORTH CAROLINA, v. PAUL S. DOWELL, THE CITY OF RALEIGH, GEORGE A. ISELEY, MAYOR AND COMMISSIONER OF PUBLIC ACCOUNTS AND FINANCES OF THE CITY OF RALEIGH, E. M. BARTON, COMMISSIONER OF PUBLIC WORKS OF THE CITY OF RALEIGH, AND JAMES H. BROWN, COMMISSIONER OF PUBLIC SAFETY OF THE CITY OF RALEIGH.

(Filed 9 October, 1935.)

Municipal Corporations D a: Public Officers B b—Commissioners held without authority to dismiss clerk of municipal court without giving clerk notice and an opportunity to be heard.

The act creating a city court provided that the clerk thereof should be elected by the city commissioners. The city commissioners duly elected a clerk of the city court under the provisions of the act, ch. 706, Public-Local Laws of 1913, but thereafter removed said clerk for alleged inattention to duty without giving the clerk notice and an opportunity to be heard. The clerk instituted proceedings in *quo warranto*, alleging the summary dismissal, and defendants demurred thereto. *Held:* The city commissioners were without authority to dismiss the clerk without giving him notice and an opportunity to be heard, and the demurrer should have

been overruled. The analogous constitutional provision for notice and hearing in the removal of clerks of the Superior Court, Art. IV, sec. 32, cited as persuasive on the commissioners, and *Mial v. Ellington*, 134 N. C., 131, cited, distinguished, and approved.

APPEAL by plaintiff from *Frizzelle, J.*, at December Term, 1934, of WAKE. Reversed.

This is a civil action (N. C. Code, 1931 [Michie], sec. 869) in the nature of a writ of *quo warranto*. The order of the Attorney-General was duly made granting Ralph C. Stephens the right to bring this action. The action is brought by plaintiff against the defendants to determine the right of defendant Paul S. Dowell to hold the position of clerk of the city court of Raleigh, N. C.

The plaintiff makes numerous allegations in his complaint, and succinctly contends in his brief that the controversy "involves the question as to whether or not the commissioners of the city of Raleigh, after having elected plaintiff's relator as clerk of the city court of Raleigh and accepted and approved his official bond conditioned for his good behavior for a term of two years, had the power within said term to summarily, and without notice or hearing, remove the plaintiff's relator from the office of clerk of the city court of Raleigh, a court of record under a special statute, which statute provides that such commissioners may elect such clerk and approve his bond, but contains no provision for the removal of the clerk by said commissioners; such attempted removal having been moved and voted for by one commissioner because said clerk would not support a certain political candidate, and one other commissioner having voted for such removal upon the mistaken idea that said clerk was an employee in the department of the first commissioner and subject to dismissal by him, and the third commissioner having opposed the action; and where such action was falsely stated upon the record to have been taken on account of inattention to duty, which charge is admittedly wrongful and without any foundation; and the commissioners having refused to give relator any hearing or to expunge said record." The defendants demurred to the complaint upon the ground that the complaint does not state facts sufficient to constitute a cause of action. The grounds of the demurrer may be summarized as follows: That the statute referred to in the complaint as a basis of action gives to the commissioners of the city of Raleigh the power of appointment or election of a clerk of the city court of Raleigh, and that the plaintiff was so appointed to such position by the commissioners of the city of Raleigh, and that it follows as a matter of law that the power of removal is incident to or inherent in the appointing power, and that the power of removal may at any time be exercised by the appointing authority, with or without cause. Second, that the statute pleaded in

the complaint does not prescribe any term of office for the clerk of the city court, and that the plaintiff having been elected in pursuance thereof was not elected for any fixed term, and accordingly held the position at the will of the electing or appointing power. Third, that it is alleged in the complaint that the plaintiff was removed by action of the commissioners, and that the commissioners having the power to appoint and the power to remove were within their rights in so doing. Fourth, that even if the removal of the plaintiff was required to be made for cause only, which is denied as a matter of law, it appears from the complaint that the action of the commissioners in removing the plaintiff was taken after due assignment of cause, and that the sufficiency for such cause was a matter addressed solely to the judgment and discretion of the commissioners. Fifth, that the position or office which the plaintiff held was not a property right, and that there existed on the part of the plaintiff no contractual or property right of which he could not be deprived by action of the commissioners.

The court below sustained the demurrer and dismissed the action, to which plaintiff excepted, assigned error, and appealed to the Supreme Court. The necessary facts will be set forth in the opinion.

Clem B. Holding, Douglass & Douglass, and Simms & Simms for plaintiff.

J. M. Broughton and W. H. Yarborough, Jr., for defendants.

CLARKSON, J. The city court of Raleigh was created a court of record by chapter 706 of the Public-Local Laws of 1913, amended by chapter 353, Public-Local Laws of 1915, and designated "The City Court of Raleigh," having civil and criminal jurisdiction. It is not a recorder's court. It is not referred to in the charter of the city of Raleigh, the two legislative enactments being entirely separate and distinct.

The statutes creating the court provide that the commissioners of the city of Raleigh shall elect the clerk of said court, and that he shall give a bond to be approved by the commissioners in the sum of $5,000, and that his salary shall be fixed by the commissioners and shall be paid in the same manner as the salary of the judge of the city court is paid, and defines his duties.

The commissioners are not given any authority, power, or control over the clerk of the city court, and there is no provision giving the commissioners any power to suspend, remove, or discharge him.

On 6 May, 1933, the commissioners of the city of Raleigh duly elected Ralph C. Stephens as clerk of the city court of Raleigh, and he thereupon duly qualified by taking the oath of office and by executing and delivering, as prescribed by statute, his bond in the sum of five thou-

sand ($5,000) dollars, conditioned according to law for the faithful performance of the duties of his said office. The bond was made for the term of two years from his election in May, 1933, reciting that he was elected for said term, and the said bond was duly accepted and approved by the board of commissioners of the city of Raleigh, and is filed and held as one of the records of said city.

Said Stephens duly entered upon the discharge of his duties. On 9 June, 1934, the following was passed by the commissioners—two voting for and one against: "That Mr. Ralph C. Stephens be removed from his office as clerk of the city court on account of inattention to duty, and that his office be filled by the appointment of Mr. Paul S. Dowell, the present assistant clerk of the court, the change to take effect *immediately.*"

It is alleged in the complaint that "The charge of inattention to duty was untrue and without foundation. No charge was at any time made against Stephens, except that set forth in his removal. Stephens was not given any notice of such contemplated action, nor was he given any opportunity to defend himself before said commissioners, either then or thereafter."

In McIntosh N. C. Practice and Procedure in Civil Cases, ch. 10, sec. 445, in part, is as follows: "A demurrer raises no issue of fact, since it admits the truth of all material facts which are properly pleaded. 'For the purpose of presenting the legal question involved, a demurrer is construed as admitting relevant facts well pleaded, and ordinarily relevant inferences of fact necessarily deducible therefrom; but the principle is not extended to admitting conclusions or inferences of law, nor to admissions of fact when contrary to those of which the court is required to take judicial notice, and more especially when such opposing facts and conditions are declared and established by a valid statute applicable to and controlling the subject.'"

The demurrer admits that Ralph C. Stephens, with no notice and without an opportunity to be heard, was removed on account of inattention to duty, and Paul S. Dowell was appointed to fill his place, *the change to take effect immediately.* Did the city commissioners of Raleigh (a majority [two] voting for the removal) have the power and authority to do this, without giving the clerk notice of the charge against him and an opportunity to be heard? We think not, under the facts and circumstances of this case.

The record in this action recalls a decision of this Court in a stormy period of the State. James W. Wilson was a railroad commissioner. He was elected in 1893 by the General Assembly for a term of six years. He had done much to build the Western North Carolina Railroad. He did not belong to the same political party as Governor Daniel L. Russell.

He had an interest in Round Knob Hotel, an eating house on the railroad. The insinuation was that, as railroad commissioner, he was obtaining special favors from the railroad. Governor Russell wrote him giving him notice of the charges, which he contended were sufficient for removal under the act under which he held his office. Governor Russell said in his letter: "Under the law, the Governor has not only a right but is required to suspend a railroad commissioner who commits a breach of the statute, which has been cited, and this he may do, as in other cases of executive removals, without notice to the party interested; but I shall not pass judgment or decide this matter until you have had a full opportunity to be heard by way of denial or explanation or justification or other defense." *Caldwell v. Wilson,* 121 N. C., 428 (429). Mr. Wilson answered denying *in toto,* and as it appears from the record completely, all the charges in a long, carefully written letter, and in it called attention to (p. 436) "the 14th Amendment of the Constitution of the United States, which forbids any state to deprive a citizen of life, liberty, or property without due process of law." Governor Russell wrote Mr. Wilson that he was disqualified under the act and suspended him until the next General Assembly, appointing L. C. Caldwell, of Iredell County, to fill the vacancy. Mr. Wilson replied (p. 437): "In reply I will say that I shall disregard your order to suspend, but will continue to do business at the old stand until removed by a tribunal other than a self-constituted 'Star Chamber.'" Caldwell brought an action *quo warranto, State ex Rel. L. C. Caldwell v. James W. Wilson,* 121 N. C., 425. The opinion—a long one—was written by *Justice Douglass.* In it he says: "What is 'due process of law' is generally difficult to define." At p. 469 it is said: "The defendant, taking under the act, holds subject to the act; and relying upon his contract is bound by all its provisions. One of its express provisions was the reserved right of the Legislature to remove, and the power and duty of the Governor to suspend under a given state of facts. This power of suspension, together with the necessary method of its enforcement, was assented to by the defendant in his acceptance of the office." . . . *Faircloth, C. J.,* dissented, and said (p. 475): "Thus we see that the Governor *suspends* whenever he deems proper and the Legislature *removes* at its will and pleasure, as an *ex parte* proceeding, the officer (commissioner) having no opportunity to be heard. This proceeding is at least a novelty, and so far as I remember is without precedent, certainly so in North Carolina. Such proceedings no doubt are found under some forms of government, but they are at variance with all fundamental rules of government in the United States of America. Those rules protect life, liberty, and property in the due administration of law. . . . (p. 480): I think the plaintiff's contention is injurious, subversive, and contrary to the organic law of our

system of government, and that it is unreasonable and unjust, and that the decisions of any court in any state, disregarding these principles, must soon fall under the condemnation of the legal mind in this country." The General Assembly of 1899, of opposite political persuasion to Governor Russell, refused to remove Wilson. Public Laws of 1899, p. 966.

Mial v. Ellington, 134 N. C., 131, overruling *Hoke v. Henderson,* 15 N. C., 1, is to the effect that: "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." That holding is sound, and does not in any way control the factual situation in this action. See *Winslow v. Morton,* 118 N. C., 486.

In *Rathburn v. United States,* Supreme Court Reporter, Vol. 55, No. 15, p. 869 (875), is the following: "The result of what we now have said is this: Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause will depend upon the character of the office; the Myers decision, affirming the power of the President alone to make the removal, is confined to purely executive officers; and as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute. To the extent that, between the decision in the Myers case, which sustains the unrestrictable power of the President to remove purely executive officers, and our present decision that such power does not extend to an office such as that here involved, there shall remain a field of doubt, we leave such cases as may fall within it for future consideration and determination as they may arise."

The above action was brought by Samuel F. Rathburn, as executor of the estate of William E. Humphrey, deceased, against the United States, in which the court of claims certified questions to the United States Supreme Court. Plaintiff brought suit in the court of claims against the United States to recover a sum of money alleged to be due the deceased for salary as a Federal Trade Commissioner from 8 October, 1933, when the President undertook to remove him from office, to the time of his death on 14 February, 1934. The opinion was rendered 27 May, 1935.

The Constitution of North Carolina, Art. IV, sec. 32, is as follows: "Any clerk of the Supreme Court, or of the Superior Courts, or of such courts inferior to the Supreme Court as may be established by law, may be removed from office for mental or physical inability; the clerk of the Supreme Court by the Judges of said Court, the clerks of the Superior Courts by the judge riding in the district, and the clerks of such courts

inferior to the Supreme Court as may be established by law by the presiding officers of said courts. The clerks against whom proceedings are instituted shall receive notice thereof, accompanied by a copy of the cause alleged for his removal, at least ten days before the day appointed to act thereon, and the clerk shall be entitled to an appeal to the next term of the Superior Court, and thence to the Supreme Court, as provided in other cases of appeals."

In regard to municipal recorders' courts, N. C. Code, 1931 (Michie), sec. 1536, *et seq.* Section 1551, in part, is as follows: "The clerk of the recorder's court shall be elected by the governing body of the city or town. . . . Before entering upon the duties of his office, the clerk shall enter into a bond, with sufficient surety, in a sum to be fixed by the governing body of the municipality, not to exceed five thousand dollars, payable to the State, conditioned upon the true and faithful performance of his duties as such clerk and for the faithful accounting for and paying over of all money which may come into his hands by virtue of his office. The bond shall be approved by the governing body and shall be filed with the clerk of the Superior Court of the county. . . . The governing body of the municipality shall have the right to remove the clerk of the court, either for incapacity or for neglect of the duties of his office; and in case of a vacancy for any cause the office shall be filled in the manner hereinbefore provided."

It will be noted that the Constitution, *supra,* provides: "The clerks against whom proceedings are instituted shall receive notice thereof, accompanied by a copy of the cause alleged for his removal," etc. This is due process, and should have been at least persuasive on the commissioners in the present case.

In *Burke v. Jenkins,* 148 N. C., 25 (27), we find: "In 1 Dillon Mun. Corp. (4 Ed.), sec. 240, it is said: 'The power to *remove a corporate officer* from his office for reasonable and just cause is one of the common-law incidents of all corporations.' . . . (p. 28.) Such action could not be taken without notice and an opportunity to be heard, except where the officer is removable without cause at the will of the appointing power. And when the motion is allowable only for cause, the soundness of such cause is reviewable by the courts upon a *quo warranto.* (Citing numerous authorities.) But in this case there was the fullest notice given and opportunity to be heard and sufficient cause shown."

In *Beaufort County v. Mayo,* 207 N. C., 211 (214), speaking to the subject, it is said: "Notice and an opportunity to be heard is a fundamental principal of our jurisprudence. It is of vital importance and constitutes due process of law."

The charter of the city of Raleigh provides that "The commissioners of the city of Raleigh shall elect . . . a clerk of said court." If the

commissioners had a right to remove the clerk they had elected "on account of inattention to duty," notice and an opportunity to be heard should have been given him. This was not done—he was summarily dismissed and Paul S. Dowell appointed to fill the office, "the change to take effect immediately." We do not think, under the act in which the clerk was elected, the commissioners had the authority and power to summarily dismiss him without notice and an opportunity to be heard.

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

Reversed.

IN THE MATTER OF MRS. ELLA YEOMAN QUICK, GUARDIAN FOR MADGE L. YEOMAN, JAMES E. YEOMAN, LILLIAN J. YEOMAN, AND GUSSIE YEOMAN, MINOR, AND JAMES E. YEOMAN, LILLIAN J. YEOMAN, AND GUSSIE YEOMAN, MINOR, v. THE FEDERAL LAND BANK OF COLUMBIA, A CORPORATION, AND MRS. ELLA YEOMAN QUICK, GUARDIAN.

(Filed 9 October, 1935.)

1. **Guardian and Ward D a—**

The statute, N. C. Code, 2180, prescribing the purposes for which a ward's land may be mortgaged and the procedure and requisites for the execution of the mortgage and the application of the proceeds of the loan, must be strictly complied with.

2. **Same—**

Where a guardian has applied for permission to mortgage her wards' land, and the clerk has entered an order therefor, which order has been approved by the court, there is a presumption that the statutory requirements have been met. N. C. Code, 2180.

3. **Guardian and Ward D d: Estoppel C a—Petitioners held not estopped from attacking mortgage executed by their guardian.**

Respondent's contention that petitioners' guardian had accepted the benefits of a loan and paid respondent interest thereon while acting in her representative capacity, and that the mortgage was executed by the guardian fourteen years prior to the institution of the proceedings, and that therefore petitioners were estopped to attack the validity of the mortgage, cannot be sustained where it sufficiently appears from the petition to set aside the mortgage that the mortgage was executed when petitioners were minors and that the proceeding attacking the mortgage was instituted by petitioners upon their coming of age.

4. **Guardian and Ward D b—Mortgage of wards' land held valid as to money used for permanent improvements and invalid as to balance.**

A guardian applied for permission to mortgage land owned by her for life with remainder in her wards, and the clerk entered an order therefor which was approved by the court. The guardian's application for the loan

stated that the proceeds thereof were to be used to purchase live stock necessary to the proper operation of the farm, to erect buildings on the land, and to provide improvements as defined by the Federal Farm Loan Board. *Held:* Under the presumption that the provisions of N. C. Code, 2180, were followed, the mortgage is valid and binding upon the wards' estate as to the funds used for permanent improvements on the land, but as to the funds used to purchase live stock the mortgage is void as to the wards, such fund not having been used to materially promote their interest, and the mortgage on the wards' estate in remainder to the extent of the proceeds used to purchase live stock should be set aside upon their petition therefor filed upon their coming of age.

APPEAL by petitioners from *Grady, J.*, at January Term, 1935, of HOKE. Modified and affirmed.

The title to the case is misleading, but not material. Madge L. Yeoman, James E. Yeoman, Lillian J. Yeoman, and Gussie Yeoman, having become of age, filed a petition in the original cause: *In the Matter of Mrs. Ella Yeoman Quick, Guardian* (naming the above infants). They allege, among other things: (1) That Mrs. Ella Yeoman Quick had a life estate in certain lands (describing same), and they are entitled to the remainder. (2) That on or about 8 November, 1919, as guardian, she filed a petition with the clerk of Hoke County (setting forth a copy). That the clerk made an order, and the same was confirmed by the judge presiding of the Superior Court, allowing her, as guardian, to make a lien on their interest in remainder in the land, in which she had a life interest, for the purpose of borrowing $5,000 from the Federal Land Bank of Columbia, a corporation. The order of the clerk and judge's confirmation are set forth. The further allegations are as follows:

"That as these affiants are informed and believe, and so allege, the said judgments marked 'Exhibits B and C' are void, irregular, and erroneous, and were entered and made while these petitioners were infants, and that these judgments were signed and entered without compliance with the statutes governing the mortgaging of the said infant petitioners' property, which was done when these infants were minors, and that these judgments were signed and entered without any examination of any disinterested parties, without affidavits taken and filed in the records, without the necessary legal proof that the loan was necessary or advantageous to the infants' estate, without a finding that the wards' interests would be materially promoted by the act, when, in fact, it was not, and without complying with the laws governing the same.

"That at the time said orders were made there was no proper compliance with the law, and there was no necessity for said loan or encumbrance of the estate of these infants, and that under such circumstances the said guardian, Mrs. Ella Yeoman Quick, gave a mortgage on the

said property in the sum of $5,000 to the Federal Land Bank of Columbia, through the Raeford Mutual Farm Loan Association, and that said mortgage is void, irregular, and erroneous, and that it should be canceled from the said record and removed as a cloud on the title of these infants in their estate, and the said Federal Land Bank of Columbia, a corporation, and the Raeford Mutual Farm Loan Association should be required to cancel the said purported mortgage, and remove it from the record.

"That neither the judge of the Superior Court nor the clerk of the Superior Court made or entered any judgment directing the exclusive method of the use of the said money to be applied and secured for purposes and trusts named by the judge, and it did not appear that the said mortgage or loan was advantageous to the infants in any way, and that by reason thereof the said judgments, 'Exhibits B and C,' are void, irregular, and erroneous.

"And it further appears that the said guardian was improperly ordered to mortgage the said property for the term of years not fixed by the court in its decree, and that it has been mortgaged from that said time, and the said mortgage still appears on record as a lien and encumbrance against the property.

"That by reason of the matters herein set forth your petitioners are entitled to have the remainder estate in their said property freed and cleared of any encumbrances of record, and are entitled to have the said void, irregular, and erroneous judgments, referred to as 'Exhibits B and C,' vacated and stricken from the record.

"Wherefore, your petitioners pray that the court will grant the following relief:

"(a) That the court will enter an order in the cause declaring the judgments referred to as 'Exhibits B and C' void; (b) that the court will declare the mortgage void, and not a lien or encumbrance on the property or estate of the infant petitioners; (c) that the court will require the Federal Land Bank of Columbia and the Raeford Mutual Farm Loan Association to appear in this matter and show cause why these judgments should not be declared void, and why they should not remove the purported lien of their mortgage from the record; (d) for the costs of this action; and for such other and further relief as the court may deem proper."

In response to the petition the Federal Land Bank of Columbia answered same, admitting that the petitioners were infants when the deed of trust was executed, the ownership of the petitioners in the remainder of the property in which Ella Yeoman Quick had a life estate; and, as a defense, alleged, in part, that "the clerk of the Superior Court of Hoke County entered his order in compliance with the statutes of the State of

North Carolina, authorizing said Ella Yeoman Quick, guardian, to execute a mortgage deed to the Federal Land Bank of Columbia, this respondent, to secure the payment of a loan of five thousand ($5,000) dollars, declaring in said order or judgment that the same should be a lien upon the interest of said minors as security for said loan.

"(c) That thereafter the presiding judge, in connection with said petition of Ella Yeoman Quick, and the order of the clerk of the Superior Court of Hoke County, confirmed said judgment of said clerk of the Superior Court of Hoke County.

"(d) That the terms and conditions of the mortgage to be given to the Federal Land Bank of Columbia to secure the payment of said loan of $5,000 were well known to the petitioners, to the clerk of the Superior Court of Hoke County, and to the presiding judge, said terms being then prescribed by rules and regulations made pursuant to the statutes of the United States of America, duly and regularly passed by the Congress of the United States; and that reference in said petition was made to the securing of said loan by a mortgage to said The Federal Land Bank of Columbia, this respondent, and the order or judgment of the clerk of the Superior Court of Hoke County, specifically by name, authorized the execution of a mortgage deed to the Federal Land Bank of Columbia.

"(e) That the proceeds derived from the loan made by The Federal Land Bank of Columbia to said Ella Yeoman Quick, guardian, for said minors, were used for the benefit of said farm and for its improvement and enhancement in value; and in accordance with the purposes stated in the application for said loan, a copy of said application being hereto attached and marked 'Exhibit A,' and asked to be taken as a part of this paragraph of the response to the petition as fully as if herein specifically set out.

"(f) That said mortgage was duly executed by the said Ella Yeoman Quick, guardian, on 9 January, 1920, and was duly recorded in Book 22, at p. 62, of the records in the office of the register of deeds for Hoke County; and that since said date, for a long period of time, the payments due under said note secured by said mortgage deed have been met.

"(g) That said petitioner, Ella Yeoman Quick, both individually and as guardian, having accepted the benefits of said loan, is estopped to deny the legality thereof and the title and interest of this respondent; and that the other petitioners named in said petition, being represented by said Ella Yeoman Quick, guardian, who made said petition for authority to borrow said sum and execute said mortgage, are estopped to deny the legality of said mortgage and the title and interest of this respondent.

"Wherefore, your respondent prays that the prayer of the petitioners be denied; that said mortgage deed referred to in the petition be declared a subsisting and outstanding legal lien covering the interest of said peti-

tioners; and that your respondent have such other and further relief as to the court may seem proper and necessary, together with its costs incurred in this cause."

"Exhibit A," made a part of the response, is headed: "Application for Loan Through Raeford National Farm Loan Association the Federal Land Bank of Columbia Under the Federal Farm Loan Act." It sets out in detail the facts in the application, and contains the following: "6. Does the applicant desire this loan, (a) for the purpose of purchasing land for agricultural uses? ....; (b) for equipment as defined by the Federal Farm Loan Board to be used in connection with the mortgaged farm? ....; (c) for fertilizers to be used thereon? ....; (d) for live stock necessary in the proper and reasonable operation of the same? $2,000.00; (e) to provide buildings to be erected on the mortgaged land? $2,000.00; (f) to provide for the improvement of the mortgaged land, improvement to be such as defined by the Federal Farm Loan Board, $1,000.00." This was signed, "Mrs. A. A. Quick, applicant."

The Loan Committee of the National Farm Loan Association, in the report, has this in it: "The statements made in the application are correct, with the following exceptions: .... Remarks and additional information: .... Findings: We find and report the value of the land is .... $14,000.00. That the value of the improvements is .... $3,000.00, making a total of .... $17,000.00. What do you think of the ability of applicant to pay the loan applied for and interest thereon out of income from the land after deducting necessary expenses and support of the family? *Good.* Do you approve of this loan and recommend that it be allowed? *Yes.* This 30 August, 1919." Then there is set forth by the directors: "Approval of Loan and Admission to Membership by Board of Directors of Raeford National Farm Loan Association."

In the reply of the petitioners to the response of the Federal Land Bank of Columbia, among other things, is the following: "Paragraph (e) is denied, the petitioners alleging the truth to be, that they received no benefits from said loan, and the proceeds did not improve or enhance the value of their interest, and said loan was not necessary, in that: (a) The property had buildings upon it prior to the loan, and it had timber of value upon it, and that as such, these petitioners having only a remainder interest, were best benefited by the property remaining in the condition in which it was. (b) That at the time the buildings were adequate in so far as the petitioners' interests were concerned, and that for the property to remain as it was would have best served the interests of these petitioners, who were minor children of tender years at said time. (c) That according to the very response filed by the defendant bank in this

action, as appears on 'Exhibit A,' these petitioners, in regard to the then purported loan, were not intended to receive the full benefit of a loan, but it was the intention to benefit two individuals, Mrs. A. A. Quick (as an individual) and her husband (these petitioners' step-father), A. A. Quick, for it appears on said exhibits that $2,000.00 was intended for live stock, $2,000.00 for additional buildings, and $1,000.00 for improvement to buildings, and that none of these things were necessary at the time for the petitioners, nor did they at the time nor since receive any benefit, and, if anything, the doing of such acts would injure and damage their interests rather than improve their interests, or benefit their interests, and according to the laws of North Carolina protecting the interest of minors, the doing of such acts were contrary to law."

The defendants demurred *ore tenus,* and "moved for judgment upon the pleadings, dismissing the motion and petition in the cause, for that the petition does not set up a cause of action, or such grounds for relief as permitted by law."

The court below sustained the demurrer. The petitioners made several exceptions and assignments of error, among them: "In that the court erred in signing the judgment as set out in the record." An appeal to the Supreme Court was taken by the petitioners. The assignments of error and necessary facts will be set forth in the opinion.

I. M. Bailey and G. B. Rowland for the Federal Land Bank of Columbia.

John Newitt and Ray S. Farris for petitioners.

CLARKSON, J. This cause was before this Court on the petition of The Federal Land Bank of Columbia to remove same to the District Court of the United States for the Middle District of North Carolina. The court below refused the petition, and the judgment, on appeal, was affirmed by this Court. *Ex parte Quick,* 206 N. C., 627.

N. C. Code, 1931 (Michie), sec. 2180, is as follows: "On application of the guardian by petition, verified upon oath, to the Superior Court, showing that the interest of the ward would be materially promoted by the sale or mortgage of any part of his estate, real or personal, the proceeding shall be conducted as in other cases of special proceeding; and the truth of the matter alleged in the petition being ascertained by satisfactory proof, a decree may thereupon be made that a sale or mortgage be had by such person, in such way and on such terms as may be most advantageous to the interest of the ward; but no sale or mortgage shall be made until approved by the judge of the court, nor shall the same be valid, nor any conveyance of the title made, unless confirmed and directed by the judge, and the proceeds of the sale or mortgage shall be

exclusively applied and secured to such purposes and on such trusts as the judge shall specify. The guardian may not mortgage the property of his ward for a term of years in excess of the term fixed by the court in its discretion. The word 'mortgage,' whenever used herein, shall be construed to include deeds in trust." *Ipock v. Bank,* 206 N. C., 791, 95 A. L. R., 836.

We have examined with care the petition of Mrs. Ella Yeoman Quick, guardian of the infant petitioners, to place a lien on the land in controversy of the infants, which they held in remainder, to the extent of $5,000. Also the judgment of the clerk and confirmation of the presiding judge. It is loosely and inartificially drawn. The statute should be strictly complied with.

In *Moore v. Gidney,* 75 N. C., 34 (39), *Bynum, J.,* who in speaking of the statutory requirements for a valid judgment against an infant, says: "So careful is the law to guard the rights of infants, and to protect them against hasty, irregular, and indiscreet judicial action. Infants are in many cases the wards of the courts, and these f[illegible] as enacted as safeguards thrown around the helpless, who, often the victims of the crafty, are enforced as being mandatory and not directory only. Those who venture to act in defiance of them, must take the risk of their action being declared void or set aside." *In re Reynolds,* 206 N. C., 276.

In The Federal Land Bank of Columbia's response to the petition of the petitioners is the following: "That said mortgage was duly executed by the said Ella Yeoman Quick, guardian, on 9 January, 1920, and was duly recorded in Book 22, at p. 62, of the records in the office of the register of deeds for Hoke County; and that since said date, for a long period of time, the payments due under said note secured by said mortgage deed have been met."

This action was brought on 12 December, 1933, nearly 14 years after the transaction was consummated. Of course, the petitioners were under age, and this petition was filed after they became of age. We think the petition inferentially alleges this, and the contentions by the Federal Land Bank of Columbia to the contrary untenable. There is a presumption that the record speaks the truth and the statute complied with, if not too glaring to the contrary. With this presumption in favor of the Federal Land Bank of Columbia, we hold that the deed of trust as to $3,000.00 is valid. As to $2,000.00 we cannot so hold. The record is that the Federal Land Bank of Columbia had notice that $2,000.00 of the $5,000.00 loan did not show "that the interest of the ward would be materially promoted by the sale or mortgage of any part of his estate." Section 2180, *supra.* The record clearly shows by the "Exhibit A" set forth in the Federal Land Bank of Columbia's response, that $2,000.00 of the $5,000.00 was "for live stock necessary in the proper and reason-

able operation of the same," on the farms in which the petitioners had a remainder. The other $3,000.00 was—$2,000.00 "to provide buildings to be erected on the mortgaged land," and $1,000.00 "to provide for the improvement of the mortgaged land, improvements to be such as defined by the Federal Farm Loan Board."

It is clear as the noonday sun that the wards who had a remainder in the land, their interest would not "be materially promoted" by $2,000.00 —being used to purchase live stock to operate the farm. The $2,000.00, included in the $5,000.00 loan, was as to the infants null and void.

For the reasons given, the judgment is

Modified and affirmed.

BOARD OF FINANCIAL CONTROL OF BUNCOMBE COUNTY v. THE COUNTY OF HENDERSON.

(Filed 9 October, 1935.)

Taxation B d—Property of municipality lying outside the county and used for business purpose is taxable by county in which it is situate.

The Board of Financial Control of Buncombe County obtained title to property situate in another county in liquidating assets belonging to a city within the county, the property being a part of the collateral security given the city for its deposit in a bank which failed. The property was rented by the Board of Financial Control to private businesses, and later the board obtained a prospective purchaser. *Held:* The property was subject to taxation by the county in which the property is situate although owned by a municipal corporation, since the property was held by the municipal corporation purely for business purposes and not for any governmental or necessary public purpose. N. C. Const., Art. V, sec. 5; N. C. Code, 7880 (2).

APPEAL by defendant from *Harding, J.*, at August Term, 1935, of HENDERSON. Reversed.

This is a controversy without action. The agreed statement of facts is as follows:

"1. The Board of Financial Control of Buncombe County, North Carolina, is a municipal corporation, created by the Legislature of North Carolina, and its duties and privileges are set out in chapter 253 of the Public-Local Laws of 1931, and as amended in chapter 189 of the Public-Local Laws of 1933, and as amended by chapter ...... of the Public-Local Laws of 1935, and under authority of these acts is the owner of, and is liquidating all of the properties, both real and personal, which were received by the city of Asheville and county of Buncombe as collateral security for their deposits in the Central Bank and Trust

Company of Asheville and certain other banks. The county of Henderson is a body politic under the statutes of North Carolina.

"2. The Board of Financial Control so created obtained title by conveyance dated 13 November, 1931, and is now the lawful owner in fee simple of the following described property:

"All that certain piece, parcel, or lot of land situate, lying, and being in the city of Hendersonville, at the northwest intersection of Main Street and Fourth Avenue, and more particularly described as follows:

"Beginning at a point in the western margin of Main Street, said point being located where the said margin of Main Street intersects the Northern margin of Fourth Avenue, and runs thence with the said margin of Main Street, north 10 deg. west 45.8 feet to a point at the extreme northeast corner of the building now occupied by the First Bank and Trust Company, and runs thence with the northern face of the wall of said building, south 80 deg. west 130 feet to a point in the eastern margin of a 20-foot alley, now known as Jackson Street; runs thence with the eastern margin of said Jackson Street, south 10 deg. east 45.8 feet to a point where the said Jackson Street intersects the northern margin of Fourth Avenue; thence along and with the northern margin of Fourth Avenue, north 80 deg. east 130 feet to the point of beginning. Being all that property conveyed to the First Bank and Trust Company by Adolf Ficker and wife, by deed dated 16 July, 1919, and recorded in Deed Book No. 102, at page 245, in the office of the register of deeds for Henderson County, North Carolina.

"3. The Board of Financial Control has received from W. B. Hodges and his associates of Hendersonville a *bona fide* offer to purchase the said property at a price agreed upon but requiring title in fee simple, free and clear of all liens and taxes. There are no liens nor claims against said property other than the taxes claimed by the county of Henderson for the years 1935, 1934, 1933, and 1932.

"4. Under their duly constituted authority the Board of County Commissioners of Henderson County have assessed said property for taxation for the aforesaid years, and have levied a tax against same which the plaintiff has refused and still refuses to pay; and the tax collector of Henderson County has advertised said property to be sold for taxes for the aforesaid years. The proposed purchasers have refused to accept title while this claim of tax lien stands against the property. The plaintiff, for and in behalf of the county of Buncombe and city of Asheville, denies that the county of Henderson is permitted to tax said property for the years hereinabove set forth, and, therefore, refuses to pay the same.

"5. Since plaintiff acquired the property described in paragraph 2, it has been renting and is now renting said property as an office building to various persons and corporations, who operate private businesses.

"Wherefore, the parties hereto have agreed upon the foregoing facts, and respectfully urge a speedy determination of the matter of law involved in this transaction. The matter in controversy being whether or not such taxes may be assessed as a lien against the said property for and during the period title to same is vested in said Board of Financial Control.

"Witness the signature of counsel representing both parties, this ...... August, 1935. J. H. Sample, Attorney for the Board of Financial Control of Buncombe. M. M. Redden, Attorney for the County of Henderson."

The judgment of the court below, rendered on the agreed statement of facts, was to the effect that the tax on the land assessed by defendant was invalid. To the judgment as rendered the defendant excepted, assigned error, and appealed to the Supreme Court.

J. Y. Jordan, Jr., and J. H. Sample for plaintiff.
Redden & Redden for defendant.

CLARKSON, J. The city of Asheville had certain collateral notes to protect its deposits in the Central Bank and Trust Company of Asheville when the bank broke. To collect and settle the many matters in which Asheville and Buncombe County were interested in, from the failure of this and other banks, the General Assembly set up the Board of Financial Control of Buncombe County, the plaintiff in this action.

Under this set-up the plaintiff acquired an office building in Hendersonville, Henderson County, N. C., by conveyance, on 13 November, 1931, and since that time has rented it as an office building to various persons and corporations who operate private businesses. There are certain taxes assessed against said property by Henderson County for the years 1932, 1933, 1934, and 1935. The plaintiff has contracted to sell the land in controversy, but the purchaser requires a title in fee simple, free and clear of all taxes.

The question involved: Is the real property, owned by the Board of Financial Control of Buncombe County, created by chapter 253 of the Public-Local Laws of 1931, exempt from the payment of *ad valorem* tax? We think not.

In *Bourne v. Board of Financial Control of Buncombe County,* 207 N. C., 170, this Court held that the Board of Financial Control for Buncombe County is a corporation with certain enumerated powers and in effect that said board was the collecting or liquidating agent of the city of Asheville and county of Buncombe.

So the question in this controversy narrows itself down: Can the city of Asheville, a municipal corporation, acquire business property in another county, hold and rent it, without the payment of taxes in that

county? We think not. The property is not held or used for any governmental or necessary public purpose, but for purely business purposes.

If a municipal corporation can go into a rental business and escape taxation, it would have a special privilege not accorded to others who are in a like business. The Constitution of North Carolina, Art. V, sec. 5, is as follows: "Property belonging to the State, or to municipal corporations, shall be exempt from taxation. The General Assembly may exempt cemeteries and property held for educational, scientific, literary, charitable, or religious purposes; also wearing apparel, arms for muster, household and kitchen furniture, the mechanical and agricultural implements of mechanics and farmers; libraries and scientific instruments, or any other personal property, to a value not exceeding three hundred dollars."

N. C. Code, 1931 (Michie), sec. 7880 (2), is as follows: "The following property shall be exempt from taxation under this article: (a) Property passing to or for the use of the State of North Carolina, or to or for the use of municipal corporations within the State or other political subdivisions thereof, for exclusively public purposes," etc.

In 3 A. L. R., pp. 1441-2, is the following: "However, in at least one jurisdiction it has been held that although the Constitution or statute in express terms exempts state or municipally owned property from taxation, it will be implied that the intention was to exempt such property only when devoted to a public use. *Atlantic & N. C. R. Co. v. Carteret County* (1876), 75 N. C., 474, wherein it appeared that a tax was levied on the interest of the State in a railroad. Holding that the constitutional exemption did not apply to property of the State held for business purposes, the Court said: 'Although this language is general, yet we do not think it was intended to embrace this case. The Capitol is not taxed, because the State would be paying out money just to receive it back again, less the expense of handling it. And if taxed for local purposes it would to that extent embarrass the State government. Nor is it any hardship upon the locality to have the property exempt, as the advantages from it are supposed to compensate for the exemption. And, as with the Capitol, so with other property. But where the State steps down from her sovereignty and embarks with individuals in business enterprises, the same considerations do not prevail. The State does not engage in such enterprises for the benefit of the State as a State, but for the benefit of individuals or communities—at least, this is generally so—and if the State gets no taxes she may get nothing. Suppose, for illustration, that the plaintiff should declare no dividends and consume the whole earnings in current expenses. In that case the State, as a State, would never derive anything from the road except the taxes. At any rate, we do not think the exemption in the Constitution embraces the

interest of the State in business enterprises, but applies to the property of the State held for State purposes.' "

In the case of *Village of Watkins Glen v. Hager, County Treasurer,* 252 N. Y., pp. 146-7, Supplement, it was held: "That property acquired by municipality is used to produce income without definite plan for use for public held not to constitute 'holding for public use,' exempting property from taxation (Tax Law, sec. 4, subd. 3)." At page 151 is the following: "It has been held in many cases in other jurisdictions that the exemption is limited to property actually devoted to a public use, or to some purpose or function of government. *Town of Hamden v. City of New Haven,* 91 Conn., 589, 101 A., 11, 3 A. L. R., 1435; *Traverse City v. East Bay Township,* 190 Mich., 327, 157 N. W., 85; *Essex County v. Salem,* 153 Mass., 141, 26 N. E., 431; *Atlantic & N. C. R. Co. v. Board of Comrs. of Carteret County,* 75 N. C., 474." It will be noted that *Atlantic & N. C. R. Co. case* is cited.

In *Collector of Taxes of Milton v. City of Boston,* 180 N. E. Rep., 116 (Mass.), at p. 117, is the following (*Rugg, C. J.*): "The exemption from taxation, in view of the principle on which it rests, cannot justly be extended to property owned by one municipality within the bounds of another, not actually devoted to a public use or held with the design within a reasonable time to devote it to such use. *Essex County v. Salem,* 153 Mass., 141, 26 N. E., 431; *Burr v. Boston,* 208 Mass., 537, 540, 95 N. E., 208, 34 L. R. A. (N. S.), 143." *Lewis v. N. Y. & N. E. R. Co.,* 26 N. E. Rep., 431.

It will be noted that the *Atlantic & N. C. R. Co. case, supra,* decides that under the Constitution of North Carolina, the property is taxable unless devoted to a public use. The North Carolina statute, section 7880 (2), *supra,* says "for exclusively public purposes."

In *Andrews v. Clay Co.,* 200 N. C., 280, the facts were that the town of Andrews was a municipal corporation. The facts, pp. 280-1: "The said land was owned and used by the plaintiff during said years as the site of a power plant for the generation of electricity, which was transmitted over wires from said power plant in Clay County to the town of Andrews in Cherokee County, and there used by said town of Andrews for lighting its streets and municipal buildings, and for distribution among the citizens of said town for domestic and commercial purposes. The revenue derived from the distribution and sale of electricity to citizens of said town was used to pay the expenses of maintaining and operating its electric light and power plant. The town of Andrews purchased the land in Clay County and constructed its power plant thereon under the authority of an act of the General Assembly of this State. It paid for said land and for the construction of said power plant out of funds raised by the issuance and sale of its municipal

bonds." In the above case the assessment made by Clay County was held invalid.

The town of Andrews was operating a municipal electric plant—a public use or purpose. *Fawcett v. Mt. Airy,* 134 N. C., 125. A necessary expense—Const. of N. C., Art. VII, sec. 7; *Webb v. Port Commission,* 205 N. C., 663 (673); *Mfg. Co. v. Aluminum Co.,* 207 N. C., 52 (59). The purpose for which the land was used in the *Andrews case, supra,* being for a public purpose or use, is distinguishable from the present case, where the use was private, for business purposes.

For the reasons given, the judgment below is

Reversed.

PLANTERS NATIONAL BANK AND TRUST COMPANY OF ROCKY MOUNT, N. C., ADMINISTRATOR OF CHARLES BARKER, DECEASED, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 9 October, 1935.)

1. **Master and Servant E c—Assumption of risk held to bar recovery for death of plaintiff's intestate under Federal Employers' Liability Act.**

   Evidence that plaintiff's intestate was employed to inspect freight cars upon defendant's tracks, and that he was seen engaged in his duties in interstate commerce a short while before his death, on a dark night with drizzling rain, and that he was found dead upon the tracks with indications that he had been struck by a train, with evidence that the place where he was working was sufficiently lighted to have enabled him to see approaching trains, *is held* to bar recovery as a matter of law under the Federal Employers' Liability Act upon the doctrine of assumption of risk, it being in evidence that plaintiff's intestate knew the risk of the employment, and the evidence leaving the manner in which he was killed in the field of speculation and conjecture.

2. **Master and Servant E a—**

   In an action to recover for the death of plaintiff's intestate, killed while engaged in his employment in interstate commerce, the Federal Employers' Liability Act is controlling.

3. **Evidence D l—**

   Circumstantial evidence, when sufficiently strong, is as competent as positive evidence to prove a fact, but it is insufficient when it leaves the matter sought to be established in the field of speculation and conjecture.

APPEAL by plaintiff from *Sinclair, J.,* at February Term, 1935, of NASH. Affirmed.

This is an action for actionable negligence, brought by plaintiff against defendant for killing its intestate, Charles Barker, on 16 February, 1932.

The following judgment was rendered in the court below:

"This cause came on for hearing before the undersigned judge presiding at the February, 1935, Term, of the Superior Court of Nash County.

"At the close of plaintiff's evidence, defendant moved that judgment of nonsuit be entered.

"Upon the proof offered, the court finds as a fact that, at the time of the occurrence of the alleged fatal injury, plaintiff and defendant were engaged in interstate commerce, and that the statutes and decisions of the Federal Courts, therefore, control.

"And the court being of opinion that defendant's motion is well taken;

"It is therefore ordered and adjudged that this action be and the same is hereby dismissed as of nonsuit, the cost to be taxed against the plaintiff by the clerk. N. A. Sinclair, Judge Presiding."

The plaintiff made numerous exceptions and assignments of error, and appealed to the Supreme Court.

J. P. Bunn, Langston, Allen & Taylor, and Cooley & Bone for plaintiff.

Spruill & Spruill and Thos. W. Davis for defendant.

PER CURIAM. At the close of plaintiff's evidence the defendant made a motion in the court below for judgment as in case of nonsuit. C. S., 567. The court below sustained the motion and in this we can see no error. The grounds of the motion were, (1) failure of proof on the part of the plaintiff; (2) assumption of risk.

The evidence on the part of plaintiff was to the effect that its intestate, Charles Barker, was an employee of defendant. It was his duty "to inspect trains, to see that the seals on the freight cars were unbroken, and generally to look after and protect the property of the defendant, and these duties required the said Charles Barker to frequently cross and re-cross the defendant's yards and tracks." He was doing that sort of work for four years. His duties required him when trains came in to examine the seals on these trains to see that they had not been broken and to examine the cars to see that no hoboes were arriving.

Charles Barker, the deceased, left his wife and children to go to work for the defendant at a quarter to six in the evening of 16 February, 1932. He was a strong, healthy man. He was found on defendant's track at 6:35 or 6:40 lying across the rail dead. He was cut in two about the breast, having been run over by defendant's train. Other employees saw him in the performance of his duties and the last seen of him alive was about 15 or 20 minutes before he was found dead. The night was dark and it was drizzling rain. One of the witnesses for plaintiff testified: "The yards there are lighted by overhead lights

and these lights are far enough apart or close enough together to light that ladder track so that you can see well enough. On this night in question when I saw Mr. Barker's body I was looking at it by the light of the overhead light. As you go and come in there all around that ladder track you can see where you are walking by these overhead lights, but, of course, you could not see how to inspect a car by them. You couldn't read a newspaper by them unless you were right under one of them, but if you had pretty good eyes and were right under the light you could read a newspaper. You could see what was coming and going on under those lights."

We have read with care the evidence. It is well settled that circumstantial evidence, when sufficiently strong, is as competent as positive evidence to prove a fact. In the present case we do not think the circumstantial evidence, taken as a whole, sufficient to be submitted to a jury. The manner in which plaintiff's intestate was killed, from the record evidence, is speculative, uncertain, and conjectural, and is not sufficient to be submitted to a jury.

Plaintiff's intestate was engaged in interstate commerce. The liability is determined solely by the Federal Employer's Liability Act, and assumption of risk pleaded by defendant is a good defense. Plaintiff's evidence indicates that plaintiff's intestate knew and assumed the risk of the employment which he was engaged in.

The evidence excluded by the court below was immaterial from the view we take of the entire evidence.

In law the nonsuit must be sustained. The plaintiff's intestate was a bread-winner and died in such a manner as should call for some provision, which should be made in such cases for the widow and children.

In law we find

No error.

WILLIAM H. MODLIN v. THE SOVEREIGN CAMP OF THE WOODMEN OF THE WORLD.

(Filed 9 October, 1935.)

Insurance R c—Recovery of disability benefits held barred by forfeiture of contract for nonpayment of dues prior to notice of disability.

Plaintiff's action on a disability provision in his fraternal benefit certificate *held* properly nonsuited under the evidence for his failure to furnish satisfactory proof of disability until more than six months after the termination of his contract for nonpayment of dues according to its terms and conditions, although the inception of the disability antedated the forfeiture for nonpayment of dues.

APPEAL by plaintiff from judgment of nonsuit entered by *Parker, J.*, at June Term, 1935, of MARTIN. Affirmed.

Elbert S. Peel for plaintiff, appellant.
Albion Dunn for defendant, appellee.

PER CURIAM. This was an action, instituted by the plaintiff, to recover total and permanent disability benefits under a beneficiary certificate issued to him by the defendant fraternal and insurance association on 24 February, 1922. The pleadings, testimony, documentary evidence and admissions establish that the plaintiff paid all dues and assessments required of him up to and including February, 1933, and has paid no dues or assessments since that time; that the plaintiff became permanently and totally disabled within the meaning of his certificate in November, 1932; that on 2 October, 1933, the plaintiff for the first time gave notice of and offered to furnish satisfactory proof of his disability, and made application for the permanent total disability benefit provided in his certificate.

Both the original application for insurance and the beneficiary certificate of the plaintiff state that "all the provisions of the Constitution and Laws of the society now in force and that may hereafter be adopted shall constitute the basis for and form a part of any beneficiary certificate that may be issued to me by the Sovereign Camp of the Woodmen of the World, . . ."

Sections 63-A and 63-B of the Constitution and By-Laws of the defendant company provide that every member shall pay certain annual assessments or monthly installments of assessments for the Sovereign Camp fund, and such Camp dues as may be required by the By-Laws of his Camp, and that upon failure by any member to make any such payments on or before the last day of the month he shall become suspended and his beneficiary certificate shall be void, and the contract between such person and the association shall be completely terminated.

In November, 1931, Section 61-C of said Constitution and By-Laws was amended to read: "Any member whose certificate so provides, and who, while younger than sixty years of age, and while the certificate is in full force and effect, shall furnish satisfactory proof to the secretary of the association at the home office of the association that he has suffered bodily injury, through external violent and accidental means or by disease, and that he is and will be permanently, totally, continuously, and wholly prevented thereby for life from pursuing any and all gainful occupations or performing any work for compensation of value, . . . may have the option of surrendering his certificate for cancellation and receiving in settlement thereof, less any indebtedness due to the associa-

tion, one-half of the face amount of his certificate as a permanent total disability benefit. . . ." This amendment was in effect from its adoption until the time of the institution and trial of this action.

The plaintiff having failed to make any payment of dues or assessments since February, 1933, his beneficiary certificate became void and his contract with the association was terminated after that month by virtue of said Sections 63-A and 63-B, and having failed to furnish satisfactory proof of his disability until 2 October, 1933, more than six months after the avoiding of his certificate and the termination of his contract, he is precluded from maintaining his action by said amended Section 61-C.

Judgment affirmed.

ANNE CANNON REYNOLDS, A MINOR, ACTING BY AND THROUGH HER NEXT FRIEND, J. F. CANNON, AND ANNE CANNON REYNOLDS II, A MINOR, ACTING BY AND THROUGH HER NEXT FRIEND, HOWARD RONDTHALER, v. ZACHARY SMITH REYNOLDS, A MINOR, W. N. REYNOLDS AND R. E. LASATER, GENERAL GUARDIANS OF SAID MINOR, ZACHARY SMITH REYNOLDS, SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE, AS TRUSTEE UNDER THE WILLS OF R. J. REYNOLDS AND KATHERINE S. JOHNSTON, RICHARD J. REYNOLDS, MARY REYNOLDS BABCOCK, CHARLES BABCOCK, NANCY REYNOLDS BAGLEY, HENRY WALKER BAGLEY, W. N. REYNOLDS AND R. E. LASATER, GUARDIANS OF NANCY REYNOLDS BAGLEY, HARDIN W. REYNOLDS, ETHEL R. REYNOLDS, SUE R. STALEY, THOMAS STALEY, A. D. REYNOLDS, GRACE REYNOLDS, HOGE REYNOLDS, SCOTTIE REYNOLDS, R. S. REYNOLDS, LOUISE REYNOLDS, CLARENCE REYNOLDS, EDNA REYNOLDS, NANCY L. LASATER, R. E. LASATER, LUCY L. STEDMAN, J. P. STEDMAN, MARY LYBROOK, SAM LYBROOK, D. J. LYBROOK, CHINA LYBROOK, ANNIE D. REYNOLDS, HARDIN W. REYNOLDS, KATHERINE REYNOLDS, WILLIAM N. REYNOLDS, LUCY R. CRITZ, W. N. REYNOLDS, KATE B. REYNOLDS, J. EDWARD JOHNSTON, J. EDWARD JOHNSTON, JR., J. EDWARD JOHNSTON, GUARDIAN OF J. EDWARD JOHNSTON, JR.

(Filed 1 November, 1935.)

1. Appeal and Error A f: Evidence E d—Ordinarily an admission of an attorney is binding on his client.

Where a party, through her duly appointed attorney, states in her brief on appeal from a judgment based upon a family agreement for the distribution of the proceeds of trust estates, that she asks nothing further for herself, but is interested only in presenting the rights of her minor infant, represented in the action by a next friend duly appointed, such party may be heard on appeal as an *amicus curæ* as the mother and natural guardian of her infant.

2. Infants A d—Court has equitable power to ratify and approve a contract *affecting the interest of an infant in trust estates.*

Where an infant has a contingent interest in trust estates, consisting of real or personal property, the courts, in their equitable jurisdiction, have the power to ratify and affirm a contract affecting the infant's interest therein in order that the estates may not be wasted in litigation and in order that the original intention of the trustors may be effectuated and not defeated by the happening of unforeseen contingencies, the best interest of the infant being the guiding principle in determining whether the contract should be ratified and affirmed.

3. Executors and Administrators F e—Judgment for distribution of trust estates in accordance with family agreement affirmed in this case.

Judgment was entered in this cause ratifying and affirming a family agreement for the distribution of funds held in trust under the provisions of the wills and deed executed by the parents of the primary beneficiary, whose interest was contingent upon his reaching the age of twenty-eight. Thereafter, the guardian of an infant having a contingent interest in the trust estates filed a motion in the cause, under authorization of the courts, to set aside the judgment so far as it affected the interest of its ward. The primary beneficiary died prior to the filing of the motion and before he reached the age of twenty-eight. All persons having a vested or contingent interest in the estates were made parties, the minors, both *in esse* and *in posse*, being represented by next friends or guardians *ad litem*, duly appointed. Before hearing the motion, a family agreement was submitted to the court, which agreement modified in certain respects the original judgment, the relations between the parties having been changed by events happening subsequent to the entering of the original judgment. It appeared that the rights of the respective parties depended, among other matters, upon the validity of the original judgment, upon the validity of a will executed by the primary beneficiary, in which he attempted to exercise the power of appointment under the terms of the trusts, the validity of a divorce decree obtained by the first wife of the primary beneficiary, the construction of the trust instruments, and that there were *bona fide* controversies between the parties, and that the cost of litigation would consume a large part of the estates. The trial court heard evidence, found the facts, and entered judgment ratifying and affirming the family agreement. *Held:* It appearing that the judgment carried out the intent of the trustors, which would otherwise have been defeated by the happening of the unforeseen contingencies, and was just, fair, and equitable between the parties, the judgment was properly entered in the equitable jurisdiction of the court.

4. Actions B a—

Legal and equitable rights and remedies are now determined in one and the same action. Const. of N. C., Art. IV, sec. 1.

5. Courts A a—

Under the provisions of N. C. Const., Art. IV, secs. 1 and 20, the Superior Courts are the successors of the courts of equity, and exercise their equitable powers, unless restrained by statute.

6. Same—

The Superior Courts have equitable jurisdiction to affirm and approve family agreements for the distribution of trust estates created by will in order to effectuate the intent of the trustors when such intent would otherwise be defeated by the happening of unforeseen contingencies.

7. Appearance A a—Appearance in this case held to give courts personal jurisdiction over party making such appearance.

The trustee of trust estates created by wills personally appeared by filing answer to a suit instituted by the wife of the primary, contingent beneficiary affecting the income from the trust, in which action judgment was entered affirming a family agreement for the distribution of the proceeds of the trust estates, by filing answer to a motion in the cause by the guardian of a minor contingent beneficiary to set aside the judgment so far as it affected the interest of the minor, and by filing answer to a petition of the heirs setting forth a proposed settlement, and only in the last answer filed did the trustee question the jurisdiction of the court on the ground that the trust *res* were beyond the jurisdiction of the court. *Held:* The appearance was a general appearance, giving the court personal jurisdiction over the trustee.

8. States A a—Courts of this State held to have jurisdiction over trust estates created by wills probated here and executed by residents.

The trust estates in question were created by wills of residents of this State, which wills were probated in this State, in the county of the domicile of the testators. The beneficiaries of the trust estates were residents at the time of the probate of the wills, and the wills provided that residents of this State might change the trustee at any time. *Held:* The courts of this State have primary jurisdiction over the trust estates, although the trustee named in the wills is a nonresident and the trust *res*, consisting of personalty, is held by the trustee in the state of its residence.

9. Taxation C h—Settlement of claim for transfer tax by agreement of parties approved by court of competent jurisdiction is upheld.

The primary contingent beneficiary of trust estates created by will died prior to the happening of the contingency upon which the estates were to vest in him, but before his death attempted to exercise the power of disposition by will in accordance with the terms of the trusts. The validity of the will and the exercise of the power of disposition provided for in the trusts was attacked by certain contingent beneficiaries of the trusts, and thereafter a family agreement was submitted to the court for the disposition of the trust estates. All persons having any interest in the estates, contingent or vested, were made parties, including the State upon its claim of inheritance or transfer taxes, N. C. Code, 7880 (1) (5). The compromise between the parties for the distribution of the estates and with the State for the payment of a stipulated sum in discharge of the claim for taxes was approved by the court after hearing evidence. *Held:* The settlement of the taxes by compromise, in the court of competent jurisdiction, in view of the *bona fide* controversies between the parties, and the facts and circumstances of the case, is affirmed on appeal, the matter being a legitimate subject of compromise and all parties affected being duly represented.

10. Same—

A liberal construction will be given to inheritance tax statutes to the end that all property fairly and reasonably coming within their provisions may be taxed.

APPEAL by Annie L. Cannon, coguardian of Anne Cannon Reynolds II, Anne Cannon Reynolds I (now Smith), and Safe Deposit and Trust Company of Baltimore, trustee, from *Moore, Special Judge,* at March Special Term of FORSYTH. Affirmed.

The following judgment was rendered in the court below:

"This cause coming on to be heard before his Honor, Clayton Moore, judge presiding, at the 11 March, 1935, Term of the Superior Court of Forsyth County, and being heard at the said term of said court, upon the pleadings filed herein and the evidence offered by the respective parties in interest, the court, upon consideration thereof, finds the following facts:

"1. That, in this action as originally constituted, the Cabarrus Bank and Trust Company, one of the duly appointed guardians of Anne Cannon Reynolds II, filed a motion on 30 April, 1934, to set aside the original judgment entered herein on 4 August, 1931, in so far as said judgment attempted to affect the rights of the said Anne Cannon Reynolds II, in the trust estates created by her paternal grandparents, hereinafter referred to.

"2. Upon the filing of said motion, an order was duly entered herein making Annie L. Cannon, coguardian of the said Anne Cannon Reynolds II, a party defendant herein, and ordering her to show cause why the said motion should not be allowed; the said order also commanding the original defendants herein to file any answer which they, or any of them, might have to said motion within twenty days from the service of said order; and that said order, together with a copy of said motion, was duly served upon the original defendants herein, and upon the said Annie L. Cannon, one of the guardians of Anne Cannon Reynolds II.

"3. That, subsequent to the order referred to in the preceding paragraph, the Safe Deposit and Trust Company of Baltimore, as trustee under the will of R. J. Reynolds and as trustee under the will and deed of Katherine S. Johnston, duly filed an answer to the motion referred to in paragraph one hereof; and that all the other original defendants herein duly filed an answer to said motion.

"4. That, subsequent to the service of the order referred to in paragraph two hereof, Annie L. Cannon, coguardian of Anne Cannon Reynolds II, duly filed herein her motion or response to the motion referred to in paragraph one hereof.

"5. That, subsequent to the filing of the motion referred to in paragraph one hereof, the following persons have been duly made parties

hereto: Maxie Smith Dunn, Albert B. Walker, John S. Graham, Christopher Smith Reynolds, an infant, Charles Henry Babcock III, an infant, Barbara Frances Babcock, an infant, Nancy Jane Bagley, an infant, Richard J. Reynolds, Jr., an infant, Mary Katherine Babcock, an infant. That R. C. Vaughn, a citizen and resident of Forsyth County, has been duly appointed next friend for the infant Christopher Smith Reynolds; that a guardian *ad litem* has been duly appointed for the other infants hereinabove named; that serving of process herein has been duly made upon said infants and upon said guardian *ad litem;* and that, by an order heretofore entered herein, P. Frank Hanes was duly appointed guardian *ad litem* for any and all persons who may hereafter be born interested in the determination of the issues raised by the pleadings herein, and service of process herein has been duly made upon said P. Frank Hanes, guardian *ad litem.*

"6. That, subsequent to the filing of the motion referred to in paragraph one hereof, the said Christopher Smith Reynolds, by his next friend, R. C. Vaughn, filed an interplea herein setting forth his alleged rights in the trust shares therein referred to; and that the Cabarrus Bank and Trust Company, one of the guardians of Anne Cannon Reynolds II, duly filed an answer to said interplea.

"7. That, subsequent to the filing of the motion referred to in paragraph one hereof, Richard J. Reynolds, Mary Reynolds Babcock, and Nancy Reynolds Bagley duly filed herein an offer of settlement and petition thereon, proposing a settlement of any and all rights and interests in the trust shares herein referred to, upon the terms and provisions set forth in said offer as amended; that, upon the filing of said offer, an order was duly entered therein directing that said offer of settlement and petition be filed with the clerk of this court, and that copies thereof be mailed by said clerk to all the parties to this action, or to their counsel, or to their duly constituted attorneys in fact, and that all parties hereto have thirty days from the date of said order within which to file an answer to said offer of settlement and petition thereon; and that said order has been duly complied with.

"8. That an order was duly entered herein making a party to this action the State of North Carolina on relation of A. J. Maxwell, Commissioner of Revenue; and that, pursuant to said order, a complaint was filed herein on behalf of the State, alleging that, under the Revenue Laws of North Carolina, the Commissioner of Revenue is entitled to receive and collect from the descendants of R. J. Reynolds, deceased, and Katherine S. Johnston, deceased, a large sum of money as inheritance tax upon the grounds set forth in said complaint.

"9. That, subsequent to the proceedings hereinabove referred to, an order was duly entered herein that notice, together with copies of the

pleas of intervention of A. J. Maxwell, Commissioner of Revenue, and of Christopher Smith Reynolds, as well as a copy of the offer of compromise and settlement aforesaid, forthwith issue out of this court to each of the infants who are parties to this cause, and the next friend or guardian *ad litem* of each infant, and the general guardians of Anne Cannon Reynolds II, and of J. Edward Johnston, Jr., requiring each and all of said parties to appear herein within thirty days from the date of the service of said notice and copies, and file such plea, answer, or response as they might deem advisable; and that, pursuant to said order, said notice, together with the copies therein referred to, were duly served upon the parties described in said order.

"10. That thereafter, the Cabarrus Bank and Trust Company, one of the guardians of Anne Cannon Reynolds II, duly filed a response to said offer of settlement of Richard J. Reynolds, Mary Reynolds Babcock, and Nancy Reynolds Bagley, referred to in paragraph seven hereof.

"11. That thereafter the Cabarrus Bank and Trust Company, one of the guardians of Anne Cannon Reynolds II, duly filed a response to the complaint of the State of North Carolina on the relation of A. J. Maxwell, Commissioner of Revenue, referred to in paragraph eight hereof.

"12. That thereafter Christopher Smith Reynolds, by his next friend, R. C. Vaughn, filed a response to the offer of settlement of Richard J. Reynolds, Mary Reynolds Babcock, and Nancy Reynolds Bagley, referred to in paragraph seven hereof.

"13. That thereafter the Safe Deposit and Trust Company of Baltimore, trustee under the will of R. J. Reynolds, and trustee under the will and deed of Katherine Smith Johnston, specially appearing under protest, filed an answer to said offer of settlement referred to in paragraph seven hereof.

"14. That thereafter Anne Cannon Smith filed an answer and response 'To all the motions, interpleadings, proposals, and acceptances filed by the various parties herein.'

"15. That thereafter Annie L. Cannon, guardian of Anne Cannon Reynolds II, filed an answer in response to the offer of settlement referred to in paragraph 7 hereof, and answered the several complaints in the pleas, answers, and motions filed in this cause affecting the rights of her infant ward.

"16. That thereafter Christopher Smith Reynolds, by his next friend, R. C. Vaughn, filed a reply to the response of Anne Cannon Smith referred to in paragraph fourteen hereof, and to the response of Annie L. Cannon, guardian referred to in paragraph fifteen hereof.

"17. That thereafter the Reynolds heirs filed an answer to the complaint of the State of North Carolina, and incorporated therein an offer of compromise of the claim of the State of North Carolina, which was amended as above stated.

"18. That thereafter, to wit: On 30 January, 1935, an order was entered herein directing that a copy of the offer of compromise referred to in the preceding paragraph, and a copy of said order, be mailed by the clerk of this court to counsel for all parties, and that all parties, within ten days from the date of said order, by filing answers to said proposal, show cause why said proposal should not be accepted and approved by the court, and that said order was duly complied with.

"19. That thereafter, in accordance with the order referred to in the preceding paragraph, responses to the offer of compromise of the tax claim referred to in paragraph seventeen hereof was duly filed on behalf of Christopher Smith Reynolds, and also by the Cabarrus Bank and Trust Company as one of the guardians of Anne Cannon Reynolds II, and also by the Safe Deposit and Trust Company, trustee.

"20. That thereafter the Reynolds heirs filed a reply to the answer and response of Annie L. Cannon, one of the guardians of Anne Cannon Reynolds II, and in said answer requested that they be allowed to withdraw the proposal of settlement referred to in paragraph seven hereof, unless the court would proceed to consider and act upon and approve the said proposal of settlement; and the Cabarrus Bank and Trust Company filed an objection to such withdrawal, and that Christopher Smith Reynolds, by his next friend, R. C. Vaughn, filed an objection to such withdrawal.

"21. That thereafter the Cabarrus Bank and Trust Company filed a reply to the answer and response of Annie L. Cannon, referred to in paragraph fifteen hereof, and to the answer and response of Anne Cannon Smith, referred to in paragraph fourteen hereof.

"22. That thereafter P. Frank Hanes, guardian *ad litem* for Richard J. Reynolds, Jr., Mary Katherine Babcock, Charles Henry Babcock III, Barbara Frances Babcock, Nancy Jane Bagley, W. N. Reynolds II, and for any unborn persons interested in the determination of this cause, duly filed an answer to all the pleadings filed by all parties herein since the commencement of the present proceedings by the motion of Cabarrus Bank and Trust Company and the order of Hon. P. A. McElroy, judge of the Superior Court, under date of 30 April, 1934.

"23. That thereafter the defendants W. N. Reynolds, Mary E. Lybrook, T. F. Staley, Jr., W. A. Lybrook, Nancy L. Lasater, H. W. Reynolds, Lucy Reynolds Critz, D. J. Lybrook, Richard S. Reynolds, J. H. Reynolds, Clarence K. Reynolds, Lucy L. Stedman, Samuel M. Lybrook, Hardin W. Reynolds, and A. D. Reynolds filed an answer to all pleadings filed in this cause since their answers filed on 24 October, 1934.

"24. That J. Edward Johnston, Jr., by his guardian, J. Edward Johnston, filed an answer to the offer of settlement and petition therein, interplea of Christopher Smith Reynolds, and the complaint of the State

of North Carolina on relation of A. J. Maxwell, Commissioner of Revenue.

"25. That the parties to this proceeding are all properly before the court; that either a next friend or a guardian *ad litem* has been duly appointed for each and every infant, whether born or unborn, who is now or may hereafter be in any way interested in the trust shares hereinafter mentioned; that all persons, whether minors or of age, and whether *in esse* or *in posse,* who are now or who may hereafter be interested in the trust shares hereinafter mentioned, have been made parties to this action, and have either appeared herein, or been duly served with process herein and with copies of all the foregoing pleadings.

"26. That, on 29 July, 1918, R. J. Reynolds died in Forsyth County.

"27. That, at the time of his death, and for a long number of years prior thereto, the residence and domicile of the said R. J. Reynolds was and had been in Forsyth County, North Carolina.

"28. That the said R. J. Reynolds left surviving him his wife, Katherine Smith Reynolds, and four children, no child of the said R. J. Reynolds having predeceased him, and the four surviving children being named as follows: R. J. Reynolds, Jr., Mary Reynolds (Babcock), Nancy Reynolds (Bagley), Zachary Smith Reynolds (hereinafter referred to as the Reynolds heirs).

"29. That the said Zachary Smith Reynolds was the youngest of the said four children, having been born on 4 November, 1911, and, consequently, he would have arrived at the age of twenty-eight years on 4 November, 1939.

"30. That the said R. J. Reynolds left a last will and testament by the terms whereof, after a specific devise and after certain specific bequests, he devised and bequeathed a portion of the residue of his estates to his wife and devised and bequeathed other portions of the said residue of his estate to Safe Deposit and Trust Company of Baltimore as trustee, in trust for certain beneficiaries, with specific directions as to the collection and disbursement of the income of said trust estate, and with the provision that if and when each of said children became twenty-eight years of age, it should receive from said trustee certain property of the estate, and that subsection seven of said fourth item read as follows:

" '(7) Should any of my children die before he or she shall arrive at the age of twenty-eight (28) years, then the share of my estate which would have been payable to him or her, had he or she arrived at that age, shall be continued to be held by my said trustee for the use and benefit of his or her devisees by will until the time that such child would have arrived at the age of twenty-eight years, if he or she had lived, when the said trust shall cease and the estate shall then become payable to such devisees, the trustee, however, paying in the meanwhile the

income from said share to them; but should any of my children die before that time without having disposed of his or her share by will, but leaving issue him or her surviving, the share of said deceased child shall continue to be held by my said trustee for the use and benefit of his or her children living at his or her death, paying unto them or applying so much of the net income of the share of my child so dying as said trustee may deem necessary for their support and maintenance and accumulating the balance until the time my child so dying would have arrived at the age of twenty-eight years, if he or she had lived, when the trust shall cease and the estate shall then become vested in his or her children, then surviving; and, should any of my said children die without having made a testamentary disposition of his or her share of my said estate and without issue living at the termination of said trust, then his or her share shall be held on like trusts for my surviving children and the then living issue of my deceased children *per stirpes;* and, should all of my children and their issue die before the termination of the trusts, then, in that event, one-half of the trust estate in value at that time, principal and income, shall go to and belong to my said wife, and the other half to my brothers and sisters then living and the descendants then living of any of my deceased brothers and sisters, *per stirpes.'*

"31. That the said last will and testament of the said R. J. Reynolds was duly and regularly probated before the clerk of the Superior Court of Forsyth County on 12 August, 1918, and that, on 12 August, 1918, letters testamentary were duly issues by the clerk of the Superior Court of Forsyth County, North Carolina, to Katherine S. Reynolds, who was nominated and appointed by said will to act as executrix of that portion of the estate of the said R. J. Reynolds situated in the State of North Carolina at the time of his death.

"32. That a duly authenticated copy of said will was admitted to record in the Orphans' Court of Baltimore City; and that, on 5 September, 1918, by an order duly entered in said court, letters testamentary were issued to the Safe Deposit and Trust Company of Baltimore, a corporation duly organized and existing under the laws of the State of Maryland, with its principal office and place of business in Baltimore, Maryland, the said Safe Deposit and Trust Company of Baltimore having been nominated and appointed by the said will to act as executor of the estate of R. J. Reynolds, consisting principally of securities, stocks and bonds, which were deposited with the Safe Deposit and Trust Company of Baltimore.

"33. That the estate of the said R. J. Reynolds was duly settled and the residue thereof was distributed to the Safe Deposit and Trust Company of Baltimore as trustee under the will of the said R. J. Reynolds; that said trustee duly qualified and has ever since acted as such under

the terms and provisions of said will; that, acting in said capacity, the said trustee received the trust estate and now holds separately the securities and personal property set aside and so constituting the trust of which the said Zachary Smith Reynolds was the first beneficiary, and has prepared and now has available a complete record in reference to the securities and properties so held.

"34. That, subsequent to the death of Katherine S. Johnston hereinafter referred to, a question arose as to the amount of net income distributable to each child of the testator, R. J. Reynolds, after attaining the age of twenty-one years, and before attaining the age of twenty-eight years, said question involving a construction and interpretation of the will of the said R. J. Reynolds; that, in order to have said question determined, the said Safe Deposit and Trust Company of Baltimore, trustee, instituted an appropriate action in the Superior Court of Forsyth County, North Carolina, wherein said question was submitted to and determined by the court, a judgment settling said question being signed by Hon. W. F. Harding, judge presiding at the May, 1927, Civil Term of the Superior Court of Forsyth County, and that said judgment has ever since been complied with in the administration of said trust.

"35. That thereafter a further question arose in reference to the proper construction and application to be made of paragraph six of item four of the said will of R. J. Reynolds, and that thereupon an action was instituted in the Superior Court of Forsyth County by R. J. Reynolds (Jr.) against the said Safe Deposit and Trust Company of Baltimore, trustee, and others, for the purpose of obtaining a construction and application of said paragraph of said will; that, in said action, the said Safe Deposit and Trust Company of Baltimore, trustee, filed an answer; that a judgment was entered in said action, which, upon appeal, was affirmed by the Supreme Court of North Carolina, the opinion of said Court appearing in 201 N. C., beginning at page 267, and that said judgment has ever since been complied with in the administration of said trust.

"That one of the issues raised in said case between the trustee and the plaintiff Richard J. Reynolds as set out in the plaintiff appellant's brief filed in the Supreme Court of North Carolina was the following:

" '2. Whether, if the contention of the trustee is correct, the plaintiff is not entitled to include in his annual statement income received from his share of the trust estates of his father or mother, or both, as "earnings of money, stocks or bonds owned by him." '

"That in the appellant's brief in said cause, and especially on pages 27, 28, and 29, the argument was squarely presented to the Court, that the children of R. J. Reynolds owned vested interests in his estate with a period of postponed possession until they should respectively attain the

age of 28 years, subject only to be divested by death before arriving at that age, which argument was considered by the Court and expressly rejected, as appears in its opinion heretofore referred to. That the appellant likewise contended that he owned a vested interest for life in the estate of his mother, which was likewise rejected by the Court. Therefore, the court holds as a matter of law that the children of R. J. Reynolds did not receive any vested interest in the trust estates of either their father or mother; that by the will of their father they had only the right to receive, if, as, and when payable, certain income from the said estate, and the possibility of receiving property vested both in interest and possession, if, as, and when they should respectively attain the age of 28 years; and that under the will of their mother they did not receive any vested interest, but merely the right to receive during their respective lives, if, as, and when payable, certain income from the said trust estate.

"36. That the said Katherine S. Reynolds, widow of the said R. J. Reynolds, was married to J. Edward Johnston on .... June, 1921.

"37. That, on 29 December, 1923, the said Katherine S. Johnston executed and delivered to the Safe Deposit and Trust Company of Baltimore a certain deed whereby she transferred and delivered to said company certain shares of stock in the R. J. Reynolds Tobacco Company to be held in trust for her four children named in paragraph four hereof, the said deed containing the following provisions:

" 'The Safe Deposit and Trust Company of Baltimore, as trustee hereunder, shall hold the share of each child for such child during its life, and upon its death shall distribute, transfer, and deliver the same to and among, or hold the same for such person or persons, objects or purposes, in trust or otherwise, as such child shall by its last will nominate and appoint to take the same, and in default of such appointment shall distribute, transfer, and deliver the same to the descendants of such child living at its death, *per stirpes* and not *per capita,* and in default of such appointment and in default of descendants of such child the said trustee shall at its death divide and distribute the same among such of said children and their descendants as are then living, *per stirpes* and not *per capita,* but the shares of such of her said children as are then living shall be held by said trustee in trust for them and upon the same trusts that their original shares are then held.'

"38. That the said Safe Deposit and Trust Company of Baltimore, upon the execution of the said deed of trust referred to in the preceding paragraph, duly qualified and has ever since acted as trustee under the terms and provisions of said deed; and that said trustee now holds in trust separately the shares of said stock set apart as the shares to be held in trust for the said Zachary Smith Reynolds under the terms of said

deed, and also holds the accumulations and reinvestments thereof; and has prepared and now has available a complete record in reference thereto.

"39. That the said Katherine S. Johnston died on 23 May, 1924.

"40. That at the time of her death, and for a long number of years prior thereto, the residence and domicile of said Katherine S. Johnston was and had been in Forsyth County, North Carolina.

"41. That the said Katherine S. Johnston left a last will and testament by the terms whereof, after certain specific bequests and devises, it was provided in Item VII of said will in part as follows:

" 'All the rest, residue, and remainder of my estate, and also the estate in the hands of the Safe Deposit and Trust Company of Baltimore, as trustee under the will of my deceased husband, Richard Joshua Reynolds, over which I have power of appointment, I give, devise, and bequeath to the Safe Deposit and Trust Company of Baltimore, in trust to divide the same in equal shares among such of my children and husband as survive me, my husband to take a share equal to that of a surviving child.

" 'My said trustee shall at once transfer and deliver the share herein given to my said husband, if he survives me, to be held by him in fee, absolutely free of any trust.

" 'My said trustee shall hold the share of each child for such child during its life, and upon its death shall distribute, transfer, and deliver the same to and among or hold the same for such person or persons, objects or purposes, in trust or otherwise, as such child shall by its last will nominate and appoint to take the same, and in default of such appointment shall distribute, transfer, and deliver the same to the descendants of such child living at its death, *per stirpes* and not *per capita*, and in default of such appointment and in default of descendants of such child my said trustee shall at its death divide and distribute the same among such of my husband, children, and descendants as are then living, *per stirpes* and not *per capita,* my said husband, if then living, shall take a share equal to that of a surviving child, but the shares of such of my children as are then living shall be held by said trustee for them and upon the same trusts that their original shares of my estate are then held.

" 'Provided, however, notwithstanding anything herein to the contrary, that if I shall leave surviving any child by my present husband, that such child's trust share shall be set aside entirely from my own absolute estate (no part thereof to be taken from the share of the estate of R. J. Reynolds over which I have power of appointment), but such share shall be equal in value to the share of each of my other children and my husband.

" 'Should, however, any of my children die before the trusts under the will of R. J. Reynolds have expired or become inoperative, leaving children or appointees entitled to its share of my estate, then my said trustee shall retain in its hands until that time in trust for those entitled to receive the same all shares of Class A Common stock of the R. J. Reynolds Tobacco Company as may then be in its hands as such trustee.'

"42. That the said last will and testament of Katherine S. Johnston was duly and regularly probated before the clerk of the Superior Court of Forsyth County on 29 May, 1924, and was duly recorded in the office of said clerk in Book of Wills 9, at pages 19-23; that on 29 May, 1924, letters testamentary were duly issued by the clerk to J. Edward Johnston, who was nominated and appointed by said will to act as executor of that part of the estate of said Katherine S. Johnston situated in North Carolina.

"43. That, upon the death of the said Katherine S. Johnston, and upon the probate of her will as above stated, the said Safe Deposit and Trust Company of Baltimore duly qualified and has ever since acted as trustee under the terms and provisions of said will; that a division of the estate and property devised and bequeathed in trust by said will has heretofore been made, including both the individual estate of said Katherine S. Johnston and the property disposed of by her in the exercise of the power of appointment conferred upon her by the will of her first husband, the said R. J. Reynolds, and that the said trustee now holds separately the property, consisting of bonds, stock, and securities, so set apart and now constituting the property thus held in trust of which the said Zachary Smith Reynolds was entitled to receive certain income, including separately such property of the individual estate of the said Katherine S. Johnston and such of the property so disposed of by her in the exercise of her said power of appointment; and that the said trustee has prepared and now has available a complete record in reference to the securities and property so held.

"44. That, surviving her, the said Katherine S. Johnston left her husband, J. Edward Johnston, the four children of her marriage with R. J. Reynolds named in paragraph 28 hereof, and one child of her marriage with the said J. Edward Johnston, the last mentioned child being named J. Edward Johnston, Jr.; and that no other child of the said Katherine S. Johnston survived her.

"45. That, on 16 November, 1929, Zachary Smith Reynolds was married to Anne Cannon, hereinafter referred to as Anne Cannon Reynolds I.

"46. That, on 23 August, 1930, Anne Cannon Reynolds II was born of the union referred to in the preceding paragraph.

"47. That, subsequent to the marriage referred to in paragraph forty-five hereof, the parties to said marriage separated and the said Anne Cannon Reynolds II was left with her mother.

"48. That on 4 August, 1931, this action was instituted in the Superior Court of Forsyth County, that as will appear from the record herein, all of the court papers in said action were filed on the same day, to wit: 4 August, 1931, said papers including the petition for the appointment of next friends of Anne Cannon Reynolds I and Anne Cannon Reynolds II, both of whom were minors, the order appointing next of friends of said minors, the complaint, the application for the appointment of the guardian *ad litem* of any unborn persons interested in said action, the answers therein, and the judgment of the court. That the Cabarrus Bank and Trust Company, guardian of Anne Cannon Reynolds II, has contended and has introduced evidence to show that prior to the entry of said judgment no evidence was introduced upon which to base said judgment; that the said proceedings were purely formal, and has presented argument to the court that the decree of the court was void by reason of the inadequacy of the investigation made by the court, and the inherent lack of power in the court to enter the judgment which was entered. The defendants Richard J. Reynolds, Mary R. Babcock, Nancy R. Bagley, and other persons generally designated in this decree as the Reynolds heirs, have introduced evidence to show that the said action was in accordance with the practice of the court, that evidence was introduced upon all material points, and that the court was fully informed as to all of the facts required for forming a judgment, and have presented argument to the court to show that the said judgment was within the power of the court, and cannot now be attacked upon any of the grounds alleged by the Cabarrus Bank and Trust Company.

"That the infant, Christopher Smith Reynolds, through his next friend, R. C. Vaughn, has contended that the said judgment was valid and binding. That Annie L. Cannon, guardian of Anne Cannon Reynolds II, contends that after the judgment of the Supreme Court in the Cabarrus proceeding, reported in 206 N. C., 276, she knows of no reason why the decree should be set aside, but prays the court that her ward be relieved of the specific performance thereof.

"The court does not decide any of the issues thus raised and presented by the parties, but does find as a fact and holds as a matter of law that the issues of law and facts existing between the parties as to the validity of the judgment of 4 August, 1931, are sufficiently uncertain that a settlement thereof as proposed by the defendants Richard J. Reynolds, Mary R. Babcock, and Nancy R. Bagley is proper, and that it is for the best interest of all the parties to this cause, and especially of Anne Cannon Reynolds II, Christopher Smith Reynolds, and all of the other

minor parties whose legal representatives have requested the instructions of the court; that the said issues of law and fact be settled and adjusted as provided in this decree.

"49. That prior to his death, to wit: On or about 21 August, 1931, the said Zachary Smith Reynolds executed an instrument in the form of a will complying with the laws of the State of New York as to the execution of wills by residents of that state, and also complying with the requirements of C. S., 4131, as to the formalities for the execution of a will under the laws of the State of North Carolina, stating therein that he was a resident of Port Washington, Nassau County, in the State of New York; that in said paper the said Zachary Smith Reynolds undertook to execute the powers of appointment conferred upon him by the will of his father, R. J. Reynolds, and by the will and deed of his mother, Katherine S. Johnston, in favor of his brother, R. J. Reynolds, Jr., and his two sisters, Mary Reynolds Babcock and Nancy Reynolds Bagley, to the practical exclusion of all other persons, including his then living child, Anne Cannon Reynolds II, and his then wife, Anne Cannon Reynolds I, which said will referred to and ratified the judgment in this cause under date of 4 August, 1931, and made no further provision for Anne Cannon Reynolds II and Anne Cannon Reynolds I, other than a bequest of $50,000 to each of them.

"50. That Zachary Smith Reynolds' twenty-first birthday would have occurred on 4 November, 1932; that at the time of the execution of the instrument referred to in paragraph 49 the general and testamentary guardians of the said Zachary Smith Reynolds were his uncle, W. N. Reynolds, and R. E. Lasater, who were domiciled in and residents of Forsyth County in the State of North Carolina, and they continued to act and were so domiciled until the date of the death of Zachary Smith Reynolds on 6 July, 1932; that the domicile of Zachary Smith Reynolds at the date of his death and at the date of the execution of the instrument referred to in paragraph 49 was in North Carolina; that a minor is without power to establish a domicile of choice, and that marriage does not change his status; that even if Zachary Smith Reynolds had the power to adopt a domicile of choice and to execute a will in the State of New York at the date of his death, which would affect his personal estate absolutely owned, such a will would not exercise the powers of appointment under the will of his father, R. J. Reynolds, and the will and deed of his mother, Katherine S. Johnston.

"51. That on or about 23 November, 1931, Anne Cannon Reynolds I obtained a judgment of divorce from her husband, Zachary Smith Reynolds, in the Second Judicial District Court of the State of Nevada, in and for the county of Washoe. That evidence has been introduced and argument presented to the court by parties whose interests are

adverse to that of Christopher Smith Reynolds, to the effect that the said judgment of divorce rendered by the court of Nevada is invalid, both by reason of defects inherent in the judgment itself and by further reason of the fact that Anne Cannon Reynolds I did not have a legal residence in the State of Nevada at the time of entry of said judgment, and have further presented argument that by reason of the fact that said judgment of divorce was void that the marriage between Zachary Smith Reynolds and Elizabeth Holman Reynolds, on 29 November, 1931, in Monroe, Michigan, was not valid.

"The infant, Christopher Smith Reynolds, has introduced evidence and presented argument to show that the said Anne Cannon Reynolds I was a *bona fide* resident of the State of Nevada both at the time of the entry of the said judgment of divorce and at the time said proceedings for divorce were commenced. That said divorce was obtained in good faith by the said Anne Cannon Reynolds I and the judgment accepted in good faith by both Anne Cannon Reynolds I and Zachary Smith Reynolds, and that subsequent to the entry of the said judgment both Anne Cannon Reynolds I and Zachary Smith Reynolds remarried. That said action was in accordance with the practice of the courts of Nevada; that evidence was introduced upon all material points; that the court was fully informed as to all the facts required for forming a judgment; that the court had jurisdiction of the persons of both plaintiff and defendant, and that said judgment of divorce was binding not only on the State of Nevada but under the Constitution of the United States it is also binding upon every other jurisdiction within the United States of America, and that consequently the marriage of Zachary Smith Reynolds to Elizabeth Holman Reynolds in Monroe, Michigan, on 29 November, 1931, was a valid marriage.

"The court does not decide any of the issues thus raised and presented by the parties, but does find as a fact and holds as a matter of law that the issues of law and fact existing between the parties as to the validity of the judgment of the divorce are sufficiently uncertain as to provoke long, continuous, expensive, and vexatious litigation, and that a settlement thereof, as proposed by the Reynolds heirs, is proper, and that it is for the best interest of all the parties to the cause, and especially to Anne Cannon Reynolds II and Christopher Smith Reynolds, and all of the other minor parties whose legal representatives have requested instructions of the court.

"52. That, on 29 November, 1931, the said Zachary Smith Reynolds was married to Elizabeth Holman in Monroe County, Michigan, and said parties continuously resided together thereafter until his death.

"53. That, on 6 July, 1932, the said Zachary Smith Reynolds, being still under the age of twenty-one years, died in Winston-Salem, North

Carolina; and that the other three children of R. J. Reynolds named in paragraph twenty-eight hereof are still living and are of lawful age; that R. J. Reynolds attained the age of twenty-eight years on 4 April, 1934.

"54. That the said Elizabeth Holman Reynolds survived the said Zachary Smith Reynolds, and that, subsequent to his death, to wit: On 10 January, 1933, Christopher Smith Reynolds was born of said union; that no child of said Zachary Smith Reynolds predeceased him; and that, therefore, the said Zachary Smith Reynolds left him surviving the following two children: Anne Cannon Reynolds II and Christopher Smith Reynolds.

"55. That on 24 March, 1933, the Safe Deposit and Trust Company of Baltimore, trustee under the two wills and the one deed heretofore mentioned, filed a bill of complaint in the Circuit Court of Baltimore City; that in said bill of complaint the said trustee set out in a full and complete manner all the facts in reference to the three trusts thereby established, attaching to said bill of complaint, as exhibits, exact copies of the three instruments above mentioned creating said trusts. That the said trustee further set out in said bill of complaint a copy of the entire proceedings in the Superior Court of Forsyth County referred to in paragraph forty-eight hereof, and a full and complete copy of the divorce proceedings of Anne Cannon Reynolds I in the Nevada court referred to in paragraph fifty-one hereof; that the said bill of complaint also set forth the alleged will executed by Zachary Smith Reynolds on 21 August, 1931, referred to in paragraph forty-nine hereof, and attached to said bill as an exhibit a copy of said will; and that the said trustee thereafter, in said bill of complaint, expressly requested the court to assume jurisdiction of the three trusts herein mentioned, and to determine and decide what disposition should be made of the trust estates in controversy in this action, and in doing so, expressly raised the following questions of law and fact for determination:

"(a) The effect of the Forsyth judgment mentioned in paragraph forty-eight hereof upon the rights of the infant, Anne Cannon Reynolds II.

"(b) The validity of the divorce of Anne Cannon Reynolds from Zachary Smith Reynolds mentioned in paragraph fifty-one hereof.

"(c) The validity of the marriage of Elizabeth Holman Reynolds with Zachary Smith Reynolds, mentioned in paragraph fifty-two hereof.

"(d) The validity and effect of the alleged will executed in New York by Zachary Smith Reynolds referred to in paragraph forty-nine hereof.

"56. That the bill of complaint referred to in the preceding paragraph further set forth that serious questions had arisen relating to the disposition of the said trust estates hereinabove mentioned; that doubts had been suggested with respect to the interpretation of the wills and the

deed hereinbefore referred to, and as to the effect of the several proceedings and other matters hereinbefore mentioned and recited, and as to what disposition should be made of said trust estates, and to what extent the same should be held in further trust, or how and among what parties the same should be divided and distributed. That the said bill of complaint also alleged that the doubts so suggested included, among other matters, the validity of the original judgment entered herein on 4 August, 1931, in so far as it attempted to effect the rights of Anne Cannon Reynolds II, the validity of the divorce of the said Anne Cannon Reynolds I from Zachary Smith Reynolds, involving, among other questions, the *bona fides* of her residence in the State of Nevada at the time when said divorce was applied for and obtained; the validity of the marriage of the said Elizabeth Holman Reynolds with the said Zachary Smith Reynolds, involving the validity of said divorce from the first wife of said Zachary Smith Reynolds; the validity and effect of said instrument purporting to be executed as a will by the said Zachary Smith Reynolds, as a testamentary appointment by him in pursuance of the powers of appointment conferred upon him by the two wills and the one deed hereinbefore mentioned, such questions involving both the *bona fides* of any intended residence of his in the State of New York, and the further question as to whether, while still a minor, he could change his residence from the State of North Carolina to the State of New York, with or without the consent or the joinder of his legally appointed guardians in said former state, and the question whether Christopher Smith Reynolds was entitled to any interest in any of the said trust estates under the terms of said instrument.

"57. That on 5 November, 1931, by an order of the clerk of the Superior Court of Cabarrus County, Annie L. Cannon and Cabarrus Bank and Trust Company were duly appointed to act as guardians of Anne Cannon Reynolds II, and thereupon duly qualified, and have ever since acted in said capacity, the said Annie L. Cannon being the grandmother of the said Anne Cannon Reynolds II, and the Cabarrus Bank and Trust Company being a corporation duly organized and existing under the laws of the State of North Carolina, with its principal office and place of business in Concord, Cabarrus County, North Carolina.

"58. That subsequent to the decision of the Supreme Court in *The Matter of the Guardianship of Anne Cannon Reynolds II,* 206 N. C., 276, the Cabarrus Bank and Trust Company, guardian of Anne Cannon Reynolds II, conducted negotiations with other parties interested in said trusts in an effort to determine and settle the rights of all beneficiaries in the three trust estates hereinbefore mentioned, including all prospective or contingent beneficiaries therein; that said negotiations were carried on for the purpose of finally settling and determining all the diffi-

cult and troublesome questions, both of law and fact, involved in a legal and proper administration of said trusts; the purpose of the parties being to bring about a final determination and settlement of the controversies between Anne Cannon Reynolds II, Christopher Smith Reynolds, and the Reynolds heirs, hereinbefore referred to, and more particularly, the controversies as to (a) the validity of the original judgment entered herein; (b) the validity of the divorce of Anne Cannon Reynolds I from Zachary Smith Reynolds and his subsequent marriage to Libby Holman; and (c) the validity and effect of the will attempted to be made by the said Zachary Smith Reynolds in the State of New York; and after long, tedious, and painstaking consideration by the several attorneys representing the parties above mentioned, the proposal of R. J. Reynolds, Mary Reynolds Babcock, and Nancy Reynolds Bagley was filed herein, suggesting a determination and settlement of all questions, both of fact and of law, relating to the rights of all present, prospective, or contingent beneficiaries in the three trust estates hereinbefore mentioned, in order that all matters in controversy between said parties hereinbefore referred to might be determined and forever settled, so that said trust estates may be henceforth freed from doubt and uncertainty, and administered to the best interests of all parties concerned, and substantially in accordance with the real objects and purposes of the creators of said trust estates, considering the changed situation and condition of said parties in relation to each other, and the contingencies and uncertainties as to which of said beneficiaries would be entitled to receive said trust estates, and in what proportions.

"59. That unless the determination and settlement herein provided for is made, the parties to this action and the intended beneficiaries of the trusts established by R. J. Reynolds and Katherine S. Johnston will be plunged into extensive litigation, both in North Carolina and Maryland, and possibly elsewhere, which would doubtless extend over a number of years, and be attended with an enormous amount of expense, uncertainty, and risk; that, as a matter of fact, each of the beneficiaries hereafter named would run the risk of jeopardizing all interest in said trust estates. For instance, if the Reno divorce of Anne Cannon Reynolds I from Zachary Smith Reynolds should be held invalid, all rights of Christopher Smith Reynolds in said trust estates would be jeopardized; on the other hand, if the original judgment herein should be held valid, all rights of Anne Cannon Reynolds II in said trust estates other than those set forth in said original judgment, would be jeopardized; if the said judgment should be held invalid, the rights of the Reynolds heirs in said trust estates would likewise be jeopardized. That a failure of the suggested determination and settlement would thus relegate the parties to venturesome and probably disastrous litigation, thereby de-

feating the primary objects of the trusts above mentioned, and practically preventing an effectuation of the intentions of the creators of said trusts; whereas, the suggested determination and settlement would really accomplish the primary objects of said trusts, and would effectually carry out the intentions of the creators thereof.

"60. There further coming on to be heard in this cause the intervening complaint of the State of North Carolina, setting forth its claim for inheritance and estate taxes; and the court, upon presentation of said complaint, having read and considered the will of R. J. Reynolds and the will and deed of Katherine S. Johnston for the purpose of determining the nature, character, and extent of whatever interest, or interests, said wills and deed conferred upon Zachary Smith Reynolds, in the trusts thereby established, hereby finds and concludes as follows:

"(a) The will of R. J. Reynolds did not bequeath or devise to Zachary Smith Reynolds any vested interest or share in the trust estate (or any part thereof) created and established by said will. A proper construction and interpretation of said will shows that no part of the trust estate established thereby, and none of the accumulated income thereof, would have vested in the said Zachary Smith Reynolds unless and until he arrived at the age of twenty-eight years. Until the said Zachary Smith Reynolds arrived at said age of twenty-eight years, the only interest which he had in the trust estate established by said will (or any part thereof) was to receive such payment from the income thereof, if, as, and when payable to him, under the terms of said will. Consequently, upon the death of the said Zachary Smith Reynolds, prior to reaching the age of twenty-one years, no part of said trust estate (either *corpus* or income) was transferred from him to anyone.

"(b) The will of Katherine S. Johnston did not bequeath or devise to Zachary Smith Reynolds any vested interest or share in the trust estate (or any part thereof) created and established by said will. The only interest which the said Zachary Smith Reynolds had in said trust established by said will (or any part thereof) was to receive such payments from the income thereof, if, as, and when payable under the terms of said will.

"(c) The trust deed of Katherine S. Johnston to the Safe Deposit and Trust Company of Baltimore, dated 29 December, 1923, did not confer upon Zachary Smith Reynolds any vested interest or share in the trust (or any part thereof) created and established by said deed. The only interest which the said Zachary Smith Reynolds had in said trust established by said deed (or any part thereof) was to receive such payments from the income thereof, if, as, and when payable under the terms of said deed.

"(d) Upon the death of Zachary Smith Reynolds intestate, without exercising the powers of appointment conferred upon him by the will of R. J. Reynolds and by the will and deed of Katherine S. Johnston, the right of the State of North Carolina, under the 5th provision of section 7880 (1) of the Consolidated Statutes of North Carolina, to collect inheritance and estate taxes out of certain of the parties to this action presents difficult questions, which would doubtless result in long, expensive, and uncertain liitgation.

"(e) Negotiations have been conducted between the State of North Carolina and the attorneys for Richard J. Reynolds, Mary Reynolds Babcock, and Nancy Reynolds Bagley, in reference to a settlement by way of a lump sum compromise to satisfy and fully settle whatever right or claim the State of North Carolina may have, if any, on account of such taxes. As a result of said negotiations, a proposal has been made that a full settlement shall be made by way of a lump sum in compromise of any and all such right or claims, if any, which the State of North Carolina might or may have by reason of the facts set forth in the intervening complaint of the State of North Carolina in this action, by the payment to the State of North Carolina of the sum of two million dollars. The said Richard J. Reynolds, Mary Reynolds Babcock, and Nancy Reynolds Bagley, have expressed a willingness to pay said sum in full settlement of said claims, in so far as their interests may be affected, provided such settlement be approved by the court, in so far as the minors may be affected, such payment, however, to be made solely out of the trust estates created by the will of R. J. Reynolds and the will and deed of Katherine S. Johnston, of which Zachary Smith Reynolds was the first beneficiary, in proportion to their respective values at the date of this decree, nothing in this compromise offer or its acceptance and approval to impose any personal liability upon any of the parties to this action. The guardians of Anne Cannon Reynolds II and Christopher Smith Reynolds have requested the instructions and advice of the court in reference to participating in said settlement, in so far as the burden thereof may fall upon said minors.

"(f) Upon a thorough and complete consideration of all the facts and circumstances relating to the claim of the State of North Carolina for said taxes, the court finds as a fact that the settlement of the taxes herein referred to is for the best interest of all parties concerned, including the infants Anne Cannon Reynolds II and Christopher Smith Reynolds, and said settlement is hereby fully approved by the court, and the guardians of said infants are hereby advised, instructed, authorized, and empowered to participate in said settlement on behalf of said infants, and it is hereby ordered and decreed that the Safe Deposit and Trust Company of Baltimore, trustee, out of said trust funds, pay to the State of North

Carolina the sum of two million dollars in full settlement of any and all claims or demands which the State now has, or may hereafter have, by reason of the things and matters set forth in the intervening complaint herein, such payment to be made solely out of the trust estates created by the will of R. J. Reynolds and the will and deed of trust of Katherine S. Johnston, of which Zachary Smith Reynolds was the first beneficiary, in proportion to their respective values as of the date of this decree, and *nothing herein to impose any personal liability upon any of the parties* to this action. That the said sum of $2,000,000 is to be paid to the State of North Carolina when and if this decree becomes effective, and shall be in full settlement of any and every claim of the State of North Carolina for inheritance taxes, penalties, and interest.

"Wherefore, upon the findings of fact and conclusions of law hereinbefore and hereinafter set forth, it is hereby considered, ordered, and adjudged as follows:

"I. That the original judgment entered herein on 4 August, 1931, be and it hereby is modified as follows:

"(a) That the establishment of the trust fund of five hundred thousand dollars for the benefit of Anne Cannon Reynolds I, as therein provided for, is hereby approved, with the qualification that said trust fund shall henceforth be held by the Safe Deposit and Trust Company of Baltimore, trustee, only upon the following terms and provisions, to wit:

"That the said Anne Cannon Reynolds I shall be entitled to receive out of the net income arising therefrom, and there shall be paid to her therefrom monthly, the sum of six hundred ($600) dollars until she arrives at the age of twenty-five years, when the total accumulated income shall be paid to her, and thereafter all income shall be paid her monthly so long as she lives; that upon the death of the said Anne Cannon Reynolds I, the *corpus* of said trust fund, together with any and all undistributed income, shall be paid to Anne Cannon Reynolds II, if living; if Anne Cannon Reynolds II is not living at the death of Anne Cannon Reynolds I, then to be distributed to the next of kin of said Anne Cannon Reynolds II upon her mother's side to the exclusion of her next of kin on her father's side; provided further, that the *corpus* of said trust fund shall be held by the Safe Deposit and Trust Company of Baltimore, trustee, until the death of Anne Cannon Reynolds I, or 4 November, 1939, whichever shall occur last.

"(b) That the trust fund therein established for the benefit of said Anne Cannon Reynolds II, together with all accumulated or undistributed income thereon, shall be returned by the trustee to the trust estate of R. J. Reynolds, from which it was created by the decree of the Superior Court of Forsyth County, dated 4 August, 1931, and the rights of the parties in reference thereto shall be placed *in statu quo,* just as if

no action whatever in reference to said fund had ever been taken under said judgment.

"II. That the Safe Deposit and Trust Company of Baltimore, trustee, shall hereafter hold the trust estate established by the will of R. J. Reynolds of which Zachary Smith Reynolds was the first beneficiary, and shall likewise hold the trust estate established by the will of Katherine S. Johnston of which Zachary Smith Reynolds was the first beneficiary, and shall likewise hold the trust estate established by the deed of Katherine S. Johnston, dated 29 December, 1923, of which Zachary Smith Reynolds was the first beneficiary, upon the following trusts, to wit:

"(a) First, to pay whatever State or Federal estate or inheritance taxes, if any, may be legally due and payable by reason and to the extent of any interest, if such there were, of the said Zachary Smith Reynolds in each of the said three trust estates herein mentioned, and to pay any compromise of any claim for any State or Federal estate or inheritance taxes, if any, against the said trust estates which may be directed or approved by this court or any other court of competent jurisdiction.

"(b) Second, to pay out of any one or more of the said trust estates to Richard J. Reynolds, Mary Reynolds Babcock, and Nancy Reynolds Bagley the sum of $250,000 each, with interest at 3½ per cent from 15 July, 1934, said sums to be reduced, however, by their proportionate part of whatever State or Federal estate or inheritance taxes may be paid, as heretofore provided in this judgment. It is the intention of these parties, as soon as said sums are available to them under the proper decrees of the courts to which this proposal is submitted, to give the sums provided in this paragraph to Mrs. Elizabeth Holman Reynolds, mother of Christopher Smith Reynolds, and they shall be reimbursed out of said trust estates before the distribution of the trust estates provided for in Sections C and D of this paragraph to the extent of any gift or transfer taxes which may be imposed upon them, or any of them, by reason of said gifts to Elizabeth Holman Reynolds.

"(c) Third, that the entire net trust estates established by the will and deed of Katherine S. Johnston, of which Zachary Smith Reynolds was the first beneficiary, now in the hands of the Safe Deposit and Trust Company of Baltimore, trustee, as trustee under said trust instruments, after making the payments provided for in Paragraph II (a) and (b) of this judgment, shall be immediately divided and paid by the trustee, free from all trusts, as follows:

"1. 25% to the legal guardian of Christopher Smith Reynolds.

"2. 37½% to Richard J. Reynolds, Mary Reynolds Babcock, and Nancy Reynolds Bagley.

"3. $37\frac{1}{2}\%$ to the Cabarrus Bank and Trust Company and Annie L. Cannon, guardians of Anne Cannon Reynolds II.

"That the principal and accumulated income in the trust estate established by the deed of Katherine S. Johnston, of which Zachary Smith Reynolds was the first beneficiary, now in the hands of Safe Deposit and Trust Company of Baltimore, Maryland, as trustee under said instrument, shall be held by the trustee under the terms of said instrument, and the income therefrom accumulated for the benefit of the persons named in the next preceding paragraphs, numbers 1, 2, and 3, respectively, until 4 November, 1939, at which time the said trust estate shall be divided and paid by the trustee to the aforesaid persons in the proportions specified in said paragraphs.

"The court has considered paragraphs (1) and (2) of Item Fourth of the will of R. J. Reynolds, together with the will of Katherine S. Johnston, exercising the power of appointment therein conferred upon her, and holds that the income from that part of the common capital stock in the R. J. Reynolds Tobacco Company appointed by Katherine S. Johnston in trust for Zachary Smith Reynolds as the first beneficiary is now held by the Safe Deposit and Trust Company of Baltimore, trustee under the will of R. J. Reynolds, upon the trusts created by the will of R. J. Reynolds, of which Zachary Smith Reynolds was the first beneficiary, and shall be held and distributed by the Safe Deposit and Trust Company as trustee under the will of R. J. Reynolds, as provided in Paragraph II (d) of this judgment.

"The court further holds, upon a consideration of the said wills, that the shares of the common capital stock of the R. J. Reynolds Tobacco Company appointed by Katherine S. Johnston in trust for Zachary Smith Reynolds as the first beneficiary, shall be held by the Safe Deposit and Trust Company, as aforesaid, for the benefit of the persons, and in the proportions in subparagraphs 1, 2, and 3 of this paragraph, who are entitled to the distribution of the estate of Katherine S. Johnston, paying the income to said persons in said proportions until 4 November, 1939, when the shares of the common capital stock of the R. J. Reynolds Tobacco Company shall be delivered to them in said proportions, free from all trusts.

"In the event that Anne Cannon Reynolds II or Christopher Smith Reynolds should die prior to 4 November, 1939, the distribution of the share of the child so dying in the trust established by the deed of Katherine S. Johnston, and in the shares of the common capital stock of the R. J. Reynolds Tobacco Company appointed by the will of Katherine S. Johnston in trust for Zachary Smith Reynolds as the first beneficiary, shall be made on 4 November, 1939, to its next of kin on its mother's side to the exclusion of its next of kin on its father's side.

"(d) Fourth, that the entire net trust estate established by the will of R. J. Reynolds, of which Zachary Smith Reynolds was the first beneficiary, now in the hands of the Safe Deposit and Trust Company of Baltimore, as trustee under said instrument, after making the payments provided for in Paragraph II (a) and (b) of this judgment, shall be immediately divided by said trustee and held for the benefit of the following parties and upon the following terms:

"1. 25% for Christopher Smith Reynolds.

"2. 37½% for Anne Cannon Reynolds II.

"In calculating the proportions to be allotted as herein provided, the trust fund of $500,000 in which Anne Cannon Reynolds I is interested as provided in the original decree in this cause, which is to be modified as set out in Section I (a) of this judgment, shall, for the sole purpose of making such calculation, be valued as of 6 July, 1932, and added to the trust estate created by the will of R. J. Reynolds from which it was taken, without any deduction by reason of the interest therein of Anne Cannon Reynolds I, and in determining the 37½% allotted to Anne Cannon Reynolds II as herein adjudged the said trust fund of $500,000 shall be allotted to and treated as a credit upon the 37½% allotted to Anne Cannon Reynolds II at its full value on 6 July, 1932, without any deduction by reason of the interest therein of Anne Cannon Reynolds I.

"3. 37½% to the Safe Deposit and Trust Company of Baltimore, trustee, to be held by it in trust for the benefit of Richard J. Reynolds, Mary Reynolds Babcock, and Nancy Reynolds Bagley as hereinafter provided in this paragraph.

"That between the date of the entry of this decree and 4 November, 1939, the Safe Deposit and Trust Company of Baltimore, trustee, shall pay to the legally constituted guardians of Christopher Smith Reynolds and Anne Cannon Reynolds II all of the income from the shares herein allotted to said infants in quarterly payments, and on 4 November, 1939, shall pay over and deliver to the legally constituted guardians of said Christopher Smith Reynolds and Anne Cannon Reynolds II the entire trust estates allotted to said infants by this paragraph of this judgment, free from all trust, and if either of said infants should die prior to 4 November, 1939, the income from the share allotted to said infant shall be paid to the next of kin of the said infant upon its mother's side, to the exclusion of the next of kin on its father's side, as herein provided, until 4 November, 1939, and on 4 November, 1939, the entire trust estate allotted to said infant by the terms of this paragraph shall be paid and delivered by the Safe Deposit and Trust Company of Baltimore, trustee, to the next of kin of the said infant upon its mother's side, to the exclusion of the next of kin on its father's side.

"That the 37½% allotted to Safe Deposit and Trust Company of Baltimore, trustee for Richard J. Reynolds, Mary Reynolds Babcock, and Nancy Reynolds Bagley, by this paragraph of this judgment shall be held by the Safe Deposit and Trust Company of Baltimore, trustee, under the will of R. J. Reynolds, as provided by the will of R. J. Reynolds, as if Zachary Smith Reynolds had died intestate and without leaving issue surviving him. The court hereby construes and interprets Item Fourth, paragraph (7), of the will of R. J. Reynolds, which is as follows, 'and should any of my said children die without having made a testamentary disposition of his or her share of my said estate and without issue living at the termination of said trust, then his or her share shall be held on like trusts for my surviving children and the then living issue of my deceased child *per stirpes*,' and holds that upon the death of Zachary Smith Reynolds intestate and without leaving issue surviving him the 37½% allotted by the terms of this paragraph of this judgment for the benefit of Richard J. Reynolds, Mary Reynolds Babcock, and Nancy Reynolds Bagley shall be divided by the Safe Deposit and Trust Company of Baltimore, trustee, into three equal parts, which three equal parts shall be respectively added to and become a part of the trusts created by Item Fourth, paragraphs (4), (5), (6), and (7) of which the said Richard J. Reynolds, Mary Reynolds Babcock, and Nancy Reynolds Bagley are the first beneficiaries; that Richard J. Reynolds arrived at the age of 28 years on 4 April, 1934, and is now entitled to receive one-third of the 37½% allotted to him as herein provided, free from all trust, and the Safe Deposit and Trust Company of Baltimore, trustee, is hereby directed to make the payment to him of one-third of said 37½% free from all trust, that Safe Deposit and Trust Company of Baltimore, trustee, shall hold ⅓ each of 37¼%, respectively, of each of the trusts created by Item Fourth, paragraphs (4), (5), (6), and (7), of the will of R. J. Reynolds, of which Mary Reynolds Babcock and Nancy Reynolds Bagley are, respectively, the first beneficiaries; that they will not be entitled to receive any income from said share prior to their respective 28th birthdays in excess of the sum of $50,000 provided for in Item Fourth, paragraph (5), of the will of R. J. Reynolds, but that they have the right, by trust indenture, to transfer their interest in the one-third of the 37½% allotted to each of them by this judgment to the trustees of the charitable trust referred to in paragraph 10 of their offer of settlement and petition in this cause, and in the event that they, or either of them, should die before reaching the age of 28, to direct the payment of said share to the trustees of said charitable trust by will, as provided in the first clause of Item Fourth, paragraph (7), of the will of R. J. Reynolds.

"That the shares of the trust estate of R. J. Reynolds, referred to in this paragraph as allotted herein, shall vest as of the date of this decree in the said Christopher Smith Reynolds, Anne Cannon Reynolds II, and Safe Deposit and Trust Company of Baltimore, trustee, for the benefit of Richard J. Reynolds, Mary Reynolds Babcock, and Nancy Reynolds Bagley, free from any claim or right of any of the other parties in and to the said trust funds, and free from any contingency by which any of the parties hereto might be prevented from claiming the share allotted to them upon the date fixed for distribution, free from all trust, by the terms of this judgment.

"(e) In order that the intention of the parties hereto may be attained, and the provisions of this judgment may be effectuated, the said parties, to wit: Christopher Smith Reynolds, the Reynolds heirs, and Anne Cannon Reynolds II, shall hold that portion of the said three trust estates herein allotted to him, her, or them absolutely free and clear from any and all claims of every nature, character, or description, which now or hereafter may be made against said portion by any other one of said parties; and that each of said parties, in consideration of the mutual transfers and releases herein decreed, shall be deemed to have transferred, conveyed, and released each to the other all right, title, and interest, present or future, which each of said parties may have in said three trust estates, other than the portion herein specifically allotted to each, and it is further decreed that this judgment shall act as a transfer, conveyance, and release of said respective interests as aforesaid; and it is herein further decreed that no party to this action shall now or henceforth have any right, title, or interest, or claim whatsoever, in any of said trust estates other than as herein specifically set forth; and it is herein further ordered and decreed that the proportionate part of each one of the parties above mentioned as hereinbefore set out shall absolutely and unconditionally vest in such party.

"(f) The personal estate of Zachary Smith Reynolds now held by Moses Shapiro as collector of said estate pursuant to the orders of Superior Court of Forsyth County after the payment of the debts of said estate and all taxes and other lawful charges therefrom, shall be divided equally between Elizabeth Holman Reynolds, Anne Cannon Reynolds II, and Christopher Smith Reynolds.

"III. That the determination and settlement of the rights of all parties, particularly including Anne Cannon Reynolds II and Christopher Smith Reynolds, as herein decreed is just, fair, and equitable; that it is for the best interests of all parties, and of all the present, prospective, or contingent beneficiaries of the three trusts hereinbefore mentioned; that such determination and settlement will substantially comply with the terms and conditions of the instruments creating said trusts,

considering the changed situation and condition of said parties in relation to each other, and the contingencies and uncertainties as to which of said beneficiaries would be entitled to receive said trust estates, and in what proportion; that it will, to a large extent, prevent a dissipation and waste of a large part of the said trusts, and that it will accomplish the objects and effectuate the intention of the creators of said trusts.

"IV. In the event that Christopher Smith Reynolds or Anne Cannon Reynolds II should die before attaining his or her majority, then and in that event any and all property allotted to said minor, or any interest thereon which he or she takes under this judgment, shall vest in his or her next of kin on his or her mother's side, to the exclusion of the next of kin on his or her father's side.

"V. This judgment is based upon and entered in conformity with the offer of settlement filed in this cause by Richard J. Reynolds, Mary Reynolds Babcock, and Nancy Reynolds Bagley, and is entire and indivisible.

"VI. This cause is retained for further orders, for the purpose of permitting the guardians or other representatives of minor parties to this cause and the attorneys for any parties to this cause to file petitions for allowance of compensation, which said allowances shall be fixed by the judge of this court.

"VII. That the proposal hereby approved and this judgment be presented in the suit now pending in the Circuit Court of Baltimore City, Maryland, hereinbefore mentioned.

"CLAYTON MOORE, Special Judge, presiding at the Special 11 March Term, 1935, of the Superior Court of Forsyth County."

Anne Cannon Reynolds (Smith), Annie L. Cannon, one of the guardians of Anne Cannon Reynolds II, and Safe Deposit and Trust Company of Baltimore, trustee, etc., duly made exceptions and assignments of error and appealed to the Supreme Court. The material assignments of error, without particular reference to same, and necessary facts will be considered in the opinion.

Hartsell & Hartsell for Anne Cannon Reynolds Smith.

Brooks, McLendon & Holderness for Annie L. Cannon, one of the guardians of Anne Cannon Reynolds II.

Cansler & Cansler, William H. Beckerdite, Mabel C. Moysey, John M. Robinson for Cabarrus Bank and Trust Company, one of the guardians of Anne Cannon Reynolds II.

Polikoff & McLennan and William Graves for R. C. Vaughn, next friend of Christopher Smith Reynolds, infant.

Charles McH. Howard for Safe Deposit and Trust Company of Baltimore, trustee.

Manly, Hendren & Womble, J. C. McDuffie of Atlanta, Ga., and Ratcliff, Hudson & Ferrell for R. J. Reynolds, Mary Reynolds Babcock, and Nancy Reynolds Bagley.

Attorney-General Seawell and Assistant Attorneys-General Aiken and Bruton for the State of North Carolina.

CLARKSON, J. This controversy has heretofore been before this Court: *In re matter of the Guardianship of Anne Cannon Reynolds II,* 206 N. C., 276.

We think it unnecessary to discuss the question as to Anne Cannon Reynolds' (now Smith) right to be heard on this record, except as an *amicus curæ.* She is now of age and the mother and natural guardian of Anne Cannon Reynolds II. In this Court, through her counsel, Anne Cannon Reynolds (Smith) says that she approves the position taken by the Safe Deposit and Trust Company of Baltimore, trustee, and Annie L. Cannon, one of the guardians of Anne Cannon Reynolds II, but later in her briefs says: "The individual rights of this appellant acquired under and by virtue of the judgment of 4 August, 1931, have not been materially changed by the judgment of the court below, and, therefore, she asks nothing in her individual right. However, as natural guardian of her child, Anne Cannon Reynolds II, she desires that this Court be fully informed as to her position taken. This appellant has always expressed a desire that the matters in controversy in this cause be settled, as will appear from the judgment of 4 August, 1931, and her affidavit in the Cabarrus proceedings: 'Owing to the many family questions which were under consideration in reaching the family agreement approved by the court, and in view of the litigation now pending in Maryland involving many other family questions affecting not only the fortunes but the good name of affiant, her child, and the infant's family on both sides.' She believes that the only rights to be considered in this cause are those of her child and Christopher Smith Reynolds, and that they alone are entitled to the trust funds in controversy, and she is further of the opinion that these differences can now be settled without the interference of those who are asserting claims based on bare or very remote probabilities." That she took no part until order was issued to her, on 16 November, 1934, by the court. That the question of the validity of her divorce was not raised by her, but questioned (1) by the Reynolds heirs (Richard J. Reynolds, Mary Reynolds Babcock, and Nancy Reynolds Bagley), (2) Cabarrus Bank and Trust Company, coguardian, in its response to the interplea of Christopher Smith Reynolds (by his next friend, R. C. Vaughn), (3) Safe Deposit and Trust Com-

pany of Baltimore, trustee, when it answered the offer of settlement of the Reynolds heirs. Further: "This appellant does not desire to have the validity of her divorce questioned in the courts of this State, and respectfully requests this honorable court not to direct that the same be done. The Reynolds heirs, Christopher Smith Reynolds, and Cabarrus Bank and Trust Company, coguardian of Anne Cannon Reynolds II, have each claimed the entire trust estates to which Zachary Smith Reynolds was entitled, *but this appellant places her child in the custody of this court and requests only that to which she is entitled.* In order that the matters and things in controversy in this action might be finally determined, this appellant respectfully requests this court to fully protect the rights of her infant child, Anne Cannon Reynolds II, *and to declare in its opinion just what property interests the respective parties are entitled to, and direct that judgment be entered accordingly,* giving to each what the law and equity directs, no more and no less."

It would appear from the above that in the final analysis the mother and natural guardian put her child in the "lap of the Chancellor."

