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VOLUME 209

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NORTH CAROLINA REPORTS

VOL. 209

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1935
SPRING TERM, 1936

REPORTED BY
ROBERT C. STRONG

RALEIGH
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1936

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7 " "	"	42	"
8 " "	"	43	"
Busbee Law	"	44	"
" Eq.	"	45	"
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2 " "	"	47	"
3 " "	"	48	"
4 " "	"	49	"
5 " "	"	50	"
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7 " "	"	52	"
8 " "	"	53	"
1 " Eq.	"	54	"
2 " "	"	55	"
3 " "	"	56	"
4 " "	"	57	"
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JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1936.

CHIEF JUSTICE:

W. P. STACY.

ASSOCIATE JUSTICES:

HERIOT CLARKSON, MICHAEL SCHENCK,
GEORGE W. CONNOR, WILLIAM A. DEVIN.

ATTORNEY-GENERAL:

A. A. F. SEAWELL.

ASSISTANT ATTORNEYS-GENERAL:

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OF THE

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Name	*District*	*Address*
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HENRY A. GRADY	Sixth	Clinton.
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N. A. SINCLAIR	Ninth	Fayetteville.
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WESTERN DIVISION

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W. F. HARDING	Fourteenth	Charlotte.
JOHN M. OGLESBY	Fifteenth	Concord.
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T. B. FINLEY	North Wilkesboro.

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C. O. RIDINGS	Eighteenth	Forest City.
Z. V. NETTLES	Nineteenth	Asheville
JOHN M. QUEEN	Twentieth	Waynesville.

LICENSED ATTORNEYS

SPRING TERM, 1936.

List of applicants granted law license by the North Carolina Board of Law Examiners at Raleigh, N. C., 29 January, 1936:

ALBRIGHT, ROBERT MAYNE.....Raleigh.
AVERITT, FRANKLIN MURPHY.....Fayetteville.
BARRINGTON, CARL ADAM.....Oriental.
BOOTH, ROY MURPHY.....Charlotte.
BOYLE, BRYSON IRVIN.....Charlotte.
BURNS, JOHN KENDRICK.....Whiteville.
CATE, ARLINDO SANDERS, JR.....Greensboro.
CHAMBERS, WILLIAM CARLER.....Asheville.
CLARK, FRANKLIN ST. CLAIR.....Fayetteville.
CONNOR, HENRY GROVES, III.....Wilson.
FLOYD, ROBERT EDWIN.....Lumberton.
GAMBILL, ROBERT MACK.....Crumpler.
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GRAY, GORDON.....Winston-Salem.
HIGHTOWER, ERWIN AVERY.....Wadesboro.
LEAK, JOHN DUNCAN.....Wadesboro.
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MANNING, JOHN TAYLOR.....Chapel Hill.
SMITH, LOUIS HIXON.....Charlotte.
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TAYLOR, ROY ARTHUR.....Black Mountain.
TOWNSEND, NEWMAN ALEXANDER, JR.....Chapel Hill.
WEEKS, CAMERON ST. CLAIRE.....Tarboro.
WULBERN, JULIAN HENRY.....Winston-Salem.
YARBOROUGH, KEMP PLUMMER.....Louisburg.

COMITY LICENSEES

HIGDON, MADISON V.....Sylva.....From Georgia.
LOCKMILLER, DAVID ALEXANDER.....Raleigh.....From Missouri
WITTENBERG, S. MONROE.....From Ohio.

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 license by the said Board, January 29, 1936.

Witness my hand and seal, this the 30th day of January, 1936.

(SEAL.)

H. M. LONDON,
Secretary.

SUPERIOR COURTS, SPRING TERM, 1936

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

THIS CALENDAR IS UNOFFICIAL

EASTERN DIVISION

FIRST JUDICIAL DISTRICT

Spring Term, 1936—Judge Grady.

Beaufort—Jan. 13* (2); Feb. 17† (2); Mar. 16* (A); April 6; May 4† (2).

Camden—Mar. 9.

Chowan—Mar. 30.

Currituck—Mar. 2; April 27†.

Dare—May 25.

Gates—Mar. 23.

Hyde—May 18.

Pasquotank—Jan. 6†; Feb. 10†; Feb. 17* (A); Mar. 16†; May 4† (A) (2); June 1*; June 8† (2).

Perquimans—Jan. 13† (A); April 13.

Tyrrell—Feb. 3†; April 20.

SECOND JUDICIAL DISTRICT

Spring Term, 1936—Judge Harris.

Edgecombe—Jan. 20; Mar. 2; Mar. 30† (2); June 1 (2).

Martin—Mar. 16 (2); April 13† (A) (2); June 15.

Nash—Jan. 27; Feb. 17† (2); Mar. 9; April 20† (2); May 25.

Washington—Jan. 6 (2); April 13†.

Wilson—Feb. 3*; Feb. 10†; May 11*; May 18†; June 22†.

THIRD JUDICIAL DISTRICT

Spring Term, 1936—Judge Cranmer.

Bertie—Feb. 10; May 4 (2).

Halifax—Jan. 27 (2); Mar. 16† (2); April 27*; June 1† (2).

Hertford—Feb. 24*; April 13‡ (2).

Northampton—Mar. 30 (2).

Vance—Jan. 6*; Mar. 2*; Mar. 9†; June 15*; June 22†.

Warren—Jan. 13 (2); May 18 (2).

FOURTH JUDICIAL DISTRICT

Spring Term, 1936—Judge Sinclair.

Chatham—Jan. 13; Mar. 2†; Mar. 16†; May 11.

Harnett—Jan. 6*; Feb. 3† (2); Mar. 30† (A) (2); May 4†; May 18*; June 8† (2).

Johnston—Jan. 6† (A) (2); Feb. 10 (A); Feb. 17† (2); Mar. 2 (A); Mar. 9; April 13 (A); April 20† (2); June 22*.

Lee—Jan. 27† (A) (2); Mar. 23 (2).

Wayne—Jan. 20; Jan. 27†; Mar. 2† (A) (2); April 6; April 13†; May 25; June 1†.

FIFTH JUDICIAL DISTRICT

Spring Term, 1936—Judge Spears.

Carteret—Mar. 9; June 8 (2).

Craven—Jan. 6*; Jan. 27† (3); April 6‡; May 11†; June 1*.

Greene—Feb. 24 (2); June 22.

Jones—Mar. 30.

Pamlico—April 27 (2).

Pitt—Jan. 13†; Jan. 20; Feb. 17†; Mar. 16 (2); April 13 (2); May 4† (A); May 18† (2).

SIXTH JUDICIAL DISTRICT

Spring Term, 1936—Judge Small.

Duplin—Jan. 6† (3); Jan. 27*; Mar. 9† (2).

Lenoir—Jan. 20*; Feb. 17† (2); April 6; May 11† (2); June 8† (2); June 22*.

Onslow—Mar. 2; April 13† (2).

Sampson—Feb. 3 (2); Mar. 23† (2); April 27† (2).

SEVENTH JUDICIAL DISTRICT

Spring Term, 1936—Judge Barnhill.

Franklin—Jan. 13 (2); Feb. 17† (2); May 11.

Wake—Jan. 6*; Jan. 27†; Feb. 3*; Feb. 10†; Mar. 2*; Mar. 9† (2); Mar. 23† (2); April 6*; April 13† (2); April 27†; May 4*; May 18† (2); June 1*; June 8† (2).

EIGHTH JUDICIAL DISTRICT

Spring Term, 1936—Judge Parker.

Brunswick—Jan. 6†; April 6; June 15†.

Columbus—Jan. 27; Feb. 17† (2); April 27 (2); June 22*.

New Hanover—Jan. 13*; Feb. 3†* (2), Mar. 2† (2); Mar. 16*; April 13† (2); May 11*; May 25† (2); June 8*.

Pender—Mar. 23 (2).

NINTH JUDICIAL DISTRICT

Spring Term, 1936—Judge Williams.

Bladen—Jan. 6; Mar. 9; April 27.

Cumberland—Jan. 13*; Feb. 10† (2); Mar. 2* (A); Mar. 23† (2); May 4† (2); June 1*.

Hoke—Jan. 20; April 20.

Robeson—Jan. 27* (2); Feb. 24† (2); April 6†; April 13*; May 18†; May 25*; June 8†; June 15*.

TENTH JUDICIAL DISTRICT

Spring Term, 1936—Judge Frizzelle.

Alamance—Jan. 27† (A); Feb. 24*; Mar. 30†; May 11* (A); May 25† (2).

Durham—Jan. 6† (3); Feb. 17*; Feb. 24† (A); Mar. 2† (2); Mar. 16† (A); Mar. 23*; April 20† (A); April 27† (2); May 18*; May 25† (A) (3); June 22*.

Granville—Feb. 3 (2); April 6 (2).

Orange—Mar. 16; May 11†; June 8; June 15†.

Person—Jan. 20 (A); Jan. 27†; April 20.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

Spring Term, 1936—Judge Warlick.

Ashe—April 13*; May 25† (A) (2).
Alleghany—April 27 (A).
Caswell—Mar. 16.
Forsyth—Jan. 6 (2); Jan. 20† (A) (2); Feb. 3 (2); Feb. 13† (2); Mar. 2 (A) (2); Mar. 16† (A); Mar. 23†; Mar. 30 (2); April 13† (A) (2); May 4 (2); May 25† (2); June 8 (A) (2); June 22 (2).
Rockingham—Jan. 20* (2); Mar. 2† (2); May 4† (A) (2); May 18*; June 8† (2).
Surry—Feb. 17 (A) (2); April 30 (2).

TWELFTH JUDICIAL DISTRICT

Spring Term, 1936—Judge Rousseau.

Davidson—Jan. 27*; Feb. 17† (2); April 6† (A) (2); May 4*; May 25† (2); June 25*.
Guilford—Jan. 6† (2); Jan. 20*; Feb. 3† (2); Feb. 17† (A) (2); Mar. 2* (2); Mar. 16† (2); Mar. 30† (A) (2); April 13† (2); April 27*; May 11† (2); June 1† (A); June 8†; June 15*.
Stokes—Mar. 30*; April 6†.

THIRTEENTH JUDICIAL DISTRICT

Spring Term, 1936—Judge Pless.

Anson—Jan. 13*; Mar. 2†; April 13 (2); June 8†.
Moore—Jan. 20*; Feb. 10† (A); Mar. 23† (A) (2); May 18*; May 25†.
Richmond—Jan. 6*; Feb. 3† (A); Mar. 16†; April 6*; May 25† (A); June 15†.
Scotland—Mar. 9; April 27†; June 1.
Stanly—Feb. 3† (2); Mar. 30; May 11†.
Union—Jan. 27*; Feb. 17† (2); Mar. 23†; May 4†.

FOURTEENTH JUDICIAL DISTRICT

Spring Term, 1936—Judge McElroy.

Gaston—Jan. 13*; Jan. 20† (2); Mar. 9* (A); Mar. 16† (2); April 20*; May 18† (A) (2); June 1*.
Mecklenburg—Jan. 6*; Jan. 6† (A) (2); Jan. 20† (A) (2); Feb. 3† (3); Feb. 3† (A) (2); Feb. 17† (A) (2); Feb. 24*; Mar. 2† (2); Mar. 2† (A) (2); Mar. 16† (A) (2); Mar. 30† (2); Mar. 30† (A) (2); April 13†; April 20† (A); April 27† (2); April 27† (A) (2); May 11*; May 11† (A) (2); May 18† (2); May 25† (A) (2); June 8*; June 8† (A) (2); June 15†; June 25† (2).

FIFTEENTH JUDICIAL DISTRICT

Spring Term, 1936—Judge Alley.

Cabarrus—Jan. 6 (2); Feb. 24† (2); April 20 (2); June 8† (2).
Iredell—Jan. 27 (2); Mar. 9†; May 18 (2).
Montgomery—Jan. 20*; April 6† (2).
Randolph—Mar. 16† (2); Mar. 30*.
Rowan—Feb. 10 (2); Mar. 2† (A) (2); May 4 (2).

SIXTEENTH JUDICIAL DISTRICT

Spring Term, 1936—Judge Clement.

Burke—Feb. 17; Mar. 9† (2); June 1 (3).
Caldwell—Feb. 24 (2); May 18† (2).
Catawba—Jan. 13† (2); Feb. 3 (2); April 6† (2); May 4† (2).
Cleveland—Jan. 6; Mar. 23 (2); May 18† (A) (2).
Lincoln—Jan. 20 (A); Jan. 27†.
Watauga—April 20 (2); June 8† (A) (2).

SEVENTEENTH JUDICIAL DISTRICT

Spring Term, 1936—Judge Sink.

Alexander—June 22 (2).
Avery—April 6*; April 13†.
Davie—Mar. 16; May 25†.
Mitchell—Mar. 23 (2).
Wilkes—Mar. 2 (2); April 27 (2); June 1† (2).
Yadkin—Feb. 24*; May 11† (2).

EIGHTEENTH JUDICIAL DISTRICT

Spring Term, 1936—Judge Phillips.

Henderson—Jan. 6† (2); Mar. 2 (2); April 27† (2); May 25† (2).
McDowell—Dec. 28*; Feb. 10† (2); June 8 (3).
Polk—Jan. 27 (2).
Rutherford—April 13† (2); May 11 (2).
Transylvania—Mar. 30 (2).
Yancey—Jan. 20†; Mar. 16 (2).

NINETEENTH JUDICIAL DISTRICT

Spring Term, 1936—Judge Harding.

Buncombe—Jan. 13† (2); Jan. 27; Feb. 3† (2); Feb. 17; Mar. 2† (2); Mar. 16; Mar. 30; April 6† (2); April 20; May 4† (2); May 18; June 1† (2); June 15 (2).
Madison—Feb. 24; Mar. 23; April 27; May 25.

TWENTIETH JUDICIAL DISTRICT

Spring Term, 1936—Judge Oglesby.

Cherokee—Jan. 20† (2); Mar. 30 (2); June 15† (2).
Clay—April 27; May 4 (A).
Graham—Jan. 6† (A) (2); Mar. 16 (2); June 1† (2).
Haywood—Jan. 6† (2); Feb. 3 (2); May 4† (2).
Jackson—Feb. 17 (2); May 18 (2).
Macon—April 13 (2).
Swain—Mar. 2 (2).

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

UNITED STATES COURTS FOR NORTH CAROLINA

DISTRICT COURTS

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

EASTERN DISTRICT

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

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. A. HOOPER, 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.
CHAS. F. ROUSE, Assistant United States District Attorney, Kinston.
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:

Durham, fourth Monday in September and first Monday in February. HENRY REYNOLDS, Clerk, Greensboro.

Greensboro, first Monday in June and December. HENRY REYNOLDS, Clerk; MYRTLE D. COBB, Chief Deputy; LILLIAN HARKRADER, Deputy Clerk; P. H. BEESON, Deputy Clerk; MAUDE B. GRUBB, Deputy Clerk.

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

Salisbury, third Monday in April and October. HENRY REYNOLDS, Clerk, Greensboro.

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

Wilkesboro, third Monday in May and November. HENRY REYNOLDS, Clerk, Greensboro; LINVILLE BUMGARNER, Deputy Clerk.

OFFICERS

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

WESTERN DISTRICT

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

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

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

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

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

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

OFFICERS

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

CASES REPORTED

A

	PAGE
Accident Asso., Thompson v.	678
Allen v. Allen	744
Allen v. Cotton Mills	238
Alley v. Long	245
Allison v. Sharp	477
Almond, Tucker v.	333
Anderson v. Bridgers	456
Anderson v. Holland	746
Assurance Society, Cox v.	778
Assurance Society, Fore v.	548
Assurance Society, Whiteside v.	536
Attorney-General v. Gorson	320
Attorney-General v. Motor Club	624
Auman, Scott v.	853

B

Bailey v. Ferguson	264
Bailey v. Howell	712
Bailey, Rogers v.	849
Bank, Bowen v.	140
Bank, Bowling v.	463
Bank, *In re*	216
Bank v. Ins. Co.	17
Bank v. McKinney	668
Bank, Wheeler v.	258
Bank v. Williams	104
Banks v. Joyner	261
Banner v. Button Corp.	697
Basnight, Blount v.	268
Batson v. Laundry Co.	223
Benson v. Johnston County	751
Benton, Brown v.	285
Benton, S. v.	27
Bessire & Co. v. Ward	266
Biscoe, Burt v.	70
Black v. Trembly	743
Blackwelder, Trust Co. v.	252
Blades, S. v.	56
Blevins v. Utilities, Inc.	683
Blount v. Basnight	268
Bolch, Deitz v.	202
Bost, Carter v.	830
Bottling Co., Collins v.	821
Bowen v. Bank	140
Bowles v. R. R.	840
Bowling v. Bank	463
Boyles v. Ins. Co.	556
Breece v. Oil Co.	527
Bridgers, Anderson v.	456
Bridgers v. Ins. Co.	282
Brockwell, S. v.	209
Brogden, Rigsbee v.	510
Brokerage Co., Cheek v.	569
Brown v. Benton	285
Bryan v. Mfg. Co.	720
Bryan v. Street	284
Bryant v. Kellum	112
Bryant, Smith v.	213
Buckner v. Ins. Co.	640
Buffkin, S. v.	117
Building & Loan Asso., Williams v.	845
Bumgarner, Miller v.	735
Bundy v. Sutton	571
Bunn v. Holliday	351
Burt v. Biscoe	70
Button Corp., Banner v.	697

C

Cagle, S. v.	114
Cain, S. v.	275
Camby, S. v.	50
Carden, S. v.	404
Carter v. Bost	830
Carter v. Smith	788
Case v. Fitzsimons	783
Castevens v. Stanly County	75
Casualty Co. v. Dunn	736
Casualty Co., Gaffney v.	515
Casualty Co., Hedgepeth v.	45
Casualty Co., McCabe v.	577
Cecil, Stevens v.	738
Charlotte, White v.	573
Cheek v. Brokerage Co.	569
Chevrolet Co., Turner v.	587
Chevrolet Co., Williams v.	29
Clark, Hill v.	358
Cline v. Cline	531
Collins v. Bottling Co.	821
Comr. of Banks v. Hewitt	810
Comr. of Banks v. Johnson	112
Comr. of Banks v. Macclesfield Co.	277
Comr. of Banks v. Macclesfield Co.	280
Comr. of Banks v. Motor Co.	303
Comr. of Banks, Oliver v.	291
Comr. of Banks, Parker v.	494

PAGE

Comr. of Banks, Pasquotank County v. 552
Comr. of Banks v. Pittman 740
Comr. of Banks v. Progressive Stores, Inc. 36
Comr. of Banks v. Stewart 424
Comr. of Banks v. Tilley 842
Comr. of Banks v. Trust Co. 367
Comr. of Banks, Weeks v. 281
Comr. of Banks v. Williams 816
Comr. of Banks, Young v. 801
Comr. of Revenue, Distributing Corp. v. 47
Comrs. of Greene, Hill v. 4
Corl v. Corl 7
Cotton Mills, Allen v. 238
Cox v. Assurance Society 778
Cranor, Tomlinson v. 688
Crump, S. v. 52

D

Dahl, Hardy v. 746
Daniels v. Swift & Co. 567
Dansby v. Ins. Co. 127
Darnell, Newell v. 254
Davis v. Dockery 272
Davis, S. v. 242
DeHart, Queen v. 414
Deitz v. Bolch 202
Dennis v. Dixon 199
Dial, Ins. Co. v. 339
Dilling v. Ins. Co. 546
Dingle, S. v. 293
Distributing Corp. v. Maxwell, Comr. of Revenue 47
Dixon, Dennis v. 199
Dixson v. Realty Co. 354
Dockery, Davis v. 272
Downing, Pittman v. 219
Dry Cleaners, Fayetteville Light Infantry v. 14
Dunn, Casualty Co. v. 736

E

Edmunds Co., Richardson v. 837
Edmundson, S. v. 716
Elkes v. Trustee Corp. 832
Ellis v. Trust Co. 247
Etheridge v. R. R. 326
Eubanks, S. v. 758
Evans, *In re* Will of 828
Evans, Lange v. 747
Exum, Spain v. 852

F

PAGE

Fayetteville Light Infantry v. Dry Cleaners 14
Ferguson, Bailey v. 264
Fitzsimons, Case v. 783
Ford v. R. R. 108
Fore v. Assurance Society 548
Foster, *In re* 489
Fox v. Tea Co. 115
Franklin Estate, Jones v. 585
Fuller v. Lockhart 61
Furniture Co., Ramsey v. 165

G

Gaddy, S. v. 34
Gaffney v. Casualty Co. 515
Gaskins v. Lancaster 301
Godwin, S. v. 60
Goerch, Harrell v. 741
Gorson, Attorney-General v. 320
Grady v. Grady 749
Gray v. Worthington 582
Graybeal, Grogg v. 575
Greensboro v. Guilford County 655
Grier, S. v. 298
Grogg v. Graybeal 575
Grubb v. Motor Co. 88
Guilford County, Greensboro v. 655
Guilford County, School District v. 655

H

Hanna v. Howard 161
Hardy v. Dahl 746
Hardy, S. v. 83
Harnett County, Thomson v. 662
Harrell v. Goerch 741
Harris, S. v. 579
Harrison, Little v. 360
Haywood v. Morton 235
Haywood, Stanback v. 798
Haywood County v. Welch 583
Hedgepeth v. Casualty Co. 45
Hester v. R. R. 843
Hester, S. v. 99
Hewitt, Hood, Comr. of Banks v. 810
Highway Com., Reed v. 648
Hill v. Clark 358
Hill v. Comrs. of Greene 4
Hill, S. v. 53
Hinson, S. v. 187
Hinton, Whitehurst v. 392
Holderfield v. Pou 844
Holland, Anderson v. 746
Holland, Pardue v. 705

PAGE

Holland, Sparks v. 705
Holliday, Bunn v. 351
Honeycutt, Stephenson v. 701
Hood, Comr. of Banks, v. Hewitt 810
Hood, Comr. of Banks, v. Johnson 112
Hood, Comr. of Banks, v. Macclesfield Co. 277
Hood, Comr. of Banks, v. Macclesfield Co. 280
Hood, Comr. of Banks, v. Motor Co. 303
Hood, Comr. of Banks, Oliver v. 291
Hood, Comr. of Banks, Parker v. 494
Hood, Comr. of Banks, Pasquotank County v. 552
Hood, Comr. of Banks, v. Pittman 740
Hood, Comr. of Banks, v. Progressive Stores, Inc. 36
Hood, Comr. of Banks, v. Stewart 424
Hood, Comr. of Banks, v. Tilley 842
Hood, Comr. of Banks, v. Trust Co. 367
Hood, Comr. of Banks, Weeks v. 281
Hood, Comr. of Banks, v. Williams 816
Hood, Comr. of Banks, Young v. 801
Horne, S. v. 725
Hosiery Mills, Slade v. 823
Hospital, Lamont v. 839
Hotel Co., Rice v. 519
Hotel Corp., Morrow v. 848
Howard, Hanna v. 161
Howell, Bailey v. 712
Howell v. R. R. 589
Huffman, S. v. 10
Huskins, S. v. 727
Hussey v. Kidd 232

I

Ice Co., Powell v. 195
Ikerd v. R. R. 270
In re Bank 216
In re Foster 489
In re Parker 693
In re Trust Co. 389
In re Will of Evans 828
In re Will of Roediger 470
Ins. Co., Bank v. 17
Ins. Co., Boyles v. 556
Ins. Co., Bridgers v. 282
Ins. Co., Buckner v. 640
Ins. Co., Dansby v. 127
Ins. Co. v. Dial 339
Ins. Co., Dilling v. 546
Ins. Co. v. Lambeth 294

PAGE

Ins. Co. v. Lassiter 156
Ins. Co., Leonard v. 523
Ins. Co., Lindley v. 116
Ins. Co., Mauney v. 499
Ins. Co., Mills v. 296
Ins. Co. v. Morehead 174
Ins. Co. v. Nichols 817
Ins. Co., Owens v. 852
Ins. Co., Smith v. 504
Ins. Co., Sutton v. 826
Ins. Co., Weaver v. 850
Ins. Co., Williams v. 765
Ins. Co., Woody v. 364
Iseley, Watkins v. 256

J

Jackson, McCormick v. 359
Jackson v. Scheiber 441
Jenkins v. Myers 312
Johnson, Hood, Comr. of Banks, v. 112
Johnson, Smith v. 729
Johnston County, Benson v. 751
Jones v. Franklin Estate 585
Jones, S. v. 49
Joyner, Banks v. 261

K

Kellum, Bryant v. 112
Kelly v. Tea Co. 839
Kidd, Hussey v. 232

L

Lambeth, Ins. Co. v. 294
Lamont v. Hospital 839
Lancaster, Gaskins v. 301
Lancaster v. Lancaster 673
Landin, S. v. 20
Lange v. Evans 747
Langley, S. v. 178
Lassiter, Ins. Co. v. 156
Laundry Co., Batson v. 223
Lawson, S. v. 59
Lay v. Publishing Co. 134
Leonard v. *Ins. Co.* 523
Letterman v. Miller 709
Levy, Trust Co. v. 834
Lewis, S. v. 191
Libby, S. v. 363
Light Co. v. Mfg. Co. 560
Lindley v. Ins. Co. 116
Little v. Harrison 360

PAGE

Lloyd, Winborne v. 483
Lockhart, Fuller v. 61
Long, Alley v. 245
Long, S. v. 300
Lowe, S. v. 846

Mc

McCabe v. Casualty Co. 577
McCormick v. Jackson 359
McGraw v. R. R. 432
McKinney, Bank v. 668
McLean, S. v. 38
McLeod, S. v. 54

M

Macclesfield Co., Hood, Comr. of Banks, v. 277
Macclesfield Co., Hood, Comr. of Banks, v. 280
Mfg. Co., Bryan v. 720
Mfg. Co., Light Co. v. 560
Massie, Mortgage Co. v. 146
Mauney v. Ins. Co. 499
Maxwell, Comr. of Revenue, Distributing Corp. v. 47
Meares v. Williamson 448
Miller v. Bumgarner 735
Miller, Letterman v. 709
Miller, Reeves v. 362
Miller, Smith v. 170
Mills v. Ins. Co. 296
Mills Co., Tesencer v. 615
Misenheimer v. Troy 838
Mitchell, S. v. 1
Monroe, Smith v. 41
Montague, Pearce v. 42
Moore, S. v. 44
Morehead, Ins. Co. v. 174
Morris v. Waggoner 183
Morrow v. Hotel Corp. 848
Mortgage Co. v. Massie 146
Morton, Haywood v. 235
Motor Club, Attorney-General v. 624
Motor Co., Grubb v. 88
Motor Co., Hood, Comr. of Banks, v. 303
Murchison, S. v. 849
Myers, Jenkins v. 312

N

Newell v. Darnell 254
Nichols, Ins. Co. v. 817

O

PAGE

O'Berry, Vinson v. 287
O'Berry, Vinson v. 289
Odom v. Palmer 93
Oil Co., Breece v. 527
Oliver v. Hood, Comr. of Banks 291
Owens v. Ins. Co. 852

P

Palmer, Odom v. 93
Pardue v. Holland 705
Parker v. Hood, Comr. of Banks 494
Parker, *In re* 693
Parker, S. v. 32
Pasquotank County v. Hood, Comr. of Banks 552
Payne, Rutherford College v. 792
Pearce v. Montague 42
Pettus, Wright v. 732
Perry, S. v. 604
Phillips v. Slaughter 543
Pittman v. Downing 219
Pittman, Hood, Comr. of Banks v. 740
Pou, Holderfield v. 844
Powell v. Ice Co. 195
Power Co., Stanley v. 829
Pressley, S. v. 300
Progressive Stores, Inc., Hood, Comr. of Banks, v. 36
Publishing Co., Lay v. 134

Q

Queen v. DeHart 414

R

R. R., Bowles v. 840
R. R., Etheridge v. 326
R. R., Ford v. 108
R. R., Hester v. 843
R. R., Howell v. 589
R. R., Ikerd v. 270
R. R., McGraw v. 432
R. R., Trust Co. v. 304
Ramsey v. Furniture Co. 165
Ray, S. v. 772
Realty Co., Dixson v. 354
Reed v. Highway Com. 648
Reeves v. Miller 362
Rhinehart, S. v. 150
Rice v. Hotel Co. 519
Richardson v. Edmunds Co. 837
Richmond County v. Simmons 250

PAGE

Rigsbee v. Brogden 510
Roediger, *In re* Will of 470
Rogers v. Bailey 849
Rutherford College v. Payne 792

S

Scheiber, Jackson v. 441
School District v. Guilford County 655
Scott v. Auman 853
Seawell, Attorney-General, v. Motor Club 624
Seawell, Attorney-General, v. Gorson 320
Shackelford v. Woodmen of the World 633
Sharp, Allison v. 477
Shinn, S. v. 22
Shoaf, S. v. 851
Simmons, Richmond County v. 250
Slade v. Hosiery Mills 823
Slaughter, Phillips v. 543
Smith v. Bryant 213
Smith, Carter v. 788
Smith v. Ins. Co. 504
Smith v. Johnson 729
Smith v. Miller 170
Smith v. Monroe 41
Sorrell v. Woodmen of the World 226
Spain v. Exum 852
Sparks v. Holland 705
Speight v. Trust Co. 563
Spencer, S. v. 827
Stafford, Vannoy v. 748
Stamey, S. v. 581
Stanback v. Haywood 798
Stanley v. Power Co. 829
Stanly County, Castevens v. 75
S. v. Benton 27
S. v. Blades 56
S. v. Brockwell 209
S. v. Buffkin 117
S. v. Cagle 114
S. v. Cain 275
S. v. Camby 50
S. v. Carden 404
S. v. Crump 52
S. v. Davis 242
S. v. Dingle 293
S. v. Edmundson 716
S. v. Eubanks 758
S. v. Gaddy 34
S. v. Godwin 60

PAGE

S. v. Grier 298
S. v. Hardy 83
S. v. Harris 579
S. v. Hester 99
S. v. Hill 53
S. v. Hinson 187
S. v. Horne 725
S. v. Huffman 10
S. v. Huskins 727
S. v. Jones 49
S. v. Landin 20
S. v. Langley 178
S. v. Lawson 59
S. v. Lewis 191
S. v. Libby 363
S. v. Long 300
S. v. Lowe 846
S. v. McLean 38
S. v. McLeod 54
S. v. Mitchell 1
S. v. Murchison 849
S. v. Moore 44
S. v. Parker 32
S. v. Perry 604
S. v. Pressley 300
S. v. Ray 772
S. v. Rhinehart 150
S. v. Shinn 22
S. v. Shoaf 851
S. v. Spencer 827
S. v. Stamey 581
S. v. Swan 836
S. v. Thomas 722
S. v. Watson 229
S. v. Webb 302
S. v. Wells 358
S. v. Williams 57
Stephenson v. Honeycutt 701
Stevens v. Cecil 738
Stewart, Hood, Comr. of Banks, v. 424
Stores Co., Inc., Williams v. 591
Street, Bryan v. 284
Sutton, Bundy v. 571
Sutton v. Ins. Co. 826
Swan, S. v. 836
Swift & Co., Daniels v. 567

T

Tea Co., Fox v. 115
Tea Co., Kelly v. 839
Teseneer v. Mills Co. 615
Thomas, S. v. 722

PAGE

Thomson v. Harnett County 662
Thompson v. Accident Asso. 678
Tilley, Hood, Comr. of Banks, v. 842
Tomlinson v. Cranor 688
Trembly, Black v. 743
Troy, Misenheimer v. 838
Trust Co. v. Blackwelder 252
Trust Co., Ellis v. 247
Trust Co., Hood, Comr. of Banks, v. 367
Trust Co., *In re* 389
Trust Co. v. Levy 834
Trust Co. v. R. R. 304
Trust Co., Speight v. 563
Trust Co. v. Williams 806
Trustee Corp., Elkes v. 832
Tucker v. Almond 333
Turner v. Chevrolet Co. 587

U

Utilities, Inc., Blevins v. 683

V

Vannoy v. Stafford 748
Vick v. Winslow 540
Vinson v. O'Berry 287
Vinson v. O'Berry 289

W

Waggoner, Morris v. 183
Ward, Bessire & Co. v. 266
Warren v. Ward 835
Watkins v. Iseley 256
Watson, S. v. 229

PAGE

Weaver v. Ins. Co. 850
Webb, S. v. 302
Weeks v. Hood, Comr. of Banks ... 281
Welch, Haywood County v. 583
Wells, S. v. 358
Wheeler v. Bank 258
White v. Charlotte 573
White v. Winslow 207
Whitehurst v. Hinton 392
Whiteside v. Assurance Society 536
Whitley v. Whitley 25
Williams, Bank v. 104
Williams v. Building & Loan Asso. 845
Williams v. Chevrolet Co. 29
Williams, Hood, Comr. of Banks, v. 816
Williams v. Ins. Co. 765
Williams, S. v. 57
Williams v. Stores Co., Inc. 591
Williams, Trust Co. v. 806
Williamson, Meares v. 448
Winborne v. Lloyd 483
Winslow, Vick v. 540
Winslow, White v. 207
Woodmen of the World, Shackelford v. 633
Woodmen of the World, Sorrell v. 226
Woody v. Ins. Co. 364
Worthington, Gray v. 582
Wright v. Pettus 732

Y

Young v. Hood, Comr. of Banks 801

DISPOSITION OF APPEALS FROM THE SUPREME COURT OF NORTH CAROLINA TO THE SUPREME COURT OF THE UNITED STATES 854

CASES CITED

A

Accident Asso., Follette v. ..... 110 N. C., 377 782
Adams, Combes v. ..... 150 N. C., 64 583
Aden v. Doub ..... 146 N. C., 10 177
Agnew, S. v. ..... 202 N. C., 755 22
Aldridge v. Ins. Co. ..... 194 N. C., 683 769
Alexander v. Alexander ..... 120 N. C., 472 797
Alexander v. Boyd ..... 204 N. C., 103 159
Alexander, Davidson v. ..... 84 N. C., 621 535
Alexander, Davis v. ..... 202 N. C., 130 ..... 653, 750
Allen v. Armfield ..... 190 N. C., 870 429
Allen v. R. R. ..... 120 N. C., 548 469
Allen v. Reidsville ..... 178 N. C., 513 653
Allen v. Smith ..... 183 N. C., 222 744
Allen, S. v. ..... 107 N. C., 805 775
Allen, S. v. ..... 166 N. C., 265 54
Allen v. Yarborough ..... 201 N. C., 568 422
Alley v. Long ..... 209 N. C., 245 743
Allison Corp., Foster v. ..... 191 N. C., 166 430
Allsbrook, Wilson v. ..... 203 N. C., 498 176
Almond, Tucker v. ..... 209 N. C., 333 430
Alston v. Connell ..... 140 N. C., 485 357
Alsworth v. Cedar Works ..... 172 N. C., 17 98
Aluminum Co., Mfg. Co. v. ..... 207 N. C., 52 755
Ammons v. Fisher ..... 208 N. C., 712 440
Anderson, S. v. ..... 208 N. C., 771 ..... 60, 61, 102, 303
Andrews v. Clay County ..... 200 N. C., 280 755
Andrews, Grimes v. ..... 170 N. C., 515 351
Andrews v. Hood, Comr. of Banks ..... 207 N. C., 499 499
Andrews, Improvement Co. v. ..... 176 N. C., 280 253
Andrews, Mason v. ..... 192 N. C., 135 331
Applicants for License, *In re* ..... 143 N. C., 1 631
Armfield, Allen v. ..... 190 N. C., 870 429
Armstrong, Ripley v. ..... 159 N. C., 158 186
Arnold v. Trust Co. ..... 195 N. C., 345 282
Arrington, S. v. ..... 7 N. C., 571 422
Asbestos Co., McNeely v. ..... 206 N. C., 568 825
Ashby v. Page ..... 106 N. C., 328 493
Asheville, Flemming v. ..... 205 N. C., 765 258
Asheville, Johnson v. ..... 196 N. C., 550 603
Asheville, Justice v. ..... 161 N. C., 62 514
Asheville, Miller v. ..... 112 N. C., 759 514
Ashford v. Shrader ..... 167 N. C., 45 31
Askew, Carr v. ..... 94 N. C., 194 695
Assurance Co., Colson v. ..... 207 N. C., 581 ..... 680, 769, 782
Assurance Corp., Walls v. ..... 206 N. C., 903 578
Assurance Society, Barnes v. ..... 204 N. C., 800 782
Assurance Society, Boozer v. ..... 206 N. C., 848 ..... 540, 551

Assurance Society v. Lazarus.....207 N. C., 63..... 98
Assurance Society, Thompson v...199 N. C., 59..... 297
Atkinson v. Downing.....175 N. C., 244..... 494
Atkinson, Live Stock Co. v.....189 N. C., 250..... 431
Atkinson v. Mills Co.....201 N. C., 5..... 241
Austin v. George.....201 N. C., 380..... 350
Averett, Oil & Grease Co. v.....192 N. C., 465..... 530
Avery v. Guy.....202 N. C., 152..... 97
Avery v. Stewart.....136 N. C., 426.....176, 565
Avery County, Brooks v.....206 N. C., 840..... 666
Avery County, Trustees v.....184 N. C., 469..... 757
Aydlett, Hite v.....192 N. C., 166..... 771
Aydlett, Swift & Co. v.....192 N. C., 330.....31, 176
Ayres, Coral Gables v.....208 N. C., 426.....175, 697

B

Bagley, S. v.....158 N. C., 608..... 422
Bailey v. Matthews.....156 N. C., 78..... 439
Bailey, S. v..... 60 N. C., 137..... 154
Bails, Grocery Co. v.....177 N. C., 298..... 737
Bain v. State..... 86 N. C., 49..... 289
Baird v. Reynolds..... 99 N. C., 469..... 176
Baker v. Clayton.....202 N. C., 741..... 576
Baker, *In re*.....187 N. C., 257.....562, 563
Baker v. Ins. Co.....206 N. C., 106..... 527
Baker v. R. R.....205 N. C., 329.....22, 42, 263
Balcum v. Johnson.....177 N. C., 213..... 255
Baldwin, S. v.....184 N. C., 789..... 602
Ballinger v. Thomas.....195 N. C., 517.....263, 596, 853
Ball-Thrash Co. v. McCormick....162 N. C., 471..... 209
Bank v. Bank.....197 N. C., 526..... 282
Bank, Bowen v.....209 N. C., 140..... 470
Bank v. Bridgers..... 98 N. C., 67..... 787
Bank v. Broadhurst.....197 N. C., 365..... 469
Bank v. Broom Co.....188 N. C., 508..... 799
Bank, Chesson v.....190 N. C., 187..... 439
Bank v. Corporation Com.....201 N. C., 381..... 499
Bank v. Cotton Mills.....115 N. C., 507..... 374
Bank v. Dardine.....207 N. C., 509.....175, 531
Bank v. Evans.....191 N. C., 535..... 584
Bank v. Glenn..... 68 N. C., 35..... 108
Bank, Griffin v.....205 N. C., 253.....292, 304
Bank v. Hessee.....207 N. C., 71.....736, 749
Bank v. Hester.....188 N. C., 68..... 311
Bank v. Howard.....188 N. C., 543..... 787
Bank, *In re*.....208 N. C., 65.....219, 292
Bank v. Ins. Asso.....203 N. C., 669.....645, 647
Bank v. Ins. Co.....187 N. C., 97.....645, 646
Bank v. Ins. Co.....188 N. C., 747..... 645
Bank, Lacy v.....183 N. C., 373..... 69
Bank v. Lewis.....203 N. C., 644..... 792
Bank v. McArthur.....168 N. C., 48..... 153
Bank v. McEwen.....160 N. C., 414..... 206
Bank, Plotkin v.....188 N. C., 711..... 542