It is well settled that ordinarily the admission of attorneys bind their clients. "Admission of attorneys bind their clients in all matters relating to the progress and trial of the cause, and are in general conclusive." 1 Greenleaf on Evidence, 186; *Lumber Co. v. Lumber Co.,* 137 N. C., 431 (438); *Bank v. Penland,* 206 N. C., 323 (324).

On 16 November, 1929, Zachary Smith Reynolds was married to Anne Cannon. Both were minors, but of legal age to marry. On 23 August, 1930, Anne Cannon Reynolds II was born of the union. In a short period of time after the marriage the parties to said marriage separated. Anne Cannon Reynolds II, the infant, was left with her mother. On 4 August, 1931, an action was instituted in the Superior Court of Forsyth County by Anne Cannon Reynolds (now Smith). This action seems to have been started under C. S., 1667, which gave the wife a legal right to make her husband provide for her and her child necessary subsistence, according to his means and condition in life; but it became elastic and reached out and deprived the infant, Anne Cannon Reynolds II, of her rights in the estate of her grandparents. The trusts set up under the agreement for Anne Cannon Reynolds II, the infant, was $500,000. Her portion is now estimated, under the facts of this record, to be worth some $12,000,000 or more. It provided for Anne Cannon Reynolds (now Smith) $500,000, which she in her brief says is not materially changed by the present decree, and she asks nothing in her individual right. The decree uses this language: "That the minor plaintiffs, Anne Cannon Reynolds and Anne Cannon Reynolds II, upon the execution and delivery of said contract and trust agreement and the setting up of the trust estates therein provided, be and they are hereby declared for-

ever estopped and barred from making other or further claims for financial support, aid, or maintenance from the said Zachary Smith Reynolds, or any estate owned or left by him, whether the same be held in trust or otherwise, and from making further claim to the whole or any part of the trust estates created by the will of R. J. Reynolds or Katherine S. Johnston, distribution of said trust estates at the time fixed for distribution as provided in said wills, to be made to the persons entitled thereto *as if Zachary Smith Reynolds and Anne Cannon Reynolds had never been married and Anne Cannon Reynolds II had never been born.*" The Safe Deposit and Trust Company of Baltimore, trustee, sets up these trust estates under the decree.

On 23 November, 1931, Anne Cannon Reynolds obtained a divorce from her husband, Zachary Smith Reynolds, in the Second Judicial District Court of the State of Nevada, and in and for the county of Washoe. On 29 November, 1931, Zachary Smith Reynolds was married to Elizabeth Holman, in Monroe, Michigan, and they resided together until his death on 6 July, 1932—under the age of 21 years. On 10 January, 1933, Christopher Smith Reynolds was born of said union. Thus, at his death, Zachary Smith Reynolds left two children—Anne Cannon Reynolds II and Christopher Smith Reynolds, in *ventre sa mere.* Under the laws of both the State of New York and the State of North Carolina, a will executed by a parent prior to the birth of a child is inoperative as to said child. The purported will in controversy was executed prior to the marriage of Zachary Smith Reynolds and Elizabeth Holman and prior to the birth of Christopher Smith Reynolds.

Before the Cabarrus County clerk, on 8 September, 1931, on petition of the father of Anne Cannon Reynolds, the Cabarrus Bank and Trust Company and Annie L. Cannon, on 5 November, 1931, were appointed guardians of the estate of Anne Cannon Reynolds II, alleging that she was entitled to the income from $500,000, the amount set up in the before mentioned decree.

On 24 March, 1933, the Safe Deposit and Trust Company of Baltimore, trustee, under the wills and deeds of the grandparents of Anne Cannon Reynolds II, filed a bill of complaint in the Circuit Court of Baltimore City, setting out in full the complete story of the tangled web, and raised certain questions of law and fact for determination. Conferences were held, letters exchanged between the attorneys for the guardians of Anne Cannon Reynolds II, in reference to a joint attack on the decree of 4 August, 1931, but of no avail. On 1 April, 1933, the Cabarrus Bank and Trust Company, one of the guardians of Anne Cannon Reynolds II, finally filed in the Superior Court of Cabarrus County a petition setting forth the facts and praying for advice and instructions of the court in reference to filing a motion in the original cause in

Forsyth County, "for the purpose of attacking the validity of said judgment, in so far as it purported to affect the interests of its ward in said trust shares."

The said Annie L. Cannon, coguardian of Anne Cannon Reynolds II, filed an answer in which she asserted the validity of the original judgment, and purported to set forth the facts which she contended showed such validity. In her answer, the said Annie L. Cannon, coguardian aforesaid, set out in full her reasons for not attacking the validity of the judgment originally entered therein, and urged the acceptance of a new and "tentative proposition" of Richard J. Reynolds, Mary Reynolds Babcock, and Nancy Reynolds Bagley, hereafter called the Reynolds heirs. The "tentative proposition" increased the $500,000 given in the Forsyth County judgment and decree $1,500,000—making a total of $2,000,000. This "tentative agreement" was approved by the court. On appeal to this Court, in the main opinion *In re Reynolds, supra,* it is said (at p. 293): "The petition of the Cabarrus Bank and Trust Company, guardian of Anne Cannon Reynolds II, should have been granted." That (pp. 278-9): "After reading and considering said petition and response thereto, and the affidavits appearing in the record, and the various exhibits appearing in the record, and after hearing argument of counsel, the Court, upon the undisputed facts, finds that the petitioner has shown reasonable, adequate, sufficient, and probable cause for filing a motion in the Superior Court of Forsyth County, in the action above entitled, praying that the decree in said action be set aside upon the following grounds," (p. 280) "it is the duty of the guardians to file the proper and appropriate motion in the said action in Forsyth County for the purpose of having the decree entered therein set aside in so far as it affects the rights of the said Anne Cannon Reynolds II, the merits of said motion to be finally passed upon and determined upon the hearing thereof in the Superior Court of Forsyth County. The Court further holds that the guardians should immediately take the necessary steps to protect the interests of their ward in the Maryland action referred to in the petition. The Court further holds that the alleged new proposal, purporting to be submitted for or on behalf of the relatives of Zachary Smith Reynolds, involving the establishment of a foundation to the memory of Zachary Smith Reynolds is not before the Court. That the persons for or on behalf of whom said proposal is submitted are not parties properly before this Court upon the hearing of the petition in this matter; that, consequently, in any event, this Court could not properly consider such alleged proposal upon the hearing of the petition herein; that, if any new proposal is to be made, it should be addressed to the Superior Court of Forsyth County, in the action to which all persons in interest are parties." *Adams, J.,* concurs in the result. *Stacy, C. J.,* concur-

ring, said (pp. 294-5): "The ruling was evidently based upon the assumption that the Forsyth decree is valid, otherwise the amount probably surrendered is disproportionate to the amount tentatively offered. But the validity of the Forsyth decree was not before the Court for determination. The question was whether sufficient showing had been made to warrant the instruction that the validity of this decree should be challenged. Apparently the showing was such as to justify the court in informing itself upon the validity of this decree before finally foreclosing the rights of the infant ward in the respect suggested. Nevertheless, it is said the practical certainty of a million and a half under the circumstances disclosed by the record is better for the infant than the uncertainty of the quest for twelve millions. The matter was not presently before the court with sufficient knowledge and in such shape as to call for the exercise of its discretion on the acceptance or rejection of this tentative proposition. The two guardians are the only parties to this proceeding, and they alone in their representative capacity would be bound by the judgment. No ward can complain if his guardian in good faith and in the exercise of his best judgment pursues the mandate of the law and loses a tentative offer of settlement such as here disclosed, but he might question a departure from established rules of procedure."

Justice Brogden, concurring in result, said (pp. 296-7): "Hence, the sole question before the chancellor was whether the minor, Anne Cannon Reynolds II, had the right to proceed to Forsyth County and lodge a motion to set aside a judgment which shut the door of the law in her face so far as asserting any further right in and to the property specified. There were no parties before the court except the guardians. The petition alleged grave irregularities and fatal defects in the Forsyth judgment. These allegations were denied and evidence offered in support of such denial. The New York will was not upon the lap of the chancellor. The family settlement and the laudable intentions of the family were not upon the lap of the chancellor. The actual validity of the Forsyth judgment was not upon the lap of the chancellor. The ultimate question was whether the minor had alleged and shown the existence of such facts, or probable facts, as to entitle her to be heard by the law of her country in a proceeding in Forsyth County to unloose the bar of that judgment. The guardians held in good faith opposite opinions as to the wisest course to pursue. Notwithstanding, it must be borne in mind that Anne Cannon Reynolds II is the heroine of the play and the clashing judgment of the guardians is incidental and secondary. The trial judge found that it was not for the best interest of the minor to be allowed to be heard in Forsyth County. Both the history and traditions of equity as held and applied in this State demonstrate that it always lends an attentive ear to the call of widows, orphans, and minors,

and in determining the bare right to be heard upon the merits of a proposition, it has not required the highest and most technical degree of proof. I am of the opinion that the facts disclosed in the record are sufficient to entitle Anne Cannon Reynolds II to a chance to be heard in the courts in a proper proceeding in Forsyth County. Of course, even a minor ought not to be heard in an assault upon a final judgment for inconsequential or captious reasons. Neither should the right to be heard upon the merits be denied because the evidence produced is not 'horse high, bull strong, and pig tight.' Therefore, I am of the opinion that the trial judge erred in denying to the minor the right to be heard upon the merits of the controversy. The Forsyth decree may have been eminently proper and advantageous not only at the time it was rendered, but even now. The proposed family settlement may be eminently wise and proper. That, however, is not the point. The right of the minor to question the proceeding in Forsyth in the due and orderly manner prescribed by law, is the point as I conceive it, and that right has been improvidently denied by the judgment rendered."

In accordance with the decision of this Court, the court below in its judgment found: "(1) That, in this action as originally constituted, the Cabarrus Bank and Trust Company, one of the duly appointed guardians of Anne Cannon Reynolds II, filed a motion on 30 April, 1934, to set aside the original judgment entered herein on 4 August, 1931, in so far as said judgment attempted to affect the rights of the said Anne Cannon Reynolds II in the trust estates, created by her paternal grandparents, hereinafter referred to. (2) Upon the filing of said motion, an order was duly entered herein making Annie L. Cannon, coguardian of the said Anne Cannon Reynolds II, a party defendant herein, and ordering her to show cause why the said motion should not be allowed; the said order also commanding the original defendants herein to file an answer which they, or any of them, might have to said motion within twenty days from the service of said order; and that said order, together with a copy of said motion, was duly served upon the original defendants herein and upon the said Annie L. Cannon, one of the guardians of Anne Cannon Reynolds II."

Schenck, J., in *Power Co. v. Yount, ante,* 182 (184), speaking to the subject of the law of the case, says: "The order consolidating the summary proceeding with the action instituted in behalf of other creditors, since it was made in conformity with the former opinion in this case, is binding upon the appellant, and pretermits, if it does not preclude, any discussion of objections and exceptions thereto. 'A decision by the Supreme Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal.'

Newbern v. Telegraph Co., 196 N. C., 14; *Nobles v. Davenport,* 185 N. C., 162." *Betts v. Jones, ante,* 410 (411).

The record discloses that the court below found that all parties in interest, whether *in esse* or *in posse,* present and prospective, were made parties and before the court. Those of age and minors representing every vested or contingent interest and every class—the State of North Carolina, claiming its inheritance or succession taxes. All were made parties and by interplea became parties and filed fully their contentions. This case was tried in the court below, as this Court, when it was here, in its opinion said it should be tried. The court below had full power and authority to hear and determine the contentions. In fact, the attorney for Annie L. Cannon, coguardian of Anne Cannon Reynolds II, of long experience and learned in the law, wrote a letter on 5 June, 1931, which is in the record: "Touching the question of the power of a court of equity to ratify and approve a contract affecting the interests of an infant in trust funds, etc., when made by properly constituted guardians, and upon suitable findings of fact, I beg to call your attention to the case of *Bank v. Alexander,* 188 N. C., 671-2. The discussion under paragraph three of the opinion involves precisely the principle which we are considering. This seems to be the only immediate decision in our courts upon the precise question of the affirmation of a contract such as we are considering, although a fuller investigation than I have had time to make may disclose some other case. The question of the power of a court to authorize a compromise in infants' rights in controversies over real estates or property is rather exhaustively considered in 33 A. L. R., 105, *et seq.,* under an annotation dealing alone with this subject. You will observe that the Supreme Court of the United States, as well as a number of states, unqualifiedly asserts the power of a court of chancery to deal conclusively in such matters and, by proper decree, to place the subject beyond any possible future attack." The law of this jurisdiction is well stated in this letter.

In the main opinion in *In re Reynolds, supra,* at p. 291, we find: "Courts of equity look with a jealous eye on contracts that affect materially the rights of infants." *Justice Brogden,* in his concurring opinion, as quoted above, says, at p. 296: "Both the history and traditions of equity, as held and applied in this State, demonstrate that it always lends an attentive ear to the call of widows, orphans, and minors, and in determining the bare right to be heard upon the merits of a proposition, it has not required the highest and most technical degree of proof." The best interest of the infants is the star (such as the wise men saw in the East and followed), which we must follow to guide us in determining this tangled controversy, so as to do justice to all and bring peace to a distressing family situation.

The facts more fully concerning all the aspects:

The will of R. J. Reynolds established a trust, providing for a certain share therein, of which his son, Zachary Smith Reynolds, was to be the first beneficiary. The provisions pertinent to the present case are as follows:

(a) Upon reaching the age of twenty-eight years, the said Zachary Smith Reynolds was to receive the *corpus* of said share, together with the accumulated income thereon.

(b) Before reaching the age of twenty-eight years, if the said Zachary Smith Reynolds died leaving a will, the trust continued for the benefit of his devisees until the time when the said Smith would have arrived at the age of twenty-eight years (4 November, 1939), whereupon the *corpus* of said trust share was to be turned over to said devisees.

(c) Before reaching the age of twenty-eight years, if Zachary Smith Reynolds died intestate, leaving issue, the trust was continued for the benefit of his children living at his death, until the time when he would have arrived at the age of twenty-eight years, whereupon the trust should cease and the said trust share should become vested in his children then surviving.

(d) Before reaching the age of twenty-eight years, if Zachary Smith Reynolds died intestate "without issue living at the termination of said trust," his share was to be held "on like trusts" for the surviving children of the testator (R. J. Reynolds) and the then living issue of the testator's deceased children *per stirpes.*

(e) If all the testator's children and their issue died before the termination of the trusts, one-half of the trust estate was to go to the testator's wife, Katherine S. Reynolds (Johnston), and the other half to the testator's brothers and sisters then living, and the descendants then living of any deceased brothers and sisters, *per stirpes.*

The will of Katherine S. Johnston also established a trust providing for a certain share therein of which her son, Zachary Smith Reynolds, was to be the first beneficiary. The provisions pertinent thereto are as follows:

(a) The trust continued during the life of said Zachary Smith Reynolds.

(b) Upon his death, the *corpus* of the trust share went to his devisees, by will; and, "in default of such appointment" to his descendants "living at his death," with an immaterial proviso as to a limited continuance of the trust with respect to Class A common stock of R. J. Reynolds Tobacco Company.

(c) In default of appointment by Zachary Smith Reynolds, and in default of any descendants of his, the share in question was to be divided among "such of my husband, children, and descendants as are then liv-

ing, *per stirpes* and not *per capita,*" the husband taking a child's part, the share of such children as were then living to be held by the trustee for them upon the same trusts that the original shares of the estate of the testatrix were then held.

During her lifetime the said Katherine S. Johnston, by deed, also established a comparatively small trust creating a share, of which the said Zachary Smith Reynolds was the first beneficiary upon the same terms as those outlined in her will.

The Safe Deposit and Trust Company of Baltimore was appointed trustee in each one of the three trust instruments above described.

On 29 July, 1918, R. J. Reynolds died in Forsyth County. His will was properly probated. His estate was settled, and the residue thereof was turned over to the trustee, who has ever since acted in said capacity. The trustee holds separately the securities and personal property which constitute the share of which Zachary Smith Reynolds was the first beneficiary.

On 29 December, 1923, Katherine S. Johnston (formerly the widow of R. J. Reynolds) executed and delivered to said trustee a certain deed whereby she transferred and delivered to said trustee certain shares of stock in the R. J. Reynolds Tobacco Company to be held in trust for her four children, the share of Zachary Smith Reynolds was to be held in a trust similar to that outlined in her will above referred to.

On 24 May, 1924, Katherine S. Johnston died. Her will was probated, her estate was settled, and the trustee now holds separately the property, consisting of bonds, stocks, and securities, constituting the share of which Zachary Smith Reynolds was the first beneficiary, including the share of the individual estate of Katherine S. Johnston and the share of the property disposed of by her in the exercise of her power of appointment.

The judgment in the court below modifies the original judgment entered on 4 August, 1931. In so doing, it approves a complete settlement of all beneficial interests in the trust shares hereafter mentioned, and also approves a settlement of a claim of the State of North Carolina for inheritance taxes thereon.

In re Reynolds, supra, contains the decision of the Court upon a former appeal. Pursuant to that decision, the Cabarrus Bank and Trust Company, one of the guardians of Anne Cannon Reynolds II, duly filed its motion to set aside the original judgment herein, in so far as it purported to affect the rights of its ward.

(a) The filing of this motion led to negotiations for a submission to the Court of a proposal for a final settlement of all questions in reference to a distribution of the trust shares involved.

(b) These questions had already been raised by a suit instituted in Maryland, on 24 March, 1933, by the Safe Deposit and Trust Company of Baltimore, the trustee under each of the three trusts involved. This suit is still pending. In it the Maryland court is requested to assume jurisdiction of the said trusts, and to settle all questions in reference to the distribution of the shares in question.

(c) The proposed settlement is as follows:

(1) Two million dollars to the State of North Carolina in full settlement of all its claims for inheritance taxes.

(2) The trust fund of $500,000 heretofore established for the benefit of Anne Cannon Reynolds I by the original judgment herein to remain intact, with certain modifications as to its disposition after the death of the said Anne Cannon Reynolds I. The amount of this trust fund is to be treated as a credit of $500,000 upon the 37½ per cent allotted to Anne Cannon Reynolds II, provided for in subsection 4 hereof.

(3) 25 per cent of the net trust shares to Christopher Smith Reynolds.

(4) 37½ per cent of the net trust shares to Anne Cannon Reynolds II.

(5) 37½ per cent of the net trust shares to Richard J. Reynolds, Mary Reynolds Babcock, and Nancy Reynolds Bagley. In addition, there is to be paid to the Reynolds heirs the total sum of $750,000, which they intend to give to Elizabeth Holman Reynolds. The Reynolds heirs have formally expressed the intention of giving to a charitable foundation in North Carolina the entire 37½ per cent of the said trust shares allotted to them in the settlement.

The trusts in question were established by the will of R. J. Reynolds and the will and a deed of Katherine Smith Johnston. In this case, we are concerned only with that share in each of the three trusts of which Zachary Smith Reynolds was the first beneficiary.

Since the death of the trustors, and since the establishment of said trusts, several vital events have occurred which have given rise to questions of unusual difficulty in reference to a final distribution of the trust shares of which Zachary Smith Reynolds was the first beneficiary. Some of the more important of said questions are as follows:

(1) *The validity of the original judgment herein of 4 August, 1931:* If this original judgment herein were held to be valid, it would entirely eliminate the infant, Anne Cannon Reynolds II, from participation in said trust shares. In such event, these shares would go either to Christopher Smith Reynolds or to the Reynolds heirs, depending upon the result of other contingencies hereinafter stated. If, on the other hand, this original judgment were held to be void, Anne Cannon Reynolds II would get the entire trust shares, or one-half thereof, or none of them, depending upon the result of other contingencies hereinafter stated, and depending also, as to the shares in the R. J. Reynolds trusts, upon whether she was living on 4 November, 1939.

(2) *Validity of the Reno divorce:* If this divorce were held to be invalid, it would effect the rights of Christopher Smith Reynolds, and the distribution of the said trust shares would likewise be affected. In that event, the said shares might go entirely to Anne Cannon Reynolds II, or might go entirely to the Reynolds heirs, depending upon subsequent contingencies and the answers to other questions herein outlined.

(3) *Validity of alleged New York will:* The question as to the validity of this will involves a number of subsidiary questions, such as the capacity of a minor to change his domicile; the question as to whether Zachary Smith Reynolds really did change his domicile, even if he had the capacity to do so; and the further question as to whether, in any event, under a proper construction of the trust instruments, the appointive powers therein contained could be exercised by Zachary Smith Reynolds before he became twenty-one years of age. There might also be a question as to the law of what state would determine some of these questions. If the alleged will were held to be valid, the Reynolds heirs might take the entire trust shares, to the exclusion of the two children of Zachary Smith Reynolds. On the other hand, if the alleged will were declared invalid, the ultimate distribution of said trust shares would depend upon the other uncertainties herein outlined.

(4) *Death of either, or both, of the infants before 4 November, 1939:* It will be noted from subsection 7 of Item 4 of the will of R. J. Reynolds that if Zachary Smith Reynolds died intestate before reaching the age of twenty-eight years the trust share in question *was continued* for the benefit of his children *living at his death* until the time Zachary Smith Reynolds would have arrived at the age of twenty-eight years (4 November, 1939), when the trust would then *cease* and the said trust shares would then become *vested* in his children *then surviving.* In other words, there were two points of time:

(a) Death of Zachary Smith Reynolds—as to income.

(b) 4 November, 1939—as to vesting of the *corpus* and accumulated income.

Hence, in the absence of any settlement, if either child died before 4 November, 1939, it, and its representatives, would lose all interest in the R. J. Reynolds trust—both income and *corpus.* In this respect the Reynolds trust differs from the Johnston trusts, the shares of which would be distributed immediately upon the death of Zachary Smith Reynolds.

The pleadings and the evidence before the court when the present judgment was signed were entirely different from those before the court when the original judgment herein was entered.

(1) At the time the original judgment was entered herein, the pleadings contained no allegations upon which it could be based, in so far as

it attempted to affect the future rights of Anne Cannon Reynolds II in said trust shares. As stated in the opinion on the former appeal: "The complaint in said action sets out no controversy as to the property rights of the infant, Anne Cannon Reynolds II. There is no allegation as to any dispute in reference to the infant's contingent interests in said trust. No reason is alleged for seeking to alter or modify the terms of said trusts, in so far as the infant, Anne Cannon Reynolds II, is concerned. No necessity is set forth for seeking to eliminate or change her interests in said trust."

The pleadings have been enlarged to embrace all the controversies connected with the distribution of said trust shares; and all parties having any present, future, or contingent interests therein have been made parties to the action.

(2) *The existence of bona fide controversies:* At the time of the entry of the original judgment Zachary Smith Reynolds was living. Hence, there was not and could not then be any controversy in reference to the distribution of the said trust shares. Likewise, no question had then arisen as to the present or future rights of Anne Cannon Reynolds II in said trust shares. So far as she was concerned, there was nothing before the Court to form the basis of any settlement affecting her rights in said trust shares. Under these circumstances, the original judgment seems to have been entered hurriedly—without adequate investigation and consideration.

Now, the situation has completely changed. We not only have the precipitating fact of Zachary Smith Reynolds' death, but we also have the existence of a number of vital questions forming the subject of *bona fide* controversies between the parties. These controversies relate to the validity of the original judgment herein, the validity of the Reno divorce, and its effect on Christopher Smith Reynolds, the validity of the New York will, and other subjects. None of these questions had arisen at the time of the original judgment. Each one of them vitally affects the distribution of the said trust shares.

The existence of these vital *bona fide* controversies furnishes a real basis and a compelling reason for a family settlement or compromise.

R. J. Reynolds left four children by his wife, Katherine S. Reynolds. After his death his widow (who is now dead) married J. Edward Johnston, and by that marriage she left a son, J. Edward Johnston, Jr. The wills of R. J. Reynolds and Katherine S. Reynolds (Johnston) and her deed in reference to the property rights of their four children are practically the same. These children were Richard J. Reynolds, Mary Reynolds Babcock, Nancy Reynolds Bagley, and Zachary Smith Reynolds. Richard J. Reynolds has reached the age of 28 years, and, under the wills and deed, his interest has become vested.

On 30 April, 1934, as before set forth, in accordance with the opinion of this Court, the Cabarrus Bank and Trust Company, one of the guardians of Anne Cannon Reynolds II, filed a motion in the Superior Court of Forsyth County "to set aside the alleged judgment entered herein on 4 August, 1931, in so far as it attempts to affect the rights of said Anne Cannon Reynolds II in the trust estates created by her paternal grandparents, hereinafter more fully described, and in support of said motion, respectfully shows to the court as follows," etc.

On 21 May, 1934, the Safe Deposit and Trust Company of Baltimore, trustee, filed an answer.

On 21 May, 1934, Annie L. Cannon, coguardian for Anne Cannon Reynolds II, filed an answer.

On 24 October, 1934, certain other defendants filed an answer. On 12 November, 1934, the State, which was allowed to interplead, filed an answer. On 15 November, 1934, an interplea of Christopher Smith Reynolds, infant, by his next friend, R. C. Vaughn, was filed.

On 16 November, 1934, Richard J. Reynolds, Mary Reynolds Babcock, and Nancy Reynolds Bagley, the only brother and sisters of Zachary Smith Reynolds (deceased), filed an offer of settlement and petition thereon. Responses were duly filed, all of which and more appear in the judgment in this cause.

Serious and grave questions of law and facts were raised. The judgment sets them out and we refer to same, all troublesome, but we will consider one for example: The validity and effect of the alleged will executed in New York by Zachary Smith Reynolds, as a basis of the offer of the brother and sisters of Zachary Smith Reynolds.

Section 49 of the judgment is as follows: "That prior to his death, to wit: On or about 21 August, 1931, the said Zachary Smith Reynolds executed an instrument in the form of a will complying with the law of the State of New York as to the execution of wills by residents of that State, and also complying with the requirements of C. S., 4131, as to the formalities for the execution of a will under the laws of the State of North Carolina, stating therein that he was a resident of Port Washington, Nassau County, in the State of New York; that in said paper the said Zachary Smith Reynolds undertook to execute the powers of appointment conferred upon him by the will of his father, R. J. Reynolds, and by the will and deed of his mother, Katherine S. Johnston, in favor of his brother, Richard J. Reynolds (Jr.), and his two sisters, Mary Reynolds Babcock and Nancy Reynolds Bagley, to the practical exclusion of all other persons, including his then living child, Anne Cannon Reynolds II, and his then wife, Anne Cannon Reynolds I, which said will referred to and ratified the judgment in this cause under date of 4 August, 1931, and made no further provision for Anne Cannon

Reynolds II and Anne Cannon Reynolds I, other than a bequest of $50,000 to each of them." This matter was discussed in the opinion *In re Reynolds, supra* (206 N. C., at pp. 290-1).

The New York statutes are as follows: Cahill's Consolidated Laws of New York (1930), ch. 13, sec. 10: "All persons, except idiots, persons of unsound mind, and infants, may devise their real estate, by a last will and testament, duly executed, according to the provisions of this article." Section 15: "Every person of the age of eighteen years or upwards, of sound mind and memory, and no others, may give and bequeath his or her personal estate, by will in writing."

Item 7 of R. J. Reynolds' will (a like provision is in the will of Katherine S. Johnston) in part is as follows: "Should any of my children die before he or she shall arrive at the age of twenty-eight (28) years, then the share of my estate which would have been payable to him or her, had he or she arrived at that age, shall be continued to be held by my said trustee for the use and benefit of his or her devisees by will until the time that such child would have arrived at the age of twenty-eight years, if he or she had lived, when the said trust shall cease and the estate shall then become payable to such devisees. . . . *And, should any of my said children die without having made a testamentary disposition of his or her share of my said estate* and without issue living at the termination of said trust, then his or her share shall be held on like trusts for my surviving children and the then living issue of my deceased children, *per stirpes,* and, should all of my said children and their issue die before the termination of the trusts, then, in that event, one-half of the trust estate in value at that time, principal and income, shall go to and belong to my said wife, and the other half to my brothers and sisters then living and the descendants then living of any of my deceased brothers and sisters, *per stirpes.*"

Zachary Smith Reynolds attempted to execute a will leaving his property to his brother and sisters, as before stated. The brother and sisters make the offer of settlement. W. N. Reynolds, the uncle of Richard J. Reynolds, Mary Reynolds Babcock, Nancy Reynolds Bagley, and Zachary Smith Reynolds, and the great uncle of the two infants, Anne Cannon Reynolds II and Christopher Smith Reynolds, and all others who have contingent interests, in their answer say: "They adopt and approve the proposals of settlement heretofore made and filed in this cause by the defendants Richard J. Reynolds, Mary Reynolds Babcock, and Nancy Reynolds Bagley." When Zachary Smith Reynolds made the will in New York, he was over eighteen years of age. The father and mother of Zachary Smith Reynolds, under their wills and deed, gave him the right to will the property. This compromise judgment is not making a new will for R. J. Reynolds, but adjusting the differences

brought about by his son, Zachary Smith Reynolds, attempting to do what under the wills and deed he had a right to do. Of course it had to be done legally. In the judgment is the following: "Sec. 60 (III). That the determination and settlement of the rights of all parties, particularly including Anne Cannon Reynolds II and Christopher Smith Reynolds, as herein decreed is just, fair, and equitable; that it is for the best interests of all parties, and of all the present, prospective, or contingent beneficiaries of the three trusts hereinbefore mentioned; that such determination and settlement will substantially comply with the terms and conditions of the instruments creating said trusts, considering the changed situation and condition of said parties in relation to each other, and the contingencies and uncertainties as to which of said beneficiaries would be entitled to receive said trust estates, and in what proportion; that it will, to a large extent, prevent a dissipation and waste of a large part of the said trusts, and that it will accomplish the objects and effectuate the intention of the creators of said trusts."

We think, from the facts and circumstances of this case, that the above is correct—that the determination and settlement is "just, fair, and equitable."

In the present case new facts are set forth, the pleadings are enlarged to bring in all parties that have the remotest interest and sufficient allegations to cover every conceivable controversy, and the differences are vital and *bona fide* controversies. Paragraph 25 of the judgment, is as follows: "That the parties to this proceeding are all properly before the court; that either a next friend or a guardian *ad litem* has been duly appointed for each and every infant, whether born or unborn, who is now or may hereafter be in any way interested in the trust shares hereinafter mentioned; that all persons, whether minors or of age, and whether *in esse* or *in posse,* who are now or who may hereafter be interested in the trust shares hereinafter mentioned, have been made parties to this action, and have either appeared herein or been duly served with process herein and with copies of all the foregoing pleadings."

Did the court have the power and authority, under the facts and circumstances of this case, to render the judgment heretofore set forth? We think so. The able attorney for Annie L. Cannon, the coguardian of Anne Cannon Reynolds II, thought a court of equity had such power, and in a letter heretofore set forth cited authorities. We quote from same: "In *Bank v. Alexander,* 188 N. C., 667 (671), we find: 'The defendants excepted on the ground that the judgment is not binding upon the unborn contingent remaindermen. As we understand the record, the contingent remaindermen are represented not only by the trustee but by living members of their class, and under these circumstances the exception must be overruled. The question of law is discussed in the

following cases and need not be repeated here. *Ex parte Dodd,* 62 N. C., 98; *Overman v. Tate,* 114 N. C., 571; *Springs v. Scott,* 132 N. C., 548; *McAfee v. Green,* 143 N. C., 411; *Lumber Co. v. Herrington,* 183 N. C., 85." Paragraph 3, pp. 671-2, thoroughly discusses the right of a court of chancery over infants and to settle controversies such as was done in the present case.

In *Metzner v. Newman* (224 Mich., 324), 33 A. L. R., 98 (accurately stated in the syllabus), we find: "When infant's property rights are involved in litigation, the general guardian or guardian *ad litem* may negotiate for a compromise of the litigation, and, if the court approves it after an examination of the facts, the judgment or decree will be binding on the infants. When a chancery court has jurisdiction of the subject matter and parties some of whom are infants, it may pass upon and adjudicate the rights and equities of the infants, and the decree will be binding upon them. The adjustment of differences in a family over the settlement of estates will be favored even where infant legatees are interested, provided the proposed compromise of the differences is submitted to the court and a finding made that the settlement and compromise are for the best interests of the infants. A finding by the chancellor, with all the facts before him, that a will contest was in good faith, and that a compromise was for the best interests of infant legatees, will not be disturbed on appeal." At p. 105 we find: "This annotation is limited to compromises of contests over wills or settlement of estates, and other contests relating to property in which infants are interested." (*Annotation at* p. 105): "It has been held, however, in a number of cases, that the court has power to sanction compromises in the settlement of estates, or litigation generally, in which the property rights of infants are concerned," citing many authorities, including cases from U. S., Ill., Mass., Miss., Tenn., and numerous cases from England. *Reynolds v. Reynolds, ante,* 254.

In *Spencer v. McCleneghan,* 202 N. C., 662 (671), it is said: "We think those *in esse* or *in posse* are properly represented in this proceeding; all parties who could possibly have any interest in the estate are parties to this action and the infant and all unborn children who might have any interest are properly represented. From a careful examination of the facts, as found by the court below and the judgment rendered, we think a court of equity has jurisdiction in the matter. We think the judgment fair to all and not prejudicial to the parties who have either vested or contingent interests. The policy of the law is to encourage settlement of family disputes like the present, so as to promote peace, good will, and harmony among those connected by consanguinity and affinity. Equity favors amicable adjustments. . . . The court below found the facts at length with care, and rendered judgment that it

was to the best interest of all that 'the terms and provisions of said contract . . . be accepted, ratified, and approved and carried into effect.'" In the above case are cited many cases sustaining the above principle.

In *Price v. Price,* 133 N. C., 494 (504), *Justice Henry G. Connor* said: "The principles by which courts of equity are governed in sustaining and enforcing such contracts as to the one set out in this record are well settled and strongly stated by *Lord Hardwicke* in the case of *Stapilton v. Stapilton,* 1 Atk., 2 (2 White & Tudor's L. C., 1675, star p. 824). In speaking of a contract made for the purpose of settling a family controversy he says: 'It was to save the honor of the father and his family, and was a reasonable agreement; and, therefore, if it is possible for a court of equity to decree a performance of it, it ought to be done. . . . And, considering the consequence of setting aside this agreement, a court of equity will be glad to lay hold of any just ground to carry it into execution, and to establish the peace of a family.'"

In re Will of McLelland, 207 N. C., 375 (376), *Chief Justice Stacy* said: "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," etc.

In the cases of *Bank v. Alexander, supra,* and *Spencer v. McCleneghan, supra,* each of these involved a trust in which there were future and contingent rights of infants, both *in esse* and *in posse.*

In *Overman v. Tate,* 114 N. C., 571 (574), cited in the *Bank case, supra,* we find: "In accordance with this policy it was laid down by *Lord Hardwicke* in the leading case of *Hopkins v. Hopkins,* 1 Atk., 590, that, 'If there are ever so many contingent limitations of a trust it is an established rule that it is sufficient to bring the trustees before the court, together with him in whom the first remainder of inheritance is vested; and all that may come after will be bound by the decree, though not *in esse,* unless there be fraud and collusion between the trustees and the first person in whom the remainder of inheritance is vested.'"

In 2 Pomeroy Equity (4th Ed.), sec. 850, it is said: "Compromises, where doubts with respect to individual rights, especially among members of the same family, have arisen, and where all the parties, instead of ascertaining and enforcing their mutual rights and obligations, which are yet *undetermined and uncertain,* intentionally put an end to all controversy by a voluntary transaction by way of a compromise, are highly favored by courts of equity."

In 69 C. J., at page 1274, we find the statement: "As a general rule, the beneficiaries under a will may validly contract with other interested persons in regard to their respective interests in the estate, and in this manner effectively compromise their claims, if they are conflicting, or

else so divide or settle the estate that all are bound by the agreement. Such contracts, being in the nature of family settlements, they are usually favored by the courts," citing a number of cases, including *Spencer v. McCleneghan, supra.*

A good statement of the rule, together with its limitations, is found in 65 C. J., pp. 683-4, as follows: "A court of equity has power to do whatever is necessary to preserve a trust from destruction, and, in the exercise of such power, it may, under some circumstances, modify the terms of a trust to preserve it. The court should have due regard for the intention of the settlor, and, in exercising its jurisdiction, should be exceedingly cautious. The power of the court is exercised not to defeat or destroy the trust but to preserve it. The exercise of the power can only be justified by some exigency which makes the action of the court in a sense indispensable to the preservation of the trust, and in such cases the court may, as far as may be, *occupy the place of the settlor and do with the trust fund what the settlor would have done had he anticipated the emergency.* The trust will not be modified in violation of the settlor's intention, merely because the interest of the parties will be served by doing so. Where a contingency arises, however, such that the estate may be totally lost to the beneficiaries, equity will not permit such loss for lack of power to modify the trust."

If the present settlement is rejected, and the parties relegated to long and exhausting litigation, the primary purpose of the trusts in question will be defeated. By the present judgment, the primary objects of the trust are preserved. As is stated in the case of *Curtiss v. Brown,* 29 Ill., 201 (230): "Exigencies often arise not contemplated by the party creating the trust, and which, had they been anticipated, would undoubtedly have been provided for, where the aid of the court of chancery must be invoked to grant relief imperatively required; and in such cases the court must, as far as may be, occupy the place of the party creating the trust, and do with the fund what he would have dictated had he anticipated the emergency. . . . From very necessity a power must exist somewhere in the community to grant relief in such cases of absolute necessity, and under our system of jurisprudence that power is vested in the court of chancery."

The cases of *Williams v. Williams,* 204 Ill., 44, which is cited in the *Spencer case, supra,* and *Wolf v. Uhlemann,* 156 N. E., 334, which cites *Williams v. Williams, supra,* are similar in principle to the present case.

Speaking of a chancellor, Black's Law Dictionary (3d Ed.), p. 308, says: "He is the general guardian of all infants, idiots, and lunatics, and has the general superintendency of all charitable uses, and all this, over and above the vast and extensive jurisdiction which he exercises in his

judicial capacity in the supreme court of judicature, of which he is the head. Wharton."

The court of chancery is a court having the jurisdiction of a chancellor; a court administering equity and proceeding according to forms and principles of equity.

Const. of N. C., Art. IV, sec. 1, in part is as follows: "The distinctions between actions at law and suits in equity, and the forms of all such actions and suits, shall be abolished; and there shall be in this State but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated a civil action," etc. This section abolished the distinction between actions at law and suits in equity, leaving such rights and remedies to be enforced in the one court, which theretofore had administered simply legal rights. *Peebles v. Gay,* 115 N. C., 38 (42). Under this section and Article IV, sec. 20, the Superior Courts became the successors of the courts of equity, having their jurisdiction and exercising their equitable powers, unless restrained by statute. *In re Smith,* 200 N. C., 272, 274. Legal and equitable rights and remedies are now determined in one and the same action. *Woodall v. North Carolina Joint Stock Land Bank,* 201 N. C., 428.

The able, careful, and painstaking judge sat in the court below as a chancellor—as general guardian of both infants. There existed a controversy between the two guardians of Anne Cannon Reynolds II. The two infants, Anne Cannon Reynolds II and Christopher Smith Reynolds, as it were, are put in the "lap of the chancellor." The chancellor in the court of equity and conscience heard all the evidence. His jurisdiction was to hear and determine the cause and to enter judgment. The judgment which was entered is fully established by reason and authority. As to the equity of the settlement—we think all of the principles of equity and natural justice require that the issues existing between the parties be settled for all time, and that the parties should not be relegated to the litigation which is inevitable if the judgment of the court below is reversed—and we think it should not be reversed. This seems to be the wish of all parties, except one of the guardians (Annie L. Cannon, coguardian of Anne Cannon Reynolds II), and the Safe Deposit and Trust Company of Baltimore, trustee, which naturally wants to be protected on account of the trust funds held by it. The present judgment gives Anne Cannon Reynolds II, the infant, some $9,000,000. The former judgment of 4 August, 1931, gave her only $2,000,000. This, at the time, was satisfactory to Annie L. Cannon, coguardian of Anne Cannon Reynolds II, but not so with the other guardian—the Cabarrus Bank and Trust Company. It asked to be heard in a court of equity, which was allowed. The differences between these guardians cannot affect the

rights of these infants. May we be so bold as to quote an old adage: "When passion blows the breeze, let reason guide the helm." We think the Superior Court of Forsyth County had power and authority to hear and determine the cause and had jurisdiction over the trustee, which enabled the court to proceed to judgment.

We do not think the appearance of the trustee was special. In the original action herein, the trustee entered a general appearance and filed an answer, from which we quote as follows: "It (the trustee) submits its rights, duties, and discretion in the premises to the determination and decision of this honorable court." Thereafter, when the Cabarrus Bank and Trust Company filed its motion in Forsyth County to set aside the original judgment herein, the trustee again, without any qualification, came in and filed an answer to said motion. The Reynolds heirs filed their petition, setting forth the offer of settlement, the trustee again came in and filed an answer to said petition, but in the beginning of the answer, for the first time these words appeared: "Specially appearing under protest, as hereinafter stated." An analysis of this last-mentioned answer, however, will show that the above-quoted words were not used for the purpose of entering a special appearance in the sense that the trustee was either denying or withholding its personal appearance, but the words were used for the purpose of insisting upon the contention that even with the trustee personally before the court, the court was without jurisdiction, because: ". . . all of the property and investments held in said three trusts are located in the State of Maryland, which is the sole *situs* of the administration of said trusts. Respondent (trustee) is advised, and therefore says, that the courts of said state alone have jurisdiction over the administration of said trusts, and that especially the Circuit Court of Baltimore, a court of said state having full equity jurisdiction, is the proper court to finally determine such questions as have arisen in reference to the administration of said trusts, and has, by virtue of the proceedings hereinbefore recited, already obtained specific jurisdiction to finally determine such questions."

In *Buncombe County v. Penland,* 206 N. C., 299 (304), we find: "If a defendant invoke the judgment of the court in any manner upon any question, except that of the power of the court to hear and decide the controversy, his appearance is general."

The trustee has personally appeared in this one action on three different occasions, to wit: (a) by filing an answer when the action was first instituted in August, 1931; (b) by filing an answer to the motion of the Cabarrus Bank and Trust Company to set aside the original judgment; and (c) by filing an answer to the petition of the Reynolds heirs setting forth the proposal of settlement. At no time has it taken the position that it itself was not personally before the court. It has simply con-

tended that the court was without jurisdiction because the trust *res* was beyond the border of the State. This, of course, was not the entry of a special appearance in so far as personal jurisdiction over the trustee was concerned.

The record shows that the trustee has repeatedly acted upon the assumption that the trusts in question were being administered under the supervision of the courts of this State. Whenever any question has heretofore arisen in reference to the administration of said trusts, such question has been referred to the courts of this State for decision. We refer to the following instances:

(a) *Upon the death of Katherine S. Johnston, a question arose* as to the amount of net income distributable to each child of R. J. Reynolds after attaining the age of twenty-one years, and before attaining the age of twenty-eight years. This question involved a construction of the will of R. J. Reynolds. For a determination of this question, the trustee applied—not to the courts of Maryland—but to the courts of North Carolina. In order to have said question determined, the trustee instituted an appropriate action in the Superior Court of Forsyth County, North Carolina, wherein said question was submitted to and determined by the court, a judgment settling this question being signed by Hon. Wm. F. Harding, judge presiding at the May, 1927, civil term of the Superior Court of Forsyth County. The judgment so rendered has ever since been complied with by the trustee in the administration of the trust.

(b) *Thereafter, a further question arose* in reference to the proper construction of paragraph 6 of Item 4 of the will of R. J. Reynolds. For a decision of this question, an action was instituted in the Superior Court of Forsyth County by young R. J. Reynolds against the trustee and all the other trust beneficiaries, for the purpose of obtaining a construction of said paragraph of the will of R. J. Reynolds. In that action, the trustee filed an answer and a judgment was entered, from which an appeal was taken to the Supreme Court of North Carolina, by which the judgment was affirmed. *Reynolds v. Trust Co.,* 201 N. C., 267.

(c) *When this original action was instituted,* in August, 1931, the trustee came in and voluntarily submitted itself to the jurisdiction of the court. There was no qualification whatever to its appearance. Although the original judgment which was entered herein altered the terms of the trust instruments in a radical manner, the trustee raised no question as to the jurisdiction of the court to enter such judgment. On the contrary, in a subsequent pleading, it states: "Your respondent was advised that this court did have jurisdiction, and that all necessary parties were brought in to sustain such jurisdiction and make the judg-

ment or decree which was passed valid and binding." After the entry of said original judgment, the trustee filed an itemized report showing in detail a compliance with said judgment.

The trusts in question are "resident trusts" of North Carolina, over which the courts of this State have primary jurisdiction. For instance, the following facts are noted: (a) The wills creating the trusts were executed by persons who were residents of and domiciled in North Carolina. (b) These wills were probated in North Carolina. (c) The *corpus* of the trusts consisted, and still consists, of intangible personal property, to wit: Bonds and corporate stocks. (d) When said wills were executed and probated, the beneficiaries of the trusts were residents of and domiciled in North Carolina. (e) Although it is true that a Maryland corporation is appointed trustee in each of the two wills in question, it is also true that each will (R. J. Reynolds and Katherine S. Johnston) gives to residents of North Carolina the power to change such trustee at any time. Hence, the courts of this State have primary jurisdiction thereof.

In 1 Perry on Trusts and Trustees (7th Ed.), sec. 71, p. 56, the following statement of the rule appears: "If a trust is created by the will of a citizen of a particular state, and his will is allowed by the probate court of that state, and a trustee is appointed by the probate court, courts of equity will have jurisdiction over the trust, although both the trustee and the property are beyond the jurisdiction of the court. *Chief Justice Bigelow,* in determining this point, said: 'The residence of the trustee and *cestui que trust* out of the commonwealth does not take away the power of this court to regulate and control the proper administration of trust estates which are created by wills of citizens of this state, and which have been proved and established by the courts of this commonwealth. The legal existence of the trust takes effect and validity from the proof of the will, and the right of the trustee to receive the trust fund is derived from the decree of the probate court. If the trustee is unfaithful or abuses his trust, that court has jurisdiction to remove him in concurrence with this court on the application of those beneficially interested in the estate.' "

In *Swetland v. Swetland,* 105 N. J. Eq., 608, 149 Atl., 50, at p. 52, the Court said: "The rule of law is well settled that the courts of the testator's domicile and of the state in which the will is probated have primary jurisdiction over testamentary trusts. *McCullough's Executors v. McCullough,* 44 N. J. Eq., 313, 14 A., 642; *Marsh v. Marsh's Executors,* 73 N. J. Eq., 99, 67 A., 706; *Davis v. Davis,* 57 N. J. Eq., 252, 41 A., 353; *Murphy v. Morrisey & Walker,* 99 N. J. Eq., 238, 132 A., 206; *Hewitt v. Green,* 77 N. J. Eq., 345, 77 A., 25; 65 C. J., 895.

The Safe Deposit and Trust Company of Baltimore, trustee, acquired its title to the two testamentary trusts from testators domiciled in North Carolina and solely by reason of the effect of their wills and the laws of this State. Whatever uncertainty may have existed on this question has been settled by four decisions of the Supreme Court of the United States. *Farmers Loan & Trust Co. v. Minnesota,* 280 U. S., 204, 74 L. Ed., 371; *Baldwin v. Missouri,* 281 U. S., 586, 74 Law Ed., 1056; *Beidler v. S. C. Tax Commission,* 282 U. S., 1, 75 Law Ed., 131; *First National Bank of Boston v. Maine,* 284 U. S., 312, 76 Law Ed., 313.

The cases involved the right of states other than that of the domicile of the decedent to levy inheritance taxes on intangible personal property. They include every form of intangible property. The tax was held void in each case under the due process clause of the Fourteenth Amendment on the ground that such property can be transferred in only one place and under one law. It may be conceded that tax cases frequently do not furnish a safe guide for the decision of questions involving jurisdiction, but, since the decision in these cases are rested upon a concept of due process of law, there is no escape from the conclusion that they apply to all questions of transfer upon the event of death, and that such transfers occur in one place and under one law, and that judgments of the courts of that place define the instrument of title and give effect to the transfer of the property, which are entitled to full faith and credit in all of the states.

Elements of jurisdiction in this case: (1) Jurisdiction over the domicile of the creator of the trust and the instrument creating it. (2) Jurisdiction over one or more of the beneficiaries of the trust. (3) Jurisdiction over the whole or part of the property constituting the trust.

In this case the following classes of persons are represented by someone *in esse:* (1) Two claimants as issue of Zachary Smith Reynolds. (2) Three children of R. J. Reynolds and Katherine S. Johnston. (3) Grandchildren of R. J. Reynolds, the issue of his children who are now living. (4) A brother and sister of R. J. Reynolds. (5) Issue of the brothers and sisters of R. J. Reynolds. All possible classes who could be interested in the outcome of this case are represented.

We have read with care the able and exhaustive briefs of the Safe Deposit and Trust Company of Baltimore, trustee, and that of Annie L. Cannon, coguardian of Anne Cannon Reynolds II. We cannot sustain the contention made in their briefs. But Annie L. Cannon, coguardian of Anne Cannon Reynolds II, in closing her brief, says: "She has sought to lay before the Court all the pertinent facts within her possession bearing upon the issues involved, and to call to the Court's attention the legal authorities governing same. She has the care and custody of this child and paramounts its interest and welfare above all else. She prays

this honorable court, in the exercise of its sound judgment, to instruct her in the further performance of her duties."

In the judgment of compromise the State of North Carolina was awarded $2,000,000 in settlement of its inheritance tax claim. It seems as if the Safe Deposit and Trust Company of Baltimore, trustee, alone appeals from the judgment. In the brief of the Attorney-General and his able assistants is the following: "There is still an open question in this State as to the basis of computation of the inheritance tax in cases where the property rights of the parties have been litigated and their interest determined by a compromise judgment. The holdings in other jurisdictions, where this question has arisen, are about evenly divided and contradictory. Note 78 A. L. R., 716. In the most favorable aspect of the controversy, the State could not hope to be materially benefited by independently litigating the serious factual questions involved, either as to the amount or security of the tax, and, therefore, the offer of compromise was accepted."

The brief of the Safe Deposit and Trust Company of Baltimore, trustee, expressly waives all questions as to the imposition of the tax except the question of its constitutionality as being violative of the Fourteenth Amendment to the Federal Constitution. This suggested constitutionality is referred to two grounds: (a) That the imposition of the tax is by retroactive law, since R. J. Reynolds died before the enactment of the first State Revenue Act containing the applicable section of the law. (b) That the trust estate had no *situs* in North Carolina, and this State had, therefore, no taxing jurisdiction. The Attorney-General and his assistants, in an elaborate and carefully prepared brief, argue and cite authorities contrary to the view taken by the Safe Deposit and Trust Company of Baltimore, trustee, and we agree with their view without setting same forth in detail.

N. C. Code of 1935 (Michie), 7880 (1). "Fifth. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment, when made, shall be deemed a transfer taxable under the provisions of this act, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of said power, and had been bequeathed or devised by such donee by will, and the rate shall be determined by the relationship between the beneficiary under the power and the donor; and whenever any person or corporation possessing such power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such omission or failure, in the same manner as though the persons or corporations thereby becoming

entitled to the possession or enjoyment of the property to which such power related and succeeded thereto by will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure." Sec. 7880 (17)—the trustee to deduct tax.

In the former opinion of this Court (206 N. C., 276-290), on the appeal of the Cabarrus Bank and Trust Company, coguardian of Anne Cannon Reynolds II, we said in the main opinion: "The alleged will of Zachary Smith Reynolds appears to be inoperative and void." The wills and deed of the parents of Zachary Smith Reynolds gave him the right to make a will—exercising the power of appointment given him was one of the serious and *bona fide* questions that brought about the compromise. He made the will in controversy to his brother and sisters, who made the "offer of settlement."

But, however conclusive the arguments as to the legality and constitutionality of the tax, we do not need to rely on the strict application of these legal principles to sustain the judgment of the court below, affirming the tax. It was a settlement by compromise and agreement in a matter which was a legitimate subject of compromise, in a court of competent jurisdiction, with all the parties affected represented. The appeal is by the trustee alone in this case, all the *cestuis que trustent* having agreed, could not properly raise the propriety of the action of the chancellor in advising the guardians of infant parties, and in approving the compromise.

A liberal construction will be given to inheritance tax statutes to the end that all property fairly and reasonably coming within their provision may be taxed. *State v. Scales,* 172 N. C., 915. See, also, *Norris v. Durfey,* 168 N. C., 321. Under this liberal construction in favor of the government, every transfer of property that could be reasonably brought within the purview of the law has been subjected to taxation, *Norris v. Durfey, supra.* "The theory on which taxation of this kind on the devolution of estates is based and its legality upheld is clearly established and is founded upon two principles: (1) A succession tax is a tax on the right of succession to property and not on the property itself. (2) The right to take property by devise or descent is not one of the natural rights of man, but is the creature of the law"—*Brown, J., In re Morris Estate,* 138 N. C., 259, cited and approved in *Rhode Island Hospital Trust Co. v. Doughton,* 187 N. C., 263, 267. See *Waddell v. Doughton,* 194 N. C., 537.

In the judgment is the following: "60 (f). Upon a thorough and complete consideration of all the facts and circumstances relating to the claim of the State of North Carolina for said taxes, the court finds as a fact that the settlement of the taxes herein referred to is for the best interest of all parties concerned, including the infants, Anne Cannon

Reynolds II and Christopher Smith Reynolds, and said settlement is hereby fully approved by the court, and the guardians of said infants are hereby advised, instructed, authorized, and empowered to participate in said settlement on behalf of said infants, and it is hereby ordered and decreed that the Safe Deposit and Trust Company of Baltimore, trustee, out of said trust funds, pay to the State of North Carolina the sum of two million dollars in full settlement of any and all claims or demands which the State now has or may hereafter have by reason of the things and matters set forth in the intervening complaint herein, such payment to be made solely out of the trust estates created by the will of R. J. Reynolds and the will and deed of trust of Katherine S. Johnston, of which Zachary Smith Reynolds was the first beneficiary in proportion to their respective values as of the date of this decree, and nothing herein to impose any personal liability upon any of the parties to this action. That the said sum of $2,000,000 is to be paid to the State of North Carolina when and if this decree becomes effective, and shall be in full settlement of any and every claim of the State of North Carolina for inheritance taxes, penalties, and interest."

Under the facts and circumstances of this case, we think the settlement of taxes correct. The court below in the judgment (I) says: "That the original judgment entered herein on 4 August, 1931, be and it hereby is modified as follows," etc., and sets forth wherein it is modified. We think all this was done in compliance with the former opinion of this Court, *In re Reynolds, supra.*

Frequently, on changed conditions, equity steps in and gives relief. In *Starkey v. Gardner,* 194 N. C., 74, it was in regard to restrictive covenants in deeds. In *Raleigh v. Trustees of Rex Hospital,* 206 N. C., 485, equitable relief was granted on account of changed conditions, and the board of trustees of Rex Hospital was permitted to borrow money by giving a lien on the property to remodel present building or erect new building. In the *Curtiss case, supra,* we repeat: "From very necessity a power must exist somewhere in the community to grant relief in such case of absolute necessity and under our system of jurisprudence that power is vested in a court of chancery."

All the facts are fully, elaborately, and carefully set out in the record and the judgment which we set forth above, covering every aspect of the controversy. Due care has been taken in so important a controversy, where the property rights of infants are concerned, to set forth all the facts in the case. We think there was sufficient evidence to support the findings of fact in the court below on the different aspects of the controversy.

The court below found the compromise, as embodied in the judgment appealed from, fair, just, and equitable in regard to the property rights

of these infants and all parties who had an interest, contingent or otherwise. The court below had power and authority to render the judgment. In this jurisdiction the courts, for perhaps a hundred years, have upheld family settlements, and the general policy of the courts has been to encourage compromise of litigation. In regard to infants, this power and authority is lodged in the chancellor in a court of equity. It seems as if justice and righteousness to the infants and all parties has been embodied in the judgment, and should bring peace and harmony. We do not think that any of the exceptions and assignments of error made by the appealing parties can be sustained.

It is the duty of both of these guardians to set up this judgment in the suit now pending in the Circuit Court of Baltimore, Maryland, heretofore mentioned.

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

Affirmed.

ROBERT CORDELL v. BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN.

(Filed 1 November, 1935.)

1. **Insurance E h: Contracts A i—Provision that decision of association's board should be final as to disability of member held void.**

   A clause in the constitution and by-laws of a mutual benefit association that the decision of its board of directors shall be final on the question of whether a member is totally and permanently disabled within the meaning of its benefit certificate, as distinguished from a clause providing for payment of such benefits as may be awarded by its officers or tribunals, is void as being against public policy, and will not prevent a beneficiary under its certificate from bringing action in the courts for the unreasonable and arbitrary rejection of his claim for benefits under the terms of the certificate.

2. **Insurance E i: States A a—Policies for which application is taken in this State are governed by laws of this State.**

   Policies of insurance issued by foreign companies, the application for which is taken in this State, are to be construed in accordance with the laws of this State, and a provision in the policy that it should be governed by the laws of the State of the domicile of the insurer is void in so far as the courts of this State are concerned.

3. **Insurance R c—**

   Where a policy provides certain benefits if insurer becomes totally and permanently disabled as defined in the policy, insurer may not escape liability by proof that insured was not suffering from a specific disabling disease, if insured is rendered disabled as defined in the policy by other ailments.

4. Insurance E h—Evidence that mutual benefit association arbitrarily rejected claim for disability benefits held for jury.

Plaintiff member of defendant mutual benefit association was not in arrears in his dues, and had, on account of total and permanent disability, been put on defendant's Relief Department and paid a stipulated sum monthly. Thereafter he agreed to release his rights under the Relief Department, and received disability benefits as prescribed in his certificate. Several years thereafter disability benefits were cut off, and he was required to furnish evidence of his total and permanent disability. Plaintiff furnished certificates of several physicians that he was totally and permanently disabled. Disability benefits were denied by defendant's board of directors. The constitution and by-laws of defendant provided that the decision of its board of directors should be final on the question of the existence of disability. Upon the trial of the action plaintiff introduced the testimony of several expert witnesses and several nonexpert witnesses that he was totally and permanently disabled as defined in the certificate, and defendant introduced some negative testimony that plaintiff was not so disabled. *Held:* The evidence was properly submitted to the jury on the issues of whether defendant's board of directors unreasonably, arbitrarily, and in want of good faith, rejected plaintiff's claim, and whether plaintiff was totally and permanently disabled.

5. Insurance P b—

The exclusion of the constitution of defendant mutual benefit association from the evidence *held* not prejudicial, all material parts of the constitution bearing on the controversy having been admitted in evidence, and the constitution, including index, comprising several hundred pages.

6. Insurance G e—

Held: The refusal to limit the recovèry of disability benefits to the Disability Department of defendant mutual benefit association was not error, defendant having the right under the judgment to pay plaintiff from its disability fund, and the matter being one of bookkeeping on the part of defendant.

7. Evidence N b—

Positive evidence should be given more weight than negative evidence.

STACY, C. J., dissenting.

APPEAL by defendant from *Hill, Special Judge,* and a jury, at January Term, 1935, of SWAIN. No error.

This is an action brought by plaintiff against the defendant to recover the sum of $650.00, on account of monthly payments due from 1 April, 1933, to 1 May, 1934, under Beneficiary Certificate No. A-316839 of the series of 1907, issued by defendant to plaintiff on 12 June, 1922. The disability benefit for which recovery is sought in this action is set forth in the Constitution of the Brotherhood of Locomotive Firemen and Enginemen (in effect on and after 1 January, 1932), sec. 23 (a), page 94: "In this Constitution of the Brotherhood of Locomotive Firemen and Enginemen, total and permanent disability shall be construed to

mean such a state of bodily incapacity as shall wholly and permanently prevent a member from engaging in any occupation, profession, or business, or from performing or directing any work for remuneration or profit, but shall not include claims resulting solely from old age."

The plaintiff was 49 years of age. He was working on the railroad, running a switch-engine, and joined the defendant organization in 1915 or 1916. He is still a member and pays defendant $4.50 a month. Since December, 1927, the plaintiff, from the Relief Department, has been paid $75.00 a month for disability. On 30 September, 1931, he was a member in good standing of the Relief Department, and received notice that payment for disability was going to be discontinued. (Letter of A. Phillips, General Secretary and Treasurer, 15 September, 1931.) On 19 November, 1931, he agreed with defendant to become a member of its Disability Benefit Department and release his rights to the Relief Department, and the defendant paid plaintiff $50.00 a month under the new arrangement until March, 1933, when plaintiff was cut off.

There is in Asheville, N. C., a local lodge of defendant, known as the Blue Ridge Lodge, No. 455. Plaintiff joined this lodge in Asheville and is in good standing. There are about 100 members in the lodge. The money is all collected in Asheville. When plaintiff was cut off on 20 May, 1933, he filed an application on blanks (as did the doctors) furnished by defendant "to the members of Lodge 455," stating, "I am totally and permanently disabled from engaging in any occupation, profession, or business, or from performing or directing any work for remuneration or profit on account of asthma and chronic bronchitis. . . . My last occupation or employment of any kind was engineer. . . . Q. Are you now totally disabled? Yes. Have you performed work of any nature for remuneration or profit since this disability was incurred? No."

The affidavit of Dr. D. R. Bryson, attending physician, states in part: "I have carefully and thoroughly examined Robert Cordell, age 46, a member of Lodge 455 of the Brotherhood of Locomotive Firemen and Enginemen, and find as follows: Date and place of examination: 5/18/33, Bryson City, N. C. How long have you been his attending physician? At times for 5 years. . . . Date and cause of injury or onset of present illness—followed influenza in 1925. Date on which he was obliged by reason of injury or illness to give up all work—1927. What improvement, if any, has occurred since you first attended him? None. 'Total and permanent disability shall be construed to mean such a state of bodily incapacity as shall wholly and permanently prevent a member from engaging in any occupation, profession, or business, or from performing or directing any work for remuneration or profit, but shall not include claims resulting solely from old age.' In your opinion,

is he *totally* and *permanently disabled* as above defined? Yes. Do you believe he is able to engage in any of the duties of his *usual* occupation? No. Do you believe he is able to engage in *any* occupation for at least part time? (Please explain fully.) Nothing in way of actual labor. If not, when, in your opinion, will he be able to do so? Indefinite."

Report of Dr. A. C. Ambler, examining physician: "Date and place of examination, Asheville, N. C., 15 June, 1933. Give below, under Remarks, a complete statement of your examination, with an accurate description of this claimant's condition as you found it upon examination, giving all the evidence, physical signs, available X-ray or laboratory findings, of illness or injury. Diagnosis? Bronchial asthma and bronchiectous. Are you able from this examination to confirm this diagnosis? If not, please explain? Yes. Do you believe he is able to engage in any of the duties of his *usual occupation?* No. Do you believe he is now able to engage in *any* work, either manual, clerical, sedentary, or directive nature, for at least part time? No. Please explain fully. Patient extremely short of breath and weak, slightly cyaustic, coughing and expectorating continuously. Expectoration muco purulent. When, in your opinion, did total disability begin? 1928. When, in your opinion, did total disability cease? Still disabled. If now totally disabled as defined above, please estimate the length of future total disability? Probably permanent. In your opinion, is he totally and permanently disabled as defined in above law? Yes. (This is set forth and is quoted before—Const., sec. 23 (a), p. 94, *supra*)."

On this application of plaintiff, accompanied by the affidavits of the physicians, the local lodge made its report: "Report of the Local Lodge—To the General Secretary and Treasurer—We beg to inform you that at a regular meeting of Lodge No. 455, held 23 May, Asheville, N. C., the above application for disability benefit allowance of Brother Robert Cordell, of Lodge No. 455, was duly considered and approved. President O. H. Bradshaw, Acting Recording Secretary. T. J. Ledwell, Rec. Sec. (Lodge Seal.) (Application will not be approved by a local lodge unless sworn statements from the applicant and examining physician are completed.)"

On 18 January, 1934, the International President disallowed the claim, and plaintiff appealed to the Board of Directors, who set a time for hearing. The plaintiff sent certificate from Dr. P. R. Bennett that he was unable to travel, and also in the record is a certificate as follows: "To the Brotherhood of Locomotive Firemen and Enginemen, Cleveland, Ohio. This is to certify that I have examined and treated Bob Cordell, and find him suffering from chronic bronchial asthma in a severe form and also from intercostal neuritis, and I further certify that he is totally disabled, and it is my opinion he always will be. Yours respectfully, (Signed) P. R. Bennett, M. D."

C. V. McLaughlin, Acting General Secretary and Treasurer for defendant, wrote a letter to plaintiff directing him to present himself to Dr. Ambler for examination, which he did.

On 19 February, 1934, the Board of Directors, on appeal, disallowed the claim of plaintiff. Dr. T. W. Folsom, an expert, testified in part: "I first treated him in 1931, soon after I came here. He is my patient now and has been continuously since 1931; however, he has seen other doctors in the meantime. It is rather difficult to say how frequently during that time I have treated Mr. Cordell; often here I would treat him for a week or two at a time, and then maybe he would go a week or so without treatment. It went along about that rate until now. At the present time he is residing in Asheville. I reside at Swannanoa; I have been called from Swannanoa to see Mr. Cordell since he has been in Asheville. I think the plaintiff is permanently and totally disabled; that is my opinion; in my opinion, he has been in that condition for three and a half years, that is as long as I have known him; I couldn't say beyond that. When I first examined him I found several conditions there, intermedial emplyseum, dilitation of the lung cells themselves; bronchitis, bronchial asthma, paroxysms, and chronic fibroid tuberculosis."

G. N. Denton, for 16 years a member of Blue Ridge Lodge, No. 455, and Financial Secretary, testified in part: "The plaintiff is now paying his dues of $4.50 to the defendant. On 30 September, 1931, the plaintiff in this action was then a member and in good standing with the defendant. I have known the plaintiff in this action, Mr. Cordell, about 20 years, I guess. He at one time worked for some railroad company; I know that. Since 1927, and on up to the present time, I saw Mr. Cordell very often, I couldn't tell, but every month, anyway. I have observed his physical condition; he has been a very sick man. He has been sick for the last 10 or 12 years to my knowledge; and I, as an officer of the defendant, knew that."

Dr. Charles Hartwell Cocke, an expert, testified in part: "I have seen him within the last three months. As I have not examined him for the last six weeks, I would not want to make any categorical statement, but from my knowledge and observation of him, I would feel that he is still totally incapacitated from gainful occupation. When I examined him within the last 3 months, I think he was then totally incapacitated from gainful occupation; that is my opinion; that he was at that time. I would say that my opinion is, from the nature of the disabilities that I have observed in Mr. Cordell, that he has been continuously disabled and totally disabled from gainful occupation since I first knew him, in December, 1927; because of the presence of advanced bilateral fibroid tuberculosis, with extensive emphysema and, asthmatoid attacks resulting

from the above, and from the numerous instances in which I have had to attend him for pulmonary hemorrhages resulting from the above disease."

Mrs. Robert Cordell testified: "Mr. Cordell and I have been married 22 years, I believe. For the last seven years, Mr. Cordell hasn't been able to work, what you say to work regularly, for a long time, I couldn't say just how long; he has helped me what he could in the little business I would try to run; he would help at times and other times he couldn't help. I have seen him have hemorrhages of the lungs; in October and November, 1934, very bad, he had several. He bled and spit up blood, more than he does right now, but he does some now, but in those two months it was right bad. I should say he does cough. It is very difficult for him to breathe. He doesn't sleep much, he doesn't have much rest. I have observed that condition for some several years. During all this period of time I have described to the jury, he spends a good deal of his time in bed."

The defendant had Dr. Edward W. Schoenheit to examine plaintiff. The physician said: "I don't know whether I can give an exact answer as to what I found Mr. Cordell was suffering from in October and November, 1933; but I was asked to try to find a diagnosis at that time, whether or not he was suffering from active tuberculosis; whether or not tuberculosis was the cause of his present disability, or whether it was bronchietasis or bronchial asthma. My findings were that he had an old healed—healed, so far as I could determine by examination at that time—at least inactive—pulmonary tuberculosis. He has profuse cough and expectoration, which I thought might be due to the bronchietasis. The X-ray did not reveal any evidence of this. Due to the fact that he had those asthmatic attacks, I felt that the cause of the trouble at that time was bronchial asthma. In my own opinion, I did not find any evidence of activity at that time."

In a letter from the same physician on 21 November, 1933, he states, in regard to plaintiff: "He has numerous rales and squeaks throughout his chest and is somewhat short of breath; he also has asthmatic attacks. I saw him in one of these and administered adrenalin hypodermically."

On cross-examination, Dr. Folsom testified in part: "I know about him being elected justice of the peace out here. I have an opinion about whether or not he could sit in his office and take affidavits and handle matters which a justice of the peace ordinarily handles; my opinion is that his physical and mental condition would not permit it. . . . I know that on account of the plaintiff's physical condition he couldn't hold the office of justice of the peace, and resigned."

The plaintiff alleged in his complaint: That defendant has arbitrarily, unreasonably, and unlawfully and fraudulently refused to pay plaintiff

the aforesaid sum of $50.00 per month, and has arbitrarily, unreasonably, wrongfully, and unlawfully refused to carry out and perform the terms of the aforesaid contract and the terms and conditions of said Constitution in effect 1 January, 1932, and plaintiff's said Beneficiary Certificate. That plaintiff has exhausted all remedies he has by appeal provided by the laws of the defendant Brotherhood of Locomotive Firemen and Enginemen, and has given the General Secretary and Treasurer of defendant thirty (30) days' notice in writing of his intention to bring this action.

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

"(1) Did the defendant unreasonably, arbitrarily, and in want of good faith, reject plaintiff's claim for a monthly compensation on account of alleged permanent and total disability? Answer: 'Yes.'

"(2) Is the plaintiff totally and permanently disabled? Answer: 'Yes.'

"(3) Is the plaintiff entitled to receive from the defendant $50.00 per month on account of said total and permanent disability, as alleged? Answer: 'Yes.'

"(4) In what amount, if any, is the defendant indebted to the plaintiff? Answer: '$650.00.' "

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 other necessary facts will be considered in the opinion.

Edwards & Leatherwood for plaintiff.
Johnston & Horner 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.

In 51 R. C. L., at p. 1421—II. General Rules, is the following: "There is a decided conflict of authority on the question of the validity of provisions of the constitution, by-laws, or contracts of a mutual benefit association undertaking to make conclusive decisions of its tribunals or officers directly upon claims for benefits. What seems, however, to be the weight of authority holds that such provisions are contrary to public policy and void, and so will not preclude either the member, in case of a claim for disability or sick benefits, or his beneficiary or representative, in case of a claim for death benefits, from resort to the civil courts, if by its contract the association assumes an absolute legal obliga-

tion to pay the benefits in a certain event, and does not merely engage to pay such benefits as may be awarded by its officers or tribunals." The N. C. case of *Kelly v. Trimont,* 154 N. C., 97, is cited.

In 51 A. L. R., *supra,* at p. 1436, we find: "In *Kelly v. Trimont Lodge* (1910), 154 N. C., 97, 52 L. R. A. (N. S.), 823, 69 S. E., 764, it was said: 'Our Court has uniformly held to the doctrine that, when a cause of action has arisen, the courts cannot be ousted of their jurisdiction by agreements, previously entered into, to submit the liabilities and rights of the parties to the determination of other tribunals named in the agreement; but it has been also generally held that the agreement to submit the particular question of the amount of loss or damage to the assured under an insurance policy is not against public policy, and is sustained. That is simply a method for the ascertainment of a single fact, and not the determination of the legal liability of the insurer.' And stating it to be the rule now, with reference to agreements to arbitrate, that it is competent for such societies to contract that the amount of damages which may be recovered, or the existence of any fact which may enter into the right to recover, shall be submitted to arbitration, provided the right is not embraced in the agreement, the Court, in *Nelson v. Atlantic Coast Line R. Co.* (1911), 157 N. C., 194, 52 L. R. A. (N. S.), 829, 72 S. E., 998, held that a railway relief department may make the determination of its own tribunals conclusive as to the duration of the time in which a member is entitled to benefits, distinguishing the case from the *Kelly case* (N. C.), *supra,* upon the ground that in that case the agreement was to submit the whole controversy to arbitration. It will be observed, too, from the quotation above, that the *Kelly case* in effect approved the rule which the *Nelson case* adopted."

In *Nelson v. R. R., supra,* at p. 207, it is said: "This is not in conflict with the opinion in *Kelly v. Trimont Lodge,* 154 N. C., 98. In that case it is stated that the plaintiffs were entitled, under the rules and regulations, to the sum demanded, and the defendant denied the right of action. It was held that an agreement to submit the whole controversy to arbitration was not binding; but it is distinctly stated that it was competent to agree that the decision of a single fact, such as we have here, could be submitted to a tribunal within the order. When a member submits his claim to the committee he is entitled to a hearing, and is not concluded by its action if it is fraudulent or oppressive, of which the facts on this record furnish no evidence."

In *S. c.,* 167 N. C., 185, the principle is reiterated that a party is not bound by the award of the committee if it is fraudulent or oppressive.

In Cyc. of Ins. Law (Couch), Vol. 1, part sec. 266, pp. 666-7, the law is thus stated: "There is a decided conflict of authority on the question of the validity of provisions undertaking to set up society tribunals with

exclusive jurisdiction and conclusive decisions as to controversies which involve property rights. The apparent weight of authority—at least, numerically as to cases and jurisdictions—denies validity to such absolute and arbitrary restrictions on the theory that they oust the courts of jurisdiction in violation of the law of the land; at least, where the society has assumed an absolute legal obligation to pay in a certain event, as distinguished from a mere engagement to pay such benefits as may be awarded by its officers or tribunals in the exercise of a discretion vested in them. Nor need remedies within the order always be exhausted where property rights are involved. And any rule which precludes a beneficiary from bringing an action in the courts, even though no remedies can be had within the order because of the default or nonaction of its officials over whom the beneficiary has no control, is unreasonable and contrary to public policy. A benefit society or association cannot make itself a judge in its own case by requiring that all claims or cases shall be tried by its tribunal in the first instance. But even in jurisdictions which in general deny, or at least do not concede, the validity of provisions purporting to make the decisions of internal tribunals conclusive upon claims for benefits, an exception is made where the insurance contract expresses no legal obligation to pay any definite sum, but only to pay such sums as may be determined or allowed by the officers or tribunals of the society, the distinction being rested upon the difference between a contract which creates an absolute legal liability and one which does not." 45 C. J., 270.

In support of the text in 51 A. L. R., *supra,* cases from both North Carolina and Ohio are cited. Therefore, the point is not material as to the law of Ohio controlling. Then, again, N. C. Code, 1931 (Michie), sec. 6287, is as follows: "All contracts of insurance on property, lives, or interests in this State shall be deemed to be made therein; and all contracts of insurance the applications for which are taken within the State shall be deemed to have been made within the State, and are subject to the laws thereof." Policies of insurance issued by foreign companies, the applications for which are taken in this State, are to be construed in accordance with the laws of this State. *Horton v. Life Ins. Co.,* 122 N. C., 498. A provision in a contract of insurance that, "This contract shall be governed by, subject to and construed only according to the laws of the State of New York, the home office of said association," is void in so far as the courts of this State are concerned. *Blackwell v. Life Assn.,* 141 N. C., 117. See *Modern Woodmen of Am. v. Mixer,* 267 U. S., 544. In the present case the allegations of the complaint clearly bring the case under the jurisdiction of this State.

The only question now under consideration in this jurisdiction was there any evidence to support the finding of the jury on the following

two issues: "1. Did the defendant unreasonably, arbitrarily, and in want of good faith, reject plaintiff's claim for a monthly compensation on account of alleged permanent and total disability? Answer: 'Yes.' 2. Is the plaintiff totally and permanently disabled? Answer: 'Yes.' "

What was the evidence succinctly, taking the circumstances: The plaintiff was not in arrears under the policy and had, on account of total and permanent disability, been receiving $75.00 a month since 1927. On 19 November, 1931, he agreed with defendant to release his rights under the Relief Department and receive $50.00 a month under the Disability Benefit. In March, 1933, plaintiff was cut off and required to furnish evidence of his total and permanent disability. The following witnesses testified to the effect that plaintiff was totally and permanently disabled: The plaintiff; Dr. D. R. Bryson, an expert and plaintiff's attending physician; Dr. A. C. Ambler, an expert who examined plaintiff at defendant's request. The Local Lodge's report to the General Secretary and Treasurer shows: "We beg to inform you that at a regular meeting of Lodge No. 455, held 23 May, Asheville, N. C., the above application for Disability Benefit Allowance of Brother Robert Cordell, of Lodge No. 455, was duly considered and approved." The International President disallowed the claim, and on appeal the Board of Directors also disallowed it. Dr. P. R. Bennett certified to defendant, at its request, "that he is totally disabled, and it is my opinion he always will be." On the trial, Dr. T. W. Folsom, an expert, testified: "I think the plaintiff is permanently and totally disabled," and has been in that condition three and a half years. G. N. Denton, Financial Secretary of Blue Ridge Lodge, testified: "I have observed his physical condition. He has been sick for the last 10 or 12 years to my knowledge and I, as an officer of the defendant, knew that." Dr. Charles Hartwell Cocke, an expert, testified: "I would say that my opinion is, from the nature of the disabilities that I have observed in Mr. Cordell, that he has been continuously disabled and totally disabled from gainful occupation since I first knew him, in December, 1927." Plaintiff's wife's testimony is to like effect. The plaintiff was unable to travel to Ohio to appear in person before the committee which cut him off.

The testimony of Dr. Edward W. Schoenheit, the witness for defendant, was to the effect, "I don't know whether I can give an exact answer as to what I found Mr. Cordell was suffering from in October and November, 1933; but I was asked to try to find a diagnosis at that time, whether or not he was suffering from active tuberculosis; whether or not tuberculosis was the cause of his present disability," etc.

Under the policy plaintiff was entitled to recover for total and permanent disability from engaging in any occupation, etc. Dr. Schoenheit was directed by defendant to diagnose "Whether or not he was suffering

from active tuberculosis; whether or not tuberculosis was the cause of his present disability." It would appear that defendant had the idea that if plaintiff did not have active tuberculosis plaintiff would be cut off, although he was totally and permanently disabled. This was not defendant's contract with plaintiff. It appears that all the positive evidence was to the effect that plaintiff was totally and permanently disabled under the provisions of the policy. Dr. Schoenheit's evidence was not to the point in controversy and negative evidence. It has been long settled in this jurisdiction that positive evidence is entitled to more weight than negative testimony. *State v. Murray,* 139 N. C., 540. The temporary holding of the position of justice of the peace is not material from the evidence. We think all the evidence shows "a state of bodily incapacity." *Gossett v. Ins. Co., ante,* 152.

Notwithstanding all the positive evidence, and, in fact, it may be conceded that all the evidence as to the total and permanent disability of plaintiff under the recovery clause was one way, the defendant's Board of Directors denied plaintiff's right for compensation under the policy. We think the matter was properly left to the jury. The charge of the court below to the jury was fair and impartial, applying the law to the facts. In fact, there was no exception and assignment of error to any part of the charge.

The second question presented: "Did the court err in excluding the constitution of the defendant from the evidence?" We think not. All the material parts of the constitution of the defendant that bore on the controversy were allowed to be introduced. The constitution, including index, is a book comprising 391 pages. At least, there was no prejudicial error.

The third question presented: "Should the recovery have been limited to the Disability Fund and the Disability Benefit Department of defendant organization?" This action was against the defendant. It contended that it owed plaintiff nothing. Under his Beneficiary Certificate, the plaintiff did not sue a department of defendant, but the defendant. In fact, he could not sue a part of defendant's activities. Under the present judgment defendant can pay plaintiff out of its Disability Fund and the Disability Benefit Department. It is a matter of bookkeeping on the part of defendant. On the entire record, we see no prejudicial or reversible error.

No error.

STACY, C. J., dissents on the ground that the evidence is not sufficient to go to the jury on the first issue. True, there was evidence before the General Secretary and Treasurer of defendant organization, and its International President and Board of Directors on appeal, to the effect

that the plaintiff was totally and permanently disabled, as he claimed, but this, and this alone, does not warrant the finding of arbitrariness or *mala fides* on their part. *Nelson v. R. R.,* 157 N. C., 194, 72 S. E., 998; *S. c.,* 167 N. C., 185, 83 S. E., 322. Furthermore, there was evidence to the contrary before these officials at the time they passed upon plaintiff's claim, as witness the following from certificate of Dr. E. W. Schoenheit, the last physician appointed to examine plaintiff: "I cannot say that he is totally and permanently disabled."

To say that a jury or fact-finding body may be convicted of fraud simply because it selects out of conflicting evidence, or, at most, rejects the positive and accepts the negative testimony in a case, is to announce a doctrine at once new and novel in view of the many such verdicts rendered and upheld in this jurisdiction. Nor does the rule which attributes more weight to affirmative testimony go to this extent. Why admit negative testimony at all, if it is not to be accepted? *S. v. Murray,* 139 N. C., 540, 51 S. E., 775.

MRS. W. S. INGRAM, WIDOW OF W. S. INGRAM, v. W. F. INGRAM, EXECUTOR OF THE LAST WILL AND TESTAMENT OF W. S. INGRAM, DECEASED, IN HIS REPRESENTATIVE CAPACITY, AND W. F. INGRAM, PERSONALLY; AND UNITED STATES FIDELITY AND GUARANTY COMPANY.

(Filed 1 November, 1935.)

1. **Wills F d—Where devisee makes election after knowledge that testator had deeded away part of property, devisee is bound by his election.**

Testator devised certain realty to defendant, whom he also named executor of his will. Testator devised his home place to his wife for life, and directed that defendant pay her a stipulated sum yearly for her support during her life and that at her death the home place be sold and the defendant be reimbursed for the advancements out of the purchase price. Prior to his death, testator executed a deed to part of the home tract to a third person, and the deed was registered after his death. Defendant had no knowledge of the deed at the time of issuance of letters testamentary, but later acquired knowledge of the deed, and thereafter paid testator's wife the annuity for several years in accordance with the provisions of the will. Thereafter defendant refused to make further payments, contending that by reason of the fact that part of the home place had been deeded away, the balance left would not bring sufficient money upon sale to reimburse him for further payments, and that it would be inequitable to force him to continue paying the annuity. *Held:* Defendant, by paying the annuity for several years with knowledge of all the facts, made his election, and is bound thereby, and is not entitled to be relieved of further payments, a devisee making his election being bound thereby even though it turns out that the burden is greater than the benefit.

2. Limitation of Actions B a—Held: Cause of action for annuity accrued date annuity was due and not date of notification of intention not to pay.

Defendant devisee, under the terms of a will in which he was also named executor, elected to pay plaintiff an annuity. Defendant paid the annuity for several years, and thereafter notified plaintiff that he would not make further payments. *Held:* Plaintiff's cause of action to recover the annuities accrued on the date the first annuity that was not paid became due, and not the date of defendant's notification he would not pay same, and, the present action having been instituted within three years from the date the first annuity that was not paid became due, defendant's plea of the statute of limitations is unavailing.

3. Wills F e—Due date of annuities should be computed from date one year after probate of will and qualification of executor.

Defendant devisee, under the terms of a will in which he was also named executor, elected to pay plaintiff an annuity as stipulated in the will. Defendant paid the annuity for several years and then refused to make further payments. *Held:* The first annuity was due and payable one year after the date of the probate of the will and defendant's qualification as executor, and the annuity for each succeeding year was due and payable on the same date of the following year, and in plaintiff's action to recover unpaid annuities, plaintiff may recover only annuities due and payable at the time of instituting action, and interest on the unpaid annuities from the date each was due, computing the time not from the date of the probate of the will and defendant's qualification as executor thereunder, but from the same date of the following year.

4. Wills F f—Held: Annuity provided for in this will was not a charge on real or personal property of testator.

Testator directed that his devisee, also named executor in the will, pay plaintiff a stipulated annuity so long as she should live, and that at her death a house and lot devised to plaintiff for life should be sold and the devisee reimbursed for the advancements out of the proceeds of sale. *Held:* The annuities are not a charge upon the property, real or personal, belonging to the estate, and in plaintiff's action to recover of the devisee unpaid annuities, judgment that the house and lot should be sold to pay annuities due and to become due, is error.

APPEAL by W. F. Ingram, as executor and personally, from *Stack, J.*, at September Term, 1934, of MONTGOMERY. Modified and affirmed.

This is an action to recover of the defendant W. F. Ingram, as executor of W. S. Ingram, deceased, and of the defendant W. F. Ingram, personally, certain sums of money now due the plaintiff on account of annuities provided for her by the last will and testament of her deceased husband, W. S. Ingram.

It is admitted in the pleadings in the action that W. S. Ingram died in Montgomery County, North Carolina, on 17 April, 1920, leaving a last will and testament, which was duly probated and recorded in the office of the clerk of the Superior Court of said county on 30 April, 1920. The provisions of said last will and testament pertinent to this action are as follows:

"ITEM 3. I will, bequeath and devise unto W. F. Ingram the A. C. Robinson land containing 435 acres, more or less, 250 acres including the old homestead with all buildings thereon, the land to be run out as W. F. Ingram may wish to include the building, to him and his heirs, the valuation to be fixed by three free-holders in the township."

"ITEM 4. I will bequeath unto my wife, L. A. Ingram, my house and lot in Mt. Gilead during her life, and my executor to pay her three hundred dollars per year during her life as a support for board and clothing, this amount to be paid by him, and after her death the house and lot to be sold and pay the executor his money and interest for the amount he has advanced and paid out for her board and support, and the balance of the money to be divided equally amounts to the five children here named: Mrs. J. B. Ingram, Mrs. Frank McAulay, Mrs. J. I. Crocker, E. J. Ingram and W. F. Ingram."

"ITEM 5. All my other lands to be sold also the mineral interest in 350 acres more or less known as the Sam Christian land. See deed from J. C. Christian and E. G. L. Barrings Est."

"ITEM 6. In making settlement I desire all my five children in this will shall share equally in all my property real and personal."

"ITEM 9. In consideration of advancement already made to my daughter, Mrs. J. A. McAulay, to-wit: a deed to five hundred acres of land, more or less, and my note for one thousand dollars all ready paid I hath not further bequeath to her any more of my estate except one hundred dollars to be paid her after the death of my wife by my executor from the sale of the homestead in Mt. Gilead."

"I hereby nominate and appoint my son, W. F. Ingram Executor and I hereby direct that before entering upon the discharge of his duty as executor he give bond in the sum sufficient to cover all my personal property to be adjudged by the Clerk of the Superior Court of Montgomery County, said bond to be conditional upon the faithful performance of his duty as Executor."

After the probate of said last will and testament, the defendant W. F. Ingram duly qualified as executor of W. S. Ingram, deceased, having first filed a bond in the sum of $20,000, as required by the testator, with the United States Fidelity and Guaranty Company as surety.

After the defendant W. F. Ingram qualified as executor of his father, W. S. Ingram, deceased, from year to year he paid to the plaintiff the sum of $300.00, as he was required to do by Item 4 of said last will and testament, each year, until and including the year 1929. He paid to her the sum of $25.00 on account of the annuity due her for the year 1930, and a like sum on account of the annuity due her for the year 1931, leaving a balance due her for each of said years of $275.00. He has failed to pay her any sum on the annuity for the year 1932, or for the year 1933.

This action was begun on 18 November, 1933, and was tried at September Term, 1934, of the Superior Court of Montgomery County.

In his answer the defendant W. F. Ingram alleges that after his execution of said last will and testament, and before his death on 17 April, 1920, to wit: on 31 March, 1920, the testator conveyed to C. B. Ingram a large part of the lot which he devised to the plaintiff in Item 4 of his last will and testament; that the deed for said part of said lot was not registered until after the death of the testator, to wit: on 20 September, 1920; and that at the time he qualified as executor of said last will and testament, the defendant did not know that his testator had conveyed a large part of said lot. He further alleges that by reason of this conveyance the part of said lot which will be subject to sale for the payment of the sums required to pay the annuities to the plaintiff will not be sufficient in value to reimburse him for the amounts which he is required by the will to advance for the support of the plaintiff during her life. He alleges that it will be inequitable to require him to continue to pay out of his own funds the annuities provided in the will for the plaintiff.

In further defense of plaintiff's recovery in this action the defendant alleges that on 30 March, 1930, defendant notified plaintiff that he would make no further payments to her on account of the said annuities, and that as more than three years had elapsed from said date until the commencement of this action, the same is barred by the three years statute of limitations. He pleads said statute in bar of plaintiff's recovery in this action.

When the action was called for trial, the plaintiff moved for judgment on the pleadings. The motion was allowed, and defendant excepted.

It was thereupon ordered, considered, and adjudged by the court that the plaintiff recover of the defendant W. F. Ingram, both as executor and personally, the following sums of money:

$275.00, with interest from 30 April, 1930.
275.00, with interest from 30 April, 1931.
300.00, with interest from 30 April, 1932.
300.00, with interest from 30 April, 1933.
300.00, with interest from 30 April, 1934.

It was further ordered and decreed by the court that "the said W. F. Ingram, executor of the last will and testament of W. S. Ingram, deceased, proceed forthwith to apply for leave of the clerk of the Superior Court to sell the personal estate, wherever situated and to be found, of the said W. S. Ingram, deceased, to make assets to pay this judgment in full, with interest, and if a sufficient amount of cash cannot be realized

out of the personal estate, then to proceed forthwith to apply for license to sell the real estate devised by the said W. S. Ingram, deceased, to all the devisees named in said last will and testament, or so much thereof as is necessary to pay this judgment in full, with interest as aforesaid; and to further make ample provision in the sale of said real estate and personal property for the payment in full of all future annuities as in said will provided, so long as the said plaintiff, Mrs. W. S. Ingram, shall live, and to this end the said defendant W. F. Ingram, both as executor and personally, is hereby ordered and directed to pay said reserve for future annuities into the office of the clerk of the Superior Court of said county, to be disbursed by said clerk in accordance with said will and this judgment."

It was further ordered and adjudged by the court that plaintiff recover of the defendant W. F. Ingram, both as executor and personally, the costs of the action.

The plaintiff submitted to a voluntary nonsuit as to the defendant United States Fidelity and Guaranty Company.

The defendant W. F. Ingram, both as executor and personally, appealed to the Supreme Court, assigning as error the allowance by the court of plaintiff's motion for judgment on the pleadings, and the judgment as signed by the court.

Armstrong & Armstrong for plaintiff.
R. T. Poole for defendant.

CONNOR, J. The facts alleged in the complaint in this action are sufficient to constitute a cause of action on which the plaintiff is entitled to recover of the defendant W. F. Ingram. These facts are admitted in the answer. For this reason the plaintiff was entitled to judgment on the pleadings, unless the allegations in the answer are sufficient to constitute a defense to the action. For the purposes of her motion, the plaintiff admitted the allegations of the answer. On her appeal to this Court she contends that the facts alleged in the answer are not sufficient to constitute a defense to her cause of action as alleged in her complaint, and admitted in defendant's answer. This contention is sustained.

The testator died on 17 April, 1920. His last will and testament was probated and recorded, and the defendant, as the executor named therein, qualified for the discharge of his duties on 30 April, 1920. The annuity for the first year after the death of the testator became due and payable to the plaintiff on 30 April, 1921. When the defendant paid this annuity, he had notice that the testator had conveyed by the deed which was recorded on 20 September, 1920, a large part of the lot of land which he had devised by his will to the plaintiff for her life, and which

he directed to be sold at her death, to reimburse the defendant for all amounts paid by him during her life for her support. With this knowledge, the defendant paid the annuity not only for the first year, but for each succeeding year until and including the year 1929. Having elected to assume the burden imposed upon him by the testator in his will, with full knowledge that by the provisions of the will he must look solely to the lot devised by the testator to the plaintiff for her life, as the only source from which he could hope for reimbursement, he cannot now be relieved of his burden because the testator had conveyed a part of the lot prior to his death by deed of which he had notice before he voluntarily assumed the burden. In *Elmore v. Byrd,* 180 N. C., 120, 104 S. E., 162, in which *Walker, J.,* discussed the principles on which the equity of election rest, it is said: "When one elected to take a benefit under the will, with burdens attached, he is bound although it turned out that the burden was greater than the benefit."

On the facts admitted in the pleadings, the three years statute of limitations cannot avail the defendant as a bar to plaintiff's recovery in this action. The will was probated and recorded, and the defendant qualified as executor of the testator on 30 April, 1920. The annuity for the year 1920 did not become due and payable until 30 April, 1921. This annuity, and the annuity for each succeeding year until and including the year 1929, has been paid by the defendant. He has not paid the annuity for the years 1930, 1931, and 1932, each of which was due at the commencement of this action. The annuity for each of these years became due and payable on 30 April of the succeeding year. Thus the annuity for the year 1930 was due and payable on 30 April, 1931, when plaintiff's cause of action to recover the amount due on said annuity accrued. This action was begun on 18 November, 1933, that is, within three years from the dates on which the causes of action for recovery on account of the annuities for the years 1930, 1931, and 1932 accrued.

The annuities for the years 1933 and 1934 were not due at the commencement of this action. For this reason, there is error in the judgment that plaintiff recover in this action the annuities for the years 1933 and 1934. There is also error in the judgment that plaintiff recover interest on the amounts due on the annuities for the years 1930, 1931, and 1932, prior to the dates on which said annuities were due.

In Item 4 of his will, the testator directed the executor to pay to the plaintiff the sum of three hundred dollars each year so long as she should live. He further directed that his executor should be reimbursed for the amounts which he should pay to the plaintiff by the sale of the house and lot devised to the plaintiff, at her death. The annuities are not charged upon the property, real or personal, owned by the testator at his death. There is error in so much of the judgment as orders and decrees that the

executor shall apply to the clerk of the court for leave to sell said property for the payment of the annuities now due or which shall hereafter become due to the plaintiff.

The plaintiff is entitled to judgment in this action that she recover of the defendant the amounts due at the commencement of the action on account of the annuities for the years 1930, 1931, and 1932, with interest from the dates on which said amounts were due, and the costs of the action. The judgment as modified in accordance with this opinion is

Affirmed.

J. S. BRASWELL v. RICHMOND COUNTY.

(Filed 1 November, 1935.)

Sheriffs B c—Sheriff held not entitled to commissions on amounts collected by auditor on tax sale certificates purchased by county.

Defendant county paid plaintiff sheriff all commissions allowed by statute for collection of taxes made by plaintiff sheriff in money, and allowed him credit in his settlement for tax sale certificates purchased by the county upon sale of the land for taxes by the sheriff as provided by law. After the tax sale certificates were turned over to the auditor, certain sums were collected thereon by the auditor from the taxpayers whose lands had been sold. *Held:* Plaintiff sheriff is not entitled to commissions on the cash collected by the auditor on the tax sale certificates. C. S., 8037, 8049; ch. 107, Public-Local Laws of 1924. Defendant's petition for a rehearing of this case reported in 206 N. C., 74, is allowed.

CLARKSON, J., dissenting.

APPEAL by defendant from *Stack, J.,* at September Term, 1933, of RICHMOND. Petition for rehearing allowed, and judgment reversed.

This action was heard at September Term, 1933, of the Superior Court of Richmond County, on defendant's demurrer to the complaint on the ground that the facts stated therein as constituting each of the four causes of action on which the plaintiff demands judgment are not sufficient to constitute such cause of action. The demurrer was overruled and defendant excepted and appealed to the Supreme Court.

The defendant's appeal was heard at the Spring Term, 1934, of the Supreme Court. The judgment of the Superior Court overruling the demurrer and allowing defendant time to file its answer to the complaint was affirmed. See *Braswell v. Richmond County,* 206 N. C., 74, 173 S. E., 41.

A petition for a rehearing of the appeal was filed by the defendant in the Supreme Court on 7 April, 1934, in accordance with Rule 44, Rules

of Practice in the Supreme Court, 200 N. C., 811. The petition was duly considered and allowed on 11 July, 1934.

The appeal has been reheard on briefs filed by both the plaintiff and the defendant, and on oral arguments ordered by the Supreme Court.

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

CONNOR, J. The facts alleged in the complaint and admitted by the demurrer in this action are substantially as follows:

The tax books of Richmond County for the years 1927, 1928, 1929, and 1930, showing the total amount of the taxes levied upon the taxpayers of said county for each of said years, were duly delivered to the plaintiff, as sheriff of said county. It was the duty of the plaintiff to collect all the taxes due the defendant for each of said years, and to account for the same, as required by statute.

The plaintiff, as sheriff of Richmond County, made the settlement for said taxes, during each of said years, as required by statute. In each settlement, plaintiff was charged with the total amount of the taxes due for said year. He was credited with the amount collected by him, in money, and duly paid to the treasurer of Richmond County; he was also credited with the amount allowed by the board of commissioners of Richmond County as due by insolvent taxpayers, and with the aggregate amount of the certificates issued by the plaintiff to the defendant as the purchaser at tax sales made by the plaintiff as required by statute. At the date of each annual settlement, the plaintiff turned over and delivered to the auditor of Richmond County the certificates which had been credited to him in said settlement. The said auditor, since the dates of the said annual settlements, has collected from the taxpayers whose lands had been sold by the plaintiff the amounts shown by the said certificates as due for taxes, interest, penalties, and costs.

The defendant has paid to the plaintiff all the commissions allowed by statute for collection of taxes made by the plaintiff in money for the years 1927, 1928, 1929, and 1930, and has declined to pay to the plaintiff any commissions on the amounts collected by the auditor of Richmond County on the certificates which had been duly credited to plaintiff in his settlements for said years.

In this action the plaintiff demands judgment that he recover of the defendant commissions on the amounts which the auditor of Richmond County has collected on the tax sale certificates delivered to said auditor by the plaintiff.

After further consideration of the statutes pertinent to a decision of the question presented by this appeal, we are of the opinion that the

plaintiff is not entitled to recover of the defendant on the facts alleged in his complaint, and that there is error in the judgment overruling the defendant's demurrer to the complaint. For that reason, the judgment is reversed.

Under the provisions of chapter 107, Public-Local Laws of North Carolina, Extra Session 1924, the sheriff of Richmond County is entitled to the commissions allowed by said statute only on the amounts collected by him, as taxes, in money. In his settlement with the treasurer of Richmond County, the said sheriff is entitled to credit for the aggregate amount of the tax sale certificates which he has issued to Richmond County, as the purchaser at tax sales made by him as required by statute. C. S., 8049. After the certificates issued by the said sheriff to said county have been duly allowed to him as credits in his settlement, and have been delivered by him to the auditor of said county, C. S., 8037, the said sheriff has no further liability on account of said certificates, nor has he any right to commissions on amounts thereafter collected by the county auditor, or by any other county official duly authorized to collect or receive money for the county on account of said certificates.

The judgment of this Court on the former appeal in this action is overruled.

Petition allowed.

CLARKSON, J., dissenting: It may be conceded, as was said in the former opinion of this Court, *Braswell v. Richmond County,* 206 N. C., 74, that the statutes in regard to the collection of back taxes are not entirely clear in their meaning, but as to Richmond County there can be no doubt that the sheriff was placed on a commission basis of compensation for the collection of all taxes. Public-Local Laws, Extra Session 1924, chapter 107. No exception was made as to the collection of back taxes. It was specified that this was to be full compensation. While a general statute, N. C. Code, 1935 (Michie), 8009, does provide for payment of certain fees, amounting to 95 cents for each sale of land, this is for necessary expenses, and is not compensation to the sheriff, and has no reference whatever to the question involved in this case.

The sole basis for granting a rehearing and for reversing the former opinion of this Court, *Braswell v. Richmond County, supra,* is the following extract from section 8037 of N. C. Code, 1935 (Michie), which was quoted in the former opinion: "All certificates of sales evidencing purchases by counties shall immediately, upon being allowed as a credit in the settlement with the sheriff of the county, be delivered to the county accountant, county auditor, or other officer, specifically designated by the board of county commissioners, or other governing board of the county, except sheriff or tax collecting officer, and it shall be the duty of the officer, or such officer designated, to collect the same."

This statute was enacted in 1927, ch. 221, sec. 4, three years after the passage of the statute fixing the compensation of the sheriff of Richmond County, and if there were conflict between them, the later statute would control, but there is no conflict with the statute fixing the compensation of the sheriff. The later statute provides for a check on the office of the sheriff, and requires him to make delivery of certificates of sales evidencing purchases by counties to some pr0perly designated officer. While it is clearly pointed out that it is the duty of such officer to collect the taxes due on these certificates of sales evidencing purchases by the counties, it is nowhere said that the actual collection shall not be made by the sheriff or the tax collector.

It would be the natural and logical thing to have the sheriff collect these back taxes, for he already has a force of men equipped to do the job. The county accountant, county auditor, or other officer, specifically designated by the board of county commissioners, must set up a force to do the collecting. Now that can be done, but in Richmond County it would mean that while the sheriff is excused from collecting the back taxes, the county commissioners are not relieved of the legal obligation to compensate him for the collection of these taxes. The statute makes no distinction as to the different kinds of taxes. Of course, the statute has reference to the collection of taxes in Richmond County for Richmond County, and not to the collection of license or other taxes for the State Department of Revenue. It is taxes due Richmond County with which we are concerned here.

That it was the plain intention of the Legislature of 1924 to provide that the sheriff should collect a commission on all taxes collected is borne out by other statutes that were then in force. C. S., 8026, provides: "When the county or other municipal corporation becomes the purchaser, under the provisions of this chapter, of any real estate sold for taxes, the sheriff shall issue a certificate of purchase in the name of such corporation substantially in the form provided by the two preceding sections. Such certificates shall remain in the custody of the sheriff, and at any time the county commissioners may assign such certificates to any person wishing to buy, for the amount expressed on the face of the certificate and interest thereon at the rate per centum which the taxes were drawing at the time of the purchase, or for the total amount of all tax on such real estate. Such assignment may be made by the endorsement of the name of the county by the chairman of the board of county commissioners, and such endorsement shall be made when ordered by the county commissioners."

C. S., 8038, which was also in force at that time, provides in part as follows: "The owner or occupant of any land sold for taxes, or any person having a lien thereon or any interest or estate therein, may re-

deem the same, at any time within one year after the date of such sale, by paying the sheriff, for the use of such purchaser, his heirs or assigns, the sum mentioned in his certificate, with interest thereon," etc.

The general statutes in force at the time of the passage of the compensation commission act for the sheriff of Richmond County, make it abundantly clear that it was the clear intention of the Legislature to provide compensation to him also for the collection of back taxes, on a commission basis, and it is a well established principle of statutory construction that a special act is never abrogated by general law, unless intention to abrogate is very clear. *Hammond v. City of Charlotte,* 205 N. C., 469; *Monteith v. Board of Commissioners,* 195 N. C., 71; *State v. Johnson,* 170 N. C., 685.

This action was carefully considered when the opinion was written before. I think it was right then, when rendered by a unanimous opinion of this Court, and I think it is right now. The general act quoted in the main opinion is not applicable to Richmond County, as the Richmond County Act is a special one. In the former opinion it was said, and I repeat (206 N. C., at p. 77): "We do not think the plaintiff would be entitled to the per cent on the tax sale certificates until paid. . . . The statutes are not entirely clear in their meaning, but we think the just intent is borne out by the position here taken, and no time limit is fixed in the local statute before or after sale as to the 'full compensation for collecting the taxes.' There are no officials in the State that have more responsibility for the peace and good order of a county than the sheriffs and 'the labourer is worthy of his hire.' " It is difficult to get good men to serve the public if you pauperize them.

W. A. THOMAS v. AMERICAN TRUST COMPANY.

(Filed 1 November, 1935.)

1. Banks and Banking C e: Trial D a—Where evidence shows breach of contract entitling plaintiff to nominal damages, refusal to nonsuit is proper.

Where a bank wrongfully and unlawfully refuses to pay a check of a depositor drawn against his account, the bank breaches its contract with the depositor and the depositor is entitled to nominal damages at least, and where there is sufficient evidence that the bank wrongfully and unlawfully refused to pay the depositor's check, the bank's motion for judgment as of nonsuit in the depositor's action to recover damages therefor is properly refused.

2. **Banks and Banking C e—In absence of malice, bank is liable only for actual damage resulting from wrongful refusal to pay depositor's check.**

The liability of a bank to a depositor for wrongfully and unlawfully refusing to pay a check of the depositor drawn against his deposit and properly presented for payment, is limited to the actual damage sustained by the depositor when such refusal to pay the check is due to an error or mistake of the employee of the bank and not to malice, C. S., 220 (m), and in the absence of evidence of malice, plaintiff depositor's recovery should be limited to the issue of actual damage sustained.

3. **Same: Trial E d—Instruction on issue of damage in action against bank for wrongfully refusing to pay check held not supported by evidence.**

In an action by a depositor against a bank to recover for the wrongful and unlawful refusal by the bank to pay the depositor's check, it is error for the court to charge the jury on the issue of damage that it should consider the evidence of damage sustained by plaintiff through injury to his credit and reputation in the community resulting from the bank's wrongful act when there is no evidence that plaintiff's credit or reputation had been injured thereby.

APPEAL by defendant from *Hill, Special Judge,* at October Special Term, 1934, of MECKLENBURG. New trial.

This is an action to recover damages caused by the wrongful and malicious refusal of the defendant to pay a check drawn by the plaintiff on the defendant, and duly presented for payment by the payee of the check.

In its answer, the defendant admitted that it had refused to pay the check drawn on it by the plaintiff, as alleged in the complaint; it denied that its refusal to pay the check was wrongful or malicious; it also denied that plaintiff had suffered damages, actual or otherwise, from its refusal to pay said check.

At the trial, the evidence for the plaintiff tended to show that for more than a year prior to 21 March, 1933, the plaintiff, a resident of the city of Charlotte, had kept an account with the defendant in its bank in said city. The plaintiff from time to time made deposits with the defendant, and from time to time drew checks on the defendant, which were duly paid by the defendant, when presented for payment.

On the morning of 21 March, 1933, when the defendant opened its bank for the day's business, the plaintiff's account was overdrawn by a small amount. Soon after the defendant opened its bank, at about 9 o'clock, the plaintiff deposited with the defendant the sum of $74.60, which was accepted by the defendant, and entered on plaintiff's pass book as a deposit. At the time the plaintiff made this deposit, he drew his check on the defendant for five dollars. This check was payable to the plaintiff and was paid by the defendant.

After the plaintiff had made the deposit of $74.60 and had received payment of his check for five dollars, he returned to his place of business in the city of Charlotte, and there drew his check on the defendant for three dollars, payable to the order of A. P. Perry. The plaintiff delivered this check to the payee, who presented it to the defendant for payment at about 10 o'clock that morning. The teller to whom the check was presented refused to pay the check. He made a note on the check as follows: "No account in this name."

The payee did not notify the plaintiff of defendant's refusal to pay his check, but during the morning of 22 March, 1933, procured a criminal warrant from a justice of the peace of the city of Charlotte, for the arrest of the plaintiff for issuing a "bad check," in violation of the statute. The officer to whom the warrant was directed went to the plaintiff's place of business, and after advising the plaintiff that he had the warrant for his arrest, directed him to appear at the office of the justice of the peace at 3 o'clock that afternoon. The plaintiff was not arrested by the officer under the warrant.

As directed by the officer, the plaintiff, accompanied by his attorney, went to the office of the justice of the peace, at 3 o'clock p.m., on 22 March, 1933. At the request of the plaintiff, an officer or employee of the defendant was present at the office of the justice of the peace, and testified that the refusal of the defendant to pay the check when the same was presented for payment by the payee was due to a mistake on the part of the teller to whom it was presented. This teller did not know when the check was presented to him at 10 o'clock that plaintiff had made a deposit at 9 o'clock that morning sufficient to cover his overdraft and to leave to plaintiff's credit an amount sufficient for the payment of the check. After hearing the evidence, the justice of the peace found that the plaintiff was not guilty as charged in the affidavit on which the warrant was issued, and dismissed the action. The defendant voluntarily paid the costs of the action.

At the trial of this action the plaintiff testified that his credit as a business man in the city of Charlotte had not been affected by the issuance of the warrant by the justice of the peace, or by the trial of the criminal action. He said: "I do not know of any place where my credit has been affected by the issuance of the warrant or by the trial. The only injury which I suffered was restlessness during the night following the trial. When I thought of the criminal charge unjustly made against me, I felt humiliated."

At the close of the evidence, the defendant moved for judgment as of nonsuit. The motion was denied, and defendant excepted.

The issues submitted to the jury were answered as follows:

"1. Did the defendant wrongfully and unlawfully refuse to pay or honor plaintiff's check, as alleged in the complaint? Answer: 'Yes.'

"1½. Did the defendant wrongfully and unlawfully represent to the payee of the check drawn by plaintiff on defendant bank that plaintiff had no account in said check, as alleged? Answer: 'Yes.'

"2. What general damages, if any, is the plaintiff entitled to recover? Answer: '$500.00.'

"3. What special damages, if any, is the plaintiff entitled to recover? Answer: '$100.00.'"

From judgment that plaintiff recover of the defendant the sum of $600.00, and the costs of the action, the defendant appealed to the Supreme Court, assigning as error the refusal of the court to allow its motion for judgment as of nonsuit, and certain instructions of the court to the jury to which defendant duly excepted.

Merl M. Long and Jake F. Newell for plaintiff.
Whitlock, Dockery & Shaw for defendant.

CONNOR, J. There was evidence at the trial of this action from which the jury could find, as it did, that the refusal of the defendant to pay the check which was drawn by the plaintiff and duly presented for payment by the payee, was wrongful and unlawful. Such refusal was a breach of the contract between the plaintiff and the defendant with respect to plaintiff's deposit with the defendant. For such breach, the plaintiff was entitled to nominal damages, at least. *Woody v. Bank*, 194 N. C., 549, 140 S. E., 150. For this reason, there was no error in the refusal of the court to allow defendant's motion for judgment as of nonsuit.

There was no evidence, however, tending to show that defendant's refusal to pay the check was malicious. All the evidence shows that the nonpayment of the check was due to a mistake or error on the part of the defendant's teller to whom the check was presented for payment. For this reason, plaintiff's recovery in this action is limited to the actual damages which he suffered by the refusal of the defendant to pay his check.

It is provided by statute that "no bank shall be liable to a depositor because of the nonpayment, through mistake or error, and without malice, of a check which should have been paid had the mistake or error of nonpayment not occurred, except for the actual damages by reason of such nonpayment that the depositor shall prove, and in such event the liability shall not exceed the amount of damages so proven." C. S., 220 (m).

With respect to the second issue, the court instructed the jury as follows:

"The court instructs you that if you find by the evidence and by its greater weight, the burden being on the plaintiff, that the defendant wrongfully refused to honor the plaintiff's check, as alleged, or wrongfully represented that the plaintiff had no account in the defendant's bank, and that in consequence of the latter, the plaintiff's check was turned down, and you further find from the evidence and by its greater weight that as a proximate result of this the plaintiff's credit was impaired or impeached, or his standing injured, or his reputation impaired, then the jury should award such damages as they shall find from the evidence and by its greater weight to be a reasonable compensation for the injury, if any, to the plaintiff's credit, standing, or reputation, brought about and proximately sustained in consequence and as the proximate result of the defendant's alleged wrongful conduct, if the defendant was guilty of any alleged wrongful conduct."

The defendant's exception to this instruction must be sustained. There was no evidence from which the jury could find that plaintiff's credit had been injured, his standing impaired, or his reputation impeached by the refusal of the defendant to pay his check. The plaintiff himself testified to the contrary.

For the error in the instruction, the defendant is entitled to a new trial.

At the new trial, we think that the only issue as to damages should be as follows: "What actual damages, if any, has the plaintiff sustained by the wrongful refusal of the defendant to pay his check?"

Whether there was evidence at the former trial tending to show more than nominal damages, we do not now decide.

New trial.

STATE EX REL. B. H. HICKS ET AL. v. MILDRED W. PURVIS ET AL.

(Filed 1 November, 1935.)

1. Executors and Administrators F f—Administratrix held not liable to creditors for losses incurred in continuing business of deceased.

Where an administratrix *c. t. a.* carries on the business of the testator with the knowledge and apparent consent of all the parties, including plaintiffs, creditors of the estate, and it appears that the administratrix was authorized by order of court to provide out of the funds of the estate labor and materials necessary to carry on the business, plaintiffs may not complain of judgment denying recovery against the administratrix and her bondsman for losses to the estate resulting from the continued operation of the business upon their contention that the estate was thereby rendered insolvent, and that such acts constituted waste or *devastavit.*

2. Limitation of Actions B a—Action against executrix for breach of bond accrues at time of breach and not time administratrix files account.

Plaintiffs, creditors of the estate, brought this action against the administratrix *c. t. a.* and her bondsman, to recover sums paid out by the administratrix in compromising a caveat to the will and in paying fees of the attorneys appearing for administratrix in the caveat proceedings, alleging that such payments constituted waste or *devastavit*, resulting in the insolvency of the estate. *Held:* The action was not to surcharge or falsify the account of the administratrix, but to recover for alleged breach of her bond, and the cause of action accrued at the time the alleged breach was committed, C. S., 441 (6), and plaintiffs' contention that it did not accrue until the administratrix filed her initial account and disclosed the facts to plaintiffs for the first time, cannot be sustained, C. S., 441 (6), having no provision relating to discovery of the breach of the official bond as is provided for in case of fraud under C. S., 441 (9).

APPEALS by plaintiffs and defendant Fidelity and Casualty Company of New York from *Devin, J.*, at June Term, 1935, of VANCE.

Civil action, instituted 27 January, 1933, by creditors of the estate of S. M. Blacknall, deceased, to recover of the defendant administratrix and the surety on her official bond for alleged waste, or *devastavit*, committed, to injury of plaintiffs, in the administration of said decedent's estate.

It is alleged that the plaintiffs are creditors of the estate of S. M. Blacknall, late of Vance County, in the aggregate deficient sum of $21,587.41, evidenced by promissory notes executed by the decedent in his lifetime; that Mildred W. Purvis duly qualified as administratrix *c. t. a.* of the estate of the said S. M. Blacknall, deceased, on or about 23 April, 1929, and gave bond as required by C. S., 33, in the sum of $80,000 with the Fidelity and Casualty Company of New York as surety thereon; and that waste, in the nature of *devastavit*, to the injury of plaintiffs (the estate originally thought to be amply solvent, later proving to be insolvent), has been committed by said administratrix in the administration of the estate in three essential particulars, as follows:

1. By continuing the operation of decedent's business from April, 1929, until the summer of 1932, without proper authority, which resulted in losses in excess of plaintiffs' claim.

2. By using $10,000 belonging to the estate, in June, 1929, to compromise a caveat filed to the will of the deceased.

3. By paying out of the estate in June, 1929, $7,000 to attorneys for services in appearing for the administratrix in said caveat proceedings.

At the October Term, 1933, there was a consent reference, except as to the administratrix, which finally resulted in judgment for defendants on the first item, and judgment for plaintiffs on the second and third items, above set out as alleged matters of waste or *devastavit.*

Both sides appeal, assigning errors.

B. H. Hicks, T. G. Stem, and B. S. Royster, Jr., for plaintiffs.
Ruark & Ruark for defendant Casualty Company.

STACY, C. J. This is the same case that was before us at the Spring Term, 1935, opinion filed 22 May and reported *ante,* 227, to which reference may be had for a more extended statement of the facts.

With respect to plaintiffs' appeal, it is sufficient to say that the continued operation of decedent's nursery business was carried on with the full knowledge and apparent consent of all concerned, creditors and beneficiaries, including the plaintiffs. The referee, therefore, concluded, upon such finding, "that the plaintiffs having permitted the defendant administratrix to continue the business of decedent for a period of more than three years with their knowledge, acquiescence and consent, may not now charge the administratrix with losses arising from the continuation of such business." This was approved by the judge upon exception to the report of the referee. 11 R. C. L., 142.

It also appears that the administratrix was authorized, by order of court, to "provide and pay for, out of the funds of the estate, the necessary labor, fertilizer, spraying materials and other things necessary to carry out the agricultural or nursery contracts entered into by the said S. M. Blacknall before his death, and to protect and preserve the growing crops and nursery stock and all other property belonging to said estate." *Hardy v. Turnage,* 204 N. C., 538, 168 S. E., 823. The plaintiffs are in no position to complain at the ruling upon the first item of their alleged *devastavit. Snipes v. Monds,* 190 N. C., 190, 129 S. E., 413.

The appeal of the surety, Fidelity and Casualty Company of New York, presents the question of the statute of limitations.

It is alleged that the two items of $10,000 and $7,000, paid out of the funds of the estate in connection with the settlement of the caveat in June, 1929, constitute a *devastavit.* This action was instituted 27 January, 1933, three years and more than seven months after the alleged waste. Hence, nothing else appearing, the plea of the statute of limitations would seem to be good. *Dunn v. Dunn,* 206 N. C., 373, 173 S. E., 900; *Finn v. Fountain,* 205 N. C., 217, 171 S. E., 85; *Drinkwater v. Tel. Co.,* 204 N. C., 224, 168 S. E., 410; *Trust Co. v. Clifton,* 203 N. C., 483, 166 S. E., 334; *Barnes v. Crawford,* 201 N. C., 434, 160 S. E., 464; *Anderson v. Fidelity Co.,* 174 N. C., 417, 93 S. E., 948; *Settle v. Settle,* 141 N. C., 553, 54 S. E., 445; *Burgwyn v. Daniel,* 115 N. C., 115, 20 S. E., 462; *Kennedy v. Cromwell,* 108 N. C., 1, 13 S. E., 135; *Woody v. Brooks,* 102 N. C., 334, 9 S. E., 294; *Norman v. Walker,* 101 N. C., 24, 7 S. E., 468.

It is provided by C. S., 441, subsection 6, that an action against the sureties of any executor, administrator, collector, or guardian to recover

on the official bond of their principal, shall be commenced within three years "after the breach thereof complained of"; otherwise, upon the plea of the statute by the surety, the right of action is deemed to be barred. *Dunn v. Dunn, supra; Anderson v. Fidelity Co., supra; Settle v. Settle, supra; Self v. Shugart,* 135 N. C., 185, 47 S. E., 484; *Burgwyn v. Daniel, supra; Gill v. Cooper,* 111 N. C., 311, 16 S. E., 316; *Kennedy v. Cromwell, supra; Woody v. Brooks, supra; Norman v. Walker, supra; Hodges v. Council,* 86 N. C., 181.

It is the contention of the plaintiffs, and their view prevailed in the court below, that the statute did not begin to run until 9 May, 1930, when the administratrix filed her initial account and disclosed to the plaintiffs, for the first time, her intention of claiming said items as proper expenditures in the administration of the estate. The action, however, is not one to surcharge or falsify the account of the administratrix, but the breaches of the bond "complained of" are alleged to have occurred in June, 1929. *Hicks v. Purvis, ante,* 227.

There is no provision in the statute that an action to recover on the official bond of an executor, administrator, collector, or guardian may be commenced at any time within three years from the discovery of the breach by plaintiffs, as in cases of fraud or mistake under subsection 9, but the language of subsection six is, "within three years after the breach thereof complained of." The statute, therefore, began to run from the time of the "breach thereof complained of." *Gordon v. Fredle,* 206 N. C., 734, 175 S. E., 126. This is the clear meaning of the statute, and plaintiffs have declared upon alleged breaches which occurred in June, 1929. Compare *Hood v. Rhodes,* 204 N. C., 158, 167 S. E., 558, and *Williams v. Casualty Co.,* 150 N. C., 597, 64 S. E., 510.

In explanation of the whole case, it may be observed that originally the estate was regarded as a comparatively large one and abundantly solvent. The amounts disbursed in connection with the settlement of the caveat were not thought excessive at the time; nor was it perceived, until much later, that the claims of creditors would not be paid in full. Heavy losses resulted from two severe droughts and the general business depression prevailing throughout the country. Similar stories could be told of many other enterprises.

On plaintiffs' appeal, Affirmed.

On defendant's appeal, Error.

STATE v. A. W. WHITLEY, JOHN ALLMAN, AND R. M. COOK.

(Filed 1 November, 1935.)

1. **Indictment E c—Contention that there was a fatal variance between allegation and proof held untenable in this case.**

   Defendants were prosecuted for larceny and receiving under an indictment charging that the goods belonged to "Cannon Mills Company," whereas the State's evidence tended to show that the property belonged to "Cannon Mills." *Held:* Defendants' motion for judgment as of nonsuit on the grounds of a fatal variance between allegation and proof was correctly denied, it appearing that the witnesses meant "Cannon Mills Company" when the abbreviated form was used and the doctrine of *idem sonans* applying.

2. **Indictment B a—Indictment will not be quashed for informality or refinement.**

   Defendants contended that the count in the indictment charging receiving stolen goods was fatally defective in that the names of defendants were not repeated in charging *scienter*. *Held:* The defect was merely an informality or refinement not sufficient to support a quashal of the indictment, the charge being plain, explicit, and sufficient to enable the court to proceed to judgment. C. S., 4623.

3. **Larceny A a—Evidence held to establish the crime of larceny and not embezzlement.**

   Where a foreman of the waste-house of a company takes goods of the company from another part of the plant, sometimes concealing same in the waste-house at night after they had been thus purloined, the foreman at no time has lawful possession of the property, and the crime is larceny and not embezzlement.

4. **Judges A a: Criminal Law I k—**

   The trial court has no power to correct the verdict by order entered out of term and out of the county, in the absence of consent of the parties or unless otherwise authorized.

5. **Criminal Law L e—**

   Where the verdict as entered on the records of the court is sufficient when interpreted with reference to the pleadings, evidence and charge of the court, an unauthorized order entered out of term and out of the county correcting the verdict will not be held for reversible error, the correction not being material or needed.

6. **Criminal Law I k: Trial G b—**

   The verdict of the jury, both in civil and criminal actions, will be interpreted in the light of the pleadings, facts in evidence, admissions of the parties, and the charge of the court, and when it is sufficient to support the judgment, when so interpreted, it will not be held sufficient ground for a new trial.

SEPARATE APPEALS by defendants, who were tried jointly, from *Sink, J.*, at April Term, 1935, of CABARRUS.

Criminal prosecution, tried upon indictment charging the defendants A. W. Whitley, John Allman, R. M. Cook, and five others, (1) with the larceny of bath towels, bed sheets, pillow cases and wash cloths, of the value of $200, the property of Cannon Mills Company, and (2) with feloniously receiving said towels, sheets, etc., knowing them to have been feloniously stolen or taken in violation of C. S., 4250.

The State's evidence tends to show that some of the defendants were engaged in a systematic looting of manufactured articles from one of the plants of the Cannon Mills Company at Kannapolis, N. C., and disposing of such stolen articles to the remaining defendants and others for gain.

The defendant John Allman was convicted on the first count of the larceny of said goods and chattels, while the defendants A. W. Whitley and R. M. Cook were convicted on the second count of receiving stolen goods knowing them to have been stolen. None of the remaining five defendants appealed. They were either acquitted, convicted, or entered pleas of guilty or *nolo contendere.*

Judgment as to A. W. Whitley: Imprisonment in the State's Prison for not less than 3 nor more than 5 years.

Judgment as to John Allman: Imprisonment in the State's Prison for not less than 5 nor more than 7 years.

Judgment as to R. M. Cook: Imprisonment in the State's Prison for not less than 2 nor more than 3 years.

The three named defendants filed separate appeals, though tried together, each assigning errors.

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

Brooks, McLendon & Holderness and Armfield, Sherrin & Barnhardt for defendant Whitley.

Woodson & Woodson for defendant Allman.

B. W. Blackwelder for defendant Cook.

STACY, C. J. Outside of the technical questions, presently to be considered, the case upon trial narrowed itself principally to issues of fact determinable alone by the jury.

Under the motion to nonsuit, the defendants say the record discloses a fatal variance between the indictment and the proof, in that the ownership of the property is laid in "Cannon Mills Company," whereas the State's evidence tends to show the stolen goods to be the property of "Cannon Mills." *S. v. Harris,* 195 N. C., 306, 141 S. E., 883; *S. v. Harbert,* 185 N. C., 760, 118 S. E., 6; *S. v. Gibson,* 170 N. C., 697, 86 S. E., 774. It appears from an examination of the record that the

witnesses used the two expressions interchangeably, meaning each time "Cannon Mills Company" when the abbreviated expression "Cannon Mills" was employed. The difference was not mooted on trial. It seems a clear case of *idem sonans*. *S. v. Drakeford,* 162 N. C., 667, 78 S. E., 308; *S. v. Hester,* 122 N. C., 1047, 29 S. E., 380.

The next position taken by the defendants is, that the second count in the bill of indictment is fatally defective, in that the names of the defendants are not repeated in charging the *scienter*. *S. v. McCollum,* 181 N. C., 584, 107 S. E., 309; *S. v. May,* 132 N. C., 1020, 43 S. E., 819; *S. v. Phelps,* 65 N. C., 450. This is a refinement which the act of 1811, now C. S., 4623, sought to remedy. *S. v. Parker,* 81 N. C., 531. It provides against quashal for informality if the charge be plain, intelligible, and explicit, and sufficient matter appear in the bill to enable the court to proceed to judgment. *S. v. Beal,* 199 N. C., 278, 154 S. E., 604. The exception is too attenuate. *S. v. Lemons,* 182 N. C., 828, 109 S. E., 27; *S. v. Francis,* 157 N. C., 612, 72 S. E., 1041.

Speaking to the subject in *S. v. Shade,* 115 N. C., 757, 20 S. E., 537, *Avery, J.,* delivering the opinion of the Court, said: "The trend of judicial decision and the tendency of legislation is towards the practical view that objections founded upon mere matter of form should not be considered by the courts unless there is reason to believe that a defendant has been misled by the form of the charge, or was not apprised by its terms of the nature of the offense which he was held to answer. Where the defendant thinks that an indictment, otherwise objectionable in form, fails to impart information sufficiently specific as to the nature of the charge, he may before trial move the court to order that a bill of particulars be filed, and the court will not arrest the judgment after verdict where he attempts to reserve his fire until he takes first the chance of acquittal. *S. v. Brady,* 107 N. C., 826."

The point is also made by the defendant Cook that the evidence tends to show embezzlement, rather than larceny, on the part of John Allman, he being foreman of the waste-house of the Cannon Mills, and, therefore, it is contended, the charge of receiving must fail. In reply to this suggestion, it is sufficient to say the fact that Allman was employed by the Cannon Mills Company as foreman of the waste-house did not change his theft of the goods from larceny to embezzlement. The goods were not taken from the waste-house. They were sometimes concealed in the waste-house at night after they had been purloined elsewhere. But Allman at no time had lawful possession of the property.

The final objection taken by the defendants is to the order of the court, made out of term and out of the county and at the time the cases were settled on appeal, directing the clerk to correct his entry as to the verdict against the defendants Whitley and Cook. It seems that the entry

made at the trial was simply "guilty of receiving as to R. M. Cook, A. W. Whitley," whereas the verdict as returned by the jury was "guilty of receiving stolen goods knowing them to have been stolen as to R. M. Cook, A. W. Whitley." The objection is not to the substance of the change (*S. v. Brown,* 203 N. C., 513, 166 S. E., 396), but to the manner and time of the correction.

If the matter were material we would be disposed to sustain the objection, for it has been the uniform holding in this jurisdiction that, except by consent, or unless otherwise authorized, a judge of the Superior Court, even in his own district, has no authority to hear a cause, or to make an order substantially affecting the rights of the parties, outside the county in which the action is pending. *Bisanar v. Suttlemyre,* 193 N. C., 711, 138 S. E., 1. Still this would not work a new trial of the cause, but simply an order of remand to have the correction properly made. *S. v. Brown, supra; Summerlin v. Cowles,* 107 N. C., 459, 12 S. E., 234. However, the change in the instant case is not regarded as material or needed. *S. v. Kinsauls,* 126 N. C., 1095, 36 S. E., 31. The record as a whole reveals the clear intent of the jury.

It is the rule with us, both in civil and criminal actions, that a verdict may be given significance and correctly interpreted by reference to the pleadings, the facts in evidence, admissions of the parties, and the charge of the court. *S. v. Snipes,* 185 N. C., 743, 117 S. E., 500; *S. v. Brame,* 185 N. C., 631, 116 S. E., 164; *S. v. Gregory,* 153 N. C., 646, 69 S. E., 674; *S. v. Long,* 52 N. C., 24; *Pierce v. Carlton,* 184 N. C., 175, 114 S. E., 13; *Kannan v. Assad,* 182 N. C., 77, 108 S. E., 383; *Howell v. Pate,* 181 N. C., 117, 106 S. E., 454; *Reynolds v. Express Co.,* 172 N. C., 487, 90 S. E., 510; *Bank v. Wilson,* 168 N. C., 557, 84 S. E., 866. Tested by this standard, it would seem that the verdict as recorded is sufficient to support the judgments. *S. v. Gregory, supra.* Only in case of uncertainty or ambiguity in the verdict is a *venire de novo* to be ordered. By correct interpretation, the present record makes certain that which otherwise might be doubtful. *Short v. Kaltman,* 192 N. C., 154, 134 S. E., 425; *Sitterson v. Sitterson,* 191 N. C., 319, 131 S. E., 641.

Nothing was said in *S. v. Lassiter, ante,* 251; *S. v. Barbee,* 197 N. C., 248, 148 S. E., 249; *S. v. Snipes, supra; S. v. Shew,* 194 N. C., 690, 140 S. E., 621, or *S. v. Whitaker,* 89 N. C., 472, which militates against our present position. All of these cases, properly interpreted, are accordant herewith. In none of them was the record capable of interpretation so as to support the judgment. *Newbern v. Gordon,* 201 N. C., 317, 160 S. E., 182. Here, the situation is just the reverse. Nevertheless, the admonition given in *S. v. Whitaker, supra,* would seem to be apropos: "To avoid embarrassment in cases like this, it would be well to follow

the suggestion of Mr. Bishop, 'that in every case of a verdict rendered, the judge or prosecuting officer, or both, should look after its form and its substance, so far as to prevent a doubtful or insufficient finding from passing into the records of the court, to create embarrassment afterwards, and perhaps the necessity of a new trial.' 1 Bish. Cr. Pro., sec. 831."

The record is free from reversible error; hence the verdict and judgments must be upheld.

No error.

ERNEST E. CARTER, ADMINISTRATOR, v. CONNECTICUT GENERAL LIFE INSURANCE COMPANY.

(Filed 1 November, 1935.)

1. **Insurance F d: R c—Held: Evidence failed to show disability at time of termination of employment, and insurer was not liable.**

   Plaintiff's intestate was insured under a policy of group insurance providing disability benefits for employees becoming totally and permanently disabled while employed by the company. While in the company's employ insured underwent two operations, but thereafter returned to work, and later his services with the company were terminated, and he was paid a premium refund, and the pay roll deduction order for insurance cancelled. About six months thereafter insured was employed by the company for two weeks. Thereafter insured again became ill and died of cancer of the stomach. There was expert testimony that insured was suffering from cancer at the time the second operation was performed while he was in the employ of the company. *Held:* The evidence failed to show permanent and total disability at the time insured's employment was terminated and the premium refund paid to him, since the evidence discloses that insured, after his illness occurring during his employment and before the termination of the insurance contract, worked full time for the company on two different occasions, and was not, therefore, permanently and totally disabled during his employment before termination of the contract.

2. **Insurance E b—**

   A policy of insurance will be construed strictly against insurer and in favor of insured, but the policy cannot be enlarged by construction beyond the meaning of the terms used.

3. **Insurance M c—**

   A letter of a physician stating that insured had survived a very serious sickness, but was at that time rapidly improving and should completely recover, *is held* insufficient as notice of permanent and total disability, although it would not preclude recovery under the disability clause in the policy if in fact the disability proved permanent.

APPEAL by defendant from *Sink, J.*, at March Term, 1935, of BUNCOMBE.

Civil action to recover on two certificates of group insurance, one for $1,000, the other for $1,250, issued by defendant to plaintiff's intestate, an employee of the Gulf Refining Company, a subsidiary of the Gulf Oil Corporation.

The certificates in suit provide for payment, in the event of death, to the beneficaries named therein, or "in the event of total and permanent disability occurring before age sixty, to the insured himself."

"Total Disability: Any employee shall be deemed to be totally disabled within the meaning of this policy if injuries, sickness, or disease continuously prevent him from performing any and every duty pertaining to his occupation."

"Permanent Total Disability: If said total disability began before age 60, and presumably will during his life prevent the employee from pursuing any occupation for wages or profit; . . . he shall be deemed to be totally and permanently disabled within the meaning of this policy."

It is further provided in said certificates that the insurance shall cease whenever the employee "leaves the service of his employer, or cancels his pay roll deduction order," unless converted into a life insurance policy according to option contained therein, which was not done in the instant case.

With respect to payment of claims, the Master Policy provides as follows: "No claim for permanent total disability incurred by an employee during his period of employment shall be paid after the termination of his employment, unless the employee gives notice of the disability to his superior in writing while in the employ of the Gulf Companies or within sixty days thereafter."

The certificates in suit were issued 13 May, 1930, when plaintiff's intestate was employed by the Gulf Refining Company as a truck driver. In May, 1931, the insured underwent an operation for appendicitis, and in August, 1931, a second operation was performed for an obstruction of the colon. A period of convalescence followed, and in December, 1931, the insured reported back for work. He was given position of service station attendant on 6 January, 1932, and worked until 31 January, 1932, when his services with the company were terminated, and the pay roll deduction order for insurance canceled, the insured being paid at the time a premium refund of sixty cents on his group insurance. He did not elect to carry his insurance thereafter.

Plaintiff's intestate later worked for the Gulf Refining Company from 22 June, 1932, to 6 July, 1932, relieving a service station attendant who was ill during this period.

In August, 1932, plaintiff's intestate again became too ill to work, and in the following December, the cause of his disability was diagnosed as cancer of the stomach, from which he died in January, 1933.

There is testimony that the cancer was forming for some time prior to his death. The physician who operated in August, 1931, testified that he was then "suspicious of possible malignancy," and "in the light of hindsight, I know now the vascular growth which I found at the second operation in August, 1931, was a cancer."

On 3 November, 1931, the physician wrote the agent of the Gulf Refining Company, at the agent's request, giving a full history of his patient's illness and stating, "We all feel he is the sickest individual we have ever seen survive," but adding: "At present he is rapidly gaining in weight and strength and should make a complete recovery."

This letter was offered as written notice of disability under the policies in suit.

Demurrers to the evidence or motions to nonsuit; overruled; exceptions.

From a verdict finding that the insured was "totally and permanently disabled on 31 January, 1932," and that written notice thereof was given "his employer while in the employ of the Gulf Companies, or within sixty (60) days thereafter," and judgment thereon, the defendant appeals, assigning errors.

R. R. Williams, William J. Cocke, Jr., and Johnson & Johnson for plaintiff.

John Izard and Harkins, Van Winkle & Walton for defendant.

STACY, C. J., after stating the case: The evidence fails to show: (1) total and permanent disability of insured during period of employment as defined in the policies, or (2) written notice of disability to superior while the insured was in the employ of the Gulf Companies, or within sixty days thereafter. These are conditions precedent to the right of recovery under the policies in suit.

It is true, the insured's physician gave it as his opinion that on 17 October, 1931, the last time he waited upon him, "the boy was unable to do any kind of work at that time, or pursue any kind of occupation." Nevertheless, plaintiff's intestate did actually perform all the duties pertaining to his employment, at regular wages, during the month of January, 1932, until his employment ceased, and also in the following June and July. These were not trifling or minor jobs, on part-time basis, as was the case in *Smith v. Equitable Assurance Society,* 205 N. C., 387, 171 S. E., 346, strongly relied upon by plaintiff. They were regular full-time positions, which were filled in an entirely satisfactory manner and without complaint of any kind.

The case is controlled by the decisions in *Hill v. Ins. Co.,* 207 N. C., 166, 176 S. E., 269; *Boozer v. Assurance Society,* 206 N. C., 848, 175 S. E., 175, and *Thigpen v. Ins. Co.,* 204 N. C., 551, 168 S. E., 845.

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. Ins. 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. Ins. 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 were intended. *Guarantee Co. v. Mechanics Bank,* 183 U. S., 402.

The letter of plaintiff's intestate's physician written under date of 3 November, 1931, at the request of the employer's agent, could hardly be regarded as written notice of disability under the policies in suit, for the reason it was not so intended (*Trust Co. v. Asheville,* 207 N. C., 162, 176 S. E., 268), and it negatives rather than affirms the probable permanency of plaintiff's intestate's disability. *Guy v. Ins. Co.,* 207 N. C., 278, 176 S. E., 554. This statement of the physician would not bar a recovery, if, in fact, the disability were permanent. *Fields v. Assurance Co.,* 195 N. C., 262, 141 S. E., 743. But the letter is not regarded as adequate, if relied upon as notice of total and permanent disability. *Wyche v. Ins. Co.,* 207 N. C., 45, 175 S. E., 697.

Under the facts in evidence, plaintiff's intestate was not entitled to recover at the time the policies in suit were terminated. The motion to nonsuit should have been allowed.

Reversed.

JULIA ANN STAMEY v. SOUTHERN RAILWAY COMPANY.

(Filed 1 November, 1935.)

Carriers C d—A passenger on a moving train is not justified in jumping therefrom by the mere fact that he is being carried beyond his station.

Evidence tending to show that plaintiff, a passenger on defendant's train, attempted to alight from the train while it was still moving after the train had slowed down without coming to a standstill at the station at a flag-stop where plaintiff intended to get off, *is held* to establish contributory negligence barring plaintiff's action for damages sustained in a fall when she attempted to alight from the train.

APPEAL by plaintiff from *Sink, J.,* at May Term, 1935, of IREDELL.

Civil action to recover damages for alleged negligent injury.

On 27 December, 1933, the plaintiff and her companions, Eula Moore and Daisy Stamey, were passengers on defendant's train, going from Statesville to Catawba, a distance of about twelve miles. As the train approached Catawba Station, the plaintiff and her companions left their seats and went to the end of the car preparatory to leaving the train when it stopped.

Eula Moore testified for the plaintiff, in part, as follows: "I had made the trip lots of times and was familiar with the fact that Catawba was a flag-stop. . . . As the train drew into the station yard, and as our coach was coming under the overhead bridge, about 150 feet east of the station, I left my seat and walked near the door and was standing there waiting for the train to come to a dead standstill so we could walk around and go down the steps. The train was slowing down kinder as it passed under the bridge. . . . Our coach was about 250 feet west of the station and about fifteen feet beyond the end of the raised gravel when we got off. . . . I got off just like if the train was standing still. The train was moving a tiny bit faster but it was moving along slowly. . . . No one was in sight at the time we got off, neither the conductor, the flagman, or any other employee of the railroad. . . . The train did not stop. It was going along slow but never did come to a standstill. We thought we could get off without being hurt, and that is what we did."

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

John W. Wallace, Andrew C. MacIntosh, Jr., and John R. McLaughlin for plaintiff.

R. C. Kelly, Jack Joyner, and W. C. Feimster for defendant.

STACY, C. J. A passenger on a moving train is not justified in jumping therefrom to his injury by the mere fact that he is being carried by or beyond his station. *Carter v. R. R.*, 165 N. C., 244, 81 S. E., 321. The general rule is, that a passenger who is injured while alighting from a moving train may not recover for such injuries. *Burgin v. R. R.*, 115 N. C., 673, 20 S. E., 473; *Browne v. R. R.*, 108 N. C., 34, 12 S. E., 958.

There are exceptions to this rule, *e.g.*, when invited to do so by the carrier's agent and it is not obviously dangerous; but, according to the plaintiff's own evidence, the train had passed the station, without stopping, and was moving "a tiny bit faster" when she and her companions jumped. *Lambeth v. R. R.*, 66 N. C., 494. This was an act of contributory negligence on her part which bars recovery. *Morrow v. R. R.*, 134 N. C., 92, 46 S. E., 12; *Denny v. R. R.*, 132 N. C., 340, 43 S. E.,

847; *Watkins v. R. R.*, 116 N. C., 961, 21 S. E., 409. The case is unlike *Johnson v. R. R.*, 130 N. C., 488, 41 S. E., 794, and *Nance v. R. R.*, 94 N. C., 619, cited and relied upon by plaintiff.

We have found nothing upon the record to take the case out of the general rule. The plaintiff thought she could alight in safety. She took a chance and lost.

Affirmed.

EULA MOORE v. SOUTHERN RAILWAY COMPANY.

(Filed 1 November, 1935.)

APPEAL by plaintiff from *Sink, J.*, at May Term, 1935, of IREDELL.

Civil action to recover damages for alleged negligent injury.

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

John W. Wallace, Andrew C. MacIntosh, Jr., and John R. McLaughlin for plaintiff.

R. C. Kelly, Jack Joyner, and W. C. Feimster for defendant.

PER CURIAM. This is a companion case to *Stamey v. Ry. Co., ante,* 668. Both cases are exactly alike. The facts are the same. The opinion in the *Stamey case* is controlling here.

Affirmed.

IN RE CARY EUGENE SNELGROVE.

(Filed 1 November, 1935.)

1. **Certiorari A a—Writ of certiorari will lie only upon showing of merit and that applicant is not guilty of laches.**

   The clerk entered an order allowing a guardian additional compensation for extraordinary services. Respondent failed to perfect his appeal from the clerk's order, and thereafter applied to the judge of the Superior Court for a writ of *certiorari*. The petition for *certiorari* was denied upon the court's finding of laches and demerit. *Held:* The denial of the petition was without error, *certiorari* lying only upon a showing that applicant was not guilty of laches and that probable error was committed on the hearing.

2. **Reference A a—**

   The appointment of a referee by the judge to ascertain the facts in regard to a petition for *certiorari* is not a reference under the code, but only a method employed by the judge to acquaint himself with the facts.

APPEAL by respondent, The Veterans Administration, from *Cranmer, J.*, at Chambers, Fayetteville, 4 June, 1934. From CUMBERLAND.

Petition by guardians of incompetent World War veteran to pay H. C. Blackwell, attorney and coguardian, additional compensation in the sum of $600 for extraordinary services performed and expenses incurred in the management of the ward's estate.

The facts are these:

1. The petition of the guardians was filed with the clerk of the Superior Court of Cumberland County, 27 January, 1934, under authority of C. S., 2202 (12).

2. This petition was allowed 19 February, 1934, after hearing, it being found that the amount requested was "a reasonable and fair compensation for such services and expenses."

3. Notice of appeal by respondent, The Veterans Administration, was given in open court, but apparently was not perfected, due to some misunderstanding.

4. Thereafter, on 9 April, 1934, the respondent applied to the judge of the Superior Court for a writ of *certiorari* to bring up the case for review.

5. Finally, after some cross-firing between the parties, the judge, at the May Term, 1934, Cumberland Superior Court, ordered that the disputed questions of law and fact be heard before Hon. Charles G. Rose, "referee for and on behalf of the court," who was directed to report to the judge not later than the first day of the June Term, succeeding.

6. The referee found that the respondent had not properly perfected its appeal from the order of the clerk, and recommended that the same be dismissed. He further recommended that, upon the merits of the case, the order of the clerk be affirmed.

7. At the June Term, 1934, the judge adopted the recommendations of the referee, and denied respondent's petition of 9 April for writ of *certiorari*.

From this ruling the respondent appeals.

Robert H. Dye for petitioner.
J. D. DeRamus and J. H. Whittington for respondent.

STACY, C. J. The single question of law presented by the appeal is whether error was committed in denying respondent's application and motion for *certiorari*. The court's ruling is based upon the dual ground of laches and demerit. *King v. Taylor,* 188 N. C., 450, 124 S. E., 751. The judgment must be affirmed on authority of what was said in *S. v. Angel,* 194 N. C., 715, 140 S. E., 727: "*Certiorari* is a discretionary writ, to be issued only for good or sufficient cause shown, and the party

seeking it is required not only to negative laches on his part in prosecuting the appeal but also to show merit, or that he has reasonable grounds for asking that the case be brought up and reviewed on appeal. Simply because a party has not appealed, or has lost his right of appeal, even through no fault of his own, is not sufficient to entitle him to a *certiorari*. 'A party is entitled to a writ of *certiorari* when—and only when—the failure to perfect the appeal is due to some error or act of the court or its officers, and not any fault or neglect of the party or his agent.' *Womble v. Gin Co.,* 194 N. C., 577, 140 S. E., 230. Two things, therefore, should be made to appear on application for *certiorari:* First, diligence in prosecuting the appeal, except in cases where no appeal lies, when freedom from laches in applying for the writ should be shown; and, second, merit, or that probable error was committed on the hearing. *S. v. Farmer,* 188 N. C., 243, 124 S. E., 562."

The appointment of a referee, for and on behalf of the court, was not a reference under the code, as respondent seems to think, but only the method employed by the judge of acquainting himself with the facts.

Affirmed.

STATE v. ROLAND EARLE ALLEN AND LOWELL MASSIE.

(Filed 1 November, 1935.)

1. **Criminal Law L a—Appeal in this case is dismissed for defendants' failure to make out and serve statement of case within time fixed.**

   Where defendants fail to make out and serve their statement of case on appeal within the time fixed, they lose their right to prosecute the appeal, and the motion of the Attorney-General to docket and dismiss will be allowed, but where defendants have been convicted of a capital felony, this will be done only after an inspection of the record for errors appearing upon its face. Attention is called to the duty of the clerk of the Superior Court relative to notifying the Attorney-General of appeals in criminal cases. C. S., 4654.

2. **Criminal Law L d—Appellant must docket appeal at first term of Supreme Court after rendition of judgment or apply for certiorari.**

   An appeal must be brought to the first term of the Supreme Court beginning after the rendition of the judgment, and same docketed fourteen days before entering the call of the district to which it belongs, and when this has not been done, and no application for *certiorari* made, the appeal will be dismissed.

MOTION by State to docket and dismiss appeal.

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

STACY, C. J. At the September Term, 1934, Rowan Superior Court, the defendants herein, Roland Earle Allen and Lowell Massie, were tried upon indictment charging them with the murder of one D. Will Reeves, which resulted in a conviction of murder in the first degree and sentence of death as to both defendants. From the judgment thus entered, the defendants gave notice of appeal to the Supreme Court, and by consent were allowed sixty days within which to make out and serve statement of case on appeal. The clerk certifies that nothing has been done towards perfecting the appeal; that the time for serving statement of case has expired, and that no extension of time for filing same has been recorded in his office. *S. v. Williams, ante,* 352; *S. v. Brown,* 206 N. C., 747, 175 S. E., 116.

The prisoners, having failed to make out and serve statement of case on appeal within the time fixed, have lost their right to prosecute the appeal, and the motion of the Attorney-General to docket and dismiss must be allowed. *S. v. Williams, supra; S. v. Johnson,* 205 N. C., 610, 172 S. E., 219. It is customary, however, in capital cases, where the life of the prisoner is involved, to examine the record to see that no error appears upon its face. *S. v. Williams, supra; S. v. Goldston,* 201 N. C., 89, 158 S. E., 926. This we have done in the instant case without discovering any error on the face of the record. *S. v. Williams, supra; S. v. Hamlet,* 206 N. C., 568, 174 S. E., 451.

There is still another reason why the motion of the Attorney-General must be allowed. ·The case was tried and judgment rendered before the commencement of the Spring Term, 1935, of this Court. Hence, the appeal was due to be brought to such term, the next succeeding term, and docketed here fourteen days before entering upon the call of the district to which the case belongs. Failing in this, application for *certiorari* at the Spring Term was required to preserve the right of appeal. *S. v. Harris,* 199 N. C., 377, 154 S. E., 628; *Pruitt v. Wood, ibid.,* 788, 156 S. E., 126. The case was neither docketed in time nor was application for *certiorari* made at the Spring Term. This was fatal to the appeal. *S. v. Rector,* 203 N. C., 9, 164 S. E., 339; *S. v. Farmer,* 188 N. C., 243, 124 S. E., 562.

Attention is again directed to what was said in *S. v. Etheridge,* 207 N. C., 801, 178 S. E., 556, and *S. v. Watson, ante,* 70, relative to notifying the Attorney-General of appeals in criminal cases as required by C. S., 4654.

Appeal dismissed.

ROLAND MILLS AND CHARLOTTE MILLS v. THE NORTH CAROLINA JOINT STOCK LAND BANK ET AL.

(Filed 1 November, 1935.)

Pleadings D b—Action held properly dismissed upon demurrer for misjoinder of parties and causes of action.

An action against insurer to reform plaintiff's fire insurance policy and to upset settlement and recover an additional sum under the policy as reformed, and against plaintiff's mortgagee to restrain foreclosure and recover rents, is defective in that the several causes do not affect all parties to the action, and the action is properly dismissed upon demurrer for misjoinder of parties and causes. C. S., 507.

APPEAL by plaintiffs from *Small, J.*, at September Term, 1935, of PITT.

Civil action (1) to reform fire insurance policy issued by the Virginia Fire and Marine Insurance Company, (2) to upset settlement and recover additional sum under said policy, as reformed, for fire loss, and (3) to restrain foreclosure and recover rents from the North Carolina Joint Stock Land Bank.

Demurrer interposed for misjoinder of both parties and causes; sustained; exception; appeal.

P. R. Hines and Julius Brown for plaintiffs.
Lewis G. Cooper for defendant Insurance Company.

STACY, C. J. Plaintiffs have incorporated three causes of action in the same complaint. The first two arise out of the insurance policy issued by the Virginia Fire and Marine Insurance Company; the other is based on a deed of trust given to secure a loan from the North Carolina Joint Stock Land Bank. The several causes do not affect all the parties to the action. C. S., 507. The complaint, therefore, is bad as against a demurrer. *Atkins v. Steed, ante,* 245, and cases there cited.

Dual misjoinder of parties and causes works a dismissal upon demurrer. *Carswell v. Whisenant,* 203 N. C., 674, 166 S. E., 793; *Shuford v. Yarbrough,* 198 N. C., 5, 150 S. E., 618; *Shemwell v. Lethco,* 198 N. C., 346, 151 S. E., 729; *Bank v. Angelo,* 193 N. C., 576, 137 S. E., 705; *Shore v. Holt,* 185 N. C., 312, 117 S. E., 165.

Affirmed.

NEWMAN ET AL. v. WATKINS ET AL., BOARD OF COUNTY COMMISSIONERS, AND ROYSTER ET AL., BOARD OF ELECTIONS OF VANCE COUNTY.

(Filed 1 November, 1935.)

1. **Statutes A e—**

The constitutionality of a statute may not be tested by injunctive proceedings unless the party seeking the injunctive relief alleges and shows that he will suffer irreparable damage from the enforcement of the statute.

2. **Same: Injunctions B e—Plaintiffs held not entitled to enjoin election to determine whether repeal statute should apply to the county.**

Plaintiffs sought to enjoin the holding of an election under ch. 493, Public Laws of 1935, to determine whether the county should be subject to a statute which provided for the repeal of the general law relating to intoxicating liquor and for the sale of intoxicating liquor under county supervision and control, and provided that sale otherwise than as permitted by the statute should be a misdemeanor. Plaintiffs, residents and taxpayers of the county and of other counties of the State, contended that the statute under which the proposed election was to be held was unconstitutional. *Held:* Plaintiffs were not entitled to the injunctive relief sought, since if taxes should be levied to meet the expense of putting the statute into operation, plaintiffs have an adequate remedy at law, and since plaintiffs have an adequate remedy against alleged unconstitutional discriminations of the statute by violating the statute and pleading its unconstitutionality as a defense, or by prosecuting under C. S., 395 (2), the persons doing the acts allowed by the statute to which they object, and plaintiffs not being entitled to injunctive relief in the absence of a showing of direct injury or an invasion of their property rights resulting in irreparable injury. *Griffith v. Board of Education*, 183 N. C., 408, cited and distinguished in that the General Assembly has authorized the holding of an election as contemplated in the present case, while in the *Griffith case, supra,* the proposed election was without authorization.

CLARKSON, J., dissenting.

APPEAL from *Devin, J.*, at June Term, 1935, of VANCE. Affirmed.

This is an equitable action, wherein the plaintiffs sought to enjoin the defendants from holding the election and putting into effect the other provisions of chapter 493 of the Public Laws of 1935, upon the ground that said statute is unconstitutional and void.

The plaintiffs base their principal contentions upon their allegations that some of them are residents and taxpayers in Vance County and that others of them are residents and taxpayers in other counties in the State, and that they are informed and believe that said statute is unconstitutional for that its provision for financing the operation of the statute from the general county funds permits the incurring of debts and the pledging of the faith of the county without a bill for that purpose having

been passed on three several readings on three different days, and for that the statute is a local, special act relating to health, abatement of nuisances, and quality of liquors for human consumption, and regulating labor and trade, and the said statute was enacted by a partial repeal of the general law, in violation of Art. II, sections 14 and 29, respectively, of the Constitution of North Carolina; and for that said statute grants privileges and immunities to some which it withholds from others, and thereby denies equal protection of the law to those within the jurisdiction of the State, in violation of the 14th Amendment to the Constitution of the United States.

The judge of the Superior Court denied the injunctive relief sought, to which ruling the plaintiffs excepted and appealed to the Supreme Court, assigning errors.

J. H. Bridgers for appellants.

George C. Green, Perry & Kittrell, Julius Banzet, Stuart Smith, and Frank Banzet for appellees.

SCHENCK, J. A perusal of the statute which the plaintiffs seek to have declared unconstitutional discloses that it provides for an election to be held to determine whether a statute which carries two major provisions shall become the law in Vance County, these provisions being, first, to repeal the general law prohibiting traffic in alcoholic beverages as it relates to said county and to establish a method for its sale therein under county supervision and control, and, second, to make the traffic in alcoholic beverages in said county, otherwise than provided in said statute, a misdemeanor, and prescribing punishment therefor.

The plaintiffs nowhere allege that they will suffer any direct injury or that there will be any invasion of their property rights if the election is held, or if the statute is put into effect as a result of the election, and it is well settled in this jurisdiction that allegations to such effect must be made by those who would seek to have the courts declare an act of the Legislature in contravention of the organic law. Only those who can allege and prove that there will be irreparable damage to them by the enforcement of a statute are privileged to ask the judicial department to exercise its high prerogative of setting at naught a solemn act of its coördinate legislative department. *Moore v. Bell,* 191 N. C., 305; *Wood v. Braswell,* 192 N. C., 588; *Yarborough v. N. C. Park Commission,* 196 N. C., 284. "Courts never pass upon the constitutionality of statutes, except in cases wherein the party raising the question alleges that he is deprived of some right guaranteed by the Constitution, or some burden is imposed upon him in violation of its protective provisions." *St. George v. Hardie,* 147 N. C., 88 (97). "The party who invokes the

power (of a court to declare an act of the Legislature unconstitutional) must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." Willoughby on the Constitution of the United States (2d Ed.), sec. 13, p. 20, quoting *Massachusetts v. Mellon,* 202 U. S., 447.

The allegations that the plaintiffs are residents and taxpayers in North Carolina, some in Vance and some in other counties, and that the putting into operation of the provisions of the statute may be financed from the general funds of Vance County do not amount to an allegation of direct injury or of an invasion of property rights of the plaintiffs, since, if this expense is to be met from the general funds already collected, the plaintiffs will not be called upon to pay taxes for this purpose, and if such expense is to be met from funds yet to be raised by taxation, which is not yet apparent, the plaintiffs have their remedy at law.

The allegations of discriminations cannot avail the plaintiffs, since they have an adequate remedy at law for any and all alleged discriminatory features of the statute. Should the plaintiffs desire to do those things made unlawful by the terms of the statute they can do so, and if indicted for so doing they may then plead the invalidity of the statute, and if their contention as to its unconstitutionality is well founded, the indictment will fail. *Connor, J.,* for the Court, in *Moore v. Bell, supra,* writes: "The validity of a statute enacted by the General Assembly of North Carolina, declaring certain acts therein defined to be unlawful, and imposing punishment therefor, as crimes which do not affect property or property rights, and which do not expose to oppression or vexatious litigation one who denies the power of the General Assembly, under the Constitution of the State to enact such statute, in the event that he shall violate its provisions, may not be determined in an action to restrain and enjoin a public officer who is required by the statute to enforce it. The invalidity of a statute, upon the ground that it is in violation of the Constitution of the State, is a good defense upon a prosecution in the courts for a violation of its provisions. Upon such prosecution his plea may be heard; its validity will then be determined by the courts in the exercise of their jurisdiction to see that no person is 'taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land.'"

If the plaintiffs are aggrieved by the acts of others and desire to prevent them from doing those things which the statute permits, but which were prohibited under the former law which the statute repeals, they

have an adequate remedy at law by having indicted and prosecuted those persons doing such things, and if the later statute is unconstitutional it will not avail as a defense. Provision for such prosecution by the State, at the instance of an individual, to prevent an apprehended crime against his person or property is contemplated by Consolidated Statutes, sec. 395 (2), and an adequate remedy at law is thereby furnished.

In speaking to the question as to the exercise by this Court of the authority vested in it to declare acts of the Legislature void when they are in conflict with the Constitution, *Stacy, C. J.*, in a concurring opinion in *Wood v. Braswell, supra,* says: "Such authority is inherent in the judicial power and it is obligatory on the courts to declare the law in all cases, when properly presented. But it is only in cases calling for the exercise of judicial power that the courts may render harmless invalid acts of the Legislature; hence, for this reason, they never anticipate questions of constitutional law in advance of the necessity of deciding them; nor do they venture advisory opinions on constitutional questions." See, also, *Person v. Doughton,* 186 N. C., 723 (725), and cases there cited.

This case is not like *Griffith v. Board of Education,* 183 N. C., 408, where it was said that ". . . an injunction will issue to restrain the holding of an election where there is no authority for calling it, and where the holding of such an election would result in a waste of public funds," cited and relied upon by plaintiffs; for here the General Assembly has authorized the holding of the election to ascertain the sense of the people upon a question of public policy, and thus to determine whether the act shall become operative in the territory affected.

The whole case resolves itself to this: The plaintiffs sought in a court of equity to restrain an election. It was freely conceded upon the argument that unless the statute in question is unconstitutional, the plaintiffs were not entitled to the relief sought. It must likewise be conceded, we think, that unless irreparable injury would result to the plaintiffs from the mere holding of the election to determine whether the statute shall become operative, their remedy is not presently by injunction.

We hold, in the absence of any allegation or finding of facts that the plaintiffs will be irreparably damaged or suffer any invasion of their property rights by a compliance with the statute, that the question of the constitutionality of chapter 493 of the Public Laws of 1935 was not properly before the court, and that his Honor correctly denied the injunctive relief prayed for in the complaint.

Affirmed.

CLARKSON, J., dissenting: I think the act unconstitutional as impinging four articles of the Constitution of North Carolina, and void for uncertainty, and injunctive relief should have been granted.

Article I, sec. 7, is as follows: "No man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services."

Article I, sec. 31: "Perpetuities and monopolies are contrary to the genius of a free state and ought not to be allowed."

The above are fundamental democratic principles of "equal rights and opportunities to all, special privileges to none." The caption of the act in controversy, chapter 493, Public Laws 1935, is as follows: "An act to exempt Pasquotank County from the provisions of Article 8 of chapter 66, Volume 3, of the Consolidated Statutes, known as the Turlington Act, *and to set up an Alcoholic Control Board for the county of Pasquotank.*" (Italics mine.) Section 1: "That the provisions of article eight of chapter sixty-six, volume three, of the Consolidated Statutes of North Carolina, known as the Turlington Act, shall not apply to Pasquotank County, Carteret County, Craven County, Onslow County, Pitt County, Martin County, Beaufort County, Halifax County, Franklin County, Wilson County, Edgecombe County, Warren County, Vance County, Lenoir County, Rockingham County, Nash County, and Greene County." Then near the end of the act, between sections 26 and 27 (the ratification clause), is the following: "Sec. A. Should a majority of the qualified voters at the election herein provided for vote in favor of the sale of liquor under the provisions of this act, the board herein named for the enforcement of this act and to provide for the sale of liquor shall establish and maintain a store for the sale of liquor under the provisions of this act in Southern Pines, in the county of Moore, when a petition requesting such establishment shall be presented to such board signed by a majority of the qualified voters of McNeill's Township in Moore County; and shall likewise establish and maintain a store for the sale of liquor under the provisions of this act in Pinehurst, in Moore County, when a petition requesting such establishment shall be presented to such board signed by a majority of the qualified voters of Mineral Springs Township in Moore County. The finding of such board that such petition in either case is signed by a majority of such qualified voters shall be conclusive of such fact."

The caption of the act is the Alcoholic Control Board for the County of Pasquotank; this special privilege to Southern Pines and Pinehurst was to be presented "to such board"—the Pasquotank County Board—but on the argument it was stated that Wilson County Alcoholic Control Board is running one and arranging to run the other of these two stores—thus sending liquor from Wilson County, some 120 miles, over territory subject to the Turlington Act, to Southern Pines (Pinehurst now operating a liquor store), without any authority under the act. The Alcoholic Control Board of Wilson County is selling and controlling

the liquor stores in these towns. Is this thing possible where law and order should be respected?

The act confers special privileges on citizens of Vance County that it denies to those of others, by providing different punishment for the manufacture of liquor from that in other counties. Sec. 19 provides a fine of $5,000, or imprisonment not exceeding two years, or both. The general law makes the first offense punishable as a misdemeanor and the second offense a felony. A citizen of Vance County, under the assailed act, can manufacture liquor, and under the judgment of a kindly court be imprisoned for a day; whereas, a citizen of Wake or Wayne counties for the second offense must be punished as for a felony.

Sec. 21 makes manufacturing and sale, etc., by clubs punishable by not exceeding $500 fine and not exceeding six months imprisonment, while similar malefactors in same county not operating clubs, etc., are punishable by fine of $5,000 or imprisonment for two years, or both.

Sections 12 and 19: Gives right to sell friends and refuse others. Gives right to sell one more than another. Requires board to purchase and sell on order and authorizes the board to refuse to sell when not on order. Authorizes transport and possession of four quarts of liquor in Vance County, and thereby discriminates against people outside such county, and particularly against the plaintiffs in Wake and Wayne counties in this action. Discriminates against advertisers of liquors in other counties. (Secs. 10 and 12.) Makes possession of still lawful in Vance County, by repeal of the Turlington Act, and unlawful in other counties not in the bill; therefore, grants special privileges to citizens of Vance which it denies to citizens of Wake and Wayne. By repealing the Turlington Act, possession of liquor is not *prima facie* evidence of possession for sale in Vance County while it is in other counties not in the act; and especially the plaintiffs herein, residents of Wake and Wayne counties. Confers special privileges on citizens of Vance County by repeal of search and seizure provisions of Turlington Act, not enjoyed by citizens of other counties. It relieves certain persons from civil liability for act that others would be liable for and prevents redress for definite rights for breaches of contracts or torts. The money goes into the coffers of these counties to the exclusion of all other counties and the State.

The foregoing are only illustrative of the numerous privileges conferred on citizens of Vance County by the attempted repeal of the Turlington Act as to that county.

The people of this State, on 27 May, 1908, voted "Against the manufacture and sale of intoxicating liquor" by a majority of 44,196. On 7 November, 1933, this State, out of a total vote of 415,536, voted 184,572 majority for dry delegates against the repeal of the Eighteenth Amendment. The General Assembly passed the "Turlington Act," Pub-

lic Laws 1923, ch. 1, to carry out the mandate of all the people of the State, it was a general State policy that no liquor should be sold in the State. "Touch not, taste not, handle not for beverage purposes" was the mandate of the people. It is a matter of common knowledge that the platforms of both political parties in the State, one since 1908 and the other for perhaps 20 years, have recognized that the vote of all the people of the State in 1908 was binding on them.

In *Simonton v. Lanier,* 71 N. C., 498, the charter of the Bank of Statesville was given the special privilege to lend money at a higher rate than the general State law. Referring to Article I, secs. 7 and 31, *Bynum, J.,* said (p. 503): "The wisdom and foresight of our ancestors is nowhere more clearly shown than in providing these fundamental safeguards against partial and class legislation, the insidious and ever working foes of free and equal government."

In *State v. Fowler,* 193 N. C., 290, we find an attempt was made to change this State policy (p. 291): "The General Assembly at the session of 1925 passed a public-local law applicable to the counties of Transylvania, Jackson, Clay, Graham and Polk. The Public-Local Laws 1925, ch. 114. . . . Sec. 2: 'That any person or persons who shall be convicted of any of the offenses hereinbefore mentioned (manufacturing, selling or offering for sale, transporting, buying, or having liquors on hand for the purpose of sale, or any other violation of the prohibition law) shall be guilty of a misdemeanor and shall, for the first offense, be fined not less than fifty dollars nor more than one hundred dollars, and for a second or further similar offense shall be imprisoned not less than six months nor more than two years, and shall be required to pay all costs and sums taxed as a reward against such convicted person, in addition to such fine or imprisonment as herein mentioned.'" At p. 292, *Adams, J.,* for the Court, said: "This provision, we think, is a guaranty that every valid enactment of a general law applicable to the whole State shall operate uniformly upon persons and property, giving to all under like circumstances equal protection and security and neither laying burdens nor conferring privileges upon any person that are not laid or conferred upon others under the same circumstances or conditions. 6 R. C. L., 369, sec. 364; 36 Cyc., 992; 12 C. J., 1187, sec. 955; 16 C. J., 1352, sec. 3189; *S. v. Bargus,* 53 A. S. R. (Ohio), 628; *Jones v. R. R.,* 121 A. S. R. (Ill.), 313; Cooley's Const. Lim., 554, *et seq.* . . . This principle, it should be understood, was not designed to interfere and does not interfere with the police power of the State, the object of which is to promote the health, peace, morals, and good order of the people, to increase the industries of the State, to develop its resources, and to add to its wealth and prosperity."

In *Plott v. Ferguson,* 202 N. C., 446 (this was a public-local law applicable to one county, giving certain privileges to certain corpora-

tions), it is said, at page 451: "The passage of laws not of uniform operation, the granting of special privilege, and the like, are ordinarily contrary to our constitutional limitations. Equal protection of the law and the protection of equal laws are fundamental. 'The statute of limitations cannot be suspended in particular cases while allowed to remain in force generally. *Holden v. James,* 11 Mass., 396; *Davison v. Johonnot,* 7 Met., 388. . . . The general exemption laws cannot be verified for particular cases or localities. *Bull v. Conroe,* 13 Wis., 233, 244. The Legislature, when forbidden to grant divorces, cannot pass special acts authorizing the courts to grant divorces in particular cases for causes not recognized in the general law.' *Teft v. Teft,* 3 Mich., 67; *Simonds v. Simonds,* 103 Mass., 572; Cooley, *supra,* note at p. 809. Const. of N. C., Art. II, sec. 10; *Cooke v. Cooke,* 164 N. C., 272. . . . Cooley's Const. Lim., Vol. 1, note under Powers Legislative Department May Exercise, p. 261: 'Gambling cannot be made a crime everywhere except "within the limits or enclosure of a regular race course." *S. v. Walsh,* 136 Mo., 400, 37 S. W., 1112, 35 L. R. A., 231; see, also, *S. v. Elizabeth,* 28 Atl., 51, 23 L. R. A., 525.'"

In *Hendrix v. R. R.,* 202 N. C., 579 (580-1), *Stacy, C. J.,* said: "If this be the correct interpretation of ch. 699, Public-Local Laws 1927, then, so far as litigants plaintiff, residing in the city of High Point or within one mile thereof, are concerned, the original jurisdiction of the Superior Court of Guilford County, with the few exceptions noted, is closed to them, while such jurisdiction is open to all other parties plaintiff. This runs counter to the organic law, whether such legislation be regarded as creating a special privilege or entailing a discrimination. *Plott v. Ferguson, ante,* 446; *S. v. Fowler,* 193 N. C., 290."

In *Edgerton v. Hood, Comr.,* 205 N. C., 816, *Connor, J.,* it is held (syllabus): "Chapter 344, Public-Local Laws of 1933, as amended by chapters 540 and 541, Public Laws of 1933, providing that depositors of certain closed banks might sell their claim for deposits to persons indebted to the banks at the date of their closing, and that the liquidating agents of such banks should accept such purchased claims at their face value in payment of the purchaser's debts to the banks, is held unconstitutional and void, it being in violation of Art. I, sec. 7, which prohibits exclusive and separate emoluments or privileges except for public service, in that the act allows only creditors who were depositors to sell their claims only to debtors of the bank at the date of their closing in discrimination against other debtors and creditors of the banks, and in that it applies only to banks within certain designated counties, and in some instances only to towns and townships in the designated counties, in discrimination against debtors and creditors of closed banks in other sections of the State, and in that it applies only to banks within the

designated areas which had been closed for eighteen months prior to the ratification of the act in discrimination against debtors and creditors of banks in such areas which closed subsequent to the specified time, all of which classifications are unjust and arbitrary." The present act applies to 17 counties and Southern Pines and Pinehurst.

There are general statutes in this State against gambling, bawdy houses, fornication and adultery, etc. Can it be said that the General Assembly, under these sections of the Constitution, could by vote of the people in the above counties allow them to have gambling, bawdy houses, and free love? It is unthinkable. Then why liquor?

In *State v. Norris,* 206 N. C., 191, this Court has said, at pp. 197-8: "This is a government founded on the consent of the governed, a democracy, the best so far devised by the human family. The will of the majority under constitutional limitations, the supreme law of the land. The use of alcohol is recognized as a habit-forming drug. The General Assembly of North Carolina, Public Laws of 1929, ch. 96, passed an act to require in the public schools of the State instruction 'of the effect of alcoholism and narcotism on the human system.' This teaching to have the effect to prevent the use of these habit-forming drugs, so destructive to the human family."

The General Assembly of North Carolina, 1935, passed a more stringent act to teach this danger to the children of the State in the public schools. Chapter 404. The policy of the State was against the sale of intoxicating liquors—like the policy now of a State System of Highways and Schools. The Pasquotank Act was passed, as shown by its place in the Public Laws 1935, at the end of the session—practically the last act—by common knowledge after midnight. Many had gone home and in the dying hours of a General Assembly that was tired and worn from being in session several months over the appointed time. No notice or opportunity to be heard was given to the opposition. That it was passed hurriedly is perhaps the reason for its vagueness and uncertainty. I do not believe that the manner and method of the passage of this act appeals to the fair-minded people of this State, whatever is their opinion on the subject of liquor.

The record of the vote of 7 November, 1933, shows that 12 of these counties voted against dry delegates to the Constitutional Convention in regard to repeal of the Eighteenth Amendment; and the others for dry delegates by a close margin, except Rockingham. All the other counties of the State voted for dry delegates. There are 100 counties in the State, these counties named in this act have a special privilege over the others.

It is a matter of common knowledge that for months the General Assembly had before it the "Hill Bill"—to repeal the Turlington Act—

which was defeated. This was the sober judgment of the General Assembly—it was a fair contest in the open. All this is cited to show the policy of the State.

The case of *Guy v. Commissioners,* 122 N. C., 471, is easily distinguishable. At the time the decision was rendered (1898) the act of 1908, which was ratified by the people 27 May, 1908, had not been enacted, and the policy of the State was then changed and "against the manufacture and sale of intoxicating liquor."

Article II, sec. 14, of the Const. of N. C., is as follows: "No law shall be passed to raise money on the credit of the State, or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or allow the counties, cities, or towns to do so, unless the bill for the purpose shall have been read three times in each house of the General Assembly and passed three several readings, which readings shall have been on three different days, and agreed to by each house respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the journal."

The Pasquotank Bill was not passed in conformity with the above provisions of the Constitution. That it was a revenue measure and pledged the credit of the cities and towns is, in my opinion, beyond question. Sec. 16 is as follows: "In order to carry the provisions of this act into effect, county commissioners are authorized and directed to advance from the general fund of said county such sums as may from time to time be necessary to purchase stocks, fixtures, and equipment, and to provide operating capital and expenses to carry out the provisions and enforcement of this act." See, also, section 10. Under the County Budget System, at the time the act was passed there could be no general fund. *Adams v. Durham,* 189 N. C., 232, does not apply, in that case the money was secured from sale of property.

It was argued that the county may not have to spend any money on these liquor stores—that is not the question. They can and are authorized to make contracts. They have no right "to raise money on the credit," directly or indirectly, of the cities or towns. It is not the amount involved, but the Constitution that prohibits using revenue unless the act is in conformity with the Constitution.

In *Claywell v. Commissioners,* 173 N. C., 657 (659-660), it is said: "And the commissioners have avowed their purpose not to issue to the limit specified, but only the proportionate part of the indebtedness for the remaining townships. But, as said in *Lang v. Development Co.,* 169 N. C., pp. 662-4, in reference to a similar argument: 'It is no answer to this position that in the particular case before us no harm is likely to occur or that the power is being exercised in a considerate or

benevolent manner, for where a statute is being squared to requirement or constitutional provision it is what the law authorizes and not what is being presently done under it, that furnishes the proper test of its validity.' . . . (p. 661) An endeavor therefore to maintain the road commission and leave them without means to carry out any of the duties imposed upon them by law would be worse than useless."

The Liquor Board is a County Board. The members have to take oath of office. It has the power conferred by the act to make contracts, sign notes, etc. (sec. 16). Its powers are analogous to the powers of the County Board of Education to contract for teachers. The Court has held that the contracts of County Board of Education are binding on the counties, and that taxes must be levied to enforce these contracts. *Hampton v. Board of Education,* 195 N. C., 213.

It provides for the unlawful and invalid delegation of legislative power to the Liquor Boards, contrary to the decisions of this State and the United States. *Provision Co. v. Daves,* 190 N. C., 7; *Albertson v. Albertson,* 207 N. C., 547 (550); *Schlecter Poultry case,* 79 Law Ed., 888; 12 Corpus Juris, 911; *Panama Ref. Co. v. Ryan,* 293 U. S., p. 388. Boards are given power to make regulations and rules regarding transportation, sale, and other matters "which said regulations shall have the force and effect of law." (Section 3.) The bill is not justified as an exercise of police power. *State v. Fowler, supra,* p. 292. It does not promote health, peace, morals, and good order, or add to the wealth and prosperity of the State. *Barbier v. Connelly,* 113 U. S., page 27; 12 C. J., 1185. In the exercise of police power, classification must not be arbitrary. *Broadfoot v. Fayetteville,* 121 N. C., p. 418; *State v. Fowler, supra.* It attempts to supersede the law of the land. *State v. Fowler, supra.* The Constitution is supreme over the police power. *State v. Moore,* 113 N. C., 697. It goes without saying that, under Art. VII, sec. 7, Const. of N. C., the sale of intoxicating liquor is not a "necessary expense," nor is it a public purpose or undertaking.

Art. II, sec. 29, is, in part: "The General Assembly shall not pass any local, private, or special act or resolution . . . relating to health, sanitation, and the abatement of nuisances; . . . regulating labor, trade, mining, or manufacturing, . . . *nor shall the General Assembly enact any such local, private, or special act by the partial repeal of a general law,* but the General Assembly may at any time repeal local, private, or special laws enacted by it. 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." (Italics mine.)

The above section of the Constitution went into effect on 10 January, 1917. *Reade v. Durham,* 173 N. C., 668.

The general law against the sale and manufacture of intoxicating liquor was passed in 1908, and this general law has never been repealed, therefore the present act in controversy comes within the inhibition of the above constitutional provision: "Nor shall the General Assembly enact any such local, private, or special act by the partial repeal of the general law." The *Guy case, supra,* was decided prior to the above constitutional amendment, so was *Garsed v. Greensboro,* 126 N. C., 159. This section of the Constitution, adopted by a vote of the people, was for the purpose of preventing this kind of legislation.

The act provides for "the abatement of nuisances." (Sec. 21.) N. C. Code, 1935 (Michie), section 3180—"Nuisance against public morals," illegal sale of liquor is designated as one. The act regulates trade and manufacturing. The courts have uniformly held that liquor business is trade. *State v. Worth,* 116 N. C., 1007; *Arey v. Comrs.,* 138 N. C., 500; *Wayne Mercantile Co. v. Mt. Olive,* 161 N. C., 121. The act is a local law. *In re Harris,* 183 N. C., 633; *Armstrong v. Comrs,* 185 N. C., 405; *Day v. Comrs.,* 191 N. C., 783. In *State v. Devine,* 98 N. C., 778 (783), it is said: "We do not say that there may not be local legislation, for it is very common in our statute books, but that an act divested of any peculiar circumstances, and *per se* made indictable, should be so throughout the State, as essential to that equality and uniformity which are fundamental conditions of all just and constitutional legislation." *State v. Fowler, supra.*

The act is void for uncertainty and vagueness—it is so loosely and obscurely drawn as to be incapable of enforcement, and therefore void for uncertainty. It says that it shall become effective in the counties named in section 1 when ratified by a majority of the qualified voters in said counties participating in an election to be held in said counties upon the call of the county commissioners of said respective counties. Sec. 24½, in part, says: "*Provided,* that this act shall not become effective until approved by a majority vote of the qualified voters of Pasquotank, Pitt, Beaufort, Martin, Halifax, Edgecombe, Carteret, Craven, Onslow, Wilson, Greene, Lenoir, Warren, Vance, Franklin and Nash counties participating in an election to be held in said counties upon the call of the board of county commissioners of said respective counties, to be held within 60 days from the ratification of this act." The statute is so drawn as to indicate that a majority of the voters in every one of the counties must vote in favor of the act before it becomes effective in any of the counties. No election has been held in Franklin County, and Rockingham voted against the act, so that if the literal meaning of the words of the statute are considered, there has been no election, the limitation of 60 days from date of ratification for holding said election has passed, and hence the act has not been ratified in accordance with section 24½, and therefore it is void.

Again, the act in its title purports to exempt Pasquotank County only from the provisions of the Turlington Act; then in its second section sets up county liquor commissions in each of 16 additional counties, and it then proceeds to outline the duties of the liquor control board of Pasquotank County. Do the provisions applicable to the liquor control commission apply also to the liquor control commissions in the other counties named in the act? And if so, since each liquor commission is a law unto itself, not simply with regard to all State laws, but within Pasquotank County, or in other counties, what shall the other law enforcement authorities do? If there is conflict between the liquor boards and the laws of the Legislature, which shall the law enforcement forces follow? Is the enforcement of the statutes with regard to liquor placed solely under control of the liquor commission? And since each liquor control commission can set up a different set of rules and regulations for each county, this makes it a local and special act for each county, but it is ostensibly an act concerned only with Pasquotank County.

The statute under which the purported authority was given Pasquotank County, and 16 other counties, to permit the sale of liquor, is so indefinite and obscure in its terms as to make it impossible to determine with any certainty its meaning. It is the declared law of North Carolina that "a statute must be capable of construction and interpretation; otherwise, it will be inoperative and void. The Court must use every authorized means to ascertain and give it an intelligent meaning; but if, after such effort, it is found to be impossible to solve the doubt and dispel the obscurity, if no judicial certainty can be settled upon as to the meaning, the Court is not at liberty to supply—to make one. The Court may not allow 'conjectural interpretation to usurp the place of judicial exposition.' There must be a competent and efficient expression of the legislative will." *S. v. Partlow,* 91 N. C., 550.

Speaking to the question, as is now involved in this case, in *Drake v. Drake,* 15 N. C., 110, *Chief Justice Ruffin,* delivering the opinion of the Court, said: "Whether a statute be a public or a private one, if the terms in which it is couched be so vague as to convey no definite meaning to those whose duty it is to execute it, either ministerially or judicially, it is necessarily inoperative. The law must remain as it was, unless that which professes to change it be itself intelligible."

Not only is this the law in North Carolina, it is also the law in other jurisdictions, the general rule being stated in Re. Di. Torio, 8 F. (2d), 279, as follows: "An act which is so uncertain that its meaning cannot be determined by any known rules of construction cannot be enforced. If no judicial certainty can be settled upon as to the meaning of a statute, the courts are not at liberty to supply one. It must be capable of construction and an interpretation; otherwise, it will be inoperative

and void. An act is void where its language appears on its face to have a meaning, but it is impossible to give it any precise or intelligible application in the circumstances under which it is intended to operate." Authorities cited for this rule include *People v. Sweitzer,* 107 N. E., 902, 266 Ill., 459, 1916 B., 586; *People v. Briggs,* 86 N. E., 522, 193 N. Y., 457; *S. v. West Side Street Ry. Co.,* 47 S. W., 959, 146 Mo., 155.

The general rule is well stated in 25 R. C. L., 810: "When an act of the Legislature is so vague, indefinite, and uncertain that the courts are unable to determine with any reasonable degree of certainty what the Legislature intended, or is so incomplete, or is so conflicting and inconsistent in its provisions that it cannot be executed, it will be declared inoperative and void."

As already pointed out, the act is so loosely and obscurely drawn as to be incapable of enforcement, and therefore void for uncertainty, bringing it within the principle upheld in *State ex rel. Hickey v. Levitan,* 210 N. W., 111, 190 Wis., 646, 48 A. L. R., 434—an original action brought to enjoin defendants, one of whom was the State Treasurer, from enforcing the provisions of an alleged unconstitutional act regulating wholesale produce business, and from incurring expenses or paying out money on account of such act. The statute was held void, the demurrer of the defendants overruled, and the injunction made permanent. Certainly, its invalidity is so clear and apparent as to bring it within the principle laid down in *Griffith v. Board of Education,* 183 N. C., 408, where it was said that "An injunction will issue to restrain the holding of an election where there is no authority for calling it, and where the holding of such an election would result in a waste of public funds."

Injunction is the remedy. While it is well settled that the remedy to test the constitutionality of a local law, making a violation of the statute a criminal offense, is not open to one who has violated the act, *Moore v. Bell,* 191 N. C., 305, such is not the question involved in this appeal. The question involved here is not the criminal violation of a statute, but an act which undertakes to exempt seventeen counties from the provisions of a State-wide act, and to set up alcoholic control boards. The facts and circumstances of the instant case bring it within the exception described in *Moore v. Bell, supra,* which is relied upon in the Court's opinion as authority for its refusal to uphold an injunction to restrain the enforcement of a void and unconstitutional statute. *Associate Justice Connor* called attention to the exception in *Moore v. Bell, supra,* p. 311, as follows: "In *Advertising Co. v. Asheville,* 189 N. C., 737, *Justice Adams,* in the opinion for the Court, says: '. . . But this general rule is not universal in its general application; on the contrary, it is subject to well recognized exceptions. If it appear that an ordinance is unlawful, or in conflict with the organic law, and that an in-

junction against its enforcement is necessary for the protection of property rights or the rights of persons otherwise irremediable, the writ is available in the exercise of the equitable powers of the court. See the concurring opinion of *Mr. Justice Hoke* in *Turner v. New Bern, supra,* and the concurring opinion of *Mr. Justice Brown* in *R. R. v. Goldsboro,* 155 N. C., 365. The principle is clearly and forcefully enunciated in recent opinions of the Supreme Court of the United States.' In addition to the authorities cited by *Justice Adams,* see *New Jersey v. Sargent,* decided January, 1925, and reported in 70 L. Ed., 177."

While this Court refused to pass upon the constitutionality of a statute in *Wood v. Braswell,* 192 N. C., 588, in which the plaintiffs sought to restrain the collection of a license tax of five dollars upon motor vehicles in Anson County, it was upon the ground that the plaintiffs had not alleged that they were owners of motor vehicles or that the sheriff had collected or attempted to collect the license tax, and it was not suggested that in a proper case the validity of a statute would not be considered in an injunctive proceeding. Indeed, in a decision of this Court, cited as an authority in the Court's decision in the instant case, it was held that ". . . an injunction will issue to restrain the holding of an election where there is no authority for calling it." *Griffith v. Board of Education, supra.* To say that a change of public policy under a void statute is on a parity with a statute imposing a small license, is going entirely too far. *Yarborough v. Commission,* 196 N. C., 284, cannot be held as an authority for the position that this Court will not consider the constitutionality or the validity of a statute, for in that case, although it was stated that "the plaintiff had no interest in any of the land alleged to be subject to condemnation," *this Court did pass upon the constitutionality of the statute involved in that proceeding and upheld its validity.*

The case of *Person v. Doughton,* 186 N. C., 723, which is also cited in the opinion, has no application to the present case, for the reason that it was an application for a writ of *mandamus,* but even so, it was not laid down as an absolute rule that a writ of *mandamus* would be issued by declaring an act of the Legislature unconstitutional, but it was stated that "it is rarely, if ever, proper to award a *mandamus* where it can be done only by declaring an act of the Legislature unconstitutional." Certainly, it was not held that a writ of *mandamus* would issue to enforce the provisions of a void statute. The contrary was held, a writ of *mandamus* would not issue under such conditions.

St. George v. Hardie, 147 N. C., 88, also cited in the opinion, has no application to the facts of this case. All that was held in that case was that the master of a schooner could not complain of a law limiting the number of qualified pilots because he was not himself a pilot and did not

seek to become one. It cannot be held as a matter of law that a citizen of Pasquotank, Warren, or Vance counties does not have an interest in an election which sole aim is to upset the declared policy of a State in a general law, applicable to the entire State, and this election is to be held under the provisions of a statute so indefinite and uncertain that nobody can determine its meaning. Certainly, a citizen of the counties affected by this purported statute is not in the same position as that of a master of a schooner who complains that pilots seek to limit their number with a view to providing a living wage for those engaged in piloting vessels.

It is well established that equity will enjoin the threatened enforcement of an alleged unconstitutional law when it is made manifest that otherwise property rights or the rights of persons would suffer irreparable injury. *Advertising Co. v. Asheville, supra.* The general principle has been well stated in *Jewett Bros. & Jewett v. Small* (S. D.), 105 N. W., 738 (740), as follows: "A court of equity has authority to enjoin its (statute's) enforcement if it be unconstitutional, for the purpose of avoiding a multiplicity of suits, and because the plaintiff has no adequate remedy at law."

In 14 R. C. L., 434-5, the principle is stated as follows: "As a void statute affords no protection to those who execute it, such persons may be enjoined from acting thereunder, when there is no adequate remedy at law. The well recognized exception to the general rule, supported by the great weight of authorities, is that where some irreparable injury will be occasioned to a private individual by the acts of a public officer or board by virtue of some alleged unconstitutional law, courts of equity will take jurisdiction and issue an injunction to restrain the commission of the act complained of. This exception is founded on the theory that, as an incident to the protection of property, a court of equity may refuse to recognize as valid a clearly unconstitutional act of the Legislature, because the Constitution is the paramount law of the land, which every suitor can invoke when an infringement of his rights is threatened under some law in violation thereof."

In 32 C. J., 243, sec. 385, we find: "An injunction is proper to restrain an officer from acting under an unconstitutional or otherwise invalid statute, where irreparable injury to complainant will result therefrom." The Court's position that only those who allege that irreparable damage will be done them by the enforcement of a statute are privileged to ask the judiciary to consider the constitutionality or the invalidity of a statute is not in accord with past decisions. Many actions have been brought in the courts to restrain the enforcement of a statute, and it has been customary to pass upon the merits of the contention.

In *Claywell v. Commissioners,* 173 N. C., 657, the plaintiffs, citizens and taxpayers of Burke County, brought an action to restrain the board

of road commissioners from issuing county bonds. Certainly the issuance of $300,000 in bonds would not have caused the taxpayers of Burke County irreparable damage, but this Court considered the merits of the controversy, holding that the invalidity of a portion of the act rendered the whole invalid.

In *Snider v. Jackson County,* 175 N. C., 590, the plaintiff, a resident and taxpayer, brought an action to restrain the board of county commissioners of Jackson County from issuing bonds, levying special taxes, and pledging the credit of the county to the establishment of a farm-life school in that county, basing his application for an injunction upon the fact that no election had been held, as required by law, authorizing the board to incur the indebtedness and to levy the tax. It was not questioned by this Court that he had the right to bring the action, although it could not be alleged that the establishment of the farm-life school would cause him irreparable injury, in fact, it might more logically have been argued that it would benefit him. Instead of booting him out of court because he could not allege irreparable injury, this Court considered the merits of the case. *Associate Justice Brown* wrote the opinion upholding the contention of the taxpayers that an act of the Legislature was void and of no effect.

In *Guy v. Commissioners,* 122 N. C., 471, *supra,* an action was brought in Cumberland County to enjoin the dispensary board of that county from establishing and maintaining the dispensary authorized by chapter 235, Public Laws 1897, and to enjoin the county commissioners from paying out any county funds or pledging the credit of the county for the support of such dispensary and from engaging in the sale of liquor under said act, and to have said act declared unconstitutional. The board of county commissioners was enjoined from paying out any of the county funds, and the plaintiff appealed. This Court did not shut the door in his face on the ground that having alleged no irreparable injury, he could not ask the court to consider the constitutionality of the act of the Legislature. On the contrary, it considered thoroughly the questions raised as to the validity of the statute.

Again, in *Garsed v. Commissioners,* 126 N. C., 159, the plaintiff brought action to annul by injunction the Greensboro dispensary on the ground that an act of the 1899 Legislature was void. No question was raised as to his right to bring the action or as to the right of this Court to pass upon the constitutionality and validity of the act. The plaintiff in that case did not allege irreparable injury, nor was it necessary in this case. The *Garsed case, supra,* was decided before the new constitutional amendment went into effect.

Of course, there are cases in which only an allegation of irreparable injury is sufficient ground for an injunction, one being a civil trespass, *Lumber Co. v. Cedar Co.,* 142 N. C., 411, but it by no means follows

that such an allegation must be made to test the constitutionality of an act. It is too broad and sweeping, too devastating to say that a citizen must allege irreparable damage to him before he can have a court pass upon the constitutionality or the validity of a statute that he and learned counsel, by whom he has been advised, believe to be void and of no effect, contrary in purpose to the declared public policy of the State—its aims in contravention of the State Constitution. If these be not sufficient grounds for a court to consider the merits of the contentions of eminent public citizens, then indeed it may be said that the courts have abdicated from their functions as preservers of the liberties of the people.

In *Russell v. Troy,* 159 N. C., 366, the plaintiff sought to restrain the issuance of $20,000 in bonds after an election had been held upon the ground that the statute under which they would be issued was void. His contention was upheld. No allegation of irreparable damage was considered in passing upon the plaintiff's contentions. Instead this Court acted in its judicial capacity and declared the statute invalid. No doubt the plaintiff was a taxpayer and had an interest to that extent in the action.

It has been argued that the establishment of these liquor stores would provide sufficient revenue to maintain them, and that, therefore, plaintiffs in this action cannot be heard to complain because they would not be damaged as to their property. This takes too narrow a view of the case. The majority have a right to rule, but they do not have the right to do so by illegal means, and certainly any citizen residing within the district included in the purported statute is entitled to the same consideration as a citizen interested in law observance as a taxpayer who may have to pay a few more dollars in taxes because of the issuance of bonds.

In *Paschal v. Johnson,* 183 N. C., 130, the plaintiff brought an action to restrain the issuance of $50,000 in school bonds, in a consolidated school district in Alamance County. While his contention as to the invalidity of the statute under which the bonds were issued was not upheld, there was no allegation of irreparable injury required in order for him to be heard in court. On the contrary, this Court passed upon his contention.

Among the learned counsel appearing for parties in the cases brought before this Court, who considered that they had at least a right to be heard on the merits as to their contentions, that the Pasquotank Liquor Commission Act is void and of no effect, unconstitutional in purpose and aim, and contrary to the legally declared public policy of the State, were the following: *Justice L. R. Varser,* a former member of this Court, Col. John D. Langston, I. C. Wright, J. H. Bridgers, W. H. Yarborough, A. P. Godwin, LeRoy Scott, G. M. Beam, A. D. Ward, K. A. Pittman, and others. They based their cause of action upon the allega-

tion that the statute was unconstitutional, null and void, asking for an injunction not only to restrain the defendants from holding an election but also to restrain them from taking any action under said statute, such as renting or buying stores, or establishing any liquor stores, or buying or selling any liquors or alcoholic beverages, or appointing any members of the Alcoholic Beverage Control Board, or in any way spending money or pledging the faith and credit, or borrowing any money.

Not only was the unconstitutionality and invalidity of the statute ably upheld in learned briefs, but it was also debated at length in oral arguments before this Court. It was not only assumed by counsel for the plaintiffs in this action that they had a right to be heard on the question of the constitutionality and validity of the statute, but also some of the able counsel for the defendants thought injunction the remedy.

R. W. Lucas *et al.* obtained a restraining order from Frizzelle, J., on 24 June, 1935, against the board of county commissioners of Beaufort County *et al.,* returnable before Cranmer, J., at Elizabeth City, *2:30 p.m., 28 June, 1935,* to show cause why the order should not be continued to the trial of the action. Small, J., issued a restraining order against R. W. Lucas *et al.* (a day sooner), *returnable 27 June, 1935, at 4 p.m.,* in it, in part, is the following: "The said plaintiffs, their agents and attorneys, are hereby enjoined and restrained from applying to any court in North Carolina for any order or rule in any way interfering with the defendants in the performance of any of the duties hereinbefore referred to, and let the said plaintiffs above named take notice that they are directed to show cause, . . . if any they have, why this restraining order should not be continued to the final hearing of this cause."

Those representing the board of county commissioners of Beaufort County *et al.* thought a restraining order was the remedy, and had Small, J., issue a restraining order against a restraining order. Perhaps never before has there been such legal procedure in this State. Now the position seems to be reversed, and an injunction is not the remedy.

If the statute was void and of no legal effect, as the plaintiffs contend, they were entitled to an injunction against the holding of the election, *Griffith v. Board of Education, supra,* but if the election had been held, under a void statute, they would have the right to restrain the defendants from proceeding under the statute. To say that a citizen may not raise the question as to the validity of a void statute until it has been shown that he has suffered irreparable injury is going entirely too far, and is not in accord with the decisions of this Court. But, taking all the facts alleged in the complaint, it showed irreparable injury without using the words. The complaint prayed for "general relief," which covered every equitable right in a court of equity.

Some of the other numerous cases in which injunctive relief was granted by this Court, although there was no allegation of irreparable damage to the plaintiff, are *State v. Scott,* 182 N. C., 868; *Newton v. Highway Commission,* 192 N. C., 56; *Carlyle v. Highway Commission,* 193 N. C., 36; see N. C. Prac. & Procedure (McIntosh), sections 857 and 859. *Glenn v. Commissioners of Durham,* 201 N. C., 233.

In *Glenn v. Commissioners of Durham, supra,* the plaintiff secured an injunction to restrain the defendants from issuing certain funding bonds in the amount of $65,000. Affirming the decision of the lower court in granting the injunction, this Court held that the Legislature cannot extend the Constitution even in times of stress, that what constitutes "special purpose" for which an unlimited tax can be levied under the Constitution is a question for the court, *Chief Justice Stacy* declaring: "The Constitution is the protector of all the people. It stands as their shield and buckler in fair weather and foul; and in periods of panic and depression, it is to them 'as the shadow of a great rock in a weary land, a shelter in the time of storm.'" In *Murphy v. Greensboro,* 190 N. C., 268, a taxpayer was held to be entitled to injunctive relief.

In *Raleigh v. Trustees,* 206 N. C., 485, an action for injunctive relief, *Associate Justice Connor,* speaking for this Court, raised no point as to the right to enjoin; nor was the point raised in *Martin v. Commissioners of Wake County, ante,* 354, which he wrote for the Court.

North Carolina has become one of the greatest agricultural and industrial states of the Union. She has gained this prominence since the enactment of the laws against the manufacture and sale of intoxicating liquors. To say that the Turlington Act cannot be enforced is to retreat—"impossibility" is not in the vocabulary of North Carolinians. They helped win the Battle of King's Mountain, which was the forerunner of Cornwallis' surrender at Yorktown. In the War Between the States she was "First at Bethel, furtherest at Gettysburg and last at Appomattox." In the World War, North Carolina, South Carolina, and Tennessee broke the Hindenburg Line.

This act is unconstitutional and should not be upheld, but the Turlington Act enforced. No person, family, community, county, state, or nation has or ever will reach the height of health, happiness and prosperity that is addicted to the use of intoxicating liquor. It is worse than war, pestilence, and famine. Already statistics in one of the counties having liquor stores for September, 1935, show an increase of 300 per cent in drunkenness and 100 per cent in drunken drivers. You cannot have *more* liquor and *less* crime. It is an evil that must be destroyed, a habit-forming drug like opium and other narcotics. The financial unsoundness, not only in wreckage to the individual, but, to sell the intoxicating liquor to get the revenue, five to ten times the amount of money is sent out of the State to foreign liquor dealers.

To my mind, the act is jungle, crazy-quilt legislation, and a blot on the garment of this great commonwealth, and every power should be exerted to wipe this blot off. If the arm of this Court is legally too feeble, the counties must throw off the galling yoke. Then, again, there is another forum, and one in which all the people of the State can have a hearing in regard to such special privilege legislation. The Constitution of this State is the Ark of the Covenant for law and order and good government.

In this dissent I am mindful of Polonius' advice to his son:

"To thine own self be true,
And it must follow, as the night the day,
Thou canst not then be false to any man."
(Shakespeare—*Hamlet.*)

I have disagreed with my brethren of the bench with no intention of being disagreeable. The contest of the organizations in 1908 and 1933 against this evil is worthy to be preserved and emulated. It was not hate, but human sympathy, in the effort to solve the greatest of all evils. "We are against the evil, not against those who differ with us. In other vocations and duties, we would wish them godspeed."

May I add:

"In the sweetest bud,
The eating canker dwells."

For the reasons given, I think the judgment of the court below should be reversed.

SPRUNT ET AL v. HEWLETT ET AL., BOARD OF COMMISSIONERS, AND GARDNER ET AL., BOARD OF ELECTIONS OF NEW HANOVER COUNTY, AND MACMILLAN ET AL., NEW HANOVER COUNTY ALCOHOLIC CONTROL BOARD, AND CITY OF WILMINGTON.

(Filed 1 November, 1935.)

APPEAL by the plaintiffs and defendants from *Frizzelle, J.*, at July Term, 1935, of NEW HANOVER.

Varser, McIntyre & Henry and I. C. Wright for plaintiffs.
Bellamy & Bellamy and Bryan & Campbell for defendants.

SCHENCK, J. This is an equitable action wherein the plaintiffs, upon allegations of unconstitutionality, sought to enjoin the defendants from holding the election and putting into effect the other provisions of chap-

ter 418 of the Public Laws of 1935, which provides for an election to be held to determine whether the statute which carries two major provisions shall become the law in New Hanover County, these provisions being, first, to make the general law prohibiting traffic in alcoholic beverages (Art. 8, ch. 66, Vol. 3, Consolidated Statutes) inapplicable to New Hanover County, and to establish a method for such traffic under county supervision and control, and, second, to make the traffic in alcoholic beverages in said county otherwise than provided in said statute a misdemeanor and to prescribe punishment therefor.

The several judgments of the court below denied orders restraining the holding of the election and the putting into operation of the other provisions of the statute, except the provision for financing such operations from general county funds, and to these judgments denying injunctive relief the plaintiffs excepted and appealed, and to those provisions in the judgments allowing injunctive relief against the financing of the operations of the statute from general county funds the defendants excepted and appealed.

While there are some differences between Chapter 418 of the Public Laws of 1935, involved in this case, and chapter 493 of said laws, involved in the case of *Newman et al. v. Watkins et al., Board of County Commissioners, and Royster et al., Board of Elections of Vance County, ante,* 675, the general provisions of the two statutes are to the same effect, and the pleadings in the two cases are similar and the same result is sought through the same method, and practically the same questions are involved in the appeals in the two cases.

Under the authorities cited in the *Vance County case, supra,* the plaintiffs cannot maintain this action for injunctive relief, since they nowhere allege that they, individually or collectively, will suffer irreparable injury, or that there will be any invasion of their property rights by the holding of the election, or by the putting into effect any or all of the other provisions of the statute as a result of the election. "Courts never pass upon the constitutionality of statutes, except in cases wherein the party raising the question alleges that he is deprived of some right guaranteed by the Constitution, or some burden is imposed upon him in violation of its protective provisions." *St. George v. Hardie,* 147 N. C., 88 (97).

Affirmed on plaintiffs' appeal.

Error on defendants' appeal.

CLARKSON, J., dissenting: The caption of chapter 418, Public Laws 1935, is as follows: "An act to exempt New Hanover County from the provisions of Article Eight of Chapter Sixty-six of Volume Three of the Consolidated Statutes, known as the Turlington Act."

Art. II, sec. 29, of the Constitution of North Carolina, in part: "The General Assembly shall not pass any local, private, or special act or resolution . . . relating to *health,* sanitation, and the abatement of nuisances . . . regulating labor, trade, mining, or manufacturing, . . . nor shall the General Assembly enact any such local, private, or special act by the partial repeal of a general law, but the General Assembly may at any time repeal local, private, or special laws enacted by it. Any local, private, or special act or resolution passed in violation of the provisions of this section shall be void."

Sec. 2 of ch. 418, Public Laws 1935, *supra,* says, in part: "This act shall be deemed an exercise of the police power of the county of New Hanover, for the protection of the . . . health," etc.

It is in the very *word* and teeth of the Constitution, above quoted, and therefore unconstitutional. It is a partial repeal of a general law.

My dissent in *Newman et al. v. Watkins et al., ante,* 675, from Vance, states fully the reasons I think the Pasquotank Act unconstitutional and injunctive relief is the proper remedy, and applies to this case also.

The questions involved on this appeal: (1) Did his Honor err in permitting an election and in making the city of Wilmington a party, having declared the act unconstitutional? I think so. (2) While an appeal is pending to the Supreme Court from an injunction continued to the final hearing, is it proper, after the judge who heard it is through hearing the courts of the district, except by exchange, and while the act is still declared unconstitutional, is it error for the judge to modify his previous injunction, and permit the county commissioners to appoint a liquor board, and the liquor board to open up stores and sell liquor, and put the act, which the same judgment and order holds unconstitutional, into effect? I think so. (3) Was it error for the court to find that there was a balance in the New Hanover County general fund, and that the liquor board, when appointed, could buy upon its own credit, and without pledging the faith and credit of New Hanover County? I think so.

I do not think it necessary to state further my reasons for dissenting, except to say, from an examination of this act that it is a special privilege, far reaching and destructive of constitutional government. It may not be amiss to say that it is to the credit of such well-known and prominent citizens, that they thought it their duty to bring this action to declare this act unconstitutional. They appear as plaintiffs: W. H. Sprunt, Rev. J. A. Sullivan, Roger Moore, Chas. Ruffin, W. F. Moore, J. L. Becton, H. S. McGirt, J. E. Willoughby, F. G. Rose, Wm. Struthers, Rev. A. J. Barton, S. J. Ellis, W. A. Walker, Sr., Mary Louise Walker, J. A. McDougall, H. W. Stevens, Sr., and B. B. Pridgen.

Sec. 26 of the act in question: "Nothing herein contained shall be construed so as to permit the manufacture and sale of alcoholic beverages in North Carolina except as herein provided." Sec. 27: "All laws

or parts of law inconsistent with the provisions of this act are hereby repealed." Nowhere in North Carolina, not even in the counties under the Pasquotank Act, is permitted "the manufacture and sale of alcoholic beverages in North Carolina *except as herein provided*"—that is, New Hanover County to have the exclusive privilege—the kingly power.

"Upon what meat doth this our Cæsar feed,
That he is grown so great?"
(Shakespeare—*Hamlet.*)

For the reasons given, I think the judgment on plaintiffs' appeal should be reversed—on defendants' appeal, no error.

INSCOE ET AL. v. BOONE ET AL., BOARD OF COMMISSIONERS, AND INSCOE ET AL., BOARD OF ELECTIONS OF FRANKLIN COUNTY.

(Filed 1 November, 1935.)

APPEAL by defendants from *Williams, J.,* at June Term, 1935, of FRANKLIN. Reversed.

Chas. P. Greene and E. H. Malone for appellants.
G. M. Beam and W. H. Yarborough for appellees.

SCHENCK, J. This is an equitable action wherein the plaintiffs, upon allegations of unconstitutionality, enjoined the defendants from holding the election and putting into effect in Franklin County the other provisions of chapter 493 of the Public Laws of 1935, being an act to exempt certain counties from the provisions of Article 8, chapter 66 (entitled "Prohibition"), Volume 3, of the Consolidated States, and to set up alcoholic control boards therein. This action is practically the same in purpose and in form as *Newman et al. v. Watkins et al., Board of Commissioners, and Royster et al., Board of Elections of Vance County, ante,* 675, and the reasons given and the authorities cited in the *Vance County case* affirming the judgment denying the injunctive relief prayed for in the complaint are reasons and authorities for reversing the judgment in this case granting such relief.

Reversed.

CLARKSON, J., dissenting: For the reasons given in my dissenting opinion in the action of *Newman et al. v. Watkins et al., ante,* 675, I think the judgment of the court below should be affirmed.

HARDY ET AL. v. BURROUGHS ET AL., BOARD OF COUNTY COMMISSIONERS, AND MOSELEY ET AL., BOARD OF ELECTIONS OF WARREN COUNTY.

(Filed 1 November, 1935.)

APPEAL by plaintiffs from *Devin, J.*, at June Term, 1935, of WARREN.

J. H. Bridgers for appellants.

George C. Green, Perry & Kittrell, Julius Banzet, Stuart Smith, and Frank Banzet for appellees.

SCHENCK, J. This case is practically the same as *Newman et al. v. Watkins et al., Board of County Commissioners, and Royster et al., Board of Elections of Vance County, ante,* 675, and is affirmed for the reasons therein stated.

Affirmed.

CLARKSON, J., dissenting: For the reasons given in my dissenting opinion in the action of *Newman et al. v. Watkins et al., ante,* 675, I think the judgment of the court below should be reversed.

LUCAS ET AL. v. MIDGETTE ET AL., BOARD OF COMMISSIONERS, AND J. R. BRITT ET AL., BOARD OF ELECTIONS OF BEAUFORT COUNTY.

(Filed 1 November, 1935.)

Appeal and Error A e—

Where it is conceded on appeal that the election sought to be enjoined by plaintiffs has been held, plaintiffs' appeal presents a moot question, and will be dismissed.

CLARKSON, J., dissenting.

APPEAL by plaintiffs from *Small, J.*, at Chambers in Elizabeth City, 27 June, 1935. From BEAUFORT. Appeal dismissed.

Varser, McIntyre & Henry, A. P. Godwin, LeRoy Scott, John D. Langston, and I. C. Wright for appellants.

J. D. Grimes, H. S. Ward, Bryan Grimes, H. C. Carter, and S. M. Blount for appellees.

SCHENCK, J. This action was first instituted by the plaintiffs to enjoin the defendants from holding an election and putting into effect the provisions of chapter 493 of the Public Laws of 1935, upon the ground that the statute is unconstitutional and void. On 24 June, 1935, the plaintiffs secured from Frizzelle, J., a temporary order restraining the defendants from holding such election and citing said defendants to appear on June 28 to show cause why such restraining order should not be continued until the final hearing. Before notice of this temporary order was served upon the defendants they procured from Small, J., a temporary order restraining the plaintiffs from interfering by injunction or otherwise with their holding the election, and the judgment entered on 27 June, by Small, J., upon the hearing to determine whether his former order should be made permanent, contains the following: "It is further ordered and adjudged that the plaintiffs and each of them and their agents and attorneys be and they are hereby enjoined and restrained from in any way attempting to interfere with the defendants in the holding of said election and the performance of other duties imposed on them under the provisions of said act." To this judgment the plaintiffs excepted and appealed to the Supreme Court.

The only assignment of error in the record is to the signing of the judgment continuing the restraining order of Small J., in effect until the final hearing, and this assignment raises the only question involved on this appeal, namely, did the defendants have the right to restrain the plaintiffs from interfering by injunction with their holding of the election in Beaufort County as provided by the statute; and, since it is conceded that this election sought to be enjoined by the plaintiffs has been held, this appeal presents a moot question, and, under the decisions of this Court should be dismissed. *Rousseau v. Bullis,* 201 N. C., 12, and cases there cited.

Appeal dismissed.

CLARKSON, J., dissenting: The questions involved: (1) When a suit is brought against defendants, public officers, to test the validity of a statute, and enjoin its enforcement, is it proper for the defendants to move in the same cause to secure an injunction against an injunction? I think not. (2) When plaintiffs have a temporary injunction against defendants, may the defendants, in the same cause, enjoin them from proceeding with the said injunction? I think not. (3) May the defendants, in the liquor act controversy, enjoin the plaintiffs, in the same suit from attempting, by said suit, to interfere with the defendants in the performance of the duties which said act attempts to confer, without the court passing on the validity of the act, and without any allegations of fact justifying such an attempt to prevent citizens from testing in the courts the validity of the liquor statute? I think not.

The plaintiffs are enjoined from in any way attempting to interfere with the defendants in the holding of an election, and the performance of other duties imposed on them under the provisions of said act. In other words, the plaintiffs are enjoined from preparing their case for trial on the merits, from in any way attempting to resist in the courts the putting into effect of what they consider an unconstitutional statute. This, when the statute was not before the court issuing the injunction, and its validity was not being passed upon by him. Plaintiffs could not do anything in the furtherance of said case. If other plaintiffs wanted to join, and when the plaintiffs had procured a temporary injunction before Judge Frizzelle, the defendants attempted to hold them for contempt, as shown by the affidavit in this case. The injunction did not limit itself to any alleged impropriety, but specifically would make the plaintiffs guilty of contempt, if they in said proceedings attempt to interfere with the defendants in putting the alleged unconstitutional act into effect or carrying it out, and the only allegation of any attempts were by legal proceedings in this cause. In other words, the order appealed from, without having the liquor act before the court for construction, would deny the plaintiffs the right to attempt to contest its validity by perfectly proper judicial proceedings.

The Constitution, Article I, section 35, says: "All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay."

The Beaufort County Liquor Act seems to be so sacro that the plaintiffs are not permitted even to attempt to question it. "It is generally held that an injunction will issue to restrain the holding of an election when there is no authority for calling it, and where the holding of an election would result in a waste of public funds." *Griffith et al. v. Board of Education of Forsyth County,* 183 N. C., 408. *Hawke v. Smith,* 253 U. S., 221, 64 L. Ed., 871. Where an order exceeds the authority conferred upon a public official, and is an illegal act done under color of his office, he may be enjoined from carrying it into effect. *Work v. Louisiana,* 269 U. S., 250, 70 L. Ed., 259, 263. The defendants were not acting in a governmental capacity. *State of Ohio v. Helvering,* 292 U. S., 360, 78 L. Ed., 1307.

The constitutionality of the statute was not before Judge Small. The question is the legal right to issue the restraining order and injunction when another restraining order had already been issued, but not served. This was known to the judge who issued the restraining order against plaintiffs and continued it to the hearing.

In *McReynolds v. Harshaw,* 37 N. C., 195 (196-7), it is said: "The supplementary bill, as it is called, is a perfect novelty. An injunction

is a prohibitary writ specially prayed for, because of matter of equity, requiring this extraordinary interposition of a court of conscience, to restrain a party from doing some act *in pais,* or from pursuing some proceeding in another court that is iniquitous, but from which he cannot otherwise be effectually restrained. An application to a court to restrain one of its suitors from moving the court for any relief, to which he believes himself entitled, can scarcely be considered as seriously made. If the contemplated motion be one which, under the circumstances of the case, is not proper to be granted, these circumstances should be disclosed, or brought to the notice of the court, upon the motion itself. The ground of enjoining proceedings in other courts is, because these courts, from the nature of their organization, cannot take effectual cognizance of the special matter, which renders the proceedings therein iniquitous. But the court, which is asked to enjoin proceedings because of equitable matter alleged, is unquestionably competent, when it shall be asked to sanction those proceedings, to determine whether they be iniquitous or not—whether it shall give or withhold that sanction."

In *Williams v. Brown,* 127 N. C., 51 (52), is the following: "The court cannot enjoin the defendant from talking, nor from threatening to enjoin the plaintiff. This would be to enjoin the defendant from enjoining the plaintiff, and we think this would be carrying the injunction business a little too far."

I do not think that a court of equity should consider a matter of this kind a moot question, when the subject which is termed moot is illegally obtained. I think the judgment of the court below should be reversed.

C. W. PENLEY AND WIFE, LAURA PENLEY, v. COLUMBUS M. RADER AND THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

(Filed 1 November, 1935.)

Process B h: Sheriffs D b—Presumption of service of summons from sheriff's return cannot be rebutted by uncorroborated testimony of person served.

Plaintiffs instituted action against the sheriff and his bondsman for damages caused by alleged false return of summons by the sheriff. The sheriff's return was regular upon its face, but each plaintiff testified that service was not made on him, but did not testify as to whether service was made on the other plaintiff, and there was no evidence corroborating plaintiffs' testimony. *Held:* Defendants' motion for judgment as of nonsuit was properly granted.

APPEAL by plaintiffs from *Phillips, J.*, at the February Term, 1935, of CALDWELL. Affirmed.

Russell & Russell for plaintiffs, appellants.
Mark Squires and W. H. Strickland for defendants, appellees.

PER CURIAM. This action was instituted by the plaintiffs to recover of the defendants, the sheriff and his bondsman, the forfeiture of $500.00 provided in C. S., 3936, for the making of a false return by the sheriff, and for other damages accruing to them by reason of such false return. The plaintiffs allege that their real property, worth $3,500, was sold at a tax foreclosure sale for $260.00, and that they had no notice thereof, and had they had such notice they would have been able, ready, and willing to make the payment of the taxes due and thereby have prevented such tax sale, and the plaintiffs further allege that the return of the defendant sheriff, upon the summons, issued in the case wherein the sale of their land was ordered, to the effect that said summons had been served upon the defendants therein, C. W. Penley and his wife, Laura Penley, by delivering a copy of the summons and of the complaint to each of them, was a false return, for that no such service was ever made upon either C. W. Penley or his wife, Laura Penley, and that as a result of this false return their lands have been lost to them and that they have been damaged thereby in the sum of $3,500. The defendants deny that the return made upon the summons in the tax foreclosure action, wherein the plaintiffs in this case were defendants, was false, and allege that service in said case was made in accord with the return on the summons, namely, by delivering copies of the summons and of the complaint to each of the defendants (plaintiffs in this action).

The male plaintiff, C. W. Penley, testified that no copy of the summons and no copy of the complaint was delivered to him. The *feme* plaintiff, Laura Penley, testified that no such copies were delivered to her. Neither testified as to whether such copies were delivered to the other. The evidence shows that at the time the return was made the plaintiffs were living in different counties, Catawba and Caldwell, respectively. There was no corroborative testimony or other evidence as to there being no service of summons and complaint upon the defendants in the tax foreclosure action.

"When notice issues to the sheriff, his return thereon that the same has been executed is sufficient evidence of its service." C. S., 921. It has been uniformly held by this court that a return upon a summons or other process by the sheriff, regular in form, cannot be successfully contradicted by the uncorroborated testimony of the defendant, or party served. "The sheriff's return imports the truth. It is made under oath

and cannot be overthrown or shown to be false by the affidavit, merely, of the person upon whom the service is alleged to have been made." *Burlingham v. Canady,* 156 N. C., 177. While a person injured thereby may maintain an action for damages growing out of a false return made by a sheriff or other officer, there is a presumption that an officer's return states the truth, and to rebut this presumption the evidence in contradiction thereof must be more than the testimony of one witness. *Commissioners v. Spencer,* 174 N. C., 36.

In the absence of any testimony or other evidence to corroborate the plaintiffs' testimony that they were never served in the tax foreclosure action, we think his Honor properly granted the motion for judgment as of nonsuit at the close of the evidence.

It was admitted by the plaintiffs that the action in so far as it relates to the forfeiture of $500.00 mentioned in the statute was barred by the statute of limitations.

Affirmed.

W. M. HARRELSON v. WILMINGTON COCA-COLA BOTTLING COMPANY.

(Filed 1 November, 1935.)

Appeal and Error F b—Exception to judgment of nonsuit without exception to court's order allowing defendant's motion therefor is insufficient.

Where appellant does not except to the court's order allowing defendant's motion for judgment as of nonsuit at the close of all the evidence, and the sole exception is to the judgment, the order is not subject to review on appeal, and the judgment will be affirmed when no error appears upon its face.

APPEAL by plaintiff from *Grady, J.,* at November Term, 1934, of COLUMBUS. Affirmed.

This is an action to recover damages for personal injuries suffered by the plaintiff and caused, as alleged in the complaint, by the negligence of the defendant.

At the close of all the evidence the defendant moved for judgment dismissing the action as of nonsuit. The motion was allowed. The plaintiff did not except to the order allowing the motion. There was judgment dismissing the action as of nonsuit.

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

Powell & Lewis for plaintiff.
Tucker & Proctor and Carr, Poisson & James for defendant.

PER CURIAM. The plaintiff did not except to the order of the trial court, allowing the motion of the defendant, at the close of all the evidence, for judgment as of nonsuit. For this reason, the order is not subject to review by this Court.

The only exception in the record is to the judgment. As there is no error in the judgment, it must be affirmed. *McCoy v. Trust Co.*, 204 N. C., 721, 169 S. E., 644, and cases there cited.

Affirmed.

R. E. JACKSON AND HIS WIFE, LULA G. JACKSON, v. NORTH CAROLINA JOINT STOCK LAND BANK OF DURHAM AND THE INTERSTATE TRUSTEE CORPORATION.

(Filed 1 November, 1935.)

Contracts A b—Where no time is stipulated for acceptance of offer, offeree has reasonable time within which to accept same.

Defendant offered to accept a stipulated sum in full settlement of plaintiffs' mortgage indebtedness to defendant if payment were made in thirty days. After the expiration of the thirty days defendant accepted a partial payment of the sum stipulated, and agreed to accept bonds of the Federal Land Bank in a stipulated amount in payment of the balance. About four months after the partial payment, plaintiffs obtained the bonds and tendered same to defendant, and defendant declined to accept same. *Held:* Plaintiffs' rights are to be determined in accordance with the second offer of defendant, made upon accepting partial payment, and as no time was therein set for acceptance by plaintiffs, plaintiffs had a reasonable time within which to comply with its terms, upon the jury's finding that plaintiffs tendered the bonds within a reasonable time, plaintiffs are entitled to specific performance.

APPEAL by defendants from *Grady, J.*, at June Term, 1935, of LENOIR. No error.

This is an action for the specific performance of a contract by which the defendant North Carolina Joint Stock Land Bank of Durham agreed to accept from the plaintiff R. E. Jackson, in full settlement of his indebtedness to said bank, amounting to $10,295, the sum of $8,000. The said indebtedness was evidenced by a bond secured by a deed of trust executed by the plaintiffs to the defendant, the Interstate Trustee Corporation, on land in Lenoir County, North Carolina.

On 5 March, 1934, the defendant North Carolina Joint Stock Land Bank of Durham offered to accept from the plaintiff R. E. Jackson, in full settlement of his indebtedness to said bank, the sum of $8,000, provided said sum was paid within thirty days. The plaintiff accepted said offer and notified defendant that he had undertaken to raise said sum of

$8,000. After the expiration of thirty days from the date of said offer, the plaintiff paid to the defendant the sum of $2,061.13, in money, and on 17 August, 1934, the defendant agreed to accept from the plaintiff bonds of the Federal Land Bank of Columbia, S. C., of the face value of $5,938.87, as the balance due on the settlement. The plaintiff had applied to said Federal Land Bank for said bonds, and said application was then pending. On 3 December, 1934, the defendant notified the plaintiff that on account of the unreasonable delay of the plaintiff in completing said settlement, its offer was withdrawn. Thereafter, on 23 January, 1935, the plaintiff procured bonds of the Federal Land Bank of Columbia of the face value of $5,938.87, and tendered same to the defendant. The defendant declined to accept said bonds. This action was begun on 19 March, 1935.

At the trial, in response to issues raised by the pleadings, the jury found that there was no unreasonable delay on the part of the plaintiff in making the tender of the bonds, and that plaintiff was then ready, able, and willing to comply with the terms of the contract entered into by the parties on 17 August, 1934. Other issues were answered by the court, with the consent of the parties to the action, in accordance with the contentions of the plaintiffs.

From judgment in accordance with the verdict, the defendants appealed to the Supreme Court, assigning numerous errors in the trial.

Wallace & White and Shaw & Jones for plaintiffs.

R. A. Whitaker, J. S. Patterson, S. C. Brawley, and A. W. Cowper for defendants.

PER CURIAM. The contract which the plaintiffs seek to enforce by this action was the result of an offer by the defendant North Carolina Joint Stock Land Bank of Durham, and its acceptance by the plaintiff R. E. Jackson, on 17 August, 1934. This contract contains no provision that it must be complied with by the plaintiff within thirty days, as was the case with the contract dated 5 March, 1934. For this reason, the plaintiff had a reasonable time within which to perform the contract. The jury having found that there was no unreasonable delay on the part of the plaintiff in making a tender of the bonds, and that plaintiff was ready, able, and willing to comply with the offer of the defendant, at the time of the trial, the plaintiffs are entitled to a specific performance by the defendant of the contract.

We find no error in the trial. The judgment appearing on the record is affirmed.

No error.

STATE v. LEON WILLIAMS.

(Filed 1 November, 1935.)

Homicide A c—Evidence held sufficient to be submitted to jury on the charge that defendant was accessory before fact to crime of murder.

Evidence tending to show that defendant knew of and participated in the plans or preparations made for the killing of deceased, that defendant procured a coat for the killer and furnished an automobile as a means of flight after the murder had been committed *is held* sufficient to be submitted to the jury on an indictment drawn under C. S., 4175.

APPEAL by defendant from *Daniels, J.,* at October Term, 1934, of LENOIR.

Criminal prosecution, tried upon indictment in which it is alleged that the defendant, on or about 6 December, 1933, "did unlawfully, wilfully, feloniously, and maliciously incite, move, procure, aid, counsel, hire, and command the said Fred Wade . . . to kill and murder the said Bennie Mozingo." The second count in the bill charges the defendant with being accessory after the fact of said murder in that he feloniously harbored, comforted, and assisted the killer, Fred Wade.

The evidence on behalf of the State tends to show that Fred Wade killed Bennie Mozingo with a shotgun. It further tends to show that the deceased, Bennie Mozingo, Fred Wade, the killer, and Tom Williams, brother of defendant, who carried the killer from the scene of the killing, and the defendant were all engaged in the liquor business. The evidence also tends to show that Eddie Mozingo hired Fred Wade to kill Bennie Mozingo. *S. v. Mozingo,* 207 N. C., 247, 176 S. E., 582.

The defendant testified that on the day of the killing the deceased, Bennie Mozingo, requested him to put certain kegs in some bushes near the scene of the killing, which he did, "around about an hour by sun." Afterwards the defendant saw the killer, Fred Wade, and at said Wade's request took him in his car to a point on the highway near a clay-hole in which the killer concealed himself, awaiting his victim. The killing occurred about 6:30 or 7:30 o'clock at night. There was evidence for the defendant that when the killer alighted from the car "he did not tell me why he was getting out. Up to that time I did not know anything about the arrangement that he and Eddie had between themselves." A short time prior to taking the kegs to the scene of the killing the defendant talked with Eddie Mozingo, who, according to the evidence, had hired Fred Wade to kill Bennie Mozingo, and that in the course of the conversation he told Eddie Mozingo that he was going to carry the kegs to be filled with liquor.

There was testimony from the officers that Tom Williams had said, in the presence of the defendant Leon Williams, that "Leon got out of the car and told Tom to take the car and go back to the clay-hole, that someone was waiting there and would tell him what to do." There was further evidence on behalf of the State that the defendant Leon Williams told Tom Williams "that Fred was down at the clay-hole and did not have a coat and for Tom to go get Fred a coat."

The defendant testified that he knew nothing of the plan to kill Bennie Mozingo. Furthermore, Fred Wade, the killer, Eddie Mozingo, who hired Wade to do the killing, and Tom Williams, who carried the killer from the scene immediately after the killing, were all serving terms in the State Prison at the time of the trial, and all testified in effect that the defendant Leon Williams had nothing to do with the killing and knew nothing about it.

Demurrer to the evidence; overruled; exception.

Verdict: "Guilty on both counts."

Judgment: Imprisonment in the State's Prison for life. C. S., 4175.

Defendant appeals, assigning errors.

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

Shaw & Jones for defendant.

PER CURIAM. The principal question presented by the appeal is the sufficiency of the evidence to carry the case to the jury.

There was no charge of conspiracy in the indictment, which was drawn in accordance with the provisions of C. S., 4175, consequently, the inquiry arises: Did the defendant "counsel, procure, or command" Fred Wade to commit the crime?

The evidence tends to show the following facts:

(a) All the parties were actively engaged in the liquor business.

(b) The defendant carried certain empty kegs to the scene of the crime about an hour before sunset.

(c) The defendant informed Eddie Mozingo, who hired the killer, that the kegs would be at the scene.

(d) The defendant carried the killer in his automobile to a point near the clay-hole or sand-pit in which he concealed himself until the victim arrived about 6:30.

(e) The defendant told Tom Williams, who carried the killer from the scene, "that Fred was down at the clay-hole and did not have a coat, and for Tom to go get Fred a coat."

(f) The defendant turned his car over to Tom "and told him to go down to the clay-hole, that Fred wanted a coat, and that he would tell him what to do."

The foregoing facts, and others of like import, tend to show that the defendant knew what was going on. Moreover, they tend to show that the defendant was active in procuring a coat for the killer and in furnishing an automobile as a means of flight after the crime had been committed. There was much evidence to the contrary, and the jury could have drawn from it either the inference of guilt or the conclusion of innocence, and, therefore, the cause was properly submitted to the twelve.

It is proper to say that, in the main, this opinion was prepared by *Mr. Justice Brogden* prior to his recent illness.

After a thorough consideration of the record, we find no sufficient cause for disturbing the verdict or the judgment.

No error.

MELVIN THOMAS McLAWHORN v. AMERICAN CENTRAL LIFE INSURANCE COMPANY, INDIANAPOLIS, INDIANA.

(Filed 1 November, 1935.)

Insurance R c: Estoppel C b—Plaintiff held estopped to maintain action on disability clause in life insurance policy.

Insurer began paying disability benefits to insured upon receipt of due proof of disability under the policy. Insured's disability had its inception several years prior to the time insurer began paying disabilty benefits, and insured instituted this action for back disability benefits, contending that he had furnished due proof of disability at its inception. The evidence tended to show that insured, for years after the inception of the disability, corresponded with insurer as to extension of time for payment of premiums, paid the premiums by borrowing on the policy and by other means, and during this time never demanded waiver of payment of premiums as provided for in the disability clause, and thereafter requested the blanks for proof of disability and furnished the proof upon which insurer began paying the disability benefits. *Held:* Conceding that there was sufficient evidence that defendant furnished due proof of disability at its inception, insured is estopped by his conduct from maintaining this action for disability benefits for the period between the inception of the disability and the time insurer began paying the benefits under the terms of the policy.

Appeal by plaintiff from *Barnhill, J.*, at May Term, 1935, of Pitt. Affirmed.

This is an action, brought by plaintiff against defendant, to recover on Policy No. 143026, issued by defendant to plaintiff on 11 September, 1925, for death, $3,000, and for total and permanent disability benefit.

The language of the policy is, in part: "American Central Life Insurance Company, Indianapolis, agrees to pay three thousand dollars, the amount of insurance, for the consideration and under the conditions

stated herein, to the beneficiary, Bessie S. McLawhorn, wife of the insured, Melvin Thomas McLawhorn."

The policy also provides: "The amount of insurance is payable to the beneficiary *Immediately* upon receipt of due proof of death of the insured and of the interest of the claimant. . . . Disability of the insured within the meaning of this supplemental contract shall exist if the insured, as the result of accident or disease, shall have become totally, permanently, and incurably disabled to such an extent that he is thereby prevented and will be presumably permanently and continuously thereby prevented from performing any work for compensation or profit, or from following any gainful occupation. . . . Even though proof of disability may have been accepted, the company may demand of the insured from time to time, but not oftener than once a year, proof of the continuance of such disability; and if such proof is not furnished on the company's demand, or if it shall appear that the insured is able to perform any work for compensation or profit, or to follow any gainful occupation, no further premiums will be waived and no further income payments will be made, but the premiums already waived and the income payments already made by the company shall not become a policy indebtedness." The annual premium is $84.78, including death and disability, and have been paid. The policy provides for certain loans and automatic premium loans.

The plaintiff alleges in his complaint that on 15 July, 1929, in accordance with the policy, he furnished to defendant proof of total and permanent disability, and that "the defendant is indebted to plaintiff in the sum of $423.00, and interest for the return of premiums erroneously paid and collected, and in the further sum of $1,485, and interest thereon, for disability benefits due for the plaintiff's disability under the provisions of said policy up to 25 February, 1934."

The defendant denied that due proof was made by plaintiff to it as above alleged, and pleads estoppel. It says, in part: "That the policy sued on was issued 11 September, 1925, and the plaintiff paid or arranged to be paid the premiums thereon, and for several years secured loans from the defendant with which to meet said premiums. That in and by the terms, conditions, and provisions of the policy, no amount was to become due under the disability clause until the company received due proof of the disability of the insured, as therein defined, and not until February, 1934, did the defendant receive such proof. That for several years prior to 1934 the plaintiff paid or arranged to be paid the premiums, without filing any claim or due proof of disability, and his failure to file said notice or due proofs of disability and payment of premium was and should be construed as a waiver of any and all rights or claims now made in this proceeding, and, in law and truth estops the

plaintiff from asserting such claim, and the defendant pleads the same in bar of any recovery."

At the close of plaintiff's evidence the court below, upon motion of defendant, rendered judgment as of nonsuit. C. S., 567. The plaintiff excepted, assigned error, made other exceptions and assignments of error, and appealed to the Supreme Court. The material assignments of error and other necessary facts will be set forth in the opinion.

Lewis G. Cooper and Albion Dunn for plaintiff.
J. B. James for defendant.

CLARKSON, J. From the evidence in the record it appears that the plaintiff, from 15 July, 1929, was, under the terms of the policy, "prevented from performing any work for compensation or profit or from following any gainful occupation."

The following letter, which is in the record, was sent by plaintiff to defendant: "Greenville, N. C., 9 February, 1934. The American Central Life Insurance Company, Indianapolis, Ind. Dear Sir: Please send me three (3) blanks 'In Disability Benefit' on my Policy No. 143026. I am unable to work or do anything at all. Several doctors will certify that I am unable to work. Yours truly, Melvin Thomas McLawhorn."

It is further in the record: "Counsel then shows the witness a check, dated 3 April, 1934, for $60.00, and asked the witness if he endorsed that check, to which he answered: 'I reckon I did.' The check was in the form and words following: 'American Central Life Insurance Company, No. 337835, Indianapolis, April 3, 1934. Pay to Melvin Thomas McLawhorn or order $60.00. Sixty and 00/100 Dollars. Monthly disability payments for 2-26-34 and 3-10-34—Policy 143026. American Central Life Ins. Company, Edward M. To Indiana National Bank, Indianapolis, Ind.' That was the first check that came to me. Witness was then asked the question: 'You accepted that check and endorsed it and got the money on it?' 'A. Yes, sir.' "

This check was dated 3 April, 1934, and was for two monthly disability payments—$30.00 a month, as provided by the policy. This action was commenced on 30 July, 1934, some five years later, for back disability payments, from 15 July, 1929, to 26 February, 1934, the time when no question is made that proper notice under the policy was given by plaintiff to defendant.

It is contended by plaintiff that he furnished proofs to defendant company on 15 July, 1929. We think the evidence is uncertain and so vague that we cannot say it was of sufficient probative value to be submitted to the jury.

Between 15 July, 1929, and February, 1934, the plaintiff made no demand for disability payments or waiver of premium, as provided by the policy. On the other hand, he was continuously corresponding with the defendant, requesting extension of premiums, etc., and executed two notes, termed "Automatic Premium Loans," whereby he secured sufficient funds to meet these premiums. If the plaintiff had submitted due proof of his disability, it was not necessary to write for blanks and submit another claim in 1934, and to accept the $60.00 check under the new claim. For some four and a half years he paid his premiums by borrowing from the company, getting extensions and otherwise, and at no time claimed to the company that he was disabled.

We think the evidence as to notice that plaintiff claimed he gave defendant was not sufficient to be submitted to the jury; but conceding, but not deciding, that it was, the plaintiff is estopped by his conduct to maintain this action. We see no error in excluding the evidence that plaintiff complains of—if admitted it would not be of such materiality as to change the view we take of the evidence on this record.

The judgment of the court below is

Affirmed.

MRS. MAE H. AMMONS, ADMINISTRATRIX OF THE ESTATE OF W. N. AMMONS, DECEASED, v. ADAM FISHER, JR., AND M. A. WATKINS.

(Filed 20 November, 1935.)

1. **Trial F c—Held: Plaintiff waived trial of issue of negligence of one defendant by tendering issues involving solely the negligence of the other defendant.**

Plaintiff brought suit against two defendants as joint tort-feasors, alleging that her intestate was struck and knocked down by an automobile driven by one of defendants, and run over by an automobile driven by the other defendant as he lay injured on the street as the result of the first accident, that both cars were negligently operated, and that her intestate died as the result of the injuries inflicted by the concurrent negligence of defendants. One defendant did not file answer; and the other defendant filed answer alleging contributory negligence. Plaintiff tendered issues of negligence of answering defendant and damages, and the court added the issue of contributory negligence arising upon the pleading of the answering defendant. *Held:* Plaintiff elected to try her case on the theory of the negligence of the answering defendant, and her exception to the issues submitted and the charge of the court for their failure to present the question of the negligence of the defendant who failed to answer and the alleged concurrent negligence of defendants cannot be sustained, plaintiff having waived her right to have the court submit the issues arising on the pleadings by the tender of issues involving solely the negligence of the answering defendant. N. C. Code, 584.

2. Appeal and Error B b—

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

APPEAL by plaintiff from *Harding, J.*, and a jury, at Special June Term, 1935, of MECKLENBURG. No error.

This was an action for actionable negligence, brought by plaintiff against defendants as joint tort-feasors, alleging damage. W. N. Ammons, about 11:00 or 11:30 at night on or about 30 March, 1934, was fatally injured (and died in April—4 days later) about the middle of the block between 1st and 2d streets, on South Tryon Street, in the city of Charlotte, N. C., while crossing the street going from the west to the east side thereof, by cars alleged to have been driven by defendants.

The plaintiff in her complaint alleges that her intestate was crossing the street "in a careful, prudent, and lawful manner, when suddenly and without any warning whatsoever he was struck and knocked up into the air and over the radiator and various parts of a car then being driven and operated and owned by the defendant M. A. Watkins; that plaintiff's intestate was thrown and knocked down upon the said street and pavement thereof, with great violence, and was immediately and concurrently run completely over by a car which was owned, driven, and operated by the defendant Adam Fisher, Jr."

The plaintiff further alleges: "That by reason of the wanton, reckless, malicious negligence of each of the defendants herein named, acting jointly and concurrently, the plaintiff was fatally injured, and as a result of his injuries died on the aforesaid date; that the said car which was being driven by the defendant M. A. Watkins was just ahead and in front of the car which was being driven by his codefendant and joint tort-feasor, Adam Fisher, Jr., and that both of said defendants, by their wrong and unlawful acts and negligence, caused and produced the death of the plaintiff's intestate, and that said negligence and unlawful acts, jointly and concurrently, solely and proximately, caused the death of the plaintiff's intestate, as aforesaid."