Bank v. Rosenstein....207 N. C., 529.... 176
Bank, Smathers v....135 N. C., 410....373, 374, 376, 815
Bank, Smathers v....155 N. C., 283....373, 376
Bank, Speas v....188 N. C., 524....177, 275
Bank v. Winslow....193 N. C., 470.... 176
Banking Co. v. Morehead....116 N. C., 413....267, 429
Banks, S. v....206 N. C., 479.... 52
Bar Association v. Strickland....200 N. C., 630....514, 696
Barber v. R. R....193 N. C., 691....308, 603
Barbour, Gibson v....100 N. C., 192.... 833
Barbour v. Wake County....197 N. C., 314.... 667
Barefoot, *Ex Parte*....201 N. C., 393.... 92
Barham, Crouse v....174 N. C., 460.... 186
Barlow, Fox v....206 N. C., 66.... 172
Barnes v. Assurance Society....204 N. C., 800.... 782
Barnes v. Crawford....201 N. C., 434....176, 809
Barnes, Elam v....110 N. C., 73.... 304
Barnes v. McCullers....108 N. C., 46.... 810
Barnett, Carawan v....197 N. C., 511.... 513
Barringer v. Trust Co....207 N. C., 505.... 216
Basnight, Nowell v....185 N. C., 142.... 704
Bass, Chemical Co. v....175 N. C., 426.... 205
Bateman v. Sterrett....201 N. C., 59....70, 160
Batson v. Laundry Co....205 N. C., 93.... 225
Batson v. Laundry Co....206 N. C., 371.... 225
Battle v. Battle....116 N. C., 161.... 114
Batts v. Sullivan....182 N. C., 129.... 514
Bazemore, S. v....193 N. C., 336.... 422
Beach v. Patton....208 N. C., 134.... 255
Beal v. R. R....136 N. C., 298.... 562
Beal, S. v....199 N. C., 278.... 154
Beam, S. v....181 N. C., 597.... 190
Beam, S. v....184 N. C., 740.... 86
Beaman, Jones v....117 N. C., 259.... 585
Bean v. Detective Co....206 N. C., 125.... 260
Bean, Hill v....150 N. C., 436.... 603
Beard, *In re* Will of....202 N. C., 661.... 359
Beard v. Sovereign Lodge....184 N. C., 154.... 740
Beard, S. v....207 N. C., 673.... 195
Beasley, S. v....196 N. C., 797.... 52
Beatty, Heyer v.... 83 N. C., 285.... 351
Beaver v. Fetter....176 N. C., 334.... 421
Beavers, S. v....188 N. C., 595.... 154
Bechtel, Greene v....193 N. C., 94.... 623
Beck v. Tanning Co....179 N. C., 123.... 603
Beck v. Wilkins-Ricks Co....186 N. C., 210.... 439
Beck, Woodson v....151 N. C., 144.... 175
Becton v. Dunn....137 N. C., 559.... 431
Belk's Dept. Store v. Ins. Co....208 N. C., 267....530, 769
Bell, Freeman v....150 N. C., 146....91, 176
Bell, Gough v....180 N. C., 268.... 431
Bell, Jackson v....201 N. C., 336.... 840
Bell, S. v....184 N. C., 701.... 190
Bell, S. v....205 N. C., 225.... 581

Benson, S. v. ....183 N. C., 795 ....125, 126
Berry, Phifer v. ....202 N. C., 388 ....48, 292, 544, 827
Bessire & Co. v. Ward ....206 N. C., 858 267
Bessire & Co. v. Ward ....209 N. C., 266 429
Biberstein, Case v. ....207 N. C., 514 677
Biscoe, Burt v. ....209 N. C., 70 ....80, 81
Bittings, S. v. ....206 N. C., 798 ....194, 195
Bizzell v. Equipment Co. ....182 N. C., 98 206
Black v. Ins. Co. ....148 N. C., 169 646
Blackmore v. Winders ....144 N. C., 212 469
Blackwelder, S. v. ....182 N. C., 899 763
Blackwell, Ray v. ....94 N. C., 10 175
Blackwell, S. v. ....193 N. C., 313 3
Blackwood v. Jones ....57 N. C., 54 350
Blades v. Hood, Comr. of Banks ....203 N. C., 56 372
Blair v. Comrs. of New Hanover ....187 N. C., 488 74
Blalock v. Clark ....137 N. C., 140 331
Bland v. Faulkner ....194 N. C., 427 796
Bland, S. v. ....97 N. C., 438 764
Board of Education, Chapman-Hunt Co. v. ....198 N. C., 111 800
Board of Education v. Comrs of Sampson ....192 N. C., 274 68
Board of Education, Crabtree v. ....199 N. C., 645 69
Board of Education v. Forrest ....193 N. C., 519 563
Board of Education, Reeves v. ....204 N. C., 74 80
Board of Education, Taylor v. ....206 N. C., 263 80
Board of Equalization, Elliott v. ....203 N. C., 749 69
Board of Financial Control v. Henderson County ....208 N. C., 569 755
Bobbitt Co. v. Land Co. ....191 N. C., 323 92
Bond v. Cotton Mills ....166 N. C., 20 ....19, 555
Bond v. Tarboro ....193 N. C., 248 655
Bonsal, Houser v. ....149 N. C., 51 721
Booker, Ogburn v. ....197 N. C., 687 285
Boone, Sykes v. ....132 N. C., 199 176
Booth v. Hairston ....193 N. C., 278 745
Booth v. Hairston ....195 N. C., 8 ....362, 745
Boozer v. Assurance Society ....206 N. C., 848 ....540, 551
Borden, University v. ....132 N. C., 476 797
Best v. Lassiter ....105 N. C., 490 692
Bottling Co., Enloe v. ....208 N. C., 305 823
Bottling Co., Hampton v. ....208 N. C., 331 568
Bottling Co., Perry v. ....196 N. C., 175 823
Bottling Co., Warren v. ....204 N. C., 288 92
Bourne, Fertilizer Co. v. ....205 N. C., 337 ....512, 514
Boushall v. Stronach ....172 N. C., 273 175
Boushiar v. Willis ....207 N. C., 511 700
Bowden v. Kress & Co. ....198 N. C., 559 ....116, 596
Bowen v. Bank ....209 N. C., 140 470
Bowen, Tudor v. ....152 N. C., 441 307
Bowman v. Trust Co. ....170 N. C., 301 154
Bowser v. Tarry ....156 N. C., 35 177
Boyd, Alexander v. ....204 N. C., 103 159

Boyd, McNair v. ....163 N. C., 478 714
Boyden, Cox v. ....167 N. C., 320 206
Boynton, S. v. ....155 N. C., 456 85
Bradley, Johnson v. .... 31 N. C., 362 234
Bradshaw, Register Co. v. ....174 N. C., 414 31
Brady, Thornton v. ....100 N. C., 38 475
Braswell, Wood v. ....192 N. C., 588 ....58, 696
Brickell v. Hines ....179 N. C., 254 494
Bridgers, Bank v. .... 98 N. C., 67 787
Brigman v. Construction Co. ....192 N. C., 791 22
Brinkley, Cahoon v. ....168 N. C., 257 561
Brinkley, Craddock v. ....177 N. C., 125 ....292, 573
Britt v. R. R. ....148 N. C., 37 622
Brittain, S. v. ....143 N. C., 668 52
Brittain v. Westall ....137 N. C., 30 173
Broadhurst, Bank v. ....197 N. C., 365 469
Broadhurst v. Drainage Comrs. ...195 N. C., 439 796
Broadway v. Cope ....208 N. C., 85 743
Broadway, Murray Co. v. ....176 N. C., 149 530
Broadway, S. v. ....157 N. C., 598 103
Brodnax v. Groom .... 64 N. C., 244 ....81, 652
Brooks v. Avery County ....206 N. C., 840 666
Brooks, Pass v. ....125 N. C., 129 836
Brooks, Pass v. ....127 N. C., 119 836
Broom Co., Bank v. ....188 N. C., 508 799
Brotherhood, Lee v. ....191 N. C., 359 769
Brown, Buie v. ....104 N. C., 335 469
Brown, Chavis v. ....174 N. C., 122 206
Brown, High Point v. ....206 N. C., 664 513
Brown v. Lumber Co. ....167 N. C., 9 742
Brown v. Power Co. ....140 N. C., 333 621
Brown v. R. R. ....204 N. C., 25 308
Brown, S. v. ....182 N. C., 761 39
Brown, S. v. ....206 N. C., 747 ....55, 301
Brown v. Wood ....201 N. C., 309 173
Brunson, Duffer v. ....188 N. C., 789 431
Bryan v. Hodges ....107 N. C., 492 350
Bryan, Rose v. ....157 N. C., 173 737
Bryan, S. v. .... 98 N. C., 644 631
Bryant v. Bryant ....193 N. C., 372 566
Bryant, S. v. ....189 N. C., 112 486
Bryson, S. v. ....200 N. C., 50 61
Buchanan v. Clark ....164 N. C., 56 ....98, 745
Buckner, Ins. Co. v. ....201 N. C., 78 428
Buie v. Brown ....104 N. C., 335 469
Building Co. v. Sanders ....185 N. C., 328 177
Building & Loan Asso., Dorrity v. ...204 N. C., 698 531
Building & Loan Asso., Williams v. 207 N. C., 362 845
Bullard v. Johnson .... 65 N. C., 436 809
Bullock, Hicks v. .... 96 N. C., 164 715
Bulluck v. Ins. Co. ....200 N. C., 642 ....526, 551
Buncombe County v. Hood, Comr. of Banks ....202 N. C., 792 741
Buncombe County, Reeves v. ....204 N. C., 45 668

Bunn v. Holliday....209 N. C., 351.... 833
Bunn v. Maxwell, Comr. of Revenue....199 N. C., 557.... 48
Bunting v. Ricks.... 22 N. C., 130.... 350
Burgess, Morris v....116 N. C., 40.... 130
Burgess, S. v....192 N. C., 668.... 303
Burgin v. R. R....115 N. C., 673.... 169
Burroughs v. Womble....205 N. C., 432.... 348
Burt v. Biscoe....209 N. C., 70....80, 81
Burton v. Ins. Co....198 N. C., 498....578, 769
Burton, Paul v....180 N. C., 45.... 522
Butler v. Ins. Co....196 N. C., 203....122, 124
Butler v. Stainback.... 87 N. C., 216.... 279
Byers, S. v....100 N. C., 512.... 244
Bynum, Smith v.... 92 N. C., 108.... 787
Byrd v. Lumber Co....207 N. C., 253.... 854

C

Cabe v. Parker-Graham-Sexton Co....202 N. C., 176.... 825
Cagle, S. v....209 N. C., 114.... 194
Cahoon v. Brinkley....168 N. C., 257.... 561
Cahoon v. Comrs. of Hyde....207 N. C., 48.... 700
Call, Rousseau v....169 N. C., 173....175, 797
Call v. Wilkesboro....115 N. C., 337.... 652
Callahan, Mills v....126 N. C., 756.... 809
Camby, S. v....209 N. C., 50.... 54
Cameron, S. v....166 N. C., 379.... 124
Campbell v. Murphy.... 55 N. C., 357.... 98
Campbell v. Shaw....170 N. C., 186.... 108
Canal Co. v. Whitley....172 N. C., 100.... 513
Canton, Felmet v....177 N. C., 52.... 513
Carawan v. Barnett....197 N. C., 511.... 513
Carawan, Swan v....168 N. C., 472.... 274
Carlson, S. v....171 N. C., 818....22, 763
Carlton v. Oil Co....206 N. C., 117.... 175
Carpenter v. R. R....184 N. C., 400....288, 289
Carr v. Askew.... 94 N. C., 194.... 695
Carrier, Comr. of Banks v....202 N. C., 850.... 376
Carson, Coxe v....169 N. C., 132.... 177
Carson, Roebuck v....196 N. C., 672.... 175
Carter v. Ins. Co....208 N. C., 665.... 539
Carter v. Lumber Co....129 N. C., 203.... 255
Carter, S. v....194 N. C., 293.... 479
Carter v. Young....193 N. C., 678....455, 805, 806
Carteret County, Thomas v....182 N. C., 374....175, 176, 177
Case v. Biberstein....207 N. C., 514.... 677
Casey, S. v....201 N. C., 620.... 58
Cash Register Co. v. Townsend...137 N. C., 652.... 360
Castellee v. Jenkins....186 N. C., 166.... 319
Castlebury, Green v.... 70 N. C., 20.... 695
Casualty Co., Moore v....207 N. C., 433....578, 771
Catawba County, Hickory v....206 N. C., 165....68, 80, 660
Cathey v. Shoemaker....119 N. C., 424.... 413

Caudle, Taylor v. ....208 N. C., 298 431
Cauley v. Sutton ....150 N. C., 327 44
Cecil v. High Point ....165 N. C., 431 263
Cedar Works, Alsworth v. ....172 N. C., 17 98
Cedar Works, Lumber Co. v. ....165 N. C., 83 715
Cement Co., Shale Products Co. v. ..200 N. C., 226 514
Chaffin, Pratt v. ....136 N. C., 350 178
Chamberlain v. Trogden ....148 N. C., 139 ....378, 379
Chambers v. R. R. ....199 N. C., 682 255
Chambers, S. v. ....180 N. C., 705 294
Chancey v. Powell ....163 N. C., 159 829
Chandley, Redmond v. ....119 N. C., 575 799
Chapman-Hunt Co. v. Board of Education ....198 N. C., 111 800
Chappell v. Surety Co. ....191 N. C., 703 98
Charlotte, Hammond v. ....205 N. C., 469 74
Charlotte, Myers v. ....146 N. C., 246 621
Charlotte, White v. ....207 N. C., 721 574
Chavis v. Brown ....174 N. C., 122 206
Cheatham v. Crews ....81 N. C., 343 809
Chemical Co. v. Bass ....173 N. C., 426 205
Chemical Co. v. Griffin ....202 N. C., 812 176
Chemical Co. v. Walston ....187 N. C., 817 787
Cherokee County v. Meroney ....173 N. C., 653 810
Cherokee County, R. R. v. ....177 N. C., 86 59
Cherry v. Gilliam ....195 N. C., 233 251
Cherry v. R. R. ....186 N. C., 263 522
Cherry, Wood v. ....73 N. C., 110 176
Chesson v. Bank ....190 N. C., 187 439
Chevrolet Co., Williams v. ....209 N. C., 29 176
Child v. Hood, Comr. of Banks ....203 N. C., 648 741
Christian, Woody v. ....205 N. C., 610 455
Clark, Blalock v. ....137 N. C., 140 331
Clark, Buchanan v. ....164 N. C., 56 ....98, 745
Clark, Gallop v. ....188 N. C., 186 92
Clark v. McQueen ....195 N. C., 714 69
Claus v. Lee ....140 N. C., 552 331
Clay County, Andrews v. ....200 N. C., 280 755
Clayton, Baker v. ....202 N. C., 741 576
Cleve, Morris, v. ....194 N. C., 202 304
Cleve, Morris v. ....197 N. C., 253 293
Clinard, Shelton v. ....187 N. C., 664 ....16, 285
Coach Co., Grimes v. ....203 N. C., 605 570
Cobb v. R. R. ....172 N. C., 58 653
Cobb v. Rhea ....137 N. C., 295 796
Cocke v. Hood, Comr. of Banks ....207 N. C., 14 498
Cogdell v. R. R. ....129 N. C., 398 154
Cohoon v. State ....201 N. C., 312 290
Cole, Seawell v. ....194 N. C., 546 304
Coleman, Hedgepeth v. ....183 N. C., 309 246
Coley-Bardin, Improvement Co. v. ....156 N. C., 255 150
Collins v. Davis ....132 N. C., 106 787
Collins, Deese v. ....191 N. C., 749 139
Collins, Rhodes v. ....198 N. C., 23 248

Collins, S. v. ..... 115 N. C., 716 294
Collins, S. v. ..... 118 N. C., 1203 244
Collins, S. v. ..... 189 N. C., 15 195
Collins v. Vandiford ..... 196 N. C., 237 ..... 274, 703
Colson v. Assurance Co. ..... 207 N. C., 581 ..... 680, 769, 782
Colson, S. v. ..... 193 N. C., 236 728
Colt v. Kimball ..... 190 N. C., 169 ..... 331, 530
Combes v. Adams ..... 150 N. C., 64 583
Combs, S. v. ..... 200 N. C., 671 14
Comr. of Banks, Andrews v. ..... 207 N. C., 499 499
Comr. of Banks, Blades v. ..... 203 N. C., 56 372
Comr. of Banks, Buncombe County v. ..... 202 N. C., 792 741
Comr. of Banks v. Carrier ..... 202 N. C., 850 376
Comr. of Banks, Child v. ..... 203 N. C., 648 741
Comr. of Banks, Cocke v. ..... 207 N. C., 14 498
Comr. of Banks v. Darden ..... 206 N. C., 566 378
Comr. of Banks, Edgerton v. ..... 205 N. C., 816 479
Comr. of Banks, Hackney v. ..... 203 N. C., 486 555
Comr. of Banks v. Johnson ..... 208 N. C., 77 112
Comr. of Banks v. Macclesfield Co. ..... 209 N. C., 280 583
Comr. of Banks v. Martin ..... 203 N. C., 620 378
Comr. of Banks, Oliver v. ..... 209 N. C., 291 827
Comr. of Banks v. Paddison ..... 206 N. C., 631 378
Comr. of Banks, Parker v. ..... 209 N. C., 494 804
Comr. of Banks, Pritchard v. ..... 205 N. C., 790 374
Comr. of Banks v. Stewart ..... 209 N. C., 424 453
Comr. of Banks, Tea Co. v. ..... 205 N. C., 313 544
Comr. of Banks, Textile Corp. v. ..... 206 N. C., 782 282
Comr. of Banks v. Trust Co. ..... 209 N. C., 367 804
Comr. of Revenue, Bunn v. ..... 199 N. C., 557 48
Comr. of Revenue, Distributing Corp. v. ..... 209 N. C., 47 292
Comr. of Revenue v. Hinsdale ..... 207 N. C., 37 ..... 48, 514
Comrs. of Buncombe, Fortune v. ..... 140 N. C., 322 272
Comrs. of Carteret, R. R. v. ..... 75 N. C., 474 ..... 754, 755
Comrs. of Duplin, Hall v. ..... 194 N. C., 768 69
Comrs. of Durham, Glenn v. ..... 201 N. C., 233 82
Comrs. of Forsyth, United Brethren v. ..... 115 N. C., 489 757
Comrs. of Forsyth, Vaughn v. ..... 117 N. C., 429 ..... 81, 652
Comrs. of Franklin, Spitzer v. ..... 188 N. C., 30 655
Comrs. of Gates, Hill v. ..... 190 N. C., 123 667
Comrs. of Greene, Edwards v. ..... 170 N. C., 448 653
Comrs. of Guilford, Frazier v. ..... 194 N. C., 49 69
Comrs. of Hyde, Cahoon v. ..... 207 N. C., 48 600
Comrs. of Iredell v. White ..... 123 N. C., 534 585
Comrs. of Jackson, Day v. ..... 191 N. C., 780 668
Comrs. of Johnston v. Lacy, State Treasurer ..... 174 N. C., 141 ..... 667, 668
Comrs. of Madison, Jones v. ..... 135 N. C., 218 603
Comrs. of Madison, Jones v. ..... 137 N. C., 579 603
Comrs. of New Hanover, Blair v. ..... 187 N. C., 488 74

Comrs. of Pender, Mfg. Co. v.....196 N. C., 744..... 48
Comrs. of Sampson, Board of
Education v. .....192 N. C., 274..... 68
Comrs. of Surry, Jackson v.....171 N. C., 379..... 81
Comrs. of Vance, Newman v.....208 N. C., 675.....5, 58, 696
Comrs. of Wake, Lewis v..... 74 N. C., 198..... 410
Comrs. of Wilson, Harrell v.....206 N. C., 225..... 82
Comrs. of Yadkin, Hemric v.....206 N. C., 845..... 80
Committee on Grievances of Bar
Asso. v. Strickland.....200 N. C., 630.....514, 696
Concord, Parks-Belk Co. v.....194 N. C., 134..... 575
Conley v. R. R.....109 N. C., 692..... 469
Connell, Alston v.....140 N. C., 485..... 357
Conrad v. Foundry Co.....198 N. C., 723..... 825
Construction Co., Brigman v.....192 N. C., 791..... 22
Construction Co., Ice Co. v.....194 N. C., 407..... 319
Construction Co., Porter v.....195 N. C., 328..... 771
Construction Co., Taylor v.....195 N. C., 30..... 603
Cook, Hutton v.....173 N. C., 496..... 144
Cook v. Mfg. Co.....182 N. C., 205..... 111
Cook v. Mfg. Co.....183 N. C., 48..... 111
Cook, S. v.....162 N. C., 586..... 153
Cook, S. v.....207 N. C., 261.....33, 190
Cooke v. Tea Co.....204 N. C., 495..... 116
Cooper v. McKinnon.....122 N. C., 447..... 737
Cooper v. R. R.....140 N. C., 209..... 308
Cooperage Co., Swain v.....189 N. C., 528..... 308
Cope, Broadway v.....208 N. C., 85..... 743
Cope, S. v.....204 N. C., 28.....21, 22, 734, 828, 850
Coral Gables v. Ayres.....208 N. C., 426.....175, 697
Cordon, Ins. Co. v.....208 N. C., 723..... 836
Corey v. Hooker.....171 N. C., 229..... 215
Corley Co. v. Griggs.....192 N. C., 171..... 530
Corpening, S. v.....191 N. C., 751..... 58
Corporation Com., Bank v.....201 N. C., 381..... 499
Corporation Com. v. Latham.....201 N. C., 342..... 378
Corporation Com. v. McLean.....202 N. C., 77.....292, 376, 377
Corporation Com. v. Murphey.....197 N. C., 42.....219, 292
Corporation Com. v. Wilkinson.....201 N. C., 344.....735, 749
Corum v. Tobacco Co.....205 N. C., 213..... 568
Cotton Mills, Bank v.....115 N. C., 507..... 374
Cotton Mills, Bond v.....166 N. C., 20.....19, 555
Cotton Mills v. Cotton Mills.....115 N. C., 475..... 374
Cotton Mills, Pilley v.....201 N. C., 426..... 825
Cotton Mills, Starling v.....171 N. C., 222..... 154
Cotton Mills, Wrenn v.....198 N. C., 89..... 735
Coward, Darden v.....197 N. C., 35..... 292
Cowart v. Lumber Co.....194 N. C., 787..... 312
Cowles v. Cowles.....121 N. C., 272..... 796
Cox v. Boyden.....167 N. C., 320..... 206
Cox v. Lumber Co.....193 N. C., 28.....312, 840
Coxe v. Carson.....169 N. C., 132..... 177
Crabtree v. Board of Education...199 N. C., 645..... 69
Craddock v. Brinkley.....177 N. C., 125.....292, 563

Craven, *In re* Will of....169 N. C., 561.... 413
Crawford, Barnes v....201 N. C., 434....176, 809
Crawford v. Michael & Bivens, Inc. ....199 N. C., 224.... 241
Crawford v. Owens....129 N. C., 286.... 833
Crawford, S. v....197 N. C., 513....51, 52
Creighton v. Water Comrs....143 N. C., 171.... 621
Crews, Cheatham v.... 81 N. C., 343.... 809
Crews v. Crews....192 N. C., 679....715, 716
Crisp v. Fibre Co....193 N. C., 77....308, 311, 840
Crooker, Hughes v....148 N. C., 318.... 177
Crouse v. Barham....174 N. C., 460.... 186
Crouse, S. v....182 N. C., 835.... 85
Culberson, Edwards v....111 N. C., 342.... 566
Culbreth v. Downing....121 N. C., 205.... 686
Cunningham v. R. R....139 N. C., 427....646, 647
Curlee v. Scales....200 N. C., 612.... 265

D

Dail, S. v....191 N. C., 231.... 85
Dallas v. Wagner....204 N. C., 517.... 531
Dalton, S. v....206 N. C., 507.... 412
Dancy, S. v.... 78 N. C., 437.... 153
Daniel v. Grizzard....117 N. C., 105.... 673
Daniel v. R. R....136 N. C., 517.... 447
Darden v. Coward....197 N. C., 35.... 292
Darden, Hood, Comr. of Banks, v....206 N. C., 566.... 378
Dardine, Bank v....207 N. C., 509....175, 531
Daughtry, McCullen v....190 N. C., 215.... 10
Davenport v. Leary.... 95 N. C., 203.... 535
Davenport, Nobles v....183 N. C., 207.... 745
Davenport, Nobles v....185 N. C., 162.... 438
Davenport, Simmons v....140 N. C., 407.... 115
Daves, Provision Co. v....190 N. C., 7....58, 695
Davidson v. Alexander.... 84 N. C., 621.... 535
Davis v. Alexander....202 N. C., 130....653, 750
Davis, Collins v....132 N. C., 106.... 787
Davis v. Dockery....209 N. C., 272.... 703
Davis v. Ins. Co....197 N. C., 617.... 251
Davis v. Jeffreys....197 N. C., 712.... 170
Davis v. Salisbury....161 N. C., 56.... 757
Davis, S. v.... 87 N. C., 514.... 413
Davis v. Stephenson....149 N. C., 113.... 703
Dawson, Sherrod v....154 N. C., 525.... 513
Dawson v. Thigpen....137 N. C., 462.... 787
Dawson v. Wright....208 N. C., 418....175, 176
Day v. Comrs. of Jackson....191 N. C., 780.... 668
Deal, Price v.... 90 N. C., 290.... 108
Deal, S. v....207 N. C., 448.... 154
Deese v. Collins....191 N. C., 749.... 139
DeLoatch v. Rogers.... 86 N. C., 358.... 544
Depesit Co., Woltz v....206 N. C., 239.... 216
Detective Co., Bean v....206 N. C., 125.... 260
Dickens v. Shepperd.... 7 N. C., 526.... 108

Dickerson v. Refining Co.....201 N. C., 90..... 247
Dills, S. v.....196 N. C., 457..... 61
Dills, S. v.....204 N. C., 33..... 22
Distributing Corp. v. Maxwell, Comr. of Revenue.....209 N. C., 47..... 292
Dix-Downing v. White.....206 N. C., 567..... 849
Dixon v. Hooker.....199 N. C., 673..... 744
Dixson v. Realty Co.....204 N. C., 521..... 357
Dockery, Davis v.....209 N. C., 272..... 703
Dockery v. Fairbanks-Morse Co...172 N. C., 529..... 796
Dongan, Farnell v.....207 N. C., 611..... 479
Donnell, S. v.....202 N. C., 782..... 294
Dorrity v. Building & Loan Asso...204 N. C., 698..... 531
Doub, Aden v.....146 N. C., 10..... 177
Doub, Eaton v.....190 N. C., 14..... 281
Doughton, Person v.....186 N. C., 723..... 58
Doughton, Rich v.....192 N. C., 604..... 757
Douglas, Hulbert v..... 94 N. C., 122..... 350
Douglas v. Rhodes .....188 N. C., 580..... 270
Downing, Atkinson v.....175 N. C., 244..... 494
Downing, Culbreth v.....121 N. C., 205..... 686
Dozier v. Wood.....208 N. C., 414..... 287
Drainage Comrs., Broadhurst v...195 N. C., 439..... 796
Drakeford, S. v.....162 N. C., 667..... 294
Drug Co. v. Drug Co.....173 N. C., 502..... 376
Dry, S. v.....152 N. C., 813..... 231
Dry Cleaners, Fayetteville Light Infantry v. .....209 N. C., 14..... 771
Dry Cleaning Co., James v.....208 N. C., 412..... 797
Duffer v. Brunson.....188 N. C., 789..... 431
Dulin, Holland v.....206 N. C., 211..... 697
Duncan v. Overton.....182 N. C., 80..... 446
Dunn, Becton v.....137 N. C., 559..... 431
Dunn, Miller v.....188 N. C., 397..... 215
Dunning, S. v.....177 N. C., 559..... 764
Durham, Guthrie v.....168 N. C., 573..... 97
Durham, Mitchell v..... 13 N. C., 538..... 308
Dyer, Puckett v.....203 N. C., 684..... 446

E

Earp, S. v.....196 N. C., 164..... 763
Eason, Fertilizer Co. v.....194 N. C., 244..... 176
Eaton v. Doub.....190 N. C., 14..... 281
Edgerton v. Hood, Comr. of Banks .....205 N. C., 816..... 479
Edgerton v. Perkins.....200 N. C., 650..... 781
Edgerton v. Taylor.....184 N. C., 571..... 318
Edmonson, Gillam v.....154 N. C., 127..... 420
Edney v. Edney..... 81 N. C., 1..... 205
Edney, S. v.....202 N. C., 706..... 294
Edwards v. Comrs. of Greene.....170 N. C., 448..... 653
Edwards v. Culberson.....111 N. C., 342..... 566
Edwards, *In re* Petition of.....206 N. C., 549.....653, 750
Edwards v. Spence.....197 N. C., 495..... 215

Ehringhaus, Gordon v.....190 N. C., 147..... 677
Elam v. Barnes.....110 N. C., 73..... 304
Elder v. R. R.....194 N. C., 617..... 170
Eldridge, S. v.....197 N. C., 626..... 22
Ellington, S. v..... 29 N. C., 61..... 244
Ellington v. Trust Co.....196 N. C., 755..... 10
Elliott v. Board of Equalization..203 N. C., 749..... 69
Elliott v. Furnace Co.....179 N. C., 142..... 241
Ellis v. Greene.....191 N. C., 761.....667, 668
Ellis, Lemly v.....146 N. C., 221..... 108
Ellis, S. v.....200 N. C., 77..... 231
Ellsworth, S. v.....131 N. C., 773..... 582
Emory, Jones v.....115 N. C., 158..... 749
English, S. v.....201 N. C., 295..... 413
Enloe v. Bottling Co.....208 N. C., 305..... 823
Equipment Co., Bizzell v.....182 N. C., 98..... 206
Etheridge v. R. R.....206 N. C., 657..... 329
Etheridge v. R. R.....209 N. C., 326..... 729
Etheridge, S. v.....207 N. C., 801..... 56
Eubanks, *Ex parte*.....202 N. C., 357..... 481
Evans, Bank v.....191 N. C., 535..... 484
Evans v. Freeman.....142 N. C., 61..... 176
Evans v. Mecklenburg County.....205 N. C., 560..... 80
Evans, S. v.....198 N. C., 82..... 126
Everhardt, S. v.....203 N. C., 610..... 851
Ex parte Barefoot.....201 N. C., 393..... 92
Ex parte Eubanks.....202 N. C., 357..... 481
Ex parte Schenck..... 65 N. C., 353..... 695
Exum v. Lynch.....188 N. C., 392.....92, 810
Exum, Park v.....156 N. C., 228..... 153

F

Fain, S. v.....106 N. C., 760..... 40
Fairbanks-Morse Co., Dockery v..172 N. C., 529..... 796
Falkner, S. v.....182 N. C., 793..... 190
Farmer, S. v.....188 N. C., 243..... 56
Farnell v. Dongan.....207 N. C., 611..... 479
Farquhar Co. v. Hardware Co.....174 N. C., 369..... 530
Farrington v. McNeill.....174 N. C., 420..... 177
Faulkner, Bland v.....194 N. C., 427..... 796
Fawcett v. Mt. Airy.....134 N. C., 125..... 755
Fayetteville Light Infantry v.
Dry Cleaners.....209 N. C., 14..... 771
Fayetteville, MacRae v.....198 N. C., 51..... 654
Fayssoux, Houser v.....168 N. C., 1..... 736
Felmet v. Canton.....177 N. C., 52..... 513
Ferebee v. Gordon..... 35 N. C., 350..... 237
Ferrell v. Ins. Co.....208 N. C., 420..... 704
Ferrell, S. v.....205 N. C., 640..... 776
Fertilizer Co. v. Bourne.....205 N. C., 337.....512, 514
Fertilizer Co. v. Eason.....194 N. C., 244..... 176
Fetter, Beaver v.....176 N. C., 334..... 421
Fibre Co., Crisp v.....193 N. C., 77.....308, 311, 840

Fidelity Co., Fishblate v. ..... 140 N. C., 489 782
Fidelity Co., Glass Co. v. ..... 193 N. C., 769 810
Fields v. Ins. Co. ..... 195 N. C., 262 ..... 527, 551
Fields v. Ogburn ..... 178 N. C., 407 150
Fishblate v. Fidelity Co. ..... 140 N. C., 489 782
Fisher, Ammons v. ..... 208 N. C., 712 440
Fisher v. Fisher ..... 170 N. C., 378 805
Fisher, Newbern v. ..... 198 N. C., 385 287
Fisher, Propst v. ..... 104 N. C., 214 749
Fisher v. Trust Co. ..... 138 N. C., 90 512
Fisheries Co., White v. ..... 183 N. C., 228 ..... 175, 177
Flemming v. Asheville ..... 205 N. C., 765 258
Fletcher, Hahn v. ..... 189 N. C., 729 337
Floars v. Ins. Co. ..... 144 N. C., 232 771
Fogleman, S. v. ..... 204 N. C., 401 13
Follette v. Accident Asso. ..... 110 N. C., 377 782
Foot v. R. R. ..... 142 N. C., 51 447
Ford v. McAnally ..... 182 N. C., 419 139
Fore v. Tanning Co. ..... 175 N. C., 583 312
Forester, Wilkes County v. ..... 204 N. C., 163 514
Forrest, Board of Education v. ..... 193 N. C., 519 563
Forrest, Henderson v. ..... 184 N. C., 230 176
Fort, Koonce v. ..... 204 N. C., 426 251
Fortune v. Comrs. of Buncombe ..... 140 N. C., 322 272
Fortune v. Hunt ..... 149 N. C., 358 745
Foscue v. Ins. Co. ..... 196 N. C., 139 578
Foster v. Allison Corp. ..... 191 N. C., 166 430
Foster, S. v. ..... 130 N. C., 666 ..... 195, 299, 727
Foster, S. v. ..... 185 N. C., 674 88
Foundry C., Conrad v. ..... 198 N. C., 723 825
Foundry Co. v. Killian ..... 99 N. C., 501 ..... 373, 374, 376
Fowler v. Fowler ..... 190 N. C., 536 573
Fowler v. Poor ..... 93 N. C., 466 431
Fox v. Barlow ..... 206 N. C., 66 172
Fox, S. v. ..... 197 N. C., 478 102
Franklin v. Franks ..... 205 N. C., 96 736
Franks, Franklin v. ..... 205 N. C., 96 736
Frazier v. Comrs. of Guilford ..... 194 N. C., 49 69
Freeman v. Bell ..... 150 N. C., 146 ..... 91, 176
Freeman, Evans v. ..... 142 N. C., 61 176
Fry, Simpson v. ..... 194 N. C., 623 ..... 354, 833
Fuchtler, Monroe v. ..... 121 N. C., 101 354
Fulcher v. Lumber Co. ..... 191 N. C., 408 707
Fulcher, S. v. ..... 184 N. C., 663 22
Fuller, *In re* ..... 189 N. C., 509 448
Fuller v. Service Co. ..... 190 N. C., 655 374
Funeral Home, Thompson v. ..... 208 N. C., 178 302
Furnace Co., Elliott v. ..... 179 N. C., 142 241
Furniture Co. v. Mfg. Co. ..... 169 N. C., 41 31
Furniture Co., Ramsey v. ..... 209 N. C., 165 827
Furr, Harrington v. ..... 172 N. C., 610 279
Furr v. Trull ..... 205 N. C., 417 176
Furst v. Taylor ..... 204 N. C., 603 ..... 274, 703

G

Gaitley, Pate v. ....183 N. C., 262 176
Gallagher, Satterwhite v. ....173 N. C., 525 542
Gallop v. Clark ....188 N. C., 186 92
Galloway v. Stone ....208 N. C., 739 692
Gant, S. v. ....201 N. C., 211 555
Gardiner v. May ....172 N. C., 192 205
Garris, Waters v. ....188 N. C., 305 215
Garrison v. Machine Co. ....159 N. C., 285 ....176, 177
Gauldin v. Madison ....179 N. C., 461 363
Gaylord v. Gaylord ....150 N. C., 222 ....173, 177, 347, 348
George, Austin v. ....201 N. C., 380 350
George v. R. R. ....207 N. C., 457 853
Gerringer v. Ins. Co. ....133 N. C., 407 772
Gibson v. Barbour ....100 N. C., 192 833
Gidney, Wittkowsky v. ....124 N. C., 437 350
Gillam v. Edmonson ....154 N. C., 127 420
Gillette, Rand v. ....199 N. C., 462 302
Gilliam, Cherry v. ....195 N. C., 233 251
Gilmore v. Ins. Co. ....199 N. C., 632 578
Givens v. Mfg. Co. ....196 N. C., 377 ....308, 840
Glass Co. v. Fidelity Co. ....193 N. C., 769 810
Glenn, Bank v. .... 68 N. C., 35 108
Glenn v. Comrs. of Durham ....201 N. C., 233 82
Glenn, S. v. ....198 N. C., 79 61
Godwin, S. v. ....138 N. C., 582 422
Goldsboro v. Holmes ....183 N. C., 203 562
Goldston, S. v. ....201 N. C., 89 ....55, 294
Goodman v. Goodman ....201 N. C., 808 ....302, 747
Gordon v. Ehringhaus ....190 N. C., 147 677
Gordon, Ferebee v. .... 35 N. C., 350 237
Gordon, Salter v. ....200 N. C., 381 150
Gossett v. Ins. ....208 N. C., 152 ....551, 772
Gotwalt, Whitehurst v. ....189 N. C., 577 10
Gough v. Bell ....180 N. C., 268 431
Grace v. Strickland ....188 N. C., 369 787
Grady v. Grady ....209 N. C., 749 653
Grady, Ins. Co. v. ....185 N. C., 348 770
Graeber, Long v. .... 64 N. C., 431 234
Graham, S. v. ....133 N. C., 645 244
Grant, Wynn v. ....166 N. C., 39 350
Grantham v. Nunn ....188 N. C., 239 692
Gray, S. v. ....180 N. C., 697 580
Green v. Castlebury .... 70 N. C., 20 695
Green, Ingle v. ....202 N. C., 116 623
Green, S. v. .... 85 N. C., 600 582
Greene v. Bechtel ....193 N. C., 94 623
Greene, Ellis v. ....191 N. C., 761 ....667, 668
Greene v. Ins. Co. ....196 N. C., 335 646
Greensboro, Pemberton v. ....205 N. C., 599 746
Greensboro, Stratford v. ....124 N. C., 127 ....652, 653
Greenville, Sugg v. ....169 N. C., 606 741
Gregory, Woodley v. ....205 N. C., 280 672
Grier v. Weldon ....205 N. C., 575 92

Griffin v. Bank....205 N. C., 253....292, 304
Griffin, Chemical Co. v....202 N. C., 812....176
Griffin, Ins. Co. v....200 N. C., 251....469
Griffin, Jenkins v....175 N. C., 184....361, 833
Griffith, Logan v....205 N. C., 580....514
Griggs, Corley Co. v....192 N. C., 171....530
Griggs, S. v....197 N. C., 352....152
Grimes v. Andrews....170 N. C., 515....351
Grimes v. Coach Co....203 N. C., 605....570
Grimes v. Holmes....207 N. C., 293....59
Grizzard, Daniel v....117 N. C., 105....673
Grocery Co. v. Bails....177 N. C., 298....737
Grocery Co., Lazarus v....201 N. C., 817....446
Grocery Co. v. Taylor....175 N. C., 37....19
Groom, Brodnax v....64 N. C., 244....81, 652
Grubb v. Motor Co....209 N. C., 88....176
Gudger v. Penland....108 N. C., 593....247, 743
Gulledge, S. v....208 N. C., 204....258
Gurley, Redrying Co. v....197 N. C., 56....374
Guthrie v. Durham....168 N. C., 573....97
Guy, Avery v....202 N. C., 152....97
Guy v. Ins. Co....207 N. C., 278....772

H

Hackney v. Hood, Comr. of Banks....203 N. C., 486....555
Hahn v. Fletcher....189 N. C., 729....337
Hailey v. Wheeler....49 N. C., 159....453
Hairston, Booth v....193 N. C., 278....745
Hairston, Booth v....195 N. C., 8....362, 745
Hairston, S. v....182 N. C., 851....195
Hall v. Comrs. of Duplin....194 N. C., 768....69
Hall v. Holloman....136 N. C., 34....749
Hall, Norfleet v....204 N. C., 573....222
Hall v. Trust Co....200 N. C., 734....429
Ham v. Norwood....196 N. C., 762....260
Ham, S. v....205 N. C., 749....412
Hamilton v. R. R....200 N. C., 543....307, 438
Hamlet, S. v....206 N. C., 568....55
Hammond v. Charlotte....205 N. C., 469....74
Hammond, S. v....188 N. C., 602....180
Hampton v. Bottling Co....208 N. C., 331....568
Hampton v. Spinning Co....198 N. C., 235....226
Handle Co., Shaw v....188 N. C., 222....448
Haney v. Lincolnton....207 N. C., 282....22
Hanks, May v....62 N. C., 310....350
Hannah v. Hyatt....170 N. C., 634....555
Hannon, S. v....168 N. C., 215....190
Hardie, St. George v....147 N. C., 88....5
Hardware Co., Farquhar Co. v....174 N. C., 369....530
Hardware Co., McIver v....144 N. C., 478....350
Hardy v. Ins. Co....180 N. C., 180....503
Hardy v. Lumber Co....160 N. C., 113....169
Hardy, S. v....209 N. C., 83....847