The defendant M. A. Watkins filed no answer. The defendant Adam Fisher, Jr., denied the material allegations of the complaint and alleged "that this defendant is informed and believes that the plaintiff's intestate was struck by an automobile other than his own, and fell in the street in the line of traffic passing along at the time and place referred to in said paragraph, but this defendant has no knowledge sufficient to form a belief as to the truth of the allegations in reference to manner in which he was struck, and therefore denies the same, and specifically denies the allegations contained therein referring to this defendant." He set up the plea of contributory negligence, and, for further answer,

avers: "That if plaintiff's intestate's death was due to or proximately caused by any negligence other than his own, which is expressly denied, his said death was solely due to and proximately caused by the negligence of the codefendant M. A. Watkins, in that the said defendant failed to keep a proper lookout while driving his automobile at an excessive and unlawful speed, and in further failing to keep his automobile under proper control under circumstances then and there apparent to a reasonably prudent man. This defendant further alleges that he is informed and believes that plaintiff's intestate had sustained fatal injuries before being run over by the automobile of the defendant Adam Fisher, Jr."

On the answer to the issues submitted to the jury, the following judgment was rendered in the court below:

"This cause coming on to be heard and being heard before his Honor, W. F. Harding, judge presiding and holding the Special June Term of Superior Court of Mecklenburg County, and a jury, and it appearing to the court upon the record that the defendant M. A. Watkins failed to file an answer in said cause, and that no action was taken by the plaintiff upon the failure of said defendant to file an answer, and the plaintiff prosecuted his action against the defendant Adam Fisher, Jr., and the jury, upon issues joined and submitted, answered said issues as follows:

" '1. Was the plaintiff's intestate's, W. N. Ammons', death caused by the negligence of the defendant Adam Fisher, Jr., as alleged? Answer: "No."

" '2. Did the plaintiff's intestate, W. N. Ammons, by his own negligence contribute to his injury and death? Answer: ....

" '3. What damages, if any, is the plaintiff entitled to recover of the defendant Adam Fisher, Jr.? Answer: ....'

"Wherefore, it is ordered, adjudged, and decreed that plaintiff take nothing by her action against the defendant Adam Fisher, Jr., and that the plaintiff and her sureties be taxed with the costs. This 6 July, 1935. (Signed) WM. F. HARDING, *Judge Presiding.*"

The plaintiff made numerous exceptions and assignments of error and appealed to the Supreme Court.

H. L. Strickland and J. M. Scarborough for plaintiff.
J. Lawrence Jones and Hiram P. Whitacre for defendant.

CLARKSON, J. We do not think any of the exceptions or assignments of error made by plaintiff can be sustained. We have read with care the charge of the court below and think the law applicable to the facts was correctly stated. The contentions of both sides were fairly and accurately set forth. The record discloses that the defendant M. A. Watkins filed no answer. The case was tried solely on the liability of Adam Fisher, Jr.

The record also discloses that plaintiff tendered the following issues: "(1) Was the plaintiff's intestate's, W. N. Ammons', death caused by the negligence of the defendant Adam Fisher, Jr., as alleged? (2) What amount, if any, is the plaintiff entitled to recover of the defendant Adam Fisher, Jr.?"

The plea of contributory negligence was set up in the answer of Fisher, and the court below added the issue.

The plaintiff, if she desired to try the liability of M. A. Watkins, under the facts and circumstances of this case, should have signified her intention to do so—but, to the contrary, she submitted an issue solely as to the liability of Fisher. At no time did plaintiff signify that she wanted the liability of Watkins determined in this action, but alone of Fisher. At no time did the plaintiff tender any issue as to Watkins. The plaintiff excepted to the issues tendered, but that was to the contributory negligence issue, as plaintiff herself tendered the other two issues, as to the negligence of Fisher and damages.

N. C. Code, 1935 (Michie), section 584, is as follows: "Issues shall be framed in concise and direct terms, and prolixity and confusion must be avoided by not having too many issues. The issues arising upon the pleadings, material to be tried, must be made up by the attorneys appearing in the action, or by the judge presiding, and reduced to writing, before or during the trial." Under this section, plaintiff made up the issue alone as to the liability of Fisher.

When a case is tried in the court below on one theory, it cannot be heard in the Supreme Court on another and different theory. It would be unfair to the trial judge. If the plaintiff desired the case tried as to Watkins, how easily she could have done so by presenting an issue; but, on the contrary, the court below was no doubt misled, as the plaintiff tendered the single issue of negligence as to Fisher, and the case was tried solely on that theory.

In *Apostle v. Ins. Co., ante,* 95 (98), is the following: "No other question is presented by this appeal, for it is well settled, as said in *Hargett v. Lee,* 206 N. C., 536, 174 S. E., 498, that an appeal *ex necessitate* follows the theory of the trial. See *Shipp v. Stage Lines,* 192 N. C., 475, 135 S. E., 339. This principle is enforced by this Court, because of the constitutional limitation of its jurisdiction as an appellate court. Const. of N. C., Art. IV, sec. 8." *Wilson v. Hood, Comr., ante,* 200; *Pulverizer Co. v. Jennings, ante,* 234; *Coral Gables, Inc., v. Ayres, ante,* 426.

Under the facts and circumstances of the present case, from the position taken by plaintiff in tendering only the issue of negligence in regard to Fisher, it was no error in the court below in not tendering an issue as to Watkins. The plaintiff did not tender an issue as to the negligence

of Watkins, but excepted to the issues tendered. This is not sufficient. *Shuford v. Brown,* 201 N. C., 17 (25). Nor did plaintiff in the court below request any prayers of instruction on the questions now complained of—it is now too late. As a rule, the court must submit the issue arising on the pleadings (N. C. Code, 1935 [Michie], 580-4), but plaintiff waived this by tendering only one issue as to Fisher, and the case was tried out on that theory.

On the whole record, including the charge, we see no prejudicial or reversible error. In the judgment below there is

No error.

R. L. TOMLINSON v. TOWN OF NORWOOD AND NEW AMSTERDAM CASUALTY COMPANY.

(Filed 20 November, 1935.)

1. Municipal Corporations D a—

A policeman has the authority under general statute to deputize a citizen to aid him in serving a warrant for breach of the peace, N. C. Code, 4379, 4547, a policeman being given the same authority, within the town limits, in making arrests as a sheriff. N. C. Code, 2642.

2. Master and Servant F a—Citizen deputized by policeman to aid in serving warrant for breach of the peace held employee of the town.

Evidence that claimant was injured while attempting to aid a policeman in serving a warrant for breach of the peace, and that claimant had been duly deputized by the policeman to aid in making the arrest, *is held* sufficient to support the finding of the Industrial Commission that at the time of injury claimant was an employee of defendant town under a valid appointment. N. C. Code, 8081 (i) (b).

3. Master and Servant F i—

The finding of the Industrial Commission upon competent evidence that claimant was an employee of defendant employer at the time of the injury is binding on the courts upon appeal.

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

APPEAL by defendants from *Alley, J.,* at February Term, 1935, of STANLY. Affirmed.

The matter was heard before the N. C. Industrial Commission. T. C. Blalock was elected and duly took the oath: "I will faithfully, to the best of my ability, perform the duties of policeman for the town of Norwood, so help me, God."

On 26 September, 1933, he, Blalock, was policeman of the town of Norwood and the only officer of that character. A warrant was issued by S. J. Lentz, a justice of the peace, against one Baxter Bunn. He

was charged with entering the house of Lee Mauldin by force, in the absence of Mauldin and his wife, in the town of Norwood. He had gone to Mauldin's home, broken in, and run the children out. This was about 8:30 o'clock at night. He was drunk and a dangerous man. R. L. Tomlinson, the plaintiff, was operating a cafe in the town. About 10 o'clock the same night Blalock deputized Tomlinson to go with him to serve the warrant. Bunn was in the house and was told by Blalock his authority to arrest him, and in the attempt to do so Bunn shot out the window and hit Tomlinson. Blalock went to the rescue of Tomlinson and, while taking him about 35 feet from the house, Bunn shot Blalock out of the same window. It was in evidence that Mauldin and Bunn had married sisters and Bunn had gone to Mauldin's after his wife.

The findings of fact: "That the plaintiff and the defendant employer had accepted the provisions of the Compensation Law and the New Amsterdam Casualty Company was the insurance carrier. That the plaintiff was duly and legally deputized by the chief of police of the town of Norwood on the night of 26 September, 1933, to assist in the arrest of Baxter Bunn, who was charged with unlawfully entering a house and for whom a warrant had been sworn out by a Mr. Mauldin, said warrant being in the hands of the chief of police. That while assisting in the arrest of said Bunn the plaintiff was shot by the said Bunn, and that he has been totally disabled since the date of the accident, 26 September, 1933. That the plaintiff sustained an injury by accident arising out of and in the course of his regular employment, 26 September, 1933, as a special deputized officer of the town of Norwood, when he was shot by Baxter Bunn," etc.

The hearing Commissioner and Full Commission, after finding of facts, made an award in favor of plaintiff. Defendant excepted and assigned error, and appealed to the Superior Court. The Superior Court rendered judgment affirming the award of the Industrial Commission. The defendant excepted to the judgment as signed, and appealed to the Supreme Court.

Robinson, Pruette & Caudle for plaintiff.
W. E. Smith for town of Norwood.
J. Lawrence Jones and J. L. DeLaney for New Amsterdam Casualty Company.

CLARKSON, J. The question involved: Was the plaintiff, at the time he sustained the injuries complained of, an employee of the town of Norwood, and did such injuries arise out of and in the course of such employment? We think so.

The defendants introduced evidence: The town charter and ordinances to the effect that T. C. Blalock, the policeman of the town of Norwood, had not been given authority to deputize anyone to aid him in making arrests. We find a general statute on the subject: "A policeman shall have the same authority to make arrests and to execute criminal process, within the town limits, as is vested by law in a sheriff." N. C. Code, 1935 (Michie), section 2642.

N. C. Code, 1935 (Michie), section 4379, is as follows: "If any person, after having been lawfully commanded to aid an officer in arresting any person, or in retaking any person who has escaped from legal custody, or in executing any legal process, wilfully neglects or refuses to aid such officer, he shall be guilty of a misdemeanor." *State v. Ditmore,* 177 N. C., 592.

Section 4547 reads as follows: "Every person summoned by a judge, justice, mayor, intendment, chief officer of any incorporated town, sheriff, coroner, or constable, to aid in suppressing any riot, rout, unlawful assembly, affray, or other breach of the peace, or to arrest the persons engaged in the commission of such offense, or to prevent the commission of any felony or larceny which may be threatened or begun, shall do so."

Blalock, while acting as a policeman, had, under the statute, the same authority as a sheriff to make arrests. He had a legal right to deputize one to aid him in serving the warrant for the offense for which Bunn is charged—a breach of the peace. The plaintiff relies on *Moore v. State,* 200 N. C., 300. In that case the findings of fact are: "(1) At the time of the accident the claimant was acting as assistant to Everett Bryson, who was duly appointed forest warden for the particular district, and who had summoned the claimant in pursuance of the authority given him by section 6137 of the North Carolina Code. (2) While so engaged the claimant was injured in the eye, which resulted in the complete loss of vision. (3) The claimant was engaged as assistant, under summons, of the forest warden, in the extinguishment of the forest fire for the period of five hours, for which he received compensation at the rate of 20 cents per hour." *Adams, J.,* writing the opinion, says, at p. 301: "The award of the Industrial Commission is conclusive and binding as to all questions of fact. Workmen's Compensation Law (P. L. 1929, ch. 120), sec. 60. Whether an injury by accident has arisen out of and in the course of a person's employment is a mixed question of law and fact, and while the parties to an action or proceeding may admit or agree upon facts, they cannot make admissions of law which will be binding upon the courts." In the *Moore case, supra,* an award was affirmed by this Court.

It will be noted that in that case the forest warden was given statutory authority to appoint persons between certain ages to assist in fight-

ing forest fires, and to compensate them. In the present case, the policeman, Blalock, is given the same authority as a sheriff to deputize the plaintiff to assist him to arrest under section 4547, *supra,* for breach of the peace, of which Bunn was charged in the warrant. Compensation would follow as a matter of course. N. C. Code, 1935 (Michie), section 8081 (i), subsec. (b) (f). We think the *Moore case, supra,* is practically on "all fours" with the present case.

N. C. Code, 1935 (Michie), section 8081 (i), subsection (b), in part, is as follows: "The term 'employee' means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, and also minors whether lawfully or unlawfully employed, but excluding persons whose employment is both casual and not in the course of the trade, business, profession, or occupation of his employer, . . . as relating to municipal corporations and political subdivisions of the State, the term 'employee' shall include all officers and employees thereof, except such as are elected by the people or elected by the council or other governing body of said municipal corporation or political subdivision, who act in purely administrative capacities, and to serve for a definite term of office," etc.

In *Monterey County v. Rader* (Cal.), 248 Pac., 912, 47 A. L. R., p. 359 (syllabus), we find: "A bystander summoned by the sheriff to assist in making an arrest is within the operation of a Workmen's Compensation Act declaring an employee to be every person in service under any appointment." *West Salem v. Industrial Com.,* 162 Wis., 57; see *Sanders v. Allen, ante,* 189.

It is well settled that the Industrial Commission, having found from competent evidence that the plaintiff was an employee of the town of Norwood at the time of his injury, such finding is binding upon us.

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

Affirmed.

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

STATE v. DAVID KIRKMAN.

(Filed 20 November, 1935.)

Homicide E a—Evidence in this case held sufficient to raise the question of self-defense for the determination of the jury.

In this prosecution for homicide, defendant's testimony was to the effect that he had been missing corn from his barn, that on the night in question he was aroused by the barking of his dog, that he dressed and took his shotgun to investigate and in the dark barely discerned a man stand-

ing neared the barn, that defendant holloed and that the intruder commanded him to get back and approached defendant and was apparently fumbling for a weapon, and that defendant then shot, intending to frighten the intruder, but resulting in his death. *Held:* Defendant was entitled to have the question of self-defense submitted to the jury, and an instruction that defendant was guilty of manslaughter at least, is erroneous.

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

APPEAL by defendant from *Parker, J.,* at April Term, 1935, of LENOIR. New trial.

This was an indictment in the usual form, N. C. Code of 1935 (Michie), section 4614, against the defendant for murder of one John Grant, on 7 January, 1935. A true bill was found. The record discloses: "Before the jury is impaneled the solicitor for the State announces and states in open court that he will not ask for a verdict of guilty of murder in the first degree, but will ask for a verdict of guilty of murder in the second degree or manslaughter, as the facts may justify."

The verdict of the jury: "The defendant is guilty of manslaughter with recommendation for mercy." Upon the verdict, judgment was duly rendered.

The defendant had been missing corn. It was a dark night, so dark that he could not tell whether the deceased was white or colored. The defendant testified, in part: "I have never been in trouble before. On this particular night, on 8 January, before that time, I had known John Grant four or five years. He and I had never had any trouble. On this particular night I was lying on the bed, had gone to bed, me and my wife were lying there reading. Later on we put the light out to go to sleep, and before long the dog begun barking. I got up and crept to my back door to see if I could see anybody, but could not see nobody, and I lay back down, and before long the dog commenced barking again. I raised the dog and was acquainted with him, and I told my wife 'that dog sees somebody.' I got up and dressed and took my single-barrel shotgun and crept out the door. I crept out in the back yard and could not see anybody. Then I crept out in a little old peach orchard and stood behind a tree, but could not see anybody. Then I walked down to the crib barn and didn't see anybody, and I crept around to the northeast end of the tobacco barn, where I kept my corn, and there was a man standing right up at the corner of the barn and I had my face right near him when I saw him, and it scared me and I hollered. He said, 'Get back, get back,' and I was getting back and he was rushing on me. It was dark and I could not see, he was fumbling and rushing me and saying, 'Get back, get back,' and I backed back a good ways and shot up in the air, trying to frighten him away. He was fumbling with his hands,

he was making towards me, I can't hardly say what he was doing, it looked like to me he was fumbling around his waist, and he scared me. I went to hollering, and my wife heard me holler. It was dark and I didn't know who it was. My wife is in the family way, expecting to be confined any day. When I shot I run back to the house and told my wife to give me a shell. I asked for another shell because I thought whoever it was that he was right on me and I hollered and told her to give me a shell. I loaded my gun and stayed in the yard a good while, and could not hear nothing, and after a while I went in the house, and then I heard something blowing and snorting, and I thought it was my cow. I had her tied to the haystack with a chain fastened around her neck. I told the fellow that stays with me would he go down with me and see what was the matter, and me and him got up and started on down there. I told him I thought it was my cow struggling down there, and I found the man a good ways before we got to the cow, lying under the tobacco barn, and I went there and examined him. The fellow with me told me to come to the police and they would tell me what to do, and I come over here as quick as I could and got Sheriff Churchill and took him back over there. This man and I had never had any trouble, never. I shot one time. I went down there three different mornings, and it looked like to me my corn was going away, and I didn't see anybody stealing it, but I missed it. There was a slab nailed over the back door and the other door that I used was fastened with a button and not locked. . . . It looked to me like from the time I first saw him, Grant had not come far toward me from where I first saw him until I went back and saw where he was lying. From where I first saw him to where he fell was something like 3 or 4 feet. From the time I first saw him until I shot I run back a long ways, about as far as from here to the window."

The court below charged the jury as follows: "The court instructs you, if you believe all the evidence in this case, of the defendant himself and the State's witnesses, beyond a reasonable doubt, you will return a verdict of guilty of manslaughter. You may retire and say how you find."

The defendant made numerous exceptions and assignments of error, and appealed to the Supreme Court.

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

Sutton & Greene for defendant.

CLARKSON, J. From the facts and circumstances of this case, we cannot sustain the charge of the able and painstaking judge in the court below. Without discussing the evidence, as the case goes back for a

new trial, we think the question of self-defense, under all the facts and circumstances of this case, was for a jury to determine.

In *State v. Hough,* 138 N. C., 663 (667-8), we find: "It is said in 1 East, Pleas of the Crown, 271: 'A man may repel force by force in defense of his person, habitation, or property against one who manifestly intends or endeavors by violence to commit a felony, such as murder, rape, burglary, robbery, and the like, upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger, and if he kill him in so doing it is called justifiable self-defense.' The American doctrine is to the same effect. See *State v. Dixon,* 75 N. C., 275. . . . The defendant was on his own premises, engaged in his peaceful pursuits at the time the deceased advanced on him in a manner giving unmistakable evidence of his purpose to do the defendant bodily harm. How was the defendant expected to receive him? In the oft-quoted language of *Judge Pearson* in *State v. Floyd,* 51 N. C., 392, 'One cannot be expected to encounter a lion as he would a lamb,' and the measure of force which the defendant was permitted to use under such circumstances ought not to be weighed in 'golden scales.'"

In *State v. Holland,* 193 N. C., 713 (718), speaking to the subject, is the following: "The first law of nature is that of self-defense. The law of this State and elsewhere recognizes this primary impulse and inherent right. One being without fault, in defense of his person, in the exercise of ordinary firmness, has a right to invoke this law and kill his assailant, if he has reasonable ground for believing or apprehending that he is about to suffer death or great or enormous bodily harm at his hands. The danger or necessity may be real or apparent. It is for the jury, and not the party setting up the plea, to determine, under all the facts and circumstances, the reasonableness of the grounds for the belief or apprehension of the real or apparent danger or necessity. The mere fact that a man believes or apprehends that he is in present, immediate, or imminent danger of death or great bodily harm, is not sufficient to justify the taking of the life of a human being, but there must be reasonable ground for the belief or apprehension—an honest and well-founded belief or apprehension at the time the homicide is committed. . . . (Citing authorities.) In *S. v. Hand,* 170 N. C., at p. 706, it is said: 'It is well-settled law that when the killing with a deadly weapon has been proved or admitted, the burden is on the prisoner to show excuse or mitigation. *S. v. Gaddy,* 166 N. C., 341; *S. v. Yates,* 155 N. C., 450; *S. v. Rowe, ibid.,* 436; *S. v. Simonds,* 154 N. C., 197; *S. v. Brittian,* 89 N. C., 481.'" *State v. Turnage,* 138 N. C., 566 (569-570); *State v. Gregory,* 203 N. C., 528.

"The law of England," said Sir Matthew Hale, "hath afforded the best method of trial that is possible for this and all other matters of fact,

namely, by a jury of twelve men all concurring in the same judgment, by the testimony of witnesses *viva voce* in the presence of the judge and jury, and by the inspection and direction of the judge." 1 Pleas of the Crown, 33. "The trial by jury," declared Blackstone, "ever has been, and I trust ever will be, looked upon as the glory of the English Law." It is "the most transcendent privilege which any subject can enjoy, or wish for," he continues, "that he cannot be affected either in his property, or his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals." 3 Comm., 379.

For the reasons given, there must be a

New trial.

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

THE UNION CENTRAL LIFE INSURANCE COMPANY v. J. C. CORDON AND GEORGE HARRIS.

(Filed 20 November, 1935.)

1. **Vendor and Vendee A a—**

   Delivery of a contract to convey land is essential to constitute it a valid and enforceable agreement.

2. **Betterments A a—Person entering upon land under unenforceable contract to convey may recover value of improvements made in good faith.**

   Defendant introduced evidence tending to show that defendant entered possession of the land in question under a parol contract to convey, which contract was later reduced to writing but not delivered, and made improvements on the land in good faith. *Held:* In plaintiff's action for possession, the evidence of the unenforceable contracts to convey was properly submitted to the jury upon the question of defendant's right to recover the value of the improvements, and upon the verdict of the jury in his favor, defendant was entitled to recover the value of the improvements placed upon the land in good faith, less the reasonable rent for the land during the time of defendant's occupancy.

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

APPEAL by plaintiff from *Cranmer, J.,* and a jury, at May Term, 1935, of BEAUFORT. No error.

This was an action brought by plaintiff to recover of defendant J. C. Cordon (George Harris was a cropper) two certain tracts of land—405 acres—describing same, in Beaufort County, N. C.

The defendant admitted plaintiff's ownership of the land, but denied other material allegations of the complaint, and alleged that plaintiff

breached its parol contract to convey the land to him, and that he had made necessary permanent improvements on the land, by a drainage system, ditching and building a new barn, the cost amounting to $2,100. The defendant further alleged: "The building of this barn and all these improvements were therefore done with the express knowledge and authorization of the plaintiff under a promise to make a good and valid contract to convey or deed and trust deed or mortgage to secure the purchase money, and this defendant says that he believed he would become a purchaser as hereinbefore stated until the receipt of a letter from the said Brooks and his attorney demanding that he vacate and turn the place over, which thing he refused unless and until he was paid for the improvements set out in his answer; plaintiff then sold the farm and purchaser took possession, and he was ousted." The defendant Cordon also prayed for general relief.

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

"1. Is the plaintiff Insurance Company the owner of the land described in the pleadings? Answer: 'Yes.'

"2. Did the plaintiff execute and deliver contract to convey to the defendant according to the agreement referred to in the pleadings? Answer: 'No.'

"3. Did the defendant enter into possession of said land under agreement of plaintiff to convey to him? Answer: 'Yes.'

"4. Did the defendant, while occupying said land, make necessary permanent improvements thereon? Answer: 'Yes.'

"5. If so, what was the value of said improvements to the said land? Answer: '$1,500—fifteen hundred dollars.'

"6. What sum as rents for the land shall the defendant be charged with? Answer: '$1,000—one thousand dollars.' "

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

J. D. Paul and MacLean & Rodman for plaintiff.
Ward & Grimes for defendants.

CLARKSON, J. There is no controversy in regard to the first issue—the ownership of the land. The main contentions of the litigants were to the 2d and 3d issues, as follows: "(2) Did the plaintiff execute and deliver contract to convey to the defendant according to the agreement referred to in the pleading? (3) Did the defendant enter into possession of said land under agreement of plaintiff to convey to him?" The jury answered the 2d issue "No," and the 3d issue "Yes." Upon a careful reading of the evidence, we think it was sufficient to be submitted

to the jury on these two issues. The credibility of the evidence was for the jury to determine.

N. C. Code, 1935 (Michie), section 988, is as follows: "All contracts to sell or convey any lands, tenements, or hereditaments, or any interest in or concerning them, and all leases and contracts for leasing land for the purpose of digging gold or other minerals, or for mining generally, of whatever duration; and all other leases and contract for leasing lands exceeding in duration three years from the making thereof, shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized."

In *Eaton v. Doub,* 190 N. C., 14 (22), speaking to the subject, citing numerous authorities, is the following: "The equitable jurisdiction of the Superior Courts of this State has been frequently invoked by vendees of land who, while in possession under parol contracts to convey, void under the statute of frauds (C. S., 988), have enhanced the value thereof by permanent improvements, and have thereafter been called upon to surrender possession by vendors who have repudiated their parol contracts. This Court, by a long line of decisions, has sustained the jurisdiction to afford relief by requiring compensation for such enhancement in value before aiding such vendors to recover possession of the land. . . . The principle upon which the jurisdiction has been sustained is well stated by *Walker, J.,* in *Jones v. Sandlin,* 160 N. C., 150. 'The general rule is that if one is induced to improve land under a promise to convey the same to him, which is void or voidable, and after the improvements are made he refused to convey, the party thus disappointed shall have the benefit of the improvements to the extent that they increased the value of the land,' citing many authorities. An examination of these cases will show that the application of the principle has been broad and liberal, waiving technical objections, and doing justice upon the facts of the particular case in which it has been applied."

It appears that the contract was in fact executed, but the evidence on the part of Cordon was to the effect that it was never delivered to him according to the parol agreement. To be a valid contract, delivery is essential.

The vendor, in a parol contract to convey land, will not be permitted to evict a vendee who has entered and made improvements, until the latter has been repaid the purchase money and compensated for betterments. *Vann v. Newsom,* 110 N. C., 122.

In *Gillespie v. Gillespie,* 187 N. C., 40 (41), it is said: "Whether a deed has been delivered in the legal sense is not dependent exclusively upon the question of its manual or physical transfer from the grantor to the grantee, but also upon the intent of the parties. Both the delivery of the instrument and the intention to deliver it are necessary to a transmu-

tation of title. Upon the evidence adduced, the ultimate question of delivery was therefore properly submitted to the jury. *Gaylord v. Gaylord,* 150 N. C., 222; *Fortune v. Hunt,* 149 N. C., 358; *Tarlton v. Griggs,* 131 N. C., 216." *Carroll v. Smith,* 163 N. C., 204; *Lee v. Parker,* 171 N. C., 144.

The court below in the charge defined what were necessary "permanent" improvements, to which the plaintiff made no exception.

We see no prejudicial or reversible error as to plaintiff's contention in the admission of certain letters introduced by defendant Cordon; to the refusal to dismiss as upon nonsuit defendant's claim for damages; to plaintiff's willingness to convey (it came too late); to refusal of the court below to submit issues tendered by plaintiff and submitting issues tendered by defendant. The issues submitted were those arising on the pleadings and essential for the determination of the controversy; to the charge of the court below in certain particulars. We think the charge, taken as a whole, correct.

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

No error.

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

MRS. LULA EAST LITTLE AND HUSBAND, JOSEPH W. LITTLE, v. WACHOVIA BANK AND TRUST COMPANY AND METROPOLITAN LIFE INSURANCE COMPANY.

(Filed 20 November, 1935.)

1. Mortgages H o—Temporary order restraining consummation of foreclosure is properly continued where issues of fact are raised and bond filed.

Where a mortgagor or trustor institutes suit to enjoin the consummation of a foreclosure sale had under the terms of the instrument, and files bond to indemnify the mortgagee or *cestui que trust* against loss, N. C. Code, 861, 2593 (b), the temporary injunction granted in the cause is properly continued to the hearing upon the court's finding that serious controversy exists between the parties and that plaintiff is entitled to a jury trial upon the issues of fact raised by the pleadings.

2. Same—

Where consummation of foreclosure sale is restrained under N. C. Code, 2593 (b), it is discretionary with the court whether it will require bond of the mortgagor or trustor, or appoint a receiver.

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

APPEAL by defendants from *Warlick, J.,* 24 January, 1935. From BUNCOMBE. Affirmed.

This action was brought in the general county court of Buncombe, N. C. The plaintiffs' complaint was to the effect that the attempted sale of certain land of plaintiffs by defendants be declared null and void, and for injunctive relief.

The judgment in the general county court is as follows: "This cause coming on to be heard before the undersigned judge upon the notice duly issued to the defendants to show cause why the order heretofore made restraining and enjoining the defendants from consummating the sale of the property mentioned and described in the plaintiffs' complaint should not be continued to the final hearing, and having been heard, and the court being of the opinion, and so finding as a fact from the pleadings and affidavits filed upon said hearing, that serious issues of law and of fact between plaintiffs and defendants are presented, on which issues of fact plaintiffs are entitled to a jury trial, and that the restraining order heretofore issued should be continued to the hearing, and, it further appearing that the plaintiffs have filed a good and sufficient bond approved by the clerk of this court and justified as required by law. It is accordingly ordered that the defendants, and each of them, their officers, agents, and employees, be and they are hereby restrained and enjoined from consummating the sale made on 18 October, 1934, of the property described in the complaint, and that the defendant Wachovia Bank and Trust Company, its officers, agents, and employees, be and they are hereby restrained and enjoined from executing to defendant Metropolitan Life Insurance Company any deed for said property until the further orders of this court.

J. P. KITCHIN, *Judge,*
General County Court, Buncombe County, N. C."

To the foregoing judgment defendants excepted, assigned error, and appealed to the Superior Court. The judgment in the Superior Court is as follows: "This cause coming on to be heard before the undersigned judge upon an appeal by the defendants from the order of the general county court of Buncombe County continuing to the hearing the restraining order theretofore granted by the judge of said general county court, and having been heard, and the court being of the opinion that the judge of the general county court committed no error in continuing said restraining order: It is accordingly ordered that the defendants' exceptions be and they are hereby overruled and the order of the judge of the general county court is in all respects affirmed. This 24 January, 1935.

WILSON WARLICK, *Judge Presiding.*"

To this judgment the defendants excepted, assigned error, and appealed to the Supreme Court.

Alfred S. Barnard for plaintiffs.
Harkins, Van Winkle & Walton for defendants.

CLARKSON, J. We have read the record and briefs of the litigants with care. It is well settled in this jurisdiction, and the matter stated in *Seip v. Wright,* 173 N. C., 14 (15-16), as follows: "Where it will not harm the defendant to continue the injunction, and may cause great injury to the plaintiff, if it is dissolved, the court generally will restrain the party until the hearing. *McCorkle v. Brem,* 76 N. C., 407; where serious questions were raised, *Harrington v. Rawls,* 131 N. C., 40; or where reasonably necessary to protect plaintiff's rights, *Heilig v. Stokes,* 63 N. C., 612. The Court said, by *Justice Hoke,* in *Tise v. Whitaker,* 144 N. C., 508: 'It is the rule with us that in actions of this character, the main purpose of which is to obtain a permanent injunction, if the evidence raises serious question as to the existence of facts which make for plaintiff's right, and sufficient to establish it, a preliminary restraining order will be continued to the hearing (citing authorities). If the plaintiff has shown probable cause, 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, is another way of stating the rule (citing authorities). . . . In *Hyatt v. DeHart,* 140 N. C., 270, the *Chief Justice* said: 'Ordinarily, the findings of fact by the judge below are conclusive on appeal. While this is not true as to injunction cases, in which we look into and review the evidence on appeal, still there is the presumption always that the judgment and proceedings below are correct, and the burden is upon the appellant to assign and show error.'" *Teeter v. Teeter,* 205 N. C., 438; *Scruggs v. Rollins,* 207 N. C., 335; *Boushiar v. Willis, ibid.,* 511; *Porter v. Ins. Co., ibid.,* 646.

In *Hare v. Hare,* 207 N. C., 849, it is said: "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."

In the present action the plaintiff was required to give bond. North Carolina Code, 1935 (Michie), section 861, permits this to be done. Public Laws 1933, ch. 275 (Michie, *supra,* sections 2593 [b], *et seq.*)—"An act to regulate the sale of real property upon the foreclosure of mortgages or deeds of trust." Sec. 2 is as follows: "The court or judge granting such order or injunction, or before whom the same is returnable, shall have the right before, but not after, any sale is confirmed to order a resale by the mortgagee, trustee, commissioner, or other person authorized to make the same in such manner and upon such terms as may be just and equitable: *Provided,* the rights of all parties in interest,

or who may be affected thereby, shall be preserved and protected by bond or indemnity in such form and amount as the court may require, and the court or judge may also appoint a receiver of the property or the rents and proceeds thereof, pending any sale or resale, and may make such order for the payment of taxes or other prior lien as may be necessary, subject to the right of appeal to the Supreme Court in all cases."

Under this section the court below could have required bond or *may* have appointed a receiver. It was discretionary with the court under this section.

The judgment of the court below is

Affirmed.

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

F. A. BROOME, ADMINISTRATOR OF THE ESTATE OF F. A. BROOME, JR., v. CITY OF CHARLOTTE.

(Filed 20 November, 1935.)

1. **Pleadings D e—**

For the purposes of a demurrer the facts set out in the complaint are deemed to be true.

2. **Municipal Corporations E a—Ordinarily, municipality is not civilly liable for negligence in performance of governmental duty.**

In the absence of statutory provision, a municipal corporation is not liable for negligence of its agents or servants in the performance of a governmental function which it exercises as an administrative agency of the State pursuant to legislative, discretionary, or judicial powers conferred on it for the benefit of the public, but a municipal corporation may be held liable civilly for negligence of its agents or servants in the performance of its corporate powers which it exercises in its private character in the management of its property for its own corporate advantage.

3. **Same—Complaint held to allege negligence of city in performance of governmental duty, and demurrer should have been sustained.**

It appeared from the face of the complaint that a trash wagon of defendant municipality, while being used in collecting and removing trash in the city, was driven into the yard of the parents of intestate for the purpose of turning it around for the convenience of the operators of the truck and not for the purpose of gathering trash, and that while turning the truck around in the yard the driver of the truck negligently ran over and killed plaintiff's intestate, a child four years old. *Held:* Defendant municipality's demurrer to the complaint should have been sustained, since the truck was being operated, pursuant to a governmental function of the city, in removing trash for the sole benefit of the inhabitants of the city, though not actually engaged at the moment in collecting trash on the premises of the parents of plaintiff's intestate.

APPEAL by defendant from *Harding, J.,* at April Special Term, of MECKLENBURG.

This was an action by the administrator of the estate of F. A. Broome, Jr., against city of Charlotte to recover damages for alleged wrongful death of plaintiff's intestate.

The complaint alleges that on 3 October, 1934, plaintiff's intestate a child 4 years of age, was struck and killed by a trash wagon on truck of defendant.

"3. That the city of Charlotte, through its mayor and members of its governing body and its business manager, and through its servants, agents, employees, and personal representatives wilfully, wantonly, deliberately, and without any notice to the parents of said infant, and without being requested by said infant's parents, sent and directed, and caused to be sent and directed, the driver or drivers of one of its trash wagons or trucks into the back yard of the parents of the aforesaid infant, not for the purpose, as this plaintiff is informed, believes, and alleges, of gathering trash, but drove off Ordermore Drive, one of the much-used thoroughfares of the city of Charlotte and county of Mecklenburg, and into the yard of the parents of the aforesaid infant as a matter of convenience to said defendant, in order to turn the trash wagon or truck around in order to go in an opposite direction, and not at the request or for any benefit to the parents of the infant child, or for any benefit to said plaintiff's intestate."

And the plaintiff prays that he recover both actual and punitive damages therefor.

Defendant demurred to the complaint, and from judgment overruling its demurrer, defendant appealed.

Kirkpatrick & Kirkpatrick and C. A. Duckworth for plaintiff.
Scarborough & Boyd for defendant.

DEVIN, J. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. For the purposes of the demurrer the facts set out in the complaint are deemed to be true. This requires a careful examination of the complaint to determine its legal effect.

The recognized doctrine in this jurisdiction is that a municipal corporation may not be held civilly liable to individuals for the negligence of its agents in performing duties which are governmental in their nature, and solely for the public benefit. *Harrington v. Greenville,* 159 N. C., 632; *James v. Charlotte,* 183 N. C., 630; *Snyder v. High Point,* 168 N. C., 608.

In its public or governmental character a municipal corporation acts as agent of the State for the better government of that portion of its people who reside within the municipality, while in its private character it exercises powers and privileges for its own corporate advantage. When a municipal corporation is acting in its ministerial or corporate character in the management of property for its own benefit, it may become liable for damages caused by the negligence of its agents subject to its control. But when the city is exercising the judicial, discretionary, or legislative authority conferred by its charter, or is discharging a duty imposed solely for the benefit of the public, it incurs no liability for the negligence of its agents, unless some statute subjects the corporation to responsibility. *Moffitt v. Asheville,* 103 N. C., 237; *Parks-Belk Co. v. Concord,* 194 N. C., 134.

The law which imposes liability in one case and not in the other has been stated in numerous decisions of this Court. *Hamilton v. Rocky Mount,* 199 N. C., 504; *Munick v. Durham,* 181 N. C., 188.

The distinction between governmental acts and those which are ministerial or corporate seems to be that in the one case the act is done in the exercise of the police power or in the exercise of legislative, discretionary, or judicial powers conferred upon a municipality for the benefit of the public; while in the other it is done by virtue of powers exercised for its own advantage or in the negligent performance of a duty specifically imposed by statute. *Sandlin v. Wilmington,* 185 N. C., 257.

Applying these general principles, it is apparent that the operation of a trash wagon or truck on the streets of the city of Charlotte by the municipal authority was in the exercise of a governmental function for the sole benefit of its inhabitants, and not a ministerial or corporate act.

While the complaint alleges that the entry of the truck on the premises where plaintiff's intestate was struck was not to gather trash, but in order to turn the truck around, it sufficiently appears that the injury was done by a truck owned by the city for purposes in respect to trash; that is, the removal of trash for street cleaning, and that its truck was in such use by one of its employees, though not actually engaged at the moment in collecting or hauling trash on the premises of plaintiff.

For these reasons, we think the court below was in error in overruling the demurrer.

The judgment overruling the demurrer is

Reversed.

MRS. RUTH DEWEASE v. TRAVELERS INSURANCE COMPANY AND HIGHLAND PARK MANUFACTURING COMPANY.

(Filed 20 November, 1935.)

1. **Insurance F b—Employee held not entitled to disability benefits when proof of disability was not given while policy was in force.**

Under the terms of defendant insurer's group policy an employee furnishing due proof of disability while insured under the policy was entitled to disability benefits. The policy provided that insurance as to each employee should terminate upon termination of his employment, unless at such time the employee was disabled as defined in the policy. Plaintiff became disabled while insured under the policy, and premiums were deducted from her wages up to the time of her disabling injury, when her employment was terminated and no further deductions for premiums were made. The master policy was canceled about nine months after her injury. About two years after her injury plaintiff gave defendant insurer notice and proof of her disability. *Held:* Although the disability occurred while plaintiff was insured under the policy, notice and due proof of such disability were not given while plaintiff was insured under the policy, and notice within such time being made a condition precedent to liability under the policy, defendant insurer's motion for judgment as of nonsuit should have been granted.

2. **Insurance M b—**

The employer in a group insurance policy is not ordinarily the agent of the insurer for the purpose of receiving notice or proof of claim by an insured employee.

APPEAL by plaintiff from *Clement, J.*, at March Term, 1935, of MECKLENBURG.

This was an action to recover on a certificate of group insurance issued by the defendant Travelers Insurance Company to the plaintiff, who was at the time an employee of the Highland Park Manufacturing Company. Plaintiff claims total disability.

The certificate, dated 4 November, 1926, contains the following provision:

"The insurance of an employee covered hereunder shall end when his employment with employer shall end, except in a case where at the time of termination of employment the employee shall be wholly disabled and prevented by bodily injury or disease from engaging in any occupation or employment for wage or profit. In such case the insurance will remain in force as to such employee during the continuance of such disability for a period of three months from the date upon which the employee ceased to work, and thereafter during the continuance of such disability while this policy shall remain in force until the employer shall notify the company to terminate the insurance as to such employee. Nothing in this paragraph contained shall limit or extend the perma-

nent total disability benefit to which an employee shall become entitled under this policy."

The permanent total disability benefit clause in the policy is as follows:

"If any employee shall furnish the company with due proof that while insured under this policy he has become wholly disabled by bodily injuries or disease, and will be permanently, continuously, and wholly prevented thereby for life from engaging in any occupation or employment for wage or profit, the company will waive further payment of premium as to such employee and pay in full settlement of all obligations to him under this policy the amount of insurance in force hereunder upon his life at the time of receipt of due proofs of such disability."

Plaintiff continued in the employ of the Highland Park Manufacturing Company, and amounts sufficient to pay the premiums on her policy were deducted from her wages until 17 August, 1931, when she was injured. Thereafter she ceased to be employed, and no further payments were made on the policy.

The superintendent of the Highland Park Manufacturing Company was verbally notified of plaintiff's injury shortly after it occurred. There was no evidence of other or further notice of any kind, until 12 August, 1933, when plaintiff's counsel wrote defendant insurance company, giving notice that she had been injured 17 July (August), 1931, and that she claimed benefit under the total disability clause of her policy. The master policy was canceled 27 May, 1932.

Voluntary nonsuit was taken as to the Highland Park Manufacturing Company.

Plaintiff offered evidence as to the manner of her injury and the extent of her disability thereafter.

At the conclusion of plaintiff's evidence, motion to nonsuit as to defendant insurance company was sustained, and from the judgment thereon plaintiff appealed.

Ralph V. Kidd and John M. Robinson for plaintiff.
Tillett, Tillett & Kennedy for defendant Insurance Company.

DEVIN, J. It is unnecessary to decide whether there was sufficient evidence to go to the jury that plaintiff was wholly disabled within the meaning of the policy, as the judgment of nonsuit must be sustained upon other grounds.

The language of the policy of insurance sued on in the instant case, as interpreted by this Court in construing similar provisions in *Johnson v. Ins. Co.,* 207 N. C., 512; *Hundley v. Ins. Co.,* 205 N. C., 780, and *Modlin v. Woodmen of the World, ante,* 576, in the light of the evidence offered here, compels the conclusion that the failure to furnish proof or

notice of any kind to defendant insurance company until two years after the plaintiff's employment had ended, and the payment of premiums had ceased, rendered plaintiff's claim unenforceable. Due proofs were not furnished the insurance company while she was insured under her policy. Her policy had lapsed.

Similar results have been reached in other jurisdictions: *Bergholm v. Peoria Life Ins. Co.,* 284 U. S., 489; *Iannarelli v. Ins. Co.,* 171 S. E. (W. Va.), 748; *Parker v. Ins. Co.,* 155 S. E. (S. C.), 617; *Ins. Co. v. Fugate,* 170 S. E. (Va.), 573; *Wick v. Ins. Co.,* 175 Pac. (Wash.), 953; *McCutcheon v. Ins. Co.,* 158 So. (Ala.), 729.

In *Bergholm v. Peoria Life Ins. Co., supra,* construing a similar provision in an insurance policy, *Associate Justice Sutherland,* speaking for the Court, uses this language:

"The obligation of the company does not rest upon the existence of the disability, but it is the receipt by the company of proof of the disability which is definitely made a condition precedent to an assumption by it (waiver) of payment of the premiums becoming due after the receipt of such proof."

In *Horn v. Ins. Co.,* 65 S. W. (2d), Ky., 1017, cited by plaintiff, the provisions of the policy were in some respects different from those in this case. And in *Smithart v. Ins. Co.,* 71 S. W. (2d), Tenn., 1059, also cited by plaintiff, it was held that where the contract stipulated no time within which proof of disability should be made, proof within a reasonable time would be sufficient, in that case seven months.

While there is no specific requirement in the policy as to the form of proof necessary, the informal statement to the superintendent of the Highland Park Manufacturing Company would not avail the plaintiff, for he was not the agent of the insurance company. *Ammons v. Ins. Co.,* 205 N. C., 23.

The employer in a group insurance policy is not ordinarily the agent of the insurance company. *Duval v. Ins. Co.,* 136 Atl. (N. H.), 400.

The judgment is

Affirmed.

STATE v. LEROY TARLTON.

(Filed 20 November, 1935.)

1. Bastardy B c—Warrant failing to charge that failure to support illegitimate child was wilful is fatally defective.

Wilfulness is an essential ingredient of the offense of failing to support an illegitimate child, N. C. Code, 276 (a), and where the warrant fails to charge that defendant's failure to support his illegitimate child was wilful, defendant's motion in arrest of judgment should be allowed.

2. Indictment D a—

Where a warrant or indictment is fatally defective in failing to charge an essential element of the offense, the defect cannot be cured by amendment after verdict upon defendant's motion in arrest of judgment.

3. Indictment B a—

Where a warrant or indictment fails to charge an essential element of the offense, the defect is fatal and is not cured by the provisions of C. S., 4623.

4. Criminal Law J a—

Where an indictment fails to charge an essential element of the offense, the defect may be taken advantage of by a motion in arrest of judgment.

APPEAL by defendant from *Sink, J.*, and a jury, at March Special Term, 1935, of MECKLENBURG. Error.

The warrant on which defendant was indicted is as follows:

"STATE OF NORTH CAROLINA,
COUNTY OF MECKLENBURG,
CHARLOTTE TOWNSHIP.

JUSTICE'S COURT,
Before W. B. WARWICK,
Justice of the Peace.

The State
v.
LeRoy Tarlton. CRIMINAL ACTION.

Avis King, being duly sworn, complains and says that at and in said county of Mecklenburg, Charlotte Township, on or about 16 January, 1934, a baby was born to her out of wedlock, and that the defendant above named is the father of said child, and that since the birth of said child the defendant has failed and refused to support or contribute to the support of said child and has failed and refused to pay any of the expenses in connection with the birth of said child all of which acts on the part of the defendant are unlawful and in violation of law and against the statutes in such cases made and provided and against the peace and dignity of the State, contrary to the form of the statute and against the peace and dignity of the State.

"Subscribed and sworn to before me, this 24 December, 1934.

"W. B. WARWICK, MISS AVIS KING.
Justice of the Peace."

Attorney-General Seawell and Assistant Attorneys-General Aiken and Bruton for the State.

J. D. McCall, L. L. Caudle, and A. A. Tarlton for defendant.

CLARKSON, J. The defendant is indicted under N. C. Code, 1935 (Michie), section 276 (a): "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 sections 276 (a)-276 (i) 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." Public Laws 1933, ch. 228, sec. 1. "The act of 1933 was intended to cover the entire subject dealing with bastardy, and will work a repeal of all the former bastardy act." *State v. Morris, ante,* 44 (47).

The defendant was tried by the justice of the peace on the warrant above set forth, and also in the Superior Court, where the jury found the defendant guilty.

The defendant made the following exception and assignment of error: "The defendant then moved for an arrest of judgment on the ground that the bill of indictment does not charge that the abandonment was wilful, which motion was made after the verdict and motion to set the same aside had been made and denied by the court. The State moved to be allowed by the court to amend by inserting the words: 'That the defendant wilfully failed and refused to support or contribute to the support of said child and had wilfully refused to pay any of the expenses in connection with the birth of said child.' The motion of the solicitor is allowed, the amendment shall be inserted in the warrant; whereupon, the plea of defendant's counsel is denied, to which the defendant in apt time excepts." We think the exception and assignment of error made by defendant must be sustained. The statute under which defendant is charged says: "Any parent who wilfully neglects or who refuses to support and maintain," etc., his illegitimate child. It nowhere charges that this is wilfully done. This ingredient of the offense is material.

In *State v. Cook,* 207 N. C., 261 (262), it is said: "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 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."

N. C. Code, 1935 (Michie), section 4623, is as follows: "Every criminal proceeding by warrant, indictment, information, or impeachment is sufficient in form for all intents and purposes if it express the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding sufficient matter appears to enable the court to proceed to judgment." By the many adjudications construing this section it has been definitely settled that the section neither supplies nor remedies the omission of any

distinct averment of any fact or circumstance which is an essential constituent of the offense charged. *State v. Cole,* 202 N. C., 592, 598.

In referring to sec. 4623, *supra,* the learned Attorney-General and his assistants say: "C. S., 4623, provides that no judgment shall be stayed because of any informality or refinement. It seems, however, that under *State v. Tyson, ante,* 231, a charge of wilful neglect or refusal to support an illegitimate child which does not allege wilfulness is not cured by the statute. However, we leave this for the consideration of the Court." We think that the omission of such a material element of the offense is fatal; nor has the court below power or authority after verdict to allow the amendment to be made.

In *State v. Lewis,* 194 N. C., 620 (621), it is said: "The defect or omission appearing, as it does, on the face of the record, may be taken advantage of by motion in arrest of judgment. *S. v. Jenkins,* 164 N. C., 527, 80 S. E., 231; *S. v. Baker,* 106 N. C., 758, 11 S. E., 360." *State v. Tyson, supra* (233).

For the reasons given, the motion in arrest of judgment should have been granted in the court below. It is always wise to follow the words of a statute to avoid the trouble as presented in this case. *State v. Leeper,* 146 N. C., 655.

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

Error.

F. C. NIBLOCK v. BLUE BIRD TAXI COMPANY, A CORPORATION.

(Filed 20 November, 1935.)

1. Trial D a—

On motion for judgment as of nonsuit, the evidence must be considered in the light most favorable to plaintiff.

2. Automobiles C c—Nonsuit held properly refused on evidence showing defendant's excessive speed on through street and plaintiff's due care before attempting to cross through street intersection.

Plaintiff's evidence tended to show that he came practically to a stop at the stop sign before attempting to cross the intersection of a through street, that he attempted to cross the intersection when he saw that the street was clear except for a car a block away, and that such car, owned by defendant and driven at a rate of seventy miles an hour, struck plaintiff's car as his car reached the far side of the intersection, the rear wheels lacking but four feet of clearing the intersection. *Held:* Defendant's motion for judgment as of nonsuit on the evidence was properly refused.

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

APPEAL by defendant from *Oglesby, J.*, and a jury, at January Term, 1935, of CABARRUS. No error.

This is an action for actionable negligence, brought by plaintiff against defendant, alleging damage.

The complaint of plaintiff alleges, in part: "That on or about 7 September, 1934, at about 4:30 or 5 o'clock p.m., the plaintiff was driving west on Templeton Street in the city of Charlotte, N. C., accompanied by his wife, and driving plaintiff's own automobile, and was at a point on said street where Templeton Street crosses Euclid Avenue, which said crossing the plaintiff approached in a slow and very cautious manner, and after observing that the crossing was clear, the plaintiff attempted to cross Euclid Avenue, there being no other car within a city block of said crossing, and as the plaintiff was just about across said Euclid Avenue the defendant taxi company, through one of its drivers, agents, employees, or chauffeurs, driving a taxicab at a very high and dangerous and unlawful rate of speed, to wit, from 60 to 80 miles per hour, through one of the residential sections of the city of Charlotte, wilfully, recklessly, wantonly, and unlawfully drove said taxi into and against the plaintiff's automobile, striking said automobile on the right rear side, and completely overturned the plaintiff's automobile and knocked same completely around in the said street, which said impact hurled the plaintiff and his wife violently against the side of said automobile and against the street, causing the personal injury and property damage hereinafter alleged."

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 were as follows:

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

"2. Did the plaintiff, by his own negligence, contribute to his injury and property damage, as alleged in the answer? Answer: 'No.'

"3. What amount, if anything, is the plaintiff entitled to recover of the defendant for personal injuries and for medical services and expenses? Answer: '$300.00.'

"4. What amount, if anything, is the plaintiff entitled to recover of the defendant for damages to his automobile? Answer: '$175.00.'

"5. Was the defendant's automobile damaged by the negligence of the plaintiff, as alleged in the answer? Answer: ....

"6. What amount, if anything, is the defendant entitled to recover of the plaintiff as damages to his automobile? Answer: ...."

The court below rendered judgment on the verdict. Defendant excepted, assigned error, and appealed to the Supreme Court.

B. W. Blackwelder and H. S. Williams for plaintiff.
John Newitt 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. The only exceptions and assignments of error made by defendant were to the refusal of the court below to grant the motions of nonsuit. The evidence on motions for nonsuit is taken in the light most favorable to plaintiff. The plaintiff's evidence fully sustained the allegations of the complaint.

Plaintiff testified, in part, that Euclid Avenue in the city of Charlotte was 40 feet wide. Templeton Avenue, about 30 feet wide. He was driving west on Templeton Avenue, and when he came to Euclid Avenue he was driving at a slow rate of speed. There was a stop sign and he practically came to a stop. His wife, who was in the car, testified that he "stopped at the stop sign." Plaintiff hesitated to see if the way was clear. There was no obstruction either way. There was only one car in sight on Euclid Avenue which was headed south, and that car was practically a block away, and the one that struck plaintiff's car. At the time of the impact plaintiff had practically cleared Euclid Avenue, and the rear of plaintiff's car was about 4 feet from the west curb of Euclid Avenue. Defendant's car which struck plaintiff was coming about 75 miles an hour, travelling 5 or 6 times as fast as plaintiff's car. The evidence was not only sufficient to be submitted to the jury, but defendant, in running 75 miles an hour in the city, contrary to all the rules of the road, from plaintiff's evidence, may be guilty of criminal negligence.

In the judgment of the court below there is
No error.

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

G. G. GALLOWAY AND WIFE, ET AL., v. I. D. STONE AND C. L. SMITH.

(Filed 20 November, 1935.)

Injunctions E b—It is error to decree permanent injunction upon hearing of order to show cause.

It is error for the court, upon the hearing of an order to show cause, to decree a permanent injunction, although the facts found are sufficient to continue the temporary restraining order to the hearing, defendants being entitled to a day in court to determine in some proper way the issues raised by the pleadings, and a permanent injunction being a final judgment which settles the rights of the parties.

APPEAL by defendants from *Harding, J.*, at April Special Term, 1935, of MECKLENBURG.

This was an action to enforce certain restrictive covenants in defendants' deed limiting the character of buildings to be erected on the lots conveyed, and to restrain defendants from erecting a gasoline filling station thereon.

A temporary restraining order was issued 11 March, 1935, by Judge Clement, with order to show cause before Pless, J., at Gastonia, 30 March, but by consent it was agreed to be heard by Harding, J., at Charlotte, at the 22 April Special Term of Mecklenburg Superior Court.

Upon consideration of the complaint and answer, and the supporting affidavits offered by the plaintiffs and defendants, judgment was rendered decreeing a permanent injunction, and from this judgment defendants appealed.

John M. Robinson and Hunter M. Jones for plaintiffs.
Stewart & Bobbitt for defendants.

DEVIN, J. The only question presented by this appeal is whether a permanent injunction was proper. Defendants concede that the facts found by the court below are sufficient to justify a continuance to the hearing, but they maintain they are entitled to a day in court to determine in some proper way the issues raised by the pleadings; and in this we concur.

A permanent or perpetual injunction issues as a final judgment which settles the rights of the parties, after the determination of all issues raised. McIntosh N. C. Prac. & Proc., secs. 848, 849; *Abernethy v. Burns,* 206 N. C., 370.

This disposition of the appeal renders unnecessary a discussion of the other questions presented on the argument and by brief.

Error and remanded.

STATE v. ED JENKINS.

(Filed 20 November, 1935.)

Criminal Law B a—Inability to distinguish right from wrong, and not low mentality, is the legal test of insanity.

The test of mental irresponsibility sufficient to render defendant incapable of the commission of crime is the inability to distinguish right from wrong, and the exclusion of testimony that defendant is of low mentality is not error, low mentality not being the test of insanity.

APPEAL by defendant from *Warlick, J.*, at July Term, 1935, of GASTON.

Criminal prosecution, tried upon indictment charging the defendant with the murder of one Paul Collins.

Verdict: Guilty of murder in the first degree.

Judgment: Death by inhaling lethal gas.

The defendant appeals, assigning errors.

Attorney-General Seawell and Assistant Attorneys-General Aiken and Bruton for the State.

Ernest R. Warren for defendant.

STACY, C. J. The evidence on behalf of the State tends to show that on the night of 4 July, 1935, the defendant shot and killed Paul Collins under circumstances which the jury found to be murder in the first degree. The shooting occurred on one of the principal streets in the town of Bessemer City. The defendant told the night policeman, who arrested him, "that he didn't want to shoot the deceased, but he made me do it." Later, on being informed by the same policeman that Collins was dead, the defendant said, "I am glad, I did a damn good job"; and, further, "there was an old grudge between me and Paul Collins and Doc Horsley over dope."

The pleas interposed by the defendant were self-defense and insanity or mental irresponsibility. Both of these pleas were rejected by the jury. The only testimony offered by the defendant to support his plea of insanity was that of several witnesses who would have testified, if permitted to do so, that the defendant was a man of low mentality. The exclusion of this evidence is the principal question presented by the appeal. There was no error in its exclusion. *S. v. Vernon, ante,* 340. Low mentality is not the test of insanity. *S. v. Spivey,* 132 N. C., 989, 43 S. E., 475. He who knows the right and still the wrong pursues is amenable to the criminal law. *S. v. Potts,* 100 N. C., 457, 6 S. E., 657. We are aware of the criticism of this standard by some psychiatrists and others. Nevertheless, the critics have offered nothing better. It has the merit of being well established, practical, and so plain "that he may run that readeth it." Hab. 2:2.

The verdict and judgment will be upheld.

No error.

H. P. SWINSON v. LANCE PACKING COMPANY ET AL.

(Filed 20 November, 1935.)

1. Pleadings E a: Judgments L a—

The denial of a motion to amend the complaint by adding two causes of action nonsuited on the evidence upon a former trial is properly entered upon the grounds of *res judicata.*

2. Pleadings E c—

The trial court has the discretionary power to allow a complaint to be amended by adding two new causes of action based upon the same subject of action as the original cause.

APPEALS by plaintiff and defendant Lance Packing Company from *McElroy, J.,* at April Term, 1935, of MECKLENBURG.

Carswell & Ervin for plaintiff.
Tillett, Tillett & Kennedy for defendant Packing Company.

STACY, C. J. Civil action for slander, tried originally at May Term, 1934, appeal by defendant, and new trial ordered 28 January, 1935, opinion reported in 207 N. C., 637, 178 S. E., 111.

Thereafter, plaintiff asked to be permitted to amend his complaint (1) by bringing forward again the two causes of action originally nonsuited; and (2) by adding two new causes of action originally regarded as secondary publications. See case as reported on first appeal.

The court denied the first part of the motion on the ground of *res judicata* (*Revis v. Ramsey,* 202 N. C., 815), and allowed the second part in his discretion. Both sides appeal. The ruling on the first part of the motion is affirmed on what was said in *Hampton v. Spinning Co.,* 198 N. C., 235, 151 S. E., 266, and that on the second part on authority of *Grant v. Burgwyn,* 88 N. C., 95.

Defendant's appeal seems precautionary, as the matter presently debated doubtless would have been rendered academic by subsequent plea and motion. *Capps v. R. R.,* 183 N. C., 181, 111 S. E., 533; *Gordon v. Fredle,* 206 N. C., 734, 175 S. E., 126.

On plaintiff's appeal, affirmed.

On defendant's appeal, affirmed.

NORTH CAROLINA MORTGAGE CORPORATION v. CHARLES L. MORGAN.

(Filed 20 November, 1935.)

1. **Corporations G h—Ordinarily corporation is not required to use its seal when individual is not required to use his seal.**

Unless its charter or some statute provides otherwise, a corporation need not use its corporate seal except when an individual is required to use his seal, and a corporation may appoint agents or make contracts by resolution or by writing, signed by a duly authorized officer, without using its corporate seal.

2. **Same: Mortgages C f—Corporate seal is not necessary to appointment of substitute trustee by corporate cestui que trust.**

The appointment of a substitute trustee by a corporate *cestui que trust* by a paper-writing signed by its duly authorized officer is valid without the corporate seal, and when the substitution is made in conformity with the provisions of the deed of trust and the statute, N. C. Code, 2583 (a), sale of the property by the substitute trustee in accordance with the terms of the instrument is valid, the appointment of a substitute trustee not being a conveyance of any interest in land.

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

APPEAL by defendant from *Pless, J.*, at March Term, 1935, of GASTON. Affirmed.

This is a controversy without action. C. S., 626. The facts on which the question of law involved in the controversy arises are as follows:

1. On 1 May, 1929, R. O. Brackett and his wife executed a deed of trust by which they conveyed to the First National Bank of Durham, N. C., as trustee, the lands described therein to secure the payment of their long term first mortgage note for $2,000, and their eight short term first mortgage notes, aggregating the sum of $240, said notes being described in said deed of trust.

The deed of trust was duly recorded in the office of the register of deeds of Gaston County, North Carolina, and contains a clause conferring upon the trustee therein named power to sell and convey the land conveyed by said deed of trust, upon default in the payment of said notes according to their tenor. It also contains a clause providing as follows:

"3. Should the trustee resign or a vacancy occur, then those who are entitled to sixty (60) per cent in value of the long term first mortgage note are entitled and empowered, with the consent of those who are entitled to sixty (60) per cent in value of the short term mortgage notes, to appoint in writing another, or, if desirable or necessary, two other trustees in the place and stead of the one herein named, which said

trustee or trustees shall have all the power and authority, and be charged with all the duties conferred upon the trustee herein named."

2. Subsequent to the execution of said deed of trust, the General Assembly of North Carolina enacted chapter 78, Public Laws of North Carolina, 1931 (N. C. Code of 1935, section 2583 [a]), providing for the appointment in certain cases of a substitute trustee in deeds of trust to secure the payment of money.

3. On 18 January, 1932, the First National Bank of Durham, N. C., ceased to do business because of its insolvency, and is now in liquidation by a receiver appointed by the Comptroller of the Currency of the United States.

4. On 22 January, the North Carolina Mortgage Corporation was the holder and owner of the long term first mortgage note for $2,000, secured by said deed of trust, and the Union Trust Company of Maryland was the holder and owner of the eight short term first mortgage notes, aggregating the sum of $240.00, also secured by said deed of trust.

At said date the North Carolina Mortgage Corporation and the Union Trust Company of Maryland executed a paper-writing by which they appointed as substitute trustee in said deed of trust Jefferson E. Owens. The said paper-writing was executed in the name of the North Carolina Mortgage Corporation by its secretary, Kenneth F. Clark. The corporate seal of the said North Carolina Mortgage Corporation was affixed to said paper-writing. The said paper-writing was executed in the name of the Union Trust Company of Maryland by its authorized officer, Frederick P. Storm. The corporate seal of the Union Trust Company of Maryland was not affixed to said paper-writing. The due execution of said paper-writing by both the North Carolina Mortgage Corporation and the Union Trust Company of Maryland was proven before a notary public. The said paper-writing, together with the certificates of the notary public, and of the clerk of the Superior Court of Gaston County, was duly recorded in the office of the register of deeds of said county.

Thereafter, Jefferson E. Owens, as substitute trustee in said deed of trust, after fully complying with the provisions thereof, sold and conveyed the lands described therein to the plaintiff. The plaintiff now claims title to said lands under the deed executed by Jefferson E. Owens, substitute trustee, and duly recorded in the office of the register of deeds of Gaston County.

On 7 March, 1935, the plaintiff and the defendant entered into a contract by which the plaintiff agreed to sell and convey to the defendant the lands described in the said deed of trust, and the defendant agreed to pay to the plaintiff a certain sum of money as the purchase price for said lands upon the execution and delivery by the plaintiff to the defendant of a deed conveying the said lands to the defendant in fee simple, free and clear of all liens or encumbrances.

The defendant has declined to accept the deed tendered by the plaintiff and to pay the contract price for said lands, contending that the appointment of Jefferson E. Owens as substitute trustee in the deed of trust from R. O. Brackett and wife to the First National Bank of Durham, N. C., is invalid for that said appointment, although in writing, was not executed as required by law by the corporate holders and owners of the notes secured by said deed of trust.

The court was of opinion that the appointment in writing of Jefferson E. Owens as substitute trustee by the holders and owners of the notes secured by the deed of trust was valid in all respects, and rendered judgment accordingly. The defendant appealed to the Supreme Court, assigning error in the judgment.

Fuller, Reade & Fuller and W. A. Devin, Jr., for plaintiff.
Bailey Patrick for defendant.

CONNOR, J. It is agreed by the parties to this controversy that the paper-writing, appearing in the record as Exhibit A, was executed in the names of the corporate holders and owners of the notes secured by the deed of trust from R. O. Brackett and his wife to the First National Bank of Durham, N. C., trustee, by authorized officers of said corporation, and is sufficient in form as an appointment in writing by said holders and owners of Jefferson E. Owens as substitute trustee in said deed of trust, in the place and stead of the First National Bank of Durham, N. C., under the provisions of both the deed of trust and of the statute. The absence from said paper-writing of the corporate seal of the Union Trust Company of Maryland does not affect the validity of said paper-writing as an appointment by said trust company of the substitute trustee. The corporate seal of the North Carolina Mortgage Corporation, which appears on said paper-writing, was not necessary to its validity as an appointment by said corporation of the substitute trustee. The general rule in this and other jurisdictions now is that unless its charter or some statute provides otherwise, a corporation need not use its corporate seal except when an individual is required to use his seal. A corporation may appoint agents, and act or make contracts by resolution or by writing signed by a duly authorized officer, without using its corporate seal, just as an individual may do. 14 C. J., 334, section 405 (2). See *Warren v. Bottling Co.,* 204 N. C., 288, 168 S. E., 226; *Mershon v. Morris,* 148 N. C., 48, 61 S. E., 647.

The paper-writing by which Jefferson E. Owens was appointed by the holders and owners of the notes secured by the deed of trust, substitute trustees, does not purport to be and is not a conveyance by said holders and owners of the land described in the deed of trust, or of any interest in said land. For this reason, the statutory requirements for

the execution by a corporation of a deed conveying land have no application to the execution of said paper-writing.

The provisions of the deed of trust and of the statute have been fully complied with in the appointment of the substitute trustee in this case. For that reason, the deed of said substitute trustee to the plaintiff as the purchaser at the sale made by him under the power of sale contained in the deed of trust, conveys to the plaintiff a fee-simple title to the land described in the deed of trust, free and clear of all liens or encumbrances. There is no error in the judgment. It is

Affirmed.

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

W. E. HARRIS, C. E. LENDERMAN, R. R. REINS, JOE R. BARBER, AND L. B. DULA, COMPOSING THE MAYOR AND BOARD OF ALDERMEN OF THE TOWN OF WILKESBORO, NORTH CAROLINA, v. T. S. MILLER, REGISTRAR, FRED HENDERSON AND WILLIAM O. JOHNSON, JUDGES OF THE TOWN ELECTION, R. M. BRAME, JR., CHAIRMAN, JOE M. PEARSON AND J. C. GRAYSON, COMPOSING THE COUNTY BOARD OF ELECTIONS FOR WILKES COUNTY.

(Filed 20 November, 1935.)

1. **Appeal and Error J f—In injunctive proceedings the Supreme Court may review findings of fact of the court below.**

   It will be presumed on appeal that the lower court found facts sufficient to support his judgment when there are no findings of fact and no request therefor, but in injunctive proceedings the Supreme Court may review the evidence, and where presumptive findings sufficient to support the judgment cannot be approved upon the record, the judgment of the lower court will be reversed upon error assigned and shown.

2. **Elections I c—Upon facts appearing of record in this case it is held that purported election was invalid.**

   Where, in injunctive proceedings involving the validity of an election, it appears from the record on appeal that the ballots cast had been adjudged illegal, that legal ballots were denied those who presented themselves to vote, that many registered voters who came to the polling place to vote were denied the privilege of voting, and that the polls were open for voting less than two hours, the judgment dissolving the temporary restraining order entered in the cause and directing the canvassing of the ballots and the declaration of the results of the election will be reversed, since upon the facts appearing of record no valid election had been held.

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

APPEAL by the plaintiffs from *Clement, J.*, at June Term, 1935, of WILKES. Reversed.

This was an action, brought by the plaintiffs, who were the mayor and aldermen of the town of Wilkesboro, against the defendants, who were the registrar and judges of the town election and the members of the county board of elections of Wilkes County, to restrain and enjoin the use by the defendants, in the election of a mayor and aldermen of Wilkesboro on 7 May, 1935, of ballots prepared by the county board of elections and bearing the facsimile signature of R. M. Brame, Jr., chairman. The plaintiffs were candidates for reëlection and contended that the proper ballots to be used in the municipal election on 7 May, 1935, were those prepared by them and bearing the facsimile signature of O. F. Blevins, town clerk.

The defendants contend that the ballots bearing the facsimile signature of Brame (hereinafter called the Brame ballots) were prepared in accord with chapter 108, Public Laws 1931, under which municipal elections in Wilkes County are held, and were therefore the proper ballots to be used; and the plaintiffs contend that the ballots bearing the facsimile signature of Blevins (hereinafter called the Blevins ballots) were prepared in accord with chapter 164, Public Laws 1929 (General Elections Law), and were the proper ballots to be used. On the Blevins ballots the names of the candidates on each platform were grouped and so arranged as to enable the voters to vote for a group, or "straight ticket," by making a single cross-mark in a circle at the head of the ballot; and on the Brame ballots the names of the candidates were so intermingled as to require the voters to mark each individual candidate for whom they desired to vote.

The cause came on to be heard before Daniels, J., on 6 May, and he issued a temporary order restraining the use of any other than the Blevins ballots; and at 11 a.m., 7 May, 1935, after answer had been filed by the defendants, and after argument had been presented for both plaintiffs and defendants, Daniels, J., made his temporary order permanent, adjudging, *inter alia:* "As to the voting of any other ticket other than the official ballot prepared by the board of aldermen and bearing the facsimile of the town clerk, to wit: O. F. Blevins, the injunction is made permanent, and the defendants, their agents, employers, and attorney, are enjoined and restrained from using any other ballot."

Notwithstanding the two foregoing orders of Daniels, J., 57 of the Brame ballots were allowed to be cast, and notwithstanding 800 of the Blevins ballots were furnished to the defendants, they failed or refused to make them available at the polls. There were approximately 400 voters registered for the election, and no ballots were cast other than the aforesaid 57 Brame ballots. The polls were opened for voting between eleven and twelve o'clock and remained open less than two hours. In the afternoon of 7 May, 1935, Daniels, J., after finding that citizens of Wilkes-

boro entitled to vote had been deprived of their privilege, and that all votes cast had been cast with illegal ballots, restrained the defendants from canvassing and reporting any election returns, "or signing same from ballots cast which bore the facsimile signature of R. M. Brame, Jr., chairman of the Wilkes County board of elections, instead of O. F. Blevins, town clerk," and directed the sheriff of Wilkes County "to seize the ballot boxes, containing the illegal ballots cast," together with the poll books, and to seal and turn the same over to the clerk of the Superior Court; and further ordered the defendants to appear before him on 8 May to show cause, if any they had, why his order should not be made permanent.

On Friday, 10 May, Daniels, J., on his own motion on account of his own physical exhaustion, "set this cause to be heard before the judge holding the June Term of Wilkes Superior Court, commencing on 3 June, 1935, to be heard on 4 June, 1935, at two o'clock p.m., in the court room in Wilkesboro."

The defendants objected and excepted to the several orders of Daniels, J., and gave notice of appeal to the Supreme Court, but never perfected any appeal.

The cause came on to be heard before Judge Clement, the judge holding the courts of the 17th Judicial District, at the regular June Term, 1935, of Wilkes County Superior Court, and he dissolved the order of Daniels, J., impounding the ballot boxes and poll books, and ordered the same returned to the defendants Miller, Henderson, and Johnson, registrar and judges of the election, respectively, and authorized and directed them to canvass the ballots and declare the result of the election. To this judgment of Clement, J., the plaintiffs objected and excepted, and appealed to the Supreme Court, assigning errors.

Chas. G. Gilreath, J. M. Brown, Trivette & Holshouser, F. J. McDuffie, and H. A. Cranor for plaintiffs, appellees.

Fred S. Hutchins, H. Bryce Parker, and J. H. Whicker for defendants, appellants.

SCHENCK, J. The appellants' assignments of error assail the judgment of Clement, J., for that (1) the ballots which it authorized and directed to be canvassed were illegal and void, and (2) that said ballots were cast in contempt of court, and (3) for that the election officials failed to furnish valid ballots, and (4) that no legal ballots were cast, and those who presented themselves to vote were denied legal ballots, and (5) that the election officials closed the polls shortly after midday and left the polling place.

His Honor found no facts, and it does not appear from the record that he was requested so to do. There would, therefore, be a presumption that he found the facts to be as alleged in the answer, since he entered judgment in favor of the defendants. However, in injunction proceedings, this Court has the power to review on appeal the findings of fact by the court below, when the appellant has assigned and shown error. *Scott v. Gillis,* 197 N. C., 223. *Clark, C. J.,* in *Peters v. Highway Commission,* 184 N. C., 30, says: "In injunction proceedings we can review the evidence."

While we at all times desire to give due weight and consideration to the findings of fact of the judge of the Superior Court, and hesitate in this case to depart from the facts presumed to have been, but not actually, so found, our understanding of the facts as gleaned from the record, more especially from the orders of Daniels, J., from which no appeal was perfected, precludes our approval of such findings as will support the judgment entered. It appears that 57 ballots adjudged to be illegal were cast, that no other ballots were cast, and that legal ballots were denied those who presented themselves to vote, and that many of the 400 registered voters who came to the polling place were denied the privilege of voting, and that the polls were open for voting less than two hours. Under these, and other circumstances that appear from the record, we think it was error to authorize and direct the canvassing of the ballots and the declaring of the results of the election.

We hold there was no valid election, and that the judgment of the Superior Court should be reversed.

Reversed.

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

TOWN OF WILKESBORO, J. F. JORDAN, AS MAYOR OF WILKESBORO, AND C. T. DOUGHTON, J. R. HENDERSON, C. E. LENDERMAN AND C. A. LOWE AS COMMISSIONERS OF THE TOWN OF WILKESBORO, v. W. E. HARRIS, C. E. LENDERMAN, JOE R. BARBER, R. R. REINS, L. B. DULA, P. L. LENDERMAN, AND O. F. BLEVINS.

(Filed 20 November, 1935.)

APPEAL by defendants from *Phillips, J.,* at Chambers in Wilkesboro, 15 August, 1935. From WILKES.

This was a *mandamus* proceeding, instituted by the plaintiffs to compel the delivery to them by defendants of the tax books, check books, bond records, and all other records and property of the town of Wilkesboro.

The court, after considering the pleadings and affidavits offered by the plaintiffs and defendants, and after hearing arguments for all parties, entered judgment directing the sheriff of Wilkes County to seize the records and property described in the complaint and deliver the possession thereof to the plaintiffs. To this judgment the defendants objected and excepted, and appealed to the Supreme Court, assigning errors.

Trivette & Holshouser, J. M. Brown, Chas. G. Gilreath, F. J. McDuffie, and H. A. Cranor for defendants, appellants.

Fred S. Hutchins, H. Bryce Parker, J. H. Whicker, and R. C. Jennings for plaintiffs, appellees.

SCHENCK, J. The basis of the individual plaintiffs' complaint is the allegation that they had been duly declared elected as mayor and aldermen of the town of Wilkesboro, respectively, at the election held on 7 May, 1935, and as such mayor and aldermen they were entitled to the possession of the records and other property of the municipality. This allegation is denied by the answer of the defendants, and, at the hearing, the defendants demanded a trial by jury, and, upon denial thereof, reserved exception.

Some of the defendants in this action were the plaintiffs in the case of *W. E. Harris et al. v. T. S. Miller et al.*, which was jointly argued with this case, and this day decided, *ante,* 746. In *Harris et al. v. Miller et al., supra,* it is held that there was no valid election on 7 May, 1935, and the judgment of the court which authorized the canvass of the illegal votes cast and the declaration of the results of the invalid election is reversed. In the light of this holding, it is manifest that the plaintiffs cannot maintain this action.

The judgment of the court below is reversed, and this case is remanded that judgment directing the records and property heretofore seized by the sheriff and delivered to the plaintiffs be returned to the defendants.

Reversed and remanded.

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

MRS. MYRTLE BLACKWELL v. COCA-COLA BOTTLING COMPANY.

(Filed 20 November, 1935.)

Food A a—Doctrine of res ipsa loquitur is not applicable to evidence showing deleterious substance in drink bottled by defendant.

The evidence favorable to plaintiff tended to show that plaintiff was injured by a foreign, deleterious substance in a drink bottled by defendant and purchased by plaintiff from a retailer. There was no evidence that the bottle had been tampered with after leaving defendant's plant, nor was there evidence that other drinks bottled by defendant had contained foreign, deleterious substances. *Held:* The evidence was insufficient to establish negligence on the part of defendant, and its motion for judgment as of nonsuit should have been allowed, the doctrine of *res ipsa loquitur* not being applicable.

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

CLARKSON, J., dissenting.

CIVIL ACTION, before *Finley, J.*, at August Term, 1934, of BUNCOMBE. Reversed.

The plaintiff alleged and offered evidence tending to show that on 25 December, 1933, she purchased a bottle of Coca-Cola at a store in Buncombe County that was bottled and sold by the defendant. She drank a large portion of the contents of the bottle. Narrating the circumstances as a witness, she said: "After drinking the Coca-Cola, the part I did drink, I felt a foreign substance in my mouth and throat. I swallowed part and spit the rest back. It was a bug. The bottle had a brownish, grayish looking mass in the bottom, . . . looked like a chew of tobacco. . . . I examined the bottle and saw a bug in the bottle at that time. . . . I was heaving, sick on my stomach," etc.

There was evidence that the bottle of Coca-Cola was purchased by Loving, a merchant, from the defendant on Friday, and that the plaintiff drank the contents on the following Monday. Loving, the merchant, testified he bought the Coca-Cola from a truck. He said: "I bought that Coca-Cola off the Coca-Cola truck that delivers at my store. . . . I think my wife bought it Friday before." This witness further said that when the plaintiff drank the contents of the bottle "she laid down part of it on the ice box out of her hand and handed me the bottle. It looked like a yellow jacket, roach, or something, and this other thing stuck down in the bottom of the bottle, looked like a half inch wide, probably a little longer than that."

The physician to whom the bottle was given for examination testified that he examined it, and that "there was an insect on one side. I examined the material I found. The material was submitted to me for the

purpose of determining whether there was an unborn child or embryo in the bottle. I found it wasn't the case. I did find a colony of fungi in the bottle. Fungus is a mold, same kind of mold you see ever so often when some of your preserves get rotten," etc.

The defendant offered evidence, which was uncontradicted, tending to show that the plant where the Coca-Cola was bottled was "such a plant as is approved and in general use. . . . Some of them are larger, but as far as the equipment is concerned it is the last word and all that human ingenuity can work out to absolutely turn out a sanitary, clean product." Witness for defendant described in detail the machinery and appliances used at the plant, the method of bottling, inspection, capping, etc., and all of this evidence tended to show the exercise of the highest degree of care, not only in the entire operation but in the selection and maintenance of the best machinery and appliances that could be procured for such purposes. There was also evidence that when the bottle was first capped in the plant the cap could not be removed with the hands, but after the cap had once been removed, it could thereafter be taken off or replaced by hand.

The cause was tried in the general county court upon issues of negligence and damages. The jury answered the issues in favor of the plaintiff and awarded the sum of $1,576. Exceptions were duly filed and the judgment of the county court was approved in the Superior Court, and the defendant appealed.

Cathey & McKinney for plaintiff.
Johnston & Horner for defendant.

SCHENCK, J. A bug is found in Coca-Cola, bottled and sold by the defendant to a merchant, who in turn sold to the plaintiff. The product was delivered by the defendant to the merchant on Friday and the plaintiff drank the contents on the following Monday. The bottle was capped and there was no evidence that it had been tampered with after delivery to the merchant.

The defendant offered evidence, which was uncontradicted, tending to show the exercise of the highest degree of care in cleansing bottles, bottling and capping them, inspection and supervision and that the plant was equipped with every appliance, safety device, and approved method that inventive genius could devise.

There was no evidence that any foreign substance of any kind had ever been found in any Coca-Cola bottled and sold by the defendant at any other time during its business existence.

The only evidence tending to establish negligence on the part of the defendant is the presence of the bug in the bottle containing the Coca-Cola sold to the plaintiff, and a holding that the evidence of this one fact

is sufficient to carry the case to the jury can be reached only by invoking the doctrine of *res ipsa loquitur,* which doctrine, irrespective of what may have been the holding in other jurisdictions, this Court has repeatedly held is not applicable to cases of this character. In a recent case, after stating that the basis of liability in such cases is negligence rather than warranty, this Court said: "That in establishing the alleged negligence of the manufacturer, bottler, or packer, the plaintiff is not entitled to call to his aid the doctrine of *res ipsa loquitur." Enloe v. Bottling Co., ante,* 305, and cases there cited.

We are of the opinion, and so hold, that his Honor erred in denying the defendant's motion, properly lodged under C. S., 567, for judgment as of nonsuit.

Judgment reversed.

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

CLARKSON, J., dissenting: In the present case a deleterious or harmful substance was found in the bottle. There is no question made as to plaintiff's injury.

In 26 C. J., p. 785, is this satisfactory statement of the present-day rule now generally applied: "Although differing in their reasoning, it is generally agreed by the authorities that a manufacturer, packer, or bottler of foods or beverages is directly liable to a consumer for an injury caused by the unwholesomeness or the unfitness of such articles, although purchased from a dealer or middleman and not from such manufacturer, bottler, or packer. And a manufacturer of food products has been held liable for injuries to one who did not buy the food from the manufacturer or from a dealer to whom the manufacturer has sold it, but who nevertheless had partaken of it and been injured thereby. In some of these decisions the doctrine of implied warranty has been assigned as a ground for such liability; but in others liability is based upon the ground of negligence, the applicability of the rule of implied warranty being denied." To the same effect, see 11 R. C. L., p. 1122.

In *Minutilla v. Providence Ice Cream Co.,* 144 Atl., 884 (R. I.), 63 A. L. R., 334, it is held (syllabus borne out by the authorities): "A maker who furnishes unwholesome food or drink for public consumption, through a retailer, may be directly liable to an injured consumer, who purchases from the retailer. . . . An instruction that testimony that small pieces of glass were imbedded in ice cream, together with evidence that the ice cream was served in the original package to a customer in a restaurant, furnishes the basis for a reasonable inference of negligence on the part of the manufacturer, is not equivalent to an application of the inapplicable doctrine of *res ipsa loquitur,* in an action against the manufacturer for the injury sustained. . . . Negligence on the part of the

manufacturer may be inferred from testimony that small pieces of glass were found imbedded in ice cream, together with evidence that ice cream was served in the original package to a customer in a restaurant."

The courts of Rhode Island, South Carolina, Virginia, Pennsylvania, Ohio, Arkansas, Iowa, Tennessee, and others have held that the presence of a foreign substance in a beverage is in itself evidence of negligence. 47 A. L. R., 146; 63 A. L. R., 334, *Norfolk Coca-Cola Bottling Co. v. Krausse,* 173 S. E., 497 (Va.), the following is held (syllabus borne out by the authorities): "Manufacturer putting food preparation on market for human consumption is liable directly to consumer for injury caused by unwholesomeness or unfitness, though consumer purchased product from middleman. . . . Negligence of bottling company held question for jury, notwithstanding its evidence of care in sterilizing and filling bottles, where consumer's evidence showed that beverage bottle, which had not been tampered with, contained glass particles causing injury." This opinion cites and discusses a large number of pertinent authorities and is a valuable digest on the subject and on "all fours" with the present action.

A large majority of the courts of the nation hold contrary to the main opinion—the heavy weight of authority is with plaintiff. Any other holding leaves the consumer at the mercy of the vendor and manufacturer. It gives no protection to the general public. I repeat what I said in my dissenting opinion in *Thomason v. Ballard & Ballard Co., ante,* 1 (7): "It is of the greatest importance to the health of the general public that when they purchase food or drink it should be pure, wholesome, and fit for use."

The bug in the bottle, from the reasoning in a wealth of authorities, should take the case to the jury for its consideration in determining whether or not it will infer negligence. If it was not the negligence of someone, how did the bug get in the bottle?

BERTHA MAY HART MURDOCK AND HER HUSBAND, W. J. MURDOCK, v. C. R. DEAL.

(Filed 20 November, 1935.)

1. Wills E b—Devise in this case held to create defeasible fee.

A devise to testator's daughter and her bodily heirs, and if she dies without bodily heirs, then in trust for the heirs of testator's sisters, *is held* to create a fee-simple estate in the daughter, defeasible upon her dying without children or issue, it being apparent that the words "bodily heirs" used in the devise meant children or issue, as otherwise the limitation over to the heirs of testator's sisters would be meaningless. C. S., 1734.

2. Wills E g—

A provision in a will that land devised should never be sold by the devisee or contingent remainderman is void as against public policy, but such provision does not affect the validity of the provisions of the will devising the land.

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

APPEAL by plaintiffs from *Clement, J.,* at August Term, 1935, of IREDELL. Affirmed.

This is an action for a declaratory judgment construing the last will and testament of T. L. Hart, deceased, and adjudging that by virtue of said last will and testament the *feme* plaintiff is the owner of an indefeasible estate in fee simple in certain lands described in the complaint, and has the power, with the joinder of her husband, to convey the same in accordance with her contract with the defendant.

The facts admitted in the pleadings are as follows:

T. L. Hart died in Iredell County, North Carolina, during the year 1930, having first made and published his last will and testament, which was duly probated by the clerk of the Superior Court of Iredell County, and recorded in the office of said clerk on 4 June, 1930.

By his last will and testament, the said T. L. Hart devised his home place in Iredell County "to my daughter, Bertha May Hart, and her bodily heirs forever, never to be sold, and if she dies without bodily heirs, then it must be in trust for my sisters' heirs, to hold but never to sell the same."

By a codicil to his said last will and testament, the said T. L. Hart devised to his daughter, Bertha May Hart, a tract of land in Iredell County, containing forty-five acres, and described in the complaint by metes and bounds.

At his death, T. L. Hart left surviving as his only heir at law his daughter, Bertha May Hart, who has since intermarried with the plaintiff W. J. Murdock. He also left surviving five sisters, three of whom are married. Each of these sisters has children. Neither of his two unmarried sisters has children. Both are now over fifty years of age.

On 1 April, 1935, the plaintiffs and the defendant entered into a contract, in writing, by which the plaintiffs agreed to convey to the defendant a fee-simple estate, free and clear of all liens or encumbrances, in two tracts of land, one tract containing twelve acres, and being a part of the home place of T. L. Hart, deceased, which was devised to the *feme* plaintiff by the said T. L. Hart in his last will and testament, and the other tract containing forty-five acres and being the tract which was devised to the *feme* plaintiff by T. L. Hart, deceased, by the codicil to his last will and testament. By said contract, the defendant agreed to

pay to the plaintiffs the sum of $1,000, upon the execution and delivery to him by the plaintiffs of a deed conveying both said tracts of land to the defendant, in fee simple, in accordance with said contract.

The defendant has refused to accept the deed tendered to him by the plaintiffs, and has declined to pay the plaintiffs the sum of $1,000, in accordance with said contract, on the ground that the *feme* plaintiff is not the owner of an indefeasible estate in fee simple in said tracts of land, and for that reason the plaintiffs cannot convey to him such an estate in said lands, in accordance with their contract.

On these facts the court was of opinion, and so held, that the *feme* plaintiff is the owner of an indefeasible estate in fee simple in the forty-five-acre tract, but that she is not the owner of such an estate in the twelve-acre tract.

It was accordingly ordered, considered, and adjudged that plaintiffs are not entitled to the specific performance by the defendant of the contract set up in the complaint, and that the defendant recover of the plaintiffs the costs of the action. The plaintiffs appealed to the Supreme Court, assigning as error the holding of the court that the *feme* plaintiff is not the owner of an indefeasible estate in fee simple in the twelve-acre tract described in the complaint.

Raymer & Raymer and Lewis & Lewis for plaintiffs.
No counsel for defendant.

CONNOR, J. There is no error in the judgment in this action. By virtue of the last will and testament of her father, T. L. Hart, deceased, and under the statute, C. S., 1734, the *feme* plaintiff is the owner of an estate in fee simple in the twelve-acre tract described in the complaint. This estate, however, is defeasible upon the death of the *feme* plaintiff without bodily heirs. *Whitfield v. Garris,* 131 N. C., 148, 42 S. E., 568, and 134 N. C., 24, 45 S. E., 904. It is clear that the words "bodily heirs," used by the testator, must be construed as meaning children or issue; otherwise, the limitation over to the heirs of the sisters of the testator would be meaningless. *Rollins v. Keel,* 115 N. C., 68, 20 S. E., 209. See *Pugh v. Allen,* 179 N. C., 307, 102 S. E. 394.

The limitation over to the heirs of the sisters of the testator, upon the death of the *feme* plaintiff without bodily heirs or issue, is not void. The provision in the will that the home place of the testator, which includes the twelve-acre tract described in the complaint, shall not be sold by either the *feme* plaintiff or the remaindermen is void as against public policy. This provision, however, does not affect the validity of the devise, either to the plaintiff or to the remaindermen. See *Lee v. Oates,* 171 N. C., 717, 88 S. E., 889.

There is nothing in the codicil which affects the estate in the home place of the testator devised in the will to the *feme* plaintiff.

The judgment is

Affirmed.

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

ELIZABETH ELLEDGE AND OTHERS v. ALICE HAWKINS.

(Filed 20 November, 1935.)

1. **Executors and Administrators A e: C a—Where executrix has not been removed by clerk, Superior Court may not appoint receiver for estate.**

   An executrix who has duly qualified is entitled to possession of the assets of the estate until removed by the clerk, even though caveat proceedings have been instituted, and the Superior Court is without authority to appoint a receiver to take over the assets of the estate upon complaint of the heirs at law alleging the insolvency of the executrix and that she was squandering the assets of the estate, although upon the facts alleged plaintiffs might be entitled to the removal of the executrix by the clerk.

2. **Executors and Administrators C a—**

   The filing of a caveat suspends further proceedings in the administration of the estate, but does not deprive the executor or executrix of the right to the possession of the assets of the estate. C. S., 4161.

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

APPEAL by defendant from *Finley, J.,* at Chambers in North Wilkesboro, N. C., on 28 December, 1934. Reversed.

This is an action, begun in the Superior Court of Wilkes County, for the appointment by the court of a permanent receiver of the estate of Shady Long, deceased, and for other relief.

The action was heard on an order requiring the defendant to show cause why a permanent receiver of the estate of Shady Long, deceased, should not be appointed by the court.

From an order made by the judge appointing Ralph Duncan permanent receiver of the estate of Shady Long, deceased, and authorizing and empowering said receiver to take into his possession all the assets of said estate, including assets now in the possession of the defendant as the executrix of Shady Long, deceased, and to preserve the same until further orders in this action, the defendant appealed to the Supreme Court, assigning as errors the refusal of the judge to sustain her demurrer to the complaint, and the signing of the order.

J. H. Whicker and Eugene Trivette for plaintiffs.
Elledge & Wells and Buford T. Henderson for defendant.

CONNOR, J. The facts alleged in the complaint are as follows:

Shady Long died in Wilkes County, North Carolina, on 19 October, 1934, leaving the plaintiffs and the defendant as his heirs at law and as distributees of his personal estate. Shortly after his death, the defendant, Alice Hawkins, offered a paper-writing for probate by the clerk of the Superior Court of Wilkes County as his last will and testament. The said paper-writing was duly probated by said clerk as the last will and testament of Shady Long, deceased. The defendant was named in said last will and testament as the executrix of Shady Long, deceased, and has duly qualified as such executrix. As such executrix, she has in her possession certain assets belonging to the estate of her testator, which she has included in the inventory filed by her in the office of the clerk of the Superior Court of Wilkes County. She also has in her possession certain other assets of said estate, which she has refused to include in said inventory.

After the last will and testament of Shady Long, deceased, was probated in common form, the plaintiffs filed a caveat to said probate, and instituted a proceeding as provided by statute in support of said caveat. This proceeding is now pending in the Superior Court of Wilkes County. In said proceeding, the plaintiffs have alleged that at the time he executed the paper-writing propounded as his last will and testament, Shady Long was without mental capacity to execute a will, and that the execution of said paper-writing by Shady Long was procured by the undue influence of the defendant.

The defendant is insolvent, and is disposing of and squandering the assets of the estate of Shady Long, deceased, and has refused to account for all the assets of said estate which have come into her hands as his executrix. The plaintiffs pray that a receiver of the estate of Shady Long, deceased, be appointed by the court in this action, and that such receiver be authorized and empowered to take into his possession all the assets of said estate, including assets now in the possession of the defendant as the executrix of Shady Long, deceased.

The defendant demurred to the complaint on the ground (1) that the court was without jurisdiction of the action, and (2) that the facts stated in the complaint are not sufficient to constitute a cause of action. The demurrer was overruled, and on her appeal to this court the defendant assigns same as error. This assignment of error is sustained.

Conceding without deciding that on the facts alleged in the complaint the plaintiffs are entitled to the removal of the defendant as executrix of Shady Long, deceased, we must hold that plaintiffs cannot have this

relief in this action. The relief may be had only by an order of the clerk of the Superior Court of Wilkes County. See *In re Battle's Estate,* 158 N. C., 388, 74 S. E., 23. Until the defendant has been removed as executrix by the clerk, she is entitled to the possession of the assets belonging to the estate of her testator, although further proceedings by her in the administration of the estate were suspended by the filing of the caveat. C. S., 4161. The clerk may, upon sufficient facts found by him, require the defendant to file a bond in form and in a penal sum sufficient to protect the estate, and upon her failure to file such bond, order her removal.

The order in this action is

Reversed.

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

MRS. C. N. WEBSTER v. WACHOVIA BANK AND TRUST COMPANY.

(Filed 20 November, 1935.)

1. **Evidence D f—**

   Evidence which tends to corroborate a party's witnesses is competent, and is properly admitted upon the trial for that purpose.

2. **Banks and Banking C b—Burden is on depositor claiming a deposit in certain amount to prove deposit in amount claimed.**

   In an action by a depositor to recover a sum alleged to have been deposited in defendant bank, which sum the bank refused to pay upon its contention that the deposit was in a smaller sum, the burden is on plaintiff depositor to prove the deposit in the amount claimed, and the introduction of a pass-book showing an entry by an employee of the bank of the deposit in the amount claimed establishes a *prima facie* case placing the burden on the bank of going forward with the evidence or taking the risk of an adverse verdict, but does not shift the burden of proof on the issue to the bank.

3. **Evidence B a—**

   The burden is on plaintiff to establish his case, and where he makes out a *prima facie* case defendant must introduce evidence or take the risk of an adverse verdict, but the burden of the issue is not shifted to defendant.

4. **Appeal and Error B b—**

   Where plaintiff assumes the burden of proof at the trial and does not there contend that the burden is on defendant, plaintiff will not be heard on appeal to assert that the burden was on defendant.

5. **Costs A c—**

Where defendant tenders judgment in its answer for the amount recovered by plaintiff, which tender is refused by plaintiff upon her claim that she is entitled to recover a larger amount, the costs are properly taxed against plaintiff. C. S., 896.

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

APPEAL by plaintiff from *Warlick, J.*, at February Term, 1935, of BUNCOMBE. No error.

This is an action to recover of the defendant the sum of $2,518.75, with interest on said sum from 1 April, 1934.

It is alleged in the complaint and admitted in the answer that on 3 January, 1934, the plaintiff deposited with the defendant a sum of money, which was credited to the plaintiff by the defendant on its books, and that at the time of said deposit the defendant agreed to pay to plaintiff interest on said sum of money at the rate of three per cent per annum, from 1 January, 1934, payable quarterly.

The plaintiff alleges in her complaint that the amount of her deposit was $2,500, and that on 1 April, 1934, the defendant refused to pay to her interest on said amount, or to pay to her the amount of said deposit, in accordance with its agreement. This allegation is denied in the answer. The defendant alleges that the amount of said deposit was $1,500, and in its answer tenders to the plaintiff judgment for the sum of $1,500, with interest at the rate of three per cent per annum, from 1 January, 1934, which judgment the defendant alleges it is ready, willing, and able to pay.

At the trial, the plaintiff offered evidence tending to support her allegation with respect to the amount of her deposit. She offered in evidence a pass book issued to her by the defendant at the date of her deposit, showing that the amount of the deposit was $2,500. The defendant offered evidence tending to contradict the evidence for the plaintiff, and to show that the entry of the deposit in the pass book was due to an error of its employee. The evidence for the defendant tended to show that the amount of the deposit made by the plaintiff was $1,500.

The only issue submitted to the jury was answered as follows:

"What amount did the plaintiff deposit with the defendant on 3 January, 1934? Answer: '$1,500.'"

From judgment that plaintiff recover of the defendant the sum of $1,500, with interest at the rate of three per cent per annum from 1 January, 1934, and that plaintiff pay the costs of the action, the plaintiff appealed to the Supreme Court, assigning as error in the trial the admission, over her objections, of certain evidence offered by the defendant, and an instruction of the court to the jury with respect to the burden of proof on the issue submitted to the jury.

Johnston & Horner for plaintiff.
Geo. H. Wright, R. R. Williams, and William J. Cocke, Jr., for defendant.

CONNOR, J. There was no error in the admission by the trial court, over objections by the plaintiff, of evidence offered by the defendant. This evidence was competent as tending to corroborate witnesses for the defendant, and was manifestly admitted only for that purpose. Plaintiff's assignments of error based upon her exceptions to the admission of this evidence cannot be sustained.

The court instructed the jury that the burden of proof on the issue submitted to the jury was on the plaintiff, and that unless the jury should find by the greater weight of the evidence that the plaintiff deposited with the defendant, on 3 January, 1934, the sum of $2,500, as alleged by her, they should answer the issue, $1,500, as alleged by the defendant.

The plaintiff excepted to this instruction and, on her appeal to this Court, assigns the same as error. This assignment of error cannot be sustained. The instruction is manifestly correct.

The plaintiff assumed the burden of proof at the trial, and did not there contend that the burden was on the defendant. Having voluntarily assumed the burden of the issue at the trial, the plaintiff will not be heard on her appeal to this Court to assert that the burden was on the defendant. 4 C. J., 715.

The introduction by the plaintiff of the pass book issued to her by the defendant, showing a deposit by her with the defendant on 3 January, 1934, of $2,500, did not affect the burden of proof on the issue. This evidence made only a *prima facie* case for the plaintiff, and at most shifted the burden to the defendant to offer evidence or take the risk of an adverse verdict on the evidence for the plaintiff. See *Bank v. Rochamora,* 193 N. C., 1, 136 S. E., 259, and cases cited in the opinion in that case.

There is no error in the judgment that plaintiff pay the costs of the action. The defendant tendered judgment in its answer for the amount recovered by plaintiff, which tender was not accepted by the plaintiff. C. S., 896. The judgment is affirmed.

No error.

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

ALICE H. LITTLE v. FRED R. BOST AND G. R. LITTLE.

(Filed 20 November, 1935.)

Limitation of Actions B g—Complaint in prior action is only evidence competent to establish identity of action with prior action nonsuited.

Upon defendant's plea of the statute of limitations, plaintiff contended that the action was instituted within one year of nonsuit in a prior action, and that the prior action had been instituted before the bar of the statute. C. S., 415. No complaint was filed in the prior action, and plaintiff sought to establish the identity of the actions by her written application to the court in the former action for extension of time for filing her complaint. *Held:* The complaint in a former action nonsuited is the only evidence competent to establish the identity of such action with a subsequent action instituted within one year of the nonsuit, and the exclusion of the evidence offered by plaintiff was not error.

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

APPEAL by plaintiff from *Clement, J.*, at August Term, 1935, of CABARRUS. Affirmed.

This is an action to recover damages for personal injuries suffered by the plaintiff and caused, as alleged in the complaint, by the negligence of the defendants.

The action was begun in the Superior Court of Cabarrus County, North Carolina, on 22 December, 1934. The cause of action alleged in the complaint accrued on 27 November, 1930. The defendant G. R. Little, in his answer, denied the allegations of negligence in the complaint, and in his further defense to the action pleaded the three-year statute of limitations. In her reply the plaintiff alleged:

"1. That paragraph 1 of the further answer and defense is untrue and denied, the truth being that while the accident complained of in the original complaint occurred on 27 November, 1930, the plaintiff above named, Alice H. Little, filed a suit in the Superior Court of Cabarrus County, N. C., on 24 November, 1933, which was within three years from the time within which the cause of action accrued against both the defendants above named, which said action, upon the motion of the defendant G. R. Little, was dismissed and nonsuited as to the defendant G. R. Little, on 5 January, 1934, and was dismissed and nonsuited as to the other defendant, Fred R. Bost, on 22 December, 1934; and under the statute, C. S., 415, the plaintiff above named had one year after 5 January, 1934, within which to bring a new action against defendant G. R. Little, and one year from 22 December, 1934, within which to bring a new action against the other defendant, Fred R. Bost; and that within said one year the plaintiff complied with all the requirements of C. S., 415, and commenced the present action."

Within apt time, and after notice to the plaintiff, the defendant G. R. Little moved before the clerk of the Superior Court of Cabarrus County that all of paragraph 1 of the reply be stricken therefrom, on the ground that no complaint was filed in the action which was begun by the plaintiff against the defendants on 24 November, 1933, and for that reason no competent evidence was available to the plaintiff to show that the action which was begun on 24 November, 1933, was identical with this action.

Upon the hearing of this motion, it was ordered by the clerk that all of paragraph 1 of the reply be stricken therefrom, and that plaintiff have leave to file an amended reply. From this order the plaintiff appealed to the judge of the Superior Court.

At the hearing of the appeal the order of the clerk was affirmed by the judge, and plaintiff appealed to the Supreme Court, assigning as error the refusal of the judge to admit certain evidence offered by the plaintiff to sustain her contention that the action begun by her against the defendants on 24 November, 1933, was identical with this action.

B. W. Blackwelder for plaintiff.
Fred B. Helms for defendant G. R. Little.

CONNOR, J. At the hearing of her appeal from the order of the clerk allowing defendant's motion that certain allegations in her reply be stricken therefrom, the plaintiff offered as evidence to show that the action begun by her against the defendants on 24 November, 1933, is identical with the present action, an application in writing made by her attorneys in the former action for an extension of time within which she might file her complaint in said action. In this application, the plaintiff showed to the court that her action was to recover damages for personal injuries suffered by the plaintiff, resulting from an automobile wreck on 27 November, 1930, which was caused by the negligence of the defendants. To the refusal of the judge to admit said application as evidence the plaintiff excepted, and on her appeal to this Court assigns such refusal as error. This assignment of error cannot be sustained.

It is admitted that no complaint was filed by the plaintiff in the action which was begun by her against the defendants on 24 November, 1933. The application made in said action for an extension of time within which a complaint might be filed is not admissible as evidence to show that the cause of action on which she sought to recover in said action is identical with the cause of action on which she seeks to recover in this action. In *Gauldin v. Madison,* 179 N. C., 461, 102 S. E., 851, it is said by *Walker, J.,* that the complaint itself is the only evidence of the cause of action alleged, or intended to be alleged. It is well settled by the uniform decisions of this Court that parol evidence is not admissible to

show the cause of action on which the plaintiff sought to recover in an action which has been dismissed by judgment of nonsuit. *Drinkwater v. Western Union Telegraph Co.,* 204 N. C., 224, 168 S. E., 410, and cases cited in the opinion in that case. The order in the instant case is in accord with this principle and is

Affirmed.

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

A. B. McDOUGALD v. TIDE WATER POWER COMPANY.

(Filed 20 November, 1935.)

1. **Corporations F c—Nonsuit is proper in absence of evidence of authority of corporate agent to make agreement sued on.**

Plaintiff alleged that the agent of defendant corporation sold stock in the corporation to plaintiff, and as an inducement to the purchase of the stock, entered an authorized agreement that the corporation would thereafter repurchase the stock at a stipulated price. The corporate agent testified that the agreement was that the corporation would resell the stock and charge a certain commission per share. *Held:* In the absence of evidence that the agent of the corporation was authorized by it to make the agreement alleged by plaintiff, defendant corporation's motion to nonsuit was properly granted.

2. **Evidence D h—**

Where a corporate agent, as plaintiff's witness, testifies as to terms and conditions of the sale of stock by defendant corporation to plaintiff, the exclusion of evidence of dissimilar terms and conditions upon which the agent sold stock to other persons will not be held for error.

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

Appeal by plaintiff from *Grady, J.,* at January Term, 1935, of Bladen. Affirmed.

This is an action to recover of the defendant on the first cause of action alleged in the complaint the sum of $2,496, with interest on said sum from 16 July, 1933, and on the second cause of action alleged in the complaint the sum of $576.00, with interest on said sum from 16 July, 1933.

As his first cause of action, the plaintiff alleges that on 15 December, 1930, the defendant sold to the plaintiff 26 shares of its capital stock, at $98.00 per share, and upon the payment by the plaintiff to the defendant of the sum of $2,548, delivered to the plaintiff a certificate for said 26 shares of its capital stock; that said sale was made on defendant's behalf by T C. Connor, an agent and employee of the defendant, who

was authorized by the defendant, as an inducement to plaintiff to purchase said shares of stock, to agree and who did agree on behalf of the defendant that the defendant would refund to the plaintiff the sum of $96.00 for each of said shares, upon notice to defendant of not less than ten or more than thirty days that plaintiff desired such refund; that on 16 June, 1933, the plaintiff made demand on defendant for the refund to him by the defendant of the sum of $96.00 for each of said 26 shares of the capital stock of the defendant; and that defendant has failed, neglected, and refused to pay to the plaintiff the sum of $2,496, in accordance with its agreement.

As his second cause of action, the plaintiff alleges that on 13 November, 1931, the defendant sold to the plaintiff 6 shares of its capital stock, at $98.00 per share, and upon the payment by the plaintiff to the defendant of the sum of $588.00, delivered to the plaintiff a certificate for said 6 shares of its capital stock; that said sale was made on defendant's behalf by T. C. Connor, an agent and employee of the defendant, who was authorized by the defendant, as an inducement to plaintiff to purchase said shares of stock, to agree, and who did agree on behalf of the defendant, that the defendant would refund to the plaintiff the sum of $96.00 for each of said shares, upon notice to defendant of not less than ten or more than thirty days that plaintiff desired such refund; that on 16 June, 1933, the plaintiff made demand on defendant for the refund to him of the sum of $96.00 for each of said 6 shares of the capital stock of defendant; and that defendant has failed, neglected, and refused to pay to the plaintiff the sum of $576.00, in accordance with its agreement.

In its answer the defendant admitted that it sold to the plaintiff the shares of its capital stock, as alleged in the complaint; and that it delivered to the plaintiff certificates for said shares of stock; it denied, however, that it had authorized its agent and employee, T. C. Connor, to agree with the plaintiff that it would refund to the plaintiff any sum for said shares of capital stock, or that said T. C. Connor had agreed with the plaintiff that it would make such refund.

At the trial, T. C. Connor, as a witness for the plaintiff, testified that he procured from the plaintiff his subscriptions for the shares of its capital stock which the defendant sold to the plaintiff. He testified as follows:

"Mr. McDougald was mighty particular in asking me several questions about the stock. He wanted to know if he bought the stock how he could get his money back. I told him there were two ways for him to get his money back if he needed it—that he could go to a bank and borrow the money on his certificates, or that he could endorse the certificates and send them to the defendant—that the defendant would resell the stock, and charge him two dollars per share for making the sale. These were the terms on which I sold him the stock. I told him that the

resale would be made by the Tide Water Power Company, and that the company would send him a check, less the commission for the resale. The defendant told me that it had a resale department."

At the close of the evidence for the plaintiff, the defendant moved for judgment as of nonsuit. The motion was allowed, and plaintiff excepted.

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

Henry L. Williamson for plaintiff.
Varser, McIntyre & Henry for defendant.

CONNOR, J. There was no evidence at the trial of this action tending to show that defendant's agent and employee, T. C. Connor, was authorized by the defendant to agree on its behalf that the defendant would refund to the plaintiff any sum on account of the shares of its capital stock which the defendant sold to the plaintiff, or that said agent and employee made such agreement with the plaintiff, on behalf of the defendant. For this reason, there is no error in the judgment dismissing the action as of nonsuit, in accordance with defendant's motion.

In this respect the instant case is distinguishable from *Byrd v. Tide Water Power Company,* 205 N. C., 589, 172 S. E., 183, in which a judgment for the plaintiff was affirmed.

In view of the testimony of T. C. Connor, as a witness for the plaintiff in this action, plaintiff's exception to the exclusion by the court of evidence tending to show the terms and conditions on which T. C. Connor offered shares of the capital stock to other persons, need not be considered.

The judgment in this action is
Affirmed.

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

EDWARD B. JACKSON, ADMINISTRATOR OF EDWARD THOMAS JACKSON, DECEASED, v. STANDARD OIL COMPANY OF NEW JERSEY AND ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 20 November, 1935.)

Negligence A c—In suit based on doctrine of attractive nuisance, demurrer is properly sustained in absence of allegation of notice to defendant.

Where plaintiff seeks to recover for the death of her intestate upon the theory of attractive nuisance, and alleges that defendant knew that small

children were in the habit of playing in a vacant lot near its property, but fails to allege that defendant had notice, actual or constructive, that children were in the habit of going on its premises, or that they were attracted to defendant's premises or habitually went there for any purpose, defendant's demurrer is properly sustained.

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

APPEAL by plaintiff from judgment sustaining demurrer, filed by the defendant railroad company, entered by *Grady, J.*, at June Term, 1935, of LENOIR. Affirmed.

Louis I. Rubin and Wallace & White for plaintiff, appellant.
Rouse & Rouse for defendant, appellee.

SCHENCK, J. The plaintiff's intestate, a child of less than six years of age, was burned to death. It is alleged that he was playing in a vacant lot, used by children of the neighborhood as a playground, and that one of his companions procured a can of gasoline from a bucket or tub on the sidetrack running from the main-line tracks of the defendant railroad company to the storage tanks of the defendant oil company, and carried the gasoline so procured to the playground, which was near by, and that the intestate's clothing became soaked with gasoline from the can, and that some companion struck a match, which ignited the intestate's clothing, and so burned him as to cause his death. It is alleged that the gasoline had been left in a bucket or tub by the servants of the oil company, who were engaged in unloading the gasoline from a tank car to a storage tank, and that said bucket or tub had been so placed as to catch the gasoline that leaked from the defective connection between the car and storage tank. While it is alleged that the railroad company knew that the vacant lot near its tracks was used as a playground by the children living near by, and that it left the gasoline unguarded on the sidetrack, there is no allegation that the defendant railroad company had notice, either actual or constructive, that children were attracted upon its tracks or sidetracks for the purpose of getting gasoline, or for any other purpose, and there is no allegation that children were actually so attracted, or that they habitually went upon such tracks, so their presence there and injuries to them could be anticipated.

Since there are no facts alleged which constitute a breach of duty owed by the defendant railroad company to the plaintiff's intestate, the judgment of the Superior Court is

Affirmed.

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

WOODROW CALAHAN, BY HIS NEXT FRIEND, J. H. CALAHAN, v. TOM ROBERTS AND WIFE, ELIZABETH ROBERTS.

(Filed 20 November, 1935.)

Master and Servant F a—Where complaint alleges that defendants were not operating under Compensation Act, demurrer on ground that Industrial Commission has exclusive jurisdiction is bad.

Where the complaint alleges that defendants employed more than eight employees, but that defendants were not operating under the Workmen's Compensation Act, a demurrer on the ground that it appeared upon the face of the complaint that the case is within the exclusive jurisdiction of the Industrial Commission should be overruled, since plaintiff may offer evidence under the allegations of the complaint that the employers and employees had exempted themselves for the operation of the act under the provisions of secs. 8081 (1), (v), (x), notwithstanding the provisions of sec. 8081 (k).

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

APPEAL by plaintiff from *Phillips, J.,* at July Term, 1935, of MITCHELL. Reversed.

Watson & Fouts and M. L. Wilson for plaintiff, appellant.
W. C. Berry and Charles Hutchins for defendants, appellees.

SCHENCK, J. In this action, instituted to recover damages for personal injuries alleged to have been proximately caused by the negligence of the servant and agent of the defendants, the plaintiff alleged that the defendants employed from "nine to thirty-five men as laborers in the operation" of their sawmill, whereupon the defendants demurred to the jurisdiction of the court on the ground that it appeared from the face of the complaint that the case was cognizable by the North Carolina Industrial Commission. The court sustained the demurrer and plaintiff excepted and appealed to the Supreme Court.

Paragraph 6th of the complaint, in part, is as follows: "That as plaintiff is advised, informed, and now alleges, the defendants, at the time of the injuries complained of, and for more than six months prior thereto, were not operating under the Workmen's Compensation Act. . . ."

Notwithstanding C. S., 8081 (k), provides that employers and employees shall be presumed to have accepted the provisions of the North Carolina Workmen's Compensation Act, there are provisions in the act whereby employers, as well as employees, may except themselves from the operation thereof, C. S., 8081 (1), 8081 (v), 8081 (x), and other sections, and the presumption of acceptance may be rebutted by the proof

of nonacceptance, and the plaintiff has laid the foundation for such proof by alleging that the "defendants . . . were not operating under the Workmen's Compensation Act." We think this allegation was sufficient to carry the case to the jury, and that his Honor erred in sustaining the demurrer.

Reversed.

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

STATE v. CHARLIE WATERS.

(Filed 20 November, 1935.)

1. **Criminal Law I f—Trial court may consolidate for trial separate offenses of the same class.**

   Defendant was tried separately in municipal court on two warrants, each charging assault with a deadly weapon, but upon different persons on separate occasions about fifteen days apart. On appeal to the Superior Court, the court, upon motion of the solicitor, consolidated the cases for trial. *Held:* Under the provisions of C. S., 4622, the order of consolidation was within the discretionary power of the trial court.

2. **Criminal Law I j—**

   Motions to nonsuit on conflicting evidence are properly denied.

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

APPEAL by the defendant from *Parker, J.,* at June Term, 1935, of LENOIR. Affirmed.

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

Shaw & Jones for defendant, appellant.

SCHENCK, J. There are two cases against the defendant that came to the Superior Court by appeal from the municipal county court of Kinston and Lenoir County. The warrant in one case charges the defendant with an assault with a deadly weapon, to wit: A club, upon one Rogers, on 3 March, 1935, and the warrant in the other case charges the defendant with an assault with a deadly weapon, to wit: A knife, upon one Lokey on 18 March, 1935.

When called for trial, upon motion of the solicitor, the two cases were ordered consolidated, and to this order of consolidation the defendant in apt time objected, and makes his exception based upon this objection his principal assignment of error.

C. S., 4622, reads as follows: "When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, *or for two or more transactions of the same class of crimes or offenses,* which may be properly joined, instead of several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court will order them to be consolidated. . . ."

Since the two transactions delineated in the two warrants are of the "same class of crimes," the consolidation of the two cases for the purpose of trial rested in the sound discretion of the trial judge.

The other assignments of error brought forward in the brief relate to the refusal of the court to allow defendant's demurrer to the evidence. While the evidence is conflicting, it was sufficient to carry both cases to the jury, and since the jury returned a verdict of guilty on both charges, these assignments can avail the plaintiff nothing.

No error.

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

STATE v. E. B. STRICKLAND.

(Filed 20 November, 1935.)

Criminal Law G b—

In a prosecution for incest, testimony of the prosecuting witness that she was born before the marriage of her father, the defendant, and her mother, is irrelevant to the issue, and its admission *is held* for reversible error as tending to prejudice or warp the judgment of the jury.

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

APPEAL by defendant from *Parker, J.,* at April Term, 1935, of SAMPSON. New trial.

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

N. W. Outlaw, Henry A. Grady, Jr., and Scott B. Berkeley for defendant, appellant.

SCHENCK, J. Two cases against the defendant, charging him with incest with his two daughters, respectively, were consolidated for the purpose of trial. The jury returned a verdict of not guilty of the charge with Esther Strickland and guilty of the charge with Bernice Strickland Hughes. From judgment of imprisonment the defendant appealed,

assigning as error, *inter alia,* that the court admitted in evidence, over his objection and declined to strike from the evidence upon his motion, the testimony of Bernice Strickland Hughes, his daughter, to the effect that she was born before her father, the defendant, and her mother were married. We think this assignment of error was well taken, and entitles the defendant to a new trial. This testimony was wholly irrelevant and collateral to the issue involved, and could easily have been harmful in its tendency to arouse the prejudice or warp the judgment of the jury, and its admission constituted prejudicial error. *State v. Mikle,* 81 N. C., 552; *S. v. Jones,* 93 N. C., 611; *S. v. Freeman,* 183 N. C., 743; *S. v. Galloway,* 188 N. C., 416.

New trial.

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

STATE v. JOHN L. ANDERSON, J. P. HOGGARD, TOM CANIPE, J. F. HARAWAY, FLORENCE BLAYLOCK, HOWARD OVERMAN, AVERY KIMREY, AND JERRY FURLOUGH.

(Filed 20 November, 1935.)

1. Criminal Law L g—

Upon defendants' appeal from judgment in a criminal prosecution, the jurisdiction of the Supreme Court is limited solely to matters of law or legal inference. N. C. Const., Art. IV, sec. 8.

2. Indictment B d—Indictment may charge in separate counts conspiracy and successive steps taken by conspirators in executing same.

The indictment charged all of the defendants with conspiracy to dynamite certain buildings, and in subsequent counts charged some of defendants with breaking and entering and larceny of dynamite from a store, with feloniously receiving said dynamite with knowledge that it had been stolen, and in the last counts charged two of the defendants with attempting to dynamite the buildings. *Held:* Defendants' motion to quash for that the indictment charged different offenses against different defendants was properly overruled, it being permissible to join in one indictment counts charging conspiracy and successive steps thereafter taken by the respective conspirators in executing the common design. C. S., 4622.

3. Indictment C b—

An indictment will not be quashed for mere informality or refinement, C. S., 4623, and a judgment will not be stayed or reversed for nonessential or minor defects. C. S., 4625.

4. Criminal Law I f—

Where several defendants are jointly indicted, a motion for severance is addressed to the discretion of the trial court, and defendants' exception

to the refusal of the court to grant them separate trials will not be sustained when no abuse of discretion appears on the record.

5. **Jury A b—Defendants held not entitled to complain of selection of jurors from men served by sheriff to act as talesmen.**

Upon adjournment of court on Tuesday of the term, the court instructed the sheriff to summon a number of men to act as talesmen in a case proposed to be called for the next day. Upon the trial defendants moved that none of the men so summoned and none of the jurors already in the box should serve, but that the jury be selected from bystanders. *Held:* Defendants' motions did not amount to a challenge to the array, and the instruction of the court was not an order under C. S., 2321, for talesmen or a special venire, and the jurors summoned being subject to all the qualifications of talesmen, and defendants having failed to exhaust their respective challenges to the poll, defendants' exceptions to the refusal of their motions cannot be sustained.

6. **Criminal Law G l—Confession held incompetent as involuntary, and should have been stricken from evidence upon motion.**

It appeared from the testimony of a State's witness that the alleged confession of one of defendants was obtained by falsely telling him that his codefendants had talked and that he had better confess. *Held:* The confession was involuntary and incompetent and defendant's exception to the court's refusal to strike it out upon motion made at the close of all the evidence is sustained, although the competency of the confession was not properly challenged when offered in evidence, nor motion made to withdraw it when the evidence establishing its incompetency was admitted.

7. **Same—**

A confession is voluntary in law only when it is in fact voluntarily made, and a confession induced by hope or extorted by fear is involuntary and incompetent.

8. **Criminal Law L e—Error in admission of evidence against one defendant held not to entitle codefendants to new trial.**

Where one of appealing defendants is granted a new trial for error in the admission of his alleged confession, his codefendants, indicted for conspiracy and crimes committed in execution of the common design, are not entitled to a new trial when the alleged confession was admitted solely against the defendant making it and the confession does not refer to the conspiracy.

9. **Criminal Law I j—Nonsuit should be denied if evidence is sufficient to warrant a reasonable inference of the fact of guilt.**

A motion to nonsuit presents the sole legal question of whether the evidence, considered in the light most favorable to the prosecution, is sufficient to warrant a reasonable inference of the fact of guilt, the weight and credibility of the evidence being for the jury, and it being for the jury to say whether they are convinced of the fact of guilt beyond a reasonable doubt.

10. **Same—Where there is sufficient evidence of guilt under one count in indictment, motion to nonsuit is correctly denied.**

The indictment upon which defendants were tried charged conspiracy to dynamite certain buildings or structures, and, in subsequent counts,

charged certain defendants with breaking and entering and larceny of the dynamite, feloniously receiving said dynamite knowing it to have been stolen, and charged two defendants with attempting to dynamite two of the buildings pursuant to the original common design. There was sufficient evidence of conspiracy as to all defendants, except, perhaps, three of them, and as to one of the three a new trial is awarded, and as to the other two there was sufficient evidence of guilt under the subsequent counts in the indictment. *Held:* Defendants' motions for judgment as of nonsuit were properly denied, since the defendants present and aiding and abetting in the commission of the crimes charged in the subsequent counts are principals and equally guilty, and a general verdict of guilty will be presumed to have been returned on the counts to which the evidence relates.

11. Criminal Law C a—

Where two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty.

12. Criminal Law I k—

Where an indictment contains several counts, and the evidence applies to one or more, but not to all, a general verdict of guilty will be presumed to have been returned on the count or counts to which the evidence relates.

13. Conspiracy B a—

Where two or more persons combine or agree to do an unlawful act, they are guilty of criminal conspiracy even though the common design is not executed, the conspiracy being the agreement to do the act and not the execution of the agreement.

14. Conspiracy B b—

Where a person enters into an agreement to do an unlawful act, he thereby places his safety and security in the hands of every member of the conspiracy, as the acts and declarations of each conspirator, done or uttered in furtherance of the common design, are admissible in evidence against all.

15. Same—Crime of conspiracy may be established by circumstantial evidence.

The fact of conspiracy, from the very nature of the crime, may be proven by circumstantial evidence, and the results accomplished, the divergence of those results from the course which would ordinarily be expected, the situation of the parties and their antecedent relations to each other, together with the surrounding circumstances, and the inferences legitimately deductible therefrom, are properly considered upon the question of guilt.

16. Criminal Law L d—

Where the record fails to show what the excluded testimony would have been, an exception to its exclusion is unavailing.

17. Conspiracy B a—

In a prosecution for conspiracy, an instruction that the jury might convict one of defendants and acquit the others will not be held for reversible error upon exception that it permitted the conviction of one

defendant of conspiracy when one of the defendants charged had entered a plea of *nolo contendere*, which had been accepted by the State.

18. Criminal Law G j—

An instruction that the jury should scrutinize with care the testimony of defendants and their near relatives to ascertain to what extent, if any, their testimony was biased, but if they then believed the witnesses, to give the testimony the same credit as other testimony, is without error.

19. Criminal Law I g: L d—

An exception to the failure of the court to instruct the jury how the testimony of detectives and accomplices should be received will not be considered erroneous on appeal when defendants failed to request such instruction.

20. Criminal Law L d—

Only exceptive assignments of error will be considered on appeal, Rule 19 (3), and an assignment of error to a remark of the court to the jury during the trial and comment on such remark by the prosecution in the argument to the jury will not be considered when not supported by objection or exception taken at the time.

21. Criminal Law I h—

It is not error for the court to instruct the jury not to consider the opinion of attorneys, expressed in their argument, as to defendants' guilt or innocence, such expression of opinion being improper, and the jury not being instructed to disregard the argument but only the improper expression of opinion.

22. Criminal Law L e—

It is beyond the province of counsel in arguing an appeal in the Supreme Court to venture his opinion that defendants had not had a fair trial in the court below.

23. Criminal Law K b—

Where a defendant seeks and accepts the suspension of judgment against him upon certain terms, he may not thereafter attack the judgment or prosecute an appeal therefrom.

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

APPEAL by defendants from *Cranmer, J.*, at November Term, 1934, of ALAMANCE.

Criminal prosecution, tried upon indictment (1) charging all of the defendants, in the first count, with conspiracy to dynamite certain buildings or structures in Alamance County; (2) charging four of the defendants, J. P. Hoggard, Tom Canipe, J. F. Haraway, and Florence Blaylock, in the second count, with feloniously breaking into a storehouse with intent to steal and carry away a quantity of dynamite; (3) charging four of the defendants, J. P. Hoggard, Tom Canipe, J. F. Haraway, and Florence Blaylock, in the third count, with the larceny of a quantity of dynamite of the value of $25, the property of Kirk Holt Hardware Company; (4) charging five of the defendants, John L.

Anderson, J. P. Hoggard, Tom Canipe, J. F. Haraway, and Florence Blaylock, in the fourth count, with feloniously receiving the said quantity of dynamite knowing it to have been feloniously stolen or taken; (5) charging two of the defendants, Florence Blaylock and Howard Overman, in the fifth count, with feloniously attempting to dynamite a certain building, the property of Stevens Manufacturing Company; (6) charging two of the defendants, Florence Blaylock and Howard Overman, in the sixth count, with feloniously attempting to dynamite a certain building, the property of E. M. Holt Plaid Mills, Inc.

CHRONOLOGY OF THE CASE.

When the case was called for trial, Jerry Furlough entered a plea of *nolo contendere* to the first count in the bill, which was accepted by the State, and a *nol. pros.* with leave was taken as to him on the other counts.

MOTIONS AND RULINGS PRIOR TO TRIAL.

Before the jury was selected and impaneled, all of the defendants, except Jerry Furlough, moved to quash the bill of indictment, on the ground that it charged different offenses against different defendants, and that they were entitled to separate trials. Overruled; exception.

Thereupon, all of the defendants, except Jerry Furlough, entered pleas of "Not guilty."

The defendants then moved that none of the jurors summoned be called, but that the sheriff should call bystanders without regard to whether they had been summoned or not, and also that those already in the box be taken out and replaced by having the sheriff call jurors from bystanders. These motions were based upon the fact that no talesmen had been drawn from the box, and no order was made to summon special jurors in open court, or at the beginning of the term, and that no request was made by the defendants for the sheriff to summon such jurors.

Overruling these motions, the court made a finding of facts that immediately upon the adjournment of court on Tuesday, 27 November, the solicitor approached the court and stated there were numerous defendants in the case he proposed to call the next morning, suggesting to the court that additional jurors be called, and as there was only one panel of jurors, the court instructed a deputy sheriff to summon 15 to 18 men to serve as talesmen, good men, of good moral character, who had paid their poll taxes, to appear the next morning.

Before the jury was impaneled, the court dictated to the reporter the following entry for the record: "At the time the jury was impaneled, the defendants Anderson, Canipe, and Haraway had four unexhausted challenges, and the defendants Overman, Kimrey, and Blaylock had eight unexhausted challenges."

THE EVIDENCE.

The case had its beginning with the throwing of dynamite into the plants of the Stevens Manufacturing Company and E. M. Holt Plaid Mills, Inc., of Burlington, during the nation-wide textile strike on Friday night, 14 September, 1934. The following day, about noon, four sticks of dynamite, tied together at each end with two strings, with a fuse in them, were found under a loom in the Stevens Manufacturing Company. The night watchman testified that between 3 and 4 o'clock on the night of 14 September, a Ford roadster, with two men in it, stopped in front of the mill, and one of them lighted something at the car, and then threw it. Two witnesses for the State testified that about 3 a.m. on the morning of 15 September, a Ford roadster speeded from the direction of the Stevens Manufacturing Company, a quarter of a mile away, and stopped after going a short distance along the road next to the E. M. Holt Plaid Mills. Shortly thereafter, an explosion was heard, and a large number of window lights were shattered and jarred out, about 150. On the following day four sticks of Red Cross dynamite were found lying by the side of a fence at the old furniture plant in Burlington.

On the night of the explosion at the E. M. Holt Plaid Mills plant, a Ford roadster automobile with a khaki top, owned by R. H. Snyder, was stolen from the street in front of his residence in the North Carolina Silk Mill village, and the next morning, after the bombing, it was found abandoned in the woods about three miles away. Three gallons of gas had been consumed, and marks on the dash-board indicated that several matches had been struck thereon. There were also a few strings and a piece of cloth found in the car which were placed in evidence along with certain strings found attached to the dynamite.

For several years the Kirk Holt Hardware Company had maintained a storehouse for dynamite, about a mile from Burlington. It contained a number of cases of dynamite up to the time of the day previous to the bombing, when it was found that the door had been broken open, the staple sawed, and the lock taken off. An investigation by the sheriff showed five different-sized tracks (two inside the dynamite house) leading down the road to a Studebaker automobile, owned by Lee Rumple, sitting in a ditch, with tracks in front and in the rear, also signs indicating that a car had been in front and another in the rear. There had been a rain during the first half of the night, the car in front having left before the rain, and the one in the rear after the rain. Tracks inside the house were compared with tracks in front of the Studebaker, and found to have been made by similar-sized shoes. T. M. Hundley, on the night previous to the bombing, was called to help Lee Rumple

pull the Studebaker car out of the ditch. He found a Chevrolet automobile sitting behind the Studebaker and in it three of the defendants, Hoggard, Haraway, and Canipe. There were two others who were not identified. There were also two other occupants of the Studebaker. Having failed to get the Studebaker out of the ditch, Hundley took its occupants with him and left in the Chevrolet. Hoggard, Haraway and Canipe admitted on the trial that they were there at the time, having gone in Canipe's car to Belmont, looking for liquor, but there was evidence by a policeman that Hoggard and Canipe claimed to be the only persons present.

On the night of the bombing the defendants Blaylock and Overman were seen together in a cafe in the North Carolina Silk Mill village. Later, Overman told the sheriff he had not seen Blaylock that night. Blaylock said they were together and went out looking for liquor, then going home about 10 o'clock.

Blaylock told Charlie A. McCullom, witness for the State, that "I am the man that throwed the dynamite in the Plaid Mill," and that Howard Overman drove the car. Howard Overman, in an alleged written confession, signed in the presence of several special officers or detectives, after having taken a couple of drinks, said he met Blaylock and after roaming around until midnight he drove the car and Blaylock threw some dynamite, on this trip, at the Stevens Mill and some at the Plaid Mill, one going off and the other not. This alleged confession was made in a cabin rented by S. E. Howard, and in the presence of several special officers who, with one exception, had been brought in from Pennsylvania to investigate the dynamiting of the mill. The alleged confession, admitted only as against Overman, was attested by these special officers or detectives, as having been made in their presence, but Overman testified he thought he was signing a paper to get it straight about an automobile which had been stolen.

On Tuesday night following the bombing the defendant Anderson told the State's witness Pruitt that he, Anderson, wanted him to make a trip for him, this being in the Labor Union hall in Burlington, and a little later the defendant Furlough also told him he wanted him to make a trip, but when he said Anderson wanted him to make a trip also, Furlough said he could wait until later in the night. Later in the night Anderson got in Pruitt's car. They went by defendant Hoggard's house and borrowed a flash light. (After Hoggard's arrest he asked the witness not to mention anything about the flash light.) Anderson directed the car until they arrived at a farm in Guilford County owned by Anderson's mother-in-law. Anderson got out and in a few minutes returned with four sticks of dynamite, wrapped in a handkerchief, the sticks being tied with a piece of light-looking string. Returning by a

different route, when near Burlington, Anderson got out, hid the dynamite, according to the State's witness, and marked the location, stating that he wanted Pruitt, when he got to the hall, to get Jerry Furlough and bring him back and show it to him. Upon their return to the Union Hall, Anderson told Furlough, in Pruitt's presence, that Pruitt would show him where the dynamite was, and Furlough said, "If he was going to do the job that he would have to have a pair of gloves." On the same night, Pruitt took Furlough and defendant Kimrey to Furlough's home, both Furlough and Kimrey saying that they had dynamite caps and fuse, and Furlough stating that "he was to pull the job at the Duke Power plant, because he was an electrician." They returned to Union Hall, and Furlough got a pair of gloves upstairs, and a dynamite fuse from behind a coal sack. They started out towards Haw River, Pruitt, Furlough, and Kimrey, in Pruitt's automobile, and when another automobile drove up behind them, Pruitt drove the car into a driveway, and Furlough threw the fuse out of the car. They went back to Union Hall, and later in the night, Pruitt went back for the fuse, taking it to Union Hall. The next morning the same three went to the spot where the defendant Anderson placed the four sticks of dynamite on Tuesday night, and moved it to a place near Glen Raven, about a quarter of a mile from the Duke Power plant, hiding it; and this dynamite was later found by the officers at another place.

After some of the defendants had been arrested, Anderson told Pruitt "he was afraid they would squawk and would tell where it was," after they had started on another trip to the farm in Guilford County, this time to move the dynamite from a sawdust pile, carrying it two or three hundred yards up or down a creek and concealing it in a hollow. Later, the officers were conducted to this place by Pruitt. The 96 sticks of dynamite found were Red Cross dynamite, and the four sticks found near the Duke Power plant were of the same kind. Pruitt also said that on one occasion Anderson remarked he would like to have someone place some dynamite under the house of Mr. Copeland, one of the owners of the Plaid Mills, and that if this were done, they would give the information to the officers, leaving the impression that it was an inside job. On Saturday night after the bombing defendant Blaylock asked about some dynamite caps the Porter boys were to bring R. A. Rowe, and on Monday he asked Frank Porter about some dynamite caps, stating he wished to kill some fish, the said Porter being then engaged in digging wells.

Jerry Furlough testified Florence Blaylock asked for the loan of a hacksaw several days before the bombing, and also stated that he was taking two cases of dynamite home. Furlough said he was in the Union Hall the night Anderson asked Pruitt to make a trip for him, and that Anderson told him Pruitt would take him to get four sticks of dyna-

mite. When he reached home he got three dynamite caps. Before setting out on the trip, he said he had an understanding that they would go to Mr. King, who would set his watch ahead, so as to establish an alibi for them. When Kimrey, Pruitt, and Furlough started on this trip, it was their intention to blow up the Duke Power transformer, according to Furlough. Anderson had not said when they were to do the job, but did arrange for them to get the dynamite. Furlough said they got scared when they found another car following them, and went back to the Union Hall, throwing the fuse into an alley. They went out the next morning to hide the dynamite. Later in the day Hoggard asked Furlough, "What is the matter, have you got scared?" and Anderson said, "If you are going to do that job, you had better hurry up." Furlough, after going home, decided to move the dynamite to a place which Pruitt and Kimrey wouldn't know about, and never said anything more about it until he went with the officers to find it. He said Anderson told him and Kimrey that they were to do the job. There was evidence of conversation between the defendants Anderson, Blaylock, Furlough, and Kimrey as to how the Duke Power plant was to be blown up.

On the morning the defendant Hoggard was arrested, Charlie McCullom, State's witness, testified Hoggard told him: "Jerry Furlough has turned us up. We are going to make him take the last day of it. We are going to pack it on him." McCullom said defendant Blaylock had one time told him that he had come out with two cases of dynamite, and Hoggard came out with one, but later told him two fellows from High Point got the dynamite. McCullom testified defendant Anderson, when informed by him that some of those in jail had squawked, said: "Florence Blaylock can't squawk; he is the man that done the work at the Plaid Mill because I was right up the line with him." Anderson also told this witness: "I know they won't get the dynamite, I took the damn thing thirty miles from here and hid them." This statement was made after the defendant Hoggard had been arrested the second time. Hoggard, after being told of the statement by Anderson, said he told the latter Pruitt would not do to trust, not to take him with him, but that "he (Anderson) had taken him right where the dynamite was." Anderson told this witness "they don't know nothing," after being informed that "they are going to get you every one to a man."

. Anderson was president of the Labor Union Council, of which the Burlington Local Labor Union was a member; the defendant Pruitt was engaged at the Burlington Labor Union Hall to drive his automobile; the defendant Furlough was on picket line duty; the witness McCullom was on a committee in charge of food supplies, and the other defendants were either members of the union or frequented the Labor Union Hall.

There was introduced in evidence the four sticks of dynamite found at the Stevens Manufacturing Plant, 96 sticks found on the farm of Mrs. Holt, mother-in-law of defendant Anderson, the fuse identified by Furlough as the fuse he had on the night in question, and a box of dynamite caps which Furlough testified he had in his possession.

J. H. Vickery testified for the defense that he and O. R. Holder went to Gray's Chapel on Monday, 17 September, to look for a lost dog, and they saw a Ford car stopped on the side of the road, two men standing by it, one of whom asked for a tire pump, after waving him down, and said to the other fellow to get me a valve core, or a valve, and the other fellow stepped into the car and picked up something. When he did, the man outside the car said, "Be damn careful with that—you know that's dynamite." They fixed the tire and drove off. H. F. Pruitt was identified as one of the men. The other was not John Anderson, the witness said. Vickery was corroborated by Holder. Pruitt, recalled to the stand by the State, denied he ever saw either Vickery or Holder before seeing them in the courtroom.

There was much evidence on behalf of the defendants in denial of the State's case, and some undertook to show that they were elsewhere when the crimes charged against them were committed.

MOTION TO STRIKE ALLEGED CONFESSION.

After the evidence was all in, the defendant Howard Overman lodged a motion that his alleged confession, previously admitted, be stricken out and withdrawn from the consideration of the jury on the ground of involuntariness, it appearing from the testimony of D. P. Stewart, a witness for the State, that the following statements were made at the time: "I think I told him some of the ones in jail had talked and would talk and he might as well do likewise. . . . It was not true that anyone in jail had talked. . . . I believe I told him it would be better for him to go ahead and tell it just like it was and he might as well go ahead and tell it because it was already told." Motion overruled; exception.

DEMURRER TO EVIDENCE.

At the conclusion of the State's evidence, and again at the close of all the testimony, the defendants moved for judgment of nonsuit under the Mason Act. Overruled; exception.

OBJECTIONS TO EVIDENCE AND THE CHARGE.

There were numerous exceptions to evidence and a number to the charge.

VERDICT.

The jury returned the following verdict: "Guilty as to all."

Motion by defendants, other than Avery Kimrey, to set aside the verdict. Overruled; exception. Appeal bonds required of all the defendants, except Avery Kimrey.

JUDGMENTS.

The defendant John L. Anderson was sentenced to be confined in the State Prison at hard labor for an indeterminate period of not less than eight nor more than ten years. The defendant J. P. Hoggard was given a sentence at hard labor of not less than four nor more than six years. The defendant Florence Blaylock was given a sentence at hard labor of not less than four nor more than six years, under the first count charging conspiracy, and an additional year in State's Prison under the second count of the indictment, and under the fifth count he was given a sentence of five years, to run concurrently, so far as it may extend, with the sentences under the first and second counts, and under the sixth count a concurrent sentence of five years with the five years under the fifth indeterminate period of not less than four nor more than six years, and concurrent terms of five years were imposed under the fifth and sixth counts. Tom Canipe was sentenced to two years at hard labor in State's Prison, and J. F. Haraway given a like sentence. The defendant Avery Kimrey was sentenced to two years in the State's Prison, judgment to be suspended upon good behavior being shown at February and November terms of Alamance Superior Court.

The defendants appeal, assigning errors.

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

John J. Henderson, Clarence Ross, J. Elmer Long, David Levinson, and Ralph T. Seward for defendants.

STACY, C. J., after stating the case: When the case was called for trial, the defendant Jerry Furlough tendered a plea of *nolo contendere* on the charge of conspiracy, which was accepted by the State. He was later used as a witness for the prosecution.

The judgment against the defendant, Avery Kimrey, was suspended upon terms acceptable to him and his counsel, and apparently he has not appealed. *S. v. Rooks,* 207 N. C., 275, 176 S. E., 752. Hence, the validity of the terms of suspension as to him, or whether they are accordant with what was said in *S. v. McAfee,* 189 N. C., 320, 127 N. C., 204, is not presently before us for decision. *S. v. Rhodes, ante,* 241.

The remaining six defendants by their appeal bring up for review alleged errors of the court in the trial of the cause, upon matters of law or legal inference. Const., Art. IV, sec. 8; *S. v. Harrell,* 203 N. C., 210, 165 S. E., 551. The guilt or innocence of the several accused, sharply joined on the record, are issues of fact, determinable alone by the jury. *S. v. Satterfield,* 207 N. C., 118, 176 S. E., 466; *S. v. Ammons,* 204 N. C., 753, 169 S. E., 631; *S. v. Lea,* 203 N. C., 13, 164 S. E., 737; *S. v. Rideout,* 189 N. C., 156, 126 S. E., 500; *S. v. Rountree,* 181 N. C., 535, 106 S. E., 669; *S. v. Phillips,* 178 N. C., 713, 100 S. E., 577; *S. v. Carlson,* 171 N. C., 818, 89 S. E., 30. We are not permitted to weigh the evidence here. *S. v. Fain,* 106 N. C., 760, 11 S. E., 593.

Was there error, or has any been shown, in any decision of the court below on any matter of law or legal inference? This—and this alone—is the inquiry presented by the appeal.

At the outset of the case, the defendants demurred to the indictment, or moved to quash, and asked for a severance. The bill charges a conspiracy on the part of all the defendants and the successive steps thereafter taken by the respective conspirators, or some of them, in the execution of their original design. These steps were six in number, all of the grade of felony, and it is permissible under our practice to join them as separate counts in a single bill. C. S., 4622; *S. v. Jarrett,* 189 N. C., 516, 127 S. E., 590.

Speaking directly to the point in *S. v. Malpass,* 189 N. C., 349, 127 S. E., 248, *Varser, J.,* delivering the opinion of the Court, said: "The rule in this State now is, that different counts relating to the same transaction, or to a series of transactions, tending to one result, may be joined, although the offenses are *not* of the same grade," citing as authority for the position: *S. v. Lewis,* 185 N. C., 640, 116 S. E., 259; *S. v. Burnett,* 142 N. C., 577, 55 S. E., 72; *S. v. Howard,* 129 N. C., 584, 40 S. E., 71; *S. v. Harris,* 106 N. C., 682, 11 S. E., 377; *S. v. Mills,* 181 N. C., 530, 106 S. E., 677. See, also, *S. v. Alridge,* 206 N. C., 850, 175 S. E., 191.

Furthermore, bills and warrants are no longer subject to quashal "by reason of any informality or refinement," C. S., 4623, and judgments are not to be stayed or reversed for nonessential or minor defects. C. S., 4625; *S. v. Whitley, ante,* 661. The modern tendency is against technical objections which do not affect the merits of the case. *S. v. Hardee,* 192 N. C., 533, 135 S. E., 345.

A similar situation to the one now presented arose in the case of *S. v. Beal,* 199 N. C., 278, 154 S. E., 604. There, it was held that a demurrer to the bill on the ground of duplicity was properly overruled. *S. v. Knotts,* 168 N. C., 173, 83 S. E., 972. A like result must follow here. *S. v. Lea,* 203 N. C., 13, 164 S. E., 737; *S. v. Charles,* 195 N. C., 868, 142 S. E., 486.

Nor was there error in denying the defendants separate trials. It was the rule at common law, which still obtains with us, that, when two or more persons are indicted jointly, a motion for severance may be made on the face of the bill (*S. v. Deaton,* 92 N. C., 788), but the granting or refusing of the motion is a matter which rests in the sound discretion of the trial court. *S. v. Donnell,* 202 N. C., 782, 164 S. E., 352; *S. v. Southerland,* 178 N. C., 676, 100 S. E., 187; *S. v. Holder,* 153 N. C., 606, 69 S. E., 66; *S. v. Carrawan,* 142 N. C., 575, 54 S. E., 1002; *S. v. Barrett,* 142 N. C., 565, 54 S. E., 856; *S. v. Smith,* 24 N. C., 402. No abuse of discretion appears on the present record. The defendants were charged with being partners in crime, conspirators, and they were tried together, as his Honor evidently thought was but meet and proper. Note, 70 A. L. R., 1171; 16 C. J., 786. The exception is not sustained.

The motions made in connection with the jury do not amount to a challenge to the array. *S. v. Levy,* 187 N. C., 581, 122 S. E., 386; *Lupton v. Spencer,* 173 N. C., 126, 91 S. E., 718. Indeed, the instruction of the court to a deputy sheriff to summon a number of men to serve as talesmen was not an order under the statute, C. S., 2321, for talesmen or a special venire. *S. v. McDowell,* 123 N. C., 764, 31 S. E., 839. The practice is quite common on the circuit. The jurors were subjected to all the qualifications of talesmen, and the defendants did not exhaust their challenges to the polls. *S. v. Levy, supra.* No just or valid complaint can be predicated upon these exceptions.

The most serious exception appearing on the record is the one addressed to the refusal of the court to strike out the alleged confession of the defendant Howard Overman. It is true, when the alleged confession was offered in evidence, its voluntariness was not questioned or determined in the manner pointed out in *S. v. Whitener,* 191 N. C., 659, 132 S. E., 603. The court was justified in admitting it at the time. And even when the testimony of D. P. Stewart later developed, there was no motion to withdraw the alleged confession from the consideration of the jury—at least none appears of record. The exception now insisted upon was taken at the close of all the evidence. The ruling might possibly be upheld upon procedural grounds, but inasmuch as the involuntariness of the alleged confession is apparent from the testimony of the State's witness, D. P. Stewart, we are disposed to disregard form for merit and to hold that the alleged confession should have been stricken out. *S. v. Livingston,* 202 N. C., 809, 164 S. E., 337; *S. v. Grier,* 203 N. C., 586, 166 S. E., 595; *S. v. Davis,* 125 N. C., 612, 34 S. E., 198; *S. v. Drake,* 113 N. C., 624, 18 S. E., 166; *S. v. Dildy,* 72 N. C., 325; *S. v. Whitfield,* 70 N. C., 356.

A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, but a

confession wrung from the mind by the flattery of hope, or by the torture of fear, comes in such questionable shape as to merit no consideration. *S. v. Livingston, supra; S. v. Patrick,* 48 N. C., 443.

Speaking to the subject in *S. v. Roberts,* 12 N. C., 259, *Henderson, J.,* said: "Confessions are either voluntary or involuntary. They are called voluntary when made neither under the influence of hope nor fear, but are attributable to that love of truth which predominates in the breast of every man, not operated upon by other motives more powerful with him, and which, it is said, in the perfectly good man cannot be countervailed. These confessions are the highest evidences of truth, even in cases affecting life. But it is said, and said with truth, that confessions induced by hope or extorted by fear are, of all kinds of evidence, the least to be relied on, and are therefore entirely to be rejected."

Voluntary confessions are admissible in evidence against the party making them; involuntary confessions are not. A confession is voluntary in law when—and only when—it was in fact voluntarily made. *S. v. Newsome,* 195 N. C., 552, 143 S. E., 187.

The sustaining of this exception, however, does not affect the other defendants, because in the alleged confession no reference is made to any conspiracy, and it was admitted only as against the defendant Howard Overman.

The overruling of the motions to nonsuit under the Mason Act, and exceptions thereto, present for review the sufficiency of the evidence, taken in its most favorable light for the prosecution, to carry the case to the jury. *S. v. Marion,* 200 N. C., 715, 158 S. E., 406. Whether there is such evidence is a question of law for the court to determine. The credibility, weight, and effect of the testimony are for the jury. *S. v. Harrell,* 203 N. C., 210, 165 S. E., 551.

The practice is now so firmly established as to admit of no questioning that, on a motion to nonsuit, the evidence is to be considered in its most favorable light for the prosecution. *S. v. Rountree,* 181 N. C., 535, 106 S. E., 669. And further, the general rule is that if there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury; otherwise not, for short of this, the judge should direct a nonsuit or an acquittal in a criminal prosecution. *S. v. Vinson,* 63 N. C., 335. But if the evidence warrant a reasonable inference of the fact in issue, it is for the jury to say whether they are convinced beyond a reasonable doubt of such fact, the fact of guilt. *S. v. McLeod,* 198 N. C., 649, 152 S. E., 895; *S. v. Blackwelder,* 182 N. C., 899, 109 S. E., 644.

Tested by this rule, what are the inculpatory inferences reasonably deducible from the evidence appearing on the present record?

They may be listed as follows:

1. That Red Cross dynamite was thrown into the plants of Stevens Manufacturing Company and E. M. Holt Plaid Mills, Inc., of Burlington, N. C., on the night of 14 September, 1934.

2. That Florence Blaylock threw the dynamite into these plants from an automobile driven by Howard Overman.

3. That on the previous night, the dynamite magazine or storehouse of the Kirk Holt Hardware Company was broken into, by means of sawing the staple, and two or three boxes of Red Cross dynamite taken therefrom.

4. That the tracks of five persons were discovered around and about this storehouse on the following morning.

5. That the defendants J. P. Hoggard, J. F. Haraway, and Tom Canipe were in the Chevrolet automobile found in front of this storehouse about 9:30 p.m. on the night of the entry.

6. That another automobile was there, also; that Florence Blaylock had in his possession a hacksaw, which he borrowed from Jerry Furlough, and that the dynamite storehouse was opened with a hacksaw.

7. That the record discloses a plain case of store-breaking, larceny, and malicious mischief, with the question of identity as the principal issue on the last five counts in the bill.

8. That the defendant John L. Anderson hid some Red Cross dynamite on the farm of his mother-in-law, later removing it to a secluded spot near Burlington; that he talked with the defendants Florence Blaylock, Jerry Furlough, and Avery Kimrey as to how the Duke Power plant was to be blown up, and that he wanted some of this dynamite put under the house of Mr. Copeland, one of the owners of the Plaid Mills, so as to make it appear an inside job.

9. That the defendants John L. Anderson, J. P. Hoggard, Florence Blaylock, Avery Kimrey, and Jerry Furlough acted in concert in directing the actions of the defendants, both with respect to arranging for the dynamite and manufacturing evidence for their defense, for example, the understanding that Mr. King would set his watch ahead, so as to be able to establish an alibi, etc.

It appears, therefore, that the evidence was amply sufficient to carry the case to the jury on the first count as against all the defendants, except, perhaps, J. F. Haraway, Tom Canipe, and Howard Overman. As to Haraway and Canipe, however, the evidence is sufficient to convict them on the 2d, 3d, and 4th counts; and Overman is to be held for another trial on the 4th, 5th, and 6th counts.

The principle upon which this conclusion rests is that, without regard to any previous design or confederation, when two or more persons aid and abet each other in the commission of a crime, all being present, all

are principals and equally guilty. *S. v. Gosnell, ante,* 401; *S. v. Donnell,* 202 N. C., 782, 164 S. E., 352; *S. v. Dail,* 191 N. C., 234, 131 S. E., 574; *S. v. Jarrell,* 141 N. C., 722, 53 S. E., 127.

And further, it is the rule of practice in this jurisdiction that where the indictment contains several counts, and the evidence applies to one or more, but not to all, a general verdict will be presumed to have been returned on the count or counts to which the evidence relates. *S. v. Snipes,* 185 N. C., 743, 117 S. E., 500; *Morehead v. Brown,* 51 N. C., 369; *S. v. Long,* 52 N. C., 26; *S. v. Leak,* 80 N. C., 404; *S. v. Thompson,* 95 N. C., 597; *S. v Stroud, ib.,* 627; *S. v. Cross,* 106 N. C., 650, 10 S. E., 857; *S. v. Toole, ib.,* 736, 11 S. E., 168; *S. v. Gilchrist,* 113 N. C., 673, 18 S. E., 319; *S. v. May,* 132 N. C., 1020, 43 S. E., 819; *S. v. Gregory,* 153 N. C., 646, 69 S. E., 674; *S. v. Poythress,* 174 N. C., 809, 93 S. E., 919; *S. v. Strange,* 183 N. C., 775, 111 S. E., 350.

The evidence as it relates to the charge of conspiracy tends to show that the Duke Power plant, or transformer station, was to be dynamited as well as the mills. Fortunately, this part of the plan was not carried out. The result, however, is the same so far as the motions to nonsuit are concerned. C. S., 4643.

A conspiracy is the unlawful concurrence of two or more persons in a wicked scheme—the combination or agreement to do an unlawful thing or to do a lawful thing in an unlawful way or by unlawful means. *S. v. Lea,* 203 N. C., 13, 164 S. E., 737; *S. v. Ritter,* 197 N. C., 113, 147 S. E., 733. Indeed, the conspiracy is the crime and not its execution. *S. v. Wrenn,* 198 N. C., 260, 151 S. E., 261. Compare *Hyde v. U. S.,* 225 U. S., 347. "As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is completed." *S. v. Knotts, supra.*

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

One who enters into a criminal conspiracy, like one who participates in a lynching, or joins a mob to accomplish some unlawful purpose, forfeits his independence and jeopardizes his liberty, for, by agreeing with another or others to do an unlawful thing, he thereby places his safety and security in the hands of every member of the conspiracy. The acts and declarations of each conspirator, done or uttered in furtherance of the common, illegal design, are admissible in evidence against all. *S. v. Ritter,* 197 N. C., 113, 147 S. E., 733. "Every one who enters into a common purpose or design is equally deemed in law a party to every act which had before been done by the others, and a party to every

act which may afterwards be done by any of the others, in furtherance of such common design." *S. v. Jackson,* 82 N. C., 565.

Direct proof of the charge is not essential, for such is rarely obtainable. It may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy. *S. v. Wrenn, supra.* When resorted to by adroit and crafty persons, the presence of a common design often becomes exceedingly difficult to detect. Indeed, the more skillful and cunning the accused, the less plainly defined are the badges which usually denote their real purpose. Under such conditions, the results accomplished, the divergence of those results from the course which would ordinarily be expected, the situation of the parties and their antecedent relations to each other, together with the surrounding circumstances, and the inferences legitimately deducible therefrom, furnish, in the absence of direct proof, and often in the teeth of positive testimony to the contrary, ample ground for concluding that a conspiracy exists. 5 R. C. L., 1088.

If four men should meet upon a desert, all coming from different points of the compass, and each carrying upon his shoulder a plank, which exactly fitted and dovetailed with the others so as to form a perfect square, it would be difficult to believe they had not previously been together. At least, it would be some evidence tending to support the inference. *S. v. Whiteside,* 204 N. C., 710, 169 S. E., 711.

So, in the instant case, the facts in evidence afford more than a scintilla of proof that the defendants were not acting in concord by accident. *S. v. Shipman,* 202 N. C., 518, 163 S. E., 657. The demurrers to the evidence were properly overruled.

The evidence upon which the defendants have been convicted comes in the main from their own alleged coconspirators and associates. If this be untrustworthy, as they now contend, it should be remembered the defendants were the first to repose confidence in these witnesses, and their appeal was to the jury. In this respect, we are unable to help them. Our jurisdiction is limited to reviewing on appeal decisions upon any matter of law or legal inference. Const., Art. IV, sec. 8.

A large number of exceptions were taken to the admission and exclusion of evidence, all of which have been examined with care. None can be sustained. Obviously, they cannot be treated separately in an opinion without extending it to "a burdensome and intolerable length." *Willis v. New Bern,* 191 N. C., 507, 132 S. E., 286. In several instances the record fails to disclose what the excluded testimony would have been. This renders such exceptions unavailing. *S. v. Rowland,* 205 N. C., 544, 172 S. E., 182; *S. v. Brewer,* 202 N. C., 187, 162 S. E., 363; 81 A. L. R., 1424; *S. v. McNair,* 93 N. C., 628.

Likewise, many of the exceptions to the charge are gossamery and attenuate in character. It would be supererogatory to consider them *seriatim* in an opinion. Nevertheless, they have been thoroughly considered. None has been overlooked.

Stress has been laid upon the following instruction given at the jury's request:

"You may convict one or more and acquit the others, on any count. You may convict them all, or you may acquit them all, on any of the counts."

The principal criticism of this instruction is that it permits a conviction of only one of the defendants on the charge of conspiracy. The defendants have apparently overlooked the fact that Jerry Furlough was named in the indictment as one of the alleged conspirators, "and others by name to the jurors unknown." This would render inapplicable the principle announced in *S. v. Mickey,* 207 N. C., 608, 178 S. E., 220; *S. v. Diggs,* 181 N. C., 550, 106 S. E., 834; and *S. v. Tom,* 13 N. C., 569. Furthermore, the point is academic, as the jury returned a general verdict against all the defendants on trial. It is also observed that during the charge, the court stated: "I shall hand you, gentlemen, before I conclude, a list containing the several counts in the bill of indictment and the names of the defendants who are included in the several counts. This will be to guide you and help you and to assist you—not in any way to control you in any manner, but simply to help you to arrive at your verdict."

It is not perceived in what way the instruction, assigned as error, was hurtful to the defendants.

Nor was there error in the court's instruction to the jury that the testimony of the defendants and their near relatives who went upon the stand and testified in their behalf should be scrutinized with care in order to ascertain to what extent, if any, their testimony was warped or biased by their interest, adding, however, that if, after such scrutiny, they believed such witnesses, they would give the same credit to their testimony as if they were disinterested. *S. v. Lee,* 121 N. C., 544, 28 S. E., 552; *S. v. Deal,* 207 N. C., 448, 177 S. E., 332.

Again, the defendants complain because the trial court did not caution the jury, or instruct them, as to how the testimony of detectives and accomplices should be received and considered. *S. v. Palmer,* 178 N. C., 822, 101 S. E., 506. There was no request for such instruction, and the assignment is without exceptive basis. A similar contention was advanced and rejected in *S. v. O'Neal,* 187 N. C., 22, 120 S. E., 817. A like result must follow here.

A remark made by the court during the trial, rhetorically appreciative of the jury, was also the subject of comment on the argument, but as no

objection or exception was taken at the time, the matter is not properly before us for review. No doubt the remark would have been corrected or withdrawn, if seasonably called to the court's attention. The rule on appeal is, that questions are to be presented by exceptive assignments of error. Rule 19 (3), Rules of Practice; *S. v. Freeze,* 170 N. C., 710, 86 S. E., 1000; *Rawls v. Lupton,* 193 N. C., 428, 137 S. E., 175.

Finally, the defendants stressfully contended they were discredited in their defense by the following instruction:

"Now, you are not concerned, gentlemen, with the opinions of the attorneys. It doesn't make any difference to you what the attorneys in the case think about it—whether they think the defendants innocent or guilty. You are only concerned with the evidence in the case—which you will not take from the attorneys nor from the court. It is your duty to remember the evidence and to be governed exclusively by the evidence."

The basis of the objection to this charge is, that it lessened the force of the argument of counsel made in behalf of the defendants in the exercise of their constitutional and statutory rights. *S. v. Hardy,* 189 N. C., 799, 128 S. E., 152. If this were so, there would be substance to the objection. It is observed, however, that it was not the argument of counsel, but their opinions as to the guilt or innocence of the accused, which the jury was told to disregard. In this there was no error. Characterization is not argument. Nor is it regarded as proper for counsel to express their opinions upon the question which the jury is impaneled to decide. *Stanley v. Lbr. Co.,* 184 N. C., 302, 114 S. E., 385. For example, in concluding the argument of the instant case on appeal, counsel for some of the defendants, Mr. Levinson, said that in his opinion the defendants had not had a fair trial, and that the charges against them should be dismissed. This was venturing an opinion beyond the province of counsel. Evidently a similar impropriety occurred in the court below, and it was this which the jury was instructed not to consider.

Again recurring to the case of Avery Kimrey, it appears that he did not join in the motion to set aside the verdict; and no bond was required of him. He and his counsel consented to the terms upon which the judgment as to him was suspended. Yet in the entries of appeal it appears "the defendants, and each of them, except and appeal to the Supreme Court." If this were intended to include the defendant Kimrey, the appeal as to him must be dismissed, as he sought and accepted the indulgence and forbearance of the court. *S. v. Henderson,* 207 N. C., 258, 176 S. E., 758; *S. v. Burnette,* 173 N. C., 734, 91 S. E., 364; *S. v. Tripp,* 168 N. C., 150, 83 S. E., 630; *S. v. Griffis,* 117 N. C., 709, 23 S. E., 164; *S. v. Johnson,* 169 N. C., 311, 84 S. E., 767; *S. v. Ed-*

wards, 192 N. C., 321, 135 S. E., 37. In this respect, his case is just the reverse of what occurred in *S. v. Burgess,* 192 N. C., 668, 135 S. E., 771.

We were told on the argument that as a matter of economic justice the charges against the defendants should be dismissed. It is observed, however, that the prosecution involves no rights arising out of the relationship of employer and employee. Indeed, whether such relationship exists is not pertinent to the inquiry. The record reveals a plain case of violence and wilful injury to property as a result of an unlawful conspiracy. No one, we take it, is willing to condone this conduct. The law condemns it, and it is to the interest of all that the offenders be apprehended. The cause of justice is never served by beclouding the issue. A jury of the vicinage has found, upon competent evidence, that the present defendants are the guilty parties. With the exception of Howard Overman, they have no legal grounds to complain.

The result, therefore, is as follows:

On appeal of defendants Anderson, Hoggard, Canipe, Haraway, and Blaylock, no error.

On appeal of defendant Overman, new trial.

On appeal of defendant Kimrey, appeal dismissed.

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

M. L. MANSFIELD, EXECUTOR OF M. C. MANSFIELD, v. T. C. WADE, ADMINISTRATOR OF E. H. GORHAM, DECEASED; GILBERT L. ARTHUR, JR., AND FLORRIE H. ARTHUR; W. S. HARRIS, TRUSTEE; CECIL OGLESBY (C. L. OGLESBY), AND LOTTIE P. OGLESBY; AND W. C. GORHAM, TRUSTEE.

(Filed 20 November, 1935.)

1. **Appeal and Error J e—**

An exception to the admission of immaterial evidence will not be sustained when the admission of such evidence is not prejudicial and there is plenary competent evidence upon the issue.

2. **Evidence D b—Plaintiff, by introducing evidence relating to transaction with decedent, opened door to like evidence by defendant.**

Plaintiff brought suit on a note which had been executed to his testatrix by defendant's intestate, and on a note which had been endorsed to his testatrix by defendant's intestate as collateral security, which note was secured by deed of trust, and the makers of the collateral note were joined as defendants. Plaintiff introduced in evidence the principal and collateral notes and deed of trust, and introduced testimony in regard to the

transaction, the loan of money by his testatrix and the hypothecation of the collateral note. *Held:* Plaintiff, by introducing the written and oral evidence in regard to the transaction, opened the door to the introduction of evidence by the makers of the collateral note to the effect that same had been paid when transferred to plaintiff's testatrix, that the deed of trust had been marked paid and satisfied by the trustee, and that testatrix's endorser had no right to transfer same. N. C. Code, 1795.

3. Bills and Notes C e—Where holder acquires note after maturity he is not a holder in due course and takes note subject to equities.

Where all the evidence is to the effect that the holder of a negotiable note obtained same by endorsement after maturity, the holder is not a holder in due course, N. C. Code, 3033, 3039, and takes same subject to equities, and the maker of the note may establish as against such holder that the note was paid before it was endorsed to and acquired by the holder.

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

APPEAL by plaintiff from *Barnhill, J.*, and a jury, at June Term, 1935, of CARTERET. No error.

This is an action, brought by M. L. Mansfield, executor of M. (Mary) C. Mansfield, against the administrator of E. H. Gorham, deceased, to collect a note of $3,000 executed by said E. H. Gorham to M. C. Mansfield. Among the collateral pledged to pay the said note was a certain note for $2,750, executed by defendant Gilbert L. Arthur, Jr., and wife, Florrie H. Arthur, to the State Bond and Mortgage Corporation, of Wilson, N. C., secured by deed of trust on real estate, to W. S. Harris, trustee. The said note for $2,750, bearing endorsement from payee, State Bond and Mortgage Corporation, by W. S. Harris, Prest., to E. H. Gorham, and by E. H. Gorham to M. C. Mansfield, and found among the papers of M. C. Mansfield.

Gilbert L. Arthur, Jr., and wife, executed to Alexander Parker and W. C. Gorham, as trustees, under date of 10 September, 1928, a deed of trust on real estate, the same property as described in deed of trust by same grantors to W. S. Harris, trustee, securing the note to State Bond and Mortgage Corporation for $2,750, to Atlantic Life Insurance Company. Arthur alleges that proceeds of latter note were used to pay the note to State Bond and Mortgage Corporation, and that said note was wrongfully transferred to E. H. Gorham, instead of being marked "Paid," and the lien canceled of record—so as to make the deed of trust dated 10 September, 1928, a first lien on the property.

The plaintiff executor finds the note dated 6 March, 1928, among the papers of his testatrix, and exhibits note, with endorsements, and original deed of trust, without indication of payment.

W. S. Harris, trustee, and W. C. Gorham, trustee, are parties to this action. W. C. Gorham, as attorney, passed upon the title at time loan

was procured from Atlantic Life Insurance Company, under deed of trust of date 10 September, 1928, and was one of the trustees.

M. L. Mansfield, executor of M. C. Mansfield, testified: "Came into possession of Arthur note and deed of trust at M. (Mary) C. Mansfield's (my mother's) death; found it among her papers; don't know what year it came in her possession; note had been renewed two or three times; note endorsed in E. H. Gorham's handwriting; was collateral on first note and carried on other notes; should say it was in 1929 when first note taken; found it among mother's papers, not first knowledge of it, knew Gorham had put up this paper, knew it all along; found it in mother's papers in deposit box in Bank of Morehead City; was her own. . . . $3,000 was obtained from M. C. Mansfield by reason of this note, paid to E. H. Gorham; was a renewal note; he got the money in 1929; in original transaction same collateral indicated as in renewal note; $3,000 paid in consideration of this collateral; saw the deed of trust and note before the money was paid; came to courthouse to see if all right; looked at the book prior to time money was paid; next day mother made the loan, and this paper was hypothecated; there was nothing of the notation in Record Book 35, page 239, at that time. Inspected it the day before Mr. Gorham got the money; don't know whether in 1928 or 1929. If I said first knowledge of paper was when I found it in mother's papers in deposit box, I was wrong, because I handled her business and papers for her. I was present when paper was passed. Got same time Dewey Willis paper, second mortgage, as represented, so found it. Dewey Willis paper was not worth anything; accepted the second mortgage; transaction made in Gorham's office; mother with me, nobody else; it was six or seven years ago; think it was 1929; I know mother loaned him the money and what collateral was put up. Later on he put up Oglesby collateral and Bank of Morehead City stock; Oglesby and Arthur collateral not put up same time; Oglesby collateral only one any good, except what we are suing on now, Arthur's; Gorham was attorney for my mother."

Plaintiff's "Exhibit A": Deed of trust, dated 6 March, 1928, Record Book 35, page 289, executed by Gilbert L. Arthur, Jr., and wife, Florrie H. Arthur, parties of first part, W. S. Harris, trustee, party of second part, and State Bond and Mortgage Corporation, of Wilson, N. C., party of third part, conveys Lot 3, Block 201. Securing even dated note for $2,750, maturing 6 May, 1928, made by Gilbert L. Arthur, Jr., and Florrie H. Arthur, to State Bond and Mortgage Corporation, of Wilson, N. C.; endorsements on note: "Pay to order of E. H. Gorham, State Bond and Mortgage Corp., by W. S. Harris, Pres.; Pay to order of Mary C. Mansfield, E. H. Gorham."

The defendant Arthur alleges that the note was paid to State Bond and Mortgage Corporation in October, 1928, by E. H. Gorham, and that

E. H. Gorham so advised W. C. Gorham of this fact and told W. C. Gorham he was on his way to Beaufort to cancel the deed of trust at the courthouse, and that he, W. C. Gorham, on the following day went to Beaufort and inspected the record and saw the notation on the deed of trust: "Paid and satisfied—E. H. Gorham."

The evidence on the part of defendant Gilbert L. Arthur, Jr.: The Registry of Conveyance Book of Carteret County, which showed the following entry on deed of trust offered by plaintiff from Arthur to Harris, trustee—on margin in E. H. Gorham's handwriting is the following: "Paid and satisfied—E. H. Gorham."

The execution of the note and deed of trust to W. C. Harris, trustee for State Bond and Mortgage Corporation, of Wilson, N. C., was admitted by Arthur. He testified that through B. F. Hagood (Hagood Land and Realty Company) he negotiated a loan with the Atlantic Life Insurance Company, and offered in evidence check from Hagood to W. C. Gorham, attorney, and G. L. Arthur, Jr., dated 6 October, 1928—amount $2,478.40. He gave it to E. H. Gorham, his attorney. It was endorsed by W. C. Gorham and himself. That E. H. Gorham got the loan for him from State Bond and Mortgage Corporation, and was acting as his agent and with his authority. "I endorsed the check Hagood gave to me to said Gorham" and made him his agent to pay same off. E. H. Gorham told him that he had paid the note and deed of trust of the State Bond and Mortgage Corporation, and he did not know until after E. H. Gorham's death that Mrs. Mansfield held his note. R. C. McElroy, secretary and treasurer of State Bond and Mortgage Corporation, which held the note and deed of trust of Arthur, testified that the paper was paid in fall of 1928—October. The company received from E. H. Gorham the money for the paper. He said that E. H. Gorham, speaking in reference to the loan, stated that the loan was a short-term loan, and he expected to get for Arthur a long-term loan to pay it. W. S. Harris, who was president of State Bond and Mortgage Corporation, endorsed the note, but on it there were "no signs of payment." W. C. Gorham testified, *in part*: That he negotiated loan for Arthur (through Hagood Loan and Realty Company) with Atlantic Life Insurance Company, to take up State Bond and Mortgage Corporation loan, on 10-year basis instead of short-term loan. Took check to Arthur and went with him to E. H. Gorham's office, as he wanted note and deed of trust of State Bond and Mortgage Corporation. Arthur and he endorsed the check and gave it to E. H. Gorham, who went to Wilson and obtained same. Later, he saw the note and deed of trust of the State Bond and Mortgage Corporation. "He (E. H. Gorham) was unlocking his door when I came up the stairs; he had this paper in his inside coat pocket and he pulled it out and he said, 'I have here Arthur's

mortgage and note and I will take it to Beaufort and cancel it of record tomorrow.' I said, 'All right,' and 'Please give it to him after cancellation.'" W. C. Gorham went to Beaufort next morning and looked to see if it had been canceled, and found the notation on it, "Paid and satisfied—E. H. Gorham"—it was in October, 1928. Court: Q. "You say you delivered that check of Hagood's to E. H. Gorham; for what purpose did you deliver it to him?" Answer: "I delivered it to him for the purpose of going to Wilson to get the mortgage or deed of trust which was written to W. S. Harris, trustee, which was the mortgage which this check was given to take up; it was set up as being due against this property."

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

"1. Had the note sued upon been paid and satisfied prior to the time it was delivered to the plaintiff's testatrix, as alleged? Answer: 'Yes.'

"2. Is the plaintiff the holder of the said note for value before maturity and without notice of any defect or infirmity, as alleged by the plaintiff? Answer: 'No.'

"3. What amount, if any, is the plaintiff entitled to recover on said note? Answer: ...."

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

Julius F. Duncan for plaintiff.

Christian, Barton & Parker and C. R. Wheatly for defendant G. L. Arthur.

CLARKSON, J. The plaintiff, as executor of M. C. Mansfield, brought this action against T. C. Wade, administrator of E. H. Gorham, to recover on a note for $3,000, made to his testatrix (now due on same $2,330.66, with interest from 7 July, 1934). Among the collateral notes to secure this $3,000 note was a certain note and deed of trust, executed by G. L. Arthur, Jr., and wife, to W. S. Harris, trustee, for State Bond and Mortgage Corporation, of Wilson, N. C., for $2,750, which was duly recorded in register of deeds' office for Carteret County, N. C.

The controversy was over the G. L. Arthur, Jr., note and deed of trust to W. S. Harris, trustee for State Bond and Mortgage Corporation. Arthur filed an answer raising the issue: "Had the note sued upon been paid and satisfied prior to the time it was delivered to the plaintiff's testatrix, as alleged?"

The plaintiff, in the questions presented, says: "May the court find a technically sound charge to the jury on such evidence, so admitted, over objections?"

The evidence introduced by defendant was for the purpose of showing payment—some of it was perhaps immaterial, and some was corroborative on the main issue of payment; but we do not think any of the evidence incompetent or prejudicial. All of it was objected to by plaintiff, but we do not think these exceptions and assignments of error can be sustained.

The plaintiff contends that it impinged N. C. Code, 1935 (Michie), sec. 1795, which is as follows: "Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through, or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through, or under a deceased person or lunatic; by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic; except where the executor, administrator, survivor, committee, or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication."

We do not think that plaintiff can call to his aid this section, if it were applicable under the facts and circumstances of this case. The plaintiff's testimony and "Exhibit A" "opens the door." Plaintiff, to show title in his testatrix, introduced in evidence: Deed of trust, dated 6 March, 1928, Record Book 35, page 289, executed by Gilbert L. Arthur, Jr., and wife, Florrie H. Arthur, parties of the first part, W. S. Harris, trustee, party of the second part, and State Bond and Mortgage Corporation, of Wilson, N. C., party of third part, conveys Lot 3, Block 201. Securing even dated note for $2,750, maturing 6 May, 1928, made by Gilbert L. Arthur, Jr., and Florrie H. Arthur, to State Bond and Mortgage Corporation, of Wilson, N. C.; endorsements on note: "Pay to order of E. H. Gorham, State Bond and Mortgage Corporation, by W. S. Harris, Pres.; Pay to order of Mary C. Mansfield—E. H. Gorham." Also, plaintiff's testimony "opens the door." Plaintiff's testatrix based her title to the note and deed of trust on the following endorsements: "Pay to order of Mary C. Mansfield, E. H. Gorham."

It was competent for Arthur to introduce the evidence which he did on the trial, to be submitted to the jury, on the issue of payment, to show that the note and deed of trust was paid and E. H. Gorham had no right to transfer it. The jury so found. The question of payment was the material controversy in this issue.

In *Herring v. Ipock,* 187 N. C., 459 (463), speaking to the subject, it is said: "That when a personal representative 'opens the door' by testifying to a transaction, etc., it is not in his province, but that of the court, to decide what testimony favorable to the adverse party may 'come in.' From a careful review of the authorities, we think that the plaintiff's contention is correct, and the court below made no error in permitting the testimony. *Cheatham v. Bobbitt,* 118 N. C., 343; *Sumner v. Candler,* 92 N. C., 635; *Hawkins v. Carpenter,* 85 N. C., 482; *Pope v. Pope,* 176 N. C., 287." *Walston v. Coppersmith,* 197 N. C., 407; *Lewis v. Mitchell,* 200 N. C., 652 (653).

As to the second issue: All of the evidence showed that plaintiff's testatrix acquired the note and deed in trust about October, 1928. The note matured 6 May, 1928. Having acquired the note after maturity, it was subject to equities—that of Arthur as to payment.

What constitutes Holder in Due Course—N. C. Code, 1935 (Michie), sec. 3033. Rights of Holder in Due Course—sec. 3038. When Subject to Principal Defenses—sec. 3039. Who Deemed Holder in Due Course—sec. 3040. *Whitman v. York,* 192 N. C., 87 (90); *Bank v. Atmore,* 200 N. C., 437; *Dyer v. Bray, ante,* 248 (249). Presumption as to Time of Endorsement—sec. 3026. *Ins. Co. v. Jones,* 191 N. C., 176 (180).

For the reasons given, in the judgment of the court below there is
No error.

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

G. R. JOHNSON AND J. MANG WOOD, ADMINISTRATORS OF JOHN W. WOOD, DECEASED, v. BERTHA WOOD BAREFOOT AND OTHERS, HEIRS AT LAW OF JOHN W. WOOD, DECEASED, AND PREMIER FERTILIZER COMPANY AND WADE F. JOHNSON.

(Filed 20 November, 1935.)

1. **Executors and Administrators E e—Heir at law may not convey title as against creditors prior to two years from granting letters testamentary.**

An heir at law mortgaged the land allotted to him in the partition proceedings prior to the expiration of two years from the granting of letters testamentary. Thereafter, the mortgage was foreclosed and the purchaser at the sale transferred title to a *bona fide* purchaser without notice. *Held:* The mortgage was void and the creditors of the estate are entitled to sale of the lands to make assets to pay debts of the estate, even against

the *bona fide* purchaser without notice, the rights of the parties being determined by the application of C. S., 76, prior to its amendment by ch. 355, Public Laws of 1935.

2. **Same—Purchaser of land mortgaged by heir after two years from granting letters testamentary held bona fide purchaser without notice.**

An heir at law executed a deed of trust on land allotted to him in the partition proceedings, the deed of trust being executed more than two years after the granting of letters testamentary. The deed of trust was foreclosed, and the purchaser at the sale transferred title to a *bona fide* purchaser who, under the facts agreed, had no actual knowledge that at the time the land was conveyed to him the personal assets were insufficient to pay debts of the estate. *Held:* The fact that it appeared from the records that the estate had not been settled does not amount to notice that the personalty was insufficient, and the purchaser was a *bona fide* purchaser without notice, and the land is not subject to sale to make assets to pay debts of the estate.

3. **Same: Mortgages C c—Mortgage lien held prior to lien of subsequently docketed judgment unaffected by prior parol agreement between judgment debtor and creditor.**

An heir at law bought in personalty of the estate at the administrators' sale and gave his note for the purchase price under a parol agreement that the land inherited by him should be security for the note. Within two years from the granting of letters testamentary, the heir at law mortgaged the land, and subsequently the mortgage was foreclosed and transferred by the purchaser at the sale to an innocent purchaser for value without notice. The administrators reduced the note given for the purchase price of the personalty to judgment, which judgment was docketed subsequent to the registration of the mortgage. *Held:* The purchaser acquired the title free from the lien of the judgment docketed subsequent to the registration of the mortgage, the purchaser not being bound by the parol agreement between the heir and the administrators.

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

APPEAL by plaintiffs and by defendant Wade F. Johnson from *Barnhill, J.,* at October Term, 1934, of JOHNSTON. Modified and affirmed in both appeals.

This is a special proceeding for the sale of lands to make assets for the payment of the debts of John W. Wood, deceased.

The proceeding was begun in the Superior Court of Johnston County, before the clerk, by summons dated 6 March, 1933, and duly served on the defendants, the heirs at law of John W. Wood, deceased.

After a trial of the issues raised by the original pleadings in the proceeding, and a judgment ordering the sale of the lands described in the petition, at February Term, 1934, of the Superior Court of Johnston County, the defendants Premier Fertilizer Company and Wade F. Johnson, on their own motion, were made parties to the proceeding, and filed a pleading in which they alleged that since the death of John W. Wood

they have become the owners, respectively, of shares of the land owned by the said John W. Wood at his death, claiming title thereto under the defendants Glenn Wood and Elmon Wood, and that said shares are not now subject to sale to make assets for the payment of the debts of the said John W. Wood, deceased.

The proceeding was heard by Judge Barnhill at October Term, 1934, of the Superior Court of Johnston County on a statement of facts agreed. These facts are as follows:

1. John W. Wood died in Johnston County, North Carolina, on 31 October, 1928, leaving as his heirs at law certain children, including the defendants Glenn Wood and Elmon Wood, all of whom are parties to this proceeding.

2. On 14 November, 1928, the petitioners, G. R. Johnson and J. Mang Wood, duly qualified as administrators of John W. Wood, deceased, and at once entered upon the administration of his estate.

3. On 12 December, 1928, a special proceeding was instituted in the Superior Court of Johnston County, before the clerk, for the partition among his heirs at law of the lands owned by the said John W. Wood at his death; the said lands were duly partitioned among the heirs at law of the said John W. Wood by commissioners appointed by the court for that purpose; the report of said commissioners was duly filed in the office of the clerk of the Superior Court of Johnston County on 16 April, 1929, and thereafter the partition of said lands made by the said commissioner was duly confirmed by the court on 7 March, 1932.

4. On 14 December, 1929, the defendant Glenn Wood, one of the heirs at law of John W. Wood, deceased, conveyed his interest in all the lands allowed to him in the partition of the lands owned by his father, John W. Wood, at his death, by a deed of trust to E. C. West, trustee. This deed of trust was duly recorded in the office of the register of deeds of Johnston County, on 14 December, 1929, in Book No. 204, at page 527.

5. On 13 January, 1931, under the power of sale contained in said deed of trust, E. C. West, trustee, sold and conveyed the land described therein to Joe P. Smith by a deed which was duly recorded in the office of the register of deeds of Johnston County on 6 March, 1931, in Book No. 275, at page 483.

6. On 16 January 1931, Joe P. Smith and his wife conveyed the land described in the deed from E. C. West, trustee, to Joe P. Smith, to the defendant, Premier Fertilizer Company, by a deed which was duly recorded in the office of the register of deeds of Johnston County on 6 March, 1931, in Book No. 275, at page 478.

7. On 20 March, 1929, the defendant Elmon Wood, one of the heirs at law of John W. Wood, deceased, conveyed his interest in the lands

allotted to him in the partition of the lands owned by his father, John W. Wood, at his death, by a mortgage deed to W. Jesse Stanly. This mortgage deed was duly recorded in the office of the register of deeds of Johnston County, on 4 May, 1929, in Book No. 237, at page 145.

8. On 24 February, 1930, under the power of sale contained in said mortgage deed from Elmon Wood to W. Jesse Stanly, the said W. Jesse Stanly, mortgagee, sold and conveyed the land described therein to P. B. Johnson, by a deed which was duly recorded in the office of the register of deeds of Johnston County, on 25 February, 1930, in Book No. 220, at page 295.

9. On 10 March, 1930, P. B. Johnson conveyed the land described in the deed from W. Jesse Stanly to P. B. Johnson to the defendant Wade F. Johnson by a deed which was duly recorded in the office of the register of deeds of Johnston County, on 12 March, 1930, in Book No. 211, at page 495.

10. After the death of John W. Wood on 18 December, 1928, the petitioners herein, as his administrators, offered for sale at public auction all the personal property belonging to his estate. At said sale it was agreed by and between the said administrators and the defendants Glenn Wood and Elmon Wood, heirs at law and distributees of the estate of John W. Wood, deceased, that if either the said Glenn Wood or the said Elmon Wood became a purchaser at said sale of any of said personal property, the administrators would accept the note of the purchaser in payment of the purchase price for such property as he had purchased, his share in the estate to be security for the payment of said note. This agreement was in parol. Pursuant to said agreement, Glenn Wood and Elmon Wood became the purchasers at said sale of certain property, and gave to the administrators their joint note for the sum of $1,105.45, the purchase price of said property.

11. The note executed by Glenn Wood and Elmon Wood and payable to the administrators of John W. Wood, deceased, was not paid at its maturity, and the said administrators brought suit against the said Glenn Wood and Elmon Wood in the Superior Court of Johnston County on said note, and recovered judgment thereon. This judgment was duly docketed in the office of the clerk of the Superior Court of Johnston County, on 13 March, 1930, in Judgment Docket No. 15, at page 205. It is provided in said judgment that the same shall be credited with the sums due to Glenn Wood and Elmon Wood as their distributive shares in the estate of their father, John W. Wood, deceased, and that execution shall issue on said judgment only for the balance due after such credits.

12. At the dates of the respective deeds under which the defendants Premier Fertilizer Company and Wade F. Johnson hold title to the

shares in the lands owned by John W. Wood at his death, allotted in the partition of said lands to the defendants Glenn Wood and Elmon Wood, respectively, the defendants Premier Fertilizer Company and Wade F. Johnson had only such notice of the indebtedness of the estate of John W. Wood, deceased, and of Glenn Wood and Elmon Wood to his administrators, on account of the note executed by them, and of the judgment on said note recovered by said administrators, as was shown by the public records in Johnston County. They had no notice as to whether the personal property belonging to his estate was sufficient in value for the payment of the debts of the said John W. Wood, deceased. They had only constructive notice that the estate of the said John W. Wood had not been finally settled by his administrators.

13. Both Glenn Wood and Elmon Wood are now insolvent, and were insolvent at the date of the sale of the personal property belonging to the estate of John W. Wood, deceased, by his administrators, except for their interest in his estate, as heirs at law and distributees.

14. The petition in this proceeding was verified by the petitioners before the clerk of the Superior Court of Johnston County on 25 February, 1933, and thereafter filed with said clerk on 6 March, 1933. All of the heirs at law of John W. Wood are defendants in the proceeding and were duly served with summons; the defendants Glenn Wood and Elmon Wood, filed no answer to the petition. The issues raised by the original pleadings were referred by the judge to a referee, for trial, on 18 October, 1933. The referee filed his report on 9 November, 1933, which was duly confirmed by the judge at November Term, 1933, of the Superior Court of Johnston. The defendants Premier Fertilizer Company and Wade F. Johnson were made parties to the proceeding, on their own motion, at February Term, 1934, of the Superior Court of Johnston County, and at said term filed a petition in the proceeding in which they prayed that commissioners appointed by the court be enjoined from selling the shares of the lands owned by John W. Wood at his death now owned by them, respectively. The temporary restraining order issued on the motion of said defendants was subsequently continued to a final hearing of the proceeding on the issues raised by the petition of said defendants and the answers of the plaintiffs to said petition.

On these facts, in accordance with its opinion as to the law determining the rights of the parties to this proceeding, it was considered, ordered, and adjudged by the court:

1. That the lands allotted to the defendant Elmon Wood in the partition of the lands owned by his father, John W. Wood, at his death, and now owned by the defendant Wade F. Johnson, claiming title thereto under the said Elmon Wood, are subject to sale in this proceeding, both (a) for the payment of the amount due on the judgment recovered by

the petitioners against the said Elmon Wood, and (b) to make assets for the payment of the debts of John W. Wood, deceased.

2. That the lands allotted to the defendant Glenn Wood in the partition of the lands owned by his father, John W. Wood, at his death, and now owned by the defendant Premier Fertilizer Company, claiming title thereto under the said Glenn Wood, are not subject to sale in this proceeding, either (a) for the payment of the amount due on the judgment recovered by the petitioners against the said Glenn Wood, or (b) to make assets for the payment of the debts of John W. Wood, deceased.

From this judgment the plaintiffs and the defendant Wade F. Johnson appealed to the Supreme Court, assigning errors in the judgment.

Abell & Shepard for plaintiffs.

Parker & Lee for defendants, other than Wade F. Johnson and Premier Fertilizer Company.

J. Ed Johnson and L. L. Levinson for defendant Wade F. Johnson.

I. R. Williams for defendant Premier Fertilizer Company.

CONNOR, J. Section 76, Consolidated Statutes of North Carolina, 1919, prior to its amendment by chapter 355, Public Laws of North Carolina, 1935, was as follows:

"All conveyances of real property of any decedent made by any devisee or heir at law, within two years from the grant of letters, shall be void as to the creditors, executors, administrators, and collectors of such decedent; but such conveyance to *bona fide* purchasers for value and without notice, if made after two years from the grant of letters, shall be valid even as against creditors."

In the instant case the conveyance of the lands allotted to Elmon Wood in the partition of the lands owned by John W. Wood, at his death, to the defendant Wade F. Johnson, by the deed of P. B. Johnson, whose title to said lands was derived from the mortgage deed executed by Elmon Wood, was within two years from the grant of letters to the administrators of John W. Wood, deceased. For that reason the conveyance to the defendant Wade F. Johnson is void under the statute in force at the trial of this proceeding, as against the petitioners herein, although the defendant Wade F. Johnson was a *bona fide* purchaser of the lands conveyed to him, for value and without notice that the personal assets of the estate of John W. Wood, deceased, were not sufficient in value for the payment of his debts.

The conveyance of the lands allotted in said partition to Glenn Wood to the defendant Premier Fertilizer Company was made after two years from the grant of such letters, and is valid as to the petitioners, if the defendant Premier Fertilizer Company was not only a *bona fide* pur-

chaser of the lands conveyed to him for value, but also such purchaser without notice. See *Murchison v. Whitted,* 87 N. C., 465. The defendant Premier Fertilizer Company had no actual notice at the time the lands were conveyed to him that the personal assets belonging to the estate of John W. Wood, deceased, were not sufficient in value for the payment of his debts. It does not appear from the facts agreed that said defendant had constructive notice of the amount of the indebtedness of John W. Wood at his death, or of the value of his personal property. The fact that it appeared from the records in Johnston County that the estate had not been settled was not notice to the defendant of such fact.

There is no error in the judgment that the lands now owned by the defendant Wade F. Johnson are subject, and that the lands now owned by the defendant Premier Fertilizer Company are not subject to sale in this proceeding for the payment of the debts of John W. Wood, deceased.

There is error, however, in the judgment that the lands now owned by the defendant Wade F. Johnson are subject to sale for the payment of the indebtedness of Elmon Wood to the petitioners, as evidenced by the judgment recovered by the petitioners against the said Elmon Wood. This judgment was docketed subsequent to the registration of the mortgage deed from Elmon Wood to W. Jesse Stanly, under which the defendant Wade F. Johnson claims title to the lands conveyed to him by P. B. Johnson. The petitioners have no lien in the lands conveyed to the defendant Wade F. Johnson by P. B. Johnson, by reason of the parol agreement between the petitioners and Elmon Wood with respect to the payment of the note which was subsequently reduced to judgment.

As modified in accordance with this opinion, the judgment is

Affirmed.

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

R. C. PETERSON v. E. B. MCMANUS AND SHIVAR SPRINGS, INCORPORATED (ORIGINAL PARTIES DEFENDANT), AND CHARLOTTE HOTEL OPERATING COMPANY, H. H. ANDERSON, AND CITIZENS HOTEL COMPANY (ADDITIONAL PARTIES DEFENDANTS).

(Filed 20 November, 1935.)

Master and Servant F a—Refusal to join insurance carrier as party defendant held without error under the facts of this case.

In this action to recover damages for alleged negligent personal injury, defendants filed a petition for new parties, alleging that plaintiff was an employee and that the employer's negligence contributed to the injury,

and that plaintiff was bound by the provisions of the Compensation Act. The motion for new parties was granted. Thereafter, more than six months after the injury complained of, the original defendants filed a petition and moved that the employer's insurance carrier also be made a party defendant, the motion was denied, and defendants appealed. *Held:* The motion for joinder of the insurance carrier, made more than six months after the injury complained of, was properly denied under the provisions of N. C. Code of 1935, sec. 8081 (r), the statute giving the right to an employee to maintain an action against a third person tort-feasor if the employer fails to institute such action within six months from date of the injury, and *held further*, N. C. Code, 460, has no application to the facts on the instant case.

APPEAL by defendants E. B. McManus and Shivar Springs, Inc., from *Harding, J.*, 24 June, 1935, Special Term of MECKLENBURG. Affirmed.

This is an action for actionable negligence, brought by plaintiff against the defendants E. B. McManus and Shivar Springs, Inc., alleging damage. The plaintiff alleges, in part: "That on or about 20 October, 1934, the plaintiff was helping to paint part of the Charlotte Hotel building in the city of Charlotte. That in performing said work the plaintiff and his fellow worker used a swinging stage, which was supported by pulleys and ropes. That immediately prior to the time complained of the plaintiff and his fellow worker, while standing upon said swinging stage, were painting the outside of some of the windows of said hotel building over and above a certain alleyway which runs from Poplar Street in an easterly direction along the back side of said hotel building, said stage at said time being about 28 feet above the surface of the ground. That while the plaintiff and his fellow worker were standing upon said stage, engaged in painting the outside of said windows, as aforesaid, the defendants, while operating an automobile truck containing Shivar Ginger Ale, over and along said alleyway from the rear of said hotel toward Poplar Street, operated said truck in such a reckless, careless, negligent, and dangerous manner that said truck caught one of the ropes which hung from said stage, thereby pulling said rope with such force and violence that one end of said swinging stage was thereby caused to fall from its stirrup, the plaintiff being thereby precipitated with great force and violence for a distance of about 28 feet to the hard surface of said alleyway, the force of said fall causing the plaintiff to sustain certain serious and permanent injuries, hereinafter described."

The defendants E. B. McManus and Shivar Springs, Inc., set up the plea of contributory negligence. The plaintiff, in reply, denied contributory negligence and set up the "last clear chance." If the plaintiff was guilty of contributory negligence, the defendants had the last clear chance to avoid the injury to plaintiff.

The defendants E. B. McManus and Shivar Springs, Inc., on 4 April, 1935, set forth a petition for new parties and filed a cross-complaint,

alleging: "That the defendants are informed and believe that any injuries received by the plaintiff on the occasion referred to in the complaint were directly and proximately caused by the negligence of Charlotte Hotel Operating Company, a corporation, and H. H. Anderson, in that they failed to exercise due care to provide the plaintiff a safe place in which to work; in that they failed to exercise due care to furnish the plaintiff appliances and equipment with which to do his work that were reasonably safe for said purpose; in that they negligently and carelessly furnished the plaintiff a dangerous and insecure stage or platform on which to stand while working many feet above the pavement; in that they failed to properly instruct the plaintiff, and that they failed to exercise due care to perform the duties which they owed to the plaintiff as an employee. That the defendants are informed and believe that the negligence of the said Charlotte Hotel Operating Company and H. H. Anderson, and the negligence of the plaintiff himself, concurred and cooperated in causing the plaintiff's injury; that if the defendants were negligent, and if their negligence was the proximate cause of the plaintiff's injury, which is expressly denied, the negligence of the Charlotte Hotel Operating Company and H. H. Anderson was also a proximate cause of said injury, operating concurrently, and that the said persons are jointly liable with these defendants, if these defendants are liable at all, and that the defendants have a right to have said liability determined in this action, in accordance with C. S., 618."

The petition was granted and an order was made making H. H. Anderson and the Charlotte Hotel Operating Company, a corporation, parties to the action. H. H. Anderson filed an answer to the cross-complaint, denying the material allegations of the cross-complaint, and for a further answer and defense alleged that the injury to plaintiff was due to the sole, direct, and proximate cause of the negligence of the defendants E. B. McManus and Shivar Springs, Inc. The Charlotte Hotel Operating Company filed an answer to the cross-complaint denying the material allegations of the cross-complaint, and alleged: "That the said H. H. Anderson, at the time referred to in the plaintiff's complaint, was doing the work therein referred to on the Charlotte Hotel as an independent contractor under a contract between the said Anderson and the owner of said hotel, and the plaintiff was not at said time an employee of this defendant."

The defendant E. B. McManus and Shivar Springs, Inc., on 22 May, 1935, set forth a petition to make the Citizens Hotel Company a party, and filed a cross-complaint, in part: "That, as appears from the record herein, Charlotte Hotel Operating Company has now filed an answer in which it alleges that the work which the plaintiff was doing was being done by H. H. Anderson under a contract with the owner of the Char-

lotte Hotel; that these defendants are informed and believe that the owner of the Charlotte Hotel is Citizens Hotel Company, and that the Charlotte Hotel Operating Company is the lessee thereof. That the work which the plaintiff was doing at the time of his injury was of an inherently dangerous nature, and that, consequently, the owner and the lessee of said hotel, as these defendants are informed and believe, would be liable for the consequences of and the negligence of the said H. H. Anderson whether he was their employee or an independent contractor. That these defendants are informed and believe, and so allege, that any injuries received by the plaintiff on the occasion referred to in the complaint were directly and proximately caused by the negligence of the said H. H. Anderson, in that he failed to exercise due care to provide the plaintiff a safe place in which to work," etc. The petition was granted, and an order was made making the Citizens Hotel Company (a corporation) a party. It filed an answer to the cross-complaint denying the material allegations of the cross-complaint, and alleged: "That the work which the plaintiff was doing was being done through H. H. Anderson as an independent contractor for a lump sum price, which was paid by this defendant."

The defendants E. B. McManus and Shivar Springs, Inc., on 22 June, 1935, set forth a petition and cross-complaint praying that the Traveller's Insurance Company, a corporation, be made a party, and alleging, in part: "That these defendants are informed and believe that the Traveller's Insurance Company, a corporation authorized to do an insurance business in the State of North Carolina, was the insurance carrier of the Charlotte Hotel Operating Company pursuant to the provisions of the North Carolina Workmen's Compensation Act at the time the plaintiff was injured. Upon information and belief that the injuries received by the plaintiff were received by him in the course of his employment with the Charlotte Hotel Operating Company, and that the Charlotte Hotel Operating Company and the Traveller's Insurance Company are liable to him for compensation under the terms of the North Carolina Workmen's Compensation Act, and for certain medical and hospital expenses. That, under the provisions of the 1933 amendment to the Workmen's Compensation Act, C. S., 8081 (r), it is required that compensation be paid in accordance with the Workmen's Compensation Act, and these defendants are entitled to insist on the said payment being made under and in accordance with said statute."

Order of Harding, J.: "This cause coming on to be heard and being heard upon the motion of E. B. McManus and Shivar Springs, Inc., that the Traveller's Insurance Company be declared a party defendant to this action, and it appearing that said motion should be denied: Now, therefore, it is ordered, adjudged, and decreed that said motion be and it is

hereby denied. This 5 July, 1935. Wm. F. Harding, Judge presiding, 24 June, 1935, Special Term, Mecklenburg Superior Court."

To the order as signed overruling the petition and motion of the defendant Shivar Springs, Inc., and E. B. McManus, to make the Traveller's Insurance Company a party defendant, the said defendants Shivar Springs, Inc., and E. B. McManus except, assign error, and appeal therefrom to the Supreme Court.

Carswell & Ervin for plaintiff.

John M. Robinson and Hunter M. Jones for defendants E. B. McManus and Shivar Springs, Inc.

CLARKSON, J. The defendants E. B. McManus and Shivar Springs, Inc., say that the question involved is: "Where an employee, injured by the alleged negligence of his employer and a third person, is subject to the Workmen's Compensation Act, and sues the third person without having first pursued his remedy under the Compensation Act, as required in C. S., 8081 (r), does the third party have the right to have the compensation carrier made a party to the action?" We do not think this question arises on this record.

The defendants contend that, to avoid certain injustice in *Brown v. Sou. Railway Co.*, 204 N. C., 668 (*S. c.*, 202 N. C., 256), the General Assembly enacted a new section, N. C. Code, 1935 (Michie), 8081 (r), and sets same forth in full. In this section is the following: "If, however, the employer does not commence such action within six months from the date of such injury or death, the employee, or his personal representative, shall thereafter have the right to bring the action in his own name and the employer, and any amount recovered shall be paid in the same manner as if the employer had brought the action."

In the present action it is alleged by the defendants that the Traveller's Insurance Company, a corporation, was the insurance carrier of the Charlotte Hotel Operating Company, pursuant to the N. C. Workmen's Compensation Act at the time plaintiff was injured. The Charlotte Hotel Operating Company, in its cross-answer, says that H. H. Anderson was doing the work as an independent contractor and plaintiff was not an employee of the Charlotte Hotel Operating Company. However this may be, we think the order of the court below correct. The injury complained of by plaintiff occurred on 20 October, 1934, he brought the action against E. B. McManus and Shivar Springs, Inc., on 13 November, 1934. The petition to make the Traveller's Insurance Company a party defendant was filed 22 June, 1935—6 months after the injury complained of. E. B. McManus and Shivar Springs, Inc., allege that the Charlotte Hotel Operating Company and Traveller's Insurance

Company are liable to plaintiff under the N. C. Workmen's Compensation Act. The Charlotte Hotel Operating Company denies that it is the employer and has never brought an action. The petition prays that the Traveller's Insurance Company be made a party to this action. Defendant made this after 6 months after the injury to plaintiff. "If, however, the employer does not commence such action within 6 months from the date of such injury," etc. On this record it is not necessary to decide whether or not this is a condition precedent, affecting the cause of action like the death by wrongful act statute (Lord Campbell's Act), N. C. Code, 1935 (Michie), sec. 160.

The appealing defendants brought in the additional parties, and this was not objected to by plaintiff. The legal difference arising between the original and new parties ought not to prejudice plaintiff's action. N. C. Code, 1935 (Michie), sec. 460, in part, is as follows: "The court, either between the terms or at a regular term, according to the nature of the controversy, may determine any controversy before it when it can be done without prejudice to the rights of others, but when a complete determination of the controversy cannot be made without the presence of other parties, the court must cause them to be brought in," etc.

The appealing defendants cite this section. It is not applicable to the facts on this record. We think bringing in the Traveller's Insurance Company cannot be done without prejudice to plaintiff. See *Rowe v. Rowe-Coward Co., ante,* 484.

The judgment of the court below is

Affirmed.

H. M. MORRIS v. THE SEASHORE TRANSPORTATION COMPANY, A CORPORATION.

(Filed 20 November, 1935.)

Automobiles C i: Negligence B b—Evidence held sufficient to be submitted to jury under doctrine of last clear chance.

The evidence tended to show that plaintiff, in order to avoid striking a chicken standing on the hard surface of the highway, drove his automobile gradually to the left, so that the car was traveling in about the center of the highway at the time of the accident in suit, and that a bus belonging to defendant was traveling in the same direction and hit plaintiff's car when the bus attempted to pass. *Held:* Conceding plaintiff was negligent in driving to the left without giving any signal or ascertaining if the car could be driven to the left in safety, N. C. Code, 2621 (59), defendant's motion to nonsuit was erroneously granted, since the pleadings and evidence are sufficient to raise the issue of the last clear chance upon the evidence tending to establish defendant's negligence in failing

to keep a safe distance between the vehicles, N. C. Code, 2621 (57), and in failing to take the precautions and give the signals required by statute for passing cars on the highway, N. C. Code, 2621 (54) (55).

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

APPEAL by plaintiff from *Parker, J.*, at May Term, 1935, of LENOIR. Reversed.

This is an action for actionable negligence, brought by plaintiff against defendant, alleging damage.

The action is for personal injuries and for property damage alleged to have resulted from the negligent operation of one of defendant's passenger buses in the manner set forth in the complaint. The defendant filed answer denying the material allegations of negligence and set up the plea of contributory negligence, and as further defense alleges: "That the plaintiff, if he was damaged or injured, which is not admitted, contributed to such damage or injury by suddenly and without warning driving his automobile to the left and in front of the bus of the defendant as the bus was properly attempting to pass the plaintiff's automobile."

The plaintiff testified, in part: "The road right in front of the filling station is practically level, least bit slanting before you get to the brink of the hill. From the filling station to the brink of the hill is 30 yards, I guess. From the filling station to the paved portion of the highway is about ten feet, I would judge, 8 to 10 feet. The road at that point, the dirt portion of the road, on the day on which the accident occurred, was good and level. It was a bright sunshiny day, the road was dry. From the filling station to the brink of the hill is 30 yards, I guess. There was nothing ahead of me that I saw, I think I saw everything except there was a chicken. No vehicle of any sort. From the filling station back toward my home the road is practically right straight for the first 400 or 500 yards. It is as level as the average hard surface road. The road is so constructed that one can see, unless there are some other automobiles, the filling station and the road plainly for 400 or 500 yards before you get to the filling station. After I left home the first 300 or 400 yards, until I got started off, I could not say about my speed, but from 400 or 500 yards from Loftin's Station on to this place I was running about 40 or 45 miles an hour. When I got in about between 40 or 50 yards of Mr. Loftin's filling station, I saw the chicken on the paved road, on the hard surface part; he was about 2 or 3 feet on the pavement. On my right side, straight in front of me. I took my feet from the accelerator and put my left foot to the brake pedal, did not put on any brake, got ready and begun taking a slight turn to about the middle of the road for the next 40 or 45 yards. My right-hand side of my car

from the right edge of the pavement when I got where the chicken was was about 5 or 6 feet. The width of the pavement at that point is 16 feet. At the point about where the chicken was I was practically in the center of the paved portion of the road. During my gradual turn to the left, covering, I say a distance of 40 to 60 yards, I did not hear any horn or any other warning of the approach of an automobile or truck or bus. I had not observed the approach of any other motor vehicle at that time. The first indication I had that there was any vehicle of any sort back of me was when I reached the point about where the chicken was, attempting to slightly turn to the middle of the road, thinking it would get on off, and I would avoid hitting him; I was nearly opposite the further corner of the filling station when something went off just like an explosion, a loud explosion, and I passed out and did not know anything else for some time. . . . I was turning to my left, figuring that the chicken would go on in the yard and I would avoid hitting him. I was going from the right over toward the left side. I got about where the chicken was, I say my right-hand wheel was five or six feet from the right edge of the pavement. My right wheels were six feet from the right edge of the pavement, because I turned into my left to keep from hitting the chicken. I slightly turned to the left. I had turned into the left when my car was hit by something. Near the center of the road. I had turned gradually to my left before I got to where the chicken was; I might have been slightly further. I was about at the center of the road."

At the conclusion of the plaintiff's evidence the action was dismissed as of nonsuit, from which judgment the plaintiff excepted, assigned error, and appealed to the Supreme Court.

Shaw & Jones for plaintiff.
Douglass & Douglass and John G. Dawson for defendant.

CLARKSON, J. The only question involved upon this appeal is whether the court below erred in sustaining the defendant's motion of nonsuit, at the close of plaintiff's evidence. C. S., 567. We are of the opinion that there was error in the court's granting the motion.

N. C. Code, 1935 (Michie), sec. 2621 (59), is as follows: "*Signals on starting, stopping, or turning:* (a) The driver of any vehicle upon a highway, before starting, stopping, or turning from a direct line, shall first see that such movement can be made in safety and if any pedestrian may be affected by such movement shall give a clearly audible signal by sounding the horn, and whenever the operation of any other vehicle may be affected by such movement shall give a signal as required in this section plainly visible to the driver of such other vehicle of the intention to

make such movement. (b) The signal herein required shall be given by means of the hand and arm in the manner herein specified, or by any approved mechanical or electrical signal device, except that when a vehicle is so constructed or loaded as to prevent the hand and arm signal from being visible both to the front and rear the signal shall be given by a device of a type which has been approved by the department. Whenever the signal is given the driver shall indicate his intention to start, stop, or turn by extending the hand and arm from and beyond the left side of the vehicle as hereinafter set forth. Left turn—hand and arm horizontal, forefinger pointing. Right turn—hand and arm pointing upward. Stop—hand and arm pointing downward. All signals to be given from left side of vehicles during last fifty feet traveled."

Conceding that plaintiff was guilty of contributory negligence in not observing the rule of the road, and was to some extent on the wrong side, yet there are other provisions applicable on the facts in this case. N. C. Code, 1935 (Michie), secs. 2621 (54), 2621 (55). Also sec. 2621 (57), which is as follows: "*Following too closely*—(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 the condition of the highway."

The defendant's bus was traveling behind the automobile of plaintiff. It was the duty of the driver to use due care in following and passing—such care as an ordinarily careful and prudent man would exercise under like and similar circumstances, to avoid the injury. This was a question for the jury—the last clear chance doctrine. Of course, if plaintiff's negligence was the proximate cause of the injury, he cannot recover. We think the complaint, construed liberally, would permit of this issue of last clear chance.

In Shirley's Leading Cases in the Common Law, 3d Ed., pp. 269-270, referring to *Davies v. Mann,* 10 M. & W., 546, is the following: "The owner of a donkey fettered its forefeet, and in that helpless condition turned it into a narrow lane. The animal had not disported itself there very long when a heavy wagon belonging to the defendant came rumbling along. It was going a great deal too fast, and was not being properly looked after by its driver; the consequence was that it caught the poor beast, which could not get out of the way, and killed it. The owner of the donkey now brought an action against the owner of the wagon, and, in spite of his own stupidity, was allowed to recover, on the ground that *if the driver of the wagon had been decently careful the consequences of the plaintiff's negligence would have been averted.* 'Although,' said Parke, B., 'the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driv-

ing over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road.' But *Davies v. Mann* engrafts an important qualification on the rule that the negligence of the plaintiff himself disentitles him to complain of the defendant's negligence. *If the defendant by being ordinarily careful would have averted the consequence of the plaintiff's negligence*—in other words, if the regrettable accident would never have happened, if the defendant had behaved as he ought to have done—then the plaintiff is entitled to recover in spite of his negligence. . . . The donkey case qualification may be put as correctly and more simply by saying that a plaintiff is not disentitled by his negligence unless such negligence was the *proximate cause* of the damage."

Brogden, J., in *Redmon v. R. R.*, 195 N. C., 764 (766-7), speaking to the subject, clearly sets forth the doctrine of last clear chance, as follows: "When must the trial judge submit an issue of last clear chance to the jury? The last clear chance doctrine is the duty imposed by the humanity of the law upon a party to exercise ordinary care in avoiding injury to another who has negligently placed himself in a situation of danger. The doctrine is said to have sprung from the celebrated case of *Davies v. Mann*, 10 M. & W., 546, decided in 1842, and is commonly known as the hobbled ass case. . . . The principle announced has been clearly stated by *Stacy, J.*, in *Haynes v. R. R.*, 182 N. C., 679, 110 S. E., 56, as follows: 'It has been held uniformly with us that, notwithstanding the plaintiff's contributory negligence, if the jury should find from the evidence that the defendant, by the exercise of ordinary and reasonable care, could have avoided the injury, and failed to do so, and had the last clear chance to so avoid it, then the defendant would be liable in damages.' To the same effect is the utterance of *Brown, J.*, in *Cullifer v. R. R.*, 168 N. C., 309, 84 S. E., 400: 'It is well settled in this State that where the plaintiff is guilty of contributory negligence the defendant must exercise ordinary care and diligence to avoid the consequences of the plaintiff's negligence, and if by exercising due care and diligence the defendant can discover the situation of the plaintiff in time to avoid injury, the defendant is liable if it fails to do so.' " *Gunter v. Wicker*, 85 N. C., 310; *Wheeler v. Gibbon*, 126 N. C., 811; *Ray v. R. R.*, 141 N. C., 84; *Casada v. Ford*, 189 N. C., 744; *Caudle v. R. R.*, 202 N. C., 404.

For the reasons given, the judgment must be

Reversed.

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

LEHMAN MOYE v. R. H. McLAWHORN, W. J. SMITH, ROY T. COX, NOAH WILLIAMS, AND S. I. DUDLEY.

(Filed 20 November, 1935.)

Public Officers C c—When failure to perform discretionary duty is not corrupt or malicious, public officer may not be held liable individually.

This action was instituted against the members of the board of commissioners of a county to recover for personal injuries alleged to have been suffered by plaintiff when assaulted by other prisoners in the jail in which plaintiff was confined. Plaintiff alleged that it was the custom of the prisoners to hold a "kangaroo court" to try new prisoners on fictitious charges, impose a so-called fine, and assault prisoners failing to pay the fine, that defendants knew of the custom and failed to make proper rules and regulations for the safety of prisoners as required by C. S., 1317. *Held:* The duty to make proper rules and regulations under C. S., 1317, imposed a discretionary duty on defendants exercisable only in their corporate capacity, and defendants are not liable as individuals unless they corruptly or with malice failed to make proper rules and regulations, and defendants' demurrer to the complaint should have been sustained in the absence of allegation that defendants' failure to act was corrupt or malicious.

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

APPEAL by defendants from *Barnhill, J.*, at January Term, 1935, of PITT. Reversed.

This is an action to recover of defendants damages for personal injuries suffered by the plaintiff, and resulting, as alleged in the complaint, from the negligent failure of the defendants as commissioners of Pitt County to perform their statutory duty to make rules and regulations for the protection of prisoners confined in the county jail of Pitt County from assaults by other prisoners confined in said jail, pursuant to spurious judgments of a fictitious court organized from time to time by said prisoners and known as a Kangaroo Court.

The action was heard on defendant's demurrer to the complaint. The demurrer was overruled, and defendants excepted and appealed to the Supreme Court.

P. R. Hines, Albion Dunn, and Thurman Kitchin for plaintiff.
J. B. James and Harding & Lee for defendants.

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

On or about 10 August, 1933, the plaintiff was committed to the county jail of Pitt County by a justice of the peace of said county to

await trial on a charge that plaintiff had violated the laws of this State prohibiting the manufacture or sale of intoxicating liquor. When the officer who had been directed by the justice of the peace to deliver the plaintiff to the keeper of said jail, arrived at the jail, with the plaintiff in his custody, the plaintiff requested the said officer not to confine him in a cell in said jail in which other prisoners were confined. This request was made by the plaintiff because he knew that it was the custom of said prisoners, when a new prisoner was admitted to said jail, to organize a so-called Kangaroo Court for the trial of the new prisoner on some fictitious charge, and upon his conviction and failure to pay the fine imposed on him by said court, to inflict upon him severe and cruel bodily punishment. Notwithstanding such request, and over his earnest protest, the plaintiff was confined in a cell in said jail in which a large number of prisoners were confined.

Soon after the plaintiff was confined in said cell with other prisoners, a so-called Kangaroo Court was organized by said prisoners, and the plaintiff was tried and convicted by said court on some fictitious charge. Plaintiff was unable to pay the so-called fine imposed upon him by said court, and thereupon, pursuant to the so-called judgment of said fictitious court, plaintiff was assaulted by prisoners in said cell, who inflicted upon him severe and cruel punishment. This punishment was so painful that plaintiff attempted to escape from said prisoners, who continued to assault him. In the struggle which ensued between the plaintiff and said prisoners, the plaintiff was seriously and permanently injured, and thereby damaged in the sum of $5,000.

The defendants are now and were at and before the time when the plaintiff was committed to the county jail of Pitt County commissioners of said county. It was their duty from time to time, as prescribed by statute (C. S., 1317), to order and establish such rules and regulations for the government and management of the county jail of Pitt County as would be conducive to the interests of the public and the security and comfort of the prisoners confined in said jail. They and each of them knew that prisoners confined in said jail had for many years prior to 10 August, 1933, from time to time, organized a fictitious court known as a Kangaroo Court; that said fictitious court was organized by said prisoners whenever a new prisoner was admitted to said jail for the trial of such new prisoner on some spurious charge; and that upon the conviction of such prisoner, and his failure to pay the fine imposed upon him by said court, the said prisoners would proceed to assault and beat said new prisoner, thereby inflicting upon him severe and cruel punishment. Notwithstanding their knowledge of the custom of prisoners confined in such jail, with respect to the organization of said Kangaroo Court, and the infliction of severe and cruel punishments upon new

prisoners in said jail, the defendants have failed to make any rules or regulations for the protection of new prisoners confined in said jail from assaults made upon them by other prisoners confined in said jail, pursuant to spurious judgments of said Kangaroo Court.

At the hearing of defendants' demurrer, the judge was of opinion that the facts stated in the complaint are sufficient to constitute a cause of action, and accordingly overruled the demurrer. On their appeal to this Court, the defendants contend that this was error. This contention must be sustained.

The defendants are not liable to the plaintiff on the facts alleged in the complaint in their corporate capacity, although in such capacity they have the power, conferred by statute, C. S., 1317, to make rules and regulations prohibiting the organization by prisoners confined in the county jail of Pitt County of a Kangaroo Court. In *Manuel v. The Board of Commissioners of Cumberland County,* 98 N. C., 9, 3 S. E., 826, it was held that the plaintiff could not maintain the action to recover of the defendant damages for injuries caused as alleged in the complaint by the failure of the defendant to exercise its statutory power to provide for the comfort and security of the plaintiff while he was confined as a prisoner in the county jail of Cumberland County. In the opinion in that case it is said by *Merrimon, J.:* "It may be that he can have a remedy against the commissioners personally, but as to this we are not called upon to express an opinion."

In *Templeton v. Beard,* 159 N. C., 63, 74 S. E., 735, a judgment sustaining a demurrer to the complaint was affirmed. It was said by *Hoke, J.,* who wrote the opinion for the Court, in which he summarized the facts alleged in the complaint: "On these facts alleged in the complaint and made the basis of plaintiff's demand, the county of Rowan is not liable on the principle declared and approved in the well-considered case of *White v. Commissioners,* 90 N. C., 437, and many others of like purport. Nor will the action lie against the members of the board of commissioners as individuals, because there is no averment that defendant acted or failed to act corruptly or of malice. The case presented is one involving the exercise of discretionary powers conferred upon the board for the public benefit, and it is very generally recognized in such case that in the absence of statutory provisions even ministerial officers acting on questions properly arising within their jurisdiction are not liable to suit by individuals without an averment of this kind."

In the instant case the defendants have no power, and therefore no duty, as individuals, to make rules and regulations prohibiting the organization by prisoners confined in the county jail of Pitt County of a Kangaroo Court. The power conferred by statute can be exercised by the defendants only in their corporate capacity, as the board of com-

missioners of Pitt County. It is a discretionary power. Neither the failure to exercise nor the exercise of the power by the defendants acting in their corporate capacity can impose liability on the defendants as individuals on the facts alleged in the complaint. There is no allegation in the complaint that the defendants failed to exercise the power corruptly or with malice.

It is held in this State that public officers in the performance of an official or governmental duty involving the exercise of judgment and discretion may not be held liable as individuals for breach of such duty unless they act corruptly or with malice. *Hipp v. Ferrall,* 173 N. C., 167, 91 S. E., 831.

The only question presented by this appeal is whether the defendants are liable to the plaintiffs as individuals on the facts alleged in the complaint. This question must be answered in the negative, and for that reason the judgment overruling the demurrer must be reversed. The demurrer should be sustained.

Reversed.

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

FANNIE K. GROOME v. CITY OF STATESVILLE.

(Filed 20 November, 1935.)

Appeal and Error L d—

Where a new trial is had upon the same pleadings and practically the same evidence, the decision of the Supreme Court on the former appeal that defendant's motion for judgment as of nonsuit should be denied is the law of the case in the subsequent proceedings in the trial court and upon a subsequent appeal.

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

APPEAL from *Warlick, J.,* at March Term, 1935, of IREDELL.

Stewart & Bobbitt, Lewis & Lewis, Self, Bagby, Aiken & Patrick, Jack Joyner, and W. R. Battley for plaintiff, appellee.

Land & Sowers and Long & Long for defendant, appellant.

PER CURIAM. This case was here on a former appeal and a new trial was awarded. See 207 N. C., 538.

Upon the former appeal, upon the same pleadings and practically the same evidence, the defendant urged its motion for a judgment of nonsuit,

which motion was denied when this Court sent the case back for a new trial. This denial of the motion became the law of that aspect of the case. "A decision of the Supreme Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal." *Power v. Yount, ante,* 182 (184), and cases there cited.

The error on the first trial upon which the new trial was awarded was corrected at the second trial, and we have examined the other assignments of error relative to the admission of evidence and of the charge and find no reversible error.

Affirmed.

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

CRAIG CAMPO, BY HIS NEXT FRIEND, MRS. ANNIE CAMPO, v. S. H. KRESS & COMPANY.

(Filed 20 November, 1935.)

Appeal and Error J a—

Defendant moved to set aside the verdict on the ground of newly discovered evidence, and for that the verdict was not supported by the evidence, and for that the damages awarded were excessive. *Held:* The discretionary rulings of the trial court denying the motions are not reviewable.

APPEAL by the defendant from *McElroy, J.,* at April Term, 1935, of MECKLENBURG. Affirmed.

Carswell & Ervin for plaintiff, appellee.
Cansler & Cansler and R. M. Gray, Jr., for defendant, appellant.

PER CURIAM. The jury by their verdict found that the defendant unlawfully arrested and wrongfully made an assault upon the plaintiff and assessed his damages at $2,250. From judgment in accord with the verdict the defendant appealed to the Supreme Court.

The defendant made three assignments of error, namely, (1) that the court erred in denying defendant's motion to set aside the verdict on the ground of newly discovered evidence, (2) that the court erred in denying defendant's motion to set aside the verdict on the ground that the same was contrary to and unsupported by the evidence, and (3) that the court erred in denying defendant's motion to set aside the verdict on the fourth

issue on the ground that the damages awarded were excessive. It appears from the record that the action of the court in denying the motions of the appellant was taken in each instance in the exercise of judicial discretion, and, for that reason, are not reviewable. *Carson v. Dellinger,* 90 N. C., 226; *Hoke v. Whisnant,* 174 N. C., 658; *Benton v. R. R.,* 122 N. C., 1007 (1009), and cases there cited.

Affirmed.

EFFIE DAILEY v. WASHINGTON NATIONAL INSURANCE COMPANY.

(Filed 20 November, 1935.)

1. Trial H b—

Where, upon trial by the court under agreement of the parties, the court fully and completely sets out the facts found by him and renders judgment thereon, an exception that the court did not state his findings of fact and conclusions of law separately as required by C. S., 569, cannot be sustained, since the judgment constitutes the court's conclusion of law on the facts found.

2. Insurance E b—

The provisions of a policy of life insurance limiting insurer's liability to a percentage of the face amount of the policy in case of disability or death resulting from rioting, fighting, resisting arrest, etc., are valid.

APPEAL by plaintiff from *Williams, J.,* at June Term, 1935, of WAKE.

Action upon an insurance policy on the life of Wilbert Carson.

The policy contained the following provisions:

"(8) Death and/or disability due partly to accidental injury and partly to disease or bodily infirmity or to blood poison shall be classed as an illness and covered only under the health insurance and natural death clause provisions hereof, the original or exciting cause thereof notwithstanding."

"(10) In the event the insured, while this policy is in force, suffers death, disability, or other loss due directly or indirectly, wholly or in part, to any of the following: Evading arrest; injuries intentionally inflicted upon him by any person other than himself for any reason whatsoever, whether or not caused by an act of the insured; rioting; fighting; or strikes, whether or not the insured is engaged in same; then in all such cases the liability of the company shall be limited to 10 per cent of the amount otherwise payable under the provisions of this policy."

A jury trial was waived and it was agreed that the judge should hear the evidence, find the facts, and render judgment thereon. From judgment awarding plaintiff less than her claim, she appealed.

D. Staton Inscoe for plaintiff.
A. W. Crawley and W. H. Yarborough, Jr., for defendant.

PER CURIAM. Plaintiff's appeal presents two questions:

(1) Did the judge's decision contain a statement of facts found and the conclusions of law separately, as required by C. S., 569?

(2) Are the provisions in the policy limiting defendant's liability valid?

Both of these questions must be answered against the plaintiff. In his judgment Judge Williams set out the facts which he found, fully and in detail, and rendered judgment thereon constituting his conclusion of law. *Eley v. R. R.*, 165 N. C., 78. Provisions in policies limiting liability have been upheld in *Epps v. Ins. Co.*, 201 N. C., 695, and in *Reinhardt v. Ins. Co.*, 201 N. C., 785, and cases cited.

The judgment is
Affirmed.

ANNIE W. MASSEY v. MILTON P. MASSEY.

(Filed 20 November, 1935.)

Divorce E a—

Where, in a wife's suit to set aside a deed of separation for fraud and for divorce *a mensa*, the trial court finds that the allegations of the complaint are true and that the wife is without means to prosecute the suit and is without means of subsistence, the findings warrant the granting of alimony *pendente lite.*

APPEAL by defendant from an order of *Williams, J.*, making certain allowances to the plaintiff *pendente lite.*

The plaintiff brought her action in the Superior Court of Franklin County to set aside for fraud a separation agreement entered into between herself and her husband, the defendant, and for divorce *a mensa.* Pending the action, she moved for an allowance to herself and for counsel fees, alleging inability to support herself.

Defendant denied the fraud, set up the separation agreement and payments to the plaintiff under the terms thereof, and resisted the motion.

Numerous affidavits were filed on both sides. After considering the pleadings and the affidavits, the court below signed the order making allowances to plaintiff and her counsel, from which order defendant appealed.

Charles P. Green and Yarborough & Yarborough for plaintiff.
Albert Doub and Thomas W. Ruffin for defendant.

PER CURIAM. The court below found that the facts set forth in the complaint were true, that the plaintiff had not sufficient means whereon to subsist during the prosecution of the suit and to defray the necessary and proper expenses thereof, and thereupon made the order from which defendant appealed.

These findings of fact warrant the making of an allowance, and the amount does not appear unreasonable or excessive.

Affirmed.

LETITIA B. RAMSEY v. FEDERAL LIFE INSURANCE COMPANY.

(Filed 20 March, 1935.)

APPEAL from *Warlick, J.*, at October Term, 1934, of YANCEY. Affirmed.

This was an action brought by the plaintiff on a policy of insurance containing a provision to the effect that in case of total and permanent disability the defendant would pay to the insured one per centum of the face amount of said policy, $1,000, each month during the continuance of her disability, *i. e.*, $10.00 per month. The plaintiff alleges that she was totally and permanently disabled from 27 January, 1932, until 27 August, 1934, and that she was therefore entitled to recover $310.00, plus $22.05 interest, or a total of $332.05.

The court submitted the following issues:

"1. From 27 January, 1932, until 27 August, 1934, has the plaintiff been totally and permanently disabled, within the meaning of the policy sued on and introduced in evidence as plaintiff's Exhibit 1, and by reason of said total and permanent disability has plaintiff necessarily been prevented from engaging in any occupation whatsoever for remuneration or profit?

"2. What sum, if anything, is plaintiff entitled to recover?"

The jury answered the first issue "Yes," and the second, "$310.00, and interest." Whereupon, the court signed judgment for the sum of $332.05, from which the defendant appealed to the Supreme Court, assigning errors.

Chas. Hutchins and Watson & Fouts for plaintiff, appellee.
Parker, Bernard & DuBose for defendant, appellant.

PER CURIAM. Since the charge of the court is not contained in the record, it is presumed to be free from error. The assignments of error based upon the court's refusal to grant the defendant's motion to dismiss the action as of nonsuit cannot be sustained, since the evidence was ample to support the verdict.

The evidence to the effect that the plaintiff had undergone an operation in the year 1931, prior to the disability alleged in the complaint which the defendant makes the basis of certain exceptive assignments of error, was clearly competent for the purposes for which it was admitted, namely, to corroborate the witnesses who had testified that this plaintiff was sick, and to aid the jury in determining whether the plaintiff was totally and permanently disabled at the later time. The assignments of error based upon the ruling of the court that the witness I. N. McLean was a medical expert and permitting him to give an opinion as to the physical condition of the plaintiff are untenable, as the finding of the court that the witness was an expert, since it was based upon sufficient evidence, is conclusive.

This case presents no novel proposition of law and no good purpose can be served by further or more detailed discussion of the assignments of error.

Affirmed.

H. O. PARSONS AND HIS WIFE, A. M. PARSONS, v. C. C. BESHEARS ET AL.

(Filed 20 March, 1935.)

APPEAL by plaintiffs from *Oglesby, J.*, at October Term, 1934, of WILKES. Affirmed.

This is an action to recover damages for a trespass by the defendants upon land owned by the plaintiffs. In their answer to the complaint, the defendants denied the allegation that the plaintiffs are the owners of the land described in the complaint.

The action was begun on 9 April, 1927. The issues raised by the pleadings and involving the title to the land were tried at October Term, 1930, of the Superior Court of Wilkes County and answered in accordance with the contentions of the plaintiffs. In the judgment on the verdict it was ordered that the action be continued for the trial of the issues involving damages resulting from the trespass by the defendants, or any one of them, as alleged in the complaint.

At the trial of the issues at October Term, 1934, as to damages, at the close of the evidence, the plaintiffs submitted to a judgment of nonsuit as to the defendants other than C. C. Beshears, and the motion of

said defendant for a judgment of involuntary nonsuit as to him was allowed.

From judgment dismissing the action as to defendant C. C. Beshears, plaintiffs appealed to the Supreme Court.

Trivette & Holshouser and F. J. McDuffie for plaintiffs.
Chas. G. Gilreath for defendant.

PER CURIAM. We find no evidence in the record on this appeal tending to show a trespass on the lands of the plaintiffs by the defendant C. C. Beshears, as alleged in the complaint. For that reason, the judgment dismissing the action as to said defendant is

Affirmed.

M. F. WESTBROOK v. THOMAS WILLIAMS ET AL.

(Filed 20 March, 1935.)

APPEAL by plaintiff from *Barnhill, J.*, at September Term, 1934, of JOHNSTON. Affirmed.

This is an action to recover possession of a black mare mule, about ten years old, and for other relief.

It is alleged in the complaint that the plaintiff is the owner of the mule described in the complaint and that said mule is now in the wrongful and unlawful possession of the defendant Henry Brady. This allegation is denied in the answer.

At the close of the evidence for the plaintiff, on motion of the defendants, the action was dismissed as to the defendant Henry Brady by judgment as of nonsuit. Plaintiff appealed to the Supreme Court.

L. E. Watson, Jr., for plaintiff.
Leon G. Stevens for defendants.

PER CURIAM. There is no evidence appearing in the record in this appeal tending to show that the mule described in the complaint is now or was at the commencement of this action in the possession of the defendant Henry Brady, as alleged in the complaint. For that reason, the plaintiff is not entitled to recover in this action of the defendant Henry Brady.

There is no error in the judgment dismissing the action as to the defendant Henry Brady. The judgment is

Affirmed.

CHARLES L. GARDNER v. BLACK MOUNTAIN RAILWAY COMPANY.

(Filed 20 March, 1935.)

APPEAL by plaintiff from *Warlick, J.*, at October Term, 1934, of YANCEY.

Civil action to recover damages for an alleged negligent injury.

Plaintiff was employed as hostler and was engaged in removing plug, preparatory to cleaning engine or boiler on 17 February, 1933, when wrench, two and one-half feet long, fell upon his leg and injured him. "The day I was hurt my boy went under the engine with me and held up the wrench until I loosened the plug. I washed the mud out of the boiler and put the plug back in. The boy was outside. I could have had the boy help me but didn't think I needed him. I had put the wrench off and on many a time and thought I could do it again. The only trouble was the plug was too large so that I had to drive the wrench on the plug to get it on. It slipped off and pulled out because I didn't hammer it enough. It had slipped off before, but not when I would drive it tight enough."

Judgment of nonsuit entered at the close of plaintiff's evidence, from which plaintiff appeals, assigning error.

W. K. McLean and Huskins & Wilson for plaintiff.
Pless & Sample, Charles Hutchins, and Murray Allen for defendant.

PER CURIAM. Affirmed on authority of *Taylor v. R. R.*, 203 N. C., 218, 165 S. E., 357; *Bunn v. R. R.*, 169 N. C., 648, 86 S. E., 503; *Bradley v. Coal Co.*, 169 N. C., 255, 85 S. E., 388.

Affirmed.

HERMAN DEAN v. A. A. DUVALL.

(Filed 20 March, 1935.)

CIVIL ACTION, before *Hill, Special Judge*, at August Term, 1934, of MACON.

The plaintiff instituted a summary proceeding in ejectment against the defendant before a justice of the peace. The defendant filed an answer denying that he was a tenant of plaintiff, or that the plaintiff was the owner of the land, and also alleged that he was the owner of said

land. The magistrate dismissed the proceeding and there was an appeal to the Superior Court.

Plaintiff testified that he rented the property to the defendant for the year 1932, and that his term expired on 31 December of that year, and that the defendant held over, etc. Plaintiff further testified that the land was the home place of the defendant.

On cross-examination counsel for defendant proposed to ask the plaintiff if he did not have a mortgage on the defendant's home. Upon objection the question was eliminated by the trial judge. The witness would have answered that he had a deed of trust on the property given in 1928. The answer was likewise stricken out. In the absence of a jury, plaintiff testified that he had a deed of trust upon the home place of defendant, which is the land in controversy, and that same was foreclosed and purchased by him, and that he had thereafter rented to the defendant.

Upon the return of the jury the foregoing testimony was offered in evidence, but upon objection by the plaintiff was excluded.

The defendant testified that the land in controversy was his home place, where he had always lived, and that he did not rent the place from the defendant.

The foregoing was the substance of all the testimony offered at the trial by both parties.

The following issues were submitted to the jury:

1. "Did the plaintiff lease or rent to the defendant for the year 1932 the lands described in the plaintiff's affidavit?"

2. "Is the plaintiff the owner and entitled to the possession of said lands?"

3. "What amount, if any, is the plaintiff entitled to recover of the defendant?"

The jury answered the first issue "Yes," the third issue "$12.50," and omitted to answer the second issue.

From judgment for possession against the defendant he appealed.

W. L. McCoy for plaintiff.
Geo. B. Patton and R. D. Sisk for defendant.

PER CURIAM. The defendant contends that the title to the land was in controversy, and that therefore a justice of the peace did not have jurisdiction of the action.

The pertinent statutes are C. S., 1476, 1477, and 2365.

In proceedings of summary ejectment the title to land is not raised or put in controversy by mere allegation that such controversy exists. *McDonald v. Ingram,* 124 N. C., 272, 32 S. E., 677; *Perry v. Perry,* 190

N. C., 125, 129 S. E., 147; *Hauser v. Morrison,* 146 N. C., 248, 59 S. E., 693; *McLaurin v. McIntyre,* 167 N. C., 350, 83 S. E., 627; North Carolina Practice & Procedure, p. 55. See *Ins. Co. v. Totten,* 203 N. C., 431, 166 S. E., 316.

The defendant did not allege facts creating a controversy with respect to the title of the property, but it seems that he attempted to offer evidence that he had given a mortgage or deed of trust on the property, and that the relationship of mortgagor and mortgagee existed. All such evidence, however, was stricken out. The jury did not answer the issue as to whether the plaintiff was the owner of the land or not, and the record is so meager that we are unable to determine the rights of the parties.

New trial.

HELEN MAJETTE v. GURNEY P. HOOD, COMMISSIONER OF BANKS, EX REL. THE PEOPLE'S BANK, INC., AND E. L. COX, JR., LIQUIDATING AGENT OF THE PEOPLE'S BANK, INC.

(Filed 20 March, 1935.)

APPEAL by defendants from *Cowper, Special Judge,* at November, 1934, Term of HERTFORD. No error.

The following issues (agreed to between the litigants) were submitted to the jury and their answers thereto are as follows: "(1) Has the plaintiff, by her acts and conduct, ratified the acts of J. B. Majette in delivering the note and deed of trust of Floyd Bridgers to the People's Bank as security for his loan from said bank? A. 'No.' (2) Is the plaintiff Helen Majette estopped by her acts and conduct to demand possession of the note and deed of trust to Floyd Bridgers from the defendants? A. 'No.' (3) Is plaintiff's cause of action for the recovery of the Floyd Bridgers note and deed of trust barred by the three years statute of limitations? A. 'No.' (4) Is the plaintiff Helen Majette the owner of and entitled to the immediate possession of the note and deed of trust of Floyd Bridgers? A. 'Yes' (by the court by consent). (5) Are the defendants the rightful holders of the note and deed of trust of Floyd Bridgers as security for the loan of J. B. Majette? A. 'No' (by court by consent)."

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

W. D. Boone for plaintiff.
Alvin J. Eley for defendants.

PER CURIAM. At the close of plaintiff's evidence and at the close of all the evidence the defendants 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 see no error.

"Defendants moved for judgment of nonsuit in the court below on the ground that from all the evidence plaintiff's cause of action is barred by the three years statute of limitations. Motion denied; defendants excepted and assigned error.

"Defendants moved for directed verdict on the grounds that the plaintiff is estopped by her acts and conduct to demand the possession of the note and deed of trust of Floyd Bridgers from the defendants. Motion denied. Defendants excepted and assigned error."

Defendants in apt time requested the court to charge the jury as follows: "Gentlemen of the jury, if you believe all the evidence, you will answer the second issue 'Yes.' The court declines to so charge. Defendants excepted and assigned error. Defendants further requested the court to charge: Gentlemen of the jury, if you believe all the evidence, you will answer the third issue 'Yes.' The court declines to so charge. Defendants excepted and assigned error. Defendants further requested the court to charge: 'I charge you that if the note of Floyd Bridgers was delivered to the People's Bank as security to the loan of J. B. Majette prior to the year 1922, and that the plaintiff Helen Majette found out that the said bank held the note of Floyd Bridgers as security to the loan of J. B. Majette during the year 1922, the statute of limitations would begin to run from the time that she found out or knew of the fact that the note was so held by the bank and plaintiff's cause of action would be barred in three years from said time.' The court declines to so charge. Defendants excepted and assigned error."