Hare, S. v. ..... 95 N. C., 682 294
Hargett v. Lee ..... 206 N. C., 536 ..... 350, 697
Harper, Ruark v. ..... 178 N. C., 249 566
Harrell v. Comrs. of Wilson ..... 206 N. C., 225 82
Harrill v. R. R. ..... 144 N. C., 542 205
Harrington v. Furr ..... 172 N. C., 610 279
Harrington v. Rawls ..... 136 N. C., 65 348
Harrington v. Wadesboro ..... 153 N. C., 437 124
Harris, *In re* ..... 183 N. C., 633 58
Harris, S. v. ..... 199 N. C., 377 56
Harris, White v. ..... 166 N. C., 227 358
Harrison v. Ray ..... 108 N. C., 215 348
Hart, S. v. ..... 186 N. C., 582 152
Hartman, Williamson v. ..... 92 N. C., 236 431
Hartsfield v. Hines ..... 200 N. C., 356 ..... 247, 743
Hartsfield v. New Bern ..... 186 N. C., 136 653
Hartsfield, S. v. ..... 188 N. C., 357 ..... 51, 54
Haskett v. Tyrrell County ..... 152 N. C., 714 81
Hatchell v. Odom ..... 19 N. C., 302 31
Hatley v. Hatley ..... 202 N. C., 577 573
Hawkins, S. v. ..... 115 N. C., 712 154
Hayes v. Pace ..... 162 N. C., 288 354
Haywood, Power Co. v. ..... 186 N. C., 313 9
Headen v. Ins. Co. ..... 206 N. C., 270 70
Hecht, Oliver v. ..... 207 N. C., 481 530
Hedgepeth v. Coleman ..... 183 N. C., 309 246
Hemric v. Comrs. of Yadkin ..... 206 N. C., 845 80
Henderson v. Forrest ..... 184 N. C., 230 176
Henderson, S. v. ..... 207 N. C., 258 33
Henderson County, Board of Financial Control v. ..... 208 N. C., 569 755
Hendersonville v. Jordan ..... 150 N. C., 35 544
Henry v. Hilliard ..... 120 N. C., 479 797
Herman v. R. R. ..... 197 N. C., 718 ..... 255, 597
Herring, Weil v. ..... 207 N. C., 6 697
Herring v. Williams ..... 153 N. C., 231 186
Hessee, Bank v. ..... 207 N. C., 71 ..... 736, 749
Hester, Bank v. ..... 188 N. C., 68 311
Hester v. Hester ..... 16 N. C., 328 805
Hester, S. v. ..... 209 N. C., 99 294
Heyer v. Beatty ..... 83 N. C., 285 351
Hice, S. v. ..... 117 N. C., 782 728
Hickory v. Catawba County ..... 206 N. C., 165 ..... 68, 80, 660
Hicks v. Bullock ..... 96 N. C., 164 615
Hicks v. Love ..... 201 N. C., 773 622
Hicks, S. v. ..... 200 N. C., 539 60
High Point v. Brown ..... 206 N. C., 664 513
High Point, Cecil v. ..... 165 N. C., 431 263
Highway Com., Latham v. ..... 191 N. C., 141 654
Highway Com., McKinney v. ..... 192 N. C., 670 654
Highway Com. v. Rand ..... 195 N. C., 799 319
Hill v. Bean ..... 150 N. C., 436 603
Hill v. Comrs. of Gates ..... 190 N. C., 123 667
Hill, Hussey v. ..... 120 N. C., 312 159

Hill v. Ins. Co.....200 N. C., 115..... 636
Hill v. Ins. Co.....207 N. C., 166..... 539
Hill v. Smathers.....173 N. C., 642..... 373
Hill, Starnes v.....112 N. C., 1..... 676
Hill, S. v.....141 N. C., 769..... 60
Hill, Whitaker v..... 96 N. C., 2..... 692
Hilliard, Henry v.....120 N. C., 479..... 797
Hines, Brickell v.....179 N. C., 254..... 494
Hines, Hartsfield v.....200 N. C., 356.....247, 743
Hinnant v. R. R.....202 N. C., 489.....255, 597
Hinsdale, Maxwell, Comr. of Revenue, v. .....207 N. C., 37.....48, 514
Hinton, Newbern v.....190 N. C., 108..... 488
Hinton v. West.....207 N. C., 708..... 354
Hite v. Aydlett.....192 N. C., 166..... 771
Hodges, Bryan v.....107 N. C., 492..... 350
Hodges v. R. R.....196 N. C., 66..... 198
Hoell v. White.....169 N. C., 640..... 205
Hoffman v. Ins. Co.....127 N. C., 337..... 820
Holden v. Royall.....169 N. C., 676..... 331
Holland v. Dulin.....206 N. C., 211..... 697
Holliday, Bunn v.....209 N. C., 351..... 833
Hollifield v. Tel. Co.....172 N. C., 714.....310, 840
Hollister, Overall Co. v.....186 N. C., 208..... 175
Holloman, Hall v.....136 N. C., 34..... 749
Holloway v. Moser.....193 N. C., 185..... 764
Holloway, S. v.....117 N. C., 730..... 244
Hollowell, Wise v.....205 N. C., 286..... 734
Holly, S. v.....155 N. C., 485..... 24
Holmes, Goldsboro v.....183 N. C., 203..... 562
Holmes, Grimes v.....207 N. C., 293..... 59
Holmes, Overall Co. v.....186 N. C., 428..... 60
Holmes v. York.....203 N. C., 709..... 186
Holt, S. v..... 90 N. C., 749.....52, 54
Holt, Williamson v.....147 N. C., 515..... 360
Hood v. Mitchell.....204 N. C., 130.....169, 170
Hood, Comr. of Banks, Andrews v.207 N. C., 499..... 499
Hood, Comr. of Banks, Blades v....203 N. C., 56..... 372
Hood, Comr. of Banks, Buncombe County v. .....202 N. C., 792..... 741
Hood, Comr. of Banks, Child v.....203 N. C., 648..... 741
Hood, Comr. of Banks, Cocke v.....207 N. C., 14..... 498
Hood, Comr. of Banks, v. Darden..206 N. C., 566..... 378
Hood, Comr. of Banks, Edgerton v. .....205 N. C., 816..... 479
Hood, Comr. of Banks, Hackney v.203 N. C., 486..... 555
Hood, Comr. of Banks, v. Johnson .....208 N. C., 77..... 112
Hood, Comr. of Banks, v. Macclesfield Co. .....209 N. C., 280..... 583
Hood, Comr. of Banks, v. Martin..203 N. C., 620.....378, 379
Hood, Comr. of Banks, Oliver v.....209 N. C., 291..... 827
Hood, Comr. of Banks, v. Paddison .....206 N. C., 631..... 378

Hood, Comr. of Banks, Parker v....209 N. C., 494..... 804
Hood, Comr. of Banks, Pritchard v. .....205 N. C., 790..... 374
Hood, Comr. of Banks, v. Stewart .....209 N. C., 424..... 453
Hood, Comr. of Banks, Tea Co. v...205 N. C., 313..... 544
Hood, Comr. of Banks, Textile Corp. v. .....206 N. C., 782..... 282
Hood, Comr. of Banks, v. Trust Co. .....209 N. C., 367..... 804
Hooker, Corey v.....171 N. C., 229..... 215
Hooker, Dixon v.....199 N. C., 673..... 744
Hooker, S. v.....207 N. C., 648..... 294
Horne, S. v.....171 N. C., 787..... 154
Horne-Wilson, Inc., v. Wiggins Bros, Inc. .....203 N. C., 85..... 159
Horton v. Ins. Co.....122 N. C., 498.....578, 769
Hospital v. Rowan County.....205 N. C., 8..... 757
Hotel Co., Kenney Co. v.....208 N. C., 295..... 215
Houck v. Ins. Co.....198 N. C., 303..... 769
Hough v. R. R.....144 N. C., 692..... 310
Household of Ruth, Pollock v.....150 N. C., 211..... 228
Houser v. Bonsal.....149 N. C., 51..... 721
Houser v. Fayssoux.....168 N. C., 1..... 736
Howard, Bank v.....188 N. C., 543..... 787
Hughes v. Crooker.....148 N. C., 318..... 177
Hughes, Johnson v.....207 N. C., 544..... 825
Hughes v. Lewis.....203 N. C., 775.....297, 298
Hughes Bros., Inc., Lertz v.....208 N. C., 490..... 446
Hulbert v. Douglas..... 94 N. C., 122..... 350
Hulin, Nance v.....192 N. C., 665..... 114
Humphries, Jolley v.....204 N. C., 672..... 10
Hunt, Fortune v.....149 N. C., 358..... 745
Hunt v. State.....201 N. C., 37..... 826
Hussey v. Hill.....120 N. C., 312..... 159
Hutton v. Cook.....173 N. C., 496..... 144
Hutton, Morganton v.....187 N. C., 736.....310, 312
Hyatt, Hannah v.....170 N. C., 634..... 555
Hyatt, Whitmore v.....175 N. C., 117..... 737
Hyman, S. v.....164 N. C., 411..... 52

I

Ice Co. v. Construction Co.....194 N. C., 407..... 319
Improvement Co. v. Andrews.....176 N. C., 280..... 253
Improvement Co. v. Coley-Bardin .....156 N. C., 255..... 150
Improvement Co., Plemmons v....108 N. C., 614.....292, 304
Indemnity Co., Lexington v.....207 N. C., 774..... 578
Ingle v. Green.....202 N. C., 116..... 623
Ingram, McDonald v.....124 N. C., 272..... 285
In re Applicants for License.....143 N. C., 1..... 631
In re Baker.....187 N. C., 257.....562, 563
In re Bank.....208 N. C., 65.....219, 292
In re Fuller.....189 N. C., 509..... 448

In re Harris....183 N. C., 633.... 58
In re Love....186 N. C., 714.... 475
In re Neal....182 N. C., 405.... 792
In re Osborne....205 N. C., 716.... 130
In re Petition of Edwards....206 N. C., 549....653, 750
In re Shelton....203 N. C., 75.... 493
In re Stiers....204 N. C., 48.... 696
In re Trust Co....197 N. C., 613....374, 391
In re Trust Co....203 N. C., 238....375, 378
In re Trust Co....207 N. C., 802....97, 469
In re Will of Beard....202 N. C., 661.... 359
In re Will of Craven....169 N. C., 561.... 413
In re Will of Rawlings....170 N. C., 58.... 487
Institute v. Mebane....165 N. C., 644....92, 810
Ins. Asso., Bank v....203 N. C., 669....645, 647
Ins. Co., Aldridge v....194 N. C., 684.... 769
Ins. Co., Baker v....206 N. C., 106.... 527
Ins. Co., Bank v....187 N. C., 97....645, 646
Ins. Co., Bank v....188 N. C., 747.... 645
Ins. Co., Belk's Dept. Store v....208 N. C., 267....530, 769
Ins. Co., Black v....148 N. C., 169.... 646
Ins. Co. v. Buckner....201 N. C., 78.... 428
Ins. Co., Bulluck v....200 N. C., 642....526, 551
Ins. Co., Burton v....198 N. C., 498....578, 769
Ins. Co., Butler v....196 N. C., 203....122, 124
Ins. Co., Carter v....208 N. C., 665.... 539
Ins. Co. v. Cordon....208 N. C., 723.... 836
Ins. Co., Davis v....197 N. C., 617.... 251
Ins. Co., Ferrell v....208 N. C., 420.... 704
Ins. Co., Fields v....195 N. C., 262....527, 551
Ins. Co., Floars v....144 N. C., 232.... 771
Ins. Co., Foscue v....196 N. C., 139.... 578
Ins. Co., Gerringer v....133 N. C., 407.... 772
Ins. Co., Gilmore v....199 N. C., 632.... 578
Ins. Co., Gossett v....208 N. C., 152....551, 772
Ins. Co. v. Grady....185 N. C., 348.... 770
Ins. Co., Greene v....196 N. C., 335.... 646
Ins. Co. v. Griffin....200 N. C., 251.... 469
Ins. Co., Guy v....207 N. C., 278.... 772
Ins. Co., Hardy v....180 N. C., 180.... 503
Ins. Co., Headon v....206 N. C., 270.... 70
Ins. Co., Hill v....200 N. C., 115.... 636
Ins. Co., Hill v....207 N. C., 166.... 539
Ins. Co., Hoffman v....127 N. C., 337.... 820
Ins. Co., Horton v....122 N. C., 498....578, 769
Ins. Co., Houck v....198 N. C., 303.... 769
Ins. Co., Johnson v....201 N. C., 362....646, 827
Ins. Co. v. Lassiter....209 N. C., 156.... 296
Ins. Co., Laughinghouse v....200 N. C., 434....769, 782
Ins. Co. v. Lumber Co....186 N. C., 269.... 769
Ins. Co., McCain v....190 N. C., 549.... 578
Ins. Co., Mahler v....205 N. C., 692....578, 645, 769
Ins. Co., Midkiff v....197 N. C., 139....646, 769
Ins. Co., Misskelley v....205 N. C., 496.... 772

Ins. Co. v. Morehead....209 N. C., 174....349, 583
Ins. Co., Murphy v....167 N. C., 334....636
Ins. Co., Paul v....183 N. C., 159....636
Ins. Co., Penn v....158 N. C., 29....548
Ins. Co., Penn v....160 N. C., 399....548
Ins. Co. v. R. R....132 N. C., 75....647
Ins. Co. v. R. R....165 N. C., 136....647
Ins. Co. v. R. R....179 N. C., 255....647
Ins. Co., Reinhardt v....201 N. C., 785....578
Ins. Co., Rhyne v....196 N. C., 717....539
Ins. Co., Scott v....208 N. C., 160....825
Ins. Co., Short v....194 N. C., 649....770, 782
Ins. Co., Smith v....179 N. C., 489....820
Ins. Co., Smith v....208 N. C., 99....680
Ins. Co., Spruill v....120 N. C., 141....578
Ins. Co., Stockton v....207 N. C., 43....645
Ins. Co., Sykes v....148 N. C., 13....769
Ins. Co., Thigpen v....204 N. C., 551....540, 851
Ins. Co. v. Totten....203 N. C., 431....285
Ins. Co., Trust Co. v....173 N. C., 558....504
Ins. Co., Watkins v....201 N. C., 681....540
Ins. Co., Welch v....196 N. C., 546....578
Ins. Co., Whitford v....163 N. C., 223....272
Ins. Co., Whitmire v....205 N. C., 101....805
Ins. Co., Wilson v....155 N. C., 173....504
Ins. Co., Womack v....206 N. C., 445....820
Investment Co., Lumpkin v....204 N. C., 563....16, 771
Iseley, Light Co. v....203 N. C., 811....481

J

Jackson v. Bell....201 N. C., 336....840
Jackson v. Comrs. of Surry....171 N. C., 379....81
Jackson, West v....198 N. C., 693....350
James v. Dry Cleaning Co....208 N. C., 412....797
Jefferson v. Raleigh....194 N. C., 479....329
Jeffreys, Davis v....197 N. C., 712....170
Jeffries, S. v....117 N. C., 727....85, 777
Jenette, Potato Co. v....172 N. C., 1....530
Jenkins, Castelloe v....186 N. C., 166....319
Jenkins v. Griffin....175 N. C., 184....361, 833
Jenkins, Latta v....200 N. C., 255....757
Jenkins, S. v....195 N. C., 747....764
Jenkins, Statesville v....199 N. C., 159....514, 810
Jenkins, Trust Co. v....193 N. C., 761....375, 376
Jernigan v. Jernigan....207 N. C., 831....222
Jessup, S. v....183, N. C., 771....580
Johnson v. Asheville....196 N. C., 550....603
Johnson, Balcum v....177 N. C., 213....255
Johnson v. Bradley....31 N. C., 362....234
Johnson, Bullard v....65 N. C., 436....809
Johnson, Hood, Comr. of Banks, v....208 N. C., 77....112
Johnson v. Hughes....207 N. C., 544....825
Johnson v. Ins. Co....201 N. C., 362....646, 827

Johnson, Liquor Co. v. ..... 161 N. C., 74 703
Johnson v. Lumber Co. ..... 189 N. C., 81 ..... 312, 840
Johnson, S. v. ..... 161 N. C., 264 126
Johnson, S. v. ..... 170 N. C., 685 74
Johnson, S. v. ..... 171 N. C., 799 ..... 695, 696
Johnson, S. v. ..... 184 N. C., 637 ..... 114, 124, 194
Johnson, S. v. ..... 194 N. C., 378 191
Johnson, S. v. ..... 205 N. C., 610 55
Johnston v. Rankin ..... 70 N. C., 550 654
Johnston v. Smith ..... 86 N. C., 498 31
Jolley v. Humphries ..... 204 N. C., 672 10
Jonas v. Mortgage Co. ..... 205 N. C., 89 215
Jones v. Beaman ..... 117 N. C., 259 585
Jones, Blackwood v. ..... 57 N. C., 54 350
Jones v. Comrs. of Madison ..... 135 N. C., 218 603
Jones v. Comrs. of Madison ..... 137 N. C., 579 603
Jones v. Emory ..... 115 N. C., 158 749
Jones v. Jones ..... 164 N. C., 320 176
Jones v. Oil Co. ..... 202 N. C., 328 576
Jones v. R. R. ..... 150 N. C., 473 447
Jones, S. v. ..... 181 N. C., 546 487
Jones, S. v. ..... 201 N. C., 424 190
Jones v. Sugg ..... 136 N. C., 143 585
Jones v. Zollicoffer ..... 9 N. C., 623 279
Jordan, Hendersonville v. ..... 150 N. C., 35 544
Jordan v. Sigmon ..... 194 N. C., 707 744
Jordan v. Simmons ..... 169 N. C., 140 ..... 566, 714
Jordan, S. v. ..... 207 N. C., 460 413
Julian v. Ward ..... 198 N. C., 480 ..... 68, 80
Justice v. Asheville ..... 161 N. C., 62 514
Justice, McCoy v. ..... 196 N. C., 553 573

K

Kearney v. R. R. ..... 177 N. C., 251 169
Keaton, S. v. ..... 205 N. C., 607 726
Kelly v. Oliver ..... 113 N. C., 442 177
Kenney Co. v. Hotel Co. ..... 208 N. C., 295 215
Kerchner, McEachern v. ..... 90 N. C., 177 205
Kernodle v. Williams ..... 153 N. C., 475 176
Kidder v. McIlhenny ..... 81 N. C., 123 787
Killian, Foundry Co. v. ..... 99 N. C., 501 ..... 373, 374, 376
Kimball, Colt v. ..... 190 N. C., 169 ..... 331, 530
Kindler v. Trust Co. ..... 204 N. C., 198 176
King v. Phillips ..... 95 N. C., 245 19
King, S. v. ..... 195 N. C., 621 582
King v. Thackers ..... 207 N. C., 869 596
Kinston, Rouse v. ..... 188 N. C., 1 621
Kline, S. v. ..... 190 N. C., 177 152
Knitting Mills, Moss v. ..... 190 N. C., 644 319
Knott v. Taylor ..... 99 N. C., 511 431
Koonce v. Fort ..... 204 N. C., 426 251
Kramer, Morris v. ..... 182 N. C., 87 153
Kress & Co., Bowden v. ..... 198 N. C., 559 ..... 116, 596

L

Lacy v. Bank....183 N. C., 373.... 69
Lacy v. State....195 N. C., 284.... 290
Lacy, State Treasurer, Comrs. of Johnston v....174 N. C., 141....667, 668
Lamb v. Perry....169 N. C., 436.... 177
Lambeth, Morris v....203 N. C., 695.... 622
Lancaster, S. v....202 N. C., 204.... 40
Land Co., Bobbitt Co. v....191 N. C., 323.... 92
Land Co., Phillips v....174 N. C., 542.... 439
Land Co., Wentz v....193 N. C., 32.... 700
Lane, S. v.... 80 N. C., 407.... 294
Lane, Withers v....144 N. C., 184....153, 154
LaNeve v. Tea Co....207 N. C., 281.... 840
Lassiter, Bost v....105 N. C., 490.... 692
Lassiter, Ins. Co. v....209 N. C., 156.... 296
Lassiter, R. R. v....207 N. C., 408.... 92
Lassiter, S. v....208 N. C., 349.... 22
Lassiter, Wellons v....200 N. C., 474.... 430
Latham, Corporation Com. v....201 N. C., 342.... 378
Latham v. Highway Com....191 N. C., 141.... 654
Latham, McKeel v....202 N. C., 318....247, 293
Latham, McKeel v....203 N. C., 246....293, 304
Latta v. Jenkins....200 N. C., 255.... 757
Laughinghouse v. Ins. Co....200 N. C., 434....769, 782
Laundry Co., Batson v....205 N. C., 93.... 225
Laundry Co., Batson v....206 N. C., 371.... 225
Lawrence, S. v.... 81 N. C., 522.... 582
Lawrence, S. v....196 N. C., 562....195, 763
Lawrence, Thomas v....189 N. C., 521.... 825
Lawson, S. v....209 N. C., 59.... 61
Layton, S. v....204 N. C., 704.... 412
Lazarus, Assurance Society v....207 N. C., 63.... 98
Lazarus v. Grocery Co....201 N. C., 817.... 446
Lea, S. v....203 N. C., 13....294, 359, 410, 580
Leach, Osborn v....135 N. C., 628.... 139
Leary, Davenport v.... 95 N. C., 203.... 535
Ledford v. Lumber Co....183 N. C., 614.... 603
Lee v. Brotherhood....191 N. C., 359.... 769
Lee, Claus v....140 N. C., 552.... 331
Lee, Hargett v....206 N. C., 536....350, 697
Lee v. Produce Co....197 N. C., 714.... 168
Lee, S. v....121 N. C., 544....154, 244
Lee v. Waynesville....184 N. C., 565.... 653
Leeper, S. v....146 N. C., 655.... 82
Lefkowitz v. Silver....182 N. C., 339.... 566
Leigh, Newbern v....184 N. C., 166.... 403
Leitch, McLean v....152 N. C., 266.... 97
Lemly v. Ellis....146 N. C., 221.... 108
Lemons, S. v....182 N. C., 828.... 775
Lenoir, Stockton v....198 N. C., 148.... 176
Lentz, Trust Co. v....196 N. C., 398.... 512
Lertz v. Hughes Bros., Inc....208 N. C., 490.... 446
Levins, Stein v....205 N. C., 302....274, 603

Lewellyn, Vaughan v. 94 N. C., 472 274
Lewis, Bank v. 203 N. C., 644 792
Lewis v. Comrs. of Wake 74 N. C., 198 410
Lewis, Hughes v. 203 N. C., 775 297, 298
Lewis v. Lewis 192 N. C., 267 348
Lewis, Montgomery v. 187 N. C., 577 420, 421
Lewis, Morrison v. 197 N. C., 79 743
Lewis v. Nunn 180 N. C., 159 16, 771
Lexington v. Indemnity Co. 207 N. C., 774 578
Light Co. v. Iseley 203 N. C., 811 481
Lightner v. Raleigh 206 N. C., 496 621
Lincolnton, Haney v. 207 N. C., 282 22
Lineberry v. R. R. 187 N. C., 787 255
Lipscomb, S. v. 134 N. C., 689 124, 125
Liquor Co. v. Johnson 161 N. C., 74 703
Little, Observer Co. v. 175 N. C., 42 281
Liverman v. R. R. 109 N. C., 52 562
Live Stock Co. v. Atkinson 189 N. C., 250 431
Lloyd v. R. R. 151 N. C., 536 260
Lloyd v. Speight 195 N. C., 179 769
Lockridge v. Smith 206 N. C., 174 354, 834
Logan v. Griffith 205 N. C., 580 514
Long, Alley v. 209 N. C., 245 743
Long v. Graeber 64 N. C., 431 234
Loomis, May v. 140 N. C., 350 26
Love, Hicks v. 201 N. C., 773 622
Love, *In re* 186 N. C., 714 475
Love, S. v. 187 N. C., 32 580
Lovelace v. Pratt 187 N. C., 686 69
Loven, Piano Co. v. 207 N. C., 96 114
Lowe, Lynn v. 88 N. C., 478 431
Lumber Co., Brown v. 167 N. C., 9 742
Lumber Co., Byrd v. 207 N. C., 253 854
Lumber Co., Carter v. 129 N. C., 203 255
Lumber Co. v. Cedar Works 165 N. C., 83 715
Lumber Co., Cowart v. 194 N. C., 787 312
Lumber Co., Cox v. 193 N. C., 28 312, 840
Lumber Co., Fulcher v. 191 N. C., 408 707
Lumber Co., Hardy v. 160 N. C., 113 169
Lumber Co., Ins. Co. v. 186 N. C., 269 769
Lumber Co., Johnson v. 189 N. C., 81 312, 840
Lumber Co., Ledford v. 183 N. C., 614 603
Lumber Co., May v. 119 N. C., 96 797
Lumber Co., Patterson v. 175 N. C., 90 310
Lumber Co., Powell v. 153 N. C., 52 737
Lumber Co., Stephens v. 160 N. C., 107 739
Lumber Co. v. Waggoner 198 N. C., 221 361
Lumber Co., Walters v. 165 N. C., 388 707
Lumber Co., Wilson v. 131 N. C., 163 475
Lumpkin v. Investment Co. 204 N. C., 563 16, 771
Lunsford v. Yarborough 189 N. C., 476 745
Lutterloh, Wade v. 196 N. C., 116 318
Lyda, Rector v. 180 N. C., 577 810
Lynch, Exum v. 188 N. C., 392 92, 810

Lynn v. Lowe..... 88 N. C., 478..... 431
Lytle v. Lytle..... 94 N. C., 522..... 487
Lytle, S. v.....138 N. C., 738..... 52

Mc

McAden, Pace v.....191 N. C., 137..... 570
McAfee, S. v.....189 N. C., 320..... 410
McAnally, Ford v.....182 N. C., 419..... 139
McArthur, Bank v.....168 N. C., 48..... 153
McCain v. Ins. Co.....190 N. C., 549..... 578
McCanless, S. v.....193 N. C., 200..... 454
McCaskill v. Walker.....147 N. C., 195..... 274
McCormac, S. v.....116 N. C.,1033..... 125
McCormick, Ball-Thrash Co. v.....162 N. C., 471..... 209
McCoy v. Justice.....196 N. C., 553..... 573
McCoy v. R. R.....142 N. C., 383..... 145
McCullen v. Daughtry.....190 N. C., 215..... 10
McCullers, Barnes v.....108 N. C., 46..... 810
McDonald v. Ingram.....124 N. C., 272..... 285
McDonald, S. v.....133 N. C., 680..... 40
McDowell, S. v..... 84 N. C., 799..... 57
McEachern v. Kerchner..... 90 N. C., 177..... 205
McEwen, Bank v.....160 N. C., 414..... 206
McGee, Wright v.....206 N. C., 52..... 479
McGraw v. R. R.....206 N. C., 873..... 438
McIlhenny, Kidder v..... 81 N. C., 123..... 787
McIver v. Hardware Co.....144 N. C., 478..... 350
McKeel v. Latham.....202 N. C., 318.....247, 293
McKeel v. Latham.....203 N. C., 246.....293, 304
McKesson v. Mendenhall..... 64 N. C., 502..... 561
McKinney v. Highway Com.....192 N. C., 670..... 654
McKinney v. Matthews.....166 N. C., 576.....91, 176
McKinnon, Cooper v.....122 N. C., 447..... 737
McLean, Corporation Com. v.....202 N. C., 77.....292, 376, 377
McLean v. Leitch.....152 N. C., 266..... 97
McLeod, S. v.....209 N. C., 54.....300, 301
McNair v. Boyd.....163 N. C., 478..... 714
McNeely v. Asbestos Co.....206 N. C., 568..... 825
McNeill, Farrington v.....174 N. C., 420..... 177
McNinch, S. v..... 90 N. C., 695..... 764
McNinch v. Trust Co.....183 N. C., 33..... 806
McPhail, Mfg. Co. v.....181 N. C., 205..... 91
McQueen, Clark v.....195 N. C., 714..... 69

M

Macclesfield Co., Hood, Comr. of
Banks, v. .....209 N. C., 280..... 583
Machine Co., Garrison v.....159 N. C., 285.....176, 177
Machine Co. v. Tobacco Co.....141 N. C., 284..... 144
MacRae v. Fayetteville.....198 N. C., 51..... 654
Madison, Gauldin v.....179 N. C., 461..... 363
Mahler v. Ins. Co.....205 N. C., 692.....578, 645, 769
Mallard v. Patterson.....108 N. C., 255..... 515
Maness, Moffitt v.....102 N. C., 457..... 530

Mansfield, S. v.....207 N. C., 233..... 33
Manuel, S. v..... 20 N. C., 144..... 58
Mfg. Co. v. Aluminum Co.....207 N. C., 52..... 755
Mfg. Co. v. Comrs. of Pender.....196 N. C., 744..... 48
Mfg. Co., Cook v.....182 N. C., 205..... 111
Mfg. Co., Cook v.....183 N. C., 48..... 111
Mfg. Co., Furniture Co. v.....169 N. C., 41..... 31
Mfg. Co., Givens v.....196 N. C., 377.....308, 840
Mfg. Co. v. McPhail.....181 N. C., 205..... 91
Mfg. Co., Newton & Co. v.....206 N. C., 533..... 430
Mfg. Co., Owens v.....168 N. C., 397..... 833
Mfg. Co. v. Price.....195 N. C., 602..... 281
Mfg. Co., Ward v. .....123 N. C., 248..... 448
Mfg. Co., Winstead v.....207 N. C., 110..... 722
Marion, S. v.....200 N. C., 715..... 22
Marriner v. Mizzelle.....207 N. C., 34..... 708
Marshall v. Tel. Co.....181 N. C., 292..... 622
Marshall v. Tel. Co.....181 N. C., 410..... 421
Martin, Hood, Comr. of Banks, v.203 N. C., 620.....378, 379
Martin, S. v.....188 N. C., 119..... 555
Martin v. Young..... 85 N. C., 156..... 809
Mason v. Andrews.....192 N. C., 135..... 331
Matthews, Bailey v.....156 N. C., 78..... 439
Matthews, McKinney v.....166 N. C., 576.....91, 176
Matthews, Roberson v.....200 N. C., 241..... 833
Maxwell v. Wallace..... 45 N. C., 251..... 351
Maxwell, Comr. of Revenue,
Bunn v.....199 N. C., 557..... 48
Maxwell, Comr. of Revenue,
Distributing Corp. v.....209 N. C., 47..... 292
Maxwell, Comr. of Revenue,
v. Hinsdale.....207 N. C., 37.....48, 514
May, Gardiner v.....172 N. C., 192..... 205
May v. Hanks..... 62 N. C., 310..... 350
May v. Loomis.....140 N. C., 350..... 26
May v. Lumber Co.....119 N. C., 96..... 797
Mebane, Institute v.....165 N. C., 644.....92, 810
Mebane v. Patrick..... 46 N. C., 23..... 829
Mecklenburg County, Evans v.....205 N. C., 560..... 80
Melton, S. v.....187 N. C., 481..... 35
Mendenhall, McKesson v..... 64 N. C., 502..... 561
Meroney, Cherokee County v.....173 N. C., 653..... 810
Merrimon v. Paving Co.....142 N. C., 539..... 260
Michael & Bivens, Inc., Crawford v. .....199 N. C., 224..... 241
Middleton v. Rigsbee.....179 N. C., 437..... 515
Midkiff v. Ins. Co.....197 N. C., 139.....646, 769
Miller v. Asheville.....112 N. C., 759..... 514
Miller v. Dunn.....188 N. C., 397..... 215
Miller, Reeves v.....209 N. C., 362..... 745
Miller, Smith v.....209 N. C., 170..... 711
Miller, S. v.....189 N. C., 695..... 85
Miller, S. v.....197 N. C., 445..... 126
Miller, Wilkes v.....156 N. C., 428..... 787

Milling Co., Stone v. ....192 N. C., 585 530
Mills v. Callahan ....126 N. C., 756 809
Mills, S. v. .... 91 N. C., 581 ....3, 412
Mills Co., Atkinson v. ....201 N. C., 5 241
Mining Co., Moore v. ....104 N. C., 534 260
Minnis v. Sharpe ....198 N. C., 364 308
Mirror Co., Rea v. ....158 N. C., 24 840
Misskelley v. Ins. Co. ....205 N. C., 496 772
Mitchell v. Durham .... 13 N. C., 538 308
Mitchell, Hood v. ....204 N. C., 130 ....169, 170
Mitchell v. Shuford ....200 N. C., 321 159
Mitchell v. Strickland ....207 N. C., 141 531
Mizzelle, Marriner v. ....207 N. C., 34 708
Moffitt v. Maness ....102 N. C., 457 530
Monday, Yarborough v. .... 14 N. C., 420 176
Monds, Snipes v. ....190 N. C., 190 ....428, 453
Monroe v. Fuchtler ....121 N. C., 101 354
Monroe, Shute v. ....187 N. C., 676 654
Monroe, Smith v. ....209 N. C., 41 263
Montgomery v. Lewis ....187 N. C., 577 ....420, 421
Montgomery v. Ring ....186 N. C., 403 771
Moore v. Casualty Co. ....207 N. C., 433 ....578, 771
Moore v. Mining Co. ....104 N. C., 534 260
Moore v. Powell ....205 N. C., 636 172
Moore, Wilmington v. ....170 N. C., 52 514
Morehead, Banking Co. v. ....116 N. C., 410 267
Morehead, Banking Co. v. ....116 N. C., 413 429
Morehead, Ins. Co. v. ....209 N. C., 174 ....349, 583
Morgan, Mortgage Corp. v. ....208 N. C., 743 159
Morgan, S. v. ....136 N. C., 628 40
Morganton v. Hutton ....187 N. C., 736 ....310, 312
Morganton, Moses v. ....192 N. C., 102 311
Morris v. Burgess ....116 N. C., 40 130
Morris v. Cleve ....194 N. C., 202 304
Morris v. Cleve ....197 N. C., 253 293
Morris v. Kramer ....182 N. C., 87 153
Morris v. Lambeth ....203 N. C., 695 622
Morris, S. v. ....208 N. C., 44 33
Morrison v. Lewis ....197 N. C., 79 743
Mortgage Co., Jonas v. ....205 N. C., 89 215
Mortgage Corp. v. Morgan ....208 N. C., 743 159
Mortgage Corp. v. Wilson ....205 N. C., 493 215
Morton, Reynolds v. ....205 N. C., 491 584
Moser, Holloway v. ....193 N. C., 185 764
Moses v. Morganton ....192 N. C., 102 311
Moss v. Knitting Mills ....190 N. C., 644 319
Motor Co., Grubb v. ....209 N. C., 88 176
Motor Co. v. Reaves ....184 N. C., 260 827
Mt. Airy, Fawcett v. ....134 N. C., 125 755
Mule Co. v. R. R. ....160 N. C., 252 601
Mull, S. v. ....178 N. C., 748 88
Mull, S. v. ....193 N. C., 668 87
Murchison v. Williams .... 71 N. C., 135 512
Murphey, Corporation Com. v. ....197 N. C., 42 ....219, 292

Murphy, Campbell v. 55 N. C., 357 98
Murphy v. Ins. Co. 167 N. C., 334 636
Murphy, S. v. 84 N. C., 742 85, 776
Murray Co. v. Broadway 176 N. C., 149 530
Myers v. Charlotte 146 N. C., 246 621
Myers, S. v. 190 N. C., 239 87

N

Nance v. Hulin 192 N. C., 665 114
Nash v. Royster 189 N. C., 408 743, 839
Neal, *In re* 182 N. C., 405 792
Nebel v. Nebel 201 N. C., 840 837, 844
Newbern v. Fisher 198 N. C., 385 287
New Bern, Hartsfield v. 186 N. C., 136 653
Newbern v. Hinton 190 N. C., 108 488
Newbern v. Leigh 184 N. C., 166 403
Newbern v. Tel. Co. 196 N. C., 14 438
New Hanover County v. Whiteman 190 N. C., 332 514
Newman v. Comrs. of Vance 208 N. C., 675 5, 58, 696
Newsome, S. v. 195 N. C., 552 606
Newton v. School Committee 158 N. C., 186 69
Newton, Sheppard v. 139 N. C., 533 287
Newton & Co. v. Mfg. Co. 206 N. C., 533 430
Nichols v. R. R. 120 N. C., 495 686
Nobles v. Davenport 183 N. C., 207 745
Nobles v. Davenport 185 N. C., 162 438
Norfleet v. Hall 204 N. C., 573 222
Norman v. Porter 197 N. C., 222 447
Norwood, Ham v. 196 N. C., 762 260
Norwood, Tomlinson v. 208 N. C., 716 854
Nowell v. Basnight 185 N. C., 142 704
Nunn, Grantham v. 188 N. C., 239 692
Nunn, Lewis v. 180 N. C., 159 16, 771

O

Oakley, S. v. 176 N. C., 755 35
Oates v. Trust Co. 205 N. C., 14 743
Observer Co. v. Little 175 N. C., 42 281
Odom, Hatchell v. 19 N. C., 302 31
Odum, Wells v. 205 N. C., 110 45
Ogburn v. Booker 197 N. C., 687 285
Ogburn, Fields v. 178 N. C., 407 150
Oil Co., Carlton v. 206 N. C., 117 175
Oil Co., Jones v. 202 N. C., 328 576
Oil Co. v. Shore 171 N. C., 51 561
Oil & Grease Co. v. Averett 192 N. C., 465 530
Oliver v. Hecht 207 N. C., 481 530
Oliver v. Hood, Comr. of Banks 209 N. C., 291 827
Oliver, Kelly v. 113 N. C., 442 177
Oliver, S. v. 186 N. C., 329 775
Orr, S. v. 175 N. C., 773 764
Osborn v. Leach 135 N. C., 628 139

Osborne, *In re*.....205 N. C., 716..... 130
Outerbridge, S. v..... 82 N. C., 618..... 775
Overall Co. v. Hollister.....186 N. C., 208..... 175
Overall Co. v. Holmes.....186 N. C., 428..... 60
Overton, Duncan v.....182 N. C., 80..... 446
Owens, Crawford v.....129 N. C., 286..... 833
Owens v. Mfg. Co.....168 N. C., 397..... 833
Owens v. Wright.....161 N. C., 127..... 215
Ownby, S. v.....146 N. C., 677..... 153

P

Pace, Hayes v.....162 N. C., 288..... 354
Pace v. McAden.....191 N. C., 137..... 570
Paddison, Hood, Comr. of
Banks, v. .....206 N. C., 631..... 378
Padgett, Trust Co. v.....194 N. C., 727..... 159
Page, Ashby v.....106 N. C., 328..... 493
Palmer, Southern Assembly v.....166 N. C., 75..... 757
Pasley, S. v.....180 N. C., 695..... 52
Pannil, S. v.....182 N. C., 838..... 776
Park, Pentuff v.....194 N. C., 146.....140, 743
Park, Pentuff v.....195 N. C., 609..... 576
Park v. Exum.....156 N. C., 228..... 153
Park Com., Yarborough v.....196 N. C., 284..... 653
Parker v. Hood, Comr. of Banks..209 N. C., 494..... 804
Parker v. R. R.....181 N. C., 95..... 308
Parker, S. v.....209 N. C., 32..... 191
Parker v. Tea Co.....201 N. C., 691..... 596
Parker-Graham Sexton Co., Cabe
v. .....202 N. C., 176..... 825
Parks v. Tanning Co.....175 N. C., 29..... 169
Parks-Belk Co. v. Concord.....194 N. C., 134..... 575
Paschal v. Paschal.....197 N. C., 40..... 745
Pass v. Brooks.....125 N. C., 129..... 836
Pass v. Brooks.....127 N. C., 119..... 836
Pate v. Gaitley.....183 N. C., 262..... 176
Patrick, Mebane v..... 46 N. C., 23..... 829
Patterson v. Lumber Co.....175 N. C., 90..... 310
Patterson, Mallard v.....108 N. C., 255..... 515
Patterson, S. v..... 24 N. C., 346.....294, 413
Patton, Beach v.....208 N. C., 134..... 255
Paul v. Burton.....180 N. C., 45..... 522
Paul v. Ins. Co.....183 N. C., 159..... 636
Paving Co., Merrimon v.....142 N. C., 539..... 260
Payne v. Sale..... 22 N. C., 455..... 9
Peace, Raleigh v.....110 N. C., 32..... 513
Peele v. Powell.....156 N. C., 553..... 287
Pemberton v. Greensboro.....205 N. C., 599..... 746
Penland, Gudger v.....108 N. C., 593.....247, 743
Penn v. Ins. Co.....158 N. C., 29..... 548
Penn v. Ins. Co.....160 N. C., 399..... 548
Pentuff v. Park.....194 N. C., 146.....140, 743
Pentuff v. Park.....195 N. C., 609..... 576
Perkins, Edgerton v.....200 N. C., 650..... 781

Perkins, S. v. ..... 141 N. C., 797 88
Perkinson, Yellowday v. ..... 167 N. C., 144 487
Perry v. Bottling Co. ..... 196 N. C., 175 823
Perry, Lamb v. ..... 169 N. C., 436 177
Perry, Speed v. ..... 167 N. C., 122 153
Person v. Doughton ..... 186 N. C., 723 58
Peters, S. v. ..... 107 N. C., 876 154
Phifer v. Berry ..... 202 N. C., 388 ..... 48, 292, 544, 827
Phillips, King v. ..... 95 N. C., 245 19
Phillips v. Land Co. ..... 174 N. C., 542 439
Phillips, Sutton v. ..... 116 N. C., 502 58
Phillips, Wallace v. ..... 195 N. C., 665 348
Phipps v. Wyatt ..... 199 N. C., 727 833
Piano Co. v. Loven ..... 207 N. C., 96 114
Pilley v. Cotton Mills ..... 201 N. C., 426 825
Pleasants v. R. R. ..... 95 N. C., 195 487
Plemmons v. Improvement Co. ..... 108 N. C., 614 ..... 292, 304
Plotkin v. Bank ..... 188 N. C., 711 542
Plumbing Co., Supply Co. v. ..... 195 N. C., 629 703
Plummer v. R. R. ..... 176 N. C., 279 601
Poe, Withers v. ..... 167 N. C., 372 810
Poindexter v. R. R. ..... 201 N. C., 833 840
Polk County, Saluda v. ..... 207 N. C., 180 514
Pollock v. Household of Ruth ..... 150 N. C., 211 228
Poole v. Thompson ..... 183 N. C., 588 677
Poor, Fowler v. ..... 93 N. C., 466 431
Poore v. Poore ..... 201 N. C., 791 481
Port Com., Webb v. ..... 205 N. C., 663 755
Porter v. Construction Co. ..... 195 N. C., 328 771
Porter, Norman v. ..... 197 N. C., 222 447
Potato Co. v. Jenette ..... 172 N. C., 1 530
Pottery Co., Spence v. ..... 185 N. C., 218 281
Potts, S. v. ..... 100 N. C., 457 ..... 122, 124
Powell, Chancey v. ..... 103 N. C., 159 829
Powell v. Lumber Co. ..... 153 N. C., 52 737
Powell, Moore v. ..... 205 N. C., 636 172
Powell, Peele v. ..... 156 N. C., 553 287
Powell v. R. R. ..... 178 N. C., 243 621
Powell, Timberlake v. ..... 99 N. C., 233 586
Powell v. Water Co. ..... 171 N. C., 290 647
Power Co., Brown v. ..... 140 N. C., 333 621
Power Co. v. Haywood ..... 186 N. C., 313 9
Power Co. v. Taylor ..... 191 N. C., 329 348
Power Co. v. Yount ..... 208 N. C., 182 438
Pratt v. Chaffin ..... 136 N. C., 350 178
Pratt, Lovelace v. ..... 187 N. C., 686 69
Price v. Deal ..... 90 N. C., 290 108
Price, Mfg. Co. v. ..... 195 N. C., 602 281
Price v. Slagle ..... 189 N. C., 757 714
Price, Whisnant v. ..... 175 N. C., 611 429
Pritchard v. Hood, Comr. of Banks ..... 205 N. C., 790 374
Produce Co., Lee v. ..... 197 N. C., 714 168
Propst v. Fisher ..... 104 N. C., 214 749

Provision Co. v. Daves....190 N. C., 7....58, 695
Pruitt v. Wood....199 N. C., 788....56, 576
Public Service Corp., Wood v....174 N. C., 697....308
Puckett v. Dyer....203 N. C., 684....446
Pugh, S. v....101 N. C., 737....764
Pulliam, S. v....184 N. C., 681....51, 52, 54
Purvis v. Wilson....50 N. C., 22....715

Q

Quarries Co., Smith v....164 N. C., 338....310

R

R. R., Allen v....120 N. C., 548....469
R. R., Baker v....205 N. C., 329....22, 42, 263
R. R., Barber v....193 N. C., 691....308, 603
R. R., Beal v....136 N. C., 298....562
R. R., Britt v....148 N. C., 37....622
R. R., Brown v....204 N. C., 25....308
R. R., Burgin v....115 N. C., 673....169
R. R., Carpenter v....184 N. C., 400....288, 289
R. R., Chambers v....199 N. C., 682....255
R. R. v. Cherokee County....177 N. C., 86....59
R. R., Cherry v....186 N. C., 263....522
R. R., Cobb v....172 N. C., 58....653
R. R., Cogdell v....129 N. C., 398....154
R. R. v. Comrs. of Carteret....75 N. C., 474....754, 755
R. R., Conley v....109 N. C., 692....469
R. R., Cooper v....140 N. C., 209....308
R. R., Cunningham v....139 N. C., 427....646, 647
R. R., Daniel v....136 N. C., 517....447
R. R., Elder v....194 N. C., 617....170
R. R., Etheridge v....206 N. C., 657....329
R. R., Etheridge v....209 N. C., 326....729
R. R., Foot v....142 N. C., 51....447
R. R., George v....207 N. C., 457....853
R. R., Hamilton v....200 N. C., 543....307, 438
R. R., Harrill v....144 N. C., 542....205
R. R., Herman v....197 N. C., 718....255, 597
R. R., Hinnant v....202 N. C., 489....255, 597
R. R., Hodges v....196 N. C., 66....198
R. R., Hough v....144 N. C., 692....310
R. R., Ins. Co. v....132 N. C., 75....647
R. R., Ins. Co. v....165 N. C., 136....647
R. R., Ins. Co. v....179 N. C., 255....647
R. R., Jones v....150 N. C., 473....447
R. R., Kearney v....177 N. C., 251....169
R. R. v. Lassiter....207 N. C., 408....92
R. R., Lineberry v....187 N. C., 787....255
R. R., Liverman v....109 N. C., 52....562
R. R., Lloyd v....151 N. C., 536....260
R. R., McCoy v....142 N. C., 383....145
R. R., McGraw v....206 N. C., 873....438
R. R., Mule Co. v....160 N. C., 252....601
R. R., Nichols v....120 N. C., 495....686

R. R., Parker v. ..... 181 N. C., 95 308
R. R., Pleasants v. ..... 95 N. C., 195 487
R. R., Plummer v. ..... 176 N. C., 279 601
R. R., Poindexter v. ..... 201 N. C., 833 840
R. R., Powell v. ..... 178 N. C., 243 621
R. R. v. R. R. ..... 148 N. C., 59 562
R. R., Rawls v. ..... 172 N. C., 211 487
R. R., Roberts v. ..... 143 N. C., 176 447
R. R., Russell v. ..... 118 N. C., 1098 308
R. R., Sawyer v. ..... 142 N. C., 1 247
R. R., Shelton v. ..... 193 N. C., 670 421
R. R., Shepard v. ..... 166 N. C., 539 308
R. R., Smith v. ..... 147 N. C., 603 728
R. R., Smith v. ..... 163 N. C., 143 421
R. R. v. Smitherman ..... 178 N. C., 595 92
R. R., Staton v. ..... 144 N. C., 135 310
R. R., Shelton v. ..... 193 N. C., 670 623
R. R., Southwell v. ..... 189 N. C., 417 447
R. R., Southwell v. ..... 191 N. C., 153 ..... 447, 448
R. R., Strunks v. ..... 187 N. C., 175 60
R. R., Tillett v. ..... 166 N. C., 515 421
R. R., Towe v. ..... 165 N. C., 1 172
R. R., Trust Co. v. ..... 209 N. C., 304 590
R. R., Wallace v. ..... 98 N. C., 494 602
R. R., Wallace v. ..... 101 N. C., 454 602
R. R., Wallace v. ..... 104 N. C., 442 ..... 601, 602, 707
R. R., Ward v. ..... 206 N. C., 530 255
R. R., Wimberly v. ..... 190 N. C., 444 448
R. R. v. Ziegler Bros. ..... 200 N. C., 396 ..... 92, 810
Raleigh, Jefferson v. ..... 194 N. C., 479 329
Raleigh, Lightner v. ..... 206 N. C., 496 621
Raleigh v. Peace ..... 110 N. C., 32 513
Ramsey v. Furniture Co. ..... 209 N. C., 165 827
Ramsey, Way v. ..... 192 N. C., 549 47
Rand v. Gillette ..... 199 N. C., 462 302
Rand, Highway Com. v. ..... 195 N. C., 799 319
Rand, Whitt v. ..... 187 N. C., 805 329
Randall, S. v. ..... 170 N. C., 757 181
Rankin, Johnston v. ..... 70 N. C., 550 654
Rawlings, *In re* Will of ..... 170 N. C., 58 487
Rawls, Harrington v. ..... 136 N. C., 65 348
Rawls v. R. R. ..... 172 N. C., 211 487
Rawls, S. v. ..... 202 N. C., 397 40
Ray v. Blackwell ..... 94 N. C., 10 175
Ray, Harrison v. ..... 108 N. C., 215 348
Ray, S. v. ..... 195 N. C., 619 ..... 154, 243, 244
Ray, S. v. ..... 206 N. C., 736 152
Rea v. Mirror Co. ..... 158 N. C., 24 840
Realty Co., Dixson v. ..... 204 N. C., 521 357
Realty Co., White v. ..... 182 N. C., 536 308
Reaves, Motor Co. v. ..... 184 N. C., 260 827
Rector v. Lyda ..... 180 N. C., 577 810
Rector, S. v. ..... 203 N. C., 9 56
Redmond v. Chandley ..... 119 N. C., 575 799

Redmond v. Staton....116 N. C., 140.... 586
Redrying Co. v. Gurley....197 N. C., 56.... 374
Redwine, Trust Co. v....204 N. C., 125.... 365
Reeves v. Board of Education....204 N. C., 74.... 80
Reeves v. Buncombe County....204 N. C., 45.... 668
Reeves v. Miller....209 N. C., 362.... 745
Refining Co., Dickerson v....201 N. C., 90.... 247
Register Co. v. Bradshaw....174 N. C., 414.... 31
Reidsville, Allen v....178 N. C., 513.... 653
Reinhardt v. Ins. Co....201 N. C., 785.... 578
Revell v. Thrash....132 N. C., 803.... 736
Revis, S. v....193 N. C., 192....58, 655
Reynolds, Baird v.... 99 N. C., 469.... 176
Reynolds v. Morton....205 N. C., 491.... 584
Rhea, Cobb v.... 137 N. C., 295.... 796
Rhodes v. Collins....198 N. C., 23.... 248
Rhodes, Douglas v....188 N. C., 580.... 270
Rhyne v. Ins. Co....196 N. C., 717.... 539
Rice, S. v....202 N. C., 411.... 39
Rich v. Doughton....192 N. C., 604.... 757
Ricks, Bunting v.... 22 N. C., 130.... 350
Rigsbee, Middleton v....179 N. C., 437.... 515
Riley, S. v....113 N. C., 648.... 60
Ring, Montgomery v....186 N. C., 403.... 771
Ripley v. Armstrong....159 N. C., 158.... 186
Rippy, S. v....127 N. C., 516.... 276
Robbins, Terry v....128 N. C., 140.... 787
Roberson v. Matthews....200 N. C., 241.... 833
Roberson, S. v....150 N. C., 837.... 126
Roberts v. R. R....143 N. C., 176.... 447
Roberts v. Syndicate....198 N. C., 381.... 724
Roberts, S. v....197 N. C., 662.... 191
Robinson, S. v....188 N. C., 784.... 719
Roebuck v. Carson....196 N. C., 672.... 175
Rogers, DeLoatch v.... 86 N. C., 358.... 544
Rogers, S. v.... 93 N. C., 523.... 154
Rogers, S. v....162 N. C., 656....51, 54
Rollins, S. v....113 N. C., 722.... 154
Rooks, S. v....207 N. C., 275....57, 303
Rose v. Bryan....157 N. C., 173.... 737
Rose, S. v....200 N. C., 342.... 181
Roseman, Shell v....155 N. C., 90.... 448
Rosenstein, Bank v....207 N. C., 529.... 176
Rotan v. S....195 N. C., 291.... 48
Rountree, S. v....181 N. C., 535.... 22
Rouse v. Kinston....188 N. C., 1.... 621
Rouse, S. v....194 N. C., 318.... 51
Rousseau v. Call....169 N. C., 173....175, 797
Rowan County, Hospital v....205 N. C., 8.... 757
Rowe v. Rowe-Coward Co....208 N. C., 484.... 854
Royall, Holden v....169 N. C., 676.... 331
Royster, Nash v....189 N. C., 408....743, 839
Ruark v. Harper....178 N. C., 249.... 566
Russell v. R. R....118 N. C.,1098.... 308

S

St. George v. Hardie....147 N. C., 88.... 5
Sale, Payne v.... 22 N. C., 455.... 9
Salisbury, Davis v....161 N. C., 56.... 757
Salter v. Gordon....200 N. C., 381.... 150
Saluda v. Polk County....207 N. C., 180.... 514
Sanders, Building Co. v....185 N. C., 328.... 177
Sasseen, S. v....206 N. C., 644.... 258
Satterfield, S. v....198 N. C., 682.... 22
Satterthwaite, Tucker v....120 N. C., 118.... 799
Satterwhite v. Gallagher....173 N. C., 525.... 542
Sawyer v. R. R....142 N. C., 1.... 247
Scales, Curlee v....200 N. C., 612.... 265
Scales v. Trust Co....195 N. C., 772.... 234
Scales v. Winston-Salem....199 N. C., 469.... 575
Schenck, *Ex parte*.... 65 N. C., 353.... 695
School Committee, Newton v....158 N. C., 186.... 69
Scott v. Ins. Co....208 N. C., 160.... 825
Seawell v. Cole....194 N. C., 546.... 304
Service Co., Fuller v....190 N. C., 655.... 374
Shale Products Co. v. Cement Co....200 N. C., 226.... 514
Sharpe, Minnis v....198 N. C., 364.... 308
Shaw, Campbell v....170 N. C., 186.... 108
Shaw v. Handle Co....188 N. C., 222.... 448
Sheets v. Tobacco Co....195 N. C., 149....805, 806
Shell v. Roseman....155 N. C., 90.... 448
Shelton v. Clinard....187 N. C., 664....16, 285
Shelton, *In re*....203 N. C., 75.... 493
Shelton v. R. R....193 N. C., 670....421, 623
Shepard v. R. R....166 N. C., 539.... 308
Sheppard v. Newton....139 N. C., 533.... 287
Shepperd, Dickens v.... 7 N. C., 526.... 108
Sherrod v. Dawson....154 N. C., 525.... 513
Shipman, S. v....203 N. C., 325.... 103
Shoemaker, Cathey v....119 N. C., 424.... 413
Shore, Oil Co. v....171 N. C., 51.... 561
Short v. Ins. Co....194 N. C., 649....770, 782
Shrader, Ashford v....167 N. C., 45.... 31
Shuford, Mitchell v....200 N. C., 321.... 159
Shute v. Monroe....187 N. C., 676.... 654
Sigmon, Jordan v....194 N. C., 707.... 744
Sigmon, S. v....190 N. C., 684.... 763
Silver, Lefkowitz v....182 N. C., 339.... 566
Simmons v. Davenport....140 N. C., 407.... 115
Simmons, Jordan v....169 N. C., 140....566, 714
Simonds, Watkins v....202 N. C., 746.... 672
Simons, S. v....178 N. C., 679.... 85
Simpson v. Fry....194 N. C., 623....354, 833
Singleton, S. v....183 N. C., 738....60, 181
Sinodis, S. v....189 N. C., 565.... 708
Sinodis, S. v....205 N. C., 602.... 154
Skeen, S. v....182 N. C., 844.... 580
Slagle, Price v....189 N. C., 757.... 714
Smathers v. Bank....135 N. C., 410....373, 374, 376, 815

Smathers v. Bank....155 N. C., 283....373, 376
Smathers, Hill v....173 N. C., 642....373
Smith, Allen v....183 N. C., 222....744
Smith v. Bynum....92 N. C., 108....787
Smith v. Ins. Co....179 N. C., 489....820
Smith v. Ins. Co....208 N. C., 99....680
Smith, Johnston v....86 N. C., 498....31
Smith, Lockridge v....206 N. C., 174....354, 834
Smith v. Miller....209 N. C., 170....711
Smith v. Monroe....209 N. C., 41....263
Smith v. R. R....147 N. C., 603....728
Smith v. R. R....163 N. C., 143....421
Smith v. Smith....117 N. C., 348....535
Smith v. Smith....150 N. C., 81....715
Smith v. Summerfield....108 N. C., 284....469
Smith, Thompson v....160 N. C., 256....745
Smith v. Quarries Co....164 N. C., 338....310
Smitherman, R. R. v....178 N. C., 595....92
Snipes v. Monds....190 N. C., 190....428, 453
Snipes, S. v....185 N. C., 743....422
Snow, White v....71 N. C., 232....431
Southern Assembly v. Palmer....166 N. C., 75....757
Southwell v. R. R....189 N. C., 417....447
Southwell v. R. R....191 N. C., 153....447, 448
Sovereign Lodge, Beard v....184 N. C., 154....740
Speas v. Bank....188 N. C., 524....177, 275
Speas v. Woodhouse....162 N. C., 66....542
Speed v. Perry....167 N. C., 122....153
Speight, Lloyd v....195 N. C., 179....769
Speight v. Speight....208 N. C., 132....744
Spence, Edwards v....197 N. C., 495....215
Spence v. Pottery Co....185 N. C., 218....281
Spinning Co., Hampton v....198 N. C., 235....226
Spitzer v. Comrs. of Franklin....188 N. C., 30....655
Spivey, S. v....151 N. C., 676....103, 606
Spruill v. Ins. Co....120 N. C., 141....578
Stainback, Butler v....87 N. C., 216....279
Stalcup, S. v....24 N. C., 50....764
Stansell, S. v....203 N. C., 69....22
Starling v. Cotton Mills....171 N. C., 222....154
Starnes v. Hill....112 N. C., 1....676
S. v. Agnew....202 N. C., 755....22
S. v. Allen....107 N. C., 805....775
S. v. Allen....166 N. C., 265....54
S. v. Anderson....208 N. C., 771....60, 61, 102, 303
S. v. Arrington....7 N. C., 571....422
S. v. Bagley....158 N. C., 608....422
S. v. Bailey....60 N. C., 137....154
S., Bain v....86 N. C., 49....289
S. v. Baldwin....184 N. C., 789....602
S. v. Banks....206 N. C., 479....52
S. v. Bazemore....193 N. C., 336....422
S. v. Beal....199 N. C., 278....154
S. v. Beam....181 N. C., 597....190

S. v. Beam ..... 184 N. C., 740 86
S. v. Beard ..... 207 N. C., 673 195
S. v. Beasley ..... 196 N. C., 797 52
S. v. Beavers ..... 188 N. C., 595 154
S. v. Bell ..... 184 N. C., 701 190
S. v. Bell ..... 205 N. C., 225 581
S. v. Benson ..... 183 N. C., 795 ..... 125, 126
S. v. Blackwelder ..... 182 N. C., 899 763
S. v. Blackwell ..... 193 N. C., 313 3
S. v. Bland ..... 97 N. C., 438 764
S. v. Bittings ..... 206 N. C., 798 ..... 194, 195
S. v. Boynton ..... 155 N. C., 456 85
S. v. Brittain ..... 143 N. C., 668 52
S. v. Broadway ..... 157 N. C., 598 103
S. v. Brown ..... 182 N. C., 761 39
S. v. Brown ..... 206 N. C., 747 ..... 55, 301
S. v. Bryan ..... 98 N. C., 644 631
S. v. Bryant ..... 189 N. C., 112 486
S. v. Bryson ..... 200 N. C., 50 61
S. v. Burgess ..... 192 N. C., 668 303
S. v. Byers ..... 100 N. C., 512 244
S. v. Cagle ..... 209 N. C., 114 194
S. v. Cameron ..... 166 N. C., 379 124
S. v. Camby ..... 209 N. C., 50 54
S. v. Carlson ..... 171 N. C., 818 ..... 22, 763
S. v. Carter ..... 194 N. C., 293 479
S. v. Casey ..... 201 N. C., 620 58
S. v. Chambers ..... 180 N. C., 705 294
S., Cohoon v. ..... 201 N. C., 312 290
S. v. Collins ..... 115 N. C., 716 294
S. v. Collins ..... 118 N. C., 1203 244
S. v. Collins ..... 189 N. C., 15 195
S. v. Colson ..... 193 N. C., 236 728
S. v. Combs ..... 200 N. C., 671 14
S. v. Cook ..... 162 N. C., 586 153
S. v. Cook ..... 207 N. C., 261 ..... 33, 190
S. v. Cope ..... 204 N. C., 28 ..... 21, 22, 734, 828, 850
S. v. Corpening ..... 191 N. C., 751 58
S. v. Crawford ..... 197 N. C., 513 ..... 51, 52
S. v. Crouse ..... 182 N. C., 835 85
S. v. Dail ..... 191 N. C., 231 85
S. v. Dalton ..... 206 N. C., 507 412
S. v. Dancy ..... 78 N. C., 437 153
S. v. Davis ..... 87 N. C., 514 413
S. v. Deal ..... 207 N. C., 448 154
S. v. Dills ..... 196 N. C., 457 61
S. v. Dills ..... 204 N. C., 33 22
S. v. Donnell ..... 202 N. C., 782 294
S. v. Drakeford ..... 162 N. C., 667 294
S. v. Dry ..... 152 N. C., 813 231
S. v. Dunning ..... 177 N. C., 559 764
S. v. Earp ..... 196 N. C., 164 763
S. v. Edney ..... 202 N. C., 706 294
S. v. Eldridge ..... 197 N. C., 626 22

S. v. Ellington ..... 29 N. C., 61..... 244
S. v. Ellis .....200 N. C., 77..... 231
S. v. Ellsworth .....131 N. C., 773..... 582
S. v. English .....201 N. C., 295..... 413
S. v. Etheridge .....207 N. C., 801..... 56
S. v. Evans .....198 N. C., 82..... 126
S. v. Everhardt .....203 N. C., 610..... 851
S. v. Fain .....106 N. C., 760..... 40
S. v. Falkner .....182 N. C., 793..... 190
S. v. Farmer .....188 N. C., 243..... 56
S. v. Ferrell .....205 N. C., 640..... 776
S. v. Fogleman .....204 N. C., 401..... 13
S. v. Foster .....130 N. C., 666.....195, 299, 727
S. v. Foster .....185 N. C., 674..... 88
S. v. Fox .....197 N. C., 478..... 102
S. v. Fulcher .....184 N. C., 663..... 22
S. v. Gant .....201 N. C., 211..... 555
S. v. Glenn .....198 N. C., 79..... 61
S. v. Godwin .....138 N. C., 582..... 422
S. v. Goldston .....201 N. C., 89.....55, 294
S. v. Graham .....133 N. C., 645..... 244
S. v. Gray .....180 N. C., 697..... 580
S. v. Green ..... 85 N. C., 600..... 582
S. v. Griggs .....197 N. C., 352..... 152
S. v. Gulledge .....208 N. C., 204..... 258
S. v. Hairston .....182 N. C., 851..... 195
S. v. Ham .....205 N. C., 749..... 412
S. v. Hamlet .....206 N. C., 568..... 55
S. v. Hammond .....188 N. C., 602..... 180
S. v. Hannon .....168 N. C., 215..... 190
S. v. Hardy .....209 N. C., 83..... 847
S. v. Hare ..... 95 N. C., 682..... 294
S. v. Harris .....199 N. C., 377..... 56
S. v. Hart .....186 N. C., 582..... 152
S. v. Hartsfield .....188 N. C., 357.....51, 54
S. v. Hawkins .....115 N. C., 712..... 154
S. v. Henderson .....207 N. C., 258..... 33
S. v. Hester .....209 N. C., 99..... 294
S. v. Hice .....117 N. C., 782..... 728
S. v. Hicks .....200 N. C., 539..... 60
S. v. Hill .....141 N. C., 769..... 60
S. v. Holloway .....117 N. C., 730..... 244
S. v. Holly .....155 N. C., 485..... 24
S. v. Holt ..... 90 N. C., 749.....52, 54
S. v. Horne .....171 N. C., 787..... 154
S., Hunt v.....201 N. C., 37..... 826
S. v. Hyman .....164 N. C., 411..... 52
S. v. Jeffries .....117 N. C., 727.....85, 777
S. v. Jenkins .....195 N. C., 747..... 764
S. v. Jessup .....183 N. C., 771..... 580
S. v. Jones .....181 N. C., 546..... 487
S. v. Jones .....201 N. C., 424..... 190
S. v. Johnson .....161 N. C., 264..... 126

S. v. Johnson ....170 N. C., 685.... 74
S. v. Johnson ....171 N. C., 799....695, 696
S. v. Johnson ....184 N. C., 637....114, 124, 194
S. v. Johnson ....194 N. C., 378.... 191
S. v. Johnson ....205 N. C., 610.... 55
S. v. Jordan ....207 N. C., 460.... 413
S. v. Keaton ....205 N. C., 607.... 726
S. v. King ....195 N. C., 621.... 582
S. v. Kline ....190 N. C., 177.... 152
S., Lacy v....195 N. C., 284.... 290
S. v. Lancaster ....202 N. C., 204.... 40
S. v. Lane .... 80 N. C., 407.... 294
S. v. Lassiter ....208 N. C., 349.... 22
S. v. Lawrence .... 81 N. C., 522.... 582
S. v. Lawrence ....196 N. C., 562....195, 763
S. v. Lawson ....209 N. C., 59.... 61
S. v. Layton ....204 N. C., 704.... 412
S. v. Lea ....203 N. C., 13....294, 359, 410, 580
S. v. Lee ....121 N. C., 544....154, 244
S. v. Leeper ....146 N. C., 655.... 82
S. v. Lemons ....182 N. C., 828.... 775
S. v. Lipscomb ....134 N. C., 689....124, 125
S. v. Love ....187 N. C., 32.... 580
S. v. Lytle ....138 N. C., 738.... 52
S. v. McAfee ....189 N. C., 320.... 410
S. v. McCanless ....193 N. C., 200.... 454
S. v. McCormac ....116 N. C.,1033.... 125
S. v. McDonald ....133 N. C., 680.... 40
S. v. McDowell .... 84 N. C., 799.... 57
S. v. McLeod ....209 N. C., 54....300, 301
S. v. McNinch .... 90 N. C., 695.... 764
S. v. Mansfield ....207 N. C., 233.... 33
S. v. Manuel .... 20 N. C., 144.... 58
S. v. Marion ....200 N. C., 715.... 22
S. v. Martin ....188 N. C., 119.... 555
S. v. Melton ....187 N. C., 481.... 35
S. v. Miller ....189 N. C., 695.... 85
S. v. Miller ....197 N. C., 445.... 126
S. v. Mills .... 91 N. C., 581....3, 412
S. v. Morgan ....136 N. C., 628.... 40
S. v. Morris ....208 N. C., 44.... 33
S. v. Mull ....178 N. C., 748.... 88
S. v. Mull ....193 N. C., 668.... 87
S. v. Murphy .... 84 N. C., 742....85, 776
S. v. Myers ....190 N. C., 239.... 87
S. v. Newsome ....195 N. C., 552.... 606
S. v. Oakley ....176 N. C., 755.... 35
S. v. Oliver ....186 N. C., 329.... 775
S. v. Orr ....175 N. C., 773.... 764
S. v. Outerbridge .... 82 N. C., 618.... 775
S. v. Ownby ....146 N. C., 677.... 153
S. v. Pasley ....180 N. C., 695.... 52
S. v. Pannil ....182 N. C., 838.... 776
S. v. Parker ....209 N. C., 32.... 191

S. v. Patterson ..... 24 N. C., 346 ..... 294, 413
S. v. Perkins ..... 141 N. C., 797 88
S. v. Peters ..... 107 N. C., 876 154
S. v. Potts ..... 100 N. C., 457 ..... 122, 124
S. v. Pugh ..... 101 N. C., 737 764
S. v. Pulliam ..... 184 N. C., 681 ..... 51, 52, 54
S. v. Randall ..... 170 N. C., 757 181
S. v. Rawls ..... 202 N. C., 397 40
S. v. Ray ..... 195 N. C., 619 ..... 154, 243, 244
S. v. Ray ..... 206 N. C., 736 152
S. v. Rector ..... 203 N. C., 9 56
S. v. Revis ..... 193 N. C., 192 ..... 58, 655
S. v. Rice ..... 202 N. C., 411 39
S. v. Riley ..... 113 N. C., 648 60
S. v. Rippy ..... 127 N. C., 516 276
S. v. Roberson ..... 150 N. C., 837 126
S. v. Roberts ..... 197 N. C., 662 191
S. v. Robinson ..... 188 N. C., 784 719
S. v. Rogers ..... 93 N. C., 523 154
S. v. Rogers ..... 162 N. C., 656 ..... 51, 54
S. v. Rollins ..... 113 N. C., 722 154
S. v. Rooks ..... 207 N. C., 275 ..... 57, 303
S. v. Rose ..... 200 N. C., 342 181
S. v. Rotan ..... 195 N. C., 291 48
S. v. Rountree ..... 181 N. C., 535 22
S. v. Rouse ..... 194 N. C., 318 51
S. v. Sasseen ..... 206 N. C., 644 258
S. v. Satterfield ..... 198 N. C., 682 22
S. v. Shipman ..... 203 N. C., 325 103
S. v. Sigmon ..... 190 N. C., 684 763
S. v. Simons ..... 178 N. C., 679 85
S. v. Singleton ..... 183 N. C., 738 ..... 60, 181
S. v. Sinodis ..... 189 N. C., 565 708
S. v. Sinodis ..... 205 N. C., 602 154
S. v. Skeen ..... 182 N. C., 844 580
S. v. Snipes ..... 185 N. C., 743 422
S. v. Spivey ..... 151 N. C., 676 ..... 103, 606
S. v. Stalcup ..... 24 N. C., 50 764
S. v. Stansell ..... 203 N. C., 69 22
S. v. Stathos ..... 208 N. C., 456 35
S. v. Steele ..... 190 N. C., 506 195
S. v. Steen ..... 185 N. C., 768 ..... 413, 582
S. v. Sterling ..... 200 N. C., 18 580
S. v. Stewart ..... 89 N. C., 563 ..... 52, 54
S. v. Stewart ..... 189 N. C., 340 195
S. v. Swindell ..... 189 N. C., 151 276
S. v. Tate ..... 161 N. C., 280 195
S. v. Tate ..... 169 N. C., 373 52
S. v. Taylor ..... 175 N. C., 833 191
S. v. Taylor ..... 194 N. C., 738 294
S. v. Thomas ..... 118 N. C., 1113 194
S. v. Trust Co. ..... 192 N. C., 246 168
S. v. Twitty ..... 9 N. C., 248 776
S. v. Tyson ..... 138 N. C., 627 231

S. v. Upton ....170 N. C., 769.... 231
S. v. Utley ....126 N. C., 997.... 763
S. v. Walker ....173 N. C., 780....125, 126
S. v. Wallace ....203 N. C., 284.... 412
S. v. Walton ....114 N. C., 783.... 776
S. v. Ward ....180 N. C., 693.... 294
S., Warren v....199 N. C., 211.... 290
S. v. Watkins ....159 N. C., 480.... 3
S. v. Watson ....208 N. C., 70.... 56
S. v. Weathers .... 98 N. C., 685.... 154
S. v. Webb ....155 N. C., 426.... 57
S. v. Wells ....142 N. C., 590.... 52
S. v. Whaley ....191 N. C., 387.... 22
S. v. White .... 89 N. C., 463.... 35
S. v. Whitley ....208 N. C., 661.... 294
S. v. Wilcox ....206 N. C., 691.... 154
S. v. Wilcox ....206 N. C., 694.... 243
S. v. Williams ....208 N. C., 352....55, 301
S. v. Yarboro ....194 N. C., 498.... 58
S. v. Yelverton ....196 N. C., 64.... 191
State Treasurer, Comrs. of
Johnston v....174 N. C., 141....667, 668
Statesville v. Jenkins....199 N. C., 159....514, 810
Stathos, S. v....208 N. C., 456.... 35
Staton v. R. R....144 N. C., 135.... 310
Staton, Redmond v....116 N. C., 140.... 586
Stedman v. Winston-Salem....204 N. C., 203.... 757
Steele, S. v....190 N. C., 566.... 195
Steen, S. v....185 N. C., 768....413, 582
Stein v. Levins....205 N. C., 302....274, 603
Stephens v. Lumber Co....160 N. C., 107.... 739
Stephenson, Davis v....149 N. C., 113.... 703
Sterling, S. v....200 N. C., 18.... 580
Sterrett, Bateman v....201 N. C., 59....70, 160
Stevens v. Turlington....186 N. C., 191.... 159
Stevenson v. Trust Co....202 N. C., 92.... 283
Stewart, Avery v....136 N. C., 426....176, 565
Stewart, Hood, Comr. of Banks, v.209 N. C., 424.... 453
Stewart, S. v.... 89 N. C., 563....52, 54
Stewart, S. v....189 N. C., 340.... 195
Stiers, *In re*....204 N. C., 48.... 696
Stockton v. Ins. Co....207 N. C., 43.... 645
Stockton v. Lenoir....198 N. C., 148.... 176
Stokes v. Stokes....206 N. C., 108.... 279
Stokes v. Taylor....104 N. C., 394.... 469
Stone, Galloway v....208 N. C., 739.... 692
Stone v. Milling Co....192 N. C., 585.... 530
Store Co., Trust Co. v....193 N. C., 122.... 570
Storm v. Wrightsville Beach....189 N. C., 679.... 73
Stratford v. Greensboro....124 N. C., 127....652, 653
Strauss v. Wilmington....129 N. C., 99.... 800
Strickland, Bar Association v....200 N. C., 630....514, 696
Strickland, Grace v....188 N. C., 369.... 787
Strickland, Mitchell v....207 N. C., 141.... 531

Strickland v. Strickland..... 95 N. C., 471..... 206
Stronach, Boushall v.....172 N. C., 273..... 175
Stroud v. Stroud.....206 N. C., 668..... 805
Strunks v. R. R.....187 N. C., 175..... 60
Sugg v. Greenville.....169 N. C., 606..... 741
Sugg, Jones v.....136 N. C., 143..... 585
Sullivan, Batts v.....182 N. C., 129..... 514
Summerfield, Smith v.....108 N. C., 284..... 469
Supply Co. v. Plumbing Co.....195 N. C., 629..... 703
Surety Co., Chappell v.....191 N. C., 703..... 98
Sutton, Cauley v.....150 N. C., 327..... 44
Sutton v. Phillips.....116 N. C., 502..... 58
Sutton v. Sutton.....183 N. C., 128..... 692
Swain v. Cooperage Co.....189 N. C., 528..... 308
Swan v. Carawan.....168 N. C., 472..... 274
Swenson, Thomason v.....207 N. C., 519..... 215
Swift & Co. v. Aydlett.....192 N. C., 330.....31, 176
Swindell, S. v.....189 N. C., 151..... 276
Sykes v. Boone.....132 N. C., 199..... 176
Sykes v. Ins. Co.....148 N. C., 13..... 769
Syndicate, Roberts v.....198 N. C., 381..... 724

T

Tanning Co., Beck v.....179 N. C., 123..... 603
Tanning Co., Fore v.....175 N. C., 583..... 312
Tanning Co., Parks v.....175 N. C., 29..... 169
Tarboro, Bond v.....193 N. C., 248..... 655
Tarry, Bowser v.....156 N. C., 35..... 177
Tate, S. v.....161 N. C., 280..... 195
Tate, S. v.....169 N. C., 373..... 52
Taylor v. Board of Education.....206 N. C., 263..... 80
Taylor v. Caudle.....208 N. C., 298..... 431
Taylor v. Construction Co.....195 N. C., 30..... 603
Taylor, Edgerton v.....184 N. C., 571..... 318
Taylor, Furst v.....204 N. C., 603.....274, 703
Taylor, Grocery Co. v.....175 N. C., 37..... 19
Taylor, Knott v..... 99 N. C., 511..... 431
Taylor, Power Co. v.....191 N. C., 329..... 348
Taylor, S. v.....175 N. C., 833..... 191
Taylor, S. v.....194 N. C., 738..... 294
Taylor, Stokes v.....104 N. C., 394..... 469
Taylor, Webber v..... 55 N. C., 9..... 351
Taylor, Wilson v.....154 N. C., 211..... 350
Tea Co., Cooke v.....204 N. C., 495..... 116
Tea. Co. v. Hood, Comr. of
Banks .....205 N. C., 313..... 544
Tea Co., LaNeve v.....207 N. C., 281..... 840
Tea Co., Parker v.....201 N. C., 691..... 596
Tel. Co., Newbern v.....196 N. C., 14..... 438
Tel. Co., Hollifield v.....172 N. C., 714.....310, 840
Tel. Co., Marshall v.....181 N. C., 292..... 622
Tel. Co., Marshall v.....181 N. C., 410..... 421
Terry v. Robbins.....128 N. C., 140..... 787

Textile Corp. v. Hood, Comr. of Banks ..... 206 N. C., 782 282
Thackers, King v. ..... 207 N. C., 869 596
Thigpen, Dawson v. ..... 137 N. C., 462 787
Thigpen v. Ins. Co. ..... 204 N. C., 551 ..... 540, 851
Thomas, Ballinger v. ..... 195 N. C., 517 ..... 263, 596, 853
Thomas v. Carteret County ..... 182 N. C., 374 ..... 175, 176, 177
Thomas v. Lawrence ..... 189 N. C., 521 825
Thomas, S. v. ..... 118 N. C., 1113 194
Thomason v. Swenson ..... 207 N. C., 519 215
Thompson v. Assurance Society ..... 199 N. C., 59 297
Thompson v. Funeral Home ..... 208 N. C., 178 302
Thompson, Poole v. ..... 183 N. C., 588 677
Thompson v. Smith ..... 160 N. C., 256 745
Thompson, Welfare v. ..... 83 N. C., 276 ..... 176, 809
Thornton v. Brady ..... 100 N. C., 38 475
Thrash, Revell v. ..... 132 N. C., 803 736
Tillett v. R. R. ..... 166 N. C., 515 421
Timberlake v. Powell ..... 99 N. C., 233 586
Tobacco Co., Corum v. ..... 205 N. C., 213 568
Tobacco Co., Machine Co. v. ..... 141 N. C., 284 144
Tobacco Co., Sheets v. ..... 195 N. C., 149 ..... 805, 806
Tomlinson v. Norwood ..... 208 N. C., 716 854
Totten, Ins. Co. v. ..... 203 N. C., 431 285
Towe v. R. R. ..... 165 N. C., 1 172
Townsend, Cash Register Co. v. ..... 137 N. C., 652 360
Trogden, Chamberlain v. ..... 148 N. C., 139 ..... 378, 379
Trull, Furr v. ..... 205 N. C., 417 176
Trust Co., Arnold v. ..... 195 N. C., 345 282
Trust Co., Barringer v. ..... 207 N. C., 505 216
Trust Co., Bowman v. ..... 170 N. C., 301 154
Trust Co., Ellington v. ..... 196 N. C., 755 10
Trust Co., Fisher v. ..... 138 N. C., 90 512
Trust Co., Hall v. ..... 200 N. C., 734 429
Trust Co., Hood, Comr. of Banks, v. ..... 209 N. C., 367 804
Trust Co., *In re* ..... 197 N. C., 613 ..... 374, 391
Trust Co., *In re* ..... 203 N. C., 238 ..... 375, 378
Trust Co., *In re* ..... 207 N. C., 802 ..... 97, 469
Trust Co. v. Ins. Co. ..... 173 N. C., 558 504
Trust Co. v. Jenkins ..... 193 N. C., 761 ..... 375, 376
Trust Co., Kindler v. ..... 204 N. C., 198 176
Trust Co. v. Lentz ..... 196 N. C., 398 512
Trust Co., McNinch v. ..... 183 N. C., 33 806
Trust Co., Oates v. ..... 205 N. C., 14 743
Trust Co. v. Padgett ..... 194 N. C., 727 159
Trust Co. v. R. R. ..... 209 N. C., 304 590
Trust Co. v. Redwine ..... 204 N. C., 125 365
Trust Co., Scales v. ..... 195 N. C., 772 234
Trust Co. v. Store Co. ..... 193 N. C., 122 570
Trust Co., S. v. ..... 192 N. C., 246 168
Trust Co., Stevenson v. ..... 202 N. C., 92 283
Trust Co., Washington v. ..... 205 N. C., 382 673
Trust Co. v. Williams ..... 201 N. C., 464 808