This whole matter, in reference to the above exceptions and assignments of error on conflicting testimony, was left to the jury to determine. The only exception and assignment of error as to the charge of the court below is as follows: "You will remember that the burden of proof upon this issue is upon the plaintiff, Miss Helen Majette, to satisfy you from the evidence and by its greater weight that she did institute the action within three years from the time the alleged cause of action accrued. Applying the principles of law which the court has just laid down, and addressing myself to the third issue, the court instructs the jury that unless the jury shall find from the evidence and by its greater weight, the burden being upon the plaintiff, that the plaintiff instituted or commenced her action within three years of such time as the jury shall find that the position of the plaintiff and defendants became adverse, as the court has just defined and explained the word 'adverse,' as it applies to this case, then it would be the duty of the jury to answer

the third issue 'Yes,' but if the jury shall so find by the greater weight of the evidence, the burden being upon the plaintiff, it will be the duty of the jury to answer the third issue 'No.' "

We think, under the facts in this case, the question of the statute of limitations was properly left to the jury. In *Garland v. Arrowood,* 172 N. C., 591 (594), it is said: "The plea of the statute of limitations generally involves a mixed question of law and fact, and when the facts are not admitted they must be found by a jury, unless by consent they are found by the court. *Oldham v. Rieger,* 145 N. C., 259."

The deed of trust to Barnes, trustee, in regard to recitals therein contained, was properly excluded. Plaintiff did not authorize and knew nothing of this at the time the deed of trust was executed. The matter was *res inter alios acta.*

The note in controversy, which belonged to plaintiff, was never endorsed by her, and when the bank took it, as collateral for her brother's debt to the bank, there was no endorsement on it.

We do not think it necessary to set forth the evidence. From a careful review of the case, none of the exceptions and assignments of error can be sustained. The issues were agreed upon between the litigants and the charge of the court below applied the law applicable to the facts with such clarity and correctness that no exception to it was taken, except in regard to the statute of limitations. From a careful review of the case on the record we find

No error.

STATE OF NORTH CAROLINA ON RELATION OF MANSON McCLEESE AND PAUL McCLEESE, AND MANSON McCLEESE AND PAUL McCLEESE, v. MRS. BEATRICE McCLEESE AND THE UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MD.

(Filed 10 April, 1935.)

APPEAL by the National Surety Corporation from *Cranmer, J.,* at Fall Term, 1934, of PAMLICO. Affirmed.

This is an action brought by plaintiffs to recover of defendants Beatrice McCleese, guardian of Manson and Paul McCleese, and her surety, United States Fidelity and Guaranty Company of Baltimore, Md., certain sums of money, for breach of duty in improperly investing and in failing to account and settle the estate and pay the amount due Manson and Paul McCleese, they having reached the age of twenty-one.

Upon motion before Judge F. A. Daniels, the following order was made: "It is therefore ordered and adjudged that the said Harry N. Levey, receiver of the National Surety Company, and the National

Surety Corporation be and they are hereby made parties defendant, and the clerk of the Superior Court of this county is authorized and directed to have summons issued in this cause, to said defendants, and each of them."

There was no exception to this order, and Harry N. Levey, ancillary receiver of National Surety Company, and the National Surety Corporation were duly made parties. (1) The National Surety Corporation demurred to the complaint. (2) Harry N. Levey, ancillary receiver, through his counsel, Kenneth M. Brim, entered a special appearance and moved to dismiss the action.

The judgment of the court below is as follows: "This cause coming on to be heard upon the special appearance, and motion to dismiss filed by the receiver, Harry N. Levey, receiver of the National Surety Company, and motion to dismiss being overruled by the court, and then coming on to be heard upon the demurrer of Harry N. Levey, receiver of the National Surety Company.

"And the court being of the opinion that the demurrers should both be overruled: It is therefore ordered and adjudged that the demurrers of Harry N. Levey, receiver of the National Surety Company, and the demurrer of National Surety Corporation be and they are hereby overruled, and the defendants Harry N. Levey, receiver of the National Surety Company, and the National Surety Corporation be and they are hereby allowed thirty days within which to file answer.

"It is further ordered that the plaintiff be allowed thirty days to amend complaint filed in this action and make such allegations against the said Harry N. Levey, receiver of the National Surety Company, and the National Surety Corporation, as they may be advised. E. H. Cranmer, Judge presiding."

The National Surety Corporation assigns as error: "(1) The order overruling the demurrer. (2) The order allowing the plaintiffs to file amendment to their complaint."

Harry N. Levey, ancillary receiver in North Carolina for the National Surety Company, files assignments of error as follows: "(1) To the refusal of the court to dismiss and abate the action. (2) To the order declining to grant the demurrer. (3) To the order allowing the plaintiff to amend the complaint."

An appeal was duly made by the parties to the Supreme Court.

S. Brown Shepherd for National Surety Corporation.
Dunn & Dunn for United States Fidelity and Guaranty Company.

PER CURIAM. The National Surety Company and Harry N. Levey, ancillary receiver, filed a motion that they desired to abandon their

appeal to the Supreme Court, and moved that they be allowed to withdraw their appeal, which has been allowed by this Court. The demurrer of the National Surety Corporation is alone to be considered on this appeal. The defendant National Surety Corporation contends it is not a necessary party to the action. This contention cannot be sustained. It was made a party and took no exception to the order of the judge at the time. Taking the pleadings as a whole, and all reasonable inferences to be drawn therefrom, we do not think that the demurrer of the National Surety Corporation can be sustained. The matter goes back for a hearing on the merits. Therefore, we see no reason to go into a discussion of the *pros* and *cons* of the matter. Allowing the plaintiffs to amend the complaint was in the discretion of the court below. The judgment of the court below is

Affirmed.

CORAL GABLES, INC., v. LAU RHEA WARD.

(Filed 10 April, 1935.)

APPEAL by plaintiff from *Oglesby, J.*, at June Term, 1934, of BURKE.

Civil action, *ex contractu,* tried upon the following issues:

"1. Did Coral Gables Corporation and the defendant Lau Rhea Ward, on 16 September, 1925, enter into a written contract whereby the said Coral Gables Corporation agreed to convey to the defendant Lau Rhea Ward certain land in Coral Gables, Florida, by good and sufficient warranty deed, free of all encumbrances other than such as may have been placed by the defendant Lau Rhea Ward, and whereby the defendant Lau Rhea Ward executed and delivered to the said Coral Gables Corporation, as the purchase price of said lands, her promissory note under seal in words and figures set forth in the complaint? Answer: 'Yes.'

"2. Was the said note, together with said land contract, assigned to the Coral Gables, Inc., for value prior to the institution of this action? Answer: 'Yes.'

"3. Was the defendant Lau Rhea Ward induced to enter into said contract for the purchase of said land and to execute and deliver said note to Coral Gables Corporation by the fraud of said Coral Gables Corporation and its agents, as alleged in the answer? Answer: 'Yes.'

"4. If so, is the right of the defendant Lau Rhea Ward to assert such fraud as a defense to said note and land contract barred by the statute

of limitations prescribed by sec. 441 of the Consolidated Statutes, as alleged in the plaintiff's reply? Answer: 'No.'

"5. Is the plaintiff Coral Gables, Inc., ready, able, and willing to convey to the defendant Lau Rhea Ward the land for which said note was given by good and sufficient deed, free of all encumbrances other than such as may have been placed thereon by the defendant Lau Rhea Ward? Answer: 'No.'"

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

Isaac T. Avery and J. Bennett Riddle, Jr., for plaintiff.
O. Lee Horton, S. J. Ervin, and S. J. Ervin, Jr., for defendant.

PER CURIAM. On the hearing the controversy narrowed itself principally to issues of fact, which the jury has determined in favor of the defendant. The numerous exceptions noted during the trial have been examined with care without discovering any reversible error or reason to disturb the result. Hence, the verdict and judgment will be upheld.

No error.

W. E. FERGUSON v. J. M. BALLENGER AND WADE BALLENGER, TRADING AS BALLENGER BROTHERS, AND BALLENGER BROTHERS COAL COMPANY, A CORPORATION.

(Filed 1 May, 1935.)

APPEAL by defendants from *Sink, J.,* and a jury, at October Term, 1934, of MECKLENBURG. No error.

This is an action brought by plaintiff: (1) To recover of defendants J. M. Ballenger and Wade Ballenger, trading as Ballenger Brothers, the sum of $480.00, and interest from 24 June, 1929, due by lease contract. (2) That Ballenger Brothers Coal Company, a corporation, was organized fraudulently to defeat plaintiff's claim, and took over the assets of Ballenger Brothers, and "that the plaintiff be entitled to follow the said property into the corporation and have judgment against the corporation for the amount of his claim." The defendants denied the material allegations of the plaintiff and set up a different contract from that alleged by plaintiff.

The issues submitted to the jury and their answers thereto were as follows: "(1) Is the paper-writing dated 24 June, 1927, designated as

plaintiff's Exhibit No. 1, between Seaboard Air Line Railway Company, a corporation of Virginia, designated therein as lessor, and W. E. Ferguson, individually, J. M. Ballenger and Wade Ballenger, partners, doing business as Ballenger Brothers, in fact a lease to W. E. Ferguson, individually, and J. M. Ballenger and Wade Ballenger, doing business as Ballenger Brothers, as sub-lessees of W. E. Ferguson, individually, as alleged in the complaint? A. 'Yes.' (2) Did Ballenger Brothers, Incorporated, assume the assets and liabilities of Ballenger Brothers, a partnership, without having retained in the firm of Ballenger Brothers, a partnership, sufficient assets to pay its debts, as alleged in the complaint? A. 'Yes.' (3) What amount, if any, is the plaintiff entitled to recover of Ballenger Brothers, a partnership? A. '$480.00, with interest from 24 June, 1929.' (4) What amount, if any, is the plaintiff entitled to recover of Ballenger Brothers, Incorporated? A. '$480.00, with interest from 24 June, 1929.' "

Judgment was rendered for plaintiff by the court below on the verdict. The defendants made numerous exceptions and assignments of error, and appealed to the Supreme Court.

G. T. Carswell and Joe W. Ervin for plaintiff.
D. E. Henderson for defendants.

PER CURIAM. We see no novel or new proposition of law involved in this appeal. The evidence was to the effect that Ballenger Brothers were tenants of plaintiff. They held over after the year expired and became tenants from year to year. They remained in possession and became liable for the year's rent. The principle, well settled under the facts and circumstances of this case, is that a tenant cannot dispute his landlord's title. The defendants Ballenger Brothers, in the execution of the lease, did not allege fraud or mistake and parol evidence was incompetent to contradict, add to, modify, or explain the written instrument.

The evidence fully sustains the verdict on the second issue that defendants Ballenger Brothers Coal Company, a corporation, were liable *ex maleficio.* The matters involved in the controversy were mainly facts for the jury's determination. They have found for the plaintiff. Upon an examination of the exceptions and assignments of error made by defendants, we can find no prejudicial or reversible error. In the judgment of the court below, we find

No error.

A. S. NEWCOMB v. R. F. POTTS.

(Filed 22 May, 1935.)

APPEAL by defendant from *Clement, J.*, at December Term, 1934, of MOORE. Affirmed.

H. F. Seawell, Jr., for plaintiff, appellee.
J. Vance Rowe and R. L. McMillan for defendant, appellant.

PER CURIAM. This was a civil action *ex contractu,* wherein judgment for the plaintiff was entered upon the following issue and answer, to wit: "In what sum, if any, is the defendant indebted to the plaintiff by reason of the things and matters alleged in the complaint? Answer: '$500.00.' "

The plaintiff's evidence tended to establish an implied contract between him and the defendant to "split fifty-fifty" the commissions on the sale and lease of two certain pieces and parcels of real estate. The evidence of the defendant tended to negative the existence of any such contract. Since in our opinion the evidence was sufficient to carry the case to the jury, and since we find no reversible error either in the court's ruling upon the evidence or in its charge to the jury, the judgment below must be

Affirmed.

AMBER B. NANCE v. HUGH N. PACE.

(Filed 22 May, 1935.)

APPEAL by defendant from *Grady, J.*, at December Term, 1934, of NEW HANOVER. No error.

This is an action to recover of the defendant the sum of $3,000, the proceeds of a policy of insurance on the life of plaintiff's deceased husband, which the defendant had collected for the plaintiff.

After the action was begun, the defendant paid to the plaintiff the sum of $2,000, retaining the sum of $1,000, which he contended plaintiff had agreed to pay him for his services in collecting from the insurance company the amount due under the policy.

The issues submitted to the jury were answered as follows:

"1. Was there an agreement between the plaintiff and the defendant that the defendant would handle the collection of the $3,000 insurance policy without charge, as alleged in the complaint? Answer: 'Yes.'

"2. If not, what amount, if any, is the defendant entitled to retain out of the recovery in question for services performed by him in behalf of the plaintiff? Answer: ....

"3. In what amount, if any, is the defendant indebted to the plaintiff on account of moneys collected by him as her attorney? Answer: '$1,000, with interest from 9 June, 1934.' "

From judgment that plaintiff recover of the defendant the sum of $1,000, with interest from 9 June, 1934, and the costs of the action, the defendant appealed to the Supreme Court.

R. M. Kermon and Kellum & Humphrey for plaintiff.
Herbert McClammey and W. F. Jones for defendant.

PER CURIAM. We find no error in the trial of this action.

The evidence introduced by the plaintiff was sufficient to support an affirmative answer to the first issue. The answer to this issue is determinative of the action. Having agreed to handle the collection of the amount due plaintiff under the policy of insurance without charge, the defendant is not entitled to recover any sum of the plaintiff for his services in handling the collection. The judgment is affirmed.

No error.

R. FRANK SEAY v. SENTINEL LIFE INSURANCE COMPANY.

(Filed 22 May, 1935.)

Appeal and Error J d—

Where the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed without becoming a precedent.

APPEAL by defendant from *McElroy, J.*, at February Term, 1935, of GUILFORD.

Civil action to recover agent's commissions on insurance premium renewals, "paid to and accepted by the (defendant) company, while this (agency) contract is in force . . . limit 9 years."

The defendant sought to terminate its agency contract with the plaintiff, prior to the expiration of the ninth renewal of some of the policies written by plaintiff. This suit is to recover commissions on such renewals up to the 9th on each policy.

Judgment of nonsuit was entered in the municipal court of the city of High Point, which was reversed on appeal to the Superior Court of Guilford County.

From the ruling of the Superior Court the defendant appeals, assigning errors.

Jones & Fisher for plaintiff.
Roberson, Haworth & Reese for defendant.

PER CURIAM. The Court being evenly divided in opinion, *Clarkson, J.*, not sitting, the judgment of the Superior Court is affirmed and stands, according to the uniform practice of appellate courts, as the decision in this case, without becoming a precedent. *Com. Co. v. Mfg. Co.,* 201 N. C., 823, 159 S. E., 411; *Raynor v. Ins. Co.,* 193 N. C., 385, 137 S. E., 137; *Jenkins v. Lbr. Co.,* 187 N. C., 864, 123 S. E., 82; *Miller v. Bank,* 176 N. C., 152, 96 S. E., 977; *Durham v. R. R.,* 113 N. C., 240, 18 S. E., 208.

Affirmed.

MARY CARTER LONG v. THE METROPOLITAN LIFE INSURANCE COMPANY.

(Filed 26 June, 1935.)

APPEAL by plaintiff from *Pless, J.*, at February Term, 1935, of ROCKINGHAM. Affirmed.

This is an action to recover on a certificate issued by the defendant to Clarence B. Carter, the deceased husband of the plaintiff, under the provisions of a group policy of insurance issued by the defendant to the Riverside and Dan River Cotton Mills, of Danville, Virginia, insuring its employees.

At the date of the issuance of the certificate, to wit: 18 August, 1927, Clarence B. Carter was an employee of the Riverside and Dan River Cotton Mills. He ceased to be an employee of said Cotton Mills on or about 23 May, 1930, and died on 6 March, 1933. The plaintiff is the beneficiary named in the certificate. She brought this action in the Superior Court of Rockingham County, North Carolina, on 21 March, 1934, and alleged in her complaint that under the provisions of the certificate the defendant is indebted to her in the sum of $800.00, with interest on said sum from 6 March, 1933.

In its answer the defendant alleged, among other things, that Clarence B. Carter, after he had ceased to be an employee of the Riverside and Dan River Cotton Mills, brought an action against the defendant in the corporation court of the city of Danville, Virginia, to recover on the certificate sued on in this action, and that a final judgment was rendered

in said action that the said Clarence B. Carter was not entitled to recover of the defendant on said certificate. The defendant alleged that the plaintiff in this action is estopped to recover of the defendant on said certificate by the judgment in the action brought by Clarence B. Carter against the defendant in the corporation court of the city of Danville.

At the trial of the action, on the facts found by the court from evidence offered by both the plaintiff and the defendant, it was adjudged that plaintiff is estopped by the judgment of the corporation court of the city of Danville from recovery on the certificate sued on in this action.

The action was dismissed, and plaintiff appealed to the Supreme Court.

P. T. Stiers for plaintiff.
Smith, Wharton & Hudgins for defendant.

PER CURIAM. There was no error in the trial of this action. The judgment dismissing the action is

Affirmed.

MARY J. MALPHURS, ADMINISTRATRIX, v. T. S. ELLINGTON ET AL.

(Filed 18 September, 1935.)

APPEAL by plaintiff from *Harding, J.*, at January Special Term, 1935, of MECKLENBURG.

Civil action to recover damages for death of plaintiff's intestate, alleged to have been caused by the neglect, default, or wrongful act of the defendant, when the cart in which plaintiff's intestate was riding was struck by an automobile owned by the defendant T. S. Ellington, and operated at the time by his son, John Ellington.

The jury returned the following verdict:

"1. Was the plaintiff's intestate killed by the negligence of the defendant, as alleged? A. 'Yes.'

"2. Did the plaintiff's intestate, by his own negligence, contribute to his death, as alleged in the answer? A. 'Yes.' "

Judgment on the verdict for defendants, from which plaintiff appeals, assigning errors.

J. D. McCall, G. T. Carswell, and Joe W. Ervin for plaintiff.
J. Laurence Jones and Plummer Stewart for defendants.

PER CURIAM. The jury's answer to the second issue bars recovery on the part of the plaintiff. *Rimmer v. R. R., ante,* 198; *Moore v. Iron Works,* 183 N. C., 438, 111 S. E., 776. The case on trial narrowed itself largely to controverted issues of fact. Both were found to be negligent. No reversible error has been made to appear. While some of the illustrations used by the judge in his charge seem a little inapposite, still they appear to be without material significance. They could hardly have affected the result. *S. v. Marshall, ante,* 127.

In the absence of a clearer showing, the verdict and judgment must be upheld. It is so ordered.

No error.

INEZ D. LEVI v. THE EQUITABLE LIFE ASSURANCE SOCIETY.

(Filed 18 September, 1935.)

APPEAL by defendant from *Pless, J.,* at December Term, 1934, of BUNCOMBE.

Civil action to recover on certificate of group insurance issued by defendant to plaintiff as an employee of the American Enka Corporation, and tried in the general county court upon the following issues:

"1. Did the plaintiff, while an employee of the American Enka Corporation, become totally and permanently disabled by disease so as thereby presumably to be continuously prevented for life from engaging in any occupation or performing any work for compensation of financial value? Answer: 'Yes.'

"2. Did the plaintiff submit due proof of total permanent disability to the defendant within one year from the alleged commencement thereof? Answer: 'Yes.'

"3. Is the plaintiff entitled to recover of the defendant under the terms of the master policy issued by the defendant to the American Enka Corporation, under which the individual certificate was issued to the plaintiff? Answer: 'Yes.'

"4. What amount, if any, is plaintiff entitled to recover of defendant? Answer: '$453.15.'"

Judgment on the verdict, from which defendant appealed to the Superior Court, assigning errors. These were overruled by the Superior Court sitting as an appellate court. From this latter judgment the defendant appeals.

Joseph W. Little and Joseph L. Auten for plaintiff.
Parker, Bernard & DuBose for defendant.

PER CURIAM. The verdict is supported by the evidence, and the record is free from reversible error. The conflict in the testimony of the witnesses relative to the alleged, and denied, total and permanent disability of plaintiff was a matter for the jury.

The case of *Thigpen v. Ins. Co.,* 204 N. C., 551, 168 S. E., 845, cited and relied upon by defendant, is not authority for the position taken.

No error has been made to appear in any of the rulings of the Superior Court.

Affirmed.

ADAM SONDEY ET AL. v. J. W. YATES ET AL.

(Filed 18 September, 1935.)

Appeal and Error J d—

Where the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgments of the lower court appealed from will be affirmed without becoming precedents.

APPEAL by plaintiffs from *Grady, J.,* at December Term, 1934, of NEW HANOVER.

Civil actions by depositors to recover of officers and directors of Home Savings Bank losses alleged to have been sustained by reason of deposits, wrongfully induced, and kept in insolvent bank, consolidated for purpose of trial, and heard upon demurrers and pleas in abatement.

From judgments sustaining the demurrers and upholding the pleas in abatement, the plaintiffs appeal, assigning errors.

Louis Goodman, W. F. Jones, James S. Manning, and Henry Averill for plaintiffs.

J. O. Carr for defendants Scott, Van Leuven, and Taylor.

Thomas W. Davis for defendants Davis and Scott.

Marsden Bellamy for defendants Van Leuven and Taylor.

George Rountree for defendant Yates.

Varser, McIntyre & Henry for defendants Moore, Bluethenthal, and Huggins.

Cyrus D. Hogue for defendants Futch and Parmele.

PER CURIAM. The Court being equally divided in opinion, *Stacy, C. J.,* not sitting, the judgments of the Superior Court are affirmed in accordance with the usual practice in such cases, and stand as the decisions in these cases without becoming precedents. *Smith v. Powell, post,* 837.

Affirmed.

JAMES LOVETT SMITH v. L. R. POWELL, JR., AND E. W. SMITH, RECEIVERS OF SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 18 September, 1935.)

Appeal and Error J d—

Where the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed without becoming a precedent.

APPEAL by defendants from *Frizzelle, J.*, at February Term, 1935, of COLUMBUS.

Civil action to recover damages for loss of plaintiff's right foot, it being alleged that the injury complained of was caused by the neglect or default of the defendants.

The usual issues of negligence, contributory negligence, last clear chance, and damages were submitted to the jury and answered in favor of the plaintiff. Defendants appeal, assigning errors.

Lyon & Lyon and R. H. Burns & Son for plaintiff.
E. M. Toon and John D. Bellamy & Sons for defendants.

PER CURIAM. The Court being evenly divided in opinion, *Clarkson, J.*, not sitting, the judgment of the Superior Court is affirmed in accordance with the usual practice of appellate courts, and stands as the decision in this case without becoming a precedent. *Durham v. Lloyd*, 200 N. C., 803, 157 S. E., 136; *Nebel v. Nebel*, 201 N. C., 840, 161 S. E., 223.

Affirmed.

MRS. MARY BEAM, WIDOW OF R. F. BEAM, DECEASED EMPLOYEE, v. NEWS PUBLISHING COMPANY, EMPLOYER, AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, CARRIER.

(Filed 18 September, 1935.)

Appeal and Error J d—

Where the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed without becoming a precedent.

APPEAL by defendants from *Clement, J.*, at March Term, 1935, of MECKLENBURG. Affirmed.

This is an action, brought by Mrs. Mary Beam, widow of R. F. Beam, to recover compensation from the defendants under the North Carolina Workmen's Compensation Act, Public Laws 1929, ch. 120, and amendments thereto, for the death of her husband, R. F. Beam, an employee of the News Publishing Company, who was killed at about 8:30 p.m. on 14 July, 1933, on the public highway while traveling in an automobile from Charlotte to Monroe.

The defendant denied liability, contending that Beam's death did not arise out of and in the course of his employment. The claim was heard by a member of the Commission, who filed an award, together with findings of fact and rulings of law to the effect that the fatal injury arose out of and in the course of the employment of the deceased, and allowed the widow compensation. Upon appeal to the Full Commission the award of the single member was affirmed, and upon appeal to the Superior Court of Mecklenburg County the award of the Full Commission was affirmed. The case comes to this Court by appeal from the judgment of the Superior Court.

Charles W. Bundy for plaintiff, appellee.
J. Laurence Jones for defendants, appellants.

PER CURIAM. The Court being evenly divided in opinion, *Justice Clarkson* not sitting, the judgment of the Superior Court is affirmed, and stands as a decision in this proceeding without becoming a precedent. *Trust Company v. Hood, Comr. of Banks,* 207 N. C., 862; *Nebel v. Nebel,* 201 N. C., 840, and cases there cited.

Affirmed.

T. L. STELLING v. WACHOVIA BANK AND TRUST COMPANY.

(Filed 9 October, 1935.)

1. Pleadings D e—

A demurrer challenges pleader's right to maintain position in any view, admitting the allegations of the complaint as correct for the purposes of demurrer.

2. Fraud A b—

Complaint *held* to allege misrepresentations amounting to fraud, and not mere promissory representations, and judgment sustaining demurrer of holder of notes with notice is reversed on authority of *Clark v. Laurel Park Estates,* 196 N. C., 624.

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

APPEAL by plaintiff from *Warlick, J.*, at April Civil Term, 1935, of BUNCOMBE. Reversed.

This is an action brought by plaintiff against the defendant to recover a certain sum on account of the wrongful conduct of defendant. The plaintiff alleges, in substance, that it was the policy of defendant by advertisement and otherwise to encourage saving by opening a saving department in its bank. That he was desirous of accumulating out of his weekly salary for a particular use $250.00, and from 1/30/34 to 5/12/34 he deposited $250.00 in the saving department. That while he was doing this the defendant wrongfully and deceitfully gave him no notice that it had any claim against him. When he went to draw the money out the defendant wrongfully and unlawfully refused to let him have the amount he had deposited in the saving department, claiming that plaintiff owed defendant the sum of $450.00, and interest, on notes made by plaintiff that it had purchased. That on 24 July, 1925, plaintiff entered into a contract with Wm. I. Phillips Company, a corporation, to purchase Lot 16, in Block 13, subdivision of "Royal Pines," at the price of $600.00, that he paid $150.00 cash and gave three notes for the balance—$150.00 each—payable 26 July, 1926, 1927, and 1928. A deed was made to him for the lot and a deed in trust back to secure the balance. That the notes came into the possession of the defendant with knowledge that the development known as "Royal Pines" was a fraudulent scheme. That defendant took the notes when past due and with notice that plaintiff denied liability on same on account of the fraud perpetrated on him by Wm. I. Phillips Company, the owner of "Royal Pines." That plaintiff was induced to give the notes upon the false and fraudulent representations of Wm. I. Phillips Company, and setting same forth in detail, and by a liberal construction of the complaint charging actionable fraud. That Wm. I. Phillips Company breached its contract with plaintiff. That plaintiff never took possession of the lot, but same was kept by Wm. I. Phillips Company, or its assignees, and that the whole transaction, on account of the fraud of Wm. I. Phillips Company, was invalid. That defendant knew plaintiff's contention that he owed nothing on said notes on account of the fraud. That defendant knew that the notes were claimed to be invalid by plaintiff when it acquired them, and is estopped to set up the notes against his thrift deposit in defendant bank, and prays for damage against defendant for its wrongful and unlawful conduct.

The defendant interposed the following demurrer: "That said complaint does not state facts sufficient to constitute a cause of action against this defendant: (a) For that it appears from said complaint that the defendant applied the plaintiff's deposit mentioned and described in the complaint to an indebtedness which plaintiff owed to the defendant

represented by certain promissory notes, and at the time said application was made and said credit given there was past due and unpaid on said notes a sum largely in excess of plaintiff's deposit, and that defendant had the legal right to so apply said deposit to the payment of said indebtedness, and plaintiff is not entitled to recover from defendant any part thereof. (b) For that it appears from said complaint that the plaintiff is estopped by his conduct from now claiming that the notes mentioned and described in said complaint are not valid and binding obligations against him."

The court below sustained the demurrer, and plaintiff excepted, assigned error, and appealed to the Supreme Court.

Frank Carter for plaintiff.
Alfred S. Barnard for defendant.

PER CURIAM. The demurrer challenges pleader's right to maintain position in any view, admitting the allegations of the complaint as correct for purpose of demurrer. The complaint is sixteen pages. In the statement of facts we have digested the complaint in part, but, taking it as a whole, we think it sets forth a cause of action. We think the representations of Wm. I. Phillips Company, a corporation, more than promissory. The "Royal Pines" type of real estate scheme, from the allegations of the complaint, seems to be similar to the Laurel Park Estates. The fraud of such a scheme and the law on every aspect is fully set forth in *Clark v. Laurel Park Estates,* 196 N. C., 624.

For the reasons given, the judgment below must be
Reversed.

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

MRS. ANNIE E. KUYKENDALL, ADMINISTRATRIX OF THE ESTATE OF RUFUS KUYKENDALL, DECEASED, v. SOUTHERN RAILWAY COMPANY AND O. E. WILSON.

(Filed 9 October, 1935.)

Railroads D b—

In this action to recover for the death of plaintiff's intestate, killed while attempting to cross defendant's tracks at an unobstructed grade crossing during the daytime, the evidence *is held* to disclose contributory negligence barring recovery as a matter of law on authority of *Rimmer v. R. R., ante,* 198.

APPEAL by plaintiff from *Sink, J.*, at January Term, 1935, of HENDERSON. Affirmed.

This is a civil action, brought by plaintiff administratrix against defendant, for actionable negligence in killing her intestate, Rufus Kuykendall. The defendant set up the plea of contributory negligence.

The judgment of the court below is as follows:

"This cause coming on to be heard before the undersigned judge presiding, and a jury, and being heard; at the close of plaintiff's evidence the defendant moved for judgment as of nonsuit. Upon hearing argument of counsel for plaintiff and defendant, the court is of the opinion that the motion should be allowed: It is therefore ordered and adjudged by the court that said action be and the same is hereby nonsuited and dismissed, and it is further adjudged that the plaintiff pay the costs of the action, to be taxed by the clerk. This 19 January, 1935. H. Hoyle Sink, Judge presiding."

The only exception and assignment of error by plaintiff is to the court below granting a judgment as of nonsuit.

Ewbank & Weeks and Charles French Toms, Sr., for plaintiff.
R. C. Kelly, Jones & Ward, and Martin & McCoy for defendant.

PER CURIAM. At the close of plaintiff's evidence the defendant made a motion in the court below for judgment as in case of nonsuit. C. S., 567. The court below sustained the motion, and in this we can see no error.

There was plenary evidence to the effect that it was a public crossing and "the engine was not blowing . . . the bell did not ring." This was negligence on the part of defendant, and, if this was the proximate cause of the injury, plaintiff could recover, but the defendant set up the plea of contributory negligence. On this aspect: Defendant's train was traveling from East Flat Rock to Hendersonville, practically in a northern direction. The plaintiff's intestate was in a one-horse wagon, traveling parallel to defendant's track on a county highway in the same direction. The crossing over the railroad track where plaintiff's intestate was killed on the main track, leads over to the mill village—Skyland Hosiery Mills. At this crossing on the west is a spur track and then the main track of defendant railroad. As plaintiff's intestate approached this spur track he had to drive from the county highway up an incline about ten feet high to the tracks. When he reached the top of the embankment and got near the railroad crossing, the road was level, and by looking he could see the defendant's train 240 steps. It was about 12 o'clock in the daytime and nothing to obstruct his view. He traveled on the level up to and over the spur track and then onto the main

track, where he was killed. This would make him guilty of contributory negligence, and would bar recovery. *Rimmer v. R. R., ante,* 198.

It may be that on account of the peculiar ascending road to the railroad crossing and the difficulty of seeing the train approach, if he had been caught on the spur track a different result would follow. We see no sufficient evidence of last clear chance to be submitted to a jury on account of the horse "prancing around on the railroad track on his hind legs."

For the reasons given, the judgment is

Affirmed.

MRS. MINNIE H. MASON, ADMINISTRATRIX OF J. W. MASON, DECEASED, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 9 October, 1935.)

APPEAL by plaintiff from *Sinclair, J.,* at April Term, 1935, of NASH. Affirmed.

This is an action to recover damages for the death of plaintiff's intestate, which she alleges was caused by the negligence of the defendant. In its answer the defendant denies the allegations of negligence in the complaint, and in further defense of plaintiff's recovery pleads the contributory negligence of her intestate.

At the close of all the evidence, on motion of the defendant, the action was dismissed by judgment as of nonsuit. Plaintiff appealed to the Supreme Court.

T. T. Thorne and J. W. Grissom for plaintiff.
Spruill & Spruill and Thos. W. Davis for defendant.

PER CURIAM. Conceding without deciding that the death of plaintiff's intestate was caused by the negligence of the defendant, as alleged in the complaint, we are of opinion that all the evidence shows that plaintiff's intestate by his failure to exercise due care for his own safety, under the circumstances confronting him at the time he was injured, contributed to the injuries which resulted in his death.

For this reason there is no error in the judgment dismissing the action.

On the authority of *Rimmer v. R. R., ante,* 198, and cases therein cited, the judgment is

Affirmed.

LESTER MARTIN, ADMINISTRATOR OF SALLIE MARTIN, DECEASED, V. SOUTHERN RAILWAY COMPANY ET AL.

(*Filed 9 October, 1935.*)

Appeal and Error J d—

Where the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed without becoming a precedent.

APPEAL by plaintiff from *Harding, J.*, at July Term, 1935, of McDOWELL. Affirmed.

This is an action to recover damages for the death of plaintiff's intestate, who was struck and killed by an engine owned and operated by defendant Southern Railway Company, while she was walking on defendant's track.

From judgment dismissing the action as of nonsuit at the close of all the evidence, plaintiff appealed to the Supreme Court, assigning error in the judgment.

Morgan & Storey for plaintiff.
R. C. Kelly, Winborne & Proctor, and Ervin & Ervin for defendant.

PER CURIAM. The Court being evenly divided in opinion, *Justice Brogden* not sitting, the judgment of the Superior Court is affirmed, as the disposition of this appeal, without becoming a precedent, in accordance with the practice of the Court. See *Trust Co. v. Hood,* 207 N. C., 862, 177 S. E., 16.

Affirmed.

BETTIE JOYNER, ADMINISTRATRIX OF WILLIAM LEE JOYNER, DECEASED, v. ST. PAUL FIRE AND MARINE INSURANCE COMPANY, TILGHMAN MOTORS, INC., J. W. HARDY, MALCOLM HARDY, AND B. O. TAYLOR.

(Filed 1 November, 1935.)

Appeal and Error J d—

Where the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed without becoming a precedent.

APPEAL from *Small, J.*, at August Term, 1935, of PITT.

The defendant St. Paul Fire and Marine Insurance Company demurred to the complaint upon the ground that said complaint failed to

allege facts sufficient to constitute a cause of action against it, the insurance company. The court overruled the demurrer, and to this order the demurrant excepted and appealed to the Supreme Court, assigning error.

Shaw & Jones for plaintiff, appellee.
J. M. Broughton for demurrant, appellant.

PER CURIAM. The Court being equally divided in opinion, *Brogden, J.*, not sitting, the order of the Superior Court is affirmed in accordance with the usual practice in such cases, and stands as a decision in this case without becoming a precedent. *Nebel v. Nebel,* 201 N. C., 840, and cases there cited.

Affirmed.

JANET SESSOMS v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 1 November, 1935.)

Appeal and Error J d—

Where the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed without becoming a precedent.

APPEAL by plaintiff from *Parker, J.*, at March Term, 1935, of SAMPSON.

Civil action to recover damages for an alleged negligent injury resulting from crossing collision when the automobile in which plaintiff was riding as a guest—returning from a dance at White Lake—was driven into a box car of defendant's freight train standing across the highway at Garland, N. C., at about 2:05 a.m. on the morning of 16 May, 1933.

The plaintiff invokes the doctrine announced in *Dickey v. R. R.,* 196 N. C., 726, 147 S. E., 15; *Dudley v. R. R.,* 180 N. C., 34, 103 S. E., 905; *Blum v. R. R.,* 187 N. C., 640, 122 S. E., 562; *Leathers v. Tobacco Co.,* 144 N. C., 330, 57 S. E., 11; *Duffy v. R. R., ib.,* 26, 56 S. E., 557; *Alexander v. R. R.,* 112 N. C., 720, 16 S. E., 896.

The defendant relies upon the decisions in *Baker v. R. R.,* 205 N. C., 329, 171 S. E., 342; *Batchelor v. R. R.,* 196 N. C., 84, 144 S. E., 542; *Eller v. R. R.,* 200 N. C., 527, 157 S. E., 800; *Goldstein v. R. R.,* 203 N. C., 166, 165 S. E., 337; *Herman v. R. R.,* 197 N. C., 718, 150 S. E., 361; *Weston v. Ry. Co.,* 194 N. C., 210, 139 S. E., 237.

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

Butler & Butler for plaintiff.
Graham & Grady and Carr, Poisson & James for defendant.

PER CURIAM. The Court being equally divided in opinion, *Brogden, J.,* not sitting, the judgment of the Superior Court is affirmed in accordance with the usual practice in such cases, and stands as the decision in this case without becoming a precedent. *Smith v. Powell, ante,* 837; *Sondey v. Yates, ante,* 836.

Affirmed.

MRS. ETTA HAYES v. CITY OF HICKORY.

(Filed 1 November, 1935.)

Appeal and Error J d—

Where the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed without becoming a precedent.

APPEAL from *Phillips, J.,* at February Term, 1935, of CATAWBA.

The defendant city is the appellant from a judgment that the plaintiff have and receive of it the sum of $3,500 as damages for a permanent easement to maintain and operate a sewage disposal plant upon its lands adjoining the lands of the plaintiff and to discharge the effluent from said plant into Clark's Creek, and for discharging the defendant from any further liability for damages to the lands of the plaintiff by reason of the maintenance and operation of said sewage disposal plant. The appellant does not contend that there is no liability from it to the plaintiff, but does contend that the verdict and judgment is excessive.

L. A. Whitener, Chas. W. Bagby, and C. D. Swift for plaintiff, appellee.
W. A. Self, W. B. Councill, and Eddy S. Merritt for defendant, appellant.

PER CURIAM. The Court being evenly divided in opinion, *Justice Brogden* not sitting, the judgment of the Superior Court is affirmed, and stands as the decision in this case without becoming a precedent. *Trust Co. v. Hood, Commissioner of Banks,* 207 N. C., 862; *Nebel v. Nebel,* 201 N. C., 840, and cases there cited.

Affirmed.

MARVIN WHITLEY v. COCA-COLA BOTTLING WORKS.

(Filed 1 November, 1935.)

APPEAL by defendants from *Barnhill, J.*, at March Term, 1935, of PITT.

Civil action to recover damages for alleged negligent injury caused by particles of jagged and broken glass in a bottle of Coca-Cola manufactured by the defendants and swallowed by plaintiff, the ultimate consumer, who purchased the same from a dealer.

There was a verdict of $250 and judgment for plaintiff, from which the defendants appeal, assigning error.

Blount & James for plaintiff.
J. B. James for defendants.

PER CURIAM. The evidence brings the case within the principles announced in *Perry v. Bottling Co.*, 196 N. C., 175, 145 S. E., 14; *Broom v. Bottling Co.*, 200 N. C., 55, 156 S. E., 152; *Enloe v. Bottling Co., ante,* 309.

No error.

CHARLES F. CONNOR v. SAPROLITES, INC., ET AL.

(Filed 1 November, 1935.)

APPEAL by plaintiff from *Sinclair, J.*, at September Term, 1934, of LEE.

Civil action to recover damages for an alleged negligent injury.

Plaintiff testified that he had been engaged in the mining business since 1916. He was removing ore from the Black Ankle Mine from a depth of 30 or 35 feet when injured.

The plaintiff offered in evidence the deposition of his associate, C. E. Barrentine, who testified, in part, as follows:

"C. F. Connor, by oral agreement, contracted with the Saprolites, Inc., through its superintendent and agent, E. L. Hedrick, that he would deliver on top of the ground at its mine in Montgomery County ore from under the ground at 50c. per ton, and that the said C. F. Connor was to use his own tools and equipment and have complete control of the matter, and the only thing that the Saprolites was to do was to pay 50c.

per ton when delivered on top of the ground, and that the company was to be in no way responsible for any accident occurring in said work, or pay for anything toward getting out said ore."

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

K. R. Hoyle for plaintiff.
J. A. Spence and W. R. Williams for defendants.

PER CURIAM. The nonsuit was based upon plaintiff's evidence of an independent employment, of his own knowledge and experience in the work, and of the fact that the shaft was only 30 or 35 feet deep. It is not perceived upon what ground the judgment should be disturbed. *Johnson v. Hosiery Co.,* 199 N. C., 38, 153 S. E., 591; *Inman v. Refining Co.,* 194 N. C., 566, 140 S. E., 289; *Greer v. Const. Co.,* 190 N. C., 632, 130 S. E., 739.

Affirmed.

J. Y. MONK AND J. M. HOBGOOD, TRADING AS MONK'S WAREHOUSE, v. F. G. SATTERFIELD, J. S. SATTERFIELD, S. W. STONE, AND WALKER STONE, TRADING AS SATTERFIELD & STONE.

(Filed 1 November, 1935.)

APPEAL by defendants from *Barnhill, J.,* at May Term, 1935, of PITT. No error.

The issue submitted to the jury at the trial of this action was answered as follows:

"Are the defendants indebted to the plaintiffs, and if so, in what amount? Answer: '$436.05, plus interest.' "

From judgment that plaintiffs recover of the defendants the sum of $436.05, with interest from 4 November, 1932, and costs, the defendants appealed to the Supreme Court, assigning errors in the trial as appear in the record.

John B. Lewis and Albion Dunn for plaintiffs.
B. I. Satterfield for defendants.

PER CURIAM. The evidence at the trial of this action tending to show that an agent of the defendants purchased tobacco from the plaintiffs for the defendants, that said tobacco was delivered by the plaintiffs to said agent, and by said agent delivered to the defendants, and that the

defendants have failed and refused to pay the purchase price of said tobacco, to wit: The sum of $436.05, was submitted to the jury, under a charge which is free from error. The testimony of the agent that he was authorized by the defendants to purchase tobacco from the plaintiffs was corroborated by other evidence at the trial.

We find no error in the trial. The judgment is in accord with the verdict, and is affirmed.

No error.

IN RE WILL OF JAMES TURNAGE.

(Filed 1 November, 1935.)

APPEAL by caveator from *Small, J.*, at August Term, 1935, of PITT.

Issue of *devisavit vel non* raised by a caveat to the will of James Turnage, late of Pitt County, and based upon alleged mental incapacity and undue influence.

The issue was originally tried at the September Term, 1934, and resulted in a verdict for the propounders on the issue of mental capacity and for the caveator on the issue of undue influence.

On appeal the exceptions addressed to the issue of mental capacity were dismissed as cured by the verdict, and a new trial ordered for failure to direct a verdict in favor of the propounders on the issue of undue influence. *In re Will of Turnage, ante,* 130.

On the present hearing, the evidence being practically the same on the issue of undue influence as it was at the first trial, the court directed a verdict for the propounder in accordance with the opinion rendered on the first appeal, and declined to resubmit the issue of alleged mental incapacity, interpreting our opinion as limiting the new trial to the issue of undue influence. Objection; exception; appeal by caveator.

Julius Brown for caveator.
Sam Worthington and J. B. James for propounders.

PER CURIAM. Caveator is without substantial ground for complaint. He has had two bites at the cherry, and his Honor was justified in interpreting our opinion as he did.

The verdict and judgment will be upheld.

No error.

THOMAS H. CARTER, DECEASED; MRS. THOMAS H. CARTER, WIDOW; MARTHA ANN CARTER, DAUGHTER, v. CAROLINA COACH COMPANY.

(Filed 20 November, 1935.)

APPEAL by claimants from *Williams, J.*, at June Term, 1935, of WAKE.

This was a proceeding instituted before the North Carolina Industrial Commission by the dependents of Thomas H. Carter, deceased, against Carolina Coach Company, for recovery of compensation for his death, alleged to have been caused by reason of accident arising out of and in the course of his employment as a bus driver by the defendant coach company. From an adverse award by the Industrial Commission, claimants appealed to the Superior Court, and from a judgment affirming the award claimants appealed to this Court.

J. M. Broughton, Geo. D. Vick, Jr., and W. R. Yarborough, Jr., for claimants.

Smith, Leach & Anderson for defendant.

PER CURIAM. It has been uniformly held by this Court that the findings of fact of the Industrial Commission, if supported by evidence, are conclusive upon appeal. The Full Commission found that the death of Thomas H. Carter was not proximately caused by an injury by accident arising out of nor in the course of his regular employment, and that the illness from which he died did not result naturally and unavoidably from an accident.

There was evidence to support this finding. Hence, the judgment must be

Affirmed.

MRS. H. H. LEE v. SEARS, ROEBUCK & COMPANY AND OTHERS.

(Filed 20 November, 1935.)

APPEAL by plaintiff from *Small, J.*, at July Special Term, 1935, of MECKLENBURG. Affirmed.

This is an action to recover damages for personal injuries suffered by the plaintiff, and caused, as alleged in the complaint, by the negligence of the defendants.

The allegations of negligence in the complaint are denied in the answer. In further defense of plaintiff's recovery, the defendants plead the contributory negligence of the plaintiff.

At the close of all the evidence at the trial the action was dismissed by judgment of nonsuit, and plaintiff appealed to the Supreme Court, assigning as errors the exclusion and the admission of certain evidence by the trial court, and the allowance of defendant's motion for judgment of nonsuit, at the close of all the evidence.

H. L. Strickland for plaintiff.
Taliaferro & Clarkson for defendant.

PER CURIAM. There was no error in the exclusion of evidence offered by the plaintiff, or in the admission of evidence offered by the defendants.

Conceding without deciding that there was evidence at the trial tending to show that defendants were negligent, as alleged in the complaint, we concur in the opinion of the trial court that all the evidence offered by the plaintiff, including her own testimony, shows that plaintiff, at least, contributed to her injuries by her own negligence. For this reason, there was no error in allowing defendant's motion for judgment as of nonsuit at the close of all the evidence, or in the judgment dismissing the action. See *King v. Thackers, Inc.*, 207 N. C., 869, 178 S. E., 95; *Clark v. Drug Co.*, 204 N. C., 628, 169 S. E., 217; *Davis v. Jeffreys*, 197 N. C., 712, 150 S. E., 488.

The judgment is
Affirmed.

COOPER & GRIFFIN, INC., v. OSAGE MANUFACTURING COMPANY.

(Filed 20 November, 1935.)

APPEAL by defendant from *Pless, J.*, at March Term, 1935, of GASTON.

This was an action to recover damages for breach of contract for purchase of two hundred bales of cotton.

It was admitted in the pleadings that defendant, a cotton manufacturing company, agreed to purchase from plaintiff cotton broker the cotton in question at a price, for delivery on 21 and 28 July, and that thereafter it was agreed that "shipments need not be made as required by the terms of the contract, but that if plaintiff would keep cotton

moving to the defendant's mill, it would be satisfactory so long as the mill was kept supplied."

The evidence was uncontradicted that from 4 August to 9 August, plaintiff shipped and defendant received and paid for 105 bales of cotton, and that plaintiff was ready, able, and willing to deliver the remaining 95 bales; that the mill requirements were 103 bales per week, and that on 9 August defendant had on hand sufficient cotton for five or six days' run. On 11 August defendant refused further shipments. Thereupon, plaintiff sold said 95 bales and sustained a loss of $1,071.42.

There was no controversy as to the amount involved.

The trial judge charged the jury if they found the facts to be as testified to answer the issues in favor of the plaintiff.

P. W. Garland and Blythe & Bonham for plaintiff.
S. J. Durham for defendant.

PER CURIAM. The only exception is to the judge's charge. In this we find no error.

The judgment is
Affirmed.

W. H. H. JONES, ADMINISTRATOR OF RUSSELL JONES, DECEASED, v. WALTER L. BAGWELL.

(Filed 20 November, 1935.)

APPEAL by plaintiff from *Daniels, J.*, at March Term, 1935, of WAKE.

Action to recover damages for wrongful death of plaintiff's intestate, alleged to have been caused by the negligence of defendant.

J. L. Emanuel, Bart M. Gatling, and Sam J. Morris for plaintiff.
Douglass & Douglass and Simms & Simms for defendant.

PER CURIAM. This case has been before this Court on two previous occasions, and is reported in 201 N. C., 831, and 207 N. C., 378, wherein judgments of nonsuit were reviewed.

It comes now upon plaintiff's appeal from an adverse verdict and judgment, after a trial on the merits. An examination of the record does not reveal any reversible error, either as to the admission of evidence or in the judge's charge.

The judgment of the court below is affirmed. There is
No error.

ISAAC M. DOTSON v. F. S. ROYSTER GUANO COMPANY.

(Filed 20 November, 1935.)

APPEAL by defendant from *Clement, J.*, at March Term, 1935, of MECKLENBURG.

Civil action for breach of contract.

Verdict and judgment for plaintiff, from which the defendant appeals, assigning errors.

John M. Robinson and Marvin L. Ritch for plaintiff.

Willcox, Cooke & Willcox and Tillett, Tillett & Kennedy for defendant.

PER CURIAM. This is the same case that was before us at the Fall Term, 1934, when a partial new trial was granted, limited to the issue of damages, opinion filed 28 January, 1935, reported in 207 N. C., 635, 178 S. E., 100.

The second trial substantially accords with our former opinion. It is true, the evidence was somewhat different, due to the necessity of conforming to our interpretation of the contract, thus rendering the special prayer requested on the first hearing inappropriate, but we have discovered no reversible error on the present hearing.

No error.

S. R. IRELAND v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 20 November, 1935.)

APPEAL by plaintiff from *Small, J.*, at June Term, 1935, of WAYNE. Affirmed.

J. Faison Thomson and J. M. Colton for plaintiff, appellant.

W. A. Townes, W. B. R. Guion, and Dickinson & Bland for defendant, appellee.

PER CURIAM. This action was instituted by the plaintiff to recover damages alleged to have been caused by the negligence of the defendant in transporting a carload of lima beans and peppers from Faison, North

Carolina, to Cleveland, Ohio; the negligence alleged being that the car furnished the plaintiff by the defendant railroad company was poorly ventilated, in bad condition, and not suitable for transporting perishable freight, and that there was unreasonable delay in the transportation of the shipment. The defendant filed answer wherein it denied the allegations of negligence in the complaint, and for further defense averred that the plaintiff was negligent in directing that the car in which the beans and peppers were shipped be not reiced after leaving Rocky Mount, North Carolina. The evidence tended to establish that the beans and peppers were received by the defendant in good condition on the night of 9 July, 1932, and reached their destination in damaged condition on 13 July, 1932.

The issues submitted and the answers made thereto were as follows:

"1. Were the plaintiff's peppers and lima beans damaged by the negligence of the defendant, as alleged in the complaint? Answer: 'No.'

"2. What damage, if any, is plaintiff entitled to recover of the defendant? Answer: 'None.' "

From judgment based upon the verdict, the plaintiff excepted and appealed to the Supreme Court, assigning errors.

The sole question arising in this case was purely one of fact, namely, was the damage to the beans and peppers caused by the negligence of the defendant or by the negligence of the plaintiff, and was clearly presented by the issues submitted, and the jury found for the defendant.

We have carefully read the record, and, in the light of the assignments of error, are left with the impression that the case has been fairly tried upon proper issues and free from any reversible error, and that the judgment should be affirmed, and it is so ordered.

Affirmed.

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

J. MARVIN ROCHELLE v. J. F. DUNN.

(Filed 20 November, 1935.)

APPEAL by defendant from *Grady, J.,* at June Term, 1935, of LENOIR. No error.

This is an action to recover of the defendant damages for the breach of his contract to sell and convey to the plaintiff certain real and personal property, described in the contract, which is in writing.

On 8 November, 1934, the defendant entered into a contract with the plaintiff by which he agreed to sell and convey to the plaintiff, or to such person or persons as the plaintiff might direct, certain real and personal property described in the contract, provided the plaintiff, on or before 18 November, 1934, should exercise his option to purchase said property and pay the purchase price for the same.

Thereafter, on or about 12 November, 1934, at the request of the plaintiff, the defendant agreed to extend the time within which the plaintiff might exercise his option to purchase said property, and pay said purchase price.

The plaintiff alleges that the defendant agreed to extend such time to 28 November, 1934, and authorized plaintiff to change the contract accordingly. This allegation is denied by the defendant, who alleges that he agreed to extend such time only to 24 November, 1934.

The date on or before which the plaintiff was required to exercise his option and to pay the purchase price, as shown in the contract offered in evidence, is 28 November, 1934.

The issues submitted to the jury were answered as follows:

"1. Did the defendant J. F. Dunn authorize the plaintiff J. Marvin Rochelle to change the expiration date of the option contract referred to in the pleadings from 18 November, 1934, to 28 November, 1934, as alleged by the plaintiff? Answer: 'Yes.'

"2. If so, did the plaintiff comply with the terms of the said contract, and make payment, or offer to make payment, to the defendant of the sum of $4,200, as stipulated therein? Answer: 'Yes.'

"3. If so, did the defendant fail and refuse to accept said payment and to comply with the terms of said contract, as alleged in the complaint? Answer: 'Yes.'

"4. If so, what damages, if any, is the plaintiff entitled to recover of the defendant by reason of such breach of contract? Answer: '$1,000.'"

From judgment that plaintiff recover of the defendant the sum of $1,000, and the costs of the action, the defendant appealed to the Supreme Court, assigning errors, as appear in the record.

John G. Dawson for plaintiff.
Shaw & Jones for defendant.

PER CURIAM. We find no error in the trial of this action.

The chief controversy between the parties was with respect to the first issue. There was evidence tending to support plaintiff's contentions with respect to the answer to this issue. All the evidence showed that plaintiff complied with the contract, as found by the jury, and that

defendant breached the contract, as alleged in the complaint. There was evidence tending to show that the market value of the property at the time of the breach of the contract by the defendant exceeded the contract price by at least the sum of $1,000.

The judgment is affirmed.

No error.

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

HAYDN GUNTER v. J. E. LATHAM COMPANY.

(Filed 11 December, 1935.)

APPEAL by plaintiff from *Pless, J.*, at September-October Term, 1935, of GUILFORD. Affirmed.

This is an action to recover damages for the breach by the defendant of its contract with the plaintiff, by which the defendant agreed that upon the happening of certain contingencies the plaintiff and the defendant should become the owners of certain properties purchased by the plaintiff for the defendant, the plaintiff to own ten per cent and the defendant ninety per cent, in value of said properties.

The defendant's demurrer *ore tenus* to the complaint for that the facts stated therein were not sufficient to constitute a cause of action was sustained, and the plaintiff appealed to the Supreme Court.

Younce & Younce for plaintiff.
Brooks, McLendon & Holderness and R. D. Douglass for defendant.

PER CURIAM. In the absence of allegations in the complaint showing that defendant had breached its contract with the plaintiff, with respect to the properties described in the contract, the demurrer *ore tenus* was properly sustained.

The order of the defendant that work on one of the properties described in the contract be discontinued, did not constitute a breach of the contract, which is in writing. No facts are alleged in the complaint which show that such order was made arbitrarily, or with intent to injure the plaintiff. The contract expressly provides that work on the properties should be continued or discontinued in the discretion of the defendant, who had advanced all the money for the purchase and operation of the properties.

The judgment is
Affirmed.

STATE v. ROY HENDERSON.

(Filed 11 December, 1935.)

APPEAL by defendant from *Phillips, J.,* at August Term, 1935, of WILKES.

Criminal prosecution, tried upon indictment charging the defendant, and another, with robbery in violation of ch. 187, Public Laws 1929.

The record discloses that on Friday night, 28 June, 1935, three masked men entered the filling station of Sherman Elledge, commanded him to hold up his hands at the point of guns, which he did, took $18 from his person, and helped themselves to other articles in the filling station.

One of the highwaymen turned State's evidence, and he, together with Sherman Elledge and his wife, identified the defendant Roy Henderson as one of the robbers.

The defendant pleaded not guilty and offered evidence tending to establish an alibi.

Verdict: Guilty.

Judgment: Imprisonment in the State's Prison for not less than seven nor more than ten years.

Defendant appeals, assigning errors.

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

J. H. Whicker for defendant.

PER CURIAM. On trial the controversy narrowed itself to an issue of fact determinable alone by the jury. The exceptions are not of sufficient moment to call for elaboration or to warrant a new trial; hence, the verdict and judgment will be upheld.

No error.

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

APPENDIX

RULES BY THE STATE BAR GOVERNING ADMISSION TO THE PRACTICE OF LAW

1. Effective Date of These Rules.

Except as otherwise provided herein, the rules of the Supreme Court as contained in 200 N. C., 813, shall govern applications for admission to the practice of law at the examinations to be held in August, 1935, and January, 1936; thereafter the following rules shall govern, provided that, when the going into effect of any of the following rules is postponed, the approximate corresponding rules of the Supreme Court shall in the meantime control.

2. Compliance Necessary.

Subject to the provisions of the foregoing paragraph, no person shall hereafter be admitted to the practice of law in North Carolina until and unless he has complied with these rules and the laws of the State.

3. Definitions.

The terms "board" and "secretary" as herein used refer, respectively, to the Board of Law Examiners of North Carolina and the Secretary of the same. Masculine pronouns shall be deemed to include the feminine.

4. Applications.

Every person desiring to be admitted to the practice of law in North Carolina shall file an application with the Secretary not later than the 15th day of June prior to the next bar examination. This application shall contain such information as is called for by the blanks approved by the Board, and shall be accompanied by the fee required by Rule 18, and by such evidence of good moral character, certificates of general and legal education, and other credentials as applicant relies upon to show compliance with these rules. All applications, proofs, and certificates shall be made upon blanks furnished by the Secretary. As soon as possible after June 15 of each year the Secretary shall make public the list of applicants.

5. Citizenship, Character, Age, Residence.

Each applicant, at the time of filing his application, must be a citizen of the United States, a person of good moral character, and must have been, for the twelve months next preceding the filing of his application, a citizen and resident of North Carolina, or must have been a nonresident student, for one scholastic year next preceding the filing of his application, in an approved North Carolina law school who has the

intention, in good faith, of becoming a citizen and resident of North Carolina within six months after filing his application, in which latter event license shall not actually issue to him until and unless within this six-months' period he has become a citizen and resident of North Carolina, and has satisfied the Chairman of the Board to that effect. He must be at least 21 years of age at the time of filing his application, or of such an age that he will become 21 within twelve months next after filing his application, provided that no license shall actually issue to any person until he has reached the age of 21.

6. Moral Character of Applicant.

No applicant shall be allowed to stand an examination or be admitted by comity until and unless he has been found by the Board to be of good moral character. Each applicant shall furnish certificates of good moral character from four responsible persons, at least two of whom shall be members of The North Carolina State Bar, practicing in the Supreme Court, provided that in exceptional and meritorious cases the Board may accept, in lieu of certificates from North Carolina practitioners, certificates from two attorneys of another State who are members of the bar of the highest court in that State, and who accompany their certificates with proof to that effect.

Any person whose application for admission to the practice of law, either by examination or comity, has been denied on account of the lack of good moral character shall thereafter be ineligible to take the examination or have his credentials considered for two years.

7. Law Students to Register.

No one shall be permitted to take the examinations to be held in August, 1936, and thereafter, unless he shall have previously registered with the Secretary as a law student, provided that all persons who have begun the study of law prior to June 15, 1936, shall be allowed until that date to register. In determining whether or not an applicant to take an examination has complied with Rules 9, 10, and 11, no time spent in legal study prior to sixty days before the date of his registration will be counted, except that students registering on and prior to June 15, 1936, shall be given credit for the entire time of their legal study prior to their respective dates of registration. Registration shall be upon blanks prescribed by the Board and shall be accompanied by the certificate of the dean of that approved law school in which the applicant has matriculated, or of that lawyer under whose instruction the applicant proposes to study (who must at the time have been a licensed practitioner in North Carolina for five years), corroborating the facts in the application of which such dean or lawyer has personal knowledge, and giving to the Board such information and such pledges of intention to

be governed by these rules in the instruction of the applicant as the Board shall require. Registration papers shall be accompanied by the registration fee of one dollar required by Rule 18. Upon receipt of the registration papers, corroborating certificates, and the registration fee, the Secretary shall acknowledge the same and shall make entry upon his records to that effect. Whenever a registered law student changes his home address, or changes the school in which, or the lawyer under whom, he is studying, or whenever he shall abandon the study of law, he shall notify the Secretary of that fact within sixty days thereafter. Where a person applying to take the examination to be held in August, 1936, or an examination to be held thereafter shall have begun and pursued his legal studies outside of North Carolina and shall have failed to register as required above, deferred registration may, in exceptional and meritorious cases, be permitted by the Board.

From time to time during the period of the student's study the Board may require reports from him or the law school in which, or the lawyer under whom, he is studying concerning the kind and character of work he is doing and training he is receiving, and, if upon such investigation the Board is of the opinion that the work he is doing or the training he is receiving does not constitute a compliance with these rules, it may refuse to allow him credit for such work or it may take such other action as seems to it appropriate.

8. General Education.

(a) Each person seeking to take the examination which is to be held in August, 1938, or any examination held thereafter, must, prior to taking such examination, have received a standard four-year high school education or its equivalent. This may be evidenced by the certificate of the principal of the high school last attended, if the applicant is a graduate of a four-year high school fully accredited at the time of graduation by the North Carolina State Department of Education. Otherwise, the Board shall ascertain whether or not the applicant has complied with this rule by such investigations and examinations as shall satisfy it.

(b) Each applicant, to take the examination to be held in August, 1940, and thereafter, must, prior to beginning the study of law, have completed, at a standard college, an amount of academic work equal to one-half of the work required for a bachelor's degree at the university of the State in which the college is located. With his application he shall file a certificate from such college furnishing all information that the Board shall require. If such person has not taken the above-described amount of college work, or for any reason cannot furnish a certificate of such work, he may request an examination upon his gen-

eral education, whereupon the Board itself, or through some agency designated by it, shall examine him. If, upon such examination, the Board is satisfied that his general education is sufficient to qualify the applicant to practice law, the Board may find that he has met the requirements of this rule as to general education.

If a person applying to take the examination to be held in August, 1940, or an examination to be held thereafter, cannot qualify under the above-stated provisions of this rule, the Board shall allow him to take the examination and be admitted if he has previously been accepted by an approved law school as a student, if at such school he has studied and passed the subjects listed in Rule 9 (a), and if he presents a certificate to that effect by the dean of that school.

9. Legal Education.

Each person applying to take the examination to be held in August, 1938, or thereafter, must have studied law for three years prior to filing the application papers required by Rule 4, all of which study must have been completed within the period of six years. During that period he must either (a) have studied as a minimum requirement the following subjects, namely: agency, bailments and carriers, bankruptcy, civil procedure, conflict of laws, constitutional law, contracts, corporations, criminal law and procedure, domestic relations, equity, evidence, insurance, legal ethics, mortgages, negotiable instruments, North Carolina statutes, partnerships, real and personal property, sales, torts, trusts, and wills and administration; or (b) he must have graduated from an approved law school.

10. Evidence of Legal Education.

Compliance with Rule 9 must be evidenced either (a) by the certificate of the dean of an approved law school that the applicant has studied law in that school for three years and that he has passed examinations given by the faculty in the entire minimum course of study above prescribed and on each subject contained therein, or that he has graduated from that law school; or (b) by the certificate of a member of The North Carolina State Bar who has been a licensed practitioner in North Carolina for five years prior to the beginning of instruction that the applicant has studied law under his personal instruction for three years, and that he has passed examinations given by him in the entire minimum course of study above prescribed, and on each subject contained therein; or (c) by a combination of such certificates showing that the aggregate total of the applicant's study in an approved law school or schools and under a lawyer or lawyers has equalled three years, and that he has passed examinations in the entire minimum course of study above prescribed, and on each subject contained therein; and no certificate show-

ing study outside of an approved law school for less than six consecutive months will be considered. Persons who have studied law outside of North Carolina will not be allowed credit for the time spent in such study, except to the extent that the same has been pursued in an approved law school.

11. Years of Study Defined.

A year of study, within the meaning of Rule 9, shall consist of a minimum of either (a) thirty weeks, excluding vacations but including examinations, embracing an average of twelve hours of classroom work each week and an average of two hours' preparation required for each hour of recitation, spent in a law school approved by the Board; or (b) forty-five weeks, exclusive of vacations, embracing an aggregate of ten hundred and eighty hours during this period devoted to study, recitations, and examinations, and with final examinations in each subject of at least two hours' duration, spent under the personal instruction of a member of The North Carolina State Bar who, at the beginning of his instruction of the applicant, has been a licensed practitioner in North Carolina for five years.

Study in the summer session of any law school approved by the Board shall count for the same part of a year's study, within the meaning of this rule, as it is counted toward graduation under the regulations of that school.

12. Approved Law Schools.

The law schools maintained by the University of North Carolina, Duke University, and Wake Forest College are hereby approved; other law schools will be approved if and when they satisfy the Board that their standards, work, and equipment are substantially the equivalent of those of one or the other of the above-mentioned law schools. The Board may, from time to time, withdraw approval from law schools previously approved, if and when it determines that they do not conform to the foregoing requirements.

13. Examinations.

Beginning with the examination to be held in August, 1936, there shall be held one examination each year of those applying to be admitted to practice law in North Carolina; it shall be held in the City of Raleigh and shall commence on the first Tuesday in August at 10 a.m. No person other than one applying for admission by comity will be admitted to the practice of law until and unless he has been found by the Board to have duly passed an examination upon the subjects listed in Rule 9 (a), the Board being hereby vested with the authority to determine what shall constitute the passing of an examination.

14. Protest.

Any person may protest the right of any applicant to be admitted to the practice of law either by examination or as a matter of comity. Such protest shall be made in writing, signed by the person making the protest, and bearing his home and business address, and shall be filed with the Secretary of the Board not later than July 15 previous to the date on which the next succeeding examination is to be held. The Secretary shall immediately notify the applicant of the protest and of the charges therein made; and the applicant may thereupon withdraw as a candidate for admission to the practice of law at that examination; but, in case his withdrawal in writing is not received by the Secretary by noon of the Saturday preceding the examination, he shall not be allowed thereafter to withdraw, and the person making the protest and the applicant in question shall appear before the Board at ten o'clock a.m. of the Monday preceding the examination, whereupon the Board shall proceed forthwith to hear the matter and to make such disposition thereof as in its judgment seems just and in accordance with these rules and with the laws of North Carolina. The protest shall not be made public unless and until the final disposition of the matter has been determined adversely to the interest of the applicant.

15. Certificates Not Conclusive.

Certificates furnished by an applicant shall not be conclusive upon the Board as to the facts therein stated; it shall make such investigation as it sees fit into the character of an applicant and the facts relating to the question as to whether or not he has complied with these rules; and, if it desires, it may require the applicant to appear in person before it, or before some person designated by it, at or before the time of the examination which the applicant is seeking to take, for the purpose of eliciting from him additional information. All information furnished to the Board by an applicant, and all answers to questions upon blanks furnished by the Board, shall be deemed material.

16. Effect of Disbarment.

No one who has been disbarred to practice law in this or any other State, or by any Federal court, and whose sentence of disbarment has not been rescinded, and whose license to practice law has not been restored, shall be allowed to stand any examination held after the adoption of these rules, nor shall he be admitted to practice law in this State by comity or otherwise.

17. Comity.

Any person duly licensed to practice law in another State may be licensed to practice law in this State without examination, if attorneys

who are licensed in this State may be licensed without examination in the State from which he comes, upon the applicant's furnishing to the Board a certificate from a member of the court of last resort of such State that he is duly licensed to practice law therein, and that he has been actively engaged in the practice of law for five years or more, is in good professional standing, with no charges undisposed of against him as to professional conduct, and is of good moral character and a proper person to be licensed to practice law, together with a certificate from two practicing attorneys of such State, practicing in the court of last resort, and two persons who are not attorneys, as to the applicant's good moral character, whose signatures shall be attested by the clerk of the court; and upon the applicant's satisfying the Board that he has complied with the provisions of Rule 5 relating to citizenship and residence in North Carolina.

18. Fees.

(a) Each person registering in accordance with Rule 7 shall, at the time of registration, pay to the Secretary one dollar; and the money derived from the payment of registration fees shall be used to defray the expenses of administering Rule 7 and the other expenses of the Board.

(b) All applicants to take examinations held after the adoption of these rules shall pay to the Secretary a filing fee of one dollar and fifty cents, and shall deposit with him an additional sum of twenty-two dollars, of which last named sum two dollars shall be considered a deposit to pay for license if issued. Any applicant who shall fail to pass the examination shall receive a refund of twelve dollars from said twenty-two dollars so deposited.

19. Issuance of License.

Upon compliance with these rules the Secretary shall issue to each successful applicant a license to practice law in North Carolina, the same to be in such form as may be prescribed by the Board.

I, Henry M. London, Secretary of the Board of Law Examiners of North Carolina, do hereby certify that the foregoing nineteen rules constitute a true and correct copy of "Rules Governing Admission to the Practice of Law in the State of North Carolina," adopted by the Board of Law Examiners of North Carolina on July 26, 1935, and recommended by the Board to the Council of The North Carolina State Bar on that date.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the Board of Law Examiners of North Carolina, this the first day of August, 1935.

(SEAL.) HENRY M. LONDON,
Secretary.

I, Henry M. London, Secretary of the Council of the North Carolina State Bar, do hereby certify that the foregoing and attached nineteen rules constitute a full and complete copy of "Rules Governing Admission to the Practice of Law in the State of North Carolina," submitted by the Board of Law Examiners of North Carolina and approved by the Council of The North Carolina State Bar on the twenty-sixth day of July, 1935.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of The North Carolina State Bar, this the first day of August, 1935.

(SEAL.) HENRY M. LONDON,
Secretary.

Pursuant to authority of Chapter 210, Public Laws 1933, and at the request of the Board of Law Examiners, it is ordered that the foregoing Rules Governing Admission to the Practice of Law in the State of North Carolina be published in the forthcoming volume of the North Carolina Reports. This the 6th day of September, 1935.

SCHENCK, J., *For the Court.*

ANNOUNCEMENT OF DEATH OF ASSOCIATE JUSTICE WILLIS J. BROGDEN

Associate Justice Willis J. Brogden died at his residence in Durham on Tuesday, 29 October, 1935, at 5:05 p.m. That evening Chief Justice Walter P. Stacy, Justices Heriot Clarkson, George W. Connor, and Michael Schenck, associates of Justice Brogden on the Supreme Court, made the following expression:

"The death of Associate Justice Willis J. Brogden is a distinct loss to the judiciary and to the people of the State. The personal feeling that has come to each member of the Court is one of profound sorrow and regret.

"He pursued his work with great industry and unremitting toil. It is not too much to say that he sacrificed himself upon the altar of duty. We shall miss his ready wit, hearty laugh, and never-failing helpfulness. We desire to express our sympathy and condolence for his bereaved family and the people of North Carolina, whom he served with great devotion and unrelenting zeal."

On Wednesday, 30 October, 1935, the Court assembled at 10:00 a.m., and the Attorney-General formally announced to the Court the death of Justice Brogden, as follows:

"Your Honors:

"It is with painful regret that I have to announce the death of Associate Justice Willis J. Brogden. I move this Court it now adjourn in recognition of our sorrow and loss and in respect to his memory."

Chief Justice Stacy made the following expression in reply to the announcement of the Attorney-General and to his motion that the Court adjourn:

"The Court has heard the announcement of the Attorney-General with solemn appreciation of the distinct loss that has come to the State and its people in the death of their Associate Justice Willis J. Brogden.

"He was not only a superb lawyer and splendid judge, but a choice spirit as well. His was a philosophy of good humor, frank acknowledgment, and fair play. The Commonwealth is richer that he lived and labored in it. It is poorer that he is gone. He was a noble fellow—a great-hearted fighter for the right. The lives of many have been enriched by the rare charm of his friendship, and in the hearts of those who knew him best, his immortality will abide.

"In recognition of his great worth, and as a mark of respect to his memory, the Court will now stand adjourned until Friday morning at ten o'clock."

ADDRESS

BY JUNIUS PARKER, ESQ.

ON

PRESENTATION OF A PORTRAIT

OF THE LATE

WILLIAMSON WHITEHEAD FULLER

TO THE

SUPREME COURT OF NORTH CAROLINA

BY HIS FAMILY

10 DECEMBER, 1935

May it please Your Honors: I have been asked by Mrs. Fuller, her son and daughters, to speak for them in presenting to the Court this excellent portrait of their husband and father, W. W. FULLER, ESQ. They hope that it will take its place here among the portraits of North Carolina lawyers who have aided this Court in attaining and maintaining its high position among the appellate courts of America. It is fitting and in accord with precedents that, accompanying the portrait, there should be an attempt to characterize and appraise the man and his life.

WILLIAMSON WHITEHEAD FULLER was born on August 28, 1858, in Fayetteville, North Carolina, the son of Thomas C. Fuller and Caroline Douglas Fuller—born Whitehead. His academic education was at Little River Academy, then a school of high repute near Fayetteville, the Horner and Graves Academy, then a notable school at Hillsboro, and the University of Virginia. He read law at the law school of Judge Dick and Judge Dillard at Greensboro, and was admitted to the bar at the January Term, 1880, of this Court. He began the practice of the law at Raleigh in association with Merrimon & Fuller, a firm then composed of Judge Augustus S. Merrimon and Judge (then Colonel) Thomas C. Fuller, which had succeeded, during 1879, Merrimon, Fuller & Ashe, a firm of which Capt. Samuel A. Ashe was also a member. Early in 1881 he moved to Durham, and for a short while practiced law there in association with W. S. Roulhac, Esq. Following the death of Mr. Roulhac he practiced law in Durham without a partner until in 1889 he formed a partnership with his brother, Frank L. Fuller, Esq., which continued until 1895. He moved then to New York, and, until his retirement in 1912, he practiced law there. In 1880 he married Annie M. Staples, of

Greensboro, and they had six children: Thomas Staples Fuller, a member of the bar of this Court and now a practicing lawyer of New York, Janet Douglas, Margaret Hereford, Caroline Whitehead, Annie Norman, and Dorothy. One of these, Annie Norman, who had become Mrs. Drury, died in 1917, but Mrs. Fuller and all the other children survive. From his retirement in 1912, Mr. Fuller lived at the country home he had built at Briarcliff Manor, near New York, and on August 23, 1934, he departed this life. He never held nor sought public office. During his residence in New York he was at one time or another a trustee of the Endowment Fund of the University of Virginia, President of the New York Southern Society, President of the North Carolina Society in New York, and President of the New York University of Virginia Alumni Society.

The foregoing is a statement of what are usually deemed material biographic facts, but short and simple as the statement is, the life and the personality of Mr. Fuller abounded in interest and charm. We who knew him well doubt whether we shall look upon his like again.

In our estimate of any man, emphasis may conceivably be placed on one or more of three aspects: What he has, what he does, and what he is. I leave out of consideration the first of these—although, subconsciously at least, we are prone to think that accumulation of wealth is a sort of measure of success in life—because it certainly was not in the gamut of his ambition or scheme of life. It is the other two aspects that are to be considered in attempting to characterize him: What did he do? What manner of man was he? These two aspects undoubtedly are related to each other: What a man is—in mind, character, and personality—is above all things influential in conditioning and limiting his activities and achievements. It is true, also, that the activities of a man have influence in the development, and so the final quality, of his mind, character, and personality. Notwithstanding these influences and interrelations, there is a distinction between what a man does and what he is, so that, occasionally at least, we meet men whose achievements have been indubitably notable but whose personal qualities are not significant; on the other hand, we meet men whose achievements have not been notable, but whose very being is a delight and benediction to those with whom they come in contact.

In both of these aspects Mr. Fuller's life was engaging and distinguished. It was a life, too, that to an unusual degree may be inspected in these two aspects separately, because of its sharp division between a period of activity and a period of retirement: From 1880 to 1912 he lived a life in which personality and its qualities were important, but which was primarily activity and achievement. From 1912 to 1934 his activities, principally friendly and benevolent, were worth while to a

great many people, but he was interesting, primarily and principally, because of what he was and not because of what he did.

Of his period of activity, let us look first at his professional achievements in North Carolina. He came to the bar before he was twenty-two years old. He moved to Durham almost precisely contemporaneously with the formation of Durham County. He left Durham and North Carolina before he was thirty-seven years old. At that early age he undoubtedly had achieved the most lucrative practice in North Carolina. He undoubtedly was accounted by the judges and the bar of the State as one of the half dozen of its best equipped and ablest practitioners. He was not a specialist, but covered the whole field of law as practiced in North Carolina. Members of the North Carolina bar then achieved, and perhaps yet achieve, their general reputations principally in trial work. In any trial—whether the issues of fact had to do with the guilt or innocence of one accused of a petty crime, or whether the issues were so pervaded and affected by equitable considerations, or so involved, that in most states they would be tried by a chancellor—he was without a superior in the courts in which he practiced, and to those of us who had to contend with him he seemed without a rival. His ability in arguments addressed to a trial judge or to an appellate court was as remarkable as his ability before a jury. As would best serve his cause, he was terse and homely, but always urbane and gracious, or scholarly and philosophic, but always practical and persuasive. In his office—in advising with respect to, and operating the legal machinery of, a business matter; in the administration of estates; drafting contracts; taking care of legal details incident to business misadventure—he was as efficient as he was in the trial of causes or in his arguments in appellate courts. His practice extended beyond Durham County, not because he sought its extension, and not because there were days of idleness in Durham, but because his efficiency became notable and known beyond the borders of his own county. He was at home and distinguished in every court, state and federal, to which a North Carolina lawyer goes. He was at home as well, practical, wise and helpful, in every sort of conference in which a North Carolina lawyer participates. I think he never tried a case in admiralty, and while he appeared in at least one patent case, he would have resisted the suggestion that he was a patent lawyer. With these two exceptions (and they are not within the activities of the general practitioner anywhere) he was a master in all the activities of a North Carolina lawyer—eminent if not preëminent in every one.

In 1890 Mr. Fuller was counsel in Durham of W. Duke Sons & Company, large and prosperous manufacturers of tobacco and cigarettes. It was in that capacity that he, in that year, coöperated in the organiza-

tion of The American Tobacco Company. Each of the five manufacturers who participated in that organization was represented by his own counsel. Mr. James B. Duke, by virtue of his genius in business and organization, became the head of The American Tobacco Company. It was Mr. Fuller, then a little over thirty, and not one of the other and more conspicuous lawyers who had been active in the organization of the company, who was called on from time to time to advise Mr. Duke and his associates in the early activities of the great industrial enterprise they had launched. In 1895 these calls had become so frequent that he was asked, and consented, to move his residence to New York City. From that time until his retirement in 1912 he devoted himself to the service of The American Tobacco Company. The corporations that were his clients became numerous, and they existed under the laws of several states and several foreign countries, and they did business in every state and nearly every foreign country. Their business activities were of various kinds. But they were all connected in some way with The American Tobacco Company.

It is a mistake to believe that a legal question is interesting only in proportion to the amount of money or property involved. Whether it concerns common law, equity, commercial law, or practice, the litigation upon whose outcome there depends only a trifling sum may engage the ability and interest of the real lawyer as completely as if there were millions at stake. The trend of jurisprudence may be influenced, too, by small as well as by large cases—if you measure the case by the amount at issue. Reviewing Mr. Fuller's professional life in North Carolina and comparing it with his professional life in New York, I realize that in New York he was engaged in larger matters—though the North Carolina lawyer has in hand large matters, too. But I am not sure which life was the more interesting or significant from the lawyer's standpoint. In New York questions of inheritance, descent, and distribution no longer engaged him. He had litigated cases, but matters of practice were left by him to associates more familiar than he with the practice in their particular courts. Real estate law, with all the fascinating common law learning that is a part of it, was not for him. He had little experience in New York with the ordinary phases of commercial law—the law of commercial paper, of checks, and bills-of-lading. Litigation involving the construction of contracts might have been, but were not, within his activity—he drew or participated in drafting many and complex contracts, but it is a tribute to him that, so far as I recall, no resort to a court was ever made to construe even one of them.

The practice of law by Mr. Fuller in New York, though, was not without intense interest from the professional standpoint: A temporary but widespread and vehement objection to the consumption of cigarettes,

which found expression in statutes passed in several states to prohibit their sale, carried him into many courts throughout the country in cases that involved the constitutional boundary between the police power of the state and the exclusive power of the federal government to regulate interstate commerce. Litigation participated in by him helped to clarify the jurisprudence, particularly of New Jersey, in the matter of corporate reorganization. He had to give consideration to important and difficult questions of taxation, state and federal. The enactment of the Federal Anti-Trust Law was substantially contemporaneous with the formation of The American Tobacco Company, and he watched, and was a part of, the whole interesting development of the law on the subject of intercorporate relationship and industrial monopoly from the *Knight case,* in which the Court held that manufacturing enterprises were not within the valid operation of the Federal Anti-Trust Law at all, until and including the determination by the Court that the American Tobacco combination itself must be dissolved. This outcome, it should be added, was not because of any transaction which Mr. Fuller had advised, nor, for that matter, against which he had advised, but resulted from the creation and application by the Court of the famous and perhaps wholesome "rule of reason"—a rule of construction that makes a statute, and a penal statute at that, very like a constantly developing principle of equity jurisprudence, and condemns a result reached over a period of years if the Court concludes, as of the time of its judgment, that such result is within the ban of the legislative intent. Following that decision, and as the last of his professional activities, he cheerfully, courageously, and with high sincerity of purpose, coöperated with other counsel, officers of the companies affected, the Attorney-General of the United States, and the United States Circuit Judges in New York, "to bring about a condition in harmony with the law" with the smallest possible injury to thousands of security-holders. Besides all these activities, purely professional, during the years of his active life in New York, he rendered constant day by day service as counsel and adviser of his client and its officers and employees, where considerations of law, of business, of policy, and of propriety, were all involved. In New York he had all the duties of the general counsel of a great enterprise, and was eminent in the discharge of every one of them.

When we turn from Mr. Fuller's achievements to the qualities and mode of life that made these achievements possible, we naturally think first of his genesis, the qualities of his stock. His maternal grandfather was Williamson Whitehead, for whom he was named. His maternal grandmother, Janet Douglas Whitehead, was born Eccles. Williamson Whitehead was a successful and highly respected merchant in Fayetteville. The Whitehead family, though, and the Eccles family, have not

many kin in North Carolina or in America. They were, not long before Mr. Fuller's generation, a part of the large and fairly long-continued Scotch immigration that made the Cape Fear section of North Carolina a Southern Nova Scotia. Through a paternal ancestor, Bartholomew Fuller, he was a second cousin of Edwin W. Fuller, whose "Sea Gift" and "Angel in the Cloud" were, in fiction and poetry, respectively, North Carolina classics in the last decades of the nineteenth century. Through the same ancestor he was a second cousin of Patrick Henry Winston, Sr., and so was of kin to the Winstons of his own generation, who have achieved so much in law, letters and scholarship. Through his grandmother, born Robateau, he was a second cousin of Mrs. Allison F. Page, and so was of kin to the Pages of his own generation, distinguished for their business achievements and public service. Through his great-grandmother, born Cooke, he was a third cousin of Judge Charles M. Cooke, a finely typical North Carolina lawyer whose memory still abides. In his lineal ancestry there seem to have been no lawyers until the generation immediately preceding his own. His father, Thomas C. Fuller, was notable in every branch of the law, but was primarily an effective and eloquent advocate. An uncle, Bartholomew Fuller, of less general fame, was esteemed by all who knew him as a sound and cultured lawyer. In his own generation the inheritance that urged him to, and fitted him for, the practice of the law, found expression in his two brothers, capable and eminent lawyers, and is carried on worthily in the generation that has followed him.

The qualities of character and mind that were in his blood showed constantly in him and his life. They were innate in him and were developed by the life he lived. Integrity and a keen sense of right and wrong were his by inheritance and, while integrity is perhaps neither enhanced nor abated by one's career, I verily believe that a discriminating and just sense of the difference between right and wrong —the difference between propriety of conduct and impropriety—is developed and refined in the proper practice of the law to a greater extent than in the pursuit of any other profession or vocation. A gift for lucid exposition and persuasive utterance was his by nature, and that, too, was increased by his culture and his activities. He had always personal charm and distinction, and, akin to them, the endowment that is very real, though it baffles adequate definition or description, that we call "personal magnetism." This last is a quality that standing alone gives no assurance of a successful life, but when combined with character and high mentality adds enormously to the effectiveness of those two basic qualities. Even strangers were drawn to him and, as with the magnet and metal filings, the closer the approach the greater the drawing-power.

In his professional life there was undoubtedly a combination of good fortune with his own energy and capacity. His father had been consulting counsel for some of the large business enterprises in Durham, and so he was introduced without wearisome waiting into the practice of the law—by no means lucrative at first, but sufficient in extent to give opportunity for industry and energy. His marriage was early and fortunate, and his home life was happy and restful. He was in Durham—first when it was a village, then a town, and before he left it a city—and it was always throbbing with life and growth. His friend and client, James B. Duke, was a colossus in business, and induced him to a larger field of action. All this was good fortune, but it might all, but for efforts of his own, have been of no avail. Even in his young days he sowed no wild oats—and the sowing of wild oats, to say nothing of their reaping, takes toll of time and energy. He was seriously bent, so long as he was active at all, on the business of life, and even more seriously bent on serving every client—however large and however small the matter involved—to the best of his great ability. In this service he spent himself without stint and without economy.

These were the characteristics—inherent qualities and habits of life—that made the man as he seemed to be to those who knew him in the years of his achievement.

Early in 1912 Mr. Fuller retired from all professional activity. From then until the end, more than twenty-two years, he lived the life of a cultivated gentleman at his beautiful home overlooking the Hudson. His visits to New York City were not numerous, because, much as he enjoyed his fellow men, or some of them, he found the city irksome. He enjoyed his visits to North Carolina because he loved its very soil, but even here he loved best the places where the soil is visible. He lost none of the personal qualities that characterized his years of activity, and perhaps gained no new qualities—but there was a change of emphasis. Clarity of mind remained, but sentiment was permitted a larger place in his thought and his life than in the years that were past. A whimsical humor that had been held in check was permitted its full play, to the delight of those who had the double advantage of his friendship and his companionship. A talent which had always been a significant part of him, the talent for friendship, became positive genius. During the years of his activity he had enjoyed good books, and in the years of retirement he gave longer hours to that indulgence. He came to know and appreciate pictures and sculpture. Most of all, he loved the loveliness of natural things—flowers and trees, the flow of the majestic river and the palisades beyond, the colorful pageant of the dying woods that we call Autumn, and the recurring mystery of the resurrection that we call Spring. The gift for rhyme and rhythm that was conspicuous

in his cousin, Edwin W. Fuller, was his, too, as he discovered in his days of leisure. He used it, though, only for the pleasure it gave himself and his family and intimate friends, and made it the vehicle for the expression of his devotion to his friends, his loyalty to institutions—the Presbyterian Church, for instance—and his joy in the beauties of the natural world.

I must dwell a moment more on his rare gift for friendship. I do not mean that he was the friend of *man*—he was not especially interested in man in the abstract. Nor do I mean that he was the friend of all men—indeed, while he tried to be just in his judgments, there were some men he did not like at all. His friends, though, he would think for and work for and suffer for with all his mind and heart. And as he gave his own affection, so he won and held the affection of others. A diverse company come to the mind of one who knew him and his friendships: There were governors and senators, and those who claimed to be only politicians. There were college presidents and poets and sculptors and men of real learning and men of only quaint and curious lore. There were captains of industry and men of inherited wealth who had never been in the market-place. There were lawyers and judges—some of them cultured and able and some whose culture and ability only his fond and partial eye could see. There were plain and unlearned, but genuine and sterling, folk. There was the colored man in Fayetteville who, when he came to make his will, thought of "Mr. Willie" as his wisest and truest friend. There was the colored man in Durham who, long after Mr. Fuller left Durham, was the proud possessor of clothes given him by "Mr. Willie," and who when accused of bootlegging, felt an assurance, justified by the event, that no jury in Durham County "was gwine to send Mr. Willie Fuller's coat to jail." I know not what test admitted one into the circle of his friends. But those who were in that circle were the better, and by much the happier, for being there.

The long restful afternoon and evening of Mr. Fuller's life—with its share of serene, sunlit hours and its share of clouds—ended, so far as it was of this world, in the sunset of August 23, 1934. But the glow of that life lasts far beyond the setting of the sun. Not for many a year will his face and figure and radiant personality go from the memory of them that loved him, nor will the tradition of him and his deeds and words go from them who from their fathers know of him. "The days of the life of a man may be numbered, . . . and his name shall be perpetual."

REMARKS OF CHIEF JUSTICE STACY, UPON ACCEPTING PORTRAIT OF WILLIAMSON WHITEHEAD FULLER, IN THE SUPREME COURT ROOM, 10 DECEMBER, 1935.

W. W. FULLER, who returns to us in remembrance today, was a distinguished member of a family in which legal ability has long been a notable trait. Endowed with unusual native intelligence, educated in the best schools of his day, brilliantly successful in his profession, he steadfastly adhered throughout a long and useful life to the fundamentals. He kept himself firmly rooted in the soil. He put first things first.

The changing scenes of a rapidly developing industrial system forced him to move to the metropolis of the Nation. There he acquitted himself as a lawyer with honor and distinction, but his noble spirit never changed. He was the same "Mr. Willie" to the humble Negro servant who had known him in his youth. He retained his devotion to the abiding institutions of his native heath. He still delighted to return to the ancestral home in the spring to see the wistaria in bloom. With a brilliant career at the bar behind him, he returned to the farm, there to enrich his great soul at Nature's fountain. He was indeed a part of all that he had known. All nature interested him. No man was so humble as not to feel a comradeship for him, none so high in power and prestige as not to respect his ability and admire his character.

The out-of-doors refreshed his soul continually. He was fully and keenly alive. He had poise, dignity, urbanity, and prestige, for he was a master in all that he undertook to carry out, but there was nothing of pomposity in his make-up. His was a great inheritance, the best that the South could offer; he lived in days that sorely tried the traditions of an age materially crushed by war; there was great temptation to forsake the old for the new, but while ever alert to the developments of a new day, achieving great success, he remained in spirit an heir of the noblest traditions of the Old South.

We are glad to have this portrait of a distinguished lawyer and a great gentleman. The marshal will hang it in its appropriate place. The fine appreciation of his life and character by his friend and ours will be published in the forthcoming volume of the Reports.

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B Forms of Action.

a Legal and Equitable Remedies

Legal and equitable rights and remedies are now determined in one and the same action. Const. of N. C., Art. IV, sec. 1. *Reynolds v. Reynolds*, 578.

C Joinder and Consolidation of Actions. (What causes and parties may be joined in complaint see Pleadings D b.)

c Consolidation by Trial Court

Consolidation of summary proceedings on bond of clerk instituted under C. S., 356, with action instituted by other creditors of clerk *held* not error. *Power Co. v. Yount*, 182.

Appeal and Error. (In criminal cases see Criminal Law L.)

A Nature and Grounds of Appellate Jurisdiction of Supreme Court.

a In General

When the lower court has no jurisdiction of motions made in the cause after judgments, the orders of the court upon such motions do not determine the rights of the parties, nor can such rights be adjudicated in the Supreme Court upon appeal. *S. v. Lumber Co.*, 347.

e Academic Questions

1. Where it is conceded on appeal that the election sought to be enjoined by plaintiffs has been held, plaintiffs' appeal presents a moot question, and will be dismissed. *Lucas v. Comrs. of Beaufort*, 699.

2. The courts will not determine the constitutionality of a statute except in cases clearly calling for the exercise of judicial power, and the courts will not render advisory opinions on constitutional questions. *Newman v. Comrs. of Vance*, 675.

f Parties Who May Appeal

1. Where receivers are not authorized by the court, expressly or by implication, to appeal from a judgment adverse to them, their appeal will be dismissed in the Supreme Court. *Kenny Co. v. Hotel Co.*, 295.

2. Where a party, through her duly appointed attorney, states in her brief on appeal from a judgment based upon a family agreement for the distribution of the proceeds of trust estates, that she asks nothing further for herself, but is interested only in presenting the rights of her minor infant, represented in the action by a next friend duly appointed, such party may be heard on appeal as an *amicus curæ* as the mother and natural guardian of her infant. *Reynolds v. Reynolds*, 578.

Appeal and Error—*continued.*

B Presentation and Preservation in Lower Court of Grounds of Review.

b Theory of Trial

1. An appeal will be determined in accordance with the theory of trial in the lower court. *Apostle v. Ins. Co.*, 95; *Coral Gables v. Ayers*, 426; *Ammons v. Fisher*, 712; *Pulverizer Co. v. Jennings*, 234.

2. Insurer's contention that insured accepted a check in full payment of insured's claim under a disability clause in a policy of group insurance *held* untenable upon the theory upon which case was tried, there being no pleadings or issues on this phase of the case. *Gossett v. Ins. Co.*, 152.

3. Where it is admitted on appeal that there was error in dismissing the action upon the ground upon which the judgment dismissing the action is based, the judgment must be reversed, since the appeal must follow the theory of trial in the lower court. *Wilson v. Hood*, 200.

4. A point of law debated on brief, but not mooted in the trial court nor supported by the record, will not be decided on appeal, but in this case, as a new trial is awarded upon exception to the court's refusal to give instructions requested, the parties will have opportunity to be heard on the matter upon the subsequent hearing. *Calhoun v. Highway Com.*, 424.

5. Where plaintiff assumes the burden of proof at the trial and does not there contend that the burden is on defendant, plaintiff will not be heard on appeal to assert that the burden was on defendant. *Webster v. Trust Co.*, 759.

C Requisites and Proceedings for Appeal.

a Making, Filing, and Service of Statement of Case on Appeal (In criminal cases see Criminal Law L a.)

1. When the trial court leaves the bench Friday preceding the last day of the term, stating he would not adjourn court, but would let the term expire by limitation, and no further business is transacted by the court at the term, the time for filing cases on appeals taken at the term will be computed from the Friday the court left the bench and not the Saturday following. *Edwards v. Perry*, 252.

2. Where appellant is one day late in filing his statement of case on appeal, although the case would have been filed within the time allowed except for the fact that the court left the bench one day before the expiration of the term, appellee's motion in the trial court to strike out the purported statement of case on appeal, because not filed within the time fixed, is properly allowed, though the circumstances may have justified an application for writ of *certiorari*. *Ibid.*

3. When appellee fails to return appellant's statement of case on appeal with objections within the time prescribed, the appellant's statement of case on appeal prevails by operation of law. C. S., 643. *Coral Gables v. Ayers*, 426.

E The Record.

a Necessary Parts of Record Proper

The pleadings, issues, and judgment appealed from are necessary parts of the record proper, Rule 19 (1), and where the judgment alone

Appeal and Error E a—*continued.*

appears of record, the appeal will be dismissed, since the pleadings are essential to advise the Court as to the nature of the action or proceedings, the judicial knowledge of the Court being limited to matters properly appearing of record. *Goodman v. Goodman,* 416.

h Questions Presented for Review on Record

1. Where a judgment entered in the cause is stricken out and another judgment entered in lieu thereof, exceptions to the signing of the first judgment and to the findings supporting such judgment are unavailing on appeal. *Moreland v. Wamboldt,* 35.

2. Where the answers of the jury to the first two issues renders the answering of the third issue unnecessary, an exception to the admission of evidence relating to the third issue becomes immaterial and need not be considered on appeal. *Pulverizer Co. v. Jennings,* 234.

F Exceptions and Assignments of Error.

a Time of Taking and Necessity for Exceptions

1. Appellant's assignment of error to the trial court's refusal to submit the issue as tendered by him cannot be considered on appeal where there is neither objection nor exception taken on the trial to the court's refusal to submit the issue as tendered or to the issue as submitted by the court. *Stadiem v. Harvell,* 103.

2. Only questions presented by exceptions duly taken can be reviewed by the Supreme Court on appeal. *Efird v. Smith,* 394.

b Form and Sufficiency of Exceptions

1. An exception to the signing of the judgment appealed from, without exception to the findings of fact or the failure to find facts supporting such judgment, confines the appeal solely to whether error is apparent in the record proper. *Moreland v. Wamboldt,* 35.

2. Where there are no findings of fact or request therefor, the Supreme Court, on appeal, will not attempt to ascertain the material facts from conflicting affidavits, upon a sole exception to the judgment. *Poindexter v. Call,* 62.

3. Where a jury trial is waived, and there is no exception to the findings of fact by the court presenting defendants' contention that certain of the findings are not supported by evidence, the findings are conclusive and defendants' contention cannot be considered on appeal. *Ins. Co. v. Murdock,* 223.

4. Where appellant requests no findings of fact, his exception to the findings of fact without specific exception to any particular finding cannot be sustained on appeal. *Ingram v. Mortgage Co.,* 329.

5. Where there are no exceptions to the findings of fact by the referee, an appeal upon exceptions to his conclusions of law must be determined in accordance with his findings of fact, the findings, in the absence of exceptions thereto, being conclusive both in the Superior Court and in the Supreme Court upon further appeal. *Salisbury v. Lyerly,* 386.

6. Where the only assignment of error is based on appellants' exception to the judgment, and the judgment is supported by the findings of fact, the judgment will be affirmed on appeal. *Efird v. Smith,* 394.

Appeal and Error F b—*continued.*

7. Where appellant does not except to the court's order allowing defendant's motion for judgment as of nonsuit at the close of all the evidence, and the sole exception is to the judgment, the order is not subject to review on appeal, and the judgment will be affirmed when no error appears upon its face. *Harrelson v. Bottling Co.*, 704.

c *On Appeals from Judgments of Superior Court Affirming or Reversing Judgment of Inferior Court*

1. Where Superior Court affirms judgment of county court, appellant should bring forward only rulings deemed erroneous. *Jenkins v. Castelloe*, 406.

2. Where, on appeal from judgment of the general county court to the Superior Court on matters of law, the Superior Court overrules each of the exceptions relied upon by appellant, upon further appeal to the Supreme Court the appellant should bring forward each ruling of the Superior Court on the exceptions deemed erroneous, and properly group them and assign same as error, Rule 19 (3), and where appellant merely assigns as error "the judgment of the Superior Court," the appeal will be dismissed or the judgment affirmed. *Harrell v. White*, 409.

G Briefs.

c *Abandonment of Exceptions by Failure to Discuss Same in Briefs*

Where defendant takes no exception to the portion of the judgment holding adversely to him on a point of law constituting one of his grounds for demurrer, and on appeal from the judgment overruling the demurrer, fails to discuss this aspect of the case in his brief or cite authorities, Rule 28, defendant will be deemed to have abandoned his contention in respect to this aspect of the case. *Bailey v. Roberts*, 532.

H Dismissal of Appeal.

a *On Procedural Grounds*

1. Where appellant's statement of case on appeal is properly stricken out for appellant's failure to file same within the time fixed, appellee is not entitled to a dismissal of the appeal, and appellant may prosecute the appeal, although it is the usual practice in such circumstances to affirm the judgment, unless error appears upon the face of the record. *Edwards v. Perry*, 252.

2. Appeal will be dismissed when the record does not contain necessary parts. *Goodman v. Goodman*, 416.

c *Dismissal as Result of Determination of Adverse Party's Appeal*

Where both parties appeal from an order entered in the cause upon the report of the referee, and upon plaintiffs' appeal the order is reversed and set aside, the defendant's appeal must be dismissed, since there is no judgment in the record from which an appeal will lie. *Hicks v. Purvis*, 227.

J Review.

a *Matters Reviewable*

1. Ordinarily an appeal from a discretionary order of the lower court will be dismissed. *Smith v. Ins. Co.*, 99.

Appeal and Error J a—*continued.*

2. The refusal of the trial court to set aside the verdict on the ground that excessive damages were awarded is not reviewable. *Waller v. Hipp*, 117.

3. A motion for a new trial for newly discovered evidence, made in the Superior Court on appeal from judgment of the county court, is addressed to the discretion of the court, and an appeal from the court's order allowing the motion and remanding the cause to the county court for a new trial will be dismissed. *Jarrett v. Ins. Co.*, 343.

4. Defendant moved to set aside the verdict on the ground of newly discovered evidence, and for that the verdict was not supported by the evidence, and for that the damages awarded were excessive. *Held:* The discretionary rulings of the trial court denying the motions are not reviewable. *Campo v. Kress & Co.*, 816.

c Of Findings of Fact

1. Defendant, a foreign corporation, was served with summons by service upon the Secretary of State in accordance with C. S., 1137. Defendant entered a special appearance and moved to dismiss the action for want of jurisdiction. *Held:* Upon the hearing of the motion, the finding of the trial court, supported by evidence, that defendant is not, and was not at the date of service of summons upon the Secretary of State, doing business in North Carolina is conclusive and not subject to review upon appeal, even conceding that there was evidence to the contrary, and judgment dismissing the action upon such finding was proper. *Brown v. Coal Co.*, 50.

2. Where the trial court hears the evidence, overrules the findings and conclusions of the referee, and makes contrary findings in support of his judgment, the Supreme Court, on appeal, will not weigh the evidence, but will affirm the findings of the trial court if they are supported by any competent evidence. *Maxwell v. R. R.*, 397.

3. Where a finding by the referee is fully supported by evidence appearing of record, the inadvertence of the trial court in striking it out for want of evidence must be held for error on appeal. *Coleman v. Hood*, 430.

4. Where plaintiff introduces documentary evidence for the purpose of attack, the inadvertence of the trial court in striking out the finding of the referee in plaintiff's favor supported thereby because the evidence was introduced by plaintiff, must be held for error. *Ibid.*

5. The findings of fact by the trial court upon the hearing of a motion to set aside a judgment for excusable neglect, N. C. Code, 600, are conclusive on appeal when supported by any competent evidence. *Carter v. Anderson*, 529.

d Presumptions and Burden on Showing Error

1. The burden is on appellant to show error, the presumption being against him. *Poindexter v. Call*, 62; *Efird v. Smith*, 394.

2. Where the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower sourt will be affirmed without becoming a precedent. *Seay v. Ins. Co.*, 832; *Sondey v. Yates*, 836;

Appeal and Error J d—*continued.*

Smith v. Powell, 837; *Beam v. Publishing Co.*, 837; *Martin v. R. R.*, 843; *Joyner v. Ins. Co.*, 843; *Sessoms v. R. R.*, 844; *Hayes v. Hickory*, 845.

e Harmless and Prejudicial Error

1. Where other testimony of like import to testimony objected to is admitted without objection, objection cannot be sustained, since the admission of the testimony objected to is harmless. *Broadway v. Cope*, 85; *Myers v. Utilities Co.*, 293.

2. Exceptions and assignments of error relating to an issue answered in favor of appellants will be disregarded on appeal, since errors cured by the verdict are not ground for reversal. *In re Will of Turnage*, 130.

3. The court's refusal to give instructions requested by defendant on one issue of the case will not be held for error where plaintiff would be entitled to recover notwithstanding the jury's answer to such issue. *Gossett v. Ins. Co.*, 152.

4. Error must be prejudicial to defendant in order to entitle him to a new trial upon appeal. *White v. McCabe*, 301.

5. The exclusion of the constitution of defendant mutual benefit association from the evidence *held* not prejudicial, all material parts of the constitution bearing on the controversy having been admitted in evidence, and the constitution, including index, comprising several hundred pages. *Cordell v. Brotherhood*, 632.

6. An exception to the admission of immaterial evidence will not be sustained when the admission of such evidence is not prejudicial and there is plenary competent evidence upon the issue. *Mansfield v. Wade*, 790.

f Review of Injunctive Proceedings

It will be presumed on appeal that the lower court found facts sufficient to support his judgment when there are no findings of fact and no request therefor, but in injunctive proceedings the Supreme Court may review the evidence, and where presumptive findings sufficient to support the judgment cannot be approved upon the record, the judgment of the lower court will be reversed upon error assigned and shown. *Harris v. Miller*, 746.

g Questions Necessary to Determination of Appeal

1. Where it is determined on appeal that defendants' motion for judgment as of nonsuit should have been allowed, other exceptions upon which defendants rely for a new trial need not be considered. *Shoemake v. Refining Co.*, 124.

2. Where there is no evidence that at the time of the injury in suit the tort-feasor was an employee of the individual defendants, it is immaterial whether the individual defendants were partners or whether the individual defendants were independent contractors with respect to the corporate defendant, since the principle of *respondeat superior* is not applicable to the facts. *Ibid.*

3. Where a new trial is awarded upon exceptions duly taken, other exceptions relating to matters which may not arise on a subsequent hearing need not be considered. *Pemberton v. Greensboro*, 466.

Appeal and Error—*continued.*

K Determination and Disposition of Cause.

b Remand

1. Where it is conceded on appeal that one of three defenses interposed as grounds for dismissal constitutes the only valid defense, and it appears that the court did not pass upon such defense, but dismissed the action upon another insufficient ground, the case will be remanded for further proceedings. *Wilson v. Hood,* 200.

2. In this case the trial court erroneously struck out certain findings of the referee. On appeal the court's rulings on the exceptions are stricken out, and the facts thus being left in doubt, and the record being in unsatisfactory shape to enable the Court to pass upon the questions sought to be presented, the case is remanded for further proceedings. *Coleman v. Hood,* 430.

e New Trial

1. Where there is no error in the trial of several issues in the case, but there is error in the trial of the issues relating to the amount recoverable by plaintiff, a partial new trial may be granted on appeal, there being no danger of complication since the issues are entirely separable. *Gossett v. Ins. Co.,* 152.

2. Where, in an action by a sheriff to recover compensation for transportation of prisoners under the provisions of C. S., 3908, it does not appear from the facts agreed how many prisoners were conveyed to jails in other counties by the sheriff or how many miles such prisoners were conveyed, a new trial will be awarded on appeal in order that the facts necessary to a determination of the question may be found and a proper adjudication made thereon. *Patterson v. Swain County,* 453.

L Proceedings in Lower Court After Remand.

a Jurisdiction and Powers of Lower Court

1. Superior Court may remand to Industrial Commission cause remanded by Supreme Court for judgment dismissing the proceeding for want of jurisdiction. *Thompson v. Funeral Home,* 178.

2. A decision of the Supreme Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court, and on a subsequent appeal. *Power Co. v. Yount,* 182; *Betts v. Jones,* 410; *Ferrell v. Ins. Co.,* 420; *Groome v. Statesville,* 815.

b Orders and Procedure in Lower Court After Remand

Where judgment of nonsuit against plaintiffs is reversed on appeal, subsequent proceedings in the trial court after the entering of the judgment as of nonsuit which adversely affected the interests of plaintiffs, are vacated. *Harris v. Aycock,* 523.

d Subsequent Appeals

A decision by the Supreme Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal. *Power Co. v. Yount,* 182; *Betts v. Jones,* 410; *Ferrell v. Ins. Co.,* 420; *Groome v. Statesville,* 815.

Appearance.

A Acts Constituting Appearance.

a General Appearance

The trustee of trust estates created by wills personally appeared by filing answer to a suit instituted by the wife of the primary, contingent beneficiary affecting the income from the trust, in which action judgment was entered affirming a family agreement for the distribution of the proceeds of the trust estates, by filing answer to a motion in the cause by the guardian of a minor contingent beneficiary to set aside the judgment so far as it affected the interest of the minor, and by filing answer to a petition of the heirs setting forth a proposed settlement, and only in the last answer filed did the trustee question the jurisdiction of the court on the ground that the trust *res* were beyond the jurisdiction of the court. *Held:* The appearance was a general appearance, giving the court personal jurisdiction over the trustee. *Reynolds v. Reynolds*, 578.

Arson.

C Prosecution and Punishment.

c Sufficiency of Evidence and Nonsuit

Evidence that defendant's car was driven away from defendant's house shortly before defendant's personal property therein was destroyed by fire, and that the car had been driven to the house several times during the days preceding the fire, and that the occupants of the car were heard in the house, *is held* insufficient, in the absence of evidence that defendant was one of the occupants of the car, to resist defendant's motions for judgment as of nonsuit in a prosecution under C. S., 4245 (a), although there was ample evidence that the fire was of incendiary origin and destroyed personal property of defendant which had been insured by him. *S. v. Simms*, 459.

Assault.

B Criminal Prosecutions.

c Sufficiency of Evidence and Nonsuit

Evidence that on a certain day poison was put in the flour in the kitchen of the prosecuting witness, that the presence of the poison was discovered in an attempt to bake biscuits made from the flour, and that defendant had an opportunity on the day in question to have committed the act, without evidence of motive or that defendant ever had the poison in his possession, *is held* insufficient to establish the identity of the defendant as the perpetrator of the crime, and his motion for judgment as of nonsuit should have been allowed, and on appeal the judgment is reversed under the provisions of C. S., 4643. *S. v. White*, 537.

Attractive Nuisance. (See Negligence A cc.)

Automobiles. (Service of process on nonresident drivers or owners see Process B e; city's liability for injury to driver caused by defect in street see Municipal Corporations E c.)

C Operation and Law of the Road.

b Speed at Intersections

Plaintiff's evidence tended to show that he came practically to a stop at the stop sign before attempting to cross the intersection of a through street, that he attempted to cross the intersection when he

Automobiles C b—*continued.*

saw that the street was clear except for a car a block away, and that such car, owned by defendant and driven at a rate of seventy miles an hour, struck plaintiff's car as his car reached the far side of the intersection, the rear wheels lacking but four feet of clearing the intersection. *Held:* Defendant's motion for judgment as of nonsuit on the evidence was properly refused. *Niblock v. Taxi Co.*, 737.

c Speed on Highways

1. Evidence that the car in which plaintiff was riding as a guest skidded on the wet paved highway and that the driver explained the skidding was caused by worn-out tires, and that, upon plaintiff's suggestion, the driver slowed his speed to 35 or 37 miles per hour, and that thereafter at this speed the car skidded again, resulting in the injury in suit, *is held* sufficient to be submitted to the jury on the question of negligence, there being evidence from which the jury could find that the skidding was caused by driving the car with worn tires at a speed, which although not ordinarily unlawful, was unlawful under all the circumstances shown by the evidence. C. S., 2621 (45). *Waller v. Hipp*, 117.

f Ordinary Care and Sudden Emergency

1. Whether the conduct of the driver of an automobile in turning the steering wheel from one side to the other in an attempt to obtain control of the car after it had skidded on the highway was that of a prudent man *held* a question for the jury and not for the court. *Waller v. Hipp*, 117.

2. Plaintiff brought this action in the courts of this State to recover for injuries sustained in an accident occurring in another state while plaintiff was riding as a passenger in a car driven by defendant. The evidence tended to show that while defendant was driving in a careful and prudent manner the car suddenly started to wobble on the highway because of a rear tire becoming flat, and that defendant in attempting to recover control of the car first speeded up the car and then stepped on the brake, resulting in the car turning over, causing the injuries in suit. *Held:* The act of defendant in applying the brake in the sudden emergency is insufficient to show negligence under the rule that a person confronted with a sudden emergency is not held to the wisest choice of conduct, but only to such choice as a person of ordinary care and prudence, similarly situated, would have made, and defendant's motion for judgment as of nonsuit should have been allowed, the *lex loci* being controlling. *Ingle v. Cassady*, 497.

h Condition and Defects in Vehicle

Evidence that skidding was caused by worn-out tires and excessive speed under the circumstances *held* sufficient for jury. *Waller v. Hipp*, 117.

i Proximate Cause, Intervening Negligence, and Last Clear Chance

1. The evidence tended to show that one defendant parked his car on the highway for fifteen minutes after colliding with another automobile, on a damp, dark night, and that the car driven by the second defendant, at an unlawful rate of speed, in order to avoid colliding with the parked car, was driven on the shoulders of the

Automobiles C i—*continued.*

highway and struck and killed plaintiff's intestate, who was standing on the shoulder of the road. *Held:* Even conceding that the first defendant was negligent in leaving the car parked on the highway under the circumstances, such negligence was not the proximate cause of the injury to plaintiff's intestate, since defendant so parking his car could not have reasonably anticipated or foreseen that a driver of another car would operate his car in such a negligent manner as to be forced to run on the shoulder of the road and strike plaintiff's intestate in order to avoid a collision with the parked car. *Beach v. Patton*, 135.

2. The evidence tended to show that plaintiff, in order to avoid striking a chicken standing on the hard surface of the highway, drove his automobile gradually to the left, so that the car was traveling in about the center of the highway at the time of the accident in suit, and that a bus belonging to defendant was traveling in the same direction and hit plaintiff's car when the bus attempted to pass. *Held:* Conceding plaintiff was negligent in driving to the left without giving any signal or ascertaining if the car could be driven to the left in safety, N. C. Code, 2621 (59), defendant's motion to nonsuit was erroneously granted, since the pleadings and evidence are sufficient to raise the issue of the last clear chance upon the evidence tending to establish defendant's negligence in failing to keep a safe distance between the vehicles, N. C. Code. 2621 (57), and in failing to take the precautions and give the signals required by statute for passing cars on the highway, N. C. Code, 2621 (54) (55). *Morris v. Transportation Co.*, 807.

j Guests and Passengers

1. Guest in car, having no control over its operation, may recover from driver and railroad company for injuries caused by their concurrent negligence. *Brown v. R. R.*, 57.

2. A guest in an automobile, injured in a collision, may recover of the driver, under the laws of this State, if the collision is the result of want of ordinary care on the part of the driver, and it is not necessary that the driver be guilty of gross or wanton negligence, and the law of this State is applicable to an action to recover for injuries to a guest in a collision occurring in this State. *White v. McCabe*, 301.

D Liability of Owner for Driver's Negligence.

b Agents and Employees

1. A person riding in an automobile upon the invitation of the driver and the driver's employer, who is injured by the negligence of the driver in the performance of his duties, may recover of both the driver and the employer. *Waller v. Hipp*, 117.

2. The evidence disclosed that the tort-feasor was requested and instructed to stay at a gasoline plant used in connection with defendant's business, answer the telephone and keep a record of orders for gasoline, that the tort-feasor, in response to a telephone call from his mother to come to supper, took a truck maintained at the plant to deliver gasoline, and without authorization drove the truck to his home, and in attempting to drive into the driveway near his home, collided with plaintiff's car, causing the injury in

Automobiles D b—*continued.*

suit. *Held:* Defendants' motion for judgment as of nonsuit should have been granted, the evidence failing to show that the tort-feasor, at the time of the injury in suit, was an agent or employee of of defendants, or either of them. *Shoemake v. Refining Co.*, 124.

3. The evidence, considered in the light most favorable to plaintiff upon defendant's motion as of nonsuit, tended to show that an employee of a filling station was given a ten dollar bill and instructed to get small change and get his supper, and in order to hurry back to relieve another employee, was instructed to use the car of a customer of the station, that the employee took a circuitous route and took women passengers into the car with him, but that at several places on the circuitous route he said he was getting out to get change for his employer, and that at the time of his collision with the car in which plaintiff was riding, he was returning to the filling station for the purpose of delivering the change, which the uncontradicted evidence showed he had in his possession at the time of the accident. *Held:* There was more than a scintilla of evidence tending to show that the act complained of was within the scope of the employee's employment and in furtherance of the employer's business, and defendant employer's motion as of nonsuit on the issue was properly refused. *Lertz v. Hughes Bros.*, 490.

4. An admission that on the day of the accident one of defendants was an employee of his codefendant, and as such employee was authorized and directed from time to time to drive defendant employer's truck, is evidence tending to show that at the time of the injury in suit the employee was driving the truck within the scope of his employment. *West v. Baking Co.*, 526.

c Family-Purpose Doctrine

The evidence tended to show that defendant, a *feme sole*, was the owner of the automobile involved in the collision in suit, and that she lived in the house with her father and managed his house, and that her brother and his family also lived in the house, and that the car was used by the adult members of the house, especially by defendant's father, for pleasure, and that defendant owned another car for her exclusive personal use. Plaintiff, a guest in the car, was injured in a collision resulting from the negligence of defendant's father, who was driving the car at the time, defendant not being present. *Held:* An instruction that the negligence of the father was imputed to the daughter, the defendant, as a matter of law is erroneous, ownership alone being insufficient to establish liability, and defendant not being liable under the family-purpose doctrine as a matter of law. *White v. McCabe*, 301.

F Criminal Responsibility of Owner or Driver.

a Smoke Screen Attachments

1. Evidence tending to show that defendant was the owner of an automobile, and had been seen in same prior to its capture, and that when the automobile was subsequently captured it was being driven by others and had attached thereto a mechanical device for the emission of excessive smoke or gas, *is held* insufficient to resist defendant's motion as of nonsuit under C. S., 4643, in a prosecution under N. C. Code, 4506 (b). *S. v. Yates*, 194.

Automobiles F—*continued.*

b Criminal Negligence in Driving

Defendant was indicted for assault with a deadly weapon growing out of injury to bicyclists struck by defendant's car. A new trial is awarded upon defendant's exception to the charge for the court's failure to observe and apply the difference between criminal and civil negligence. *S. v. Lancaster*, 349.

Banks and Banking.

C Functions and Dealings.

b Deposits

In an action by a depositor to recover a sum alleged to have been deposited in defendant bank, which sum the bank refused to pay upon its contention that the deposit was in a smaller sum, the burden is on plaintiff depositor to prove the deposit in the amount claimed, and the introduction of a pass book showing an entry by an employee of the bank of the deposit in the amount claimed establishes a *prima facie* case placing the burden on the bank of going forward with the evidence or taking the risk of an adverse verdict, but does not shift the burden of the proof on the issue to the bank. *Webster v. Trust Co.*, 759.

d Pledges by Borrowers

A husband and wife executed a note to a bank, and to secure payment, pledged certain collateral, the pledge stipulating that the bank might hold same as security for any other obligation, primary or secondary, etc., "under which the undersigned shall be in any way bound." *Held:* Construing the pledge to ascertain the intention of the parties, the pledge covered only such obligations to the bank upon which the husband and wife were jointly liable, and the bank, or its receiver upon insolvency, is not entitled to hold the pledged security for the individual liability of the husband as endorser on a note of a third person, the bank, which selected the language of the pledge, having failed to stipulate that the security should be pledged to secure the joint or several liabilities of the pledgors. *Powell v. McDonald*, 436.

e Payment of Checks

1. Where a bank wrongfully and unlawfully refuses to pay a check of a depositor drawn against his account, the bank breaches its contract with the depositor and the depositor is entitled to nominal damages at least, and where there is sufficient evidence that the bank wrongfully and unlawfully refused to pay the depositor's check, the bank's motion for judgment as of nonsuit in the depositor's action to recover damages therefor is properly refused. *Thomas v. Trust Co.*, 653.