Trust Co. v. Williams ....208 N. C., 243.... 808
Trustees v. Avery County....184 N. C., 469.... 757
Tucker v. Almond....209 N. C., 333.... 430
Tucker v. Satterthwaite....120 N. C., 118.... 799
Tucker v. Yarn Mill Co....194 N. C., 756.... 150
Tudor v. Bowen....152 N. C., 441.... 307
Turlington, Stevens v....186 N. C., 191.... 159
Turner, Williams v....208 N. C., 202.... 176
Twitty, S. v.... 9 N. C., 248.... 776
Tyrrell County, Haskett v....152 N. C., 714.... 81
Tyson, S. v....138 N. C., 627.... 231

U

United Brethren v. Comrs. of Forsyth ....115 N. C., 489.... 757
University v. Borden....132 N. C., 476.... 797
Upton, S. v....170 N. C., 769.... 231
Utley, S. v....126 N. C., 997.... 763

V

Vandiford, Collins v....196 N. C., 237....274, 703
Vaughan v. Lewellyn.... 94 N. C., 472.... 274
Vaughn v. Comrs. of Forsyth....117 N. C., 429....81, 652
Venters, Walker v....148 N. C., 388.... 175

W

Wade v. Lutterloh....196 N. C., 116.... 318
Wadesboro, Harrington v....153 N. C., 437.... 124
Waggoner, Lumber Co. v....198 N. C., 221.... 361
Wagner, Dallas v....204 N. C., 517.... 531
Wake County, Barbour v....197 N. C., 314.... 667
Walker, McCaskill v....147 N. C., 195.... 274
Walker, S. v....173 N. C., 780....125, 126
Walker v. Venters....148 N. C., 388.... 175
Wallace, Maxwell v.... 45 N. C., 251.... 351
Wallace v. Phillips....195 N. C., 665.... 348
Wallace v. R. R.... 98 N. C., 494.... 602
Wallace v. R. R....101 N. C., 454.... 602
Wallace v. R. R....104 N. C., 442....601, 602, 707
Wallace, S. v....203 N. C., 284.... 412
Walls v. Assurance Corp....206 N. C., 903.... 578
Walters v. Lumber Co....165 N. C., 388.... 707
Walton, S. v....114 N. C., 783.... 776
Walston, Chemical Co. v....187 N. C., 817.... 787
Ward, Bessire & Co. v....206 N. C., 858.... 267
Ward, Bessire & Co. v....209 N. C., 266.... 429
Ward, Julian v....198 N. C., 480....68, 80
Ward v. Mfg. Co....123 N. C., 248.... 448
Ward v. R. R....206 N. C., 530.... 255
Ward, S. v....180 N. C., 693.... 294
Warren v. Bottling Co....204 N. C., 288.... 92
Warren v. State....199 N. C., 211.... 290
Washington v. Trust Co....205 N. C., 382.... 673

Wasson, Wittkowsky v. ... 71 N. C., 451 ... 35
Water Comrs., Creighton v. ... 143 N. C., 171 ... 621
Water Co., Powell v. ... 171 N. C., 290 ... 647
Waters v. Garris ... 188 N. C., 305 ... 215
Watkins v. Ins. Co. ... 201 N. C., 681 ... 540
Watkins v. Simons ... 202 N. C., 746 ... 672
Watkins, S. v. ... 159 N. C., 480 ... 3
Watson, S. v. ... 208 N. C., 70 ... 56
Way v. Ramsey ... 192 N. C., 549 ... 47
Waynesville, Lee v. ... 184 N. C., 565 ... 653
Weathers, S. v. ... 98 N. C., 685 ... 154
Webb v. Port Com. ... 205 N. C. 663 ... 755
Webb, S. v. ... 155 N. C., 426 ... 57
Webber v. Taylor ... 55 N. C., 9 ... 351
Weil v. Herring ... 207 N. C., 6 ... 697
Welch v. Ins. Co. ... 196 N. C., 546 ... 578
Weldon, Grier v. ... 205 N. C., 575 ... 92
Welfare v. Thompson ... 83 N. C., 276 ... 176, 809
Wellons v. Lassiter ... 200 N. C., 474 ... 430
Wells v. Odum ... 205 N. C., 110 ... 45
Wells, S. v. ... 142 N. C., 590 ... 52
Wentz v. Land Co. ... 193 N. C., 32 ... 700
West, Hinton v. ... 207 N. C., 708 ... 354
West v. Jackson ... 198 N. C., 693 ... 350
Westall, Brittain v. ... 137 N. C., 30 ... 173
Whaley, S. v. ... 191 N. C., 387 ... 22
Wheeler, Hailey v. ... 49 N. C., 159 ... 453
Whisnant v. Price ... 175 N. C., 611 ... 429
Whitaker v. Hill ... 96 N. C., 2 ... 692
White v. Charlotte ... 207 N. C., 721 ... 574
White, Comrs. of Iredell v. ... 123 N. C., 534 ... 585
White, Dix-Downing v. ... 206 N. C., 567 ... 849
White v. Fisheries Co. ... 183 N. C., 228 ... 175, 177
White v. Harris ... 166 N. C., 227 ... 358
White, Hoell v. ... 169 N. C., 640 ... 205
White v. Realty Co. ... 182 N. C., 536 ... 308
White v. Snow ... 71 N. C., 232 ... 431
White, S. v. ... 89 N. C., 463 ... 35
White, Winslow v. ... 163 N. C., 29 ... 26
Whitehurst v. Gotwalt ... 189 N. C., 577 ... 10
Whiteman, New Hanover County v. ... 190 N. C., 332 ... 514
Whitford v. Ins. Co. ... 163 N. C., 223 ... 272
Whitley, Canal Co. v. ... 172 N. C., 100 ... 513
Whitley, S. v. ... 208 N. C., 661 ... 294
Whitmire v. Ins. Co. ... 205 N. C., 101 ... 805
Whitmore v. Hyatt ... 175 N. C., 117 ... 737
Whitt v. Rand ... 187 N. C., 805 ... 329
Wiggins Bros., Inc., Horne-Wilson, Inc., v. ... 203 N. C., 85 ... 159
Wilcox, S. v. ... 206 N. C., 691 ... 154
Wilcox, S. v. ... 206 N. C., 694 ... 243
Wilkes v. Miller ... 156 N. C., 428 ... 787
Wilkesboro, Call v. ... 115 N. C., 337 ... 652

Wilkes County v. Forester.....204 N. C., 163..... 514
Wilkinson, Corporation Com. v 201 N. C., 344.....735, 749
Wilkins-Ricks Co., Beck v.....186 N. C., 210..... 439
Williams v. Building & Loan
Asso. .....207 N. C., 362..... 845
Williams v. Chevrolet Co.....209 N. C., 29..... 176
Williams, Herring v.....153 N. C., 231..... 186
Williams, Kernodle v.....153 N. C., 475..... 176
Williams, Murchison v..... 71 N. C., 135..... 512
Williams, S. v.....208 N. C., 352.....55, 301
Williams, Trust Co. v.....201 N. C., 464..... 808
Williams, Trust Co. v.....208 N. C., 243..... 808
Williams v. Turner.....208 N. C., 202..... 176
Williamson v. Hartman..... 92 N. C., 236..... 431
Williamson v. Holt.....147 N. C., 515..... 360
Willis, Boushiar v.....207 N. C., 511..... 700
Willis v. Willis.....203 N. C., 517..... 26
Wilmington v. Moore.....170 N. C., 52..... 514
Wilmington, Strauss v.....129 N. C., 99..... 800
Wilson v. Allsbrook.....203 N. C., 498..... 176
Wilson v. Ins. Co.....155 N. C., 173..... 504
Wilson v. Lumber Co.....131 N. C., 163..... 475
Wilson, Mortgage Corp. v.....205 N. C., 493..... 215
Wilson, Purvis v..... 50 N. C., 22..... 715
Wilson v. Taylor.....154 N. C., 211..... 350
Wimberly v. R. R.....190 N. C., 444..... 448
Winchester v. Winchester.....178 N. C., 483..... 354
Winders, Blackmore v.....144 N. C., 212..... 469
Winslow, Bank v.....193 N. C., 470..... 176
Winslow v. White.....163 N. C., 29..... 26
Winstead v. Mfg. Co.....207 N. C., 110..... 722
Winston-Salem, Scales v.....189 N. C., 469..... 575
Winston-Salem, Stedman v.....204 N. C., 203..... 757
Wise v. Hollowell.....205 N. C., 286..... 734
Withers v. Lane.....144 N. C., 184.....153, 154
Withers v. Poe.....167 N. C., 372..... 810
Wittkowsky v. Gidney.....124 N. C., 437..... 350
Wittkowsky v. Wasson..... 71 N. C., 451..... 35
Woltz v. Deposit Co.....206 N. C., 239..... 216
Womack v. Ins. Co.....206 N. C., 445..... 820
Womble, Burroughs v.....205 N. C., 432..... 348
Wood v. Braswell.....192 N. C., 588.....58, 696
Wood, Brown v.....201 N. C., 309..... 173
Wood v. Cherry..... 73 N. C., 110..... 176
Wood, Dozier v.....208 N. C., 414..... 287
Wood, Pruitt v.....199 N. C., 788.....56, 576
Wood v. Public Service Corp.....174 N. C., 697..... 308
Woodhouse, Speas v.....162 N. C., 66..... 542
Woodley v. Gregory.....205 N. C., 280..... 672
Woodson v. Beck.....151 N. C., 144..... 175
Woody v. Christian.....205 N. C., 610..... 455
Wrenn v. Cotton Mills.....198 N. C., 89..... 735
Wright, Dawson v.....208 N. C., 418.....175, 176
Wright v. McGee.....206 N. C., 52..... 479

Wright, Owens v.....161 N. C., 127..... 215
Wrightsville Beach, Storm v.....189 N. C., 679..... 73
Wyatt, Phipps v.....199 N. C., 727..... 833
Wynn v. Grant.....166 N. C., 39..... 350

Y

Yarboro, S. v.....194 N. C., 498..... 58
Yarborough, Allen v.....201 N. C., 568..... 422
Yarborough, Lunsford v.....189 N. C., 476..... 745
Yarborough v. Monday..... 14 N. C., 420..... 176
Yarborough v. Park Com.....196 N. C., 284..... 653
Yarn Mill Co., Tucker v.....194 N. C., 756..... 150
Yellowday v. Perkinson.....167 N. C., 144..... 487
Yelverton, S. v.....196 N. C., 64..... 191
York, Holmes v.....203 N. C., 709..... 186
Young, Carter v.....193 N. C., 678.....455, 805, 806
Young, Martin v..... 85 N. C., 156..... 809
Yount, Power Co. v.....208 N. C., 182..... 438

Z

Ziegler Bros., R. R. v.....200 N. C., 396.....92, 810
Zollicoffer, Jones v..... 9 N. C., 623..... 279

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1935

STATE v. A. MARVIN MITCHELL.

(Filed 11 December, 1935.)

1. Criminal Law L c—

Where a new trial is awarded defendant for error in the exclusion of evidence, other exceptions, relating to other rulings upon the evidence and the charge of the court need not be considered.

2. Homicide G c—Held: Proper predicate was laid for admission of testimony of dying declarations.

Where it appears that deceased, a few hours before his death, made the dying declarations sought to be admitted in evidence by defendant, that at the time of making the declarations deceased was in imminent danger of death as the result of five gunshot wounds, that he was in a very weakened condition and stated to one witness that he felt he was "fading out" *is held* sufficient basis for the admission of his dying declarations in evidence, it not being required that deceased should actually express his apprehension of imminent death, but only that it satisfactorily appear from the relevant facts and circumstances that he did apprehend the danger of imminent death.

3. Same—Dying declarations held material to the issue and were improperly excluded over defendant's objection.

The evidence disclosed that deceased and defendant, a white man, were well acquainted. Defendant offered testimony of dying declarations of deceased, after laying proper predicate for their admission in evidence, to the effect that deceased recognized his assailant as a white man and recognized his dress and build, but did not have any idea who his assail-

ant was. *Held:* Testimony of the dying declarations was material to the issue as tending to show that the assailant was someone other than defendant, and its exclusion constitutes reversible error.

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

APPEAL by the defendant from *Williams, J.*, at the June Special Term, 1935, of WAKE. New trial.

On Saturday night, 20 April, 1935, about 10 o'clock, Ross C. Teague, manager of the Raleigh Laundry, while preparing for deposit the money which had been collected by the drivers during the week, was assaulted and robbed by an unidentified person in the laundry at 411 South East Street in Raleigh. In the assault Teague suffered five gunshot wounds, inflicted by .32 calibre bullets, as a result of which he died in Rex Hospital about 8:15 o'clock the following morning. Subsequently, the defendant was arrested, charged with the murder of Teague, and upon his trial set up as a defense, *inter alia,* an alibi.

From a sentence of death, based upon a verdict of guilty of murder in the first degree, the defendant appealed, assigning errors.

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

Chas. U. Harris and Jones & Brassfield for defendant, appellant.

SCHENCK, J. The appellant makes many assignments of error, both to the rulings upon the evidence and to the charge of the court, but under the view we take of the case it becomes necessary to discuss but one group of these assignments, since we hold that they entitle the defendant to a new trial.

There was evidence tending to show that the deceased knew well the defendant, that they had often met and conversed, and that the defendant for many months worked in a filling station close by the laundry of the deceased, and that they had each often been in the place of business of the other.

The State's witness, Dr. P. Y. Greene, testified that he saw the deceased immediately after he was brought to the hospital a short time after he was shot about 10:20 o'clock p.m., on 20 April, 1935, and that he was conscious and able to talk, but was rapidly going into "what we term shock," and that his body was becoming cold and his pulse rapid. On cross-examination, Dr. Greene was asked: "You say he made a statement to you?" and upon objection by the State the court refused to permit an answer, to which refusal the defendant reserved an exception. In the absence of the jury the witness answered the foregoing question as follows: "Officer Bennett asked me if I thought the man was likely

to die, and I replied, 'Yes,' and he asked me if I would ask if he had any idea who shot him, and I asked Mr. Teague in the presence of the officer, and he said he did not know, and I asked him if it was a white man or a colored man, and he said it was a white man. . . . I asked him if he knew who it was, and he said he had no idea."

Another State's witness, Bruce Poole, captain of city detectives, on cross-examination, was asked the following question: "Did Mr. Teague at that time make a statement as to the identity of the man who shot him?" and upon objection by the State the court refused to permit an answer, to which refusal the defendant reserved an exception. In the absence of the jury the witness answered the question as follows: "I asked Mr. Teague who shot him and he told me he didn't feel like talking—that he felt like he was fading out, and I asked him would he answer a question, and he said he would, and I asked him if it was a white man or a colored man, and he said, 'A white man,' and I asked him how he was dressed, and he said, 'About like you,' and I said, 'What size was he?' and he said, 'About like you,' and he looked kinder like he was fading like and I waited and thought I would talk to him some more when he got to feeling better and thought I would wait around, and I stayed until five o'clock in the morning to try to get a statement from him, and that is all I ever got."

"In Greenleaf Ev., sec. 158 (16 Ed.), it is said that while it is essential that the deceased was under the sense of impending death, it is not necessary that he should so state at the time. It is enough, if it satisfactorily appears, in any mode, that the declarations were made under that sanction; whether it be directly proved by the express language of the declarant or be inferred from his evident danger, or the opinion of the medical or other attendants, stated to him, or from his conduct or the circumstances in the case, all of which are resorted to in order to ascertain the state of the declarant's mind." *S. v. Watkins,* 159 N. C., 480 (484). "The rule for the admission of such testimony is thus laid down in Taylor on Evidence, sec. 648: 1. At the time they (the dying declarations) were made, the declarant should have been in actual danger of death, (2) that he should have a full apprehension of his danger, and (3) that death should have ensued." *S. v. Mills,* 91 N. C., 581 (594).

"Dying declarations are admissible on a trial for murder as to the fact of the homicide, and the person by whom it was committed in favor of the defendant as well as against him." *S. v. Blackwell,* 193 N. C., 313; *Mattox v. U. S.,* 146 U. S., 140, 36 Law Ed., 917; Wigmore on Evidence (2d Ed.), Vol. 3, par. 1452, p. 187.

We are of the opinion that the testimony of the witness Greene and of the witness Poole elicited by the answers to the questions to which objections were sustained and exceptions reserved, was competent under

the authorities cited, and we are further of the opinion that such testimony was material to the issue, since it appears that the defendant was well known to the deceased and that the deceased had opportunity to and did see his assailant and recognized that he was a white man, and recognized his dress and build, but did not know him or have any idea who his assailant was. This evidence was material as tending to show that the assailant was someone else than the defendant, and we hold that its exclusion was prejudicial error, and entitles the defendant to a new trial; and it is so ordered.

New trial.

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

LEVI HILL, B. R. FIELDS, W. L. MANESS, W. P. MOORE, AND CHARLES RUFFIN v. THE BOARD OF COMMISSIONERS OF GREENE COUNTY, GEORGE C. MOORE, L. F. HERRING, H. S. GRANTHAM, J. H. WHITAKER, J. S. WHITLEY, AND COUNTY BOARD OF ELECTIONS OF GREENE COUNTY, NORTH CAROLINA, F. A. MOSELEY, CHAIRMAN, AND B. M. MERCER.

(Filed 11 December, 1935.)

Statutes A e: 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 sale of intoxicating liquor under county supervision and control, and provided that sale otherwise as permitted by the statute should be a misdemeanor. Plaintiffs did not 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. *Held:* In the absence of such allegations, plaintiffs are not entitled to the injunctive relief sought, and judgment of the lower court requiring defendants to give bond as a condition precedent to the holding of the election is error.

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

CLARKSON, J., dissenting.

APPEAL by both plaintiffs and defendants from *Frizzelle, J.*, at Chambers in Snow Hill, 13 July, 1935. From GREENE.

L. R. Varser, I. C. Wright, K. A. Pittman, and John D. Langston for plaintiffs.

Walter D. Sheppard 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 chapter 493, Public Laws 1935, which provide for an election to be held to determine whether the statute which carries two major provisions shall become the law in Greene 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 Greene 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 prescribe punishment therefor.

The resident judge of the Fifth Judicial District entered a number of judgments in this case, the final one of which permitted the carrying out of the provisions of the act conditioned upon the defendants filing a bond indemnifying the petitioners and other taxpayers of Greene County from liability and civil responsibility for any act done or contract made by the defendants pursuant to the provisions of the act. From this judgment both parties appealed, the plaintiff assigning as error the refusal of the court below to enjoin the holding of the election and the putting into effect of the other provisions of the statute, and the defendants assigning as error the provision in the judgment requiring them to furnish an indemnity bond.

Under the authorities cited in *Newman et al. v. Watkins et al., Board of County Commissioners, and Royster et al., Board of Elections of Vance County,* 208 N. C., 675, the plaintiffs cannot maintain this action for injunctive relief, since they 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. "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 action is dismissed.

Affirmed on plaintiffs' appeal.

Error on defendants' appeal.

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

CLARKSON, J., dissenting: This case presents the same question as was decided in *Newman et al. v. Comrs. of Vance et al.,* 208 N. C., 675. In that case I dissented, as I do in this case, saying (at p. 678): "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."

I think that the question of the unconstitutionality of the act was duly raised and plaintiffs were deprived of rights guaranteed by the Constitution and were entitled to injunctive relief, and the allegations in the complaint of plaintiffs fully sufficient to grant the relief prayed for.

This is a government founded on the consent of the governed, subject to constitutional limitations. It is the best so far established by the human family to preserve an orderly system of government so as to insure peace, order, and good government. In violation of the Constitution and in the face of a popular vote, inaugurated by those desiring wet delegates to a convention to repeal the 18th Amendment, the dry delegates won by a majority of 184,576, yet notwithstanding this the Pasquotank Liquor Act was passed.

This State was the first to declare an act of the General Assembly unconstitutional. In *Bayard v. Singleton,* Vol. 1, N. C. Reports, 5 (November Term, 1787), p. 45, it is said: "But there it was clear, that no act they could pass, could by any means repeal or alter the constitution, because if they could do this, they would at the same instant of time destroy their own existence as a Legislature, and dissolve the government thereby established. Consequently, the Constitution (which the judicial power was bound to take notice of as much as of any other law whatever), standing in full force as the fundamental law of the land, notwithstanding the act on which the present motion was grounded, the same act must, of course, in that instance, stand as abrogated and without any effect."

In *Marbury v. Madison,* 1 Cranch, 137 (February Term, 1803), the Supreme Court of the United States said, p. 180: "It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank. Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that courts, as well as other departments, are bound by that instrument." At p. 163, we find: "The Government of the United States has been emphatically termed a government of laws, and not of men."

I think the action should not be dismissed, but should be reversed on plaintiffs' appeal, and no error on defendants' appeal.

GEORGE F. CORL v. BUFORD D. CORL ET AL.

(Filed 11 December, 1935.)

1. Estates B b—Contingent limitation is not destroyed by forfeiture of life estate.

The forfeiture of a life estate will not destroy a contingent limitation over for want of a particular estate to support it, but, under the more modern doctrine, the person to whom the estate is forfeited takes only the interest of the life tenant without disturbing the contingent limitations over.

2. Wills E d—Contingent limitation over to beneficiary's children held not destroyed by forfeiture of beneficiary's life estate in trust.

Testator devised certain land in trust for his son for his life with contingent limitation over to his son's legitimate children him surviving. The will provided that if any beneficiary should contest the will the beneficial interest of such beneficiary should be forfeited and should go to another son in fee simple, discharged from any trust created for such beneficiary. The son first named contested the will, and in the caveat proceedings the validity of the will was upheld. *Held:* The son contesting the will forfeited the life estate created in trust for him, but such forfeiture did not destroy the contingent limitation over to his children, and the son to whom the estate was forfeited did not take a fee simple in the lands forfeited, but only the life estate forfeited free from the trust.

3. Wills E a—

The intent of the testator must prevail in the interpretation of the will unless contrary to public policy or some positive rule of law.

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

APPEAL by defendants from *Sink, J.*, at February Term, 1935, of CABARRUS.

Proceeding under Declaratory Judgment Act, ch. 102, Public Laws 1931, to determine effect of contest of will by beneficiary under provision therein providing for forfeiture of caveator's interest.

The facts are these:

1. On 3 January, 1931, M. J. Corl, resident of Cabarrus County, died leaving a last will and testament, the pertinent items of which are as follows:

"Fifth: I give, bequeath, and devise to the Citizens Bank and Trust Company of Concord, N. C., in trust for my son, Buford D. Corl, the following described property, to have and to hold the same for and during the natural life of said Buford D. Corl, and in the event he should marry and have legitimate children, the remainder after his death I will and devise to his said legitimate children in fee simple; but in the event the said Buford D. Corl should die without leaving legitimate children,

then after his death I will and devise said property to his then living nearest blood relatives in fee simple, discharged from any trust. . . ."

(Description of lands not in dispute.)

"Sixth: I give and bequeath to the Citizens Bank and Trust Company of Concord, N. C., in trust for my said son, Buford D. Corl, the sum of five thousand dollars ($5,000.00), said sum to be paid to it in cash after the death of my wife, E. J. Corl. I hereby forgive and release my said son, Buford D. Corl, from the payment of any principal or interest on any notes or accounts which may be due me from him on account of any advancements heretofore made at the time of making this will, which sums amount to about $1,792.80."

"Thirteenth: After the death of my wife, E. J. Corl, all the residue of my property, both real and personal, not used in the cost and expenses in the administration of my estate, and the payment of all inheritance taxes, etc., or used for the support of my said wife, shall be divided into three equal shares, and be distributed as follows, taking into account all future advancements from the date of this will to any of my children so made by me or from my property under my authority or direction, from his or her part or share: (a) One share, I give, bequeath, and devise to my son, George F. Corl, in fee simple. (b) One share, I give, bequeath, and devise to the Citizens Bank and Trust Company of Concord, N. C., in trust for my son, Buford D. Corl. (c) One share, I give, bequeath, and devise to the Cabarrus Bank and Trust Company of Concord, N. C., in trust for my son, J. Banks Corl.

"Fourteenth: If any of my children, grandchildren, or any of the beneficiaries under this will, shall contest the validity of this my last will and testament, or attempt to vacate the same, or alter or change any of the provisions thereof, he, or she, or they, shall thereby forfeit any and all beneficial interest in my estate, and the interest of such person or persons, shall go and I do give, bequeath, and devise his or her interest to my son, George F. Corl, his heirs and assigns in fee simple, discharged from any trust hereinbefore created for his or her benefit."

2. On 14 December, 1932, Buford D. Corl "contested the validity" of his father's will by filing caveat thereto. At the February Term, 1934, this caveat was tried, resulting in verdict and judgment for the propounders and upholding the will.

3. Thereafter, on 14 April, 1934, George F. Corl instituted an action in the Superior Court of Cabarrus County to declare a forfeiture of the beneficial interests of the said Buford D. Corl in his father's estate. This action was tried at the June Term, 1934, resulting in verdict for plaintiff and judgment as follows:

"That the plaintiff George F. Corl is the owner and entitled to the possession of all the beneficial interest of Buford D. Corl under the will

and testament of M. J. Corl, and in the estate of M. J. Corl, discharged from any trust created for the benefit of said Buford D. Corl, together with the cost of this action."

4. The testator's wife mentioned in item thirteen of the will predeceased her husband.

Upon the foregoing facts, it was declared and adjudged in the court below:

"1. That under and by virtue of the will of M. J. Corl, deceased, the plaintiff Geo. F. Corl is vested with an indefeasible title in fee simple in and to the real estate described or referred to in item fifth and item thirteenth (b) of the will of said M. J. Corl, discharged from any trust or remainders.

"2. That Geo. F. Corl is the absolute owner of all cash funds, moneys, and/or other personalty referred to in items fifth, sixth, and thirteenth (b) of the will of M. J. Corl, discharged from any trust."

Defendants appeal, assigning errors.

Hartsell & Hartsell for plaintiff.

Armfield, Sherrin & Barnhardt and Crowell & Crowell for defendants.

STACY, C. J. Does the forfeiture of all of Buford D. Corl's beneficial interest in his father's estate destroy the contingent interests limited after his life estate? The court below was of opinion that the inquiry should be answered in the affirmative. The law is otherwise. Note, Ann. Cas., 1917A, 902, *et seq.;* 23 R. C. L., 560-561.

True, at the early common law it was said every remainder requires a particular estate to support it, and a contingent remainder must vest during the continuance of the particular estate, or *eo instanti* that it determines. *Power Co. v. Haywood,* 186 N. C., 313, 119 S. E., 500. The determination of the particular estate, therefore, by surrender, merger, tortious alienation, forfeiture or otherwise, prior to the happening of the contingency upon which the remaindermen could take, would defeat the remainder for want of a particular estate to support it. *Bond v. Moore,* 236 Ill., 576; *Lumsden v. Payne,* 120 Tenn., 407, 114 S. W., 483, 21 L. R. A. (N. S.), 605. The rule was of feudal origin, based on the philosophy of feoffment, livery of seizin, etc. 23 R. C. L., 559. But with the invention of intervening estates to trustees to preserve contingent remainders (2 Blk. Com., 172), and later by statute (8 and 9 Vict.), the law of conveyancing underwent quite a change in England, and much of the prior learning on the subject was confined to simple deeds or became obsolete. Fearne on Contingent Remainder, secs. 316-324; Preston on Conveyancing (3d Ed.), 399; 2 Washburn Real Property, 263; 1 Tiffany Real Property, sec. 123; Williams Real Property (6th Ed.), 282. See, also, *Payne v. Sale,* 22 N. C., 455.

In the present case, it will be observed, the testator left all of Buford's interest in trust, and for life only (except the *residuum*), while George was given his outright, absolutely and in fee simple. Evidently the testator regarded George's business sagacity better than Buford's, and subsequent events seem to have justified this estimate. *Whitehurst v. Gotwalt,* 189 N. C., 577, 127 S. E., 582.

So, in providing in item fourteen that all forfeited interests should go to George F. Corl "in fee simple, discharged from any trust," it was not thereby intended to enlarge the forfeited interest, but to strip the interest so forfeited—and only such interest—of any trust and to give it to George, to the extent that such interest was capable of being bequeathed or devised, as his other bequests and devises in the will, absolutely and in fee simple.

In other words, the intention of the testator was to take from any beneficiary who should contest the validity of his will, the interest intended for him or her thereunder, and to give such interest to George, with the added provision that the interest of any contestant should go to his son George, "discharged from any trust hereinbefore created for his or her benefit;" *i.e.,* discharged from any trust previously created in the will for the benefit of any who should contest the validity of the will.

In the interpretation of wills, the intent of the testator is to prevail, unless contrary to public policy or some positive rule of law. *Jolley v. Humphries,* 204 N. C., 672, 169 S. E., 417; *Ellington v. Trust Co.,* 196 N. C., 755, 147 S. E., 286; *McCullen v. Daughtry,* 190 N. C., 215, 129 S. E., 611.

Let the cause be remanded for judgment accordant herewith.

Error.

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

STATE v. FRANK HUFFMAN.

(Filed 11 December, 1935.)

1. Burglary C d—Evidence of defendant's guilt of feloniously breaking and entering held sufficient to be submitted to the jury.

Evidence tending to show that a store building had been broken into by breaking the lock and prizing the rear door open, that defendant's fresh finger prints were found the following morning about the vault, which had been blown open with nitro-glycerine, and about other places in the building, and that at the time of his arrest some ten months after the commission of the crime, defendant had in his possession dynamite caps

and nitro-glycerine, *is held* sufficient to be submitted to the jury on the issue of defendant's guilt of feloniously breaking and entering, the evidence being sufficient to warrant the inference that defendant was present and committed or participated in the commission of the crime, and the weight and credibility of the evidence being for the jury.

2. Criminal Law G i—Testimony of finger print expert held competent.

Where a witness testifies that he has had special training and experience in taking and classifying finger prints, his testimony that the fresh finger prints found at the scene of the crime were identical with those of defendant is competent as tending to show that defendant was present when the crime was committed, and that he at least participated in its commission.

3. Same—

It is competent for a finger print expert, in the presence of the jury, to demonstrate his method of taking finger prints and explain how he identifies them.

4. Burglary C c—Defendant's possession of explosive some ten months after vault was blown open held competent under facts of this case.

Where it is established by evidence that a store building was broken into and the vault therein blown open with nitro-glycerine, it is competent for the State to show, in connection with evidence tending to establish defendant's presence at the scene of the crime when it was committed, that defendant had in his possession dynamite caps and nitro-glycerine when he was arrested some ten months after the commission of the crime, since such possession tended to show that, if defendant were present, he committed or participated in the commission of the crime, the probative value of the evidence being for the jury.

APPEAL by defendant from *Pless, J.*, at September Term, 1935, of GUILFORD. No error.

This is a criminal action in which the defendant Frank Huffman was tried at September Term, 1935, of the Superior Court of Guilford County on an indictment charging that on or about 12 November, 1934, at and in Guilford County, North Carolina, the said defendant did feloniously break and enter into a building owned and occupied by the Borden Brick and Tile Company, with the felonious intent to steal, take, and carry away from said building certain articles of personal property therein. The jury returned a verdict of guilty.

From judgment that he be confined in the State's Prison for a term of not less than three or more than five years, the defendant appealed to the Supreme Court, assigning as error the admission, over his objections, of evidence offered by the State, and the refusal of the court to allow his motion at the close of all the evidence for judgment as of nonsuit.

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

Younce & Younce for defendant.

CONNOR, J. Neither of the assignments of error on this appeal can be sustained.

The evidence for the State showed that some time during the night of 12 November, 1934, a building owned and occupied by the Borden Brick and Tile Company, and located on Westover Terrace in the city of Greensboro, N. C., was entered through a rear door by some person or persons, with the felonious intent to steal, take, and carry away from said building articles of personal property then in said building. The rear door opening into said building was prized open after the lock had been broken by a pinch bar. There was a safe in the vault in the building in which was money and valuable papers. The door to the vault, which had been locked by the manager of the Borden Brick and Tile Company, before he left the building at the close of the previous day's business, had been blown open. The combination lock on the safe in the vault had been blown to pieces. Nothing was taken from the safe or from the vault. Police officers of the city of Greensboro, in response to a summons from the manager of the Borden Brick and Tile Company, arrived at the building, at about 8 o'clock on the morning after the building had been entered, and made an examination of the premises.

W. P. Whitley, a police officer of the city of Greensboro, who was found by the court to be a finger print expert, testified as follows:

"I am in charge of the identification bureau of the police department of the city of Greensboro. I have had practical experience for ten years in identifying persons by means of their finger prints. I had two years of training for this work in the police department of Washington City. I have taken the finger prints of over ten thousand persons, and have never found two persons who had the same finger prints.

"During the morning of 12 November, 1934, I went to the plant of the Borden Brick and Tile Company in the city of Greensboro. I found that the door to the vault in the office building had been forced open. It appeared to have been blown open. Inside the vault there was a safe. An attempt had been made to enter the safe. I found soap and glycerine packed around the crease in the door to the safe. In another office in the building I found a desk. The drawers to this desk had been prized open by some kind of an instrument. There was a metal box in one of the drawers.

"My first examination for finger prints was at the rear door of the building. I did not find any good finger prints there. I then went to the vault, and on the inside of the door to the vault I found some clear finger prints. I photographed these finger prints, and then went to the desk. On the side of the metal box which was in one of the drawers of the desk I found the print of a thumb and of four fingers. I photographed these prints and later developed these and the other photographs. This was in November, 1934.

"About a month ago, I took the finger prints of the defendant Frank Huffman, who was then in the custody of the police department of the city of Greensboro. I compared these finger prints with the photographs which I had made of the finger prints which I found in the office of the Borden Brick and Tile Company. They are identical. The finger prints which I found in the office of the Borden Brick and Tile Company are the finger prints of the defendant Frank Huffman. The finger prints which I found in the office of the Borden Brick and Tile Company on the morning of 12 November, 1934, were fresh finger prints."

The witness, at the request of the solicitor for the State, and in the presence of the jury, demonstrated his method of taking finger prints, and explained how he identified them. To this the defendant objected. His objections were overruled, and defendant excepted. This exception is manifestly without merit.

R. D. Hayworth, a police officer of the city of Greensboro, testified as follows:

"I know the defendant Frank Huffman. I arrested him at his home in the city of Greensboro three or four weeks ago. I examined his premises and found, under his house, buried in fresh dirt, several bottles containing nitro-glycerine. Near the place where these bottles were buried there were tracks made by a shoe of the size of the shoe worn by the defendant. I found in a trunk in defendant's house fuses and dynamite caps which the defendant said belonged to him. He said that he was a well-digger by trade, and had the fuses and the dynamite caps for use in digging wells. He said he knew nothing of the nitro-glycerine which I found in bottles buried under his house. I made tests with the fuses, dynamite caps, and nitro-glycerine which I found at the defendant's house. I had no difficulty when I made the tests in exploding the nitro-glycerine with the dynamite caps and fuses which I found in defendant's house."

The defendant objected to the testimony of this witness tending to show that the defendant had in his possession fuses, dynamite caps, and nitro-glycerine ten months after the commission of the crime with which he was charged. These objections were overruled, and defendant excepted. On his appeal to this Court he assigns as error the admission of this testimony as evidence. This assignment of error cannot be sustained. The testimony was competent as evidence tending to show that if the defendant was present when the crime was committed, as his finger prints tended to show, he committed or participated in the commission of the crime. The probative value of the evidence was, of course, for the jury to determine. See *State v. Fogleman,* 204 N. C., 401, 168 S. E., 356; also, 16 C. J., p. 546, section 1045.

The testimony of the finger print expert was competent as evidence tending to show that defendant was present when the crime was committed and that he at least participated in its commission. See *State v. Combs*, 200 N. C., 671, 158 S. E., 252. This evidence was properly submitted to the jury as tending to show the guilt of the defendant.

The judgment is affirmed.

No error.

FAYETTEVILLE INDEPENDENT LIGHT INFANTRY, INC., v. SANITARY LAUNDRY AND DRY CLEANERS, INC.

(Filed 11 December, 1935.)

1. Ejectment C a—

Where lessor has contracted to sell the leased premises and the lessee refuses to vacate, action in ejectment is properly brought in the name of the lessor.

2. Landlord and Tenant D d—Lease held to terminate upon exercise of option given third person by lessor.

The lease in question provided that it was made subject to an option given a third person by lessor. A letter written by lessees prior to the execution of the lease in which lessees stated they could not obtain a lease without a provision that they should vacate upon the exercise of the option, was admitted in evidence, and there was evidence that upon the exercise of the option by the third person and demand for the premises by lessor, lessees agreed to vacate. *Held:* The court's holding, upon agreement of the parties to trial by the court, that the lease terminated upon the exercise of the option by the third person, is without error, the instrument being construed in the light of the interpretation given it by the parties themselves.

3. Contracts B a—

In determining the meaning of an indefinite or ambiguous contract, the construction placed upon it by the parties themselves is to be considered by the court.

APPEAL by defendant from *Grady, J.*, at February Term, 1935, of CUMBERLAND. Affirmed.

This was a summary ejectment proceeding, instituted by plaintiff lessor to eject defendant lessee from certain premises in the city of Fayetteville.

The lease, dated 8 February, 1933, was for a period of two years from 1 February, 1933, with right to lessee to renew the lease at its expiration for an additional two years at a stipulated rental, and contained this provision: "This lease is made subject to an option to the United States Government, which has not yet expired, to buy said property." The original lessees, B. J. Holleman and C. M. Johnson, assigned said lease

to the defendant. Plaintiff, on 11 November, 1932, gave to the Secretary of the Treasury of the United States a "site proposal" or offer to sell the described premises for $30,000, and on 26 September, 1934, a proposal in same form at the price of $28,000. There was no time limit in either proposal. On 1 October, 1934, plaintiff was notified by the Post Office Department that the Government would exercise its option to purchase said property, and on 1 November, 1934, plaintiff gave defendant written notice to vacate, which defendant refused to do.

From an adverse judgment by the justice of the peace, defendant appealed to the Superior Court.

In the Superior Court it was agreed that the court might hear the evidence, find the facts, and enter judgment thereon.

The trial judge found the following facts:

"It is alleged in the complaint and admitted in the answer that the defendants entered into said contract with knowledge of the fact that the United States Government held an option upon said property, to purchase the same, and there is no attack made by the defendant upon the validity or the terms of said option; and the only defense set up by the defendants is that they will be damaged in a large sum of money if they are now required to vacate said premises.

"The plaintiff offered in evidence those parts of the complaint contained in 'Article 3' thereof, pertaining to the lease and its terms, and that part of paragraph 3 of the answer, in so far as it admitted said allegations; the plaintiff also offered said lease in evidence, a copy of which is hereto attached, marked Exhibit A, and made a part of this judgment; plaintiff also offered in evidence a letter from the defendants to Brown and Williams, Attorneys at Law, Morris Building, Philadelphia, Pa., dated 16 November, 1932, in which they state that they were unable to get a lease upon the property in question except upon the condition that a provision be included to vacate the same in the event that a sale was made thereof to the Government, and further stating that such provision makes it considerably less desirable, as there would be considerable expense in moving a laundry, as well as the loss of business while it is closed; plaintiff offered certified copy of option made by the United States Government, dated 1 November, 1932, and also offered certified copy of 'site proposal,' dated 26 September, 1934, both of which are hereto attached and made a part of these findings of facts.

"J. R. Jones, commanding officer of the plaintiff, testified that after the plaintiff had notified the defendants to vacate the premises, on or about 1 November, 1934, he had a conversation with C. M. Johnson, president of the defendant, and with Mr. Wray, its secretary and treasurer, in which the option of the Government and the contract were discussed, and that they both said they would vacate the premises; he also testified that the Government had insisted upon the plaintiff for a deed and was

ready to exercise its option and to take over the property and pay for the same, but that the plaintiff was unable to do so, because the defendants had refused to vacate.

"There was no evidence offered by the defendant in contradiction of any part of the plaintiff's testimony or of the plaintiff's documentary evidence.

"The court finds as a fact that the United States Government, acting through its proper departments, is now undertaking to exercise said option and to erect upon the property a large, commodious building, which is to be a part of the Fayetteville Post Office, that the Government stands ready, able, and willing to pay for said property, and will pay the contract price, as soon as it is let into the possession of the same; that the defendant is in the wrongful and unlawful possession of said property, and the plaintiff is entitled to a writ of assistance, commanding the sheriff to eject the defendant from said property and to put the plaintiff in the possession thereof."

Thereupon, it was adjudged that plaintiff was entitled to the immediate possession of the lands described, and that defendant be ejected.

From judgment rendered, defendant appealed to this Court.

Downing & Downing for plaintiff.
Ball & Ball for defendant.

DEVIN, J. The facts found by Judge Grady fully support the judgment.

Defendant demurred *ore tenus* that the complaint does not state facts sufficient to constitute a cause of action, and for that there is a defect of parties plaintiff. This cannot be sustained.

Where lessor has contracted to sell the leased premises and the lessee refuses to vacate, action may be properly brought in the name of the lessor. *Shelton v. Clinard,* 187 N. C., 664.

The provision in the lease that it is made "subject to an option to United States Government" seems to have been interpreted by the parties to mean that the lease would terminate in the event the United States Government exercised its option, and it was so found by the court below. In determining the meaning of an indefinite or ambiguous contract, the construction placed upon it by the parties themselves is to be considered by the court. *Lewis v. Nunn,* 180 N. C., 159; *Lumpkin v. Investment Co.,* 204 N. C., 563.

Defendant's motion for judgment of nonsuit was properly overruled.

It is admitted that defendant vacated the premises in accordance with the judgment and is no longer in possession.

The judgment is

Affirmed.

SECURITY NATIONAL BANK AND LEO H. HARVEY, TRUSTEES, v. TRAVELERS INSURANCE COMPANY.

(Filed 11 December, 1935.)

1. Insurance O a—Insurer held liable for interest on amount of policy from receipt of due proof of death of insured until payment.

Where under the terms of a policy of insurance payment is to be made to the beneficiary immediately upon receipt of due proof of death of insured, the failure of the insurer to make payment until more than a year after receipt of such due proof entitles the beneficiaries to interest on the amount from the date of insurer's receipt of due proof, and payment of interest will not be excused because payment by insurer was delayed by reason of the fact that the trust agreement under which the policy was assigned was changed without notice to insurer by adding an individual trustee, and the fact that the corporate trustee became insolvent before payment and a substituted trustee appointed and insurer did not have notice of such substitution until a much later date, insurer having had the use of the money during the period of delay. C. S., 2309.

2. Interest B b—

A debt draws interest from the date it becomes due, and when interest is not made payable on the face of the instrument, payment of interest will be imposed by law in the nature of damages for the retention of the principal of the debt. C. S., 2309.

APPEAL by plaintiffs from *Pless, J.*, at August Term, 1935, of GUILFORD. Reversed.

This was an action to recover interest upon a fund derived from an insurance policy.

By consent, the case was submitted to the court without a jury. The facts agreed were substantially as follows:

That on or about 18 July, 1930, the defendant executed and delivered to Charles Felix Harvey, Jr., its contract of insurance, by which it contracted to pay to the beneficiaries named therein the sum of twelve thousand dollars ($12,000) immediately upon receipt of due proof of the death of Charles Felix Harvey, Jr., during the continuance of said contract.

That on 20 August, 1931, the said insurance policy was assigned to the North Carolina Bank and Trust Company as trustee, and in accordance with the terms and conditions of the trust deed, notice of which was given to the defendant. That on or about 30 September, 1932, the trust agreement aforesaid was canceled and terminated, in accordance with its terms and provisions, and said contract of insurance and the proceeds thereof were assigned to the North Carolina Bank and Trust Company and Leo H. Harvey, Jr., as trustees by a new trust agreement in writing, but defendant had no notice thereof until 20 February, 1933, on or before which date due proof of death had been made.

That Charles Felix Harvey, Jr., the assured, died on 29 January, 1933, while said contract of insurance was in full force and effect; that on 7 February, 1933, the defendant received the proof of death forms from the assistant trust officer of the North Carolina Bank and Trust Company at Raleigh, N. C.; that on 9 February, 1933, the local office of defendant received from its home office a check for the total amount due under said policy, which check was payable to the North Carolina Bank and Trust Company, as trustee under the deed of trust dated 20 August, 1931; that this check was transmitted to the claims representative of defendant at Goldsboro, N. C. That on or about 20 February, 1933, defendant's representative for the first time learned that the trust agreement dated 20 August, 1931, was not in force; that it had been canceled and a new trust agreement executed in favor of the North Carolina Bank and Trust Company and Leo H. Harvey, Jr., trustees, dated 30 September, 1932; that thereupon the check or draft which had been issued by the defendant in payment of the insurance provided for in said policy, and which was payable to the North Carolina Bank and Trust Company, was returned to defendant by its agent at Goldsboro; that thereupon, on 20 March, 1933, the local office of defendant received from its home office a corrected check payable to the North Carolina Bank and Trust Company and Leo H. Harvey, Jr., in trust under the deed of trust dated 30 September, 1932; that on 3 March, 1933, the North Carolina Bank and Trust Company, one of the trustees named in the second trust agreement, was insolvent, and voluntarily subjected itself to the orders and control of the Bank Commissioner of the State of North Carolina; that on 4 March, 1933, a bank holiday was declared and the North Carolina Bank and Trust Company was closed and did not reopen thereafter for unrestricted business. That thereafter, by orders of the Commissioner of Banks, dated 3 March, 7 March, 20 March, and 22 April, the said bank was permitted to operate under restrictions, with authority to the trust department to continue to act as trustee, provided no funds should be disbursed, and that any fund received for benefit of such trusts after close of business on the last day of unrestricted operation should be held in a special trust account. That thereafter the liquidation of the North Carolina Bank and Trust Company proceeded, and on or about 1 September, 1933, the plaintiff Security National Bank was organized and began business on 1 September, 1933; that the Security National Bank was licensed to act as trustee by the Federal Reserve Board on 15 September, 1933, and by the North Carolina Commissioner of Banks on 26 September, 1933; that thereafter the Security National Bank requested that the amount of this policy be paid to it; whereupon, on 15 February, 1934, a petition was filed by the plaintiffs herein, alleging that the North Carolina Bank and Trust Com-

pany was insolvent, was being liquidated, and was not in position to act as cotrustee under the trust agreement, and asking the appointment of a new trustee. Whereupon, on 1 March, 1934, by order, the Security National Bank, the plaintiff herein, was appointed cotrustee of the estate of Charles Felix Harvey, Jr., with the right and power to receive the assets of said estate; that on 10 May, 1934, the defendant received notice that the Security National Bank had been appointed successor trustee of the North Carolina Bank and Trust Company in the above entitled matter; that on 22 May, 1934, the defendant paid to the Security National Bank of Greensboro and Leo H. Harvey, trustees, the amount of eleven thousand six hundred twenty-two dollars and seventy-three cents ($11,622.73), the face value of the policy, less a loan of three hundred eighty-three dollars and ninety-two cents ($383.92), which had been negotiated by the assured; that tender of this amount was not, theretofore, made by defendant. The plaintiffs claim that they are entitled to interest on $11,622.73 from 7 February, 1933, until 21 May, 1934, amounting to nine hundred dollars and seventy-five cents ($900.75), together with interest thereon from 21 May, 1934. The defendant contends that it is not liable for the interest claimed, nor any part thereof.

From the facts agreed, the court below was of the opinion the defendant had paid the insurance within a reasonable time, and rendered judgment that the plaintiffs were not entitled to recover the interest sued for. From this judgment the plaintiffs appealed.

Brooks, McLendon & Holderness for plaintiffs.
Sapp & Sapp for defendant.

DEVIN, J. From the facts agreed, it is apparent the defendant insurance company was not relieved of the duty to make payment immediately upon receipt of proof of death of the insured in accordance with the terms of the policy, and it is therefore liable for interest on the fund retained by it.

The fact that the money was due under the terms of the policy, and that it was retained by the defendant, entitles the beneficiaries to interest under the statute. C. S., 2309; *Bond v. Cotton Mills,* 166 N. C., 20.

There was no controversy as to the amount recoverable, and the defendant held the fund and had the use of the money long after it was due and payable. A debt draws interest from the time it becomes due. When interest is not made payable on the face of the instrument, it is in the nature of damages for the retention of the principal debt. *King v. Phillips,* 95 N. C., 246; *Grocery Co. v. Taylor,* 175 N. C., 37.

For the reasons given, the judgment of the court below must be

Reversed.

STATE v. L. L. LANDIN AND WILLIE BRYANT.

(Filed 11 December, 1935.)

1. Automobiles F b—Evidence held sufficient for jury on charge of manslaughter.

The evidence on behalf of the State tended to show that defendant, while intoxicated, drove his car at a speed of 55 to 60 miles per hour into a city street intersection and struck the rear of another car which had passed the center of the intersection as it traveled along the intersecting street from defendant's right, that defendant at the time was talking with a passenger in his car and did not see the intersection or the other car, and that the passenger in defendant's car died as a result of injuries sustained in the collision. *Held:* The evidence was sufficient to overrule defendant's motion to nonsuit in a prosecution upon an indictment charging defendant with the unlawful and felonious slaying of the deceased.

2. Criminal Law I j—

On motion to nonsuit, the court is required merely to ascertain whether there is any competent evidence to sustain the allegations of the indictment.

3. Automobiles F b—Evidence held insufficient for jury on charge of manslaughter.

Evidence that defendant drove his car into a city street intersection at 35 or 40 miles per hour, but that he blew his horn before entering the intersection, and thereafter slackened his speed, and kept his car on the right side of the street, and that after he had passed the center of the intersection the rear of his car was struck by another car entering the intersection at 55 to 60 miles per hour from defendant's left, *is held* insufficient to be submitted to the jury in a prosecution of defendant on a charge of manslaughter for the death of a passenger in the other car resulting from the collision, since the negligence of defendant in entering the intersection at an excessive rate of speed had spent itself and would have been harmless but for the intervening negligence of the driver of the other car.

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

APPEAL by defendants from *Williams, J.*, at June Term, 1935, of WAKE.

Criminal prosecution, tried upon indictment charging the defendants with the unlawful and felonious slaying of Miss Ruth Ellis.

It is admitted that on the night of 10 March, 1935, a collision occurred at the intersection of Davie and East streets, in the city of Raleigh, between a Terraplane automobile, operated by Willie Bryant, and a Chevrolet, driven by L. L. Landin. The deceased was riding with the defendant Landin. East Street runs in a northerly and southerly direction. Davie Street runs in an easterly and westerly direction. There is a manhole in the center line of East Street, four feet north of the center of the intersection. At the southeast corner of the two streets

there is a brick garage which extends up to the sidewalk on both streets and makes what is known as a blind corner. At the northeast corner of said intersection there is a cafe; at the northwest corner there are two telephone poles and certain billboards; and at the southwest corner there is a vacant lot.

The evidence on behalf of the State tends to show that the Terraplane operated by Bryant entered the intersection first at a speed of 35 or 40 miles an hour. It was on the north side of Davie Street, going in a westerly direction. Bryant sounded his horn before entering the intersection and, according to his testimony, slowed down or slackened the speed of his car.

The Chevrolet driven by Landin approached from the south on East Street at a rate of from 55 to 60 miles an hour. It ran into the intersection without sounding its horn or lessening its speed, and struck the left rear wheel and fender of Bryant's Terraplane at a point slightly northwest of the manhole. The Terraplane was turned over several times. After the impact, the Chevrolet ran at an angle across the balance of the intersection to its left and rammed into a telephone pole at the northwest corner of the intersection, throwing Miss Ellis out of the car and causing her death. It was further in evidence that Landin had been drinking and did not see the intersection or Bryant's car before the collision. Landin and Bryant were both severely injured.

Landin testified that he had not been drinking and that he was driving between 25 and 30 miles an hour. He admitted, however, that he did not see the Terraplane or the intersection before entering it, as he and Miss Ellis were engaged in conversation at the time.

Both defendants demurred to the evidence and moved to dismiss under the Mason Act, C. S., 4643. Overruled; exception.

Verdict: Guilty as to both defendants.

Judgment as to Landin: Imprisonment in State's Prison for not less than three nor more than six years.

Judgment as to Bryant: Imprisonment in State's Prison for not less than eighteen months and not more than three years.

The defendants appeal, each assigning errors.

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

Norman Gold and Thomas W. Ruffin for defendant Landin.

W. H. Sawyer and Douglass & Douglass for defendant Bryant.

STACY, C. J. It is not perceived upon what theory the action could be dismissed as against the defendant Landin. *S. v. Cope,* 204 N. C., 28, 167 S. E., 456. There is not only evidence of his reckless driving but also of his intoxication; and death as a result of the collision is

admitted. *S. v. Dills,* 204 N. C., 33, 167 S. E., 459. This made it a case for the jury so far as Landin is concerned. *S. v. Stansell,* 203 N. C., 69, 164 S. E., 580.

In passing upon the sufficiency of the evidence, raised by demurrer or motion to nonsuit, the court is required merely to ascertain whether there is any competent evidence to sustain the allegations of the indictment. *S. v. Marion,* 200 N. C., 715, 158 S. E., 406; *S. v. Carlson,* 171 N. C., 818, 89 S. E., 30; *S. v. Rountree,* 181 N. C., 535, 106 S. E., 669.

On the other hand, a careful perusal of the record leaves us with the impression that the demurrer to the evidence should have been sustained as to Willie Bryant. *S. v. Satterfield,* 198 N. C., 682, 153 S. E., 155; *S. v. Agnew,* 202 N. C., 755, 164 S. E., 578; *S. v. Cope, supra; S. v. Lancaster,* 208 N. C., 349.

It is true the defendant Bryant may have entered the intersection at an excessive rate of speed, nevertheless his negligence in this respect had spent itself and would have been harmless but for the reckless driving of the defendant Landin. The Terraplane was on its right side of the road, and had passed the center of East Street before it was struck by the Chevrolet. *S. v. Satterfield, supra; S. v. Fulcher,* 184 N. C., 663, 113 S. E., 769.

The doctrine of insulating the conduct of one, even when it amounts to inactive negligence, by the intervention of the active negligence of a responsible third party, has been applied in a number of cases. *Haney v. Lincolnton,* 207 N. C., 282, 176 S. E., 573; *Baker v. R. R.,* 205 N. C., 329, 171 S. E., 342; *S. v. Eldridge,* 197 N. C., 626, 150 S. E., 125; *Brigman v. Const. Co.,* 192 N. C., 791, 136 S. E., 125; *S. v. Whaley,* 191 N. C., 387, 132 S. E., 6.

On Landin's appeal, No error.

On Bryant's appeal, Reversed.

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

STATE v. LOUIS SHINN.

(Filed 11 December, 1935.)

1. Criminal Law L c—

Where a new trial is awarded defendant for error in the admission of certain evidence, other assignments of error need not be considered.

2. Criminal Law G r—

It is reversible error to admit testimony of specific acts of misconduct of a material witness for defendant for the purpose of impeaching the

testimony of such witness, the State being confined to the general reputation of the witness in impeaching his credibility.

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

APPEAL by defendant from *Sink, J.*, at April Term, 1935, of CABARRUS. New trial.

This is a criminal action in which the defendant Louis Shinn was tried on two indictments for murder, one for the murder of Brady Medlin and the other for the murder of Albert Medlin. Without objection, the two indictments were consolidated for trial.

When the defendant was arraigned for trial, the solicitor for the State announced that he would not contend that on the evidence which he would offer for the State the defendant was guilty of murder in the first degree, but that he would contend that the defendant is guilty of murder in the second degree or of manslaughter, as the jury should find the facts from the evidence. The defendant entered a plea of not guilty to each indictment.

All the evidence at the trial showed that early in the night of 23 March, 1935, near a store in the town of Kannapolis, N. C., the defendant Louis Shinn shot and killed both Brady Medlin and Albert Medlin. There was evidence for the State tending to show that the defendant shot each defendant with a pistol twice, and that the second shot in each case was fired by the defendant while the deceased was leaving the place where the first shot was fired, and that the second shot inflicted the fatal wound.

The evidence for the defendant tended to show that he shot and killed both Brady Medlin and Albert Medlin in his self-defense, while he was being assaulted by both the deceased men, who were brothers.

Luther Mesimer testified as a witness for the defendant. His testimony, which was admitted as evidence for the defendant without objection by the State, if believed by the jury, showed that both homicides were committed by the defendant in his self-defense.

S. J. Critz, who had testified as a witness for the defendant, on his cross-examination by the solicitor for the State, testified that he knew the general reputation of the witness, Luther Mesimer, and that it was "pretty good." He was then asked the following questions by the solicitor for the State:

"Q. How many times has Luther Mesimer been up in court?

"A. Two or three times.

"Q. In the last six years, hasn't he been involved in affrays with deadly weapons at least half a dozen times, and isn't that his reputation?

"A. I don't know how many times—several times.

"Q. Didn't he serve an 8 months sentence for an assault with a deadly weapon, to wit: A knife?

"A. Yes, sir."

The defendant's objections to these questions and the answers thereto, all made in apt time, were overruled, and the defendant excepted.

There was a verdict that the defendant is guilty of murder in the second degree, as charged in each indictment.

From judgment that he be confined in the State's Prison for a term of not less than fifteen or more than twenty-five years the defendant appealed to the Supreme Court, assigning errors in the trial as appear in the case on appeal.

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

Hartsell & Hartsell and Clyde R. Hoey for defendant.

CONNOR, J. As the defendant is entitled to a new trial of this action for error in the admission of evidence tending to show specific acts of misconduct by Luther Mesimer, a witness for the defendant, as evidence of his bad character, to be considered by the jury as affecting the credibility of his testimony, we shall not discuss serious assignments of error also urged by counsel for defendant on his appeal to this Court.

In *State v. Holly,* 155 N. C., 485, 71 S. E., 450, it is said that the authorities in this State are numerous and uniform that it is error to allow questions on the cross-examination of a witness as to the character of the defendant, or as to the character of a material witness for the defendant, as to specific acts of misconduct of the witness, as tending to affect the credibility of his testimony. In the instant case it was competent to show the general reputation of the witness for the defendant, for the purpose of impeaching him. However, evidence tending to show specific acts of misconduct by him was not admissible as evidence tending to show that his general reputation was bad.

In accordance with this principle, we must sustain the defendant's assignment of error based on his exceptions to the rulings of the court on his objections to questions addressed to the witness Critz as to specific acts of misconduct by the witness Luther Mesimer. For this reason the defendant is entitled to a

New trial.

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

PHILLIP WHITLEY v. FRANCES WHITLEY.

(Filed 11 December, 1935.)

1. Deeds A a—

A deed executed in consideration of the marriage of the grantee to grantor is supported by a valuable consideration, and is not a voluntary deed.

2. Deeds C f—

A promise by the grantee to take care of the grantor so long as they both should live is a condition subsequent, and the breach of the condition does not affect the validity of the deed.

3. Cancellation and Rescission of Instruments A a—

The grantor may not rescind a deed executed in consideration of the marriage of the grantee to him, since the grantor cannot restore the consideration received for the deed.

APPEAL by plaintiff from *McElroy, J.*, at August Term, 1935, of UNION. Affirmed.

This is an action for the cancellation of a deed from the plaintiff to the defendant on the allegation that the execution of the deed by the plaintiff was procured by the fraud of the defendant. The action was begun on 12 October, 1934.

At the trial the plaintiff testified as follows:

"My name is Phillip Whitley. I lack three months of being 89 years of age. I have lived in Union County all my life. I have been married three times. My first two wives are dead. The third time I married the defendant, who was the widow Griffin. We were married in May, 1933. We had a marriage contract, which was not in writing. She agreed to marry me if I would give her the tract of land described in the deed, and I told her that I would give her the land if she would marry me and take care of me as long as she lived, or as long as I lived. We were in the cow shed. She was milking, and we shook hands across the cow's back. I gave her the land, and we were married the next day at Chesterfield, South Carolina. She lived with me six or seven months, and then left my home. She left me about 1 December, 1933, and has not lived with me since.

"I had a conversation with her the day she left. I told her that I had an uncle who lived in Stanly County and that he lived until he was 105 years of age, and then cleared a new ground. I told her that I believed I was going to live that long. When I said that she came up and struck me in the eye. My foot slipped, and she beat me over the head until she was satisfied. She then quit, and rang the bell, which is

near my porch. Within about thirty minutes Rufus Little came for her. She left my house and has never been back or spoken to me since."

There was evidence for the plaintiff tending to show that the land conveyed by the deed contains 163 acres, and is worth $15,000.

There was evidence for the plaintiff tending to show that a short time before she left the plaintiff, the defendant said that she had married the plaintiff until she could do better, that she did not love him when she married him, and that she was not going to stay with the old devil (referring to the plaintiff) much longer.

At the close of the evidence for the plaintiff the defendant moved for judgment as of nonsuit. The motion was allowed, and the plaintiff excepted.

From judgment dismissing the action as of nonsuit the plaintiff appealed to the Supreme Court, assigning as error the order allowing defendant's motion for judgment as of nonsuit.

H. W. B. Whitley and W. B. Love for plaintiff.
Vann & Millikin for defendant.

CONNOR, J. It is well recognized in the law that marriage is to be regarded and dealt with as a valuable consideration for a contract. See *Winslow v. White,* 163 N. C., 29, 79 S. E., 258. The deed executed by the plaintiff to the defendant in the instant case is, therefore, not a voluntary deed. It was executed for a valuable consideration.

The promise of the defendant to the plaintiff that after her marriage to the plaintiff she would live with him and take care of him so long as both should live is, at most, a condition subsequent. The breach of the promise by the defendant, if wrongful as contended by the plaintiff, does not affect the validity of the deed. See *Willis v. Willis,* 203 N. C., 517, 166 S. E., 398, and *Jackson v. Jackson,* 222 Ill., 46, 78 N. E., 19, 6 L. R. A. (N. S.), 785.

In no aspect of this case is the plaintiff, on the facts shown by the evidence at the trial, entitled to the equity of rescission. The plaintiff manifestly cannot restore the consideration which he has received from the defendant for his deed. See *May v. Loomis,* 140 N. C., 350, 52 S. E., 728. In this case it is said that as a general rule a party is not allowed to rescind when he is not in a position to put the other party *in statu quo* by restoring the consideration passed.

Since the trial of this action, and pending the appeal to this Court, the plaintiff has died. H. W. B. Whitley, his executor, was duly made a party plaintiff in this Court.

There was no error in the trial of this action. The judgment is

Affirmed.

STATE v. C. J. BENTON.

(Filed 11 December, 1935.)

1. Criminal Law L e—

Where it is determined on appeal that defendant's motion to nonsuit should have been allowed, other assignments of error, relied on for a new trial, need not be considered.

2. Automobiles C l—Position of needle on speedometer after collision held no evidence of speed of car at time of collision.

After the collision in question the speedometer on defendant's car registered 70 miles per hour, the speedometer having stuck and ceased to function as a result of the collision. *Held:* Whether the needle on the speedometer fell or rose after the collision is a matter of speculation and conjecture, and its position after the collision is no evidence that defendant was driving 70 miles per hour at the time of the collision.

3. Automobiles G b—

In this prosecution for homicide for the death of deceased, killed in an automobile collision, defendant's motion to nonsuit should have been allowed, there being no evidence that the collision was caused by the culpable negligence of defendant.

APPEAL by defendant from *Williams, J.*, at August Term, 1935, of COLUMBUS. Reversed.

This is a criminal action in which the defendant was tried on an indictment in which it was charged that on 20 January, 1935, at and in Columbus County, North Carolina, the defendant C. J. Benton did kill and murder L. E. Hooks.

When the defendant was arraigned for trial, the solicitor for the State announced that on the evidence which he would offer for the State he would not contend that the defendant was guilty of murder in the first degree, but that he would contend that the defendant was guilty of murder in the second degree, or of manslaughter, as the jury should find the facts from all the evidence. The defendant entered a plea of not guilty.

The evidence for the State showed that some time between 2 and 3 o'clock on the morning of 20 January, 1935, there was a collision on a highway in Columbus County, between an automobile driven by the defendant C. J. Benton and an automobile driven by the deceased, L. E. Hooks, and that the death of the deceased was the result of personal injuries caused by the collision.

J. R. Pridgen, a witness for the State, testified as follows:

"I am a member of the State Highway Patrol, and was called to the scene of the wreck in which Mr. Hooks lost his life. I arrived on the scene at about 3 o'clock on the morning of 20 January, 1935, and made an investigation. I found the dead body of Mr. Hooks in the automo-

bile which he was driving at the time of the collision. This automobile was on the right side of the highway going in the direction in which Mr. Hooks was driving. Its left fender and left front wheel were broken off. The steering wheel was broken. A part of the steering wheel was sticking in a tire on the automobile which the defendant was driving at the time of the collision. This automobile had swung around after the collision, and was standing on the right side of the highway going in the direction in which the defendant was driving. It had turned over and stopped about ten steps from the point of its impact with the deceased's automobile, which was near the center of the highway. I observed the speedometer on defendant's automobile. Its needle was hung and was pointing to seventy, that is, seventy miles per hour.

"About two days after he left the hospital the defendant, who was injured in the wreck, told me that when he first saw the deceased's automobile approaching him on the highway its lights were not burning, and that at first he started to pass on his left, but quickly changed his mind and passed on his right.

"The automobile which the deceased was driving at the time of the collision was an old Chrysler roadster, 1927 or 1928 model. The defendant was driving a Ford V-8."

At the time of the collision, the deceased was driving alone; the defendant had two companions in his automobile. Neither of the latter was called as witness. The defendant did not offer evidence.

The jury found that the defendant is guilty of involuntary manslaughter.

From judgment that he be confined in the State's Prison for a term of not less than eighteen months or more than four years, the defendant appealed to the Supreme Court, assigning as error the refusal of the court to allow his motion for judgment as of nonsuit, and other errors as appear in the case on appeal.

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

Tucker & Proctor for defendant.

CONNOR, J. As there was error in the refusal of the trial court to allow defendant's motion at the close of all the evidence for judgment of nonsuit, we shall not discuss other assignments of error urged by counsel for defendant as entitling him to a new trial.

The evidence tending to show that the needle on the speedometer on defendant's automobile, after the collision, which wrecked both automobiles, pointed to the figures "70" on the dial, while admissible to show the condition of the automobile after the collision, has no probative

value as evidence to show the speed at which the defendant was driving his automobile at the time of the collision. The needle was hung, showing that the speedometer was injured by the collision, and ceased to function. Otherwise, it would have fallen to the figure "0" when the automobile stopped. Whether the needle on the speedometer fell or rose, after the collision, is a matter of conjecture and speculation. Its position on the dial after the collision, and the resulting injury to the speedometer, has no value as evidence showing the speed at which the automobile was driven before its collision with the automobile of the deceased.

As there was no evidence at the trial of the action tending to show that the collision of the two automobiles, and the resulting death of the deceased, was caused by the culpable negligence of the defendant, the action should have been dismissed.

The judgment is

Reversed.

G. B. WILLIAMS v. DIXIE CHEVROLET COMPANY ET AL.

(Filed 11 December, 1935.)

1. Sales H a—Where article is worthless for purpose for which manufactured, retailer may recover from manufacturer regardless of terms of warranty.

Where the article sold is not reasonably fit for the use for which it was intended there is a total failure of consideration, and the purchaser may recover from the retailer, and the retailer may recover from the manufacturer, regardless of the terms of warranty prescribing the time within which the article must be returned to the manufacturer after discovery of defect therein, the warranty not being binding, since it fails with the entire contract for want of consideration.

2. Same—Directed verdict on issue of reasonable fitness of article sold for purpose for which it was made held error.

It is error for the court to direct a verdict on the issue of whether the automobile sold was reasonably fit for the purpose for which it was intended upon evidence that the engine was defective, the scope of the issue being broader than a breach of warranty, and the question being for the determination of the jury.

APPEAL by defendants Chevrolet Motor Company and General Motors Corporation from *Grady, J.*, at March Term, 1935, of CUMBERLAND.

Civil action, tried upon the following issues:

"1. Was the Chevrolet automobile, sold by Dixie Chevrolet Company, Inc., to the plaintiff, defective in material or workmanship at the time

of its delivery to the plaintiff, so that it was not reasonably fit for the use for which it was intended? A. 'Yes.'

"2. Did the defendant Dixie Chevrolet Company, Inc., purchase said automobile from its codefendants under the terms of the selling agreement, as alleged in the answer? A. 'Yes.'

"3. If so, was said automobile defective in material or workmanship at the time it was received by the defendant Dixie Chevrolet Company from its codefendant? A. 'Yes.'

"4. If so, was said automobile returned to the defendants Chevrolet Motor Company or General Motors Corporation within 90 days from the date of its delivery to the plaintiff, or before the same had been driven four thousand miles? A. 'No.'

"5. If not, did Chevrolet Motor Company and General Motors Corporation waive the provisions of the written contract, after being informed of such defect in material or workmanship? A. 'Yes.'

"6. What damages, if any, is the plaintiff entitled to recover of the defendant Dixie Chevrolet Company? Answer: '$200.00.'

"7. What damages, if any, is Dixie Chevrolet Company entitled to recover of the Chevrolet Motor Company and General Motors Corporation? A. '$200.00.'"

It is in evidence that the engine of the automobile purchased by plaintiff was defective and that a new engine would cost about $200. The original purchase price of the car was $733.00. The condition of the engine was reported to the seller, the Dixie Company, and it in turn reported the matter to the dealer, the Chevrolet Company, and a mechanic was sent from Charlotte to Dunn, N. C., to remedy the defect, which he was not able to accomplish.

The court instructed the jury that, as counsel for the Dixie Company had admitted on the argument, "the car was defective at the time, it would be your duty to answer the first issue 'Yes.'" Exception by the other defendants. The Dixie Company has not appealed.

The principal question debated on the appeal was whether the Dixie Company is entitled to judgment over against its codefendants under the "Chevrolet Standard Warranty," which provides:

"The manufacturer warrants each new motor vehicle . . . to be free from defects in material or workmanship under normal use and service, its obligation under this warranty being limited to making good at its factory any part or parts thereof which shall, within 90 days after delivery of such vehicle to the original purchaser or before such vehicle has been driven 4,000 miles, whichever event shall first occur, be returned to it," etc.

It is admitted that the defective parts were not returned to the manufacturer within ninety days after delivery, or before the car had been

driven 4,000 miles, but the contention is that these provisions were waived by sending a mechanic to repair the automobile. The appealing defendants rely upon the decisions in *Gibbs v. Plymouth Motor Corp.*, 203 N. C., 351, 166 S. E., 74, and *Ford v. Willys-Overland, Inc.*, 197 N. C., 147, 147 S. E., 822.

From judgment on the verdict, the Chevrolet Motor Company and General Motors Corporation appeal, assigning errors.

I. R. Williams and Rose & Lyon for appellee, Dixie Chevrolet Company.

Cansler & Cansler for appellants, Chevrolet Company and General Motors.

STACY, C. J., after stating the case: The full significance and import of the first issue seems to have been overlooked on all hands. If the automobile purchased by the plaintiff were so defective "that it was not reasonably fit for the use for which it was intended," then the plaintiff would be entitled to recover of the seller for want of consideration. *Swift & Co. v. Aydlett*, 192 N. C., 330, 135 S. E., 141; *Register Co. v. Bradshaw*, 174 N. C., 414, 93 S. E., 898; *DeWitt v. Berry*, 134 U. S., 306; 6 R. C. L., 684, *et seq.* Similarly, the seller would be entitled to recover over against the dealer or manufacturer, irrespective of the terms of the contract of warranty. *Ashford v. Shrader*, 167 N. C., 45, 83 S. E., 29. It is believed that a covenant, however expressed, must be regarded as *nude pact*, and not binding in law, if founded solely upon considerations which the law holds altogether insufficient to create a legal obligation. *Hatchell v. Odom*, 19 N. C., 302. "If it (the article sold) be of no value to either party, it of course cannot be the basis of a sale"—*Ashe, J.*, in *Johnston v. Smith*, 86 N. C., 498. The refusal to warrant against worthlessness would fall with the balance of the supposed contract for want of consideration. *Furniture Co. v. Mfg. Co.*, 169 N. C., 41, 85 S. E., 35 (*Hearse case*).

So long as the first issue stands, it is not worth while to consider the other questions debated on brief. There was error, however, in directing a verdict on this issue, considering the breadth of its terms, and for which a new trial must be awarded the appellants. It is so ordered.

New trial.

STATE AND ROXIE ROYAL v. BILL PARKER.

(Filed 11 December, 1935.)

1. Criminal Law L g—

The State may appeal in criminal prosecutions from judgment for defendant upon a special verdict, upon a demurrer, upon a motion to quash, and upon arrest of judgment. C. S., 4649.

2. Bastards B c—

A parent may be prosecuted under N. C. Code, 276 (a) for willful failure to support his illegitimate child begotten and born before the effective date of the statute, the offense being the willful failure to support an illegitimate child, and it being sufficient if such willful failure occur after the effective date of the statute.

3. Indictment C a—

The court may not adjudge the defendant not guilty upon sustaining defendant's demurrer to the indictment, the defendant being entitled only to his discharge upon judgment sustaining his demurrer.

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

APPEAL by the State and Roxie Royal from *Grady, J.*, at August Term, 1935, of SAMPSON. Reversed.

This is a criminal action, brought against the defendant in the recorder's court of Sampson County, N. C. It was a charge under N. C. Code, 1935 (Michie), sec. 276 (a)—"Any parent who willfully neglects or who refuses to support or maintain his or her illegitimate child shall be guilty of a misdemeanor," etc.

The above act was ratified on 6 April, 1933. Public Laws 1933, ch. 228, sec. 12. Roxie Royal gave birth to an illegitimate child on 8 February, 1933, prior to the ratification of the act on 6 April, 1933, and charged defendant with the paternity of the illegitimate child.

The record discloses: "Hon. R. L. Herring, judge of the recorder's court, tried said case on 25 April, 1935, and the defendant having demurred to said warrant, said recorder rendered judgment in favor of the defendant, sustaining said demurrer," etc.

The judgment of the recorder's court is as follows: "The defendant, through his counsel, having entered a demurrer to the said indictment, and the court being of the opinion that the criminal offense charged in said indictment cannot be maintained under the provisions of chapter 228 of the Public Laws of 1933, which was ratified on 6 April, 1933, the demurrer of the defendant is sustained, and the defendant is discharged. This 25 April, 1935. Richard L. Herring, Recorder."

From the foregoing judgment the State and prosecutrix excepted, assigned error, and appealed to the Superior Court.

The case came on for hearing before Grady, J., who rendered the judgment, in part: "Upon the law as it is understood by the court, it is ordered and adjudged that the defendant is not guilty, and the judgment of the recorder is affirmed. This 15 August, 1935. Henry A. Grady, Judge presiding."

The State and Roxie Royal excepted, assigned error to the judgment, and appealed to the Supreme Court.

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

Butler & Butler for Roxie Royal.

Faircloth & Fisher and P. D. Herring for defendant.

CLARKSON, J. N. C. Code, 1935 (Michie), section 4649, is as follows: "An appeal to the Supreme Court may be taken by the State in the following cases, and no other. Where the 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."

In the recorder's court of Sampson County the defendant demurred to the charge set out in the warrant. The judge of the recorder's court sustained the demurrer. The State appealed to the Superior Court on the demurrer. The judgment of the recorder was affirmed and the defendant ordered and adjudged not guilty. The State then appealed to the Supreme Court. The illegitimate child was begotten and born before the passage of the act—6 April, 1933—but the charge by the State is that he willfully neglected and refused, after the passage of the act, to support his illegitimate child.

In *State v. Mansfield,* 207 N. C., 233 (236), speaking to the subject, it is said: "It is immaterial when the child was begotten. It was born after the passage of the act and the offense is the willful neglect or refusal to support and maintain his or her illegitimate child. See *S. v. Cook, post,* 261; *S. v. Henderson, post,* 258." *State v. Morris,* 208 N. C., 44.

The present charge is defendant's willful neglect or refusal to support his illegitimate child after the passage of the act—it is immaterial when the child was begotten or born. The court below "ordered and adjudged that the defendant is not guilty." This could not be done upon a demurrer.

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

Reversed.

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

STATE v. ED GADDY, ARNIE CARLYLE, LUTHER SMITH, AND ROBERT COMER.

(Filed 11 December, 1935.)

Receiving Stolen Goods B c—Evidence held insufficient to overrule motion to nonsuit on charge of receiving stolen goods.

Evidence tending to show that the prosecuting witness had several twenty-dollar bills in his possession, to the knowledge of defendants, while riding in an automobile with defendants, that the next morning his money was gone, that he went to the house of appealing defendant, who gave him a twenty-dollar bill upon being informed of the loss or theft of the money, the appealing defendant stating that he supposed it belonged to the prosecuting witness, with testimony of the appealing defendant that he did not know before the conversation that prosecuting witness had lost any money, and that he had found the twenty-dollar bill on the ground as the party got out of the car to go into a filling station, *is held* insufficient to be submitted to the jury on the issue of appealing defendant's guilt of receiving stolen goods knowing at the time they had been stolen.

APPEAL by defendant Gaddy from *Shaw, Emergency Judge,* at August Special Term, 1935, of MOORE. Reversed.

The defendants Ed Gaddy, Arnie Carlyle, and two others were indicted for the larceny of a sum of money from M. G. Pilson, with a second count in the bill charging the defendants with receiving said property knowing it to have been stolen. The defendant Carlyle was convicted of larceny and did not appeal.

Defendant Gaddy was found guilty of receiving stolen goods knowing them to have been stolen, and from the judgment thereon appealed.

The other defendants named in the bill were not on trial.

Defendant Gaddy moved for judgment of nonsuit at the close of the State's evidence and again at the close of all the evidence, and excepted to the overruling of these motions.

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

W. R. Clegg for the defendant Gaddy.

DEVIN, J. The appealing defendant's exception to the overruling of his motions for nonsuit challenges the sufficiency of the evidence to warrant his conviction for receiving stolen goods knowing them to have been stolen, and upon a careful consideration of the evidence, as shown by the record before us, we reach the conclusion that there was not sufficient evidence to be submitted to the jury upon the second count in the bill, to wit: Receiving stolen goods knowing them to have been stolen.

The jury by their verdict have acquitted him of the larceny charged in the first count.

The record shows that the State offered the following evidence, in substance, in support of the charge:

The prosecuting witness Pilson testified that on a Saturday night in January, 1934, he had seven twenty-dollar bills on his person, that he was under the influence of intoxicating liquor, that he got in an automobile with the defendants Carlyle, Smith, Comer, and Gaddy, and drove to Charley Boaz's filling station near Cameron; that he showed his money and tried to leave it with Boaz for safekeeping, but they told him to keep his money, as they were going to take him home, and he got in the car with them; that later he got out of the car again with the intention of giving his money to Boaz, but Carlyle took him by the shoulder and said: "No use to give up your money, we are going to take you home now;" that he went back and got in the car and they drove off; that Carlyle and Comer were on the front seat with him, and Smith and Gaddy were in the rumble seat; that Carlyle and Comer took his money from him while he was in the car; that on the following Tuesday he went to Gaddy's house and told of his loss and made inquiry about his money, and Gaddy said he knew nothing about the larceny, and said: "I reckon I have got $20.00 of your money. I suppose it is yours—it is in the house," and he went in the house and got it and gave it to him, and said he found it on the running board at Lakeview at Garner's place. Witness testified that was the only money he ever recovered.

D. H. Garner, a witness for the State, testified, in substance, that on Sunday morning following the alleged larceny he saw Carlyle, Comer, Smith, and Gaddy at his lunch stand in Lakeview; that Carlyle came in the back of his place, and he saw him smoothing out six twenty-dollar bills; that Gaddy was not present when Carlyle was counting the money.