2. The liability of a bank to a depositor for wrongfully and unlawfully refusing to pay a check of the depositor drawn against his deposit and properly presented for payment, is limited to the actual damage sustained by the depositor when such refusal to pay the check is due to an error or mistake of the employee of the bank and not to malice, C. S., 220 (m), and in the absence of evidence of malice, plaintiff depositor's recovery should be limited to the issue of actual damage sustained. *Ibid.*

Banks and Banking C e—*continued.*

3. In an action by a depositor against a bank to recover for the wrongful and unlawful refusal by the bank to pay the depositor's check, it is error for the court to charge the jury on the issue of damage that it should consider the evidence of damage sustained by plaintiff through injury to his credit and reputation in the community resulting from the bank's wrongful act when there is no evidence that plaintiff's credit or reputation had been injured thereby. *Ibid.*

D National Banks.

b Deposits

Testator directed that a portion of his estate be deposited in a designated national bank in trust for his daughter for her life, and the income therefrom be paid to her, and that upon her death the principal be paid to designated beneficiaries. The bank accepted the deposit and paid the daughter four per cent on the deposit per year, and used the funds in its general banking business by depositing securities in its trust department. *Held:* The bank, by its acts, accepted the trust created by the will and exercised control over the funds as trustee, and neither the bank nor its trustees in liquidation can successfully contend that such deposit was a time deposit. *Bobbitt v. Bank,* 460.

f Fiduciary Transactions

It is the duty of a national bank to segregate all assets held by it in any fiduciary capacity from its general assets, and to keep separate books and records showing in proper detail all transactions engaged in by it in its fiduciary capacities, and if any of such funds are used in the conduct of the bank's business, the bank must first secure such funds by Government bonds or other securities set aside in its trust department. U. S. Code, Anno., Title 12, Banks and Banking, sec. 248. *Bobbitt v. Bank,* 460.

H Insolvency and Receivership.

a Statutory Liability of Stockholders

Judgment in this case dismissing an appeal from the levy of the statutory liability on bank stock for laches or because not taken in apt time for that nineteen or twenty months had elapsed since the assessment, is affirmed. N. C. Code, 218 (c). *In re Bank,* 65.

c Management and Control of Assets

A creditor of a bank may not maintain an action to interfere with the disposition of its assets by the liquidating agent in the absence of any allegation of fraud, bad faith, or neglect on the part of the liquidating agent, and a showing that a greater return would result from the disposition of the assets as contended for by the creditor. *In re Bank,* 509.

e Claims and Priorities

1. A sum in excess of the judgment was realized upon an execution sale against plaintiff's property, and while this sum was held by the sheriff, a consent judgment was entered against plaintiff in favor of defendant bank, and in pursuance of the consent judgment the sum was paid over to the bank. Thereafter the consent judgment was set aside by motion in the cause for want of authority on the part of plaintiff's attorneys to enter same, and the order setting aside the judgment stipulated that the bank return the sum

Banks and Banking H e—*continued.*

of money to the court to be held by the court until final determination of the appeal from the order, and then the money paid out according to law. The bank became insolvent without complying with the order of court, and the order setting aside the consent judgment was affirmed on appeal to the Supreme Court. *Held:* As between plaintiff and the bank, the bank's receipt of the money was wrongful, and the relation of debtor and creditor did not exist between the bank and plaintiff, and plaintiff was entitled to a preference in the bank's assets in the hands of the receiver. *Hensley v. Hood, Comr.*, 18.

2. A national bank accepted a trust deposit under the terms of a will, and later transferred the deposit to its trust department and used the funds in its general banking business, but set aside in its trust department bonds and securities sufficient to cover trust funds so used, as required by U. S. Code, Anno. Title 12, Banks and Banking. *Held:* Upon the bank's insolvency, the beneficiaries of the trust are entitled to a lien on the bonds so set aside in the trust department, in addition to their claim against the estate of the bank. *Bobbitt v. Bank*, 460.

Bastards.

B Custody and Support.

c Proceedings to Compel Support or to Punish Failure to Do So

1. The old bastardy act is repealed *in toto* by ch. 228, Public Laws of 1933, the provisions of sec. 2 that the Act of 1933 should not affect pending litigation or accrued actions being repugnant to the specific repealing clause of sec. 9, and in a prosecution under the Act of 1933 a demurrer on the grounds that proceedings under the old bastardy act were then pending should be overruled. C. S., 265, *et seq.* *S. v. Morris*, 44.

2. In a prosecution under ch. 228, Public Laws of 1933, it is immaterial when the illegitimate child was begotten, the offense under the act being the wilful neglect or refusal to support and maintain an illegitimate child born after the ratification of the act. *Ibid.*

3. The begetting of an illegitimate child is not of itself a crime, and a warrant charging defendant with being the father of an unborn, illegitimate child is insufficient to support a prosecution under N. C. Code, 276 (a), nor is such insufficiency cured by an amendment allowing the word "wilful" to be inserted therein, in the absence of an amendment alleging the birth of the child and defendant's refusal to support the child. *S. v. Tyson*, 231.

4. Wilfulness is an essential ingredient of the offense of failing to support an illegitimate child, N. C. Code, 276 (a), and where the warrant fails to charge that defendant's failure to support his illegitimate child was wilful, defendant's motion in arrest of judgment should be allowed. *S. v. Tarlton*, 734.

Betterments.

A Nature and Requisites of Claim for Betterments.

b Good Faith in Making Improvements Under Belief of Title

1. A judgment of nonsuit upon a petition for betterments is improperly entered on the ground that claimant was not an innocent third party in that it appeared that the deed of trust under which plain-

Betterments A b—*continued.*

tiff claims as purchaser at the foreclosure sale was properly registered at the time deed was executed to claimant, where it appears that claimant's deed, regular upon its face, purported to convey the property in fee free from encumbrances and was supported by full consideration, and that claimant went into possession and made the improvements after foreclosure of the deed of trust under which plaintiff claims, and that at the time of the execution of the mortgage the mortgagor and mortgagee did not contemplate that the tract in question should be covered by the mortgage, and that claimant, at the time of purchasing the property, was advised by a reputable attorney that the title was free of encumbrances, and that claimant believed he had good title. *Ins. Co. v. Allen,* 13.

2. Defendant introduced evidence tending to show that defendant entered possession of the land in question under a parol contract to convey, which contract was later reduced to writing but not delivered, and made improvements on the lands in good faith. *Held:* In plaintiff's action for possession the evidence of the unenforceable contracts to convey was properly submitted to the jury upon the question of defendant's right to recover the value of the improvements, and upon the verdict of the jury in his favor, defendant was entitled to recover the value of the improvements placed upon the land in good faith, less the reasonable rent for the land during the time of defendant's occupancy. *Ins. Co. v. Cordon,* 723.

c Mortgagors and Those Claiming Under Them

Where, at the time of claimant's going into possession under a deed purporting to convey the fee-simple title free from encumbrances, the deed of trust constituting a lien upon the lands, executed by claimant's predecessor in title, had been foreclosed and deed executed by the trustee to plaintiff, the mortgagee and purchaser at the foreclosure sale, claimant is not precluded by C. S., 710, from filing his claim for betterments upon his ejectment by plaintiff, the relationship of mortgagor and mortgagee existing between plaintiff and claimant's predecessor in title having been terminated by the foreclosure sale and the trustee's deed prior to the time of claimant's taking possession, and therefore claimant not being included in the relationship of mortgagor and mortgagee. *Ins. Co. v. Allen,* 13.

Bills and Notes. (Limitations of actions on see Limitation of Actions; admissibility of parol evidence affecting see Evidence J a 3.)

C Rights and Liabilities of Parties. (Pledges by borrower from bank see Banks and Banking C d.)

a Definitions of Capacity of Parties

1. Where a note is assigned as collateral security for another note, and the assignee holds the collateral note without procuring the endorsement of the assignor until after the collateral note is past due, the assignee is not a holder in due course of the collateral note, and takes same subject to all equities existing in favor of the maker of the collateral note as against the payee who assigned same. C. S., 3030. *Hare v. Hare,* 442.

2. Where all the evidence is to the effect that the holder of a negotiable note obtained same by endorsement after maturity, the holder is

Bills and Notes C a—*continued.*

not a holder in due course, N. C. Code, 3033, 3039, and takes same subject to equities, and the maker of the note may establish as against such holder that the note was paid before it was endorsed to and acquired by the holder. *Mansfield v. Wade*, 790.

d Rights and Liabilities of Holders Not Holders in Due Course

Maker of note *held* not estopped to set up equities against holder not a holder in due course. *Hare v. Hare*, 442.

G Payment and Discharge.

a In General

Where a note is given in renewal of another note and not in payment thereof, the only effect of the transaction is to extend the time for payment, and the original note is not extinguished, and upon default, the payee may sue upon the original note, and in a suit on original notes in which the plaintiff introduces evidence of ownership, that the notes were due and unpaid, and that defendant executed same for value, and that the original notes were not paid by the renewal notes, defendant's motion as of nonsuit based solely upon the contention that plaintiff could declare only upon the renewal notes, should be overruled, plaintiff having made out a *prima facie* case. C. S., 3033, 3040. *Dyer v. Bray*, 248.

Bona Fide Purchaser. (See Mortgages H m 2.)

Boundaries.

A Nature and Scope of Special Proceeding to Establish Boundaries.

a Occupation and Title

In a special proceeding under C. S., ch. 9, to establish the dividing line between adjoining tracts of land, title is not a prerequisite, C. S., 362, and where it is admitted in the case on appeal that plaintiff's title was not in dispute, and that defendant's title was not in dispute except as to the true boundary line, the refusal of the court to submit an issue as to plaintiff's title, in addition to the issue as to the true boundary line, will not be held for error. *Clark v. Dill*, 421.

Bribery.

B Prosecution and Punishment.

b Sufficiency of Evidence and Nonsuit

Evidence of defendants' guilt of bribing a witness to give false testimony *held* sufficient to support the verdict of the jury upon which defendants were sentenced to imprisonment in the State's Prison. *S. v. McLamb*, 378.

Burglary. (Competency of evidence obtained by feigned coöperation with perpetrators of crime see Criminal Law G u.)

Bus Companies. (Liability to passengers see Carriers C.)

Cancellation of Insurance Policies for Fraud. (See Insurance I.)

Carriers.

C Carriage of Passengers

a Relationship of Carrier and Passenger

Plaintiff was a passenger on a bus line. The bus stopped at an intermediate point, and plaintiff was told that the bus would stop at

Carriers C a—*continued.*

such terminal for thirty minutes for rest and lunch. Plaintiff left the bus and went into the bus station, through the ladies' rest room to the toilet, and sustained a personal injury from a fall while returning to the rest room. *Held:* Plaintiff left the bus for the purpose stated with the express or implied consent of the bus company, and did not lose her status as a passenger by temporarily alighting from the bus under the circumstances. *Goodman v. Queen City Lines*, 323.

d Injuries to Passengers

1. Certain of defendant bus companies using in common with other of defendants a central bus station, but who were not lessees of the station, may not be held liable to a person, a passenger on another bus line, but not a passenger on their lines, nor a prospective passenger thereon, for personal injuries sustained by such person from a fall occurring when such person stepped down a slight depression in the station upon the wet floor. *Goodman v. Queen City Lines*, 323.

2. Certain defendant bus companies who were lessees of a common station *are held* not liable to a passenger of another bus company who was not a passenger on their lines, nor a prospective passenger thereon, for personal injuries sustained by such person from a fall occurring when such person stepped down a slight depression in the station upon the wet floor, in the absence of evidence of wilful or wanton negligence on the part of such bus lines, the injured person being a mere permissive licensee in relation to such companies. *Ibid.*

3. Plaintiff, without losing her status as a passenger, left the bus and went to the toilet in the station at an intermediate point, and was injured in a fall occurring when she stepped down a depression of about six inches in the floor of the station, upon her return from the toilet to the ladies' rest room. The evidence was conflicting as to whether there was sufficient light at the place, and as to whether the floor was slippery and wet. *Held:* Defendant's motion as of nonsuit was properly refused, the question of negligence being for the jury, upon the principle that defendant was under duty to furnish its passenger reasonably safe accommodations. *Ibid.*

4. Evidence tending to show that plaintiff, a passenger on defendant's train, attempted to alight from the train while it was still moving after the train had slowed down without coming to a standstill at the station at a flag-stop where plaintiff intended to get off, *is held* to establish contributory negligence barring plaintiff's action for damages sustained in a fall when she attempted to alight from the train. *Stamey v. R. R.*, 668.

Certiorari. (See, also, Appeal and Error C a 2.)

A Nature and Grounds of Writ.

a In General

The clerk entered an order allowing a guardian additional compensation for extraordinary services. Respondent failed to perfect his appeal from the clerk's order, and thereafter applied to the judge of the Superior Court for a writ of *certiorari*. The petition for *certiorari* was denied upon the court's finding of laches and demerit. *Held:*

Certiorari A a—*continued*.

The denial of the petition was without error, *certiorari* lying only upon a showing that applicant was not guilty of laches and that probable error was committed on the hearing. *In re Snelgrove*, 670.

Claim and Delivery.

G Liabilities on Bonds.

a Extent of Liability and Damage

Where defendant in claim and delivery recovers judgment and the property cannot be returned to him, the measure of damages is the value of the property at the time of its seizure, and an instruction that defendant, from whom an automobile had been taken in claim and delivery by the assignor of a chattel mortgage thereon, would be entitled to recover, if plaintiff's seizure of the property were wrongful, the amount paid on the purchase price of the car less the value of the use obtained from the car by defendant, *is held* for error. C. S., 833. *C. I. T. Corp. v. Watkins*, 448.

Clerks of Court. (Power of commissioners to dismiss clerk of city court see Municipal Corporations D a; liabilities on official bonds see Principal and Surety B c.)

B Duties and Liabilities. (Duty to notify Attorney-General of failure of defendant in criminal prosecution to prosecute appeal see Criminal Law L a 2, 3.)

b Receipt of Payments on Judgments

The clerk of the Superior Court and the surety on his bond are liable for loss resulting to the owner of a judgment from the clerk's failure to perform his statutory duty to enter the judgment and payments thereon on the judgment docket or his failure to account to the owner for sums paid on the judgment by the judgment debtor, C. S., 617. *Dalton v. Strickland*, 27.

Common Law.

The common-law rule that there can be no limitation over in personal property after reservation of a life estate therein is in force in this State, C. S., 970, and has been recognized by judicial decision and by statutory implication. *Speight v. Speight*, 132.

Compensation Act. (See Master and Servant F.)

Consolidated Statutes and Michie's Code Construed. (For convenience in annotating. Rules for construction of statutes see Statutes.)

SEC.

33. Action to recover for certain disbursements as breach of bond *held* not action to surcharge or falsify final account, and was improperly remanded to clerk. *Hicks v. Purvis*, 227.

54. Devisee *held* entitled to rents from land where at date of testator's death no crops had been planted. *Carr v. Carr*, 246.

74. Personalty is primary fund for payment of debts of estate, and realty may be sold only when personalty is insufficient. *Parker v. Porter*, 31.

76, prior to its amendment by ch. 355, Public Laws of 1935. Heir at law may not convey title as against creditors prior to two years from granting letters testamentary. *Johnson v. Barefoot*, 796.

Consolidated Statutes—*continued.*

SEC.

218(c). Appeal from summary judgment of assessment dismissed for laches or because not taken in apt time. *In re Bank*, 65.

220(m). In absence of malice, bank is liable only for actual damage resulting from wrongful refusal to pay depositor's check. *Thomas v. Trust Co.*, 653.

265, *et seq.* Old bastardy act is repealed *in toto* by ch. 228, Public Laws of 1933. *S. v. Morris*, 44. Under the Act of 1933 it is immaterial when the illegitimate child was begotten, the offense under the act being the wilful neglect or refusal to support. *S. v. Morris*, 44. Warrant failing to aver that failure to support illegitimate child was wilful *held* fatally defective. *S. v. Tyson*, 231; *S. v. Tarlton*, 734.

356. Consolidation of summary proceedings on clerk's bond under the statute with action instituted by other creditors of the clerk *held* not error. *Power Co. v. Yount*, 182. Institution of proceedings under the statute *held* not to create priority over other creditors. *Ibid.*

358. Judgment against principal is ordinarily *prima facie* evidence against surety. *R. R. v. Lassiter & Co.*, 209.

362. Occupation is sufficient to sustain special proceeding to establish boundary. *Clark v. Dill*, 421.

395(2). Statute relating to repeal of Turlington Act *held* subject to constitutional test under this decision, but not by enjoining holding of election provided for in the act. *Newman v. Comrs. of Vance*, 675.

405. Cause of action against guarantor on a note accrues upon the maturity of the note and the failure of the maker to pay same according to its tenor. *Hall v. Hood, Comr.*, 59.

415. Complaint in prior action is only evidence competent to establish identity of actions. *Little v. Bost*, 762.

437. Tardy payment of street assessment will not start running of statute against unpaid installments not then due in absence of exercise by municipality of rights under acceleration provision. *Farmville v. Paylor*, 106.

441(1). In voluntary payment on note by application of funds of maker in hands of payee to note does not affect running of statute in favor of guarantor on note. *Hall v. Hood, Comr.*, 59.

441(6). Action against executrix for breach of bond accrues at time of breach and not at time executrix files final account, there being no provision relating to discovery of breach. *Hicks v. Purvis*, 657.

441(9). More than three years elapsed after payment of usury should have been discovered and action was barred. *Ghormley v. Hyatt*, 478.

442(2). Action to recover penalty for usury is barred after two years from each payment of usurious interest. *Ghormley v. Hyatt*, 478.

462. When executor dies prior to trial, judgment against estate is irregular, and is properly set aside upon motion. *Taylor v. Caudle*, 298.

Consolidated Statutes—*continued.*

SEC.

465, 470(2). Trial court has discretionary power to grant motion for change of venue in action instituted against personal representative. *Pushman v. Dameron*, 336.

476. Signature of clerk is essential part of summons. *McLeod v. Pearson*, 539.

491(a). Service may not be had on personal representative of deceased auto owner under this section. *Dowling v. Winters*, 521.

507. Action *held* properly dismissed upon demurrer for misjoinder of parties and causes. *Mills v. Bank*, 674.

521. Defendants *held* entitled to offset debt due county with past-due bonds of county in this case. *Swain County v. Welch*, 439.

536. Allowance of amendment to pleadings *held* within discretionary power of trial court. *Smith v. Ins. Co.*, 99.

537. In action for deficiency after foreclosure sale, defense collaterally attacking sale *held* properly stricken from answer upon motion. *Bank v. Stewart*, 139.

547. Allowance of amendment in trial court's discretion *held* not objectionable that it substantially changed cause of action. *Smith v. Ins. Co.*, 99. Trial court has discretionary power to allow plaintiff to amend upon hearing of defendant's demurrer. *Bailey v. Roberts*, 532.

564. Where charge is sufficiently full, failure to give more specific instructions on any given point will not be held for error in the absence of request for special instructions. *S. v. Caudle*, 249.

567. On motion to nonsuit, all the evidence tending to support plaintiff's claim is to be considered in light most favorable to plaintiff. *Lynn v. Silk Mills*, 7; *Gossett v. Ins. Co.*, 152; *Niblock v. Taxi Co.*, 737. Motion to nonsuit must be made at close of plaintiff's evidence, and if overruled, again at the conclusion of all the evidence. *Ferrell v. Ins. Co.*, 420.

569. Objection that court did not separately state findings of fact and conclusions of law *held* untenable. *Dailey v. Ins. Co.*, 817.

584. Plaintiff *held* to have waived issue of negligence of one defendant by tendering issues involving solely the negligence of the other defendant. *Ammons v. Fisher*, 712.

593. Consent judgment may be entered at any time by clerk of Superior Court in which action is pending. *Hood, Comr., v. Wilson*, 120.

600. Only party against whom order is entered may move to set it aside for surprise, excusable neglect, etc. *In re Bank*, 509. Judgment *held* taken upon neglect of client present at time of refusal of his attorney's motion for continuance. *Carter v. Anderson*, 529.

614. Docketed consent judgment has priority over another consent judgment against the same party docketed later on the same day, since C. S., 613, does not apply to consent judgments. *Hood, Comr., v. Wilson*, 120.

Consolidated Statutes—*continued.*

SEC.

617. Judgment debtor is entitled to credit on judgment for amounts paid by him on the judgment to the clerk, although clerk fails to enter payment on the judgment docket. *Dalton v. Strickland*, 27.

620. Judgment debtors *held* entitled to have judgment credited with sum paid by joint tort-feasors for covenant not to sue. *Brown v. R. R.*, 423.

643. When appellee fails to return appellant's statement of case on appeal with objections within time prescribed, appellant's statement of case on appeal prevails by operation of law. *Coral Gables, Inc., v. Ayres*, 426.

710. Where relationship of mortgagor and mortgagee is terminated by foreclosure prior to claimant's possession under *mesne* conveyances from mortgagor, the statute does not apply to prevent claim for betterments. *Ins. Co. v. Allen*, 13.

833. Where defendant recovers judgment in claim and delivery, measure of damages is value of property at time of taking. *C. I. T. Corp. v. Watkins*, 448.

867, as amended by ch. 349, Public Laws of 1933. Action *held* an action to enforce money demand against county, and *mandamus* would not lie in absence of judgment against county. *Woodmen of the World v. Comrs. of Lenoir*, 433.

881. Summons served on defendant in *quo warranto* proceedings must be signed by clerk. *McLeod v. Pearson*, 539.

896. Where defendant tenders judgment in the amount to which plaintiff is entitled, costs are properly taxed against plaintiff. *Webster v. Trust Co.*, 760.

970. Common law rule that there can be no limitation over in personal property after reservation of life estate is in force in this State. *Speight v. Speight*, 132.

987. Evidence *held* for jury on question of whether promise was original promise not coming within provisions of statute. *Dozier v. Wood*, 414.

988. Agreement of vendor to remove prior lien upon payment of purchase price *held* not required to be in writing. *Hare v. Hare*, 442.

994, 997. With certain common law and statutory exceptions, contracts of infants are voidable at option of the infant. *Coker v. Bank*, 41.

1137. Finding, supported by evidence, that foreign corporation was not doing business in this State *held* conclusive. *Brown v. Coal Co.*, 50.

1193, 1194, 1199. Where corporation has been served with summons and has filed answer, the action against it does not abate upon its subsequent dissolution. *Lertz v. Hughes Bros., Inc.*, 490.

1317. Commissioners *held* not individually liable for injuries to prisoner caused by their failure to promulgate proper rules for safety of prisoners in the absence of malice or corrupt failure to act. *Moye v. McLawhorn*, 812.

Consolidated Statutes—*continued.*

SEC.

1450. Governor has authority to order special term of Superior Court and to order drawing of grand jury therefor, but when grand jury is not ordered for the term only cases pending in the court at the time may be tried at such special term. *S. v. Baxter*, 90.

1475. Justice of the peace has jurisdiction of suit by employee under National Recovery Act for code wages when amount demanded does not exceed $200. *James v. Dry Cleaning Co.*, 412.

1608(cc). Rule of Practice in Supreme Court No. 19 (3). Where Superior Court on appeal from county court grants new trial, Superior Court should specifically state rulings upon exceptions, and where it affirms judgment of county court, appellant should bring forward only rulings deemed erroneous. *Jenkins v. Castelloe*, 406. See, also, *Harrell v. White*, 409.

1659(a). Where separation is result of criminal act of plaintiff, he may not maintain divorce on ground of two years separation. *Reynolds v. Reynolds*, 428.

1667. Court need not find facts supporting order for alimony *pendente lite* when complaint alleges facts sufficient to support order. *Southard v. Southard*, 392.

1734. Devise in this case *held* to create defeasible fee. *Murdock v. Deal*, 754.

1737. Devisee *held* not to have acquired indefeasible fee under the facts of this case. *Hudson v. Hudson*, 338.

1744. Commissioner appointed to make judicial sale *held* without authority to insert restrictions in deed to purchaser. *Trust Co. v. Refining Co.*, 501.

1795. Plaintiff, by introducing evidence relating to transaction with decedent, opened door to like evidence by defendant. *Mansfield v. Wade*, 790.

2180. Mortgage of ward's lands *held* valid as to money used for permanent improvements and invalid as to money used to buy live stock and operate farm. *In re Quick*, 562.

2306. Where equitable relief of enjoining foreclosure is sought, neither forfeiture nor penalty for usury may be had. *Kenny Co. v. Hotel Co.*, 295. Conflicting evidence *held* for jury on issue of whether transaction was usurious. *Sherrill v. Hood*, 472.

2321. Court's order that sheriff summon a number of men to act as talesmen in a case proposed to be called the next day *held* not an order for talesmen or special venire under this section. *S. v. Anderson*, 771.

2365, *et seq.* Verdict liberally construed in light of evidence and charge *held* to sustain judgment for defendant in this action in summary ejectment. *Stadiem v. Harvell*, 103.

2435. Mechanic's lien is based upon retention of possession of property by mechanic. *Iron Works v. Bugg*, 284.

Consolidated Statutes—*continued.*

SEC.

2583(a). Corporate seal is not necessary to appointment of substitute trustee by corporate *cestui que trust*. *Mortgage Corporation v. Morgan*, 743.

2591. After confirmation of sale by clerk and application of proceeds to debt, validity of sale cannot be attacked in mortgagee's action for deficiency. *Bank v. Stewart*, 139.

2593(b). Temporary order restraining consummation of foreclosure sale is properly continued where issues of fact are raised and bond filed. *Little v. Trust Co.*, 726.

2621(45). Whether speed of 35 to 37 miles per hour was excessive under evidence showing that pavement was wet and that car had skidded immediately prior to accident because of worn tires, *held* for jury. *Waller v. Hipp*, 117.

2621(59), (57), (54), (55). Conceding plaintiff was negligent in driving to left without giving signal, defendant's liability was properly submitted to the jury under the doctrine of last clear chance for failing to keep safe distance between cars and in attempting to pass without giving proper warnings. *Morris v. Transportation Co.*, 807.

2716. Statute gives municipality option to accelerate maturity of unpaid assessments upon default in payment of any installment. *Farmville v. Paylor*, 106.

2787(36), 2673. Municipality *held* without authority to require operators of vehicles for hire to furnish insurance or solvent bonds. *S. v. Gulledge*, 204. (Legislative authority given by ch. 279, Public Laws of 1935. See *Watkins v. Iseley*, 209 N. C., 256.)

3030. When assignee does not obtain endorsement of note assigned until after it is past due, he is not a holder in due course. *Hare v. Hare*, 442.

3033, 3039. Where holder acquires note after maturity, he is not a holder in due course, and takes note subject to equities. *Mansfield v. Wade*, 790.

3033, 3040. Original note is not extinguished merely by execution of renewal note, and upon default holder may sue on original note. *Dyer v. Bray*, 248.

3908. Sheriff's compensation for conveying prisoners to State penitentiary is not to be computed on mileage basis. *Patterson v. Swain County*, 453.

4103. Minor wife may disaffirm her joinder in mortgage on husband's home site upon her majority. *Coker v. Bank*, 41.

4161. Filing of caveat suspends further proceedings in the administration of the estate, but does not deprive executor of the right to possession of the assets of the estate. *Elledge v. Hawkins*, 757.

4175. Evidence *held* sufficient to be submitted to jury on the charge that defendant was accessory before the fact to crime of murder. *S. v. Williams*, 707.

Consolidated Statutes—*continued.*

SEC.

4200. Where all the evidence is to the effect that the murder was committed in the perpetration of a robbery, 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. *S. v. Gosnell*, 402.

4201, as amended by ch. 249, Public Laws of 1933. Involuntary manslaughter is felony and not a misdemeanor. *S. v. Dunn*, 333; *S. v. Leonard*, 346.

4242, 4245(a). Counts in indictment under the statutes *held* separate and distinct, and defendant could be acquitted on one and found guilty on the other. *S. v. Pearce*, 47.

4245(a). Evidence *held* insufficient to identify defendant as perpetrator of crime of arson. *S. v. Simms*, 459.

4250. In order for conviction under this section defendant himself must have guilty knowledge, express or implied, at time of receiving stolen goods, and rule of implied knowledge if facts are sufficient to put a reasonable man on inquiry which would have discovered facts, is not applicable. *S. v. Stathos*, 456.

4339. Nonsuit *held* proper in this case for want of supporting testimony that defendant promised to marry prosecutrix. *S. v. McDade*, 197.

4379, 4547, 2642. Policeman *held* authorized to deputize a citizen to aid in serving warrant for breach of the peace. *Tomlinson v. Norwood*, 716.

4506(b). Evidence *held* insufficient to be submitted to jury in this prosecution of owner of car having smoke screen attachment. *S. v. Yates*, 195.

4622. Trial court may consolidate for trial separate offenses of the same class. *S. v. Waters*, 769. Indictment may charge in separate counts conspiracy and successive steps taken in furtherance thereof. *S. v. Anderson*, 771.

4623. Indictment will not be quashed for informality or refinement. *S. v. Whitley*, 61; *S. v. Anderson*, 771. Where indictment fails to charge essential element of crime, motion to quash must be allowed. *S. v. Tarlton*, 735.

4643. Evidence *held* insufficient to show identity of defendant as perpetrator of crime charged. *S. v. Yates*, 195; *S. v. Simms*, 459; *S. v. White*, 537.

4649. State may appeal from judgment for defendant upon a special verdict, upon a demurrer, upon a motion to quash, or upon arrest of judgment. *S. v. Morris*, 44.

4654. Clerk of Superior Court should notify Attorney-General of appeal and of any extension of time for perfecting same. *S. v. Watson*, 70. Appeal in this case is dismissed for defendant appellant's failure to make out and serve statement of case within time fixed. *S. v. Allen*, 672.

6460, 6289. Statutes *held* applicable to this action to cancel policy purchased by father on life of son. *Ins. Co. v. Hardin*, 22.

Consolidated Statutes—*continued.*

SEC.

6658, as amended by ch. 206, Public Laws of 1933. Pharmacist licensed by another state, failing to pass examination, *held* not entitled to stand another examination upon application therefor filed after 1 July, 1933. *McNair v. Board of Pharmacy,* 279.

7880(1) (5). Settlement of claim for transfer tax by agreement of parties approved by court of competent jurisdiction is upheld. *Reynolds v. Reynolds,* 578.

7880, 118. Corporation is liable for franchise tax for years during which its business is continued by receiver under orders of court. *Stagg v. Nissen Co.,* 285.

7880(2). Property of municipality lying outside the county and used for business purpose is taxable by county in which property is situate. *Board of Financial Control v. Henderson County,* 569.

8009. Sheriff *held* not entitled to fees under this section in addition to salary as tax collector under ch. 329, Public-Local Laws of 1925. *Patterson v. Swain County,* 453.

8037, 8049. Sheriff *held* not entitled to commissions on amount collected by auditor on tax sale certificates purchased by county. *Braswell v. Richmond County,* 649.

8081(i). From facts appearing of record in this case, deputy sheriff *held* not an employee of the county within meaning of Compensation Act. *Saunders v. Allen,* 189. Evidence *held* sufficient to sustain finding that accident arose in course of employment. *Latham v. Grocery Co.,* 505. Citizen deputized by policeman to aid in serving warrant for breach of the peace *held* employee of the town within meaning of Compensation Act. *Tomlinson v. Norwood,* 716.

8081(k) (l) (v) (x). Where complaint alleges that defendants were not operating under Compensation Act, demurrer on ground that Industrial Commission has exclusive jurisdiction is bad. *Calahan v. Roberts,* 768.

8081(r), prior to amendment by ch. 449, Public Laws of 1933. Where employee does not obtain judgment on his counterclaim in action by third person, he may proceed under the act. *Rowe v. Rowe-Coward Co.,* 484. Refusal to join insurance carrier as party defendant *held* without error under facts of this case. *Peterson v. McManus,* 802.

8081(jjj). Industrial Commission *held* to have the power to order a rehearing for newly discovered evidence. *Butts v. Montague Bros.,* 186.

Conspiracy.

B Criminal Prosecutions.

a Nature and Elements of the Crime

1. Where two or more persons combine or agree to do an unlawful act, they are guilty of criminal conspiracy even though the common design is not executed, the conspiracy being the agreement to do the act and not the execution of the agreement. *S. v. Anderson,* 771.

Conspiracy B a—*continued.*

2. In a prosecution for conspiracy, an instruction that the jury might convict one of the defendants and acquit the others will not be held for reversible error upon exception that it permitted the conviction of one defendant of conspiracy when one of the defendants charged had entered a plea of *nolo contendere*, which had been accepted by the State. *Ibid.*

b Evidence

1. Where a person enters into an agreement to do an unlawful act, he thereby places his safety and security in the hands of every member of the conspiracy, as the acts and declarations of each conspirator, done or uttered in furtherance of the common design, are admissible in evidence against all. *S. v. Anderson*, 771.

2. The fact of conspiracy, from the very nature of the crime, may be proven by circumstantial evidence, and the results accomplished, the divergence of those results from the course which would ordinarily be expected, the situation of the parties and their antecedent relations to each other, together with the surrounding circumstances, and the inferences legitimately deductible therefrom, are properly considered upon the question of guilt. *Ibid.*

Constitution, Sections of, Construed. (For convenience in annotating.)

ART.

I, sec. 12. Motion in arrest of judgment allowed for that record disclosed that grand jury was not ordered to be drawn for special term of court at which defendant was tried, and therefore indictment was not returned by duly constituted grand jury. *S. v. Baxter*, 90. Grand jury *held* to have no jurisdiction to charge commission of crime in another county, and motion to dismiss was properly allowed. *S. v. Beasley*, 318.

I, sec. 17. Ch. 349, Public Laws of 1933, *held* not to impair obligations of contract, but merely to change procedure. *Woodmen of the World v. Comrs. of Lenoir*, 433.

IV, sec. 1. Legal and equitable rights and remedies are now determined in one action. *Reynolds v. Reynolds*, 578.

IV, secs. 1 and 20. Superior Courts are the successors of courts of equity and exercise their equitable powers, unless restrained by statute. *Reynolds v. Reynolds*, 578.

IV, sec. 8. An appeal will be determined in accordance with the theory of trial in the lower court. *Apostle v. Ins. Co.*, 95. Upon defendants' appeal from judgment in criminal action, the jurisdiction of Supreme Court is limited solely to matters of law or legal inference. *S. v. Anderson*, 771.

IV, sec. 32. Commissioners *held* without authority to dismiss clerk of municipal court without giving clerk notice and an opportunity to be heard. *Stephens v. Dowell*, 555.

V, sec. 5. Property of municipality lying outside the county and used for business purpose is taxable by county in which property is situate. *Board of Financial Control v. Henderson County*, 569.

V, sec. 6. Tax in this case for care of indigent sick by county *held* for special purpose, with special approval of Legislature, and tax is not subject to limitation on tax rate. *Martin v. Comrs. of Wake*, 354.

Constitution—*continued.*

ART.

VII, sec. 7. County tax to provide funds for care of indigent sick *held* for necessary expense not requiring approval of voters. *Martin v. Comrs. of Wake,* 354. Municipal tax for purpose of raising revenue necessary to care for indigent sick *held* for necessary municipal expense not requiring approval of voters. *Martin v. Raleigh,* 369.

XI, sec. 7. Care of indigent sick is function of the State which it may require counties to perform as administrative agencies. *Martin v. Comrs. of Wake,* 354.

Constitutional Law. (Requirements and restrictions in taxation see Taxation A; procedure to test constitutionality of statute see Statutes A f.)

E Obligations of Contract.

a Nature and Extent of Mandate

Ch. 349, Public Laws of 1933, providing that *mandamus* should not lie in an action *ex contractu* to enforce a money demand against a county, city, town, or taxing district, unless final judgment had been obtained against defendant, is constitutional, since it does not impair the obligations of a contract, U. S. Const., Art. I, sec. 10; N. C. Const., Art. I, sec. 17, the effect of the statute being merely to alter the method of procedure in which there can be no vested right, and the change not being so radical as to take away all methods of procedure for the enforcement of contractual obligations. *Woodmen of the World v. Comrs. of Lenoir,* 433.

F Constitutional Guarantees of Person Accused of Crime. (Former jeopardy see Criminal Law F.)

a Right Not to Incriminate or Testify Aginst Self

Defendants, charged with murder, were forced by officers to hear read affidavits of codefendants charging them with complicity in the crime. *Held:* If the accusations were true, defendants were within their constitutional rights in remaining silent in the face of the accusations, since no one should be forced to incriminate himself, or to make false statements to avoid so doing. *S. v. Dills,* 313.

d Jury Trial

Defendant was convicted of a misdemeanor in the mayor's court upon his plea of not guilty. Upon appeal to the Superior Court the case was submitted upon an agreed statement of facts, and the court adjudged the defendant guilty. *Held:* Defendant, without changing his plea, could not waive his constitutional right to a jury trial, and there was error in the judgment. *S. v. Walters,* 391.

I Due Process of Law: Law of the Land.

b Notice and Opportunity to Be Heard

Ch. 334, Public-Local Laws of 1923, relating to assessments for public improvements, is constitutional, and objection that the statute fails to provide for personal service upon abutting landowners as to the date of final settlement is untenable, service by publication, as provided for in the act, being sufficient, since the act provides for notice and an ample opportunity to be heard. *Arbogast v. Buncombe County,* 515.

Contracts. (Of infants see Infants B; contracts to convey land see Vendor and Purchaser; contracts required to be in writing see Frauds, Statute of; impairment of obligations of see Constitutional Law E.)

A Requisites and Validity.

b Offer and Acceptance

Defendant offered to accept a stipulated sum in full settlement of plaintiff's mortgage indebtedness to defendant if payment were made in thirty days. After the expiration of the thirty days defendant accepted a partial payment of the sum stipulated, and agreed to accept bonds of the Federal Land Bank in a stipulated amount in payment of the balance. About four months after the partial payment, plaintiffs obtained the bonds and tendered same to defendant, and defendant declined to accept same. *Held:* Plaintiffs' rights are to be determined in accordance with the second offer of defendant, made upon accepting partial payment, and as no time was therein set for acceptance by plaintiffs, plaintiffs had a reasonable time within which to comply with its terms, upon the jury's finding that plaintiffs tendered the bonds within a reasonable time, plaintiffs are entitled to specific performance. *Jackson v. Bank*, 705.

d Consideration

The benefit, *inter alia*, which an employer derives from others in the industry signing similar agreements is sufficient consideration to support his agreement voluntarily entered into under the National Recovery Act. *James v. Dry Cleaning Co.*, 412.

i Contracts Ousting Jurisdiction of Courts

Provision that decision of association's board should be final as to disability of member *held* void. *Cordell v. Brotherhood*, 632.

B Construction and Operation.

a General Rules of Construction

1. Where a contract is not ambiguous, its construction is a matter of law for the court, and its plain and unambiguous terms may not be disregarded to relieve a party of a hard bargain. *Belk's Department Store v. Ins. Co.*, 267.

2. In construing a contract, the construction placed thereon by the parties themselves will generally be adopted by the courts, and the attendant circumstances, the relationship of the parties, and the object of the agreement may be taken into consideration. *Ibid.*

F Actions for Breach.

a Parties Who May Sue

An employee may sue upon the "President's Reëmployment Agreement," voluntarily signed by the employer, either in equity, under the doctrine of subrogation, or at law, as upon a contract made for the benefit of a third person. *James v. Dry Cleaning Co.*, 412.

d Nonsuit

Where evidence shows breach of contract entitling plaintiff to nominal damages, refusal to nonsuit is proper. *Thomas v. Trust Co.*, 653.

G Liability of Third Persons for Procuring Breach of Contract.

a Nature and Grounds of Liability in General

1. In order for a cause of action to lie against a competing third party for procuring the breach of a contract by one of the contracting

Contracts G a—*continued.*

parties it is necessary for such procurement to be unlawful and wrongful, since the law affords no protection against lawful competition, however malicious, the lawful procurement of the breach of the contract being *damnum absque injuria. Holder v. Bank,* 38.

2. Procurement of breach of contract by third person *held* lawful in this case and was therefore *damnum absque injuria. Ibid.*

Controversy Without Action.

B Jurisdiction and Proceedings.

d Conclusiveness of Facts Agreed

Where a note signed by defendants as comakers is set out in the agreed statement of facts, and there is no agreement that one of them signed the note as surety, the court is without authority to find as an additional fact that one of the defendants signed as surety for the other, the parties having agreed that the facts stated were the facts relative to the controversy. *Hood v. Johnson,* 77.

Corporations. (Franchise taxes see Taxation B b; service of process on foreign corporations see Process B d.)

D Stock.

h Liability of Corporation on Stock Sale Agreements

Plaintiff alleged that the agent of defendant corporation sold stock in the corporation to plaintiff, and as an inducement to the purchase of the stock, entered an authorized agreement that the corporation would thereafter repurchase the stock at a stipulated price. The corporate agent testified that the agreement was that the corporation would resell the stock and charge a certain commission per share. *Held:* In the absence of evidence that the agent of the corporation was authorized by it to make the agreement alleged by plaintiff, defendant corporation's motion to nonsuit was properly granted. *McDougald v. Power Co.,* 764.

G Corporate Powers and Liabilities.

c Liability of Corporation on Instruments Executed by Officers or Agents

Nonsuit is proper in absence of evidence of authority of corporate agent to make agreement sued on. *McDougald v. Power Co.,* 764.

h Necessity of Corporate Seal to Validity of Corporate Transactions

1. Unless its charter or some statute provides otherwise, a corporation need not use its corporate seal except when an individual is required to use his seal, and a corporation may appoint agents or make contracts by resolution or by writing, signed by a duly authorized officer, without using its corporate seal. *Mortgage Corp v. Morgan,* 743.

2. The appointment of a substitute trustee by a corporate *cestui que trust* by a paper writing signed by its duly authorized officer is valid without the corporate seal, and when the substitution is made in conformity with the provisions of the deed of trust and the statute, N. C. Code, 2583 (a), sale of the property by the substitute trustee in accordance with the terms of the instrument is valid, the appointment of a substitute trustee not being a conveyance of any interest in land. *Ibid.*

Corporations G—*continued.*

i Liability for Torts

1. The complaint alleged that plaintiff and the individual defendant were organizers and officers of competitive business corporations, that a person seeking to make a connection with one or the other of the corporations called at the office of the corporate defendant, and that while there the individual defendant, acting for himself and his corporate codefendant, said that plaintiff was a thief, and that therefore the prospect would not want to do business with plaintiff's corporation. *Held:* The demurrer of the corporate defendant, on the ground that the complaint failed to state a cause of action against it, was properly overruled, a corporation being liable *civiliter* for slanderous words spoken by its officers or agents in its service with its authority, express or implied, and the complaint being sufficient to support the introduction of evidence of its liability within the rule. *Britt v. Howell*, 519.

2. A corporation is liable for torts committed by its agents and servants precisely as a natural person, and a corporation may be joined as a party defendant with its officer or agent in an action for slander for words spoken by its officer or agent in the service of the corporation and with its express or implied authorization. *Ibid.*

K Dissolution.

c Rights of Creditors Upon Dissolution

Where a corporation has been served with summons and has filed answer, the action against it does not abate upon its subsequent dissolution, C. S., 1199, and its directors are made trustees of its property by statute, C. S., 1193, 1194. *Lertz v. Hughes Bros.*, 490.

Costs.

A Taxing Costs.

c Tender of Judgment in Amount Less Than Amount Claimed by Plaintiff

Where defendant tenders judgment in its answer for the amount recovered by plaintiff, which tender is refused by plaintiff upon her claim that she is entitled to recover a larger amount, the costs are properly taxed against plaintiff. C. S., 896. *Webster v. Trust Co.*, 759.

Counterclaims. (See Set-offs and Counterclaims.)

Counties. (Individual liability of commissioners for failure to promulgate rules for safety of prisoners see Public Officers C d 2; deputy sheriff held not employee of county within meaning of Compensation Act see Master and Servant F a 1.)

A Governmental Powers and Functions.

a In General

1. A county is not, in a strict legal sense, a municipal corporation, but is a body politic and corporate, deriving its powers, express and implied, from statute, and is an instrumentality for the performance of certain of the governmental functions of the State. *Martin v. Comrs. of Wake*, 354.

2. Care of indigent sick is function of the State which it may require counties to perform as administrative agencies. *Ibid.*

Counties—*continued.*

C Contracts of Counties.

a Requisites and Validity in General

Where the General Assembly has authorized a county to enter into a contract with a public hospital for the care of its indigent sick for a period of thirty years, and the board of commissioners of the county, in the exercise of the discretion vested in the board by the statute, has agreed to contract for that period, the contract will not be held invalid because of its duration. *Martin v. Comrs. of Wake,* 354.

F Actions.

b Conditions Precedent to Action Against County

Plaintiff alleged ownership of certain county bonds, and sought *mandamus* to compel the county to levy taxes sufficient to pay same. *Held:* The effect of the action is to enforce a money demand, and N. C. Code, 867, as amended by ch. 349, Public Laws of 1933, providing that *mandamus* should not lie in an action *ex contractu* to enforce a money demand against a county, city, town, or taxing district, unless the claim has been reduced to judgment, is applicable, and a demurrer to the complaint for its failure to state a cause of action is properly sustained. *Woodmen of the World v. Comrs. of Lenoir,* 433.

d Set-offs and Counterclaims

Defendants were indebted to plaintiff county as principal and sureties on the bond of the county treasurer for funds of the county which the treasurer had not accounted for because of the failure of the bank in which the funds were deposited. Defendants tendered as an offset past-due bonds of the county owned by them, according to the agreed facts and stipulations, prior to the institution of the action by the county. *Held:* Defendants were entitled to offset their debt to the county with the past-due county bonds, since the respective obligations of the county and defendants arose out of contract, and either party might have recovered judgment against the other on their respective obligations, and the county's obligation to defendants existed prior to the institution of the action, C. S., 521. In this case it did not appear of record that the funds deposited in the bank represented collection of taxes levied for specific purposes, or that the bonds held by defendants were other than general obligations of the county. *Swain County v. Welch,* 439.

Courts.

A Superior Courts. (Supreme Court see Appeal and Error; clerks of Superior Courts see Clerks of Court; justices of the peace see Justices of the Peace.)

a Original Jurisdiction

1. Under the provisions of N. C. Const., Art. IV, secs. 1 and 20, the Superior Courts are the successors of the courts of equity, and exercise their equitable powers, unless restrained by statute. *Reynolds v. Reynolds,* 578.

2. The Superior Courts have equitable jurisdiction to affirm and approve family agreements for the distribution of trust estates created

Courts A a—*continued.*

by will in order to effectuate the intent of the trustors when such intent would otherwise be defeated by the happening of unforeseen contingencies. *Ibid.*

c Appeals from Inferior Courts

1. Where it is provided by statute that a person convicted in a recorder's court should have the right to appeal to the Superior Court, and that trial in the Superior Court should be *de novo*, there is no provision for an appeal from an order of the recorder's court that a suspended judgment against a person convicted in said court should be executed, and the Superior Court obtains no jurisdiction from a purported appeal from such order unless such appeal is treated as a return of a writ of *recordari*, and where on such appeal the Superior Court hears evidence and affirms the judgment of the recorder's court, the case will be remanded by the Supreme Court for proceedings according to law. The requisites for an order that execution issue on a suspended judgment discussed by STACY, C. J. *S. v. Rhodes*, 241.
2. When an appeal is taken from the general county court to the Superior Court for errors assigned in matters of law, as authorized by C. S., 1608 (cc), and a new trial is granted by the Superior Court, it is essential that the rulings upon exceptions granting the new trial be specifically stated, so that in case of appeal to the Supreme Court, they may be separately assigned as error in accordance with Rule 19 (3) of the Rules of Practice in the Supreme Court, and properly considered on appeal. In this case numerous exceptions to the charge were assigned as error on appeal to the Superior Court, and the Superior Court granted a new trial for error in the charge "as set out in the exceptions." The cause is remanded by the Supreme Court for proceedings in accordance with the rule. *Jenkins v. Castelloe*, 406.
3. When an appeal is taken from the general county court to the Superior Court for errors assigned in matters of law, as authorized by C. S., 1608 (cc), and the judgment of the general county court is affirmed by the Superior Court, it follows that each and all of the exceptions, properly presented, were overruled; hence, in assigning errors on appeal to the Supreme Court, it is necessary for appellant to bring forward such of the rulings, but only such, as he deems erroneous, in accordance with the requirements of Rule 19 (3) of the Rules of Practice in the Supreme Court. *Ibid.*

g Terms of Court

1. The Governor has statutory authority to order a special term of the Superior Court, C. S., 1450, in which case he should appoint a judge to hold such term and issue a commission to the judge appointed, and, if such special term is for trial of criminal cases, only cases pending in the court at the time may be tried, and no grand jury may be drawn, unless the Governor also expressly orders that a grand jury be drawn, C. S., 1454, in which event indictments returned by such grand jury may be tried at such term. *S. v. Baxter*, 90.

Courts—*continued.*

C Jurisdiction of State and Federal Courts. (Removal of causes to Federal Courts see Removal of Causes; Federal Employers' Liability Act see Master and Servant E.)

a In General

Our State courts have jurisdiction of an action to recover the amount by which the salary paid an employee fails to equal the amount stipulated in the "President's Reëmployment Agreement," the Federal Courts not having been given exclusive jurisdiction either by the Constitution or Act of Congress. *James v. Dry Cleaning Co.*, 412.

D Respective Jurisdiction of Courts of This State and Courts of Other States.

a Transitory Causes of Action

An action may be instituted in the courts of this State on a transitory cause of action arising in another state unless forbidden by public policy or the laws of this State, but the right to recover will be determined by the laws of the state in which the cause of action arose. *Ingle v. Cassady*, 497.

b Jurisdiction of Res and Parties

1. The trust estates in question were created by wills of residents of this State, which wills were probated in this State, in the county of the domicile of the testators. The beneficiaries of the trust estates were residents at the time of the probate of the wills, and the wills provided that residents of this State might change the trustee at any time. *Held:* The courts of this State have primary jurisdiction over the trust estates, although the trustee named in the wills is a nonresident and the trust *res*, consisting of personalty, is held by the trustee in the state of its residence. *Reynolds v. Reynolds*, 578.

2. Policies for which application is taken in this State are governed by laws of this State. *Cordell v. Brotherhood*, 632.

Covenants Not to Sue. (See Torts C.)

Criminal Law. (Particular crimes see Particular Titles of Crimes; constitutional guarantees of persons accused of crime see Constitutional Law F; indictment see Indictment.)

B Mental Capacity and Responsibility for Crime.

a Mental Capacity in General

The test of mental irresponsibility sufficient to render defendant incapable of the commission of crime is the inability to distinguish right from wrong, and the exclusion of testimony that defendant is of low mentality is not error, low mentality not being the test of insanity. *S. v. Jenkins*, 740.

c Evidence, Burden of Proof and Verdict

1. Defendants' pleas of mental irresponsibility, one based upon mental incapacity and the other upon drunkenness, *held* determined adversely to defendants by the verdict of the jury upon conflicting evidence. *S. v. Glover*, 68; *S. v. Vernon*, 340.

2. Where defendants introduce expert testimony in support of their pleas of mental irresponsibility, the exclusion of testimony of the

Criminal Law B c—*continued.*

sheriff that from his conversations with defendants he judged them to be "of extreme low mentality" is erroneous, the testimony being competent in support of the expert testimony on the question of mental capacity and felonious intent involved in the case, and its exclusion being prejudicial in view of the fact that defendants did not testify in their own behalf. *S. v. Vernon*, 340.

3. Defendant's plea of insanity *held* determined adversely to defendant by the jury upon the evidence submitted by defendant. *S. v. Gosnell*, 401.

C Parties and Offenses.

a Principals

When two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty without regard to any previous confederation or design. *S. v. Gosnell*, 401; *S. v. Anderson*, 771.

b Accessories

Evidence *held* sufficient to be submitted to jury on the charge that defendant was accessory before fact to crime of murder. *S. v. Williams*, 707.

d Crimes and Misdemeanors

Involuntary manslaughter is a felony and not a misdemeanor. *S. v. Dunn*, 333; *S. v. Leonard*, 346.

F Former Jeopardy.

c Mistrials, New Trials, and Void Indictments

1. A trial and conviction upon a void indictment will not support a plea of former jeopardy upon a subsequent trial after the Supreme Court has reversed the judgment upon the void indictment. *S. v. Beasley*, 318.

2. Where the court in its discretion has vacated a judgment and set aside the verdict and ordered a new trial, a plea of former conviction entered upon the subsequent trial ordered is properly overruled, since the former judgment having been vacated, and the verdict set aside, there is nothing to support the plea. *S. v. McLamb*, 378.

G Evidence.

b Facts in Issue and Relevant to Issues

In a prosecution for incest, testimony of the prosecuting witness that she was born before the marriage of her father, the defendant, and her mother, is irrelevant to the issue, and its admission *is held* for reversible error as tending to prejudice or warp the judgment of the jury. *S. v. Strickland*, 770.

f Declarations and Admissions

Defendants were prosecuted for burglary of a store owned by a corporation. Defendants contended that an officer of the corporation consented to the robbery in order to apprehend defendants in the commission of the crime. *Held:* There was no error in excluding evidence of statements and acts of the corporate officer offered by defendants in support of their contention in the absence of evi-

Criminal Law G f—*continued.*

dence that the corporate officer was authorized to consent to the robbery of the store, evidence of the acts or statements of an agent being incompetent against the principal, unless such acts or statements were authorized or were made in the course of the employment, express or implied. *S. v. Hughes*, 542.

j Testimony of Convicts, Accomplices, and Codefendants

An instruction that the jury should scrutinize with care the testimony of defendants and their near relatives to ascertain to what extent, if any, their testimony was biased, but if they then believed the witnesses, to give the testimony the same credit as other testimony, is without error. *S. v. Anderson*, 771.

k Testimony of Acts and Declarations of Coconspirators

Where a person enters into an agreement to do an unlawful act, he thereby places his safety and security in the hands of every member of the conspiracy, as the acts and declarations of each conspirator, done or uttered in furtherance of the common design, are admissible in evidence against all. *S. v. Anderson*, 771.

l Confessions

1. In order for defendant's silence in the face of accusations of guilt to be competent as an implied confession, it is necessary that the circumstances be such as to call for a denial by him. *S. v. Dills*, 313.

2. Defendants, arrested on a charge of murder, had denied to the officers that they were present at the scene of the crime. Thereafter defendants were forced by the officers to hear read affidavits of codefendants charging them with complicity in the crime. *Held:* Defendants' silence in the presence of the officers upon the reading of the affidavits was not under circumstances calling for a denial by them, since they might well have thought that nothing further could be accomplished by again denying their guilt to the same parties, and evidence of their silence was improperly admitted as an implied confession by them. *Ibid.*

3. Defendants, under arrest upon a charge of murder, were forced by officers to hear read affidavits of codefendants charging them with complicity in the crime. *Held:* Evidence of defendants' silence in the face of the accusations was not competent as being implied confessions by defendants for that they were forced to hear the affidavits read, and therefore their failure to speak was not voluntary actions, and confessions are competent only when voluntarily made. *Ibid.*

4. Where the trial court duly hears the evidence *pro* and *con* as to the competency of alleged confessions, and rules that they are voluntary and competent, and there is abundant evidence to support its findings, the court's rulings as to their competency will not be disturbed on appeal. *S. v. Gosnell*, 401.

5. Voluntary confessions are admissible in evidence against the party making them, but involuntary confessions are inadmissible, and a confession is voluntary in law when, and only when, it is in fact voluntarily made. *Ibid.*

Criminal Law G 1—*continued.*

6. A confession is voluntary in law only when it is in fact voluntarily made, and a confession induced by hope or extorted by fear is involuntary and incompetent. *S. v. Anderson*, 771.

7. It appeared from the testimony of a State's witness that the alleged confession of one of defendants was obtained by falsely telling him that his codefendants had talked and that he had better confess. *Held:* The confession was involuntary and incompetent and defendant's exception to the court's refusal to strike it out upon motion made at the close of all the evidence is sustained, although the competency of the confession was not properly challenged when offered in evidence, nor motion made to withdraw it when the evidence establishing its incompetency was admitted. *Ibid.*

r Impeaching and Corroborating Evidence

Evidence cannot be held competent as corroborative of defendant's testimony when such evidence is offered before defendant takes the stand in his own behalf. *S. v. Caudle*, 249.

u Evidence Obtained by Unlawful Means: Inducing Commission of Crime

Evidence for the State showed that one of the defendants broke into and robbed a store owned by a corporation, and that the other defendant aided and abetted in the robbery. Defendants offered evidence which tended to show that one of defendants went to an employee in the store and suggested that the employee give him the combination to the safe, and that the loot be divided with the employee, that the next morning the employee reported the conversation to his superior officer, and that the corporate officer instructed the employee to give defendant a purported combination to the safe, that thereafter the employee gave the defendant a combination and advised defendant how to break into the store and when the safe would contain a large sum of money, and that officers of the law apprehended defendants when they attempted to carry out the plans for the robbery. *Held:* The exclusion of the evidence offered by defendants in support of their contention was not prejudicial, since defendants' contention would not have been a defense to the prosecution if established. The distinction is pointed out between tempting and procuring the commission of a crime for the purpose of punishing the perpetrators, and taking steps to apprehend persons in the execution of a felonious intent, previously formed, to commit the crime, and the evidence in this case failing to show consent to the robbery or temptation of defendants to commit the crime, but merely the apprehension of defendants in the execution of their felonious intent, previously formed. *S. v. Hughes*, 543.

I Trial. (Right to trial by jury see Constitutional Law F d; selection of jury see Jury.)

c Course and Conduct of Trial

Motion for mistrial for that defendants' expert witness became enraged at the solicitor and "started as if to assault him as he left the witness chair," and was conducted from the courtroom by officers, *held* addressed to the sound discretion of the trial court. *S. v. Vernon*, 340.

Criminal Law I—*continued.*

f Joinder and Severance of Offenses for Trial

1. Defendant was tried separately in municipal court on two warrants, each charging assault with a deadly weapon, but upon different persons on separate occasions about fifteen days apart. On appeal to the Superior Court, the court, upon motion of the solicitor, consolidated the cases for trial. *Held:* Under the provisions of C. S., 4622, the order of consolidation was within the discretionary power of the trial court. *S. v. Waters,* 769.

2. Where several defendants are jointly indicted, a motion for severance is addressed to the discretion of the trial court, and defendants' exception to the refusal of the court to grant them separate trials will not be sustained when no abuse of discretion appears on the record. *S. v. Anderson,* 771.

g Instructions

1. It is incumbent upon the appellant, if he desires more specific instruction on any point, or a more detailed and complete statement of his contentions, to make request therefor, and where the charge of the court is sufficiently full and complete to meet the requirements of C. S., 564, any omission will not be held for reversible error in the absence of such request calling the attention of the court to the desired instructions. *S. v. Caudle,* 249.

2. An exception to the failure of the court to instruct the jury how the testimony of detectives and accomplices should be received will not be considered erroneous on appeal when defendants failed to request such instruction. *S. v. Anderson,* 771.

h Argument and Conduct of Counsel

1. It is not error for the court to instruct the jury not to consider the opinion of attorneys, expressed in their argument, as to defendants' guilt or innocence, such expression of opinion being improper, and the jury not being instructed to disregard the argument but only the improper expression of opinion. *S. v. Anderson,* 771.

2. It is beyond the province of counsel in arguing a case, either in the Superior Court or in the Supreme Court, to venture his opinion that defendants had not had a fair trial. *Ibid.*

j Nonsuit and Directed Verdict

1. Evidence *held* insufficient to identify defendant as the perpetrator of the crime charged. *S. v. Simms,* 459; *S. v. White,* 537.

2. Motions to nonsuit on conflicting evidence are properly denied. *S. v. Waters,* 769.

3. A motion to nonsuit presents the sole legal question of whether the evidence, considered in the light most favorable to the prosecution, is sufficient to warrant a reasonable inference of the fact of guilt, the weight and credibility of the evidence being for the jury, and it being for the jury to say whether they are convinced of the fact of guilt beyond a reasonable doubt. *S. v. Anderson,* 771.

4. The indictment upon which defendants were tried charged conspiracy to dynamite certain buildings or structures, and, in subsequent counts, charged certain defendants with breaking and entering and larceny of the dynamite, feloniously receiving said dynamite know-

Criminal Law I j—*continued.*

ing it to have been stolen, and charged two defendants with attempting to dynamite two of the buildings pursuant to the original common design. There was sufficient evidence of conspiracy as to all defendants, except, perhaps, three of them, and as to one of the three a new trial is awarded, and as to the other two there was sufficient evidence of guilt under the subsequent counts in the indictment. *Held:* Defendants' motions for judgment as of nonsuit were properly denied, since the defendants present and aiding and abetting in the commission of the crimes charged in the subsequent counts are principals and equally guilty. and a general verdict of guilty will be presumed to have been returned on the counts to which the evidence relates. *Ibid.*

k Verdict (Acquittal on one count and conviction on others see Indictment E e.)

1. A general verdict of guilty upon a bill of indictment containing several counts, charging offenses of the same grade, carries with it a verdict of guilty on each count, and will support a judgment upon any valid count in the bill. *S. v. Caudle*, 249.
2. Where, in a prosecution for the illegal possession of intoxicating liquor, defendant contends that the small quantity of liquor found in his home was for the exclusive use of himself and family, a verdict of "Guilty of possession," without reference to the count charging possession against the form of the statute, is insufficient to support a judgment, since such verdict is entirely consistent with defendant's contention that his possession was lawful. *S. v. Lassiter*, 251.
3. The trial court has no power to correct the verdict by order entered out of term and out of the county, in the absence of consent of the parties or unless otherwise authorized. *S. v. Whitley*, 661.
4. The verdict of the jury, both in civil and criminal actions, will be interpreted in the light of the pleadings, facts in evidence, admissions of the parties, and the charge of the court, and when it is sufficient to support the judgment, when so interpreted, it will not be held sufficient ground for a new trial. *Ibid.*
5. Where an indictment contains several counts, and the evidence applies to one or more, but not to all, a general verdict of guilty will be presumed to have been returned on the count or counts to which the evidence relates. *S. v. Anderson*, 771.

m Errors Cured by Verdict (Defects in indictment cured by verdict see Indictment F a.)

Error, if any, in the charge of the court on the question of the right of self-defense, *is held* cured or rendered harmless by the verdict in the light of defendant's admissions and the evidence appearing on the record. *S. v. Marshall*, 127.

J Motions and Orders After Verdict.

a Motions in Arrest of Judgment

1. A motion in arrest of judgment for vital defect appearing in the record proper may be made for the first time in the Supreme Court at the hearing of the appeal from the judgment of the Superior Court. *S. v. Baxter*, 90.

Criminal Law J a—*continued.*

2. Motion in arrest of judgment allowed for that record disclosed that grand jury was not ordered to be drawn for special term of court at which defendant was tried. *Ibid.*

3. Where the warrant upon which defendant was tried is insufficient to charge any crime, defendant's motion in arrest of judgment should be allowed, since the defect is one appearing on the face of the record. *S. v. Tyson*, 231.

4. Where an indictment fails to charge an essential element of the offense, the defect may be taken advantage of by a motion in arrest of judgment. *S. v. Tarlton*, 734.

c *Power of Court to Set Aside Verdict, Vacate Judgment and Order Mistrial*

1. The valid discretionary order of the trial court vacating a judgment, setting aside the verdict and ordering a new trial, to which order defendants do not object, although present in court, is binding on defendants and is not subject to challenge by them upon the subsequent trial ordered, and evidence offered by them in support of their plea in abatement upon the subsequent trial tending to show that the order vacating the judgment was entered so that incriminating evidence of codefendants might be introduced upon such new trial, is properly excluded. *S. v. McLamb*, 378.

2. During term all matters are *in fieri*, and court may vacate judgment although appeal had been taken. *Ibid.*

K Judgment and Sentence.

a *Construction and Operation in General*

Where the judgment does not provide to the contrary, a prison sentence imposed on each conviction on separate counts in the indictment will run concurrently. *S. v. Duncan*, 316.

b *Suspended Judgments and Executions*

1. No appeal lies from order of recorder's court that execution issue on suspended judgment, review being by *recordari*. *S. v. Rhodes*, 241.

2. Where a defendant seeks and accepts the suspension of judgment against him upon certain terms, he may not thereafter attack the judgment or prosecute an appeal therefrom. *S. v. Anderson*, 771.

L Appeal in Criminal Cases.

a *Prosecution of Appeal*

1. When appellant in a criminal case fails to make out and serve his statement of case on appeal within the statutory time, no extension of time being asked or granted, 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. Watson*, 70; *S. v. Sentell*, 140; *S. v. Williams*, 352; *S. v. Dunlap*, 432; *S. v. Allen*, 672.

2. Where 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. *S. v. Watson*, 70; *S. v. Allen*, 672.

Criminal Law L a—*continued.*

3. Where execution is stayed in a criminal case under C. S., 4654, but the defendant fails to docket his appeal within the time prescribed by Rule 5 of the Rules of Practice in the Supreme Court, the clerk of the Superior Court, in order that the Attorney-General may move to docket and dismiss the appeal, should certify to him the day the court convened, the name of the presiding judge, the organization and action of the grand jury, the indictment in full, the impaneling and action of the trial jury, the judgment, the appeal entries, and the facts constituting abandonment of the appeal, or failure to prosecute it. *Ibid.*

4. Upon failure of appellant to file a brief in his appeal from conviction of a capital felony, the motion of the Attorney-General to dismiss the appeal will be allowed in the absence of error appearing upon the face of the record. *S. v. Waller*, 351.

b *Nature and Grounds of Appellate Jurisdiction of Supreme Court in Criminal Cases*

1. The State may appeal from judgment for defendant upon a special verdict, upon a demurrer, upon a motion to quash, or upon arrest of judgment. N. C. Code, 4649. *S. v. Morris*, 44.

2. A motion in arrest of judgment for vital defect appearing of record may be made for the first time in the Supreme Court on appeal. *S. v. Baxter*, 90.

3. Upon defendants' appeal from judgment in a criminal prosecution, the jurisdiction of the Supreme Court is limited solely to matters of law or legal inference. N. C. Const., Art. IV, sec. 8. *S. v. Anderson*, 771.

4. Where a defendant seeks and accepts the suspension of judgment against him upon certain terms, he may not thereafter attack the judgment or prosecute an appeal therefrom. *Ibid.*

c *Effect of Appeal*

During the term of court all matters before the court at the term are *in fieri*, and the court has the power during the term to vacate a judgment, set aside the verdict, and order a new trial, in his dicretion, although an appeal had been taken by defendants from such judgment. *S. v. McLamb*, 378.

d *Record and Briefs*

1. The record as certified to the Supreme Court is controlling. *S. v. Baxter*, 90.

2. Upon failure of appellant to file a brief in his appeal from conviction of a capital felony, the motion of the Attorney-General to dismiss the appeal will be allowed in the absence of error appearing upon the face of the record. *S. v. Waller*, 351.

3. The record failed to show that the grand jury was drawn by the jury commission, as contended, or that the grand jury was impaneled. *Held:* The competency of the jury commission and the alleged disqualification of a grand juror, discussed in appellant's brief, were not properly presented for review, it being the duty of appellants to see that the record is properly made up and transmitted to the Supreme Court. *S. v. Gosnell*, 401.

Criminal Law L d—*continued.*

4. An appeal must be brought to the first term of the Supreme Court beginning after the rendition of the judgment, and same docketed fourteen days before entering the call of the district to which it belongs, and when this has not been done, and no application for *certiorari* made, the appeal will be dismissed. *S. v. Allen,* 672.

5. Where the record fails to show what the excluded testimony would have been, an exception to its exclusion is unavailing. *S. v. Anderson,* 771.

6. Only exceptive assignments of error will be considered on appeal, Rule 19 (3), and an assignment of error to a remark of the court to the jury during the trial and comment on such remark by the prosecution in the argument to the jury will not be considered when not supported by objection or exception taken at the time. *Ibid.*

e *Review* (Errors cured by verdict see hereunder I m, Indictment F a.)

1. *Held:* Neither evidence admitted over defendants' objection nor evidence excluded on objection by the State was of sufficient probative value to affect the verdict of the jury, and *held further,* there was no error either in the admission or exclusion of evidence. *S. v. Glover,* 68.

2. Where defendant's motion in arrest of judgment is allowed in the Supreme Court, exceptions in the record upon which defendant relies for a new trial need not be considered. *S. v. Baxter,* 90.

3. Where defendant is convicted on each of two counts in the bill of indictment and sentences of equal length are imposed on each conviction, the sentences to run concurrently, the granting of a new trial on one count would seem futile where there is no contention that there was error in respect to the other count. *S. v. Duncan,* 316.

4. Where defendants, charged in various indictments with the same offense, are tried together, and judgment of conviction of some of the defendants is reversed because the indictment upon which they were tried is void, a new trial will be awarded the other defendants upon their appeal upon their exception to the admission of evidence on the joint trial which depended for its competency upon the void indictment. *S. v. Beasley,* 318.

5. Where defendants are awarded a new trial for error in the exclusion of testimony, other exceptions relating to matters not likely to arise on another hearing need not be considered on appeal. *S. v. Vernon,* 340.

6. Where the verdict as entered on the records of the court is sufficient when interpreted with reference to the pleadings, evidence and charge of the court, an unauthorized order entered out of term and out of the county correcting the verdict will not be held for reversible error, the correction not being material or needed. *S. v. Whitley,* 661.

7. Where one of appealing defendants is granted a new trial for error in the admission of his alleged confession, his codefendants, indicted for conspiracy and crimes committed in execution of the common design, are not entitled to a new trial when the alleged

Criminal Law L e—*continued.*

confession was admitted solely against the defendant making it and the confession does not refer to the conspiracy. *S. v. Anderson*, 771.

i Jurisdiction and Proceedings of Lower Court After Decision of Supreme Court

Where a judgment in a criminal case is arrested for fatal defect appearing on the record, the defendant is not entitled to his discharge, but will be held subject to further action by the Superior Court of the county in which the judgment was rendered. *S. v. Baxter*, 90.

Damages. (In action for slander see Libel and Slander D e.)

Deeds and Conveyances. (Contracts to convey see Vendor and Purchaser; special proceedings to establish boundaries see Boundaries; reformation see Reformation of Instruments.)

A Requisites and Validity.

i Conveyances of Personal Property

A deed to certain described lands and of all the personalty of the grantor, reserving in the grantor "the complete use and control" of said property during his natural life, is void as to the personalty, since the deed reserves a life estate in the personalty and there can be no limitation over after a life estate in personal property. *Speight v. Speight*, 132.

C Construction and Operation.

c Estates and Interests Created

A deed "to M. and her children," with granting clause "to M., her heirs and assigns," and *habendum* "to have and to hold . . . to M., her heirs, and assigns," *is held* to convey no estate to the children of M. *in esse* at the time of the execution of the deed, the word "children" appearing only in the premises, and the intent of the grantor as gathered from the whole instrument being to convey the estate to M. in fee. *Mayberry v. Grimsley*, 64.

d Restrictive Covenants

1. Where lots are conveyed with restrictive covenants limiting buildings to residences, the owner of each lot has a negative covenant in respect to the other lots in the development, and where one of such lots is owned by a husband and wife by the entireties, the husband may not convey or contract in respect to the negative easement of such lot over the other lots without the consent of his wife, since the wife has the right to such negative easement as a part of the estate if she should survive her husband, and the easement would be lost by its violation and the resulting change in character of the development. *Moore v. Shore*, 446.

2. Commissioner appointed to make judicial sale *held* without authority to insert restrictions in deed to purchaser. *Trust Co. v. Refining Co.*, 501.

f Conditions

The grantors brought action to cancel deed delivered to the clerk of the court in escrow, delivery to defendant grantee being conditioned

Deeds C f—*continued.*

upon defendant's maintenance and care of the grantors during the term of their natural lives. Upon sharply conflicting evidence the jury found that defendant had not breached the conditions of the deed. *Held:* By force of the jury's verdict, plaintiffs are not presently entitled to cancellation of the deed, and defendant's ultimate right to the land, conditioned upon his continued performance, is not in issue. *Ferguson v. Ferguson*, 67.

Demurrer. (See Pleadings D.)

Descent and Distribution.

A Nature and Course of Title by Descent.

a In General (Right of heir to convey see Executors and Administrators F g.)

Personal property of a deceased passes direct to his administrator, but the real property passes direct to the heirs at law, subject to be divested only if it becomes necessary to sell the realty to make assets. *Parker v. Porter*, 31.

C Rights and Liabilities of Heirs. (See, also, Executors and Administrators F f; E a.)

a Right to Prevent Sale of Realty by Paying Debts of Estate

The heirs at law have the right to pay off debts of the estate and the costs of administration in order to prevent the necessity of selling the realty to make assets. *Parker v. Porter*, 31.

Divorce.

A Grounds for Divorce.

d Separation

Plaintiff was living separate and apart from his wife and paying certain sums to her from time to time under the terms upon which judgment for abandonment and assault upon her was suspended. *Held:* Plaintiff may not maintain an action for divorce upon the grounds of two years separation, C. S., 1659 (a), the law not permitting the maintenance of an action based in whole or in part upon the violation by the plaintiff of the criminal laws of the State. *Reynolds v. Reynolds*, 428.

E Alimony.

a Alimony Pendente Lite

1. Where the complaint alleges facts sufficient to entitle plaintiff to alimony *pendente lite* under C. S., 1667, it is not error for the court to grant plaintiff's motion therefor and refuse to find the facts upon which the order is based, since it will be presumed that the court found the facts as alleged in the complaint for the purposes of the hearing. *Southard v. Southard*, 392.

2. Where, in a wife's suit to set aside a deed of separation for fraud and for divorce *a mensa*, the trial court finds that the allegations of the complaint are true and that the wife is without means to prosecute the suit and is without means of subsistence, the findings warrant the granting of alimony *pendente lite*. *Massey v. Massey*, 818.

Dower.
C Dower Consummate.
a Respective Rights of Widow and Creditors
While creditors of an estate may be permitted to contest the widow's allotment of dower in proper instances upon the ground that the allotment is excessive, they must pursue their remedy in apt time by excepting to the report of the jury, and their motion to be made parties in order to contest the allotment of dower, made in this case almost three months after approval by the court of the clerk's confirmation of the jury's report, *is held* too late. *Poindexter v. Call*, 62.

c Exceptions to Jury's Report and Reallotment
Ordinarily, the court, before which exceptions to the report of the jury in the allotment of dower is heard, is the sole judge whether a reassignment or successive reassignments shall be made. *Poindexter v. Call*, 62.

Druggists. (See Pharmacists.)

Ejectment.
B Summary Ejectment.
a Jurisdiction
Title to land is not raised or put in controversy by mere allegation that such controversy exists. *Dean v. Duvall*, 822.

f Trial in Superior Court Upon Appeal
The issue submitted in this action in summary ejectment was: "Is the defendant a tenant of the plaintiff, and does he hold over after the expiration of the tenancy?" to which the jury answered "No." In the light of an affidavit filed by plaintiff before the justice of the peace, the evidence and charge of the court in the Superior Court and the court's statement of the contentions of the parties to which no objection was entered, it appeared that the parties admitted the tenancy and the only issue of fact was whether the parol lease terminated the December prior to the institution of the action or the December next succeeding, and that the jury answered this issue of fact on conflicting evidence in defendant's favor. *Held:* The verdict sustains the judgment of the court that plaintiff is not entitled to the relief of summary ejectment. *Stadiem v. Harvell*, 103.

Election of Remedies.
A When Election Must Be Made.
b Between Rescission and Action for Damages
Mortgagor must elect between setting aside foreclosure and recovery of damage from mortgagee. *Bailey v. Stokes*, 114.

Elections.
I Contested Elections.
c Enjoining Count and Declaration of Result of Election (Enjoining holding of election see Statutes A f.)
Where, in injunctive proceedings involving the validity of an election, it appears from the record on appeal that the ballots cast had been adjudged illegal, that legal ballots were denied those who presented

Elections I c—*continued.*

themselves to vote, that many registered voters who came to the polling place to vote were denied the privilege of voting, and that the polls were open for voting less than two hours, the judgment dissolving the temporary restraining ordered entered in the cause and directing the canvassing of the ballots and the declaration of the results of the election will be reversed, since upon the facts appearing of record no valid election had been held. *Harris v. Miller,* 746.

Electricity.

A Duties and Liabilities in Respect Thereto.

a In General

The court's charge in this case that defendant distributor of electricity to household users was under duty to exercise a constant vigilance and observe a high degree of care in keeping its wires outside plaintiff's house in good repair and in keeping its transformers in a safe condition at all times, so that excessive and dangerous current should not be conducted into plaintiff's house, and that its failure to use such care would be negligence entitling plaintiff to recover if the proximate cause of her injuries, *is held* without error on defendant's exceptions. *Lynn v. Silk Mills,* 7.

c Excessive Voltage

Evidence *held* sufficient for jury on question of defendant's negligence in permitting excessive voltage to be carried to plaintiff's home over defendant's wires. *Lynn v. Silk Mills,* 7.

Eminent Domain.

A Nature and Extent of Power.

c Acts Constituting Taking of Private Property

Evidence that plaintiff constructed and owned certain water mains, and that defendant municipality remained in permissive possession thereof for a number of years, until shortly before the institution of the action, when defendant municipality refused to recognize plaintiff's ownership and right to forbid the city to use same, and retained possession of the water mains, and continued to use same as a part of its municipal water system adverse to plaintiff's claim of title, *is held* sufficient to support a finding that defendant municipality took possession of the water mains and appropriated them to its own use under the power of eminent domain. *Construction Co. v. Charlotte,* 309.

C Compensation.

a Elements of Damage

Plaintiffs brought this action against a municipality to recover damages to their land and personal property by reason of the discharge of sewage by the city through a by-pass into a creek adjoining plaintiffs' lands, and plaintiffs introduced evidence that by reason of the city's alleged wrongful acts they had been forced to discontinue their dairy business theretofore conducted by them on the land. *Held:* Although the rendering of plaintiffs' land unfit for dairying might be an element of damage as tending to diminish the value of the land, the value of plaintiffs' dairy as a going concern is not a recoverable element of damage for the partial taking of the land

Eminent Domain C a—*continued.*

under the power of eminent domain, and a new trial is awarded on defendant's exceptions to the admission of evidence and the charge of the court relating to this aspect of the case, it being apparent from the record that the value of plaintiffs' dairy business was considered by the jury in awarding the recovery. *Pemberton v. Greensboro*, 466.

c Compensation for Injury to Contiguous Land

An abutting property owner may not recover for damages to his land caused by changing the grade of an established street or road when such change is made pursuant to lawful authority and there is no negligence in the manner or method of doing the work. *Calhoun v. Highway Com.*, 424.

D Proceedings to Take Land and Assess Compensation.

d Judgments

Judgment was entered in proceedings in eminent domain that upon payment by petitioner of the sum of money stipulated in the judgment title to the lands should *eo instanti* pass to petitioner, free from all adverse claims, liens, and encumbrances, and by later paragraph the judgment stipulated that the items of taxes, insurance, and maintenance incurred *pendente lite* were expressly reserved to be later passed upon by the court. Thereafter petitioner paid the sum stipulated into court and respondent accepted said sum. *Held:* Upon the payment and acceptance of the stipulated sum the provision of the judgment that petitioner acquire the land free from all claims, liens, and encumbrances immediately took effect, and the reservation in the judgment in conflict therewith was void, and the court was thereafter without jurisdiction to hear a motion in the cause requesting that respondent be restrained from further claiming any amounts from petitioner for the items attempted to be reserved in the judgment, and respondent's cross petition asking that said amounts be determined and awarded, since the former cannot be regarded as an action to remove cloud from title, not the latter as a suit upon the judgment. *S. v. Lumber Co.*, 347.

Equity. (Where equitable relief is sought, neither forfeiture nor penalty for usury may be had see Usury B b.)

Estoppel.

C Equitable Estoppel.

a Grounds and Essentials in General

1. Defendant surety *is held* not estopped to deny liability on the bond of a city official in suit by having joined the city and another surety in bringing suit against the official in an attempt to recover the funds misappropriated, it appearing that defendant surety joined in the suit upon information furnished it by the city, that the facts were equally known to the city, and that therefore the surety's joinder in the suit against the official did not constitute a deception of the city in respect to the surety's liability on the bond. *Salisbury v. Lyerly*, 386.

2. Where the maker of a note for the balance of the purchase price of land alleges that the payee agreed that upon payment of the note,

Estoppel C a—*continued.*

a prior encumbrance against the land should be removed, a person obtaining the note from the payee as collateral security, but who is not a holder in due course thereof, may not maintain that, as he took the note in good faith for value, and as the maker failed to have the parol agreement included in the writing, the maker should not be allowed to enforce the parol agreement as against him, since a holder who is not a holder in due course should first ascertain if there are any equities existing against the note, and since the holder of equities against a note is under no duty to notify a purchaser thereof. *Hare v. Hare*, 442.

3. Respondent's contention that petitioners' guardian had accepted the benefits of a loan and paid respondent interest thereon while acting in her representative capacity, and that the mortgage was executed by the guardian fourteen years prior to the institution of the proceedings, and that therefore petitioners were estopped to attack the validity of the mortgage, cannot be sustained where it sufficiently appears from the petition to set aside the mortgage that the mortgage was executed when petitioners were minors and that the proceeding attacking the mortgage was instituted by petitioners upon their coming of age. *In re Quick*, 562.

4. Plaintiff *held* estopped to maintain action on disability clause in life insurance policy. *McLawhorn v. Ins. Co.*, 709.

Evidence. (In particular actions see Particular Titles of Actions.)

B Burden of Proof.

a General Rules

The burden is on plaintiff to establish his case, and where he makes out a *prima facie* case defendant must introduce evidence or take the risk of an adverse verdict, but the burden of the issue is not shifted to defendant. *Webster v. Trust Co.*, 759.

D Relevancy, Materiality, and Competency.

b Testimony of Transactions or Communications With Decedent

Plaintiff brought suit on a note which had been executed to his testatrix by defendant's intestate, and on a note which had been endorsed to his testatrix by defendant's intestate as collateral security, which note was secured by deed of trust, and the makers of the collateral note were joined as defendants. Plaintiff introduced in evidence the principal and collateral notes and deed of trust, and introduced testimony in regard to the transaction, the loan of money by his testatrix and the hypothecation of the collateral note. *Held:* Plaintiff, by introducing the written and oral evidence in regard to the transaction, opened the door to the introduction of evidence by the makers of the collateral note to the effect that same had been paid when transferred to plaintiff's testatrix, that the deed of trust had been marked paid and satisfied by the trustee, and that testatrix's endorser had no right to transfer same. N. C. Code, 1795. *Mansfield v. Wade*, 790.

f Impeaching and Corroborating Witness

Evidence which tends to corroborate a party's witnesses is competent, and is properly admitted upon the trial for that purpose. *Webster v. Trust Co.*, 759.

Evidence D—*continued.*

h Similar Facts and Transactions

1. In an action to recover damages caused by a fire alleged to have been set out by defendant's railroad engine, evidence that one of defendant's engines had theretofore set out fires is incompetent in the absence of evidence that this particular engine set out the fire in suit. *Nufer v. R. R.*, 55.

2. Competency of evidence that noxious substances had been found by others in product of manufacturer. *Enloe v. Bottling Co.*, 305.

3. Where a corporate agent, as plaintiff's witness, testifies as to terms and conditions of the sale of stock by defendant corporation to plaintiff, the exclusion of evidence of dissimilar terms and conditions upon which the agent sold stock to other persons will not be held for error. *McDougald v. Power Co.*, 764.

l Circumstantial Evidence

In an action to recover for the death of plaintiff's intestate, killed while engaged in his employment in interstate commerce, the Federal Employers' Liability Act is controlling. *Trust Co. v. R. R.*, 574.

E Admissions.

d By Agents

Testimony of declaration of corporate agent held not admissible against principal in absence of evidence that declarations were within scope of agent's authority. *S. v. Hughes*, 542.

e Admissions in Pleadings

1. Voluntary nonsuit on cause of action based on negligence *held* admission for purpose of trial that defendant was not negligent. *Thomason v. Ballard & Ballard Co.*, 1.

2. Where it is admitted in the pleadings that no contract existed between the parties, defendant is bound thereby, although plaintiff introduces contract in evidence for restricted purpose. *Construction Co. v. Charlotte*, 309.

3. Where the material allegations of a paragraph of the complaint are admitted in the answers, defendants' exception to the admission of the paragraph in evidence cannot be sustained. *West v. Baking Co.*, 526.

J Parol Evidence Affecting Writings.

a Admissibility in General

1. Parol evidence is inadmissible to vary or contradict the terms of a written instrument, but where a contract is not required by law to be in writing, and a part of it is written and a part is not, parol evidence of the unwritten part, if it does not contradict the writing, is admissible to establish the contract in its entirety. *Dawson v. Wright*, 418.

2. Parol evidence that credit memorandum given by an automobile dealer was to be used only in the purchase of a new car and not a used car *held* competent, the parol evidence not contradicting the writing, but tending to establish the unwritten part of the agreement. *Ibid.*

Evidence J a—*continued.*

3. Plaintiff declared on a note executed by defendant for the balance of the purchase price of land. Defendant offered parol evidence to the effect that it was agreed that plaintiff should resell the land within two months, and that defendant would never be called upon for further payments, that the land was resold, and that plaintiff understood that her note would thereupon be canceled. *Held:* The parol evidence was incompetent as being in contradiction of the written instrument, and its admission constitutes reversible error, although plaintiff would not have been precluded from showing an agreement that her note was to be delivered up and canceled upon the resale of the land by plaintiff, if such was the agreement and the meaning of her allegation. *Coral Gables v. Ayers,* 426.

4. The deed conveying the land to plaintiff excepted a prior encumbrance from the covenant against encumbrances, but did not except such prior encumbrance from the general warranty of title. Plaintiff executed a deed of trust to secure his note for the balance due on the purchase price. Plaintiff offered evidence of a parol agreement between him and his vendor that the vendor should remove the prior encumbrance upon the payment of the purchase money note by plaintiff. *Held:* The alleged parol agreement was not in conflict with the written instruments, but in accord with them, and parol evidence of the agreement was competent. *Hare v. Hare,* 442.

d In Actions for Fraud or Reformation

Where instrument is attacked for fraud, parol evidence is competent to establish and refute allegation of fraud. *Willett v. Ins. Co.,* 344.

K Expert and Opinion Testimony.

a Conclusions and Opinions in General

1. The admission of testimony of an electrical expert, upon proper hypothetical questions, as to the electrical causes of burned-out fuses and light bulbs and a burned socket and as to the effect of grounding a wire, *is held* without error in this case. *Lynn v. Silk Mills,* 7.

2. In an action on a disability clause in a policy of life insurance a lay witness may testify from his personal observation of insured that in his opinion insured would not be able to do any kind of physical work. *Gossett v. Ins. Co.,* 152.

3. A witness' statement that if the defendant had not moved his car the accident would not have occurred *is held* competent as a "shorthand statement of a fact," or a statement of a "composite or compound fact," and objection thereto on the ground that the testimony invaded the province of the jury *is held* untenable. *Myers v. Utilities Co.,* 293.

4. A nonexpert witness who has had opportunity of knowing and observing a person may testify from his own personal observation as to his opinion of the sanity or insanity of such person. *Harris v. Aycock,* 523.

b Invasion of Province of Jury

It is incompetent for plaintiff's witnesses, in an action for slander, to testify, in response to questions of what they understood the article

Evidence K b—*continued.*

in question to mean, that they understood it as actuated by malice, and defendant's motion to strike out should have been allowed, since the answers were not responsive to the questions and the opinion evidence invaded the province of the jury, the question of malice being one of the issues involved. *Minton v. Ferguson*, 541.

N Weight and Credibility. (Province of court and jury see Trial D.)

b Positive and Negative Evidence

Positive evidence should be given more weight than negative evidence. *Cordell v. Brotherhood*, 632.

Execution.

E Stay, Quashing, Vacating.

a Right to Stay Execution and Grounds of Relief

Allegations that because of prevailing financial conditions a sale of defendant judgment debtor's lands under execution will not produce money sufficient to pay all judgments docketed against him, but that a sale under supervision of the court would probably produce sufficient money to pay all the judgments, are insufficient to state a cause of action upon which plaintiff judgment creditor is entitled to enjoin execution upon defendant judgment creditor's prior docketed judgment, nor are such allegations sufficient to support the appointment of a receiver by the court for the property of the judgment debtor. *Hood v. Wilson*, 120.

Executors and Administrators.

B Assets, Appraisal and Inventory.

a Title and Right to Possession of Assets of Estate

1. Personal property of a deceased passes direct to his administrator, but the real property passes direct to the heirs at law, subject to be divested only if it becomes necessary to sell the realty to make assets. *Parker v. Porter*, 31.

2. At the date of testator's death certain contracts for the cultivation of his lands by tenants had been let, but no crop planted. *Held:* Testator's sole devisee is entitled to the rents from the lands for the year, the provisions of C. S., 54, that ungathered crops should belong to the executor or administrator not applying to crops not planted at the date of testator's or intestate's death. *Carr v. Carr*, 246.

3. The filing of a caveat suspends further proceedings in the administration of the estate, but does not deprive the executor or executrix of the right to the possession of the assets of the estate. C. S., 4161. *Elledge v. Hawkins*, 757.

4. An executrix who has duly qualified is entitled to possession of the assets of the estate until removed by the clerk, even though caveat proceedings have been instituted, and the Superior Court is without authority to appoint a receiver to take over the assets of the estate upon complaint of the heirs at law alleging the insolvency of the executrix and that she was squandering the assets of the estate, although upon the facts alleged plaintiffs might be entitled to the removal of the executrix by the clerk. *Ibid.*

Executors and Administrators—*continued.*

C Control and Management of Estate.

c Business and Contracts of Executor

Where an administratrix *c. t. a.* carries on the business of the testator with the knowledge and apparent consent of all the parties, including plaintiffs, creditors of the estate, and it appears that the administratrix was authorized by order of court to provide out of the funds of the estate labor and materials necessary to carry on the business, plaintiffs may not complain of judgment denying recovery against the administratrix and her bondsman for losses to the estate resulting from the continued operation of the business upon their contention that the estate was thereby rendered insolvent, and that such acts constituted waster or *devastavit. Hicks v. Purvis*, 657.

D Allowance and Payment of Claims.

b Claims for Personal Service Rendered Deceased

In an action to recover the reasonable value of services rendered deceased under an oral contract to devise lands, the value of lands promised to be devised is competent as affording some estimate of what the parties themselves contemplated such services probably would be worth. *Norton v. McLelland*, 137.

g Rights and Remedies of Creditors

Suit by creditors of an estate to set aside partition by the heirs at law should be dismissed upon tender into court of an amount sufficient to pay all debts of the estate, nor in such instance may a lessee of the lands from the administrator maintain the suit after the expiration of the period of the lease, since any claim he might have on account of the lease is a claim against the estate protected by the tender of money into court. *Parker v. Porter*, 31.

h Actions Against Estate (Venue see Venue C a; service of process on personal representative of deceased nonresident auto owner see Process B. e.)

When executor dies prior to trial, judgment against estate is irregular, and is properly set aside upon motion. *Taylor v. Caudle*, 298.

E Sales and Conveyances Under Orders of Court.

a Grounds and Conditions Precedent to Sale of Realty to Make Assets

1. Personal property of the estate is the primary fund for the payment of the debts of the estate, and it is only when the personalty is insufficient for this purpose that the administrator has the right and duty to apply for license to sell real property of the estate to make assets. C. S., 74. *Parker v. Porter*, 31.

2. Suit by the administrator against the heirs at law to set aside partition of the lands of deceased upon allegations of necessity to sell realty to make assets, and inadequacy of the purchase price upon the partition sale and irregularities therein, should be dismissed upon tender into court by one of the heirs at law, the purchaser at the partition sale, of an amount sufficient to pay the debts of the estate, the cost of administration, and the costs of the litigation, the sole interest of the administrator in the lands being the right to sell same to make assets and pay costs of administration, and the other grounds for relief alleged being available solely to the other heirs at law. *Ibid.*

Executors and Administrators E—*continued.*

e Right to Sell to Make Assets as Against Tranferee of Heirs

Heir at law may not convey title as against creditors prior to two years from granting letters testamentary but after two years heir may convey free from their claims. *Johnson v. Barefoot*, 796.

F Distribution of Estate.

e Family Agreements

1. Approval of family agreement for allotment of income to wife of insane beneficiary upheld under facts of this case. *Reynolds v. Reynolds*, 254.

2. Judgment for distribution of trust estates in accordance with family agreement affirmed in this case. *Reynolds v. Reynolds*, 578.

f Right of Heirs to Institute Suit in Behalf of Estate

Insured attempted to change the beneficiary in policies of life insurance to his sister. After his death, his heirs at law instituted this action to set aside the purported change of beneficiary, and it appeared that plaintiffs had previously challenged the right of insured's executor to act in the premises by filing a caveat, and that the executor was joined as a defendant in the action, and that he denied the allegations of the complaint and supported the contentions of his codefendant. *Held:* Failure of plaintiffs to show a demand on the executor to bring the action and his refusal to do so is not sufficient cause for dismissing the action as in case of nonsuit, it clearly appearing that the executor was in opposition to plaintiffs, and the law not requiring the doing of a vain or useless thing. *Harris v. Aycock*, 523.

g Title and Rights of Heirs

1. An heir at law mortgaged the land allotted to him in the partition proceedings prior to the expiration of two years from the granting of letters testamentary. Thereafter, the mortgage was foreclosed and the purchaser at the sale transferred title to a *bona fide* purchaser without notice. *Held:* The mortgage was void and the creditors of the estate are entitled to sale of the lands to make assets to pay debts of the estate, even against the *bona fide* purchaser without notice, the rights of the parties being determined by the application of C. S., 76, prior to its amendment by ch. 355, Public Laws of 1935. *Johnson v. Barefoot*, 796.

2. An heir at law executed a deed of trust on land allotted to him in the partition proceedings, the deed of trust being executed more than two years after the granting of letters testamentary. The deed of trust was foreclosed, and the purchaser at the sale transferred title to a *bona fide* purchaser who, under the facts agreed, had no actual knowledge that at the time the land was conveyed to him the personal assets were insufficient to pay debts of the estate. *Held:* The fact that it appeared from the records that the estate had not been settled does not amount to notice that the personalty was insufficient, and the purchaser was a *bona fide* purchaser without notice, and the land is not subject to sale to make assets to pay debts of the estate. *Ibid.*

3. An heir at law bought in personalty of the estate at the administrators' sale and gave his note for the purchase price under a parol

Executors and Administrators F g—*continued.*

agreement that the land inherited by him should be security for the note. Within two years from the granting of letters testamentary, the heir at law mortgaged the land, and subsequently the mortgage was foreclosed and transferred by the purchaser at the sale to an innocent purchaser for value without notice. The administrators reduced the note given for the purchase price of the personalty to judgment, which judgment was docketed subsequent to the registration of the mortgage. *Held:* The purchaser acquired the title free from the lien of the judgment docketed subsequent to the registration of the mortgage, the purchaser not being bound by the parol agreement between the heir and administrators. *Ibid.*

H Liabilities of Executors and Administrators. (Limitations see Limitation of Actions B a 7.)

d Liability for Losses in Managing Estate

Administratrix *held* not liable to creditors for losses incurred in continuing business of deceased. *Hicks v. Purvis,* 657.

g Procedure to Determine or Enforce Liabilities

1. Plaintiffs, creditors of the estate, brought action against the administratrix *c. t. a.* and the surety on her statutory bond, C. S., 33, to recover for disbursements out of the assets of the estate by the administratrix to the heirs at law and distributees in settlement of a caveat proceeding instituted by them, and to certain attorneys at law for services in defending the caveat proceedings, and certain losses to the estate incurred by the administratrix in the operation of the business in which deceased was engaged at the date of his death, and commissions to the administratrix to which they contend she was not entitled. The action was referred to a referee, and upon the filing of the report of the referee the trial court ordered that the final account of the administratrix be remanded to the clerk to adjust and settle in accordance with certain rulings appearing in the order. *Held:* The action or proceeding was not to surcharge or falsify the final account of the administratrix, the correctness of the account not being disputed, but to recover of defendants the amount of the disbursements attacked as being a breach of the statutory bond, and the order in effect remanding the action to the clerk to adjust and settle the final account was error, plaintiffs being entitled to judgment in accordance with the law applicable to the findings of fact by the referee, and a new trial is awarded upon exceptions to the conclusions of law of the referee. *Hicks v. Purvis,* 227.
2. Action *held* based on breach of bond and not action to surcharge and falsify account. *Hicks v. Purvis,* 657.

"Family Car Doctrine." (See Automobiles D c.)

Federal Courts. (See Courts D, Removal of Causes.)

Fires. (See Railroads D g.)

Food.

A Liability of Manufacturer to Consumer

a Deleterious or Foreign Substances

1. As between the manufacturer and the ultimate consumer, there is no implied warranty that food prepared and sold by the manufac-

Food A a—*continued.*

turer to a retailer and purchased from the retailer by the consumer, is wholesome and fit for human consumption, there being no contractual relation between the manufacturer and the ultimate consumer to which such warranty could attach, and in an action by the ultimate consumer against the manufacturer, based upon such implied warranty, the manufacturer's motion to nonsuit should be allowed. *Thomason v. Ballard & Ballard Co.*, 1.

2. The liability of a manufacturer of food or drink in sealed containers for injury to ultimate consumers resulting from unwholesomeness of the product is predicated upon negligence and not implied warranty. *Enloe v. Bottling Co.*, 305.

3. In order for an ultimate consumer to recover of the manufacturer for noxious substances in food or drink purchased by the consumer in sealed containers it is necessary for the consumer to establish negligence on the part of the manufacturer in failing to use due care under the circumstances, and that such negligence was the cause of the unwholesomeness of the product resulting in the injury, and in establishing such negligence the consumer may not rely upon the doctrine of *res ipso loquitur*, although such negligence need not be directly established, but may be inferred from relevant circumstances, but the installation by the manufacturer of modern machinery and appliances, such as are in general and approved use, does not *ipso facto* negative negligence on its part. *Ibid.*

4. In establishing negligence on the part of the manufacturer as the cause of unwholesomeness of its product resulting in injury to an ultimate consumer, it is competent for the consumer to show by evidence that others had found noxious substances in the product of the manufacturer, when such other occurrences are so substantially similar, and within such reasonable proximity of time, as to show the likelihood of a similar occurrence at the time of plaintiff's injury, but proof of the explosion from gas pressure of a single bottle of a drink put up by the defendant, without more, is insufficient to carry the case to the jury on the issue of negligence. *Ibid.*

5. Testimony of a witness of finding a like deleterious substance in the product of the defendant manufacturer *is held*, under the facts of this case, too remote in point of time to be competent as tending to show a like occurrence at the time of plaintiff's injury. *Ibid.*

6. Plaintiff alleged that she was injured by drinking coca-cola from a bottle which contained a dead mouse. Evidence that others had found glass in bottles of coca-cola prepared by defendant *is held* incompetent, since it tends to establish a dissimilar rather than a similar source of deleteriousness from that of which plaintiff complains, and was too remote in point of time. *Ibid.*

7. The manufacturer of food or drink is required to exercise due care in the preparation of these commodities, and may be held liable by the ultimate consumer for injury resulting from breach of this duty upon a proper showing. *Hampton v. Bottling Co.*, 331.

8. In establishing negligence on the part of a manufacturer in the preparation of a bottled drink, the ultimate consumer, injured by a foreign, deleterious substance in the bottle, may not rely upon the doctrine of *res ipsa loquitur*, but direct proof of negligence is not

Food A a—*continued.*

necessary, since negligence may be established by other relevant facts and circumstances from which it may be inferred, and similar instances are competent as tending to show a probable like occurrence at the time of plaintiff's injury, when accompanied by proof of substantially similar circumstances and reasonable proximity of time. *Ibid.*

9. Evidence that plaintiff was injured by drinking coca-cola from a bottle which had paint or varnish inside on its bottom and side, and that shortly after the injury in suit another had discovered a substance resembling white paint on the inside of another bottle prepared by the defendant, *is held* sufficient to be submitted to the jury on the issue of defendant's actionable negligence. *Ibid.*

10. The evidence favorable to plaintiff tended to show that plaintiff was injured by a foreign, deleterious substance in a drink bottled by defendant and purchased by plaintiff from a retailer. There was no evidence that the bottle had been tampered with after leaving defendant's plant, nor was there evidence that other drinks bottled by defendant had contained foreign, deleterious substances. *Held:* The evidence was insufficient to establish negligence on the part of defendant, and its motion for judgment as of nonsuit should have been allowed, the doctrine of *res ipsa loquitur* not being applicable. *Blackwell v. Bottling Co.*, 751.

Fraud. (Cancellation of insurance policies for see Insurance I.)

A Deception Constituting Fraud.

b Misrepresentation

Complaint *held* to allege misrepresentations amounting to fraud, and not mere promissory representations, and judgment sustaining demurrer of holder of notes with notice is reversed on authority of *Clark v. Laurel Park Estates*, 196 N. C., 624. *Stelling v. Trust Co.*, 838.

B Actions.

b Pleadings

The essential elements of fraud are a representation, its falsity, *scienter*, deception, and injury, and each of the essential elements of fraud must be clearly alleged in order for the pleader to avail himself of the defense. *Ghormley v. Hyatt*, 478.

e Sufficiency of Evidence

All the evidence tended to show that plaintiffs' son, acting as agent for his parents, negotiated a loan for plaintiffs, that the son paid ten per cent interest on the loan for nine and a half years, and that thereafter plaintiffs voluntarily executed a renewal note and mortgage bearing six per cent interest, and that their acknowledgment of the renewal mortgage was properly taken without semblance of fraud. *Held:* Plaintiffs' contention that the renewal note and mortgage were obtained by false and fraudulent representations of the lender that the principal of the debt was still due cannot be sustained, and the trial court's refusal to submit an issue of fraud was not error, the jury having found, upon a subsequent issue under correct instructions from the court, that the plaintiffs knew their son paid the interest on the original note. *Ghormley v. Hyatt*, 478.

Frauds, Statute of.
A Promise to Answer for Debt or Default of Another.
a Scope and Application
1. Plaintiff furnished defendant's tenants fertilizer and supplies which were used on defendant's farm. Evidence of defendant's statements to plaintiff at the time plaintiff agreed to furnish the merchandise *is held* susceptible of the interpretation that defendant's promise to pay therefor was an original promise not coming within the statute of frauds, C. S., 987, and not a superadded one barred by the statute, and the question of interpretation should have been submitted to the jury, and the granting of defendant's motion for judgment as of nonsuit was error. *Dozier v. Wood*, 414.
2. Whether a promise is an original one not coming within the provisions of C. S., 987, or a superadded one required by the statute to be in writing, does not depend altogether on the form of expression, but the situation of the parties, and whether they understood the promise to be direct or collateral, should also be considered. *Ibid.*

B Contracts Affecting Realty. (Right to value of improvements made by purchaser under parol contract to convey see Betterments A b 2.)
a Nature and Scope
Plaintiff alleged that his vendor agreed to procure a release of the land from a prior deed of trust upon the payment by the plaintiff of a note given for the balance of the purchase price of the land, and secured by a deed of trust to his vendor. *Held:* The agreement is not one to sell or convey land, or any interest in or concerning same, and does not come within the provisions of the statute of frauds. C. S., 988. *Hare v. Hare*, 442.

Grand Jury. (Grand jury may not be drawn for special term unless expressly ordered by Governor see Courts A g; duly constituted grand jury see Indictment A b.)

Guardian and Ward.
D Sale or Mortgage of Ward's Estate.
a Procedure and Formal Requisites
1. The statute, N. C. Code, 2180, prescribing the purposes for which a ward's land may be mortgaged and the procedure and requisites for the execution of the mortgage and the application of the proceeds of the loan, must be strictly complied with. *In re Quick*, 562.
2. Where a guardian has applied for permission to mortgage her wards' land, and the clerk has entered an order therefor, which order has been approved by the court, there is a presumption that the statutory requirements have been met. N. C. Code, 2180. *Ibid.*

b Purposes for Which Mortgage May Be Executed
A guardian applied for permission to mortgage land owned by her for life with remainder in her wards, and the clerk entered an order therefor which was approved by the court. The guardian's application for the loan stated that the proceeds thereof were to be used to purchase live stock necessary to the proper operation of the farm, to erect buildings on the land, and to provide improvements as

Guardian and Ward D b—*continued.*

defined by the Federal Farm Loan Board. *Held:* Under the presumption that the provisions of N. C. Code, 2180, were followed, the mortgage is valid and binding upon the wards' estate as to the funds used for permanent improvements on the land, but as to the funds used to purchase live stock the mortgage is void as to the wards, such fund not having been used to materially promote their interest, and the mortgage on the wards' estate in remainder to the extent of the proceeds used to purchase live stock should be set aside upon their petition therefor filed upon their coming of age. *In re Quick*, 562.

d Attack and Setting Aside Sale or Mortgage

Respondent's contention that petitioners' guardian had accepted the benefits of a loan and paid respondent interest thereon while acting in her representative capacity, and that the mortgage was executed by the guardian fourteen years prior to the institution of the proceedings, and that therefore petitioners were estopped to attack the validity of the mortgage, cannot be sustained where it sufficiently appears from the petition to set aside the mortgage that the mortgage was executed when petitioners were minors and that the proceeding attacking the mortgage was instituted by petitioners upon their coming of age. *In re Quick*, 562.

Highways. (Law of the road see Automobiles C; owner of abutting property may not recover damages resulting from change of grade of highway see Eminent Domain C c 1.)

Home Site.

A Nature of Home Site and Rights Therein.

b Conveyance of Home Site

1. A minor's wife's joinder in the execution of a mortgage on the home site of her husband may be disaffirmed by her within three years after her majority, her husband living, and the execution of the instrument never having been ratified by her, and upon such disaffirmance the mortgage is void. N. C. Code, 4103, and sections 997, 4102, 4103 (a) (b), being separate and distinct statutes, *are held* to have no application to this action. *Coker v. Bank*, 41.

Homicide.

A Homicide in General.

c Parties and Offenses

Evidence tending to show that defendant knew of and participated in the plans or preparations made for the killing of deceased, that defendant procured a coat for the killer and furnished an automobile as a means of flight after the murder had been committed *is held* sufficient to be submitted to the jury on an indictment drawn under C. S., 4175. *S. v. Williams*, 707.

B Murder.

a Murder in the First Degree (Attempted poisoning see Assault B c.)

Voluntary drunkenness and insanity, as negativing premeditation and deliberation, *held* properly submitted to the jury in this prosecution for murder in the first degree. *S. v. Vernon*, 340.

Homicide—*continued.*

C Manslaughter.

a In General

The amendment to N. C. Code, 4201, by ch. 249, Public Laws of 1933, which added a proviso that in cases of involuntary manslaughter the defendant shall be punishable by fine or imprisonment, or both, in the discretion of the court, does not constitute involuntary manslaughter a misdemeanor instead of a felony, the effect of the proviso being to mitigate punishment in cases of involuntary manslaughter, and not to set up involuntary manslaughter as a separate offense. *S. v. Dunn*, 333; *S. v. Leonard*, 346.

E Justifiable and Excusable Homicide.

a Self-defense

1. A homicide is justifiable when committed by a person in defense of himself or family when such person reasonably believes, under the facts and circumstances as they appear to him at the time, that such action is necessary to save himself or his family from death or great bodily harm, the reasonableness of his belief or apprehension under the circumstances as appearing to him being for the jury to determine. *S. v. Marshall*, 127.

2. Defendant testified that he shot deceased when deceased reached for a hammer because he thought deceased was going to hit or kill him with the hammer, but that deceased had not grasped the hammer or drawn it back when defendant shot him, and there was other testimony that deceased did not reach for the hammer until after he was shot. *Held:* Defendant's own testimony shows that he was not in imminent danger of death or great bodily harm when he shot deceased, and did not apprehend that he was in such danger. *Ibid.*

3. In the exercise of the right of self-defense, more force must not be used than is reasonably necessary under the circumstances, and if excessive force or unnecessary violence be employed, the party charged will be guilty of manslaughter, at least. *Ibid.*

4. Where defendant's own testimony tends to show that he shot and killed deceased in a fit of uncontrollable anger immediately after defendant had shot and killed another, the charge of the court that if the jury should find the facts to be as testified by defendant to return a verdict of guilty of manslaughter, at least, will not be held for error on defendant's exception based upon his contentions of self-defense, there being nothing in defendant's testimony tending to show that he killed deceased because of apprehension, real or apparent, that deceased was going to kill him or do him serious bodily harm. *S. v. Duncan*, 316.

5. In this prosecution for homicide, defendant's testimony was to the effect that he had been missing corn from his barn, that on the night in question he was aroused by the barking of his dog, that he dressed and took his shotgun to investigate and in the dark barely discerned a man standing near the barn, that defendant holloed and that the intruder commanded him to get back and approached defendant and was apparently fumbling for a weapon, and that defendant then shot, intending to frighten the intruder, but resulting in his death. *Held:* Defendant was entitled to have

Homicide E a—*continued.*

the question of self-defense submitted to the jury, and an instruction that defendant was guilty of manslaughter, at least, is erroneous. *S. v. Kirkman*, 719.

G Evidence.

d Competency and Admissibility in General

1. In a prosecution for homicide in which defendant contends and introduces evidence that deceased killed herself, testimony of declarations by deceased that she was going to kill herself is competent as tending to show the condition of the mind of the deceased, and therefore the probability of her having committed suicide. *S. v. Lagerholm*, 195.

2. Evidence of conspiracy among defendants to rob the deceased is competent under the general allegation of premeditation, and it need not be supported by an allegation that the murder was committed in the perpetration of a robbery, previously designed. *S. v. Gosnell*, 401.

e Weight and Sufficiency

Evidence of defendants' guilt of murder in the first degree in killing deceased while attempting to rob him *held* sufficient to be submitted to the jury. C. S., 4200. *S. v. Glover*, 68.

H Prosecution and Punishment.

c Instructions

Where all the evidence is to the effect that the murder was committed in the perpetration of a robbery, 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. Gosnell*, 401.

g Errors Cured by Verdict

Error, if any, in the charge of the court on the question of the right of self-defense, *is held* cured or rendered harmless by the verdict in the light of defendant's admissions and the evidence appearing on the record. *S. v. Marshall*, 128.

Hospitals.

A Definitions and Classes of Hospitals.

b Distinction Between Private and Charitable Hospitals

A hospital owned and maintained for the medical treatment and hospital care of the indigent sick and afflicted poor, and supported by donations from individuals and the county and city in which it is located, is a public hospital maintained primarily as a charitable institution, although it is partly supported by sums paid by nonindigent patients for services rendered to them. *Martin v. Comrs. of Wake*, 354.

Husband and Wife. (Divorce see Divorce; dower see Dower.)

B Liabilities Arising Out of Relationship. (Alimony see Divorce.)

d Husband's Liability for Wife's Support

Wife of insane beneficiary held entitled to support out of income from trust estate. *Reynolds v. Reynolds*, 254.

Husband and Wife—*continued.*
C Estates by Entireties.
e Conveyance

The husband has the right, during coverture, to deal with the possession of land held by him and his wife by entireties without the consent of the wife, but neither may make a contract affecting title, so as to defeat the right of the survivor in the whole estate, without the consent of the other. *Moore v. Shore*, 446.

Improvements. (See Betterments.)

Indemnity.
B Rights and Liabilities of Parties.
a Suffering of Loss by Parties Indemnified

The makers of notes executed a deed of trust to secure the endorser on the note from any loss resulting from the endorsement, but the deed of trust recited that it was given to secure payment of principal and interest on the notes, and provided that upon default in the payment of any of the notes, all the notes should become due and payable, and that the trustee should foreclose upon demand of the *cestui que trust* or the holder of the notes. The endorser assigned the note to the payee bank in consideration of the bank's releasing him of liability on the endorsement. Upon default in payment of the note the deed of trust was foreclosed, the property bought in by the bank, and a purchaser from the bank secured, who refused to accept deed on the ground that the foreclosure was void because no loss had been suffered by the endorser, the beneficiary in the deed of trust. *Held:* The suffering of loss was not a prerequisite to foreclosure of the deed of trust by the assignee bank, since from the provisions of the deed of trust it was intended to secure the entire debt as well as to save the endorser from loss, and since the bank assignee for value held same as security for the debt, and had the right to foreclosure upon default. *Hood v. Collins*, 326.

Indictment.
A Requisites and Validity.
b Finding by Duly Constituted Grand Jury

1. The record in this case disclosed that defendant was tried at a special term of criminal court upon an indictment returned by a grand jury drawn for the special term, but that there was no order by the Governor that a grand jury be drawn for such term. *Held:* Defendant's motion in arrest of judgment, made the first time in the Supreme Court upon appeal, must be allowed. Art. I, sec. 12. *S. v. Baxter*, 90.

2. The jurisdiction of a grand jury, with certain statutory exceptions, extends only to crimes committed within the county, and where the bill of indictment avers that the crime, not within the statutory exceptions, was committed in another county, and the court, upon the finding of a true bill, transfers the case to the county in which the indictment avers the offense to have been committed, the Superior Court of such county acquires no jurisdiction, and defendants' motion to dismiss should be allowed, since the indictment is void

Indictment A b—*continued.*

for want of jurisdiction in the grand jury returning same, and cannot confer jurisdiction upon the Superior Court of any county. *S. v. Beasley,* 318.

3. Defendants move to quash the bill of indictment for that a member of the grand jury which returned the bill was not a resident of the county. Upon a hearing duly had, the trial court found from the evidence that at the time of serving the juror was a resident of the county, and overruled the motion. *Held:* The court's ruling was without error and is directly supported by *S. v. Vick,* 132 N. C., 995. *S. v. Gosnell,* 401.

4. Objection that jury commission was not competent for that members held other offices *held* untenable. *Ibid.*

B Form and Sufficiency of Indictment.

a In General

1. Defendants contended that the count in the indictment charging receiving stolen goods was fatally defective in that the names of defendants were not repeated in charging *scienter. Held:* The defect was merely an informality or refinement not sufficient to support a quashal of the indictment, the charge being plain, explicit, and sufficient to enable the court to proceed to judgment. C. S., 4623. *S. v. Whitley,* 661.

2. Where a warrant or indictment fails to charge an essential element of the offense, the defect is fatal and is not cured by the provisions of C. S., 4623. *S. v. Tarlton,* 734.

3. An indictment will not be quashed for mere informality or refinement, C. S., 4623, and a judgment will not be stayed or reversed for nonessential or minor defects. C. S., 4625. *S. v. Anderson,* 771.

d Joinder of Counts (Joinder and severance of counts by trial court see Criminal Law I f.)

The indictment charged all of the defendants with conspiracy to dynamite certain buildings, and in subsequent counts charged some of defendants with breaking and entering and larceny of dynamite from a store, with feloniously receiving said dynamite with knowledge that it had been stolen, and in the last counts charged two of the defendants with attempting to dynamite the buildings. *Held:* Defendants' motion to quash for that the indictment charged different offenses against different defendants was properly overruled, it being permissible to join in one indictment counts charging conspiracy and successive steps thereafter taken by the respective conspirators in executing the common design. C. S., 4622. *S. v. Anderson,* 771.

C Motions to Quash or Dismiss.

d For Want of Jurisdiction

1. When the indictment charging defendants with the commission of crime is invalid, defendants' motion to dismiss the action for want of jurisdiction should be allowed. N. C. Const., Art. I, sec. 12. *S. v. Beasley,* 318.

2. A motion to quash the indictment upon the trial in the Superior Court for that the crime charged was a misdemeanor, and that the

Indictment C d—*continued.*

recorder's court had exclusive jurisdiction, is properly refused where the record does not show that there was a recorder's court for the county, or that such court had exclusive jurisdiction of misdemeanors. *S. v. Dunn*, 333.

3. The amendment of C. S., 4201, by ch. 249, Public Laws of 1933, does not make involuntary manslaughter a misdemeanor, and the Superior Court has jurisdiction of a prosecution under the statute although the fatal accident occurred within the territorial jurisdiction of a city court having exclusive original jurisdiction of misdemeanors. *S. v. Leonard*, 346.

D Amendment.

a Scope and Nature of Amendment

Where a warrant or indictment is fatally defective in failing to charge an essential element of the offense, the defect cannot be cured by amendment after verdict upon defendant's motion in arrest of judgment. *S. v. Tarlton*, 734.

E Issues, Proof and Variance.

a Variance in General

Defendants were prosecuted for larceny and receiving under an indictment charging that the goods belonged to "Cannon Mills Company," whereas the State's evidence tended to show that the property belonged to "Cannon Mills." *Held:* Defendants' motion for judgment as of nonsuit on the grounds of a fatal variance between allegation and proof was correctly denied, it appearing that the witnesses meant "Cannon Mills Company" when the abbreviated form was used and the doctrine of *idem sonans* applying. *S. v. Whitley*, 661.

e Conviction on One Count and Acquittal on Other Counts

Defendant was indicted in two counts, one under N. C. Code, 4242, for wantonly and wilfully burning a dwelling-house used as a storehouse or barn, and the other under N. C. Code, 4245 (a), for wilfully and maliciously burning personal property in such dwelling, with intent to injure the owner thereof. The court charged the jury that defendant could be found guilty on both counts, or not guilty on one count and guilty on the other. Defendant appealed from a conviction on the second count. *Held:* Defendant's contention that a verdict of not guilty on the first count necessarily carried a verdict of not guilty on the second count upon his exception to the charge for separating the counts cannot be sustained, the counts being separate and distinct and each requiring proof of facts which the other does not. *S. v. Pierce*, 47.