The defendant Gaddy testified in his own behalf that he didn't know at the time that Pilson had lost any money; that when they got down to Garner's place Sunday morning those in the front seat got out and started in the filling station, and then he got out and happened to look on the ground and saw a twenty-dollar bill lying there, and picked it up and put it in his pocket.

This evidence, though it may give rise to conjecture and suspicion, is not of sufficient probative force to be submitted to the jury on the charge of receiving stolen goods knowing them to have been stolen, and the motion for nonsuit should have been allowed. *Wittkowsky v. Wasson,* 71 N. C., 451; *State v. White,* 89 N. C., 463; *State v. Oakley,* 176 N. C., 755; *State v. Melton,* 187 N. C., 481; *State v. Stathos,* 208 N. C., 456.

For the reasons given the judgment is

Reversed.

GURNEY P. HOOD, COMMISSIONER OF BANKS OF THE STATE OF NORTH CAROLINA, EX REL. THE UNITED BANK AND TRUST COMPANY: A. G. SMALL, LIQUIDATING AGENT OF THE UNITED BANK AND TRUST COMPANY (W. P. DYER, JR., SUBSTITUTED FOR A. G. SMALL), AND RECONSTRUCTION FINANCE CORPORATION, v. PROGRESSIVE STORES, INC., R. E. BOBBITT, R. T. HOWARD, AND DEWEY H. COOPER.

(Filed 11 December, 1935.)

1. Venue A d—Action on note held properly instituted in county of residence of liquidating agent of insolvent payee bank.

An action on a note by the Commissioner of Banks and the liquidating agent of an insolvent bank, the payee of the note, and the Reconstruction Finance Corporation, the pledgee of the note, is properly brought in the county in which the insolvent bank is situate and of which the liquidating agent is a resident, and defendants' motion for change of venue to the county of their residence is properly refused. N. C. Code, 446, 469, 218 (c) (7).

2. Bills and Notes H a—Under facts of this case, pledgor and pledgee of note held entitled to maintain joint suit against makers.

In an action on a note executed to a bank, the liquidating agent of the payee bank and the Reconstruction Finance Corporation, to which the note had been pledged as collateral security, may jointly sue the makers of the note.

APPEAL by defendants from *McElroy, J.*, at April Term, 1935, of GUILFORD. Affirmed.

This was a civil action, heard before his Honor, P. A. McElroy, judge, at the April Civil Term of Guilford Superior Court, 1935, upon a motion of the defendants for a change of venue.

In February, 1933, the United Bank and Trust Company, a North Carolina banking corporation, with its principal place of business in the city of Greensboro, Guilford County, North Carolina, closed its doors, and the management of the assets and affairs of the said bank was assumed, for the purpose of liquidation pursuant to the North Carolina banking laws, by Gurney P. Hood, Commissioner of Banks. At the time of the institution of this action, A. G. Small was the duly appointed, qualified, and acting liquidating agent of the said bank, and was a resident of Guilford County, North Carolina.

This suit was instituted upon a note executed by the defendants unto the United Bank and Trust Company in November, 1932, and by the said bank pledged to coplaintiff Reconstruction Finance Corporation as security for an indebtedness of the United Bank and Trust Company unto the said corporation, which said indebtedness at the time of the institution of this action exceeded the amount of the note involved in this suit.

Subsequent to the commencement of this action, W. P. Dyer, Jr., was duly substituted as party plaintiff in behalf of A. G. Small, the said Dyer having been duly appointed and having qualified as successor liquidating agent to the said Small. W. P. Dyer, Jr., was at the time of the substitution as party plaintiff, and is at the present time, a resident of Guilford County, North Carolina. Reconstruction Finance Corporation is a corporation created by the Congress of the United States, with its principal office in the city of Washington, D. C., and with its principal North Carolina office in the city of Charlotte, Mecklenburg County.

Under the facts as stated above, both the clerk of the Superior Court of Guilford County and subsequently the presiding judge were of the opinion that Guilford County was a proper venue for the trial of this cause, and, therefore, declined to grant the defendants' motion for change of venue to Lee County, North Carolina, where the defendants reside.

The defendants excepted and assigned error and appealed to the Supreme Court.

Smith, Wharton & Hudgins for plaintiffs.
Gavin & Jackson for defendants.

PER CURIAM. N. C. Code, 1935 (Michie), section 446, in part, is as follows: "Every action must be prosecuted in the name of the real party in interest," etc.

Section 469: "In all other cases the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement; or if none of the defendants reside in the State, then in the county in which the plaintiffs, or any of them, reside; and if none of the parties reside in the State, then the action may be tried in any county which the plaintiff designates in his summons and complaint, subject to the power of the court to change the place of trial, in the cases provided by statute."

Section 218 (c) (7) is, in part: "Upon taking possession of the assets and business of any bank by the commissioner of banks, the commissioner of banks, or the duly appointed agent, is authorized to collect all moneys due such bank, and to do such other acts as are necessary to conserve its assets and property, and shall proceed to liquidate the affairs thereof, as hereinafter provided. The commissioner of banks, *or the duly appointed agent, shall collect all debts due and claims belonging to such bank, by suit, if necessary;*" etc. (Italics ours.)

The liquidating agent was a resident of Guilford County, N. C., and the statute, *supra,* gave him the right to institute the suit. The United Bank and Trust Company, when it closed its doors, was doing a banking business in Guilford County, and the liquidating agent *ex necessitate*

was there to close up the affairs of the insolvent bank. The pledge of defendants' note by United Bank and Trust Company as collateral to the Reconstruction Finance Corporation does not militate against the liquidating agent being a party plaintiff. We think, under the facts and circumstances of this case, the pledgor and pledgee are both interested in the action and necessary parties to it. The note in controversy was assigned as collateral to the Reconstruction Finance Corporation.

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

Affirmed.

STATE v. J. D. McLEAN.

(Filed 11 December, 1935.)

1. Criminal Law I f—

It is not error for the court to consolidate for trial three indictments each charging defendant with embezzlement from his employer on separate specified dates. C. S., 4622.

2. Criminal Law I j—

On a motion to nonsuit the court is required to ascertain only if there be any competent evidence sufficient to go to the jury, the weight of the evidence being for the jury.

3. Embezzlement A b—Fraudulent intent is essential element of embezzlement.

Fraudulent intent is a necessary element of the statutory offense of embezzlement, C. S., 4268, and the State must prove such intent beyond a reasonable doubt, but direct proof is not necessary, it being sufficient if facts and circumstances are shown from which it may be reasonably inferred.

4. Same: Embezzlement B c—Evidence of fraudulent intent held sufficient in this prosecution for embezzlement.

Fraudulent intent within the meaning of the statute defining embezzlement is the intent to willfully or corruptly use or misapply the property of another for purposes other than that for which it is held, and evidence tending to show that defendant, without authorization, applied funds of his employer to his own use, although defendant testified that he used the funds to pay a debt due him by his employer, is sufficient to be submitted to the jury on the question of fraudulent intent.

5. Embezzlement B c—Exclusion of testimony of defendant that prosecuting witness obtain value for money appropriated held not error.

An exception to the refusal of the court to permit the defendant, on trial for embezzlement, to testify that the prosecuting witness obtained full value for the money appropriated by defendant will not be sustained when it appears that defendant testified as to every fact relative to the transaction, the testimony sought to be introduced by defendant being of a conclusion from such facts.

6. Criminal Law I g—

Exceptions to the statement of the contentions of the parties will not be sustained when the objections are not brought to the attention of the trial court in apt time.

APPEAL by defendant from *Shaw, Emergency Judge,* at August Special Term, 1935, of MOORE. No error.

The grand jury returned three bills of indictment charging defendant with the embezzlement of certain sums from the Central Carolina Oil Company, Inc., on three different occasions.

It was admitted that at the time alleged defendant was the secretary-treasurer of the oil company, a corporation, and that on 13 March, 1931, he drew a check on the company's fund in the sum of $2,000 in favor of Page Trust Company, and that on 6 May, 1931, he drew a check on the company's fund in the sum of $1,000, payable to Bank of Pinehurst, and on 1 April, 1931, he drew a check on the company's fund in the sum of $1,717, in favor of United Bank and Trust Company. It was also in evidence that the $1,000 and the $1,717 checks were used to pay a note on which defendant and another were liable.

The State offered evidence tending to show defendant admitted he had applied the funds represented by these checks to his own use.

At the close of State's evidence motion for nonsuit as to the bill or count with respect to the $2,000 check was sustained.

Defendant testified in substance that the $1,000 and the $1,717 checks were issued by him and applied as credits on his own debts for the reason that the oil company owed him $2,900, and he used the money to pay himself. He also admitted that he applied the $2,000 check on the note he and one McLauchlin had signed, payable to the Page Trust Company, and that he did it to pay McLauchlin's half of the note.

There was a general verdict of guilty, and from judgment thereon defendant appealed.

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

W. R. Clegg for defendant.

DEVIN, J. The defendant excepted to the order consolidating for trial the three bills of indictment. In this ruling there was no error. C. S., 4622, authorizes the consolidation of two or more bills "when there are several charges against any person . . . for two or more acts or transactions connected together, or for two or more transactions of the same class of crimes or offenses." *State v. Brown,* 182 N. C., 761; *State v. Rice,* 202 N. C., 411.

Defendant's exception to the denial of his motion for judgment of nonsuit cannot be sustained. There was evidence sufficient to be submitted to the jury. In the language of *Davis, J.*, in *State v. Fain*, 106 N. C., 760: "If there was any evidence reasonably sufficient to go to the jury, its weight is a question with which this Court has nothing to do."

Embezzlement was not a common law offense. The acts constituting the offense are set forth in the statute, C. S., 4268. It has been defined by this Court as "the fraudulent conversion of property by one who has lawfully acquired possession of it for the use and benefit of the owner." *State v. McDonald*, 133 N. C., 681. One of the necessary elements of the offense is the fraudulent intent. The fraudulent intent within the meaning of the statute is the intent to "embezzle or otherwise willfully and corruptly use or misapply the property of another for purposes other than that for which they are held." *State v. Lancaster*, 202 N. C., 204. And since the criminality of the act depends upon the intent, it is incumbent on the State to show the intent to defraud beyond a reasonable doubt. *State v. Morgan*, 136 N. C., 628. Such intent may be shown by direct evidence, or by evidence of facts and circumstances from which it may reasonably be inferred. *State v. Lancaster*, 202 N. C., 204; *State v. Rawls*, 202 N. C., 397; 20 C. J., 487.

We find no error in the refusal of the court below to permit the defendant to answer the question "whether or not the Central Carolina Oil Company, Inc., got value received for every dollar represented for that check." The evidence discloses that the defendant was permitted to and did testify fully as to all the facts of the transaction, and the question propounded is rather a conclusion than a statement of fact.

The other exceptions to the evidence are without merit.

Defendant made exceptions to the charge of the court for failure to charge as to the element of fraudulent intent, but upon an examination of the charge of the able and careful judge, we find that this was sufficiently called to the attention of the jury.

The other exceptions to the charge were to statements of contentions of the State and defendant, and these not having been called to the attention of the court at the time, are not now available to the defendant.

Upon a careful examination of the record, we find no reversible error in the trial.

No error.

G. C. SMITH, ADMINISTRATOR OF JENNETTE STEGALL, v. THE CITY OF MONROE.

(Filed 11 December, 1935.)

Municipal Corporations E c: Negligence B c—Active negligence of third person held sole proximate cause of accident causing death.

The complaint in this action against a municipality for wrongful death alleged in effect that the car in which plaintiff's intestate was riding was struck by another car which was negligently operated, and that the car in which intestate was riding was thrown by the impact against a foot-high curb surrounding an unpaved eight-foot space maintained by defendant city in the center of the street, without signals or warnings, and that the curb caused the car in which intestate was riding to overturn, resulting in the death of intestate. *Held:* Whether the defendant city was negligent in maintaining the unpaved space surrounded by a curb in the center of the street is immaterial to plaintiff's right to recover, since defendant city would not be liable to plaintiff under any circumstances, defendant city's negligence, if any, being passive, and the negligence of the driver of the car which struck the car in which intestate was riding being active and the sole proximate cause of intestate's death.

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

APPEAL by the plaintiff from judgment sustaining demurrer *ore tenus* entered by *McElroy, J.*, at August Term, 1935, of UNION. Affirmed.

Cansler & Cansler and A. M. Stack for plaintiff, appellant.
E. Osborne Ayscue for defendant, appellee.

SCHENCK, J. This is a civil action, instituted by the plaintiff to recover damages for the wrongful death of his intestate, alleged to have been proximately caused by the negligence of the defendant. The plaintiff alleges that his intestate was riding in a car driven by her father, T. B. Stegall, in an easterly direction on Franklin Street in the city of Monroe, and when said car had practically crossed the intersection of Franklin Street and Crawford Street a car driven by Beda Teague in a northerly direction on Crawford Street entered the intersection and turned east on Franklin Street and ran into the right rear wheel of the Stegall car and knocked the left rear wheel of said car against the curbing surrounding an unpaved eight-foot space in the center of Franklin Street, which turned the Stegall car over and almost instantly killed the plaintiff's intestate.

The specific negligence alleged against the defendant city is that it maintained a space of land in the center of Franklin Street unpaved and surrounded by a foot high curb, which constituted a permanent and dangerous obstruction and nuisance in Franklin Street, and reduced the

width of said street from 40 feet to 16 feet on either side of said unpaved space, and, further, failed to erect on or near said street signals or warnings of such danger.

The defendant demurred *ore tenus* upon the ground that "the complaint did not state facts sufficient to constitute a cause of action against said defendant for that the allegations of the complaint establish that the plaintiff's intestate was injured solely and proximately by the negligence of Beda Teague." The court sustained the demurrer and entered judgment accordingly, which action the plaintiff assigns as error upon appeal.

It is not necessary for us to decide the question as to whether the city was negligent in maintaining the unpaved eight-foot space, surrounded by a foot-high curb in the center of Franklin Street, without signals or warnings on or near the street, since we are of the opinion that, under the allegations contained in the complaint, the negligence of the defendant, if any, was only passive, while the negligence of Beda Teague, the driver of one of the cars involved in the collision, was active, and must be regarded as the sole proximate cause of the plaintiff's intestate's death. This case is governed by the principles enunciated in *Baker v. R. R.*, 205 N. C., 329, and cases there cited.

Affirmed.

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

M. Z. PEARCE v. CHARLES E. MONTAGUE.

(Filed 11 December, 1935.)

1. Mortgages C d: Taxation H e—Where mortgagee acquires superior title by paying prior lien he holds such title for benefit of himself and mortgagor.

A mortgagor's equity of redemption is not extinguished by the mortgagee's purchase of the property at a tax foreclosure sale, since the mortgagee holds the superior title thereby acquired in trust for the benefit of himself and the mortgagor, and the mortgagor is entitled to redeem the land by paying the amount due on the mortgage plus the sum paid by the mortgagee by way of taxes.

2. Ejectment B a—

Where plaintiff mortgagee bases his title in summary ejectment upon his past due but unforeclosed mortgage and his purchase of the property at a tax foreclosure sale, the action is properly dismissed for want of jurisdiction, since defendant mortgagor has an interest in the land.

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

PEARCE *v.* MONTAGUE.

APPEAL by plaintiff from *Williams, J.*, at Second April Term, 1935, of WAKE. Affirmed.

Gulley & Gulley for plaintiff, appellant.
Sherwood Brantley and Jones & Brassfield for defendant, appellee.

SCHENCK, J. This is an action in summary ejectment, C. S., 2365, *et seq.*, instituted before the recorder's court of Wake Forest in the capacity of a justice of the peace. The action was dismissed by the recorder for the reason that it appeared upon the trial that he was without jurisdiction, since the title to the real estate was in controversy. From the judgment of the recorder dismissing the action, the plaintiff appealed to the Superior Court, and the action was there heard upon the following agreed facts:

"That on and prior to 6 February, 1930, the defendant Charles E. Montague was the owner in fee simple of the land in controversy, and that on or about 6 February, 1930, the defendant Charles E. Montague made, executed, and delivered to M. Z. Pearce, the plaintiff herein, a mortgage conveying said lands as security for an indebtedness of $60.00. That thereafter, to wit: On 15 December, 1930, M. Z. Pearce, the plaintiff, acquired a deed for said lands from a commissioner appointed in a proceeding brought to foreclose tax liens held by Wake County. That at the time of the foreclosure of said tax lien and the execution and delivery of said tax deed to the plaintiff the mortgage from the defendant to the plaintiff was unpaid, outstanding, and uncanceled of record. That the defendant has been in possession of the lands continuously since 1930, and this action is brought to eject him from said land under the Landlord and Tenant Act."

Upon the foregoing statement of facts the Court found that the defendant had an interest in the real estate involved and that the title to same was in controversy, and that an action in summary ejectment would not lie, and that the recorder, in whose court the action was originally instituted, properly dismissed the action for want of jurisdiction. To the judgment of the Superior Court affirming the judgment of the recorder, the plaintiff excepted, and appealed to this Court, assigning errors.

When the defendant executed and delivered to the plaintiff his mortgage, he was the owner of the equity of redemption in the lands and the mortgagee could not extinguish this equity of redemption by his purchase of the land at the tax sale, and the title which the mortgagee acquired at the tax sale is held by him in trust for himself and the defendant, the mortgagor, since when a mortgagee pays off an encumbrance and acquires a title superior to his title as mortgagee, he holds such title so

acquired as trustee for the benefit of himself and the mortgagor. *Cauley v. Sutton,* 150 N. C., 327.

It is clear that the defendant has an interest in the land from which the plaintiff seeks to eject him, this interest being the equity of redemption and the right to redeem upon paying to the plaintiff the amount due on the mortgage, plus such sum as the plaintiff may have paid by way of taxes, and his having such an interest in said lands puts the title to real estate in controversy, and for that reason the recorder, sitting as a justice of the peace, properly dismissed the action, and the Superior Court, upon appeal, properly affirmed his judgment.

Affirmed.

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

STATE v. JOHN MOORE.

(Filed 11 December, 1935.)

Criminal Law G m: Courts A c—Evidence of conviction in municipal court held incompetent under statute upon trial in Superior Court.

The statute creating the municipal court in which defendant was convicted provided that the right of appeal should be the same as provided in case of appeals from justices of the peace, and that trial in the Superior Court should be *de novo*, and the statute regulating appeals from justices of the peace provides that trial in the Superior Court shall be anew and without prejudice from the former proceedings. Upon defendant's appeal the trial court admitted evidence of his conviction in the municipal court. *Held:* The evidence of his conviction was not without prejudice to defendant from the former proceedings, C. S., 4647, and defendant is entitled to a new trial.

APPEAL by the defendant from *McElroy, J.,* at June Special Term, 1935, of GUILFORD. New trial.

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

Younce & Younce for defendant, appellant.

SCHENCK, J. The defendant was bound to the municipal court of the city of Greensboro by a justice of the peace upon a warrant charging him with willfully refusing to support and maintain his illegitimate child, in violation of chapter 228, Public Laws of 1933. Upon trial in the municipal court the defendant was found guilty and judgment was pronounced, from which the defendant appealed to this Court, assigning errors.

Upon the trial in the Superior Court a State's witness was allowed, over the objection of the defendant, to testify in effect that the defendant had been tried in the municipal court and convicted, and by the final order of that court was required to pay to the prosecutrix $10.00 a week.

Section 7, chapter 651, Public Laws of 1909, by which the municipal court of the city of Greensboro is established, provides that, "Any person convicted in said court shall have the right of appeal to the Superior Court of Guilford County, as is now provided for appeals from judgments of justices of the peace, and upon such appeal the trial shall be *de novo.*" Section 4647, Consolidated Statutes, provides that, "In all cases of appeal (from judgments of justices of the peace to the Superior Court), the trial shall be anew, without prejudice from the former proceedings."

The testimony as to the conviction of the defendant and judgment pronounced in the municipal court, admitted in the trial in the Superior Court, was immaterial, incompetent, and not "without prejudice from the former proceedings," and its admission, over his objection, entitles the defendant to a new trial.

If it should be held competent to show the conviction and judgment in the municipal court in the trial in the Superior Court, no trial upon appeal from the municipal court could ever be wholly free from prejudice from the former proceedings. See *Wells v. Odum,* 205 N. C., 110.

Attention is called to the fact that the warrant as it now appears in the record, evidently after amendment, is inartificially drawn, and that further amendment might well serve to make more definite the charge.

New trial.

G. N. HEDGEPETH v. LUMBERMEN'S MUTUAL CASUALTY COMPANY AND W. L. BIZZELL.

(Filed 11 December, 1935.)

1. Master and Servant F a—Industrial Commission has exclusive jurisdiction of claim against insurer for failure to provide medical attention.

Plaintiff employee brought action against the insurance carrier and its agent, alleging that after plaintiff's injury by accident arising out of and in the course of his employment, the agent, on behalf of insurer, induced plaintiff to dispense with the services of his physician and consult physicians selected by insurer, and that insurer promised to provide hospitalization and surgical services recommended by insurer's physicians, but failed to do so to plaintiff's permanent injury. *Held:* Insurer's obligation to furnish medical attention necessary to plaintiff's complete recovery was founded on the Workmen's Compensation Act, N. C. Code, 8081 (h), (gg),

and the Industrial Commission has exclusive jurisdiction of plaintiff's claim, and the demurrer of each defendant was properly sustained.

2. Principal and Agent C b—

An agent may not be held liable by a third person for acts done in the scope of his authority for a disclosed principal, the acts of the agent in such instance being the acts of the principal alone.

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

APPEAL by plaintiff from judgment sustaining demurrers to the jurisdiction of the Superior Court, entered by *Devin, J.*, at March Term, 1935, of VANCE. Affirmed.

A. W. Gholson, Jr., T. P. Gholson, J. B. Hicks, and J. H. Bridgers for plaintiff, appellant.

Ruark & Ruark for defendants, appellees.

SCHENCK, J. A reasonable interpretation of the complaint, the truth of which is admitted for the purposes of the demurrers, is that on 16 March, 1933, the plaintiff was employed by the Corbitt Company, a corporation, which carried a workman's compensation insurance policy with the defendant Lumbermen's Mutual Casualty Company, and on that day the plaintiff was injured by accident in the course of and growing out of his employment, and was subsequently awarded compensation for total disability by the North Carolina Industrial Commission. After this award was made the defendant W. L. Bizzell, who was the agent of the codefendant Lumbermen's Mutual Casualty Company, induced the plaintiff to dispense with the service of a physician he had first employed, and to submit himself to examinations by several other physicians at different times and different places, and that these latter physicians recommended certain hospital treatments, surgical services, and medicines for his restoration to health, which treatments, services, and medicines the defendant promised to furnish and procure for plaintiff, but failed so to do, and as a result of such failure the plaintiff's body became permanently deformed and disabled, to his great damage in the sum of $15,000. The alleged contract and promise to furnish and procure treatments, services, and medicines for the plaintiff was never submitted to or approved by the Industrial Commission.

It is manifest that if there was any liability to the plaintiff by the defendant casualty company for treatments, services, or medicines, such liability existed by virtue of the workmen's compensation insurance policy issued to the Corbitt Company, the plaintiff's employer, and therefore any action based upon such policy should be instituted under the North Carolina Workmen's Compensation Act, North Carolina

Code of 1935 (Michie), secs. 8081 (h), *et seq.*, which gives to the North Carolina Industrial Commission exclusive jurisdiction of the rights and remedies therein afforded.

Among the rights and remedies vouchsafed the employee are medicine, surgical, hospital, and other treatments, including such medical and surgical supplies as may reasonably be required to effect a cure or give relief, and it is provided that in case of a controversy arising relative to the continuance of any treatment the Industrial Commission may order such further treatment as may in its discretion be necessary, and that upon request of either party the Commission may change the treatment or designate other treatment suggested by the injured employee. Sec. 8081 (gg).

The demurrer of the corporate defendant to the jurisdiction of the Superior Court of Vance County was properly sustained; and since the position of Bizzell, the codefendant, was that of a known agent acting within the scope of his authority for a disclosed principal, any act of his was the act of the principal alone, *Way v. Ramsey,* 192 N. C., 549 (551), 21 R. C. L., 846, and his demurrer was likewise properly sustained.

Affirmed.

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

METRO-GOLDWYN-MAYER DISTRIBUTING CORPORATION v. A. J. MAXWELL, COMMISSIONER OF REVENUE.

(Filed 11 December, 1935.)

1. Taxation E c—Demurrer in suit by taxpayer to recover tax paid held properly sustained, statutory procedure not having been followed.

Plaintiff failed to observe the statutory method provided for testing the validity of the tax paid under the Revenue Act, but instituted suit alleging that the tax was paid under compulsion in that plaintiff was notified that it would be subject to fine and imprisonment if it did business in the State without first paying the tax, that the tax is discriminatory and unlawful, and that the statutory procedure prescribed for the recovery of the tax is unconstitutional as applied to plaintiff. *Held:* The allegation that the tax was paid under compulsion was a mere conclusion of the pleader, and the demurrer of the Commissioner of Revenue was properly sustained.

2. Pleadings D c—

A demurrer admits facts properly pleaded, but not inferences or conclusions of law.

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

DISTRIBUTING CORP. *v.* MAXWELL, COMR. OF REVENUE.

APPEAL by plaintiff from *Cowper, Special Judge,* at April Special Term, 1935, of WAKE.

Civil action to recover license tax, alleged to have been illegally collected.

The complaint alleges:

1. That on or about 1 June, 1933, the plaintiff paid to the defendant Commissioner of Revenue $1,250 annual Schedule B license tax, as assessed under the Revenue Act of 1933, for the privilege of distributing moving picture films in North Carolina, which tax is discriminatory and unlawful.

2. That said payment was made under compulsion, in that printed notice was received by plaintiff from defendant to the effect that doing business in the State without first paying the tax as imposed by the Revenue Act would subject the plaintiff to fine and imprisonment.

3. That the provisions of the statute requiring payment of tax under protest and demand for return within thirty days, and suit if not refunded in ninety days, are unduly restrictive, burdensome, and unconstitutional as applied to the plaintiff.

Wherefore, plaintiff demands return of tax paid as above indicated.

Demurrer interposed on the ground that the complaint does not state facts sufficient to constitute a cause of action. Demurrer sustained. Plaintiff appeals, assigning error.

John Newitt for plaintiff.

Attorney-General Seawell and Assistant Attorneys-General Aiken and Bruton for defendant.

STACY, C. J. It appears on the face of the complaint that the tax in question was levied and collected under the Revenue Act of 1933; that plaintiff did not observe the statutory method provided for testing the validity of any tax paid thereunder; and that the allegation of payment under compulsion is a mere conclusion of the pleader unsupported by the facts. This renders the complaint bad as against a demurrer. *Bunn v. Maxwell,* 199 N. C., 557, 155 S. E., 250; *Mfg. Co. v. Comrs. of Pender,* 196 N. C., 744, 147 S. E., 284; *Rotan v. State,* 195 N. C., 291, 141 S. E., 733; *Maxwell v. Hinsdale,* 207 N. C., 37, 175 S. E., 847.

The demurrer admits facts properly pleaded, but not inferences or conclusions of law. *Phifer v. Berry,* 202 N. C., 388, 163 S. E., 119. The action was properly dismissed.

Affirmed.

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

STATE v. J. E. JONES AND C. C. HAMILTON.

(Filed 11 December, 1935.)

Intoxicating Liquor G e—Ch. 493, Public Laws of 1935, does not repeal general prohibition statute in counties not named in the act.

The general prohibition law of the State was not repealed by ch. 493, Public Laws of 1935, as to counties not named in the latter act, its provisions applying by express provision only to the counties therein named, and it is unlawful to possess intoxicating liquor for the purpose of sale in any counties of the State not named in the act of 1935. C. S., 3379.

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

APPEAL by defendants from *Parker, J.*, at July Term, 1935, of WAKE. No error.

This is a criminal action in which the defendants were charged with a violation of the prohibition laws of this State.

At the trial of the action in the Superior Court of Wake County, the defendants were convicted by a jury on the charge that on 19 June, 1935, the defendants had in their possession in the city of Raleigh, Wake County, North Carolina, intoxicating liquors for the purpose of sale.

From judgment that the defendants be confined in the county jail of Wake County, the defendant J. E. Jones, for a term of fifteen months and the defendant C. C. Hamilton for a term of four months, each to be assigned to work under the direction of the State Highway and Public Works Commission, as provided by law, the defendants appealed to the Supreme Court.

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

Charles U. Harris for defendants.

CONNOR, J. On their appeal to this Court the defendants abandoned their contention that there was error in the refusal of the trial court to allow their motion, at the close of the evidence, for judgment as of nonsuit, C. S., 4643, and contend that they are entitled to a new trial for error in the instruction of the court to the jury that if the jury should find from the evidence beyond a reasonable doubt that the defendants on 19 June, 1935, had in their possession in the city of Raleigh, Wake County, North Carolina, intoxicating liquor for purposes of sale, they should return a verdict of guilty as charged in the warrant.

In support of their assignment of error based on their exception to the instruction of the court to the jury, the defendants contend that by section 12 of chapter 493, Public Laws of North Carolina, 1935, known

as the Pasquotank County Liquor Control Act, all the laws of this State making it unlawful for any person to have intoxicating liquor in his possession for the purpose of sale have been repealed, not only as to the counties named in the act, but also as to all other counties in the State. This contention manifestly cannot be sustained.

By its terms, chapter 493, Public Laws of North Carolina, 1935, applies only to the counties named in section one of the act. Wake County is not named in said section or in any other section of the act. None of its provisions, in any event, apply to Wake County or to any other county in this State not named in the act.

Notwithstanding the act, it is now, as heretofore, "unlawful for any person, firm, association, or corporation, by whatever name called, to have or keep in possession for the purpose of sale any spiritous, vinous, or malt liquors," in any county in this State not named in section one of the act. C. S., 3379.

There was no error in the trial of this action. The judgment is affirmed.

No error.

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

STATE v. LONNIE CAMBY.

(Filed 11 December, 1935.)

Constitutional Law F d—Act permitting trial by court upon conditional plea of guilty held unconstitutional, since jury trial may not be abrogated.

The constitutional right to trial by jury in the Superior Court, Art. I, sec. 13, may not be waived by the accused after a plea of not guilty, nor may the General Assembly permit this to be done by statute, and ch. 23, Public Laws of 1933, as amended by ch. 469, is unconstitutional in that it provides, in effect, for trial by the court as upon a plea of "Not guilty," when a defendant enters a "conditional plea" under the act, and a judgment entered upon a trial under the act will be stricken out upon appeal and the cause remanded for trial according to law.

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

APPEAL by defendant from *Sink, J.*, at July Term, 1935, of CLEVELAND.

Criminal prosecution, tried upon indictment charging the defendant Lonnie Camby, and another, (1) with the larceny of a number of

chickens of the value of more than $20, the property of Wylie H. McGinnis; and (2) with feloniously receiving said chickens knowing them to have been feloniously stolen or taken in violation of C. S., 4250.

The defendant entered a conditional plea, and asked the court to hear and determine the matter under chapter 23, Public Laws 1933, as amended by chapter 469, without the intervention of a jury, to which the solicitor agreed.

Motion for judgment of nonsuit at the close of State's evidence; overruled; exception; renewed at the close of all the evidence; overruled; exception.

The court adjudged the defendant to be "guilty as charged in the bill of indictment," and sentenced him to the roads for 3½ years.

The defendant appeals, assigning errors.

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

C. B. Falls, Jr., and B. T. Falls for defendant.

STACY, C. J. It is provided by chapter 23, Public Laws 1933, as amended by chapter 469, that in all trials in the Superior Court, wherein the defendant stands charged with an offense other than capital, it shall be competent for the defendant, when represented by counsel, to enter a conditional plea of guilty, or *nolo contendere,* if the court shall permit the latter plea; and thereupon the court may hear and determine the matter without the intervention of a jury. The defendant is permitted to demur to the evidence as in cases under the Mason Act, C. S., 4643, preserve his exceptions thereto, if overruled, and have the benefit of same on appeal. It is further provided that if upon the evidence the court is satisfied beyond a reasonable doubt of the defendant's guilt, he shall proceed to judgment and sentence upon the plea entered in like manner as upon a conviction by a jury. If not so satisfied, the plea is to be stricken out and a verdict of not guilty entered.

The practical effect of a "conditional plea" under this statute, as we understand it, is to waive a jury trial and have the court hear and determine the matter as upon a plea of "Not guilty." This may not be done in the Superior Court—the court of last resort so far as a jury trial is concerned. *S. v. Crawford,* 197 N. C., 513, 149 S. E., 729; *S. v. Rouse,* 194 N. C., 318, 139 S. E., 433; *S. v. Hartsfield,* 188 N. C., 357, 124 S. E., 629; *S. v. Pulliam,* 184 N. C., 681, 114 S. E., 394; *S. v. Rogers,* 162 N. C., 656, 78 S. E., 293. The reason for this holding is to be found in the language of the Constitution: "No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court. The Legislature may, however, provide other

means of trial for petty misdemeanors with the right of appeal." Const., Art. I, sec. 13.

It is permissible under this section for the General Assembly to provide for the trial of petty misdemeanors in inferior courts with the right of appeal to the Superior Court. *S. v. Pasley,* 180 N. C., 695, 104 S. E., 533; *S. v. Tate,* 169 N. C., 373, 85 S. E., 383; *S. v. Hyman,* 164 N. C., 411, 79 S. E., 284; *S. v. Brittain,* 143 N. C., 668, 57 S. E., 352; *S. v. Lytle,* 138 N. C., 738, 51 S. E., 66.

"Two decisions of this Court—*S. v. Stewart,* 89 N. C., 564; *S. v. Holt,* 90 N. C., 749—have held that in the Superior Court, on indictment originating therein, trials by jury in a criminal action could not be waived by the accused"—*Hoke, J.,* in *S. v. Wells,* 142 N. C., 590, 55 S. E., 210.

The parties are not permitted to change the policy of the law and substitute a new method of trial in criminal prosecutions for that of trial by jury as guaranteed by the Constitution. *S. v. Crawford, supra.* Nor can this be done by act of assembly. *S. v. Pulliam, supra; S. v. Beasley,* 196 N. C., 797, 147 S. E., 301.

The decision in *S. v. Banks,* 206 N. C., 479, 174 S. E., 306, is not at variance with what is said above.

Let the judgment be stricken out and the cause remanded for trial according to law.

Error and remanded.

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

STATE v. JAMES CRUMP.

(Filed 11 December, 1935.)

APPEAL by defendant from *Williams, J.,* at April Term, 1935, of WAKE.

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

The defendant entered a conditional plea of guilty under chapter 23, Public Laws 1933, and waived trial by jury.

The court found the defendant guilty upon the evidence offered, and sentenced him to eight months on the roads.

Defendant appeals, assigning error.

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

Wilbur H. Royster for defendant.

STACY, C. J. As the proceeding in the Superior Court is without warrant of constitutional law, the judgment will be stricken out and the cause remanded for trial by jury as the law provides. None has yet been had. *S. v. Camby, ante,* 50.

Error and remanded.

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

STATE v. CLYDE HILL AND C. C. CHRISTOPHER.

(Filed 11 December, 1935.)

Constitutional Law F d—Defendant may not waive trial by jury in Superior Court after entering plea of not guilty.

A defendant in a criminal prosecution for a felony or a misdemeanor may not waive his constitutional right to trial by jury in the Superior Court after entering a plea of "Not guilty," without changing his plea, nor may the General Assembly permit him to do so by statute, ch. 23, Public Laws of 1933, and where the court, after a plea of "Not guilty," finds the defendant guilty without a jury trial, the judgment will be stricken out and the cause remanded. Art. I, sec. 13. Special verdicts distinguished in that the jury finds all essential facts under such procedure.

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

APPEAL by defendant Christopher from *Sink, J.,* at July Term, 1935, of CLEVELAND.

Criminal prosecution, tried upon indictment charging the defendants with housebreaking, larceny, and receiving stolen goods knowing them to have been feloniously stolen or taken.

The record shows the following entry:

"The defendant Clyde Hill pleaded 'Guilty' to the charge and was sentenced to five years in the State Penitentiary. He was not represented by counsel. The defendant C. C. Christopher pleaded 'Not guilty' to the charges preferred against him, but was found guilty by the trial judge, without a jury, of receiving stolen goods knowing them to have been stolen."

From a judgment of twenty months on the roads, the defendant C. C. Christopher appeals, assigning errors.

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

P. C. Gardner and T. J. Moss for appellant.

STACY, C. J. It has been the uniform holding with us that when 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; *S. v. Rogers,* 162 N. C., 656, 78 S. E., 293. And this applies to misdemeanors as well as to felonies. *S. v. Pulliam,* 184 N. C., 681, 114 S. E., 394.

True, special verdicts are permissible in criminal cases, but when such procedure is had, all the essential facts must be found by a jury. *S. v. Allen,* 166 N. C., 265, 80 S. E., 1075. They may not be referred to the judge for decision even by the consent of the accused or his counsel. *S. v. Holt,* 90 N. C., 749; *S. v. Stewart,* 89 N. C., 563. The parties are not permitted to change the policy of the law and substitute a new method of trial in criminal prosecutions for that of trial by jury as provided by the Constitution: "No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court. The Legislature may, however, provide other means of trial for petty misdemeanors, with the right of appeal." Const., Art. I, sec. 13.

Even if the defendant intended to enter a "conditional plea of guilty" under chapter 23, Public Laws 1933, this would not save the proceeding under the decision in *S. v. Camby, ante,* 50.

The cause will be remanded to the Superior Court for trial by a jury as the law provides; none has yet been had.

Error and remanded.

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

STATE v. WILLIE McLEOD, ALIAS BUSTER McLEOD.

(Filed 11 December, 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.

Where 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 appeal will be dismissed upon motion of the Attorney-General, but where defendant has been convicted of a capital felony this will be done

only when no error appears upon the face of the record. Attention is again directed to the duty of the clerk relative to notifying the Attorney-General of appeals in criminal cases, as required by 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 Attorneys-General Aiken and Bruton for the State.

STACY, C. J. At the June Term, 1934, Cumberland Superior Court, the defendant herein, Willie McLeod, *alias* Buster McLeod, was tried upon indictment charging him, and another, with the murder of one Herbert Bridgers. The jury "for their verdict say that the defendant Willie McLeod is guilty of murder in the first degree." The judgment of the court was that the defendant suffer death by electrocution.

From the judgment thus entered, the defendant gave notice of appeal to the Supreme Court, and was allowed to prosecute the same *in forma pauperis*. 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,* 208 N. C., 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.

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 Fall Term, 1934, 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 Fall Term was required to preserve the right of appeal. *S. v. Harris,* 199 N. C., 377, 154 S. E., 628; *Pruitt v. Wood, ib.,* 788, 156 S. E., 126. The case was neither docketed in time nor was application for *certiorari* made at the Fall 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,* 208 N. C., 70, relative to notifying the Attorney-General of appeals in criminal cases as required by C. S., 4654.

Appeal dismissed.

STATE v. W. B. BLADES AND J. V. BLADES.

(Filed 11 December, 1935.)

Criminal Law L g—Appeal to Supreme Court in criminal prosecution will lie only from final judgment.

The right to appeal to the Supreme Court is wholly statutory, and a defendant in a criminal prosecution may appeal only from a conviction in the Superior Court, or from some judgment of that court that is final in its nature, C. S., 4650, and an appeal from the denial of defendant's plea in abatement will be dismissed as being an appeal from an interlocutory judgment.

APPEAL by defendants from *Barnhill, J.,* at Spring Term, 1935, of PAMLICO. Appeal dismissed.

The defendants were indicted at the November Term, 1934, of the Superior Court of Pamlico County for certain offenses under the State banking laws.

At the Spring Term, 1935, defendants filed a plea in abatement on the ground that the defendants were residents of Craven County, and that the offenses charged, if committed at all, were not committed in Pamlico County, and on the further ground that as to two other bills of indictment, charging the defendants with the commission of the same offenses, pleas in abatement had been sustained at the Spring Term, 1934, of the Superior Court of Pamlico County.

From an order denying the plea in abatement defendants appealed.

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

R. E. Whitehurst and Ward & Ward for defendants.

DEVIN, J. The right of appeal to this Court is wholly regulated by statute, and there is none which gives a defendant in a criminal action

the right to appeal from an interlocutory judgment. *S. v. McDowell,* 84 N. C., 799.

The statute, C. S., 4650, provides that "in all cases of conviction in the Superior Court for any criminal offense the defendant shall have the right of appeal."