F Aider by Verdict. (Errors in charge cured by verdict see Criminal Law I M.)

a In General

Defendant was prosecuted under a warrant charging him with being the father of an unborn, illegitimate child. The issue submitted to the jury and the charge of the court presented to the jury the question of defendant's wilful refusal to support his illegitimate child. *Held:* The failure of the warrant to charge defendant with wilful failure to support his illegitimate child was not cured by the charge or verdict, since the warrant fails to charge any criminal offense. *S. v. Tyson*, 231.

Infants. (Guardianship see Guardian and Ward; attractive nuisance see Negligence A cc.)

A Property and Conveyances

c Right to Set Aside Conveyances (Right to set aside mortgage executed by guardian see Guardian and Ward.)

Minor wife may disaffirm her joinder in mortgage on husband's home site upon her majority. *Coker v. Bank*, 41.

d Equitable Power of Court to Approve Compromise of Suit Affecting Infant's Interest

Where an infant has a contingent interest in trust estates, consisting of real or personal property, the courts, in their equitable jurisdiction, have the power to ratify and affirm a contract affecting the infant's interest therein in order that the estates may not be wasted in litigation and in order that the original intention of the trustors may be effectuated and not defeated by the happening of unforeseen contingencies, the best interest of the infant being the guiding principle in determining whether the contract should be ratified and affirmed. *Reynolds v. Reynolds*, 578.

B Contracts of Infants.

a Validity and Right to Disaffirm

With certain common-law and statutory exceptions, N. C. Code, 220 (i), 994, 4103 (b), 5181, contracts of infants are voidable at the option of the infant, and when so avoided are void *ab initio*. *Coker v. Bank*, 41.

Injunctions.

C Subjects of Injunctive Relief. (Enjoining foreclosure see Mortgages H b; enjoining consummation of foreclosure see Mortgages H o; enjoining declaration of result of election see Elections I c.)

b Enjoining Enforcement of Statutes

The constitutionality of a statute may not be tested by injunctive proceedings unless the party seeking the injunctive relief alleges and shows that he will suffer irreparable damage from the enforcement of the statute. *Newman v. Comrs. of Vance*, 675.

E Permanent Injunctions.

b Procedure and Decree

It is error for the court, upon the hearing of an order to show cause, to decree a permanent injunction, although the facts found are sufficient to continue the temporary restraining order to the hearing, defendants being entitled to a day in court to determine in some proper way the issues raised by the pleadings, and a permanent injunction being a final judgment which settles the rights of the parties. *Galloway v. Stone*, 739.

Insane Persons.

D Control and Management of Estate.

b Charges and Liabilities of Estate

Where the beneficiary of a trust agreement who receives a fixed income therefrom becomes insane, and such income substantially exceeds the needs of the beneficiary in providing expert medical attention and care and maintenance, the wife of such beneficiary who is

Insane Persons D b—*continued.*

otherwise without means has the right to support and maintenance from the beneficiary's income from the trust estate. *Reynolds v. Reynolds*, 254.

Insurance. (Surety bonds see Principal and Surety.)

C Insurance Agents

a Appointment and Tenure

Evidence that agent issuing policy was authorized agent of defendant insurer at the time the policy was issued *held* properly submitted to jury. *Belk's Store v. Ins. Co.*, 267.

b Authority

1. Evidence *held* properly submitted to jury on question of agent's authority from insured to cancel policy and substitute another. *Belk's Store v. Ins. Co.*, 267.

2. An agent representing several fire insurance companies issued three policies in separate companies insuring plaintiff's stock of goods in compliance with plaintiff's request that the goods be insured in that sum for one year. Before the expiration of the year the agent was informed by the Insurance Commissioner that one of the companies had become insolvent, and the agent canceled the policy in the insolvent company and issued in substitution therefor the policy in defendant company, which the agent also represented. *Held:* The agent's acts in canceling the policy in the insolvent company and issuing the policy in defendant company, done for the benefit of insured, were not inconsistent with its duties to defendant company, and was not such dual agency as to taint the transaction. *Ibid.*

E The Contract in General.

a Execution of Policy

1. The policy of fire insurance in suit was issued in the name of "Belk's Department Store" instead of "Belk's Department Stores of New Bern, North Carolina, Inc.," the full name of insured. In its answer insurer admitted plaintiff is a corporation, and did not set up any defense based upon the failure of the policy to state insured's full name. *Held:* The failure of the policy to state insured's full name is not fatal, the policy having been duly received through the mail by insured and having been intended for it, and if the defect had been set up in insurer's answer, insured could have set up mutual mistake and had its full name inserted in the policy. *Belk's Store v. Ins. Co.*, 267.

2. An agent representing several fire insurance companies was requested by plaintiff to insure plaintiff's stock of goods in a specified sum for one year, and in compliance with the request the agent issued three policies in the aggregate sum requested in three separate companies. Thereafter, upon information from the Insurance Commissioner that one of the companies had become insolvent, the agent canceled the policy in the insolvent company and issued a policy in defendant company in substitution thereof. Defendant company contended that it was not liable because the policy in the company which became insolvent had never been validly canceled. *Held:* Defendant's contention is immaterial, since liability under

Insurance E a—*continued.*

the policy canceled by the agent without knowledge of insured does not affect defendant insurer's liability under the policy in suit, and it appearing further that the agent canceled the policy in the insolvent company as insured's agent, and that insured ratified the cancellation, and that the cancellation was warranted by information from the Insurance Commissioner. *Ibid.*

b Construction and Operation in General

1. An insurance contract, like any other contract, is based upon an offer and acceptance, and is an agreement between the parties supported by sufficient consideration. *Belk's Store v. Ins. Co.*, 267.

2. A policy of insurance will be construed strictly against insurer and in favor of insured, but the policy cannot be enlarged by construction beyond the meaning of the terms used. *Carter v. Ins. Co.*, 665.

3. The provisions of a policy of life insurance limiting insurer's liability to a percentage of the face amount of the policy in case of disability or death resulting from rioting, fighting, resisting arrest, etc., are valid. *Dailey v. Ins. Co.*, 817.

d Provisions Ousting Jurisdiction of Courts

1. A clause in the constitution and by-laws of a mutual benefit association that the decision of its board of directors shall be final on the question of whether a member is totally and permanently disabled within the meaning of its benefit certificate, as distinguished from a clause providing for payment of such benefits as may be awarded by its officers or tribunals, is void as being against public policy, and will not prevent a beneficiary under its certificate from bringing action in the courts for the unreasonable and arbitrary rejection of his claim for benefits under the terms of the certificate. *Cordell v. Brotherhood*, 632.

2. Evidence that mutual benefit association arbitrarily rejected claim for disability benefits *held* for jury. *Ibid.*

h What Law Governs

Policies of insurance issued by foreign companies, the application for which is taken in this State, are to be construed in accordance with the laws of this State, and a provision in the policy that it should be governed by the laws of the state of the domicile of the insurer is void in so far as the courts of this State are concerned. *Cordell v. Brotherhood*, 632.

F Group Insurance.

d Termination of Employee's Contract by Termination of Employment

1. *Held:* Evidence failed to show disability at time of termination of employment, and insurer was not liable. *Carter v. Ins. Co.*, 665.

2. Under the terms of defendant insurer's group policy an employee furnishing due proof of diability while insured under the policy was entitled to disability benefits. The policy provided that insurance as to each employee should terminate upon termination of his employment, unless at such time the employee was disabled as defined in the policy. Plaintiff became disabled while insured under the policy, and premiums were deducted from her wages up to the time of her disabling injury, when her employment was terminated and

Insurance F d—*continued.*

no further deductions for premiums were made. The master policy was canceled about nine months after her injury. About two years after her injury plaintiff gave defendant insurer notice and proof of her disability. *Held:* Although the disability occurred while plaintiff was insured under the policy, notice and due proof of such disability were not given while plaintiff was insured under the policy, and notice within such time being made a condition precedent to liability under the policy, defendant insurer's motion for judgment as of nonsuit should have been granted. *Dewease v. Ins. Co.*, 732.

H Cancellation and Reinstatement of Policy.

c Reinstatement

1. Whether insurer acted on application for reinstatement of policy within reasonable time *held* for determination of jury. *Apostle v. Ins. Co.*, 95.

I Avoidance of Policy for Misrepresentation or Fraud.

b Matters Relating to Insured

1. Evidence in behalf of plaintiff insured was to the effect that he told defendant insurer's agent at the time of applying for the policy that he had sustained a fractured skull from which he had entirely recovered, that he offered to tell more of his illnesses, and that the agent declared that since insured had recovered from the fracture, it would be unnecessary to give further information. Evidence in behalf of insurer tended to show that insured had suffered injuries other than the fracture, and that insured made no attempt to disclose such other injuries. *Held:* The evidence was sufficient to support the finding by the court, a jury trial having been waived, that insured did not obtain the policy by means of false and fraudulent representations or concealments, the evidence being conflicting, and the burden of proof on the issue being on insurer. *Willett v. Ins. Co.*, 344.

2. Where insurer alleges fraud in the procurement of a policy of insurance by false and fraudulent misrepresentations or concealments in insured's application for the policy, parol evidence for insurer is competent to establish such fraud, and for insured to refute the alleged fraud, and insurer's contention that insured's testimony that insurer's agent stated that other information required by the application would not be necessary was incompetent, as being in contradiction of the written instrument, cannot be sustained. *Ibid.*

bb Policies Issued Without Medical Examination

1. A father took out a policy of life insurance on his son in the sum of two thousand dollars, the policy providing that no further premiums would be required upon the death or total and permanent disability of the father. Insurer required no medical examination of the father. In an action by insurer to cancel the policy for alleged false and fraudulent representations as to the father's health made by the father in his application for the policy, C. S., 6460, providing that a policy issued without physical examination should not be void or payment resisted for misrepresentations as to applicant's physical condition except in cases of fraud, and C. S.,

Insurance I bb—*continued.*

6289, providing that all statements in applications for insurance shall be deemed representations and not warranties, and that a representation should not prevent recovery on the policy unless material or fraudulent, *are held* applicable, and insurer is not entitled to cancellation for misrepresentations relating to the health of the father in the absence of fraud. *Ins. Co. v. Hardin*, 22.

2. Applicant's statement that health was good *held* not fraudulent where evidence shows that applicant *bona fide* believed health to be good. *Ibid.*

3. In response to question in application as to whether applicant had had any disease or received any medical attention within ten years prior to application, applicant stated that he had been attended for influenza, but failed to disclose a physical examination upon which he was advised that there was nothing the matter with him, although the physician had discovered he was suffering from an incurable disease. The evidence disclosed that applicant believed in good faith that his health was good. *Held:* The evidence of fraud in applicant's answer to the question is insufficient to be submitted to the jury, insurer having accepted applicant's answer as satisfactory and sufficiently definite, and it appearing that the fact of examination with a favorable report thereon to applicant by the physician was not regarded by applicant as material. *Ibid.*

J Forfeiture of Policy for Breach of Condition Subsequent.

b Nonpayment of Premiums or Assessments

Plaintiff's action on a disability provision in his fraternal benefit certificate *held* properly nonsuited under the evidence for his failure to furnish satisfactory proof of disability until more than six months after the termination of his contract for nonpayment of dues according to its terms and conditions, although the inception of the disability antedated the forfeiture for nonpayment of dues. *Modlin v. Woodmen of the World*, 576.

K Estoppel, Waiver, or Agreements Affecting Right to Avoid or Declare Forfeiture.

a Knowledge of Local Agent

1. In the absence of fraud or collusion between insured and insurer's agent, knowledge of the agent, acting in the scope of his authority, at the inception of the policy of violations of its conditions or covenants is imputed to the insurer, though the policy contains a stipulation to the contrary. *Smith v. Ins. Co.*, 99.

2. The knowledge of the local agent of a fire insurance company that at the time of issuing the policy in suit insured carried other insurance on the property *is held* a waiver of the provisions of the policy that the policy would be void unless all other insurance on the property was listed in the policy, although the local agent did not have knowledge of the amount of such other insurance, it appearing that the property was worth much more than the total amount of insurance thereon, and there being no semblance of bad faith or fraud. *Belk's Store v. Ins. Co.*, 267.

Insurance—*continued.*

M Notice and Proof of Death or Loss.

b Notice or Proof to Agent of Insurer

The employer in a group insurance policy is not ordinarily the agent of the insurer for the purpose of receiving notice or proof of claim by an insured employee. *Dewease v. Ins. Co.*, 732.

c Form and Sufficiency of Proof

A letter of a physician stating that insured had survived a very serious sickness, but was at that time rapidly improving and should completely recover, *is held* insufficient as notice of permanent and total disability, although it would not preclude recovery under the disability clause in the policy if in fact the disability proved permanent. *Carter v. Ins. Co.*, 665.

e Waiver of Proof

Insured claimed temporary and total disability under a group policy in which he was insured, and insurer paid temporary disability benefits thereunder but denied the permanency of the disability. Insured demanded of insurer's agent forms on which to make proofs of disability under other policies of life insurance taken out with insurer which provided for benefits for total and permanent disability, and defendant's agent refused to furnish such forms on the ground that insured was not entitled to disability benefits under the policies. *Held:* In insured's action on each of the policies the submission of issues as to whether insured furnished due proof of total and permanent disability under each of the policies and whether insurer waived the furnishing of blanks for the production of proof of disability was without error. *Gossett v. Ins. Co.*, 152.

P Actions on Policies.

g Judgment and Recovery

Held: The refusal to limit the recovery of disability benefits to the Disability Department of defendant mutual benefit association was not error, defendant having the right under the judgment to pay plaintiff from its disability fund, and the matter being one of bookkeeping on the part of defendant. *Cordell v. Brotherhood*, 632.

R Accident and Health Insurance.

a "Accidental" Injuries or Death

Plaintiff's evidence tended to show that insured had a tooth extracted by a competent and skillful dentist, who performed the operation at the request of insured with proper and sterile instruments in the usual and ordinary manner, employing the requisite degree of care and skill, that thereafter infection set in which produced an embolus which caused the death of insured. Plaintiff's evidence was not conclusive that the embolus resulted from the extraction of the tooth. *Held:* The evidence was insufficient to show that insured died from an external, violent, and accidental means within the terms of the double indemnity clause of the policy sued on, for although insured's death was the result of an accident in that death from an embolus caused by infection is not the ordinary and expected result of a tooth extraction, yet such accidental death was not the result of accidental means, since the tooth extraction

Insurance R a—*continued.*

ultimately resulting in death was performed intentionally in a skillful and usual manner, without mishap or unforeseen element. *Scott v. Ins. Co.*, 160.

c Disability Clauses

1. In an action on a disability clause in a policy of life insurance a complaint alleging disability within the terms of the policy, and that the condition of the policy that such disability should occur after the issuance of the policy, was waived by knowledge of insurer's agent at the time the policy was issued that insured had been treated for a defect in his eye and had seemingly entirely recovered and had been in good health for five years *is held* good as against a demurrer. *Smith v. Ins. Co.*, 99.

2. Evidence that insured had undergone several successive operations, and had had a nervous breakdown, and because of his nervous, weak, and run-down condition had been unable for a period of two years to perform any work for remuneration or profit, and that there had been no improvement in his condition, *is held* sufficient to be submitted to the jury on the question of insured's total and permanent disability within the meaning of the policies sued on. *Gossett v. Ins. Co.*, 152.

3. It is not necessary that insured introduce testimony of a physician that insured is totally and permanently disabled in order for insured to recover on disability clauses in policies of life insurance. *Ibid.*

4. In this action on a disability clause in a policy of life insurance the court used the phrase "unable to earn a living himself" in its charge on the issue of total and permanent disability, to which defendant insurer objected for that the court failed to charge that such inability must be the result of bodily injury or disease in order for plaintiff to recover. In concluding the charge upon the issue the court instructed that the burden was on plaintiff to show that he had been permanently and totally disabled and thereby prevented from performing work or conducting any business for compensation or profit. *Held:* The charge, when construed as a whole, is without error, the closing portion of the charge being correct and not in conflict with the portion objected to, but being in explanation thereof. *Bradshaw v. Ins. Co.*, 214.

5. In this action on a disability clause in a policy of life insurance insurer's objection to the charge for that the court used the phrase "disability has continued for a period of ninety days" instead of the language of the policy, "for a period of ninety consecutive days," *is held* untenable, since "period of" connotes consecutiveness, and since the issue between the parties was the totality of the disability and not its permanency. *Ibid.*

6. The testimony of insured in his own behalf is sufficient to take the case to the jury on the question of the totality of insured's disability, the permanence of insured's disability being admitted, although there is testimony *contra*. *Ibid.*

7. Conflicting evidence as to totality or permanence of insured's disability within the meaning of a disability clause in a policy of life insurance raises an issue for the determination of the jury. *Ibid.*

Insurance R c—*continued.*

8. Plaintiff's action on a disability provision in his fraternal benefit certificate *held* properly nonsuited under the evidence for his failure to furnish satisfactory proof of disability until more than six months after the termination of his contract for nonpayment of dues according to its terms and conditions, although the inception of the disability antedated the forfeiture for nonpayment of dues. *Modlin v. Woodmen of the World*, 576.

9. Where a policy provides certain benefits if insurer becomes totally and permanently disabled as defined in the policy, insurer may not escape liability by proof that insured was not suffering from a specific disabling disease, if insured is rendered disabled as defined in the policy by other ailments. *Cordell v. Brotherhood*, 632.

10. *Held:* Evidence failed to show disability at time of termination of employment, and insurer was not liable. *Carter v. Ins. Co.*, 665.

11. Employee *held* not entitled to disability benefits when proof of disability was not given while policy was in force. *Dewease v. Ins. Co.*, 732.

12. Insurer began paying disability benefits to insured upon receipt of due proof of disability under the policy. Insured's disability had its inception several years prior to the time insurer began paying disability benefits, and insured instituted this action for back disability benefits, contending that he had furnished due proof of disability at its inception. The evidence tended to show that insured, for years after the inception of the disability, corresponded with insurer as to extension of time for payment of premiums, paid the premiums by borrowing on the policy and by other means, and during this time never demanded waiver of payment of premiums as provided for in the disability clause, and thereafter requested the blanks for proof of disability and furnished the proof upon which insurer began paying the disability benefits. *Held:* Conceding that there was sufficient evidence that defendant furnished due proof of disability at its inception, insured is estopped by his conduct from maintaining this action for disability benefits for the period between the inception of the disability and the time insurer began paying the benefits under the terms of the policy. *McLawhorn v. Ins. Co.*, 709.

Intoxicating Liquor. (Repeal of general law in certain counties see Statutes A f.)

B Possession.

a Legal and Illegal Possession

Verdict of "Guilty of possession" *held* insufficient to support judgment where defendant contends possession was lawful. *S. v. Lassiter*, 251.

Judges. (Power to render judgment or order out of term and out of county see Judgments G b.)

Judgments.

B Judgments by Consent.

a Parties Who May Consent to Judgment

A judgment affirming a family agreement for the distribution of trust estates created by wills, including the rights of infants and persons

Judgments B a—*continued.*

not *in esse*, is affirmed in this case, it appearing that the infants and persons not *in esse* were duly represented, and that the court heard evidence and found that the agreement was to the best interests of the infants. *Reynolds v. Reynolds*, 578.

c Entry and Docketing

A consent judgment may be entered at any time by the clerk of the Superior Court in which the action is pending, C. S., 593, and it is not required that such judgment be entered on a Monday as is the case with other judgments which the clerk is authorized to enter. C. S., 597 (b). *Hood, Comr., v. Wilson*, 120.

F On Trial of Issues.

c Conformity to Verdict and Pleadings

A judgment may not be rendered in favor of a defendant who alleged no further defense, counterclaim, or cross action. *C. I. T. Corp. v. Watkins*, 448.

G Entry, Recording, and Docketing.

b Time and Place of Rendition of Judgment or Order in the Cause

1. The judge of the Superior Court granted a motion requiring the adverse parties to show cause why the judgment entered in the cause should not be set aside, and heard the motion and entered an order modifying the judgment, over respondents' objection, outside the county in which the action was pending. *Held:* The court had had no authority to hear the motion or make the order substantially affecting the rights of the parties outside the county in which the action was pending. *Bank v. Hagaman*, 191.
2. The trial court has no power to correct the verdict by order entered out of term and out of the county, in the absence of consent of the parties or unless otherwise authorized. *S. v. Whitley*, 661.

H Judgment Lien.

a Attachment of Lien and Priority

Plaintiff's consent judgment was docketed 7 o'clock p.m., 6 December, and defendant judgment creditor's consent judgment against the same party was docketed 3 o'clock p.m., the same day, the judgments being docketed on a day other than a Monday, as authorized by statute. *Held:* The judgment of defendant judgment creditor has priority over plaintiff's judgment, C. S., 614, since the provisions of C. S., 613, that judgments rendered during a term should relate back to the first day thereof, and that the liens of all judgments rendered on the same Monday shall be of equal priority, do not apply to judgments by consent. *Hood, Comr., v. Wilson*, 120.

K Attack and Setting Aside.

b For Surprise, Excusable Neglect, etc.

1. Judgment was obtained upon the statutory liability of a holder of stock in a bank in course of liquidation. The liquidating agent obtained an order of the court for the sale of the judgment, C. S., 218 (c) (7), and in accordance with the order the judgment was assigned to a purchaser. The stockholder made a motion in the cause to set aside the order for the sale of the judgment under C. S., 600, for surprise, excusable neglect, etc. *Held:* Movant was without authority to intervene and move to set aside the order,

Judgments K b—*continued.*

since she was not a party against whom the order was taken, and her rights were not thereby adversely affected, since the rights of a judgment debtor are not affected by the assignment of the judgment, and she may not maintain that her rights as a creditor of the bank were adversely affected by the disposition of its assets by the liquidating agent in the absence of allegation of fraud, bad faith, or neglect on the part of the liquidating agent. *In re Bank,* 509.

2. Although the neglect of an attorney employed to defend an action will not ordinarily be imputed to his client, and will not, therefore, prevent the setting aside of a judgment by default upon a showing of excusable neglect and a meritorious defense, N. C. Code, 600, where the trial court finds upon supporting evidence that defendants and their attorney were present in court at the beginning of the term at which the judgment was rendered, that defendants' motion for a continuance was refused, and that defendants and their attorney thereupon left the court room without definite agreement with the court or opposing counsel, and did not return to defend the case, and that both defendants and their attorney had failed to exercise due diligence, the court's refusal of the motion to set aside the judgment will be affirmed on appeal. *Carter v. Anderson,* 529.

c For Want of Proper Service

Where judgment is rendered by default final upon a fatally defective service of summons by publication, the judgment is void, since jurisdiction of defendant is necessary to enable the court to render a valid judgment against him. *Guerin v. Guerin,* 457.

d Irregular Judgments

When executor dies prior to trial, judgment against estate is irregular, and is properly set aside upon motion. *Taylor v. Caudle,* 298.

f Procedure

1. A motion for an order requiring adverse parties to show cause why the judgment rendered in the cause should not be set aside should be in writing and should be supported by an affidavit stating the grounds of the motion, but failure to file the written motion and affidavit is not sufficient grounds for dismissal of the motion as a matter of right, since upon the hearing the court granting the motion to show cause may require movants to then file the necessary papers and allow respondents time to answer if they so request. *Bank v. Hagaman,* 191.

2. The proper procedure to set aside a void judgment is by a motion in the cause. *Guerin v. Guerin,* 457.

L Operation of Judgments as Bar to Subsequent Action.

a Judgments of Nonsuit

The denial of a motion to amend the complaint by adding two causes of action nonsuited on the evidence upon a former trial is properly entered upon the grounds of *res judicata.* *Swinson v. Packing Co.,* 742.

f Pleading Bar and Preservation of Defense of Bar

Defendant did not plead estoppel by judgment in his answer, but his contention that the execution of notes by plaintiff upon which de-

Judgments L f—*continued.*

fendant had obtained judgment constituted a new contract superseding the contract sued on by plaintiff in this action was fully submitted to the jury and answered in plaintiff's favor. *Held:* Defendant's contention that the court erred in refusing to dismiss the action on the ground of the former action between the same parties on the notes cannot be sustained. *Davis v. Warren*, 174.

g Procedure and Disposition of Cause

1. It is not error for the court to dismiss plaintiff's action upon his finding, unchallenged, that the matters sought to be litigated therein are *res judicata*. *Alexander v. Thompson*, 353.

2. When plaintiff's suit to restrain foreclosure is dismissed upon the plea of *res judicata*, and defendants' cross action for foreclosure in equity is allowed, and a commissioner appointed to sell the lands and report the sale for confirmation, it is error to defendants' prejudice for the court to dismiss the action, and the action should be retained for further orders. *Ibid.*

M Conclusiveness of Adjudication.

a Matters Concluded

Judgment *held* to have adjudicated all claims of respondent in land condemned, and to preclude subsequent motions in the cause in respect thereto. *S. v. Lumber Co.*, 347.

P Assignment of Judgments.

c Rights of Judgment Debtor

A judgment debtor has no interest in the assignment of the judgment since the assignee takes it subject to and charged with all equities which could be asserted against the assignor at the time of the assignment. *In re Bank*, 509.

R Payment and Discharge. (Execution on see Execution.)

a Clerk Is Agent of Judgment Creditor in Receiving Payment

A judgment debtor is entitled to credit on the judgment for amounts paid by him on the judgment to the clerk of the Superior Court in whose office the judgment is docketed, C. S., 617, although the clerk fails to enter payment on the judgment docket, the judgment debtor being under no duty to require the clerk to make entry of payment on the judgment docket and the clerk being in effect the statutory agent of the owner of the judgment in making such entries. *Dalton v. Strickland*, 27.

Judicial Sales.

A Nature and Scope of Remedy.

a Power and Office of Commissioner

A commissioner was authorized by the court to sell part of the lands of an estate for reinvestment under the provisions of N. C. Code, 1744. There were no restrictions in regard to the use of the property of the estate, and in the commissioner's report and recommendation of the offer to purchase no authority to restrict the use of the property was asked, and none granted in the order of the court. The commissioner executed deed to the purchaser upon the order of the court, but inserted restrictions in the deed limiting the use of the property to white people and residence purposes. *Held:* The commissioner was without authority to insert the restrictions in the

Judicial Sales A a—*continued.*

deed to the purchaser, his authority being limited under the order of the court to the sale of the property and the disposition of the proceeds of sale, and the restrictions were null and void and the purchaser at the sale may transfer title free of the restrictions. *Trust Co. v. Refining Co.*, 501.

Jury. (Constitutional right to jury trial see Constitutional Law F d.)

B Summons of Persons for Jury Duty.

a Summons of Persons from County of Trial

Upon adjournment of court on Tuesday of the term, the court instructed the sheriff to summon a number of men to act as talesmen in a case proposed to be called for the next day. Upon the trial defendants moved that none of the men so summoned and none of the jurors already in the box should serve, but that the jury be selected from bystanders. *Held:* Defendants' motions did not amount to a challenge to the array, and the instruction of the court was not an order under C. S., 2321, for talesmen or a special venire, and the jurors summoned being subject to all the qualifications of talesmen, and defendants having failed to exhaust their respective challenges to the poll, defendants' exceptions to the refusal of their motions cannot be sustained. *S. v. Anderson*, 771.

Justices of the Peace.

C Jurisdiction

a Actions on Contract

A justice of the peace has jurisdiction of an action on contract to recover the amount by which the salary paid plaintiff failed to equal the amount stipulated in the "President's Reëmployment Agreement," voluntarily signed by defendant employer, when the amount demanded does not exceed two hundred dollars. C. S., 1475. *James v. Dry Cleaning Co.*, 412.

Landlord and Tenant.

C Title of Landlord.

b Estoppel of Tenant to Deny Landlord's Title

A tenant cannot dispute his landlord's title. *Ferguson v. Ballenger*, 829.

Larceny.

A Offenses and Responsibility. (Receiving stolen goods see Receiving Stolen Goods.)

a Nature and Elements of the Crime

Where a foreman of the waste-house of a company takes goods of the company from another part of the plant, sometimes concealing same in the waste-house at night after they had been thus purloined, the foreman at no time has lawful possession of the property, and the crime is larceny and not embezzlement. *S. v. Whitley*, 661.

Libel and Slander.

A Nature and Essentials of Right of Action. (Liability of corporation for slander see Corporations G i 1.)

a Words Actionable Per Se

1\. Plaintiff and defendant were rival butchers or meat dealers. Defendant stated to third persons words which in effect charged that

Libel and Slander A a—*continued.*

the cow which plaintiff butchered the previous day had been bitten by a mad dog and advised such persons not to buy the meat from plaintiff. There was no contention that the words were true and no claim of privilege. *Held:* The words were actionable *per se* as a matter of law. *Broadway v. Cope,* 85.

2. Where words spoken by defendant are actionable *per se,* malice and compensatory damage are conclusively presumed. *Ibid.*

D Actions.

d Evidence

1. Plaintiff's testimony in this action for slander on the issue of damages *is held* not incompetent as being of speculative damage. *Broadway v. Cope,* 85.

2. In action for libel witnesses may not testify they understood defendant to be actuated by malice. *Minton v. Ferguson,* 541.

e Damage

The charge of the court on the issue of damage in this action for slander by words actionable *per se* as a matter of law, that upon an affirmative finding that the plaintiff published the words complained of, the law presumed malice and compensatory damage, and that plaintiff was entitled to recover his actual damage naturally and proximately resulting from the words spoken, and that plaintiff could be awarded punitive damage in the discretion of the jury upon a finding of actual malice *is held* without error. *Broadway v. Cope,* 85.

Limitation of Actions. (Notice and filing of claim as prerequisite to action against municipality see Municipal Corporations J b.)

A Statutes of Limitation.

c Actions Barred by Three-Year Statute

Upon a finding to the effect that the maker of a negotiable note did not intend to adopt as his seal the printed word "(Seal)" appearing thereon, and therefore did not intend to execute a sealed instrument, the note is a simple contract and the three-year statute of limitations is applicable to an action thereon, and where the note is payable upon demand, the statute begins to run immediately. *Williams v. Turner,* 202.

d Actions Barred by Ten-Year Statute

The ten-year statute of limitations, C. S., 437, applies to actions upon sealed instruments against the principals thereon, but not against the sureties. *Trust Co. v. Williams,* 243.

B Computation of Period of Limitation.

a Accrual of Right of Action

1. A cause of action against the guarantor on a note accrues upon the maturity of the note and the failure of the maker to pay same according to its tenor. C. S., 405. *Hall v. Hood,* 59.

2. Defendants paid the first of ten yearly installments on liens against their lots for street improvements fourteen days late, and made no further payments on the liens. Over ten years elapsed from the date of defendants' tardy payment of the first installment to the date plaintiff municipality instituted this action to enforce the

Limitation of Actions B a—*continued.*

liens, but the action was instituted less than ten years from the date the second installment was due. *Held:* Plaintiff's action was not barred by the ten-year statute of limitations, since the provision of C. S., 2716, that upon failure to pay any installment when due all installments remaining unpaid should at once become due and payable, gives municipality the option of right to declare all installments due and payable upon default, and in the absence of its declaration to invoke the acceleration provision the statute of limitations will not begin to run against unpaid installments not then due. C. S., 437. *Farmville v. Paylor*, 106.

3. Plaintiff brought suit to recover the amount of shortage in a tract of land under the provision of a contract under seal to convey which provided that defendant vendor should pay for such shortage at the rate of a stipulated sum per acre as ascertained by a survey to be made, the vendor binding himself to "a survey of said land before the final settlement is made so as to know the correct number of acres to settle on." The evidence showed that the action was instituted more than ten years after the execution of the contract, but less than four years from the date of final payment of the purchase price by the purchaser. *Held:* A directed verdict in plaintiff's favor on the issue of the bar of the statute o f limitations was not error. *Davis v. Warren*, 174.

4. The evidence tended to show that defendant municipality was in the permissive possession of water mains owned by plaintiff, that thereafter, less than two years prior to the institution of the action, the municipality refused to recognize plaintiff's ownership of the water mains and appropriated same to its own use as a part of the municipal water system. *Held:* Plaintiff's right of action for defendant's wrongful appropriation of plaintiff's property accrued, not at the time of the construction and permissive use of same by the city, but at the time defendant municipality took possession of same adversely to plaintiff, and plaintiff's cause of action was not barred by the statutes of limitation. *Construction Co. v. Charlotte*, 309.

5. A cause of action to recover the penalty for usury accrues immediately upon the payment of the usurious charge, and when there is a series of such payments the cause of action as to each payment is barred upon the expiration of two years from the date of payment. C. S., 442 (2). *Ghormley v. Hyatt*, 478.

6. Defendant devisee, under the terms of a will in which he was also named executor, elected to pay plaintiff an annuity. Defendant paid the annuity for several years, and thereafter notified plaintiff that he would not make further payments. *Held:* Plaintiff's cause of action to recover the annuities accrued on the date the first annuity that was not paid became due, and not the date of defendant's notification he would not pay same, and, the present action having been instituted within three years from the date the first annuity that was not paid became due, defendant's plea of the statute of limitations is unavailing. *Ingram v. Ingram*, 643.

7. Plaintiffs, creditors of the estate, brought this action against the administratrix *c. t. a.* and her bondsman, to recover sums paid out by the administratrix in compromising a caveat to the will and in

Limitation of Actions B a—*continued.*

paying fees of the attorneys appearing for administratrix in the caveat proceedings, alleging that such payments constituted waste or *devastavit*, resulting in the insolvency of the estate. *Held:* The action was not to surcharge or falsify the account of the administratrix, but to recover for alleged breach of her bond, and the cause of action accrued at the time the alleged breach was committed, C. S., 441 (6), and plaintiffs' contention that it did not accrue until the administratrix filed her initial account and disclosed the facts to plaintiff for the first time, cannot be sustained, C. S., 441 (6), having no provision relating to discovery of the breach of the official bond as is provided for in case of fraud under C. S., 441 (9). *Hicks v. Purvis*, 657.

b Fraud or Ignorance of Cause of Action

Plaintiffs contended that usurious interest was paid defendant by their agent without their knowledge, and that therefore their action to recover the penalty for usury was not barred although instituted more than two years after the last usurious payment, C. S., 441 (9). *Held:* Plaintiffs are not entitled to invoke the statute, it appearing that plaintiffs did not institute action until more than three years after they had executed a note bearing six per cent interest in renewal of the original note upon which usury was paid, and that plaintiffs were negligent in asserting their rights, if any they had. *Ghormley v. Hyatt*, 478.

g Institution of Action

Upon defendant's plea of the statute of limitations, plaintiff contended that the action was instituted within one year of nonsuit in a prior action, and that the prior action had been instituted before the bar of the statute. C. S., 415. No complaint was filed in the prior action, and plaintiff sought to establish the identity of the actions by her written application to the court in the former action for extension of time for filing her complaint. *Held:* The complaint in a former action nonsuited is the only evidence competent to establish the identity of such action with a subsequent action instituted within one year of the nonsuit, and the exclusion of the evidence offered by plaintiff was not error. *Little v. Bost*, 762.

C Matters Effecting Waiver of Plea and Estoppel.

a Part Payment

The liquidating agent of a bank wrongfully applied the deposit of an administrator to the payment of a note in the bank's favor executed by the administrator for the estate. Thereafter, the application of the deposit was set aside, and the liquidating agent prayed judgment on the note against the maker and the guarantor of payment thereon. The guarantor of payment pleaded the three-year statute of limitations, C. S., 441 (1), more than three years having elapsed from the maturity of the note. *Held:* The action against the guarantor was barred, there having been no voluntary payment of the note. *Hall v. Hood*, 59.

b New Promise and Agreements Not to Plead

Where it appears that an action upon a sealed instrument was instituted more than three years after the accrual of the cause of the action, and plaintiff, the assignee of the instrument, relies on a

Limitation of Actions C b—*continued.*

resolution of the corporate principal and the individual sureties, executed to a third person less than three years prior to the institution of the action, which resolution stated that the parties to the instrument agreed to remain bound thereon, a peremptory instruction in favor of plaintiff assignee on the issue of the bar of the statute is error, certainly as to one or more of the sureties, it appearing that one surety did not sign the resolution, and that another did not sign it individually. *Trust Co. v. Williams*, 243.

Mandamus.

A Nature and Scope of Remedy.

b Performance of Legal Duty

Mandamus will not lie except to enforce a clear legal right against a party under legal obligation to perform the act sought to be enforced. *Woodmen of the World v. Comrs. of Lenoir*, 433.

d Compelling of Exercise of Discretion

The charter of a city directed the city council, upon the filing of a proper petition, to pass the ordinance proposed in the petition or to submit the proposed ordinance to the qualified voters of the city. Ch. 121, art 12, sec. 83, Private Laws of 1931. In an action against the city councilmen, judgment that they should pass an ordinance proposed in a petition duly filed is erroneous as an interference with the discretion vested in the council. *Moreland v. Wamboldt*, 35.

Marshaling. (In foreclosure see Mortgages H a.)

Master and Servant.

A The Relation.

a Requisites and Validity of Contract of Employment

The benefit, *inter alia*, which an employer derives from others in the industry signing similar agreements is sufficient consideration to support his agreement voluntarily entered into under the National Recovery Act. *James v. Dry Cleaning Co.*, 412.

B Compensation.

a Remedies of Employee

1. An employee may sue upon the "President's Reëmployment Agreement," voluntarily signed by the employer, either in equity, under the doctrine of subrogation, or at law, as upon a contract made for the benefit of a third person. *James v. Dry Cleaning Co.*, 412.

2. The evidence in this case that defendant employer had failed to pay plaintiff employee the amount due plaintiff under the agreement voluntarily entered into by the employer under the National Recovery Act, although conflicting, *is held* sufficient to support the verdict awarding plaintiff a portion of the amount claimed. *Ibid.*

C Master's Liability for Injuries to Third Persons.

b Scope of Employment

1. An employer is liable for negligence of the employee causing injury to a third person when the employee is acting within the scope of his employment and about his employer's business. *Waller v. Hipp*, 117.

Master and Servant C b—*continued.*

2. The modern tendency is to give the rule that holds a master liable for the acts of his servant when about his master's business a liberal and practical application, especially where the business of the master entrusted to the servant involves a duty owed by him to the public or third persons. *Lertz v. Hughes Bros.*, 490.

3. Evidence *held* sufficient to be submitted to jury on issue of whether employee was acting in scope of his employment. *Ibid.*

4. An admission that on the day of the accident one of defendants was an employee of his codefendant, and as such employee was authorized and directed from time to time to drive defendant employer's truck, is evidence tending to show that at the time of the injury in suit the employee was driving the truck within the scope of his employment. *West v. Baking Co.*, 526.

E Federal Employers' Liability Act.

a Scope and Application

Where it is admitted that a railroad employee was killed while engaged in interstate commerce, the Federal Employers' Liability Act applies in an action against the railroad to recover for his death. *Vest v. R. R.*, 80; *Trust Co. v. R. R.*, 574.

c Assumption of Risk and Contributory Negligence

1. Under the Federal Employers' Liability Act an employee working upon a live track is charged with knowledge of the conditions and that a train is likely to be upon the scene at any time. *Vest v. R. R.*, 80.

2. Contributory negligence and assumption of risk *held* to bar recovery in this action to recover for employee's death. *Vest v. R. R.*, 80; *Trust Co. v. R. R.*, 574.

F Workmen's Compensation Act.

a Nature, Construction, and Application

1. From the facts appearing of record in this case, a deputy sheriff *is held* not an employee of the county within the meaning of the Compensation Act, N. C. Code, 8081 (i), (a), (b), (c), and was not covered by the county's policy of compensation insurance. *Saunders v. Allen*, 189.

2. The Compensation Act will be liberally construed to afford employees compensation for injuries sustained by them, and technicalities and refinements are not looked on with favor by the courts. *Rowe v. Rowe-Coward Co.*, 484.

3. Claimant filed proceedings for compensation before the Industrial Commission, and pending an award, filed a counterclaim in a suit at law instituted against him by a third person, which suit involved the same accident resulting in the injuries for which he sought compensation. Claimant recovered nothing on his counterclaim, but judgment was rendered in favor of the third person in the suit at law. *Held:* Claimant was not barred by filing the counterclaim from thereafter prosecuting his claim before the Industrial Commission, since claimant recovered no judgment on the counterclaim, and the intent of the statute, N. C. Code, 8081 (r), being that an injured employee should be compensated either

Master and Servant F a—*continued.*

by an award or by the "procurement of a judgment in an action at law," and the rights of the parties being determined by the act prior to its amendment by ch. 449, Public Laws of 1933, the accident having occurred prior to the effective date of the amendment. *Ibid.*

4. Evidence *held* sufficient to support finding that claimant, at time of injury, was an employee and not an executive. *Ibid.*

5. Plaintiff and his employer were bound by the provisions of the Workmen's Compensation Act. On the morning of plaintiff's injury he was not working for his employer, but was allowed by his employer to use the machinery for his own personal ends. Compensation was denied under the Compensation Act for that the accident did not arise out of and in the course of the employment. Thereafter plaintiff instituted this action, alleging negligence on the part of the employer. *Held:* Judgment as of nonsuit was properly entered at the close of all the evidence. for even conceding that the evidence established negligence of defendant employer, the Compensation Act barred all other rights and remedies of defendant employee except those provided in the act. *Francis v. Wood Turning Co.,* 517.

6. Evidence that claimant was injured while attempting to aid a policeman in serving a warrant for breach of the peace. and that claimant had been duly deputized by the policeman to aid in making the arrest, *is held* sufficient to support the finding of the Industrial Commission that at the time of injury claimant was an employee of defendant town under a valid appointment. N. C. Code, 8081 (i) (b). *Tomlinson v. Norwood,* 716.

7. Where the complaint alleges that defendant employed more than eight employees, but that defendants were not operating under the Workmen's Compensation Act, a demurrer on the ground that it appeared upon the face of the complaint that the case is within the exclusive jurisdiction of the Industrial Commission should be overruled, since plaintiff may offer evidence under the allegations of the complaint that the employers and employees had exempted themselves from the operation of the act under the provisions of secs. 8081 (l), (v). (x), notwithstanding the provisions of sec. 8081 (k). *Calahan v. Roberts,* 768.

8. Refusal to join insurance carrier as party defendant in this action by workmen against third party, after alleged employer of workman had been joined without objection, *held* without error. *Peterson v. McManus,* 802.

b Injuries Compensable

1. The denial of liability of a sheriff for the death of his deputy is affirmed upon facts tending to show that at the time of the deputy's fatal injury by a person whom he had arrested for drunkenness the deputy was acting upon his own responsibility and contrary to the instructions of the sheriff. *Saunders v. Allen,* 189.

2. There was evidence to the effect that two employees were hired to ride on defendant employer's truck to help the driver unload at the place of delivery, that on the occasion in question the driver, the employer's *alter ego,* changed his mind, after leaving defendant's

Master and Servant F b—*continued.*

warehouse, and decided he would not need help in unloading on this particular trip, which was the last for the day, and that the driver consented to let the employees off the truck at the place on his route nearest their homes, in accordance with established custom, and that when the driver slowed up at the appointed place to let the employees get off, one of the employees, claimant's intestate, attempted to alight before the truck had completely stopped, contrary to express orders, and fell to his mortal injury. *Held:* The evidence was sufficient to sustain the finding of the Industrial Commission that the accident arose out of and in the course of the employment. N. C. Code, 8081 (i). *Latham v. Grocery Co.*, 505.

d Jurisdiction and Powers of Industrial Commission

1. While there is no direct statutory provision giving the Industrial Commission power to order a rehearing of an award made by it for newly discovered evidence, the Commission has such power in proper instances, in accordance with its rules and regulations, N. C. Code, 8081 (jjj), it being the intent of the Legislature, as gathered from the whole act, to give the Industrial Commission continuing jurisdiction of all proceedings begun before it with appellate jurisdiction in the Superior Court on matters of law only. *Butts v. Montague Bros.*, 186.

2. Where a proceeding is remanded to the Industrial Commission by the Superior Court for a specific purpose in accordance with a decision of the Supreme Court upon a former appeal, the Superior Court surrenders jurisdiction and the Industrial Commission acquires jurisdiction for all purposes, and the Commission has the power, notwithstanding that the remand of the cause was for a specific purpose, to order a rehearing for newly discovered evidence in accordance with its rules and regulations. *Ibid.*

f Premium Rates

Rates promulgated in accordance with plan approved by Insurance Commissioner prior to issuance of policy *held* recoverable by insurer under the terms of the policy. *Ins. Co. v. Murdock*, 223.

h Amount Recoverable

In this case *held:* There was sufficient competent evidence to sustain the Industrial Commission's finding that claimant was totally disabled for a period of forty-eight weeks. *Rowe v. Rowe-Coward Co.*, 484.

i Appeal and Proceedings in Superior Court

1. Upon appeal to the Superior Court from an award of the Industrial Commission the question of jurisdiction of the Industrial Commission was raised for the first time. Defendants' challenge to the jurisdiction was not sustained and judgment was entered affirming the award of the Industrial Commission. Upon appeal to the Supreme Court the judgment was reversed and the cause remanded to the Superior Court for that the evidence of record showed that at the time of the injury in suit the employer regularly employed less than five employees, and that therefore the Industrial Commission was without jurisdiction. Before judgment was entered in the Superior Court upon the judgment of the Supreme Court, the

Master and Servant F i—*continued.*

Superior Court, upon motion supported by affidavits, remanded the cause to the Industrial Commission in order that it could hear evidence and ascertain the disputed jurisdictional fact. *Held:* The Superior Court had the power to so remand the cause. *Thompson v. Funeral Home,* 178.

2. A finding of the Industrial Commission in regard to the number of employees regularly employed by defendant employer, being jurisdictional, is subject to review upon appeal. *Ibid.*

3. The findings of fact of the Industrial Commission are conclusive on appeal, unless there is not sufficient evidence to support them. *Saunders v. Allen,* 189.

4. The findings of fact by the Industrial Commission will be sustained on appeal when they are supported by any competent evidence. *Rowe v. Rowe-Coward Co.,* 484.

5. Where there is any competent evidence in support of the finding of the Industrial Commission that the accident in question arose out of and in the course of the employment, the finding is conclusive on the courts upon appeal. *Latham v. Grocery Co.,* 505; *Carter v. Coach Co.,* 849.

6. The finding of the Industrial Commission upon competent evidence that claimant was an employee of defendant employer at the time of the injury is binding on the courts upon appeal. *Tomlinson v. Norwood,* 716.

Mechanics' Liens.

A Nature and Extent of Lien.

b Possession

Where a mechanic repairs certain personal property at the request of the lessee, and without request or knowledge on the part of the owner, and the mechanic never has possession of the property, but possession is returned to the owner by the lessee upon the termination of the lease, the mechanic may not hold the owner liable for the reasonable value of the repairs, the statute relating to mechanics' liens, C. S., 2435, being applicable only where the mechanic retains possession of the property. *Iron Works v. Bugg,* 284.

Mortgages.

A Requisites and Validity.

a Capacity of Parties (Mortgaging ward's estate see Guardian and Ward D.)

Minor wife may disaffirm her joinder in mortgage on husband's home site upon her majority. *Coker v. Bank,* 41.

C Construction and Operation.

c Lien and Priority: Registration

Mortgage lien held prior to lien of subsequently docketed judgment unaffected by prior parol agreement between judgment debtor and creditor. *Johnson v. Barefoot,* 796.

f Appointment and Tenure of Trustee

Corporate seal is not necessary to appointment of substitute trustee by corporate *cestui que trust.* *Mortgage Corp v. Morgan,* 743.

Mortgages C—*continued.*

g Improvements

Where relationship of mortgagor and mortgagee is terminated by foreclosure prior to claimant's possession under *mesne* conveyances from mortgagor, C. S., 710, does not apply. *Ins. Co. v. Allen,* 13.

E Assignment of Mortgage or Debt.

d Right of Junior Lienor to Pay Prior Lien and Compel Assignment

Where senior mortgage is usurious, junior lienor may compel assignment upon payment of amount due without interest. *Sherrill v. Hood,* 472.

H Foreclosure. (Foreclosure of mortgage executed to secure mortgagee from loss on endorsement of mortgagor's note to third person see Indemnity B a.)

a Right to Require Mortgagee to Marshal Security and Sell Land Mortgaged in Separate Tracts

The owners of land as tenants in common executed, with joinder of their wives, a deed of trust thereon. One of the tenants in common paid one-half the amount due on the notes secured by the deed of trust and brought suit to restrain foreclosure, joining the other tenant in common and his wife as defendants. Pending the action, the lands were partitioned between the tenants in common. *Held:* Judgment entered in the action dissolving prior restraining orders entered in the cause and providing that the trustee should sell the land of the defendant tenant in common before selling the land of plaintiff tenant who had paid his part of the notes, and that if it became necessary to sell plaintiff's land, plaintiff should be subrogated to the rights of the *cestui* in the judgment to the extent his land was subjected to the payment of the judgment, *is held* without error, the right of the *cestui* to have both tracts sold, if necessary to pay the notes, being recognized, and the equities of the tenants in common being protected, and the judgment not being inconsistent with prior restraining orders entered in the cause. *McLamb v. McLamb,* 72.

b Injunctions Against Foreclosure

1. Where equitable relief of enjoining foreclosure is sought, neither forfeiture nor penalty for usury may be had. *Kenny Co. v. Hotel Co.,* 295; *Ghormley v. Hyatt,* 478.

2. Where, upon the hearing of a temporary order restraining the foreclosure of a deed of trust upon allegations of usury, and that the full amount of the debt had been paid, and that plaintiff was entitled to recover a certain sum as the penalty for usury, the trial court finds that there is a balance due and unpaid on the debt, and that no tender of any amount had been made defendant on the past-due balance, judgment that the temporary order be dissolved and that the trustee foreclose the property is supported by the findings of fact, and an exception to the judgment cannot be sustained. *Ingram v. Mortgage Co.,* 329.

m Title and Rights of Purchaser

1. A mortgage on the lands in question was foreclosed in July and deed made to the purchaser on 3 August, under an agreement that the purchaser should hold the land for plaintiff until plaintiff could

Mortgages H m—*continued.*

obtain a loan. In October the purchaser made deed to plaintiff in pursuance of the agreement. *Held:* As between the mortgagor and plaintiff, plaintiff is entitled to the crops, the crops not having been severed at the time of the foreclosure and execution of the commissioner's deed, at which time the mortgagor's interest in the land was terminated. *Price v. Davis*, 75.

2. The mortgagee, a partnership, foreclosed the mortgage, and one of the partners bid in the land at the foreclosure sale and thereafter transferred title to the partnership. The partnership thereafter leased the land to the former mortgagors for one year, and the subsequent year leased the land to a third person. Upon the termination of the lease of the former mortgagors they voluntarily gave up possession to such third person and sold him certain personal property consisting of tobacco sticks, screens, etc. Upon the termination of the second lease the partnership sold the land to such third person for value. Prior to institution of action the former mortgagors did not notify such third person purchaser that they claimed any equity in the land. *Held:* In the mortgagors' action against the partnership and the third person purchaser, attacking the foreclosure for irregularities, a nonsuit was properly granted as to the third person purchaser, the record evidence being insufficient under the facts and circumstances of this case to show that the third person purchaser was not a *bona fide* purchaser without notice. *Bailey v. Stokes*, 114.

o Enjoining Consummatioin of Sale

1. Where a mortgagor or trustor institutes suit to enjoin the consummation of a foreclosure sale had under the terms of the instrument, and files bond to indemnify the mortgagee or *cestui que trust* against loss. N. C. Code, 861, 2593 (b), the temporary injunction granted in the cause is properly continued to the hearing upon the court's finding that serious controversy exists between the parties and that plaintiff is entitled to a jury trial upon the issues of fact raised by the pleadings. *Little v. Trust Co.*, 726.

2. Where consummation of foreclosure sale is restrained under N. C. Code, 2593 (b), it is discretionary with the court whether it will require bond of the mortgagor or trustor, or appoint a receiver. *Ibid.*

p Attack of Foreclosure

1. The mortgagee, a partnership, foreclosed the mortgage and one of the partners bought the land at the foreclosure sale and thereafter transferred title to the partnership. The partnership thereafter sold the land to a third person. The mortgagors instituted action against the partnership and the purchaser, attacking the foreclosure sale for irregularities. A nonsuit was granted as to the purchaser, and issues were submitted to the jury with plaintiffs' consent as to the validity of the foreclosure sale and damages recoverable by plaintiff mortgagors against the partnership, and upon plaintiffs' motion upon a verdict in their favor, judgment was entered upon the verdict. *Held:* Plaintiffs are estopped from maintaining on appeal that there was error in granting defendant purchaser's motion as of nonsuit. *Bailey v. Stokes*, 114.

Mortgages H p—*continued.*

2. In an action to recover the balance due on mortgage notes after foreclosure, confirmation of the sale by the clerk, C. S., 2591, and application of the proceeds of sale to the notes, equitable matters in defense relevant only upon the motion to confirm the sale are properly stricken from the answer upon motion, C. S., 537, since plaintiff seeks a legal remedy only and invokes no equitable jurisdiction of the court, and the foreclosure sale cannot be collaterally attacked in plaintiff's action to recover the deficiency after foreclosure. *Bank v. Stewart,* 139.

Municipal Corporations. (Right to issue bonds see Taxation A.)

D Officers, Agents, and Employees. (Bonds of municipal officers see Principal and Surety B.)

a Election, Appointment, and Tenure

1. The act creating a city court provided that the clerk thereof should be elected by the city commissioners. The city commissioners duly elected a clerk of the city court under the provisions of the act, ch. 706, Public-Local Laws of 1913, but thereafter removed said clerk for alleged inattention to duty without giving the clerk notice and an opportunity to be heard. The clerk instituted proceedings in *quo warranto,* alleging the summary dismissal, and defendants demurred thereto. *Held:* The city commissioners were without authority to dismiss the clerk without giving him notice and an opportunity to be heard, and the demurrer should have been overruled. The analogous constitutional provision for notice and hearing in the removal of clerks of the Superior Court, Art. IV, sec. 32, cited as persuasive on the commissioners, and *Mial v. Ellington,* 134 N. C., 131, cited, distinguished, and approved. *Stephens v. Dowell,* 555.

2. A policeman has the authority under general statute to deputize a citizen to aid him in serving a warrant for breach of the peace, N. C. Code, 4379, 4547, a policeman being given the same authority, within the town limits, in making arrests as a sheriff. N. C. Code, 2642. *Tomlinson v. Norwood,* 716.

E Torts of Municipal Corporations.

a Governmental and Corporate Functions

1. In the absence of statutory provision, a municipal corporation is not liable for negligence of its agents or servants in the performance of a governmental function which it exercises as an administrative agency of the State pursuant to legislative, discretionary, or judicial powers conferred on it for the benefit of the public, but a municipal corporation may be held liable civilly for negligence of its agents or servants in the performance of its corporate powers which it exercises in its private character in the management of its property for its own corporate advantage. *Broome v. Charlotte,* 729.

2. It appeared from the face of the complaint that a trash wagon of defendant municipality, while being used in collecting and removing trash in the city, was driven into the yard of the parents of intestate for the purpose of turning it around for the convenience of the operators of the truck and not for the purpose of gathering trash,

Municipal Corporations E a—*continued.*

and that while turning the truck around in the yard the driver of the truck negligently ran over and killed plaintiff's intestate, a child four years old. *Held:* Defendant municipality's demurrer to the complaint should have been sustained, since the truck was being operated pursuant to the municipality's governmental function in removing trash for the sole benefit of the inhabitants of the city, though not actually engaged at the moment in collecting trash on the premises of the parents of plaintiff's intestate. *Ibid.*

c Defects or Obstructions in Streets

Evidence tending to show that plaintiff's testate was crossing a street diagonally near an intersection as it was getting dark, and that he was struck and killed by an automobile which was running twenty miles an hour with its headlights burning, and that shortly after the accident defendant town turned on its street lights, *is held* insufficient to show a causal connection between the failure of defendant town to turn on its street lights earlier and the accident in suit, and a directed verdict in favor of defendant town was not error, there being no evidence of any defect in the street. *Reading v. Cornelius,* 218.

f Injuries to Land from Sewer Systems

Owner may recover decrease in value of land resulting from fact that sewer system rendered it unfit for dairying, but may not recover value of dairy as going concern. *Pemberton v. Greensboro,* 466.

g Appropriation of Private Improvements

Evidence *held* sufficient to support finding that city appropriated private water main to its own use under power of eminent domain. *Construction Co. v. Charlotte,* 309.

G Public Improvements.

b Preliminary Proceedings and Levy of Assessments

Ch. 334, Public-Local Laws of 1923, relating to assessments for public improvements, is constitutional, and objection that the statute fails to provide for personal service upon abutting landowners as to the date of final settlement is untenable, service by publication, as provided for in the act, being sufficient, since the act provides for notice and an ample opportunity to be heard. *Arbogast v. Buncombe County,* 515.

i Nature of Lien, Priority, and Enforcement

The provision of C. S., 2716, that upon default in the payment of an installment due on street assessments, the remaining unpaid installments should thereupon become due and payable, being for the benefit of the municipality, gives the municipality the optional right to declare remaining unpaid installments due upon default in payment of any installment and does not automatically accelerate the maturity of unpaid installments. *Farmville v. Paylor,* 106.

H Police Powers and Regulations.

d Public Safety and Health

Municipality *held* without authority to require operators of vehicles for hire to furnish personal injury and property damage insurance or bonds with solvent surety. *S. v. Gulledge,* 204.

Municipal Corporations H—*continued.*

f Damage to Private Property

Where the owners of a dairy are prohibited from selling milk in a city because of danger to the public health arising from the fact the city emptied sewage in a stream contiguous to the pasture, causing disease among the cattle, the owners of the dairy, in an action against the city for the partial taking of the land, may not recover damages resulting from the loss of their dairy business by reason of the enforcement of the valid ordinance, the health ordinance being governmental in character and function, and grounded in the police power. *Pemberton v. Greensboro*, 466.

J Actions Against Municipal Corporations.

b Charter Provisions Relating to Notice and Filing Claim

1. An action against a city to recover permanent damages resulting to plaintiff's land by reason of defendant municipality's diversion of water therefrom by a dam erected on its property is barred where plaintiff fails to file claim for damages with the city within ninety days after the first substantial injury to her lands, as required by the city charter as a prerequisite to the maintenance of the action against it. *Wallace v. Asheville*, 74.

2. The provisions of the charter of a municipality requiring the filing of notice of claim for damages does not apply to an action to recover the value of private property appropriated by the city under the power of eminent domain. *Construction Co. v. Charlotte*, 309.

Murder. (See Homicide.)

National Recovery Act. (See Master and Servant A a, B a; Courts C a.)

Negligence. (Negligent injury to passengers see Carriers; of distributors of electricity see Electricity; of manufacturers of food see Food; in operation of automobiles see Automobiles C; in operation of trains see Railroads D; negligence in setting fire to property see Railroads D g.)

A Acts or Omissions Constituting Negligence.

b Sudden Peril

A person confronted with a sudden emergency is not held by the law to the same degree of care as in ordinary circumstances, but only to that degree of care which a person of ordinary care and prudence, similarly situated, would have exercised. *Ingle v. Cassady*, 497.

c Condition and Use of Lands and Buildings

Evidence that plaintiff, the purchaser of bankrupt stock stored in the building of the defendant, went to defendant's warehouse Sunday night to inspect the stock before the time for its delivery the following morning, and left defendant's warehouse by the back door and fell from a loading platform at the rear of the building to his injury *is held* insufficient to be submitted to the jury on the issue of negligence on the contention that defendant owed plaintiff the duty, in common with all persons entering the building, to maintain a guard rail around the platform and to maintain a light over the platform, since a rail around the loading platform would interfere with the very use for which the platform was maintained, and since the failure to maintain a light over the platform at 9:30 Sunday night cannot be held negligent. *Kaminsky v. Waddell*, 173.

Negligence A—*continued.*

cc Attractive Nuisance

1. Evidence that plaintiff's intestate, a thirteen-year-old boy, went to defendant's corn mill to return an implement, or take some corn to be ground, and that while there he engaged in a friendly fight with boys in the mill, wrestling and throwing corncobs, and that intestate, contrary to repeated warnings given by defendant to boys around the mill, went into the engine room, while defendant was not looking, to get more corncobs for the fight, and there came in contact with revolving machinery resulting in injury causing his death, *is held* insufficient to resist defendant's motion as of nonsuit. *Reid v. Sustar*, 203.

2. Where plaintiff seeks to recover for the death of her intestate upon the theory of attractive nuisance, and alleges that defendant knew that small children were in the habit of playing in a vacant lot near its property, but fails to allege that defendant had notice, actual or constructive, that children were in the habit of going on its premises, or that they were attracted to defendant's premises or habitually went there for any purpose, defendant's demurrer is properly sustained. *Jackson v. Oil Co.*, 766.

B Proximate Cause.

a In General

1. When the accident in suit is caused solely by the negligence of another, defendant may not be held liable, but when the negligence of defendant is the cause of the accident, either solely or concurrently, defendant is liable to plaintiff for the resulting injury. *Myers v. Utilities Co.*, 293.

2. Evidence *held* to show that intestate's injuries resulted from joint negligence of defendants. *West v. Baking Co.*, 526.

b Last Clear Chance

1. Where the evidence establishes contributory negligence barring recovery as a matter of law, the doctrine of the last clear chance does not apply. *Rimmer v. R. R.*, 198.

2. The doctrine of last clear chance is not applicable when the contributory negligence of the person injured continues up to the moment of the accident resulting in the injury. *Stover v. R. R.*, 495.

3. Evidence *held* sufficient to be submitted to jury under doctrine of last clear chance. *Morris v. Transportation Co.*, 807.

C Contributory Negligence.

a Of Persons Injured in General

Contributory negligence is negligence of plaintiff which proximately causes the injury, and an instructioin that fails to charge, in any manner, that the acts of plaintiffs complained of must have produced the injury in order to bar recovery, must be held for reversible error. *Stephenson v. Leonard*, 451.

D Actions.

c Sufficiency of Evidence and Nonsuit

1. Where the evidence is conflicting on the issue of whether the accident in suit was caused by the negligence of defendant, defendant's motion as of nonsuit is properly overruled. *Myers v. Utilities Co.*, 293.

Negligence D c—*continued.*

2. Where there is evidence tending to show that plaintiff's intestate was injured as a result of defendants' negligence, and no evidence of contributory negligence, defendants' exception to the refusal to grant their motions for judgment as of nonsuit cannot be sustained. *West v. Baking Co.*, 526.

d Instructions

Contributory negligence is negligence of plaintiff which proximately causes the injury, and an instruction that fails to charge, in any manner, that the acts of plaintiffs complained of must have produced the injury in order to bar recovery, must be held for reversible error. *Stephenson v. Leonard*, 451.

Nonsuit. (See Trial D a.)

Nuisance. (Attractive see Negligence A cc.)

Obstructing Justice.

B Prosecution and Punishment.

c Sufficiency of Evidence and Nonsuit.

Evidence that defendant's son, driving defendant's car at night, presumably with defendant's consent, drove recklessly and unlawfully, and struck and killed a pedestrian on the highway, that the occupants of the car fled the scene of the accident, that defendant was informed of the accident and immediately drove the car with its occupants in a roundabout way from the place where he was visiting to his home in another town, and that before daylight he was driving his car from his home to a city some hundred miles distant to have the car repaired, and all tell-tale marks removed therefrom, *is held* sufficient to be submitted to the jury on the issue of defendant's guilt of aiding and abetting his son in avoiding arrest and in undertaking to conceal the crime, although defendant testified that he did not know that a man had been struck or killed, and that he was taking the car to the city for repairs because he understood there were expert mechanics there, since more than one inference can be drawn from the evidence. *S. v. Dunn*, 333.

Parent and Child.

A Rights, Duties, and Liabilities of Parent. (Liability of parent or child under "family car doctrine" see Automobiles D c.)

b Support (Criminal prosecution for failure to support illegitimate child see Bastards.)

The duty of a father to provide for the support of his minor child is not absolute, and on the facts of the instant case, the order relieving the father of this duty while his child is in the custody of its mother *is held* within the discretion of the trial court and not subject to review. *Pappas v. Pappas*, 220.

c Custody and Control

Decree awarding custody of minor child to its mother, who had been divorced from its father and had married again, *held* correct upon the facts found by the court under the principle that the welfare of the child is the paramount consideration in determining its custody. *Pappas v. Pappas*, 220.

Parties. (Joinder of corporation with agents in action for libel see Corporations G i 2; demurrer for misjoinder of parties and causes see Pleadings D b; joinder of parties in suit against third person by injured employee see Master and Servant F a; parties in particular action see Particular Titles of Actions.)

Partition. (Right of tenant in common to require mortgagee to first foreclose lands of cotenant see Mortgages H a.)

"Pasquotank Liquor Act." (See Statutes A f.)

Pauper. (See Counties A a; States B a; Taxation A a, A b.)

Personal Property.

Limitation over after reservation of life estate is void. *Speight v. Speight*, 132.

Pharmacists.

A Licensing and Supervision.

a Person Entitled to Stand Examination

Pharmacist licensed by another state failing to pass examination, *held* not entitled to stand another examination upon application therefor filed after 1 July, 1933. *McNair v. Board of Pharmacy*, 279.

Pleadings.

D Demurrer.

b For Misjoinder of Parties and Causes

1. An action by a widow, individually and as administratrix of her deceased husband, and the heirs at law of the deceased husband, to recover two tracts of land, one of which had been held by the widow and her husband by entirety, upon allegations that defendants had obtained title thereto from the widow and her husband wrongfully, is properly dismissed upon demurrer for misjoinder of parties and causes of action, for that the widow as administratrix could have no interest in her husband's real estate of which he died seized, in the absence of allegation that the personalty was insufficient to pay debts; and the widow, as administratrix, and the heirs at law could have no interest in the land formerly held by the deceased and his wife by the entirety. *Green v. Jones*, 221.

2. An action brought against the driver of an automobile alleging that such driver struck the car upon which plaintiff was riding on the running board, knocking plaintiff off the car to the highway, and against the driver of a second car alleging that while plaintiff was lying or sitting on the highway in an unconscious condition as the result of the first accident, the driver of the second car negligently hit plaintiff, resulting in further injuries, *is held* properly dismissed upon demurrer for misjoinder of parties and causes of action, since the complaint alleges two separate injuries caused by different parties. *Atkins v. Steed*, 245.

3. An action against insurer to reform plaintiff's fire insurance policy and to upset settlement and recover an additional sum under the policy as reformed, and against plaintiff's mortgagee to restrain foreclosure and recover rents, is defective in that the several causes do not affect all parties to the action, and the action is properly dismissed upon demurrer for misjoinder of parties and causes. *Mills v. Bank*, 674.

Pleadings D—*continued.*

c Defects Appearing Upon Face of Complaint: "Speaking Demurrers"

Where it does not appear upon the face of the complaint that the injury in suit was inflicted in another state, a demurrer upon the ground that the injury was inflicted in such other state and that under its laws plaintiff could not recover is properly overruled as a "speaking demurrer." *Johns v. Stevenson*, 222.

e Office and Effect of Demurrer

A demurrer challenges pleader's right to maintain position in any view, admitting the allegations of the complaint as correct for the purposes of demurrer. *Broome v. Charlotte*, 729; *Stelling v. Trust Co.*, 838.

E Amendment of Pleadings.

c Allowance of Amendment by Trial Court

1. Plaintiff brought suit on a disability clause in a policy of life insurance, and defendant insurer filed answer alleging that the disability complained of, originating prior to the issuance of the policy, was not covered thereby. The trial court allowed plaintiff to amend his complaint by alleging waiver by defendant of the condition precedent to his right of action that the disability should originate subsequent to the issuance of the policy. *Held:* The allowance of the amendment was in the court's discretionary power, and is not objectionable on the ground that it substantially changed the cause of action, C. S., 547, or that the time for filing reply to defendant's further answer had long since expired, C. S., 536. *Smith v. Ins. Co.*, 99.

2. The trial court has the discretionary power to allow plaintiff to amend his complaint, upon the hearing of defendants' demurrer thereto, so as to allege that the negligence complained of was the proximate cause of the injury. C. S., 547. *Bailey v. Roberts*, 532.

3. The denial of a motion to amend the complaint by adding two causes of action nonsuited on the evidence upon a former trial is properly entered upon the grounds of *res judicata*. *Swinson v. Packing Co.*, 742.

4. The trial court has the discretionary power to allow a complaint to be amended by adding two new causes of action based upon the same subject of action as the original cause. *Ibid.*

Pledges. (See Banks and Banking C d.)

Principal and Agent. (Insurance agents see Insurance C.)

Principal and Surety.

B Nature and Extent of Liability on Bonds.

c Bonds of Public Officers or Agents

1. Institution of proceedings under C. S., 356, *held* not to create priority over other creditors of estate of insolvent principle. *Power Co. v. Yount*, 182.

2. The facts found by the court *held* not to warrant the conclusion that part of the funds paid by claimant to the defaulting clerk were found segregated from other funds in the clerk's hands during

Principal and Surety B c—*continued.*

a subsequent term of his office so as to rebut the presumption that default was made when the funds were received by the clerk, and claimant's contention that the funds were so segregated and that claimant was entitled to assert its claim therefor against the bond for the subsequent term cannot be sustained. *Ibid.*

3. Upon default of a public officer, there is a legal presumption that the funds were misappropriated at the time of their receipt. *Salisbury v. Lyerly*, 386.

4. The findings of fact by the referee, unexcepted to, were to the effect that the same individual performed the duties of both city treasurer and city tax collector, and that defendant was surety on his bond as city treasurer, and that the city held another large bond in a different surety company covering default of the individual in the capacity of city tax collector, that the respective duties of the two offices were set forth by the city council, and that the defalcations in suit were of moneys received by the official in his capacity as city tax collector and not in his capacity as city treasurer. *Held:* Since the duties of the two offices were separate and distinct, the surety on the bond designating the official as city treasurer cannot be held liable for defalcations of such officer in his capacity as city tax collector, and upon the finding that the defalcations in suit were made by the official in his capacity as city tax collector, defendant surety's motion for judgment as of nonsuit should have been allowed. *Ibid.*

5. Defendant was surety on a bond in which the principal was designated as city treasurer. It appeared from the findings of fact by the referee that the principal accepted the office of treasurer when he was still filling the office of city tax collector. *Held:* The contention of the city in a suit upon the bond that the principal vacated the office of city tax collector by accepting the office of treasurer, and that all his official acts thereafter were in the capacity as city treasurer, and therefore covered by the bond, is untenable, for, even conceding that the office of city tax collector was so vacated, the unauthorized acts of collecting taxes and fees, constituting the moneys misappropriated, were not covered by the bond of the principal as treasurer, it appearing from the findings that the duties of the treasurer were specifically defined by the city council, and that they did not include the collection of taxes or fees of any kind; and *further held:* That the defendant surety, in writing the bond in suit, had a right to rely upon the designation of the duties of the principal as contained in the minutes of the governing body of the city. *Ibid.*

C Actions on Surety Bonds.

e Competency and Effect of Judgment Against Principal in Establishing Surety's Liability

1. Where there is no conflict in the interests of the principal and surety, a judgment against the principal is *prima facie* evidence against the surety, C. S., 358, although rendered against the principal in a prior action to which the surety was not a party, but in such case the surety may attack the judgment for fraud, collusion, or may set up an independent defense. *R. R. v. Lassiter*, 209.

Principal and Surety C e—*continued.*

2. Where the surety is a party to an action against the principal in which judgment by default final is entered against the principal, and the surety sets up the sole defense that the surety bond sued on had not been validly executed by the surety, and its motion of nonsuit based upon such defense is granted in the lower court but reversed on appeal, the surety cannot attack the judgment against the principal for fraud or collusion, and may not set up an independent defense, but the surety is entitled to have an issue submitted to the jury as to what amount, if any, the surety is indebted to the plaintiff, the surety having denied plaintiff's allegation of indebtedness, and the judgment against the principal being only *prima facie* evidence thereof, and the entering of a summary judgment against the surety for the amount of the judgment against the principal is error. C. S., 358. *Ibid.*

Process.

A Issuance, Requisites, and Validity.

a Formal Requisites

Signature of clerk is essential part of summons and must appear on summons served under the provisions of C. S., 881. *McLeod v. Pearson*, 539.

B Service of Process.

c Service by Publication

1. Where service of summons is had by publication, and the notice, as published, erroneously states that the action is pending in a county other than the one in which the action is in fact pending, the service by publication is void. *Guerin v. Guerin*, 457.

2. Service by publication is sufficient notice of street assessments. *Arbogast v. Buncombe County*, 515.

d Service on Foreign Corporations

Finding, supported by evidence, that foreign corporation was not doing business in the State *held* conclusive. *Brown v. Coal Co.*, 50.

e Service on Nonresident Auto Owners

The statute, C. S., 491 (a), providing that summons may be served on a nonresident automobile owner in an action involving an accident occurring in this State, by service through the Commissioner of Revenue, and that automobile owners who use our public highways shall be deemed to have appointed the Commissioner of Revenue their process agent, makes no provision for service on the personal representative of a deceased automobile owner who dies after an accident occurring in this State and before service of process, and service under the statute upon such personal representative confers no jurisdiction on our courts, since an agency, unless coupled with an interest, is terminated by the death of the principal. *Dowling v. Winters*, 521.

h Proof of Service

Presumption of service of summons from sheriff's return cannot be rebutted by uncorroborated testimony of person served. *Penley v. Rader*, 702.

Public Officers. (Bonds of see Principal and Surety B c; duties and liabilities of particular officers see Particular Titles of Offices.)

B Qualifications, Appointment, and Tenure.

c Person May Not Hold More Than One Public Office at Same Time

Defendants moved to quash the bill of indictment for that the members of the jury commission which drew the grand jury was not competent to act, since the act creating the jury commission provided that persons holding county offices should also serve on the commission. The trial court overruled the motion. *Held:* The court's ruling is without error and is supported by *McCullers v. Comrs.*, 158 N. C., 75. *S. v. Gosnell*, 401.

d Dismissal

Commissioners *held* without authority to dismiss clerk of municipal court without giving clerk notice and an opportunity to be heard. *Stephens v. Dowell*, 555.

C Duties and Liabilities.

d Liability to Individuals for Wrongful Official Acts or Failure to Act

1. While a public officer may not be held personally liable to a third person for an injury resulting from the performance of an official act in the absence of malice or corruption, in this action against the members of a school committee in their individual capacity to recover for the death of plaintiff's intestate caused by an accident resulting from the negligence of a driver of a school bus selected by the committee, evidence that the driver was a nephew of one of the members of the committee, and that he was selected by the committee over the protest of the patrons of the school, and that the driver had the general reputation of being an incompetent and reckless driver, *is held* sufficient to warrant an inference of malice, and the submission of the issue to the jury, malice in law being presumed from a tortious act, deliberately done without just cause, excuse, or justification, which is reasonably calculated to injure another or others. *Betts v. Jones*, 410.

2. This action was instituted against the members of the board of commissioners of a county to recover for personal injuries alleged to have been suffered by plaintiff when assaulted by other prisoners in the jail in which plaintiff was confined. Plaintiff alleged that it was the custom of the prisoners to hold a "kangaroo court" to try new prisoners on fictitious charges, impose a so-called fine, and assault prisoners failing to pay the fine, that defendants knew of the custom and failed to make proper rules and regulations for the safety of prisoners as required by C. S., 1317. *Held:* The duty to make proper rules and regulations under C. S., 1317, imposed a discretionary duty on defendants exercisable only in their corporate capacity, and defendants are not liable as individuals unless they corruptly or with malice failed to make proper rules and regulations, and defendants' demurrer to the complaint should have been sustained in the absence of allegation that defendant's failure to act was corrupt or malicious. *Moye v. McLawhorn*, 812.

Purchaser for Value. (See Mortgages H m 2.)

Quo Warranto.

B Actions.

a Process

In order for a valid service of summons in *quo warranto* proceedings under the provisions of C. S., 881, it is necessary that a true copy of the summons be left at the last address of the defendant, and where the summons so served is not signed by the clerk, but is a true copy of the original, it is fatally defective, since the signature of the clerk is an essential part of the summons, C. S., 476, and if the summons so served is not a true copy of the original, it is insufficient under the statute for the substituted service therein provided for. *McLeod v. Pearson,* 539.

Railroads.

D Operation.

b Accidents at Crossings

1. The complaint in this action *is held* to allege negligence on the part of defendant railroad company and the owner of the car in which plaintiff was riding as a guest, which jointly caused the accident at a grade crossing in which plaintiff was injured, and defendant railroad's demurrer, interposed on the ground that the negligence of the owner as alleged insulated the alleged negligence of the railroad as a proximate cause or one of the proximate causes of the injury, should have been overruled. *Brown v. R. R.,* 57.

2. Evidence that defendant's train approached a grade crossing at a high rate of speed, in violation of city ordinance, and that it gave no signal or warning of its approach, is sufficient to establish negligence of defendant. *Rimmer v. R. R.,* 198.

3. Evidence that plaintiff's intestate ran or walked upon defendant's track at a grade crossing during the daytime, that she wore the top part of her coat around her head as protection from the drizzling rain, and that her attention was distracted by traffic on the highway, and that she was struck and killed on the crossing by defendant's train approaching along its straight, unobstructed track, establishes contributory negligence on the part of intestate barring recovery as a matter of law, although the evidence establishes the negligence of defendant in the operation of the train. *Ibid.*

4. Where the evidence establishes contributory negligence barring recovery as a matter of law, the doctrine of the last clear chance does not apply. *Ibid.*

5. In this action to recover for the death of plaintiff's intestate, killed while attempting to cross defendant's tracks at an unobstructed grade crossing during the daytime, the evidence *is held* to disclose contributory negligence barring recovery as a matter of law on authority of *Rimmer v. R. R., ante,* 198. *Kuykendall v. R. R.,* 840; *Mason v. R. R.,* 842.

c Injuries to Persons on or Near Track

Where a person is in full possession of his faculties and, while walking, standing, or arising from a sitting position on the track, is struck by a locomotive, and there is no indication that he is helpless upon the track, the contributory negligence of such person will bar recov-

Railroads D c—*continued.*

ery for injuries sustained by him although the locomotive is negligently operated, and, the engineer having the right to assume up to the last moment that he would step from the track, the doctrine of last clear chance has no application. *Stover v. R. R.*, 495.

g Fires

Where plaintiff's allegation that the fire in suit was caused by defendant's railroad engine is denied, and the fact that the fire originated from a railroad engine is not established, plaintiff's contention that evidence that one of defendant's engines had theretofore set out fires was competent in that the engine was identified by showing that the other two engines at the scene at the time were not responsible therefor, cannot be sustained. *Nufer v. R. R.*, 55.

Receivers. (May not be appointed for estate when executrix has not been removed see Executors and Administrators B a 4; receiver may not appeal without permission of court see Appeal and Error A f.)

E Allowance and Payment of Claims.

b Priorities

1. Preferences are not favored by the law and can only arise by reason of some definite statutory provision or some fixed principle of common law which creates special and superior rights in certain creditors over others. *Power Co. v. Yount*, 182.

2. The fact that one creditor of a clerk instituted summary proceedings on his bond under C. S., 356, prior to the institution of action by other creditors of the clerk *is held* not to create a priority in favor of such creditor in the absence of laches on the part of the general creditors, where the summary proceeding was consolidated with the general creditors' bill and a receiver appointed therein, since C. S., 356, has no provision giving a preference to the party or parties first seeking such summary remedy, and the appointment of a receiver prevents a party from obtaining a preference by way of prior judgment. *Ibid.*

G Costs, Accounting, and Compensation.

b Taxes

The amount of a franchise tax for which a corporation is liable for the years during which its business is continued by its receiver under orders of court is properly paid by the receiver out of assets of the corporation in his hands as an expense of the receivership. *Stagg v. Nissen Co.*, 285.

d Persons and Funds Liable for Receivership Costs

The assets realized by the receiver of defendant insolvent were derived from the sale of realty, the sale of personalty upon which appellant had a conditional sales contract, and the sale of other personalty of the insolvent. The court entered an order allowing the receiver to retain his fees and expenses, including fees for the attorney of the receiver, pro rata from the three funds. *Held:* The holder of the conditional sales contract, having received the benefits of the receivership in common with other creditors, and the fees and expenses of the receiver being reasonable and just, cannot complain that a pro rata part thereof was retained out of the fund realized from the sale of the personal property covered by the conditional sales contract. *Bank v. Country Club*, 239.

Receiving Stolen Goods.

A Elements of the Crime.

b Guilty Knowledge and Intent

In order for a defendant to be convicted of receiving stolen goods under the provisions of C. S., 4250, it is necessary that defendant have knowledge, express or implied, that at the time of the receiving the goods had been stolen, and a charge that such knowledge would be imputed to defendant if the circumstances at the time were sufficient to put a reasonably prudent man upon inquiry which would have disclosed the facts. is erroneous, the rule of the prudent man being applicable to civil actions but not to criminal prosecutions. and it being necessary for conviction that defendant himself have guilty knowledge, express or implied. *S. v. Stathos*, 456.

Recovery Act. (See Master and Servant A a, B a; Courts C a.)

Reference.

A Nature and Scope of Remedy.

a In General

The appointment of a referee by the judge to ascertain the facts in regard to a petition for *certiorari* is not a reference under the code, but only a method employed by a judge to acquaint himself with the facts. *In re Snelgrove*, 670.

C Report and Review.

a Exceptions and Preservation of Grounds of Review

Where there are no exceptions to the findings of fact by the referee, an appeal upon exceptions to his conclusions of law must be determined in accordance with his findings of fact, the findings, in the absence of exceptions thereto, being conclusive both in the Superior Court and in the Supreme Court upon further appeal. *Salisbury v. Lyerly*, 386.

b Review

1. In reviewing a report of a referee, the trial court is not bound by the findings of fact by the referee, but may review the evidence and make contrary findings, which findings by the trial court are conclusive upon appeal to the Supreme Court if supported by any competent evidence. *Maxwell v. R. R.*, 397.

2. Where a finding by the referee is fully supported by evidence appearing of record, the inadvertence of the trial court in striking it out for want of evidence must be held for error on appeal. *Coleman v. Hood*, 430.

3. Where plaintiff introduces documentary evidence for the purpose of attack, the inadvertence of the trial court in striking out the finding of the referee in plaintiff's favor supported thereby because the evidence was introduced by plaintiff, must be held for error. *Ibid.*

Reformation of Instruments.

C Actions.

a Parties

In an action between the grantees and a judgment creditor of one of the grantees to reform a deed, the grantors are proper, if not necessary, parties to the action, and may be joined upon motion. *Lewis v. Pate*, 512.

Reformation of Instruments C—*continued.*

d Evidence and Issues

Plaintiff contended that defendant, plaintiff's judgment debtor, inserted the words "and wife" in a deed after it had been executed to defendant by a third person, and that such alteration was made without the knowledge of the grantor in order to create an estate by entirety and defraud defendant's creditors. Defendants contended that even if the insertion was made after the execution of the deed, they were entitled to reformation of the deed for mutual mistake for that the draftsman failed to carry out the intention of the grantor and defendants to create an estate by entirety in defendants. *Held:* Defendants are entitled to the submission of the question of mutual mistake for the determination of the jury upon their evidence in support of their allegations, but defendants' right to the equitable relief sought might be determined by an issue of whether defendant made the alteration with the purpose of cheating and defrauding his creditors, as alleged in the complaint. *Lewis v. Pate,* 512.

Release. (See Torts C.)

Removal of Causes.

C Citizenship of Parties.

b Separable Controversy and Fraudulent Joinder

1. A complaint against a corporation and several individuals, alleging that the corporation was the owner of stock of a domestic bank at the time the bank was closed because of insolvency, and that the corporation was a mere "dummy," and that the individual defendants were the beneficial or equitable owners of the shares of stock, and alleging liability for the statutory assessment on the bank stock on the part of the corporation and proportionately on the part of the individuals, *is held* to state a separable controversy as to the corporation and the individuals within the meaning of the Judicial Code, and motions of the nonresident defendants for removal to the Federal Court upon petitions showing the requisite jurisdictional amount should be allowed. *Hood v. Richardson,* 321.

2. The fact that a complaint is good as against a demurrer for misjoinder of parties and causes is not a test of whether the complaint alleges separable controversies within the meaning of the Judicial Code. *Ibid.*

3. Upon the facts alleged in the petition in this case, plaintiff's motion for removal to the Federal Court should have been allowed for that the facts alleged in the complaint are not sufficient to state a cause of action against the resident defendants, or either of them, and it appearing that the joinder of the resident defendants was fraudulent in that it was made solely to prevent a removal. *Sharpe v. Petroleum Products Co.,* 339.

E Effect of Removal.

a In General

A single separable controversy between citizens of different states, upon motion to remove, carries the whole cause to the Federal Court, and, therefore, when one such separable controversy exists it is unnecessary to consider additional alleged separable controversies. *Hood v. Richardson,* 321.

Replevin. (See Claim and Delivery.)

Robbery. (Competency of evidence obtained by feigned coöperation with perpetrators see Criminal Law G u.)

Rule in Shelley's Case. (See Deeds and Conveyances C c; Wills E b 3.)

Sales.

F Warranties. (There is no implied warranty between manufacturer of food and ultimate consumer see Food A b.)

f Waiver of Breach of Warranty

Where the evidence is conflicting whether the purchaser signed a renewal note for machinery before or after discovery by him of breach of warranty, the question of waiver is for the jury, and a peremptory instruction in plaintiff's favor on the note is error. *Ward v. Nurney*, 53.

Schools and School Districts. (Liability of members of school committee in selecting incompetent driver for school bus see Public Officers C d 1.)

Seals. (Necessity for corporate seal see Corporations G h.)

A Nature and Requisites of Seals.

b Intent to Use Character for Seal

1. Whether a mark or character upon an instrument not required by law to be under seal is to be regarded as a seal depends upon the intention of the executant. *Williams v. Turner*, 202.

2. A finding that executant of an instrument not required by law to be under seal, did not adopt as his seal the word "(Seal)" printed in the form on the line upon which executant wrote his name, unless he did so by writing his name on the line, *is held* a finding that executant had no intention at the time of executing a sealed instrument. *Ibid.*

Seduction.

A Nature and Elements of the Crime.

a In General

The essential elements of seduction are the innocence and virtue of the prosecutrix, the promise of marriage, and intercourse induced by such promise. C. S., 4339. *S. v. McDade*, 197.

B Prosecution and Punishment.

d Sufficiency of Evidence and Nonsuit

1. The unsupported testimony of the prosecutrix is insufficient for a conviction of seduction. *S. v. McDade*, 197.

2. Testimony that prosecutrix told her mother and father that she and defendant were to be married, without supporting testimony that defendant ever told anyone or admitted to anyone that he was engaged to prosecutrix, or that he intended to marry her, is insufficient to resist defendant's motion as of nonsuit in a prosecution for seduction. *Ibid.*

Set-offs and Counterclaims.

A Nature and Scope of Remedy.

b Mutuality

Defendants *held* entitled to offset debt due county with past-due bonds of county in this case. *Swain County v. Welch*, 439.

Sheriffs. (Deputy *held* not employee of county within meaning of Compensation Act see Master and Servant F a 1; sheriff *held* not liable to deputy under Compensation Act see Master and Servant F b 1.)

B Compensation.

b For Collection of Taxes

1. Plaintiff sheriff was paid a fixed salary for his services as tax collector under the provisions of ch. 329, Public-Local Laws of 1925. *Held:* His services in advertising and selling land for delinquent taxes, and preparing land-sale certificates, and entering land sales upon the land-sale register, were performed in pursuit of his duties as tax collector, and the sheriff is not entitled to receive, in addition to his salary, fees for such services under C. S., 8009. *Patterson v. Swain County*, 453.

2. Defendant county paid plaintiff sheriff all commissions allowed by statute for collection of taxes made by plaintiff sheriff in money, and allowed him credit in his settlement for tax-sale certificates purchased by the county upon sale of the land for taxes by the sheriff as provided by law. After the tax-sale certificates were turned over to the auditor, certain sums were collected thereon by the auditor from the taxpayers whose lands had been sold. *Held:* Plaintiff sheriff is not entitled to commissions on the cash collected by the auditor on the tax-sale certificates. C. S., 8037, 8049; ch. 107, Public-Local Laws of 1924. Defendant's petition for a rehearing of this case reported in 206 N. C., 74, is allowed. *Braswell v. Richmond County*, 649.

d For Conveying Prisoners to Penitentiary

Under the provisions of C. S., 3908, a sheriff is entitled to compensation for conveying prisoners to the State Penitentiary, but such compensation is not to be computed upon a mileage basis. *Patterson v. Swain County*, 453.

D Liabilities.

b For False Return of Process

Plaintiffs instituted action against the sheriff and his bondsman for damages caused by alleged false return of summons by the sheriff. The sheriff's return was regular upon its face, but each plaintiff testified that service was not made on him, but did not testify as to whether service was made on the other plaintiff, and there was no evidence corroborating plaintiffs' testimony. *Held:* Defendants' motion for judgment as of nonsuit was properly granted. *Penley v. Rader*, 702.

Specific Performance. (Time within which acceptance must be made to offer in order to constitute it valid contract specifically enforceable see Contracts A b.)

States. (Respective jurisdictions of courts of this State and courts of other States see Courts D; jurisdiction of State courts of actions under Federal statutes see Courts C.)

B Governmental Powers and Function of the State.

a In General

In accordance with express constitutional declaration, Art. XI, sec. 7, the care of the indigent sick and afflicted poor is a proper function of the State Government, and the General Assembly may by stat-

States B a—*continued.*

ute require the counties, as administrative agencies of the State, to perform this function, at least within their territorial limits. *Martin v. Comrs. of Wake*, 354.

Statute of Frauds. (See Frauds, Statute of.)

Statute of Limitations. (See Limitation of Actions.)

Statutes. (Table of statutes construed see Consolidated Statutes.)

A Requisites and Validity.

f Procedure to Test Constitutionality and Validity

The constitutionality of a statute may not be tested by injunctive proceedings unless the party seeking the injunctive relief alleges and shows that he will suffer irreparable damage from the enforcement of the statute. *Newman v. Comrs. of Vance*, 675.

Summons. (See Process.)

Taxation.

A Constitutional Requirements and Restrictions.

a Necessity of Submitting Issuance of Bonds to Vote

1. A tax to provide funds necessary for the medical care and hospitalization of the indigent sick of a county is for a necessary expense of the county, and may be levied without the approval of the qualified voters of the county. Art. VII. sec. 7. *Martin v. Comrs. of Wake*, 354.

2. The declaration of the General Assembly in a statute authorizing a municipality to levy a tax and the finding of the municipal commissioners that the tax is for a necessary municipal expense within the meaning of Art. VII, sec. 7, is not controlling, but, when made in good faith, such declaration and finding are persuasive, and are entitled to serious consideration by the courts in determining whether the purpose for which the tax is proposed to be levied is for a necessary municipal expense within the meaning of term as used in the Constitution. *Martin v. Raleigh*, 369.

3. In accordance with the provisions of an act of the General Assembly, the commissioners of a city proposed to enter into a contract with a public hospital providing for the payment by the city of the sum of $10,000 a year for thirty years, in consideration of the agreement of the hospital to give medical care and hospitalization to the indigent sick and afflicted poor of the city, and to levy a tax to raise revenue sufficient to meet such payments. *Held:* Under the facts found by the trial court, the proposed tax is for a necessary municipal expense, and the approval of the qualified voters of the city is not a prerequisite to the validity of the tax. Art. VII, sec. 7. *Ibid.*

b Limitation on Tax Rate

The General Assembly passed an act authorizing a county to levy a tax for the purpose of raising revenue in the sum of $10,000 a year to pay a public hospital for the care and hospitalization of the indigent sick of the county under a contract with the hospital whereby the hospital agreed to care for such indigent sick for a period of thirty years in consideration of the payment by the county of the

Taxation A b—*continued.*

stipulated sum yearly for the period of the contract. *Held:* The tax contemplated is for a special, necessary purpose, with special approval of the General Assembly, and is not, therefore, subject to the limitation on the tax rate. Art. V, sec. 6. *Martin v. Comrs. of Wake,* 354.

B Liability of Persons and Property.

b Franchise Taxes

A corporation organized and doing business under the laws of this State for profit, as authorized by its charter, is liable for an annual franchise tax assessed and levied by the Commissioner of Revenue under the provisions of N. C. Code, 7880 (118), for the years prior to its dissolution, during which a receiver of the corporation, appointed by a court of competent jurisdiction, continues the business of the corporation under orders of the court, since the statute expressly provides that a corporation is liable for the tax for each year during which it enjoys the privilege of the continuance of its charter, and therefore liability for the tax does not cease until the corporation surrenders or forfeits its corporate existence. *Stagg v. Nissen Co.,* 285.

d Property Exempt from Taxation

The Board of Financial Control of Buncombe County obtained title to property situate in another county in liquidating assets belonging to a city within the county, the property being a part of the collateral security given the city for its deposit in a bank which failed. The property was rented by the Board of Financial Control to private businesses, and later the board obtained a prospective purchaser. *Held:* The property was subject to taxation by the county in which the property is situate although owned by a municipal corporation, since the property was held by the municipal corporation purely for business purposes and not for any governmental or necessary public purpose. N. C. Const., Art. V, sec. 5; N. C. Code, 7880 (2). *Board of Financial Control v. Henderson County,* 569.

C Levy and Assessment.

c Levy and Assessment of Corporate Excess and Income

In assessing income taxes against a corporation the Commissioner of Revenue must follow the statute, leaving the question of whether the result is arbitrary or unwarranted to the determination of the courts upon appeal of the corporation. *Maxwell v. R. R.,* 397.

f Levy and Assessment of Inheritance and Transfer Taxes

1. A liberal construction will be given to inheritance tax statutes to the end that all property fairly and reasonably coming within their provisions may be taxed. *Reynolds v. Reynolds,* 578.

2. Settlement of claim for transfer tax by agreement of parties approved by court of competent jurisdiction is upheld. *Ibid.*

h Appeals and Review of Levy or Assessment

1. On appeal to the courts from the levy of taxes by the Commissioner of Revenue, on the ground that the result reached by the Commissioner is unconstitutional, the burden is on the appealing taxpayer to show such unconstitutional result. *Maxwell v. R. R.,* 397.

Taxation C h—*continued.*

2. Defendant railroad corporation operated its railroad partly within and partly outside the State. The Commissioner of Revenue assessed its income taxable by the State in accordance with the statutory formula. Section 312 of the Revenue Act of 1927 and 1929. Defendant contended that the acts, as interpreted and applied by the Commissioner, operated unconstitutionally in defendant's case. *Held:* Defendant cannot prevail merely by assailing the Commissioner's method of computing deductible items in ascertaining the taxable income, but must show that the result of the Commissioner's computation of taxable income was unconstitutional as alleged, and in this case defendant *is held* to have failed to make apparent any reversible error in the trial court's conclusion, upon supporting findings of fact, that defendant had failed to show want of due process, or lack of equal protection of the laws. *Ibid.*

Torts.

B Joint Torts.

a Determination of Whether Injury Is Result of Joint Tort. (See, also, Negligence B a.)

1. A person riding in an automobile, the driver of which is not his agent or servant, nor under his control, and who is injured by the joint or combined negligence of a third person and the driver, may recover of either or both, upon proper allegations, for the injuries thus inflicted through such concurring negligence. *Brown v. R. R.*, 57.

2. Evidence that plaintiff's intestate was struck and injured by a car driven by one of defendants, and that as he was attempting to rise from the pavement where he had been knocked by the impact, he was struck and injured by a truck driven by another defendant in the course of his employment by the third defendant, and that the negligence of the drivers of both cars caused the respective accidents, and that intestate died from the injuries thus inflicted, *is held* to show that the proximate cause of the injuries was the joint and concurrent negligence of defendants, and the doctrine of intervening negligence has no application. *West v. Baking Co.*, 526.

C Release from Liability and Covenants Not to Sue.

a Joint Tort-Feasors

1. There can be but one recovery for the same injury or damage, and a sum paid the injured party in consideration for a covenant not to sue the party making the payment should be deducted from the amount recoverable by the injured party for the same injury in his action against another tort-feasor upon allegations that the negligence of such tort-feasor proximately caused the injury, regardless of whether the party making payment and the party sued are joint tort-feasors, the injured party being entitled to recover only the amount of his damage, however many sources of compensation there may be. *Holland v. Utilities Co.*, 289.

2. Where some of defendants, sued as joint tort-feasors, pay plaintiff a sum in consideration of a covenant not to sue, and as to them plaintiff takes a voluntary nonsuit, and thereafter the action is prosecuted against the other defendants, and judgment recovered against them, the defendants against whom judgment was entered

Torts C a—*continued.*

are entitled to have the judgment credited with the amounts paid by the other defendants for the covenant not to sue upon their motion made prior to execution, the motion coming within the spirit if not the letter of C. S., 620, and movants not being barred by their laches either in failing to bring the matter to the trial court's attention at the time of rendition of judgment, since the matter appeared on the face a judgment in the cause, or in waiting until issuance of execution, the execution still being in the hands of the sheriff. *Brown v. R. R.*, 423.

Trial. (Trial of particular actions see Particular Titles of Actions.)

D Taking Case or Question from Jury.

a Nonsuit

1. Upon a motion as of nonsuit all the evidence upon the whole record tending to support plaintiff's cause of action 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. *Lynn v. Silk Mills*, 7; *Broadway v. Cope*, 85; *Gossett v. Ins. Co.*, 152; *Niblock v. Taxi Co.*, 737.

2. On a motion of nonsuit the plaintiff is entitled to a liberal view of the evidence, and discrepancies and contradictions, even in plaintiff's evidence, are matters for the jury, and not the court. *Dozier v. Wood*, 414.

3. The failure to appeal from judgment overruling a demurrer to the complaint does not preclude defendant from entering a motion for nonsuit, since a demurrer is addressed to the pleadings and a motion of nonsuit is addressed to the evidence. *Holder v. Bank*, 38.

4. A judgment as of nonsuit entered by the trial court of its own motion will not be held for error when the evidence would justify a directed verdict, a nonsuit and a directed verdict having the same legal effect. *Ferrell v. Ins. Co.*, 420.

5. A motion as of nonsuit must be made at the close of plaintiff's evidence, and, if overruled, at the conclusion of all the evidence, or question of the sufficiency of the evidence will be deemed waived. C. S., 567. *Ibid.*

c Voluntary Nonsuit

Plaintiff sued the manufacturer for alleged negligence in the preparation of a sack of flour sold by the manufacturer to a retailer and purchased from the retailer by plaintiff, and for breach of implied warranty that the flour was wholesome and fit for human consumption, plaintiff alleging damage from a foreign and deleterious substance in the flour. Upon the trial plaintiff took a voluntary nonsuit on his first cause of action. *Held:* The voluntary nonsuit was an admission, at least for the purpose of trial, that defendant was not guilty of negligence in the manufacture or packing of the flour. *Thomason v. Ballard & Ballard Co.*, 1.

E Instructions.

d Conformity to Pleadings and Evidence

Instruction on issue of damage in action against bank for wrongfully refusing to pay check *held* not supported by evidence. *Thomas v. Trust Co.*, 653.

Trial E—*continued.*

e Requests for Instructions

1. This action in summary ejectment was tried solely upon the theory of whether defendant's lease had expired. *Held:* Plaintiff's exception to the court's refusal to give instructions requested as to the necessity of giving notice to quit cannot be sustained, the instructions requested having no relevancy to the theory upon which the case was tried. *Stadiem v. Harvell*, 103.

2. If the charge fails to fully set forth a party's contentions or incorrectly states them, it is incumbent upon the party to aptly request additional or more specific statements of the contentions. *Pulverizer Co. v. Jennings*, 234.

3. When a party tenders a request for a specific instruction, correct in itself and supported by the evidence, the failure of the trial court to give such instruction, in substance at least, either in response to the prayer or in some portion of the charge, is reversible error. *Calhoun v. Highway Com.*, 424.

4. If a party desires fuller or more specific instructions on any point, he should aptly tender request therefor, and any omissions or errors in the court's statement of the contentions should be brought to the court's attention in time to afford an opportunity to supply the omissions or make correction. *Sherrill v. Hood*, 472.

f Objections and Exceptions to Charge

Objection to the court's statement of the contentions of the parties must be made in apt time to afford opportunity for correction in order to be considered on appeal. *Bradshaw v. Ins. Co.*, 214.

g Construction of Charge and General Rules Upon Review

1. A charge will be construed as a whole, and an exception thereto will not be sustained when it does not prejudice appellant when so construed. *Bradshaw v. Ins. Co.*, 214; *Pulverizer Co. v. Jennings*, 234.

2. Appellant's exceptions to the charge *held* untenable when the charge is read contextually as a whole. *Myers v. Utilities Co.*, 293.

F Issues

c Tender of Issues

1. The refusal to submit issues tendered will not be held for error when the issues submitted by the court are determinative of the controversy, and every aspect sought to be presented by the issues tendered is covered by the court's charge on the issues submitted. *Belk's Store v. Ins. Co.*, 267.

2. Where defendant tenders an issue arising on the pleadings and supported by evidence elicited on cross-examination of plaintiff's witness, the refusal of the trial court to submit the issue must be held for reversible error where the question involved in the issue is not presented for the determination of the jury under the issues submitted. *Lewis v. Pate*, 512.

3. *Held:* Plaintiff waived trial of issue of negligence of one defendant by tendering issues involving solely the negligence of the other defendant. *Ammons v. Fisher*, 712.

Trial—*continued.*

G Verdict.

b Form and Sufficiency of Verdict

1. A verdict will be liberally construed with a view of sustaining it, and to this end resort may be had to the pleadings, evidence, and charge of the court. *Stadiem v. Harvell*, 103.

2. The verdict of the jury, both in civil and criminal actions, will be interpreted in the light of the pleadings, facts in evidence, admissions of the parties, and the charge of the court, and when it is sufficient to support the judgment, when so interpreted, it will not be held sufficient ground for a new trial. *S. v. Whitley*, 661.

H Trial by Court by Agreement.

b Findings of Fact and Conclusions of Law

Where, upon trial by the court under agreement of the parties, the court fully and completely sets out the facts found by him and renders judgment thereon, an exception that the court did not state his findings of fact and conclusions of law separately as required by C. S., 569, cannot be sustained, since the judgment constitutes the court's conclusion of law on the facts found. *Dailey v. Ins. Co.*, 817.

Trusts

F Appointment and Tenure of Trustees.

b Removal

Where the court finds that the plaintiffs, beneficiaries under a trust created by will, have not made out a *prima facie* case that defendant trustees were guilty of misconduct or bad faith in the administration of the trust or of damage to plaintiffs in the administration thereof, the findings support the court's order refusing plaintiffs' prayer for the removal of the trustees. *Efird v. Smith*, 394.

G Management and Disposal of Trust Property.

b Modification of Trust by Courts in Equitable Jurisdiction

1. In this case the wife of an insane beneficiary receiving an income from a trust estate created by the beneficiary's father, brought action to have allotted to her one-third of her husband's income from the estate. The trustee and all persons having an interest in the trust estate were made parties, the minors and persons not *in esse* being represented by a guardian *ad litem*, and the insane beneficiary being represented by his committee duly appointed and by a guardian *ad litem*. The parties submitted an agreement for the approval of the court which provided that certain assets of the trust estate be set apart and that the wife of the insane beneficiary receive a stipulated monthly income therefrom for her permanent support and maintenance, and relinquish all claims against her husband. The court, after judicial investigation, found that the beneficiary is incurably insane, that the agreement was fair and just, and that the wife of the beneficiary would receive therefrom less than she possibly might be entitled to in the absence of such agreement, and that the agreement was to the best interest of all the parties, and approved the agreement, retaining the cause for further orders. *Held:* Under the facts and circumstances of the

Trusts G b—*continued.*

case, the Superior Court properly approved the agreement under its inherent equitable jurisdiction. *Reynolds v. Reynolds*, 254.

2. Judgment for distribution of trust estates in accordance with family agreement affirmed in this case. *Reynolds v. Reynolds*, 578.

Usury.

A Usurious Contracts and Transactions.

a Determination of Whether Contract or Transaction Is Usurious

1. When a transaction is in reality a loan of money, and the lender charges a sum in excess of interest at the legal rate, the transaction will be held usurious, regardless of what the excessive charge may be called, since the law will look to the substance and not the form, and upon conflicting allegations and evidence the question of whether the transaction is usurious is for the determination of the jury. *Sherrill v. Hood*, 472.

2. Conflicting evidence *held* properly submitted to the jury on the issue of whether transaction was usurious. *Ibid.*

B Right to Plead Usury. (Limitation of actions based on usury see Limitation of Actions B a 5, B b 1.)

b Where Equitable Relief Is Demanded

1. Where the creditors of the mortgagor seek to enjoin the foreclosure of a deed of trust on their creditor's property, and pray for an accounting to ascertain the amount of the debt upon allegations that usurious interest was charged thereon, *it is held,* upon sale of the property under orders of the court, the mortgagee is entitled to the principal amount of his debt, plus six per cent interest thereon, since the plaintiffs, seeking equitable relief, must do equity, and the mortgagee is entitled to the amount of the debt, plus the legal interest, unaffected by the forfeiture or penalty for usury. C. S., 2306. *Kenny Co. v. Hotel Co.*, 295.

2. Where plaintiff seeks to enjoin the foreclosure of a mortgage and pleads usury, plaintiff must tender the principal of the debt, plus six per cent interest, since, upon invoking equity, the only forfeiture he may demand is the amount of interest in excess of the legal rate. *Ghormley v. Hyatt*, 478.

d Parties Who May Plead Usury

A junior lienor is entitled to have the amount due under a senior mortgage ascertained, and the lien and notes assigned to him upon the payment to the senior lienor of the amount so determined, and when the senior lien is affected with usury, the amount that must be paid by the junior lienor before he can compel an assignment is the principal sum due without interest, and in this case the conflicting evidence as to whether plaintiff was a junior lienor was properly submitted to the jury, and its verdict in plaintiff's favor was amply supported by the evidence.

e Waiver of Right to Plead Usury

Plaintiffs' son negotiated a loan for plaintiffs, and paid usurious interest thereon for plaintiffs to the lender for nine and a half years. Thereafter plaintiffs voluntarily executed a renewal note and mortgage at the legal rate of interest for the principal amount originally

Usury B e—*continued.*

borrowed, and plaintiffs' acknowledgments of the renewal mortgage were properly taken. Upon default in the payment of the renewal note, and advertisement of the property, plaintiffs sought to restrain foreclosure and pleaded usury. *Held:* By executing the renewal note and acknowledging the debt in the principal amount of the renewal note, plaintiffs are precluded from setting up usury in the original transactions, since the party paying usury may waive the benefit of the usury statutes, and the cause of action to recover the penalty for usury being barred, defendant is entitled to judgment for the amount of the renewal note plus the legal interest called for by it upon the verdict of the jury for this amount under instructions that plaintiffs would not be bound by the payment of usurious interest by their son unless they had knowledge of such payments. *Ghormley v. Hyatt*, 478.

Vendor and Purchaser.

A Requisites and Validity of Contract.

a Delivery

Delivery of a contract to convey land is essential to constitute it a valid and enforceable agreement. *Ins. Co. v. Cordon*, 723.

C Abandonment or Modification of Contract.

a By Acts or Agreement of the Parties

Where, in an action on a contract to convey lands, the jury finds that plaintiff purchaser had abandoned or canceled the contract sued on, a subsequent issue as to whether the vendor's subsequent contract with a third person to convey the same lands was entered into collusively in furtherance of a conspiracy to defeat plaintiff purchaser's right to specific performance, is rendered immaterial, since such issue determines only whether plaintiff is entitled to specific performance or is remitted to damages for breach of the contract, and the answer to the first issue determines that plaintiff has no rights under the contract sued on, and has no legal basis to demand cancellation of the second contract to convey. *Moye v. Bank*, 110.

F Remedies of Purchaser.

a Specific Performance

In a suit by the purchaser in a contract to convey lands against the vendor therein and a third person to whom the vendor subsequently contracted to convey the same lands, the burden is on plaintiff to prove that the second contract to convey was entered into through conspiracy and collusion to defeat plaintiff's right to specific performance, and where plaintiff's evidence is insufficient to sustain an affirmative answer to the issue, the court's peremptory instruction to answer the issue in defendant's favor is not erroneous. *Moye v. Bank*, 110.

b Actions to Recover for Shortage in Number of Acres Conveyed (Limitation of actions for shortage see Limitation of Actions B a 3.)

Plaintiff purchaser brought suit on a contract to convey forty acres of land, which stipulated that the vendor should pay the purchaser for any shortage in the tract at the rate of $75.00 an acre, the vendor to be bound by a survey to be made of the land, the contract failing to stipulate which party was to make the survey.

Vendor and Purchaser F b—*continued.*

The vendor denied the execution of the contract, but upon the trial both parties introduced evidence as to the disputed acreage. *Held:* The admission of testimony of a surveyor as to the acreage as ascertained by him in an *ex parte* survey without notice to defendant will not be held for error upon the vendor's exception. *Davis v. Warren*, 174.

Venue.

C Change of Venue.

a For Convenience of Parties and Witnesses

While an action against an executor or administrator must be instituted in the county in which defendant gave bond, C. S., 465, the statute does not preclude the court from changing the venue to another county, in his discretion, for the convenience of witnesses and the promotion of the ends of justice, upon motion properly made under C. S., 470 (2), and since plaintiff is bound to institute the action in the county in which defendant gave bond, his act in so doing cannot be imputed to him as a voluntary choice of venue, so as to prevent the lodging of a motion under C. S., 470 (2). *Pushman v. Dameron*, 336.

Wills. (Actions for value of services rendered under void contract to devise see Executors and Administrators D b.)

D Probate and Caveat.

e Undue influence

1. Undue influence sufficient to avoid an instrument is such influence which destroys the free agency of the person executing the instrument and substitutes therefor the will of another, and although moral turpitude is not a necessary element of undue influence, where influence exerted upon the person executing the instrument amounts to a substitution of wills and constrains the person executing the instrument to do what he or she otherwise would not have done, it is a fraudulent influence in the eyes of the law. *In re Will of Turnage*, 130.

2. Testimony of a declaration made by testator four years after the execution of the will to the effect that he had let others take advantage of him, and lead him to make the will, is insufficient, standing alone, to be submitted to the jury on the issue of undue influence. *Ibid.*

h Sufficiency of Evidence and Nonsuit

Evidence *held* insufficient to show undue influence or mental incapacity, and directed verdict should have been given. *In re Will of Neal*, 535.

m Costs and Attorneys' Fees

Where the purpose of an action is to construe a will, the costs are properly taxed against the executor thereof. *Knox v. Knox*, 141.

E Construction and Operation.

b Estates and Interests Created

1. A devise of the use and benefit of the rents and profits from designated real property transfers the land itself to the beneficiary in the absence of a clear intention to separate the income from the principal. *Knox v. Knox*, 141.

Wills E f—*continued.*

2. A direction to sell realty and distribute the proceeds of sale works an equitable conversion of the property so that the beneficiaries take a bequest and not a devise. *Ibid.*

3. Plaintiff's father devised the land in question to plaintiff "to be hers and to her heirs, if any, and if no heirs, to be equally divided with my other children." At the time plaintiff executed deed to defendant, which was refused by him, plaintiff was married, but had been abandoned by her husband, and had no children. *Held:* Plaintiff's deed did not convey the indefeasible fee to the land free and clear of the claims of all persons, whether the limitation over be regarded as a limitation over on failure of issue, C. S., 1737, or as not coming within the rule in *Shelley's case*. *Hudson v. Hudson*, 338.

4. A devise to testator's daughter and her bodily heirs, and if she dies without bodily heirs, then in trust for the heirs of testator's sisters, *is held* to create a fee-simple estate in the daughter, defeasible upon her dying without children or issue, it being apparent that the words "bodily heirs" used in the devise meant children or issue, as otherwise the limitation over to the heirs of testator's sisters would be meaningless. C. S., 1734. *Murdock v. Deal*, 754.

d Vested and Contingent Interests

1. Where the time of enjoyment of a gift or devise is merely postponed, the interest is a vested one, but where time is annexed to the substance of the gift or devise as a condition precedent the interest is a contingent one. *Knox v. Knox*, 141.

2. Testator devised to his wife a life estate in certain lands and the fee in certain other lands, and directed that at her death the property not disposed of in fee should revert to his executor and be disposed of as thereafter provided. In the subsequent residuary clause of the will the testator directed that his lands be sold and the proceeds of sale divided among his next of kin and their representatives. *Held:* The interests created after the termination of the life estate were contingent and vested upon the death of the widow in those of testator's next of kin alive as of the date of the widow's death and in the living representatives of deceased next of kin. *Ibid.*

f Designation of Devisees and Legatees and Their Respective Shares

1. In a devise the words "next of kin" mean "nearest of kin" by blood relationship and not next of kin in the sense of the statute of distribution, and where a devise provides that upon the termination of a life estate in certain of testator's property the lands should be sold and the proceeds divided among testator's next of kin and their representatives, a widow of one of testator's brothers may not claim as one of testator's next of kin or as a representative of a deceased next of kin, although she is made the sole legatee and executrix in the will of testator's brother, who survived testator but who died without issue prior to the vesting of the proceeds of sale of testator's lands, she not being related to testator by blood, and an executrix not being a "representative" within the meaning of the will. *Knox v. Knox*, 141.

Wills F e—*continued.*

2. Where a will provides for the sale of testator's lands and distribution of the proceeds of sale to certain beneficiaries, the beneficiaries take a bequest and not a devise, and where one of the beneficiaries survives testator but dies prior to the distribution of the fund, the interest of such beneficiary passes under his will to his sole legatee, and not to those to whom he devised his realty. *Ibid.*

3. Construction of will as to priority of payment of legacies upon deficiency of estate to pay all legacies in full. *Clement v. Whisnant*, 167.

4. Testatrix directed that all of her real property and all of her personal property, with the exception of her personal effects, furniture, and furnishings, should be sold and divided equally between named beneficiaries, and stipulated that she wished her personal effects to be disposed of by delivering them to persons whose names would appear on a memorandum which she intended filing with the will. The will contained a residuary clause. Testatrix failed to prepare and file the memorandum with the will. *Held:* The personal effects of testatrix did not become a part of the *corpus* of the estate, it being the intent of the testatrix as gathered from the whole instrument that such personal effects should not be sold by the executor or included in the provisions for equal division of the *corpus* of the estate to the named beneficiaries, and such personal effects fell within the residuary clause and should be delivered to the beneficiaries named therein. *Trust Co. v. Cowan*, 236.

g Conditions and Restrictions

1. Devise upon condition that devisee pay certain sum to testator's wife during her lifetime *held* not a charge upon other realty of testator. *Ingram v. Ingram*, 643.

2. A provision in a will that land devised should never be sold by the devisee or contingent remainderman is void as against public policy, but such provision does not affect the validity of the provisions of the will devising the land. *Murdock v. Deal*, 754.

F Rights and Liabilities of Devisees and Legatees.

b Nature of Title and Rights in General

Devisee *held* entitled to rents from land where at date of testator's death no crops had been planted. *Carr v. Carr*, 246.

d Election

Where devisee makes election after knowledge that testator had deeded away part of property, devisee is bound by his election. *Ingram v. Ingram*, 643.

e Annuities

Defendant devisee, under the terms of a will in which he was also named executor, elected to pay plaintiff an annuity as stipulated in the will. Defendant paid the annuity for several years and then refused to make further payments. *Held:* The first annuity was due and payable one year after the date of the probate of the will and defendant's qualification as executor, and the annuity for each succeeding year was due and payable on the same date of the following year, and in plaintiff's action to recover unpaid

Wills E b—*continued.*

annuities, plaintiff may recover only annuities due and payable at the time of instituting action, and interest on the unpaid annuities from the date each was due, computing the time not from the date of the probate of the will and defendant's qualification as executor thereunder, but from the same date of the following year. *Ingram v. Ingram*, 643.

f Bequests Constituting Charge on Land

Testator directed that his devisee, also named as executor in the will, pay plaintiff a stipulated annuity so long as she should live, and that at her death a house and lot devised to plaintiff for life should be sold and the devisee reimbursed for the advancements out of the proceeds of sale. *Held:* The annuities are not a charge upon the property, real or personal, belonging to the estate, and in plaintiff's action to recover of the devisee unpaid annuities, judgment that the house and lot should be sold to pay annuities due and to become due, is error. *Ingram v. Ingram*, 643.

h Death of Legatee and Lapsed Legacies

1. Testator's will provided that certain of his lands should be sold upon his death and the proceeds divided among his next of kin and their representatives. One of testator's next of kin died less than two months after testator's death and before the lands could be sold and the proceeds distributed. *Held:* The interest in the proceeds of sale vested in the beneficiaries *eo instanti* the death of the testator, and such interest was not divested by the fact that the next of kin died before the lands could have been sold and the proceeds distributed, and before the expiration of the year given by law as the minimum time for the sale of the property and settlement of the estate by the executor. *Knox v. Knox*, 141.

2. Testatrix provided that her personal effects should be delivered to persons whose names would appear on a memorandum which she intended to file with the will. Testatrix failed to prepare and file the memorandum with the will. *Held:* The legacy was void because impossible of taking effect. *Trust Co. v. Cowan*, 236.

Witnesses. (Impeaching and corroborating witnesses see Evidence D f, Criminal Law G r; testimony of transactions or communications with deceased see Evidence D b.)

Workmen's Compensation Act. (See Master and Servant F.)