In *S. v. Webb,* 155 N. C., 426, *Hoke, J.,* thus states the law: "It would lead to interminable delay and render the enforcement of the criminal law well-nigh impossible if an appeal were allowed from every interlocutory order made by a judge or court in the course of a criminal prosecution, or from any order except one in its nature final. Accordingly, it has been uniformly held with us, as stated, that an ordinary appeal will not be entertained except from a judgment on conviction or some judgment in its nature final." *S. v. Rooks,* 207 N. C., 275.

C. S., 638, provides a different rule for civil appeals.

The ruling of the court below, denying defendant's plea in abatement, was an interlocutory judgment, and from this there was no right of appeal.

Appeal dismissed.

STATE v. WOODROW WILLIAMS.

(Filed 11 December, 1935.)

1. Statutes A b: Courts B a—Act providing for establishment of recorder's courts in particular county held unconstitutional.

Ch. 286, Public-Local Laws of 1925, providing for the establishment of township recorder's courts in one specified county *is held* unconstitutional and void as being a local act relating to the establishment of courts inferior to the Superior Court, prohibited by Art. II, sec. 29.

2. Statutes A e—General rules relating to construction of statutes in regard to their constitutionality.

The presumption is in favor of the constitutionality of a statute, and when a statute is susceptible to two interpretations, one constitutional and the other not, the constitutional interpretation will be adopted, and no statute will be declared unconstitutional except in a case properly calling for the determination of its validity.

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

APPEAL by defendant from *Hill, Special Judge,* at July Special Term, 1935, of CABARRUS.

Criminal prosecution, tried upon a warrant issued by the recorder of No. 4 Township, Cabarrus County, charging the defendant with an assault upon Barney Melton with a deadly weapon, to wit, a pocket knife, inflicting serious injury.

From a verdict of guilty and judgment thereon in the recorder's court, the defendant appealed to the Superior Court, where the matter was tried *de novo* upon the original warrant, again resulting in an adverse verdict and judgment thereon.

In the Superior Court the defendant moved to quash the warrant issued by the recorder of No. 4 Township, on the ground that the act creating said recorder's court was void as violative of Art. II, sec. 29, of the Constitution. Overruled; exception.

From the judgment entered in the Superior Court, the defendant appeals, assigning errors.

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

R. R. Hawfield for defendant.

STACY, C. J. That chapter 286, Public-Local Laws 1925, entitled, "An act to establish township recorder's courts with criminal jurisdiction in Cabarrus County," runs counter to Art. II, sec. 29, of the Constitution, prohibiting the establishment of courts inferior to the Superior Court, by any local, private, or special act or resolution, is the conclusion of the whole matter. *Provision Co. v. Daves,* 190 N. C., 7, 128 S. E., 593; *In re Harris,* 183 N. C., 633, 112 S. E., 425.

This result has been reached after observing the following rules:

1. In considering the constitutionality of a statute, every presumption is to be indulged in favor of its validity. *S. v. Revis,* 193 N. C., 192, 136 S. E., 346; *Sutton v. Phillips,* 116 N. C., 502, 21 S. E., 968; *S. v. Manuel,* 20 N. C., 144.

2. If the act of assembly be fairly susceptible of two interpretations, one constitutional and the other not, in keeping with the rule *in favorem vitæ,* the former will be adopted and the latter rejected. *S. v. Casey,* 201 N. C., 620, 161 S. E., 81; *S. v. Yarboro,* 194 N. C., 498, 140 S. E., 216; *S. v. Revis, supra; Hopkins Fed. S. & L. Asso. v. Cleary,* 296 U. S., 80, Law Ed., 209.

3. The courts will not declare an act of the General Assembly unconstitutional, even when clearly so, except in a case properly calling for the determination of its validity. *Newman v. Comrs. of Vance,* 208 N. C., 675; *Wood v. Braswell,* 192 N. C., 588, 135 S. E., 529; *S. v. Corpening,* 191 N. C., 751, 133 S. E., 14; *Person v. Doughton,* 186 N. C., 723, 120 S. E., 481.

It follows, therefore, that the warrant should have been quashed.

It is provided by the section of the Constitution above mentioned that the "General Assembly shall not pass any local, private, or special act or resolution relating to the establishment of courts inferior to the Superior Court." Chapter 286, Public-Local Laws 1925, is a local act relat-

ing to the establishment of courts inferior to the Superior Court, to wit, township recorder's courts, and is applicable only to Cabarrus County. An act of the General Assembly in conflict with the Constitution is void. *Grimes v. Holmes,* 207 N. C., 293, 176 S. E., 746; *R. R. v. Cherokee Co.,* 177 N. C., 86, 97 S. E., 758; *Atkins v. Hospital,* 261 U. S., 525. The trial in the recorder's court was *coram non judice,* and the warrant was not issued by a proper judicial officer.

Reversed.

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

STATE v. JOE LAWSON.

(Filed 11 December, 1935.)

Criminal Law I j—Directed verdict of guilty is error when there is testimony by defendant of facts sufficient to establish innocence.

Where under defendant's testimony he is not guilty of the offense charged in the bill of indictment, it is error for the court to peremptorily instruct the jury to convict the defendant if they believe the evidence beyond a reasonable doubt, although there may be plenary evidence of guilt on the part of the State, since the conflicting or equivocal evidence raises a question for the determination of the jury.

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

APPEAL by defendant from *Parker, J.,* at June Term, 1935, of MARTIN.

Criminal prosecution, tried upon indictment charging the defendant and another with the unlawful and felonious slaying of Peggy Hardison.

On 15 November, 1934, the defendant was driving his new Chevrolet truck from Plymouth to Williamston, N. C. He stopped at a filling station on the way, obtained some whiskey and got drunk. Johnnie Williams agreed to drive the truck the balance of the way. The defendant was on the front seat beside the driver. While rounding a curve, Mrs. Ida Godard, who was rolling her granddaughter in a baby carriage on the left shoulder of the road, was struck by the truck, greatly injured, and the baby killed.

The driver testified that he was unable to manage the truck at the time because the defendant "Lawson had his foot on the accelerator, and I could not get his foot off."

The defendant denied this, saying: "I did not have my foot on the pedal. I was asleep when the wreck occurred. When I woke up I did not have my foot on the accelerator."

The court instructed the jury that if they believed the evidence beyond a reasonable doubt to return a verdict of guilty of manslaughter. Exception.

Verdict: Guilty.

Judgment: Imprisonment in State's Prison for not less than two nor more than four years.

Defendant appeals, assigning errors.

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

Elbert S. Peel for defendant.

STACY, C. J. The defendant says in his brief: "There is a conflict in the testimony of Williams and Lawson. Of course, if Williams is to be believed, Lawson is guilty. On the other hand, if Lawson is to be believed he is not guilty, and he is entitled to have a jury pass upon the facts."

It must be conceded, we think, that the evidence is sufficiently equivocal, if not contradictory, to require its submission to the jury without peremptory instruction. *S. v. Anderson,* 208 N. C., 771; *S. v. Hicks,* 200 N. C., 539, 157 S. E., 851; *Strunks v. Ry.,* 187 N. C., 175, 121 S. E., 436; *Overall Co. v. Holmes,* 186 N. C., 428, 119 S. E., 817.

In the absence of some admission or incriminating testimony on the part of the defendant, it is seldom that a verdict of guilty can properly be directed in a criminal case. *S. v. Singleton,* 183 N. C., 738, 110 S. E., 846; *S. v. Hill,* 141 N. C., 769, 53 S. E., 311; *S. v. Riley,* 113 N. C., 648, 18 S. E., 168.

New trial.

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

STATE v. OBA GODWIN.

(Filed 11 December, 1935.)

Criminal Law L e—

The verdict of the jury upon conflicting evidence is final when no reversible error is committed upon the trial.

APPEAL by defendant Oba Godwin from *Shaw, Emergency Judge,* at August Special Term, 1935, of MOORE.

Criminal prosecution, tried upon indictment charging the defendant with the murder of one Peter Harrington.

Verdict: Guilty of murder in the second degree.

Judgment: Imprisonment in the State's Prison for not less than six nor more than ten years.

Defendant appeals, assigning errors.

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

W. R. Clegg for defendant.

STACY, C. J. The evidence on behalf of the State tends to show that on the night of 23 July, 1933, as a result of a quarrel over a girl at a Negro dance hall and cafe, situate on the road between Aberdeen and Southern Pines, the defendant Oba Godwin shot and killed the deceased under circumstances which the jury found to be murder in the second degree.

The plea interposed by the said defendant was that of self-defense. *S. v. Bryson,* 200 N. C., 50, 156 S. E., 143; *S. v. Glenn,* 198 N. C., 79, 150 S. E., 663; *S. v. Dills,* 196 N. C., 457, 146 S. E., 1. The issue of guilt or innocence is sharply joined on the record. The jury alone could determine it. *S. v. Lawson, ante,* 59; *S. v. Anderson,* 208 N. C., 771.

The trial is free from reversible error, hence the verdict and judgment must be upheld.

No error.

JAMES W. FULLER, ON BEHALF OF HIMSELF AND ALL OTHER TAXPAYERS OF THE COUNTY OF WAKE WHO DESIRE TO MAKE THEMSELVES PARTIES HERETO, v. JOHN C. LOCKHART, SUPERINTENDENT OF PUBLIC INSTRUCTION FOR THE COUNTY OF WAKE; DR. N. Y. GULLEY, CHAIRMAN OF THE BOARD OF EDUCATION OF THE COUNTY OF WAKE; DR. W. C. RIDDICK, M. B. CHAMBLEE, ALFRED BAUCOM, AND J. P. HUNTER, MEMBERS OF THE BOARD OF EDUCATION OF THE COUNTY OF WAKE; AND HARDWARE MUTUAL FIRE INSURANCE COMPANY OF MINNESOTA, A CORPORATION; HARDWARE DEALERS MUTUAL FIRE INSURANCE COMPANY OF STEVENS POINT, WIS., A CORPORATION; MINNESOTA IMPLEMENT MUTUAL FIRE INSURANCE COMPANY OF OWATONNA, MINNESOTA, A CORPORATION; AND FEDERAL HARDWARE AND IMPLEMENT MUTUALS, AND ALL OTHER OFFICERS AND AGENTS AND EMPLOYEES OF SAID COMPANIES.

(Filed 11 December, 1935.)

1. Counties C a—County may insure school property in mutual companies.

A county board of education has the authority to insure school property in a mutual fire insurance company authorized to do business in this State, and assume the contingent liability limited to the amount of the cash premium, and the execution of such policy does not lend the credit of the State to a private corporation, Art. V, sec. 4, nor create a debt for

other than a necessary expense, Art. VII, sec. 7, nor constitute the county the owner of stock in a private corporation, nor a partner in a private business.

2. Insurance B b—

The policyholders in a mutual fire insurance company are not stockholders therein, and are in no way liable for the debts of the company beyond the contingent liability fixed in the policy. N. C. Code, 6348, 6351, as amended by ch. 89, Public Laws of 1935.

3. Schools and School Districts D a—

A county board of education is an administrative agency of the State in the maintenance and operation of the State public school system.

4. Schools and School Districts D b—

By the School Machinery Act of 1935, salaries, plant operation, and other major items of current school expenses were transferred from the county boards of education to the State, but maintenance expense and fixed charges, including insurance, were left with the county boards of education. Ch. 455, sec. 9, Public Laws of 1935.

5. Taxation A a—

Premiums for insurance of its public school buildings is a necessary public expense of a county, and the incurring of liability therefor need not be submitted to the voters. N. C. Code, 5596 (a); Art. VII, sec. 7.

6. Schools and School Districts D b—

The selection of a company to carry insurance on the public school buildings is a matter in the discretion of the county board of education, and its action in regard thereto is not ordinarily reviewable.

7. Schools and School Districts C c—

Where a county board of education desires to purchase insurance in a mutual company, it may set up in its budget the cash premium and the contingent liability, not exceeding the cash premium.

8. Schools and School Districts D b—

N. C. Code, 6348, 6351, as amended by ch. 89, Public Laws of 1935, do not indicate legislative intent to prohibit county boards of education insuring property in mutual companies by failing to expressly grant such authority, sec. 6348 being an enabling statute relating solely to trustees, and sec. 6351 prescribing the method and allowing the operation of mutual companies in this State.

9. Insurance E b—

Laws in force at the time of executing a policy of insurance are binding on the insurer and become a part of the insurance contract. N. C. Code, 6287.

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

APPEAL by plaintiff from *Parker, J.*, at September Term, 1935, of WAKE. Affirmed.

This was a civil action, instituted on behalf of the plaintiff and all other taxpayers of Wake County who desire to make themselves parties

against the County Board of Education of Wake County and the three mutual fire insurance companies above set forth, named as defendants.

The plaintiff in his complaint, among other things, alleges that the County Board of Education of the County of Wake, by unanimous vote, adopted a resolution authorizing the superintendent of public instruction of said county to insure against loss by fire certain school buildings located in Wake County, under the jurisdiction of said board, and in pursuance of said resolution that the superintendent of public instruction applied for a fire insurance policy insuring the Green Hope High School against loss by fire to be issued by defendant fire insurance companies. That the said three insurance companies delivered a single policy to the County Board of Education of Wake County, as is set forth in the record, in the amount of $2,000, limiting the liability of each to one-third of any loss sustained not exceeding the amount of the policy, for a period of one year, reciting a consideration of $12.35 premium and a contingent liability against said County Board of Education to an assessment in an equal additional amount.

The plaintiff further alleged that, unless restrained, the County Board of Education would accept said policy of insurance and pay the cash premium and assume said contingent liability for assessment for equal and additional amounts, to the great and irreparable damage and injury of plaintiff and other taxpayers in said county.

The plaintiff further alleges: "The acceptance of said fire insurance policy and payment of said cash premium will and does constitute said defendant County Board of Education of the County of Wake a member of each of said defendant mutual insurance companies; and in accepting said insurance and becoming members of said defendant insurance companies, said County Board of Education of the County of Wake does and will: (1) Assume an unlimited liability to assessment to pay losses and expenses of the companies, notwithstanding any limitation of this liability recited in the policy, and assumption of such liability by the County Board of Education of the County of Wake would be wholly *ultra vires* and contrary to law; (2) undertake to pay for the insurance coverage obtained an indeterminate price, which would be left to the arbitrary determination of the companies, contrary to the laws of the State relating to school districts and other public corporations; (3) assume or underwrite the obligations of private individuals and corporations, contrary to the Constitution and laws of the State; (4) undertake to raise money by taxation for private purposes, contrary to the Constitution and laws of the State; (5) lend its credit to a private corporation, contrary to the Constitution of the State; (6) become a stockholder in a private corporation, contrary to the Constitution of the State; (7) engage in the business of fire insurance, and in so doing would

be acting *ultra vires* and contrary to the law of the State relating to public corporations and insurance companies; (8) associate itself as a partner in the conduct of a private business in which it has no authority or power to engage, and in so doing would be acting *ultra vires* and contrary to the Constitution and laws of the State."

And the plaintiff prayed that the County Board of Education of Wake County be enjoined and restrained from accepting the policy of insurance or any other policy of insurance issued by any mutual fire insurance company, and from paying or undertaking to pay the premiums under any policy of insurance issued by said defendant insurance companies or doing any act or assuming any liability to give effect to such fire insurance policies, and that the insurance company, its officers and agents, be forever enjoined and restrained from accepting any payment of premiums under said contract of insurance or asserting any liability or obligation against or on the part of said County Board of Education, or by virtue of said policies or contract of insurance, or asserting the membership of said defendant County Board of Education in any of said defendant fire insurance companies, or doing any act or thing to give effect to such policy or contract of insurance.

In answer, the defendants, and each of them, "admit that all of the losses and expenses of the defendant companies are and must be paid out of moneys derived ultimately from the amounts collected from their member policyholders, past, present, and future; but further say that a large part of the moneys available for the payment of such losses and expenses are derived directly from the income from the investment of a portion of the premiums collected from their members and accumulated as reserves, guaranty funds, and surplus, the principal of which funds, now aggregating a large amount in the case of each of the defendant companies, as well as the income therefrom, are at all times available, if needed, for the payment of losses and expenses of the said companies. They admit that the County Board of Education of Wake County and its officers intend to accept said policy of insurance and pay the cash premium of $12.35, and assume a contingent liability to assessment for an equal and additional amount, but it is denied that such action on their part will result in the damage or injury of plaintiff or of any other taxpayer of the county of Wake. . . . They admit that the acceptance of said fire insurance policy and the payment of the cash premium will and does make the County Board of Education of the County of Wake a member of each of said defendant mutual fire insurance companies, but not a stockholder or partner in or with any of them. . . . Further answering, the defendants, and each of them, assert that the present condition and record of all and each of said defendant companies justify the trustees and officers of the defendant and school dis-

trict, in the exercise of a sound administrative discretion, in applying for and accepting the policy or policies of which complaint is made in said petition, and thereby obtaining for said school district a large saving in its insurance expense as to the property covered by said policy or policies, and undertaking as consideration for such indicated savings the possible payment under certain extraordinary conditions of the further premium in the form of assessment which can under no condition exceed the amount of the cash premium."

The judgment of the court below is as follows: "This cause coming on to be heard before his Honor, R. Hunt Parker, judge, and being heard upon the restraining order heretofore made by his Honor, Clawson L. Williams, enjoining the defendants herein from making any payment of the premiums under the policy of insurance set forth in the complaint or asserting any liability or obligation against or on the part of the County Board of Education of the County of Wake under and by virtue of said policy or contract of insurance, or asserting the membership of said County Board of Education of Wake County in any and all of said defendant fire insurance companies, or doing any act or thing to give effect to said policy or contract of insurance and from the payment of the premium alleged to be due thereon, and after argument by counsel representing the plaintiff and the defendants, the court being of the opinion that said temporary restraining order should be vacated, it is accordingly ordered and judged: That the temporary restraining order heretofore issued in the above entitled cause be and the same is hereby set aside and vacated; that the defendants go hence without day and recover their costs of the plaintiff. R. Hunt Parker, Judge presiding over courts of the 7th Judicial District."

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

Manning & Manning and Jones & Brassfield for plaintiff.
John W. Hinsdale and Eugene Quay for defendants.

CLARKSON, J. The many objections made by plaintiff to the contract made between the County Board of Education of Wake County, N. C., and the three defendants, mutual fire insurance corporations, cannot be sustained.

The County Board of Education of Wake County insured in these corporations a two-story brick building, known as Green Hope School, in White Oak Township in said county. The amount of insurance was $2,000, and for one year, from 1 April, 1935, to 1 April, 1936. The language of the policy applicable to the controversy: "In consideration of the stipulations herein named and of twelve and 35/100 dollars

premium do insure Board of Education of Wake County, . . . This policy is issued on a mutual basis for cash premium with a contingent liability in an amount as set forth in the by-laws of the respective companies on page three hereof, and by the acceptance of this policy the policyholder becomes a member of each of said companies, subject to the provisions of the by-laws thereof for all purposes. In determining the contingent liability of a policyholder in each company, the total premium of this policy shall be prorated among the companies in proportion to their several liabilities hereunder. . . . This corporation shall have no capital stock. Every person, corporation, partnership, or association named as the insured in a policy issued by the corporation shall be a member of the corporation while such policy is in force. . . . The board of directors shall, from time to time, determine which, if any, of the policies or classes of policies issued by the corporation shall be subject to a contingent mutual liability, and shall determine the maximum amount of such liability, *which maximum amount shall in no case exceed a sum equal to the amount of one annual premium on the policy.*"

N. C. Code, 1935 (Michie), sec. 6274, gives the Insurance Commissioner authority over all insurance companies, and the same must be licensed and supervised by him. Section 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 this State and are subject to the laws thereof."

There is no question but that the defendant insurance companies have complied with the conditions of admission (section 6411) and have a right to do business in the State. The provisions of mutual insurance companies are found in Article 8, "Mutual Insurance Companies," secs. 6346 to 6355, inclusive. Section 6348 provides, in part: "Every person insured by a mutual fire insurance company is a member while his policy is in force, entitled to one vote for each policy he holds. . . . A person holding property in trust may insure it in such company, and as trustee assume the liability and be entitled to the rights of a member, but is not personally liable upon the contract of insurance," etc.

Section 6351 was amended by chapter 89, Public Laws of 1935, and is as follows: "The directors of a mutual fire insurance company may from time to time, by vote, fix and determine the amount to be paid as a dividend upon policies expiring during each year. Each policyholder is liable to pay his proportional share of any assessments which are made by the company in accordance with law and his contract on account of losses incurred while he was a member, if he is notified of such assessments within one year after the expiration of his policy. Any

mutual fire insurance company doing business with a fixed annual premium may in its by-laws and policies fix the contingent liability of its members for the payment of losses and expenses not provided for by its cash funds, which contingent liability must not be less than a sum equal to the cash premium written in his policy, and in addition thereto. The by-laws may also provide for policies to be issued for cash premiums without contingent liability of policyholders; provided, that no mutual fire insurance company shall issue any policy without contingent liability until and unless it possesses a surplus of at least one hundred thousand dollars. The total amount of the liability of the policyholder must be plainly and legibly stated upon the back of each policy. Whenever any reduction is made in the contingent liability of members, it applies proportionally to all policies in force. Provided, this section shall not apply to farmers mutual fire insurance companies."

We think the only material question presented on this record: Has the County Board of Education of Wake County a right to make the contract complained of by plaintiff? We think so. The plaintiff contends that it cannot "lend its credit to a private corporation contrary to the Constitution of the State." It contends that it impinges the following sections of the Constitution of North Carolina: Art. V, sec. 4, in part: "And the General Assembly shall have no power to give or lend the credit of the State in aid of any person, association, or corporation, except to aid in the completion of such railroads as may be unfinished at the time of the adoption of this Constitution, or in which the State has a direct pecuniary interest, unless the subject be submitted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon." Art. VII, sec. 7: "No county, city, town, or other municipal corporation shall contract any debt, pledge its faith, or lend its credit, nor shall any tax be levied or collected by any officer of the same except for the necessary expenses thereof, unless by a vote of a majority of the qualified voters therein."

We cannot agree with plaintiff's contention. We think that the County Board of Education of Wake County did not lend its credit, but purchased the $2,000 of insurance from defendants for a year by paying them $12.35 and agreeing to pay them an amount on certain contingencies—the maximum not to exceed $12.35. It did not enter into private business, but purchased the insurance to protect its property. This was in the sound discretion of the board.

"By becoming a member of a mutual insurance company a municipality does not become the owner of any stock or bonds of the company in violation of a constitutional provision prohibiting any municipality from owning any stock or bonds of any association or corporation; and by giving premium notes for the payment of assessments to meet losses

incurred by such an insurance company, the municipality does not loan its credit to the company in violation of a constitutional prohibition against doing so. *French v. Milville,* 66 N. J. L., 392, 49 Atl., 465." Colley's Constitutional Limitations, Vol. 1 (8th Ed.), p. 469—note. Affirmed 67 N. J. L., 349, 51 Atl., 1109. *Downing v. School Dist. of Erie,* 297 Pa., 474, 147 Atl., 239; *Dalzell v. Bourbon Board of Education* (1921), 193 Ky., 171, 235 S. W., 360.

"There is an essential difference between stock and mutual insurance companies. A stock insurance company is a corporation with a capital stock, organized for the profit of its stockholders, who need not be policyholders. Its policies are issued solely upon the credit of its capital stock to persons who may be entire strangers to the corporation, who acquire by reason of their policies no right of membership and no right to participate in its profits, and who subject themselves to no liability by reason of its losses. In all these respects it differs materially from a mutual company, which has no stock or stockholders." 32 C. J., 1020.

Under the purchase of the insurance the board in no way became a stockholder or partner, nor did it incur any liability for debts. It is a mutual company, without stock or stockholders. Its policyholders are its only members. A stockholder is the owner or holder of shares in a corporation having a capital stock represented by shares. The policyholders can in no way become liable for the debts of the corporation. For the insurance purchased, it paid $12.35, and its contingent liability is limited to the maximum of the cash payment, in the present case to $12.35. The County Board of Education had full power and authority to make the contract and it was in its sound discretion. Section 6351, *supra.* The board is a corporation and an agency of the State. N. C. Code, 1935 (Michie), sec. 5419. *Board v. Board,* 192 N. C., 274; *Hickory v. Catawba Co.,* 206 N. C., 165.

The county of Wake and the County Board of Education of Wake County are administrative units in the public school system of the State. In *Julian v. Ward,* 198 N. C., 480 (482), it is said: "Under these (N. C. Const., Art. IX, secs. 1, 2, and 3) and other pertinent sections of the Constitution, it has been held in this jurisdiction that these provisions are mandatory. It is the duty of the State to provide a general and uniform State system of public schools of at least six months (now eight months—Public Laws 1935, ch. 455) in every year wherein tuition shall be free of charge to all the children of the State between the ages of six and twenty-one. It is a necessary expense and a vote of the people is not required to make effective these and other constitutional provisions in relation to the public school system of the State. Under the mandatory provision in relation to the public school system of the State, the financing of the public school system of the State is in the discretion of

the General Assembly by appropriate legislation either by State appropriation or through the county acting as an administrative agency of the State. *Lacy v. Bank,* 183 N. C., 373; *Lovelace v. Pratt,* 187 N. C., 686; *Frazier v. Commissioners,* 194 N. C., 49; *Hall v. Commissioners of Duplin,* 194 N. C., 768." *Elliott v. Board of Equalization,* 203 N. C., 749.

By the School Machinery Act of 1935, salaries, plant operation, and other major items of the current expense fund were transferred from the County Board of Education to the State Fund Administration, but maintenance expense and fixed charges, including insurance, are still left to the County Board of Education. Public Laws N. C., 1935, ch. 455, sec. 9 (pp. 760-761).

The fixed charges indicated in N. C. Code, 1935 (Michie), sec. 5596 (a) 5, including insurance, are consequently "necessary expenses" of the County Board of Education, and the limitations of Art. VII, sec. 7, of the Constitution do not and cannot apply to the insurance of the regular public schools of the county which form a part of the State-wide system.

The purchase of the insurance was for a public and not a private purpose, and a necessary expense. Ordinarily, the Board of Education has discretion in matters of this kind, and usually its action is not reviewable.

In *Newton v. School Committee,* 158 N. C., 186 (188), citing a wealth of authorities, it is said: "Courts may not interfere with discretionary powers conferred on these local administrative boards for the public welfare, unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion." *Clark v. McQueen,* 195 N. C., 714 (716); *Crabtree v. Board of Education,* 199 N. C., 645 (650).

The plaintiff in his brief says: "The general law of this State is silent as to insuring property of schoolhouses in this State. Section 5419 incorporates the Board of Education and gives it general powers to purchase and hold real and personal property, buildings, schoolhouses, etc. Section 5596 provides: 'The May budget prepared by the County Board of Education shall provide for three separate school funds'; and subsection 5 of section (a) is as follows: 'Fixed charges rent, insurance, and other necessary fixed charges.' "

"Nowhere in the act creating the County Board of Education, or in any other legislative authority, has the County Board of Education been given the right to become a member and assume a contingent liability in a mutual fire insurance company." We think plaintiff takes too narrow a view of section 6351, *supra,* and the subject.

When the budget is set up by the County Board of Education, if it desires to purchase insurance in mutual companies like the defendants', it can show the cash amount to do so and the contingent amount not

exceeding the cash premium. This matter is discretionary with the County Board of Education.

The plaintiff cites section 6351, *supra,* and says: "We submit that the Legislature has carefully avoided granting to the County Board of Education or any other municipal corporation the authority to insure in mutual fire insurance companies. It has granted the right to trustees to become members of such mutual fire insurance companies, but it has declined to give its consent to a Board of Education or any other governmental agency to become a member of a mutual fire insurance company," etc.

We do not think this was necessary in specific language. Reading the section as a whole and giving it a liberal construction, it opens up the door to these mutual companies and says how they shall operate. The mutual companies are bound by the statute which is in force at the time of the execution of the contract and becomes part of the intention of the parties. *Bateman v. Sterrett,* 201 N. C., 59; *Headen v. Ins. Co.,* 206 N. C., 270 (272).

Section 6348 is an enabling statute to protect a trustee from liability. It has nothing to do with the rights asserted here by the County Board of Education, nor is the County Board of Education restricted from purchasing insurance in a mutual company; but section 6351 provides the terms and method of how mutual insurance can operate in this State. Those who purchase mutual insurance have their rights fixed.

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.

E. R. BURT, ON HIS OWN BEHALF AND ON BEHALF OF ALL OTHER CITIZENS AND TAXPAYERS OF THE TOWN OF BISCOE SIMILARLY SITUATED AND WHO DESIRE TO MAKE THEMSELVES PARTIES TO THIS ACTION, *v.* TOWN OF BISCOE, A MUNICIPAL CORPORATION.

(Filed 11 December, 1935.)

1. Statutes C b—

Ordinarily, a special statute prevails over a repugnant general statute as an exception to the general statute.

2. Same—

The courts will try to harmonize inconsistent and conflicting statutes relative to the same subject-matter in order to give effect to the legislative intent as gathered from the statutes construed together.

3. Taxation A a—Municipality may issue bonds for necessary purpose without vote under Emergency Bond Act, notwithstanding provisions of local act.

Defendant municipality was subject to a special act prohibiting the issuance of bonds for sewerage and other designated necessary purposes without a vote. Ch. 208, Public-Local Laws of 1925. Defendant municipality, under an agreement with a Federal agency for a Federal grant, proposed to issue bonds to provide its part of the expense of a sewerage plant without a vote under the provisions of the Emergency Bond Act. Ch. 426, Public Laws of 1935. *Held:* The intent of the Emergency Bond Act is to expedite the issuance of bonds for projects constituting necessary municipal or county expenses for which the Federal Government offers a loan or grant by dispensing with a vote, notwithstanding the restrictions of any general, special, or private act, and a vote is not necessary to the issuance of the proposed bonds by defendant municipality, the provision of the Emergency Act that it should not repeal any private or local act in conflict therewith being precautionary and operating to keep such local acts in full force and effect, except for the issuance of bonds for necessary purposes under the provisions of the Emergency Act, the statutes being reconciled to effectuate the legislative intent to aid the Federal Government in financing certain necessary constructive projects to give relief to the unemployed.

APPEAL by plaintiff from *Clement, J.*, at Chambers, 6 November, 1935. From MONTGOMERY. Affirmed.

This is a civil action, brought by the plaintiff in the Superior Court of Montgomery County, and heard before Clement, Judge, at the courthouse in Statesville, North Carolina, on 6 November, 1935, upon an agreed statement of facts and from a judgment for the defendant the plaintiff appealed.

The agreed statement of facts is as follows:

"That E. R. Burt, the plaintiff, is a citizen, taxpayer, and qualified voter of the town of Biscoe.

"That the town of Biscoe is a municipal corporation, created by chapter 24, Private Laws of 1901.

"That the town of Biscoe has made application to the Federal Emergency Administration of Public Works, an agent of the United States of America, for a loan of $44,000 and a grant in the sum of $36,000 for the purpose of financing the construction of a water works and sewerage system for the said town, and that the Public Works Administration has agreed to make said loan and said grant to the said town in the amounts named.

"That at a regular meeting of the board of commissioners for the town of Biscoe held on 4 November, 1935, a resolution was adopted whereby was determined that the said town should issue $44,000 negotiable coupons, water and sewer bonds of said town for the purpose of constructing a water works and sewerage system in and for said town,

said bonds to be dated 1 October, 1935, and maturing $1,000 on 1 October in each of the years 1939 to 1950; $2,000 thereof on 1 October in each of the years 1951 to 1963, and $3,000 thereof 1 October in each of the years 1964 and 1965, and under the terms of said resolution the bonds are purported to be issued pursuant to the Emergency Bond Act of 1935 (being chapter 426 of the Public Laws of 1935). The resolution sets forth the form of bond and rate of interest and all details with reference to the issuance thereof, and provides that an annual tax shall be levied and collected sufficient to pay the principal and interest of said bonds as same become due, and that it shall become effective immediately upon its passage and shall not be submitted to the voters of said town.

"It is also admitted that chapter 208 of the Public-Local Laws of 1925, applicable to Montgomery County, is especially pleaded in this action and that same has not been repealed or affected by any act other than by the Emergency Bond Act of 1935.

"That the town of Biscoe proposes to issue bonds in accordance with the terms and provisions of said resolution and said Emergency Bond Act, and that said bonds are proposed to be sold to the United States of America.

"GARLAND S. GARRISS,
Attorney for Plaintiff.
R. T. POOLE,
Attorney for Defendant."

The judgment of the court below is as follows: "This cause coming on to be heard before his Honor, J. H. Clement, judge, upon an agreed statement of facts, at the courthouse in Statesville, North Carolina, on 6 November, 1935, and being heard, and it appearing to the court that the plaintiff is not entitled to the relief sought in said action: It is therefore ordered, adjudged, and decreed by the court that this action be dismissed at the cost of the plaintiff.

J. H. CLEMENT,
Judge Presiding."

To the judgment as signed, the plaintiff excepts and assigns error and appeals to the Supreme Court.

Garland S. Garriss for plaintiff.
R. T. Poole for defendant.

CLARKSON, J. The main question involved on this appeal is whether or not bonds may be issued for water works and sewerage system, under

Emergency Municipal Bond Act of 1935, without regard to a particular local act. We think so under the facts and circumstances of this case.

Under Art. VII, sec. 7, of the Constitution of North Carolina, "a vote of the majority of the qualified voters therein" is not necessary when the purpose of the bond issue is for a "necessary expense." It has been decided by this Court that a water works and sewerage system is a necessary expense. *Storm v. Wrightsville Beach,* 189 N. C., 679 (681).

The Emergency Municipal Bond Act, ch. 426, Public Laws 1935, has this in it: The caption of the act is as follows: "An act to authorize cities and towns to issue bonds for municipal improvements for the purpose of financing or aiding in the financing of any work, undertaking, or project to which any loan or grant is or may be made by the United States of America through the Federal Emergency Administrator of Public Works, or through any other agency or department of the United States of America, *and to expedite the procedure for the issuance of such bonds.*" (Italics ours.) Section 11: "The powers conferred by this act are in addition to and not in substitution of those conferred by any other act, either general, special, or local, and every municipality may proceed to issue bonds under the provisions of this law notwithstanding any conditions, restrictions, or limitations contained in any other act, whether general, special, or local. Every provision of this law shall be construed as being qualified by constitutional provisions, whenever such construction shall be necessary in order to sustain the constitutionality of any portion of this law," etc. Section 13: "Nothing in this act shall be construed as repealing any general, special, or local law in conflict with this act."

Chapter 208, Public-Local Laws of 1925, sec. 1, is as follows: "That it shall be unlawful within the boundaries of the county of Montgomery for bonds for county, township, school, road or highway, city or town, street or sidewalk paving, water, sewerage, lights or other public purposes, improvements or repairs to be issued without the approval of the qualified voters, to be affected thereby, of the respective city, town, township, or county at large, or within the jurisdiction of the road, highway, school, or other board, or trustees, proposing to issue such bonds: *Provided, however,* that bonds may be issued by the said authorities in the way and manner now provided by law to meet an emergency occasioned by the sudden destruction of property now owned and existing."

The town of Biscoe, a municipal corporation, created by chapter 24, Public Laws of 1901, has made application to the Federal Emergency Administration of Public Works, an agent of the United States of America, for a loan of $44,000 and a grant in the sum of $36,000 for the purpose of financing the construction of a water works and sewer system

for the said town, and the Public Works Administration has agreed to make said loan and grant to the town in the amounts named.

In *Hammond v. Charlotte,* 205 N. C., 469 (472), it is said: "It is a settled principle, subject to exceptions, that where a public or general and a private or special statute relate to the same subject and the two are essentially inconsistent the special statute shall prevail on the theory that it is an exception to the former," citing authorities.

It is also well settled that courts will try to harmonize inconsistent and conflicting statutes relative to the same subject-matter to ascertain the intent of the General Assembly.

In *Blair v. Commissioners,* 187 N. C., 488 (490), we find: "But it is a well settled principle that in case of doubt or ambiguity the two enactments must be construed so as to effectuate the true intent and purpose of the lawmaking body. 'The first canon in the construction of statutes is to ascertain the legislative intent, as gathered from the statute itself, which should be enforced accordingly as the only authentic expression of the popular will. We may consider other statutes relating to the same subject, and the purpose to be accomplished, where there is any real doubt as to the true meaning; but whenever and however discovered, the intent prevails over all other considerations.' *Walker, J.,* in *S. v. Johnson,* 170 N. C., 690."

The caption to the Emergency Municipal Bond Act of 1935 says: "And to expedite the procedure for the issuance of such bonds." Further: "Every municipality may proceed to issue bonds under the provisions of this law notwithstanding any conditions, restrictions, or limitations contained in any other act, whether general, special, or local." The water works and sewerage bonds are a necessary expense under Article VII, section 7, of the Constitution of North Carolina, *supra,* and a vote of the people is not necessary. A vote under the local law would hinder and in no sense expedite the procedure for the issuance of bonds.

We think the language contained in section 13 is merely precautionary in that it expresses the legislative intent that all local laws shall remain in full force and effect except in cases where bonds are issued under this act to secure a loan from the Federal Government for a necessary expense. The act would not be an emergency one if it was restricted as contended by plaintiff. It seems that the very purpose and intent of the General Assembly was to aid the Federal Government in financing certain necessary constructive projects to give relief to the unemployed. This laudable purpose may be destroyed by not reconciling the general and special local act and paramounting the general act under the facts and circumstances of the case.

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

Affirmed.

C. M. CASTEVENS AND JAMES FORREST, CITIZENS AND TAXPAYERS OF STANLY COUNTY, v. STANLY COUNTY AND T. R. WOLFE, J. V. BARRINGER, AND JOHN L. LITTLE, CONSTITUTING THE BOARD OF COMMISSIONERS OF STANLY COUNTY.

(Filed 11 December, 1935.)

1. Taxation A a—County may issue bonds for necessary purposes without vote under Emergency Bond Act, notwithstanding provisions of local act.

A county may issue its bonds for a necessary special purpose with the special approval of the General Assembly, or to raise funds necessary to the maintenance of the constitutional school term, without submitting the issuance of the bonds to a vote, notwithstanding the provisions of a special statute requiring a vote, ch. 443, Public-Local Laws of 1927, when the purpose of the bond issue is to provide the county's part of the expense of a project for which a Federal grant is available, and the proposed bond issue comes within the provisions of the Emergency County Bond Act, ch. 427, Public Laws of 1935, the special act being harmonized with the Emergency Act to effectuate the legislative intent.

2. Same—Public-local statute may not prohibit a county from issuing bonds for necessary school facilities as administrative State agency.

A public-local statute prohibiting the issuance of bonds without a vote does not prevent a county named in the act from issuing bonds to provide funds for the purpose of erecting school buildings, making additions to old building, and purchasing equipment necessary to the maintenance of the constitutional school term, since the county, in issuing bonds for such purpose, is an administrative agency of the State, and the public-local statute applies only to local matters.

3. Taxation A b—Held: Taxes for payment of bonds issued under Emergency Bond Act for school purposes will not be subject to limitation.

Where a county has assumed all indebtedness of its political subdivisions for school purposes, and a proposed bond issue to provide funds necessary to the maintenance of the constitutional school term in the county is within the limitations of N. C. Code, 1334 (17), and comes within the provisions of the Emergency Bond Act, ch. 427, Public Laws of 1935, taxes for the payment of principal and interest of the proposed bond issue will not be subject to any limitation on the tax rate.

4. Taxation A b—Bonds for county jail held for necessary, special purpose given special legislative approval, and taxes therefor are not subject to limitation.

Where it is stipulated in the agreed facts that defendant county's jail is unsafe and insanitary, and the erection of a new jail is a public necessity, bonds necessary to provide funds for the erection of a new jail, with plumbing, heating, and electrical work, are for a special necessary county expense, N. C. Code, 1297, 1317, and the issuance of such bonds is given special legislative approval, N. C. Code, 1321 (a), 1334 (8) (a), (d), and taxes necessary to pay principal and interest of such bond issue by the county are not subject to limitation on the tax rate. N. C. Const., Art. V, sec. 6, Art. VII, sec. 7.

5. Statutes B a—

Statutes relating to the same subject matter must be construed *in pari materia.*

APPEAL by defendants from *McElroy, J.*, at October Term, 1935, of STANLY. Reversed.

AGREED STATEMENT OF FACTS.

"The plaintiffs and the defendants above named beg to submit to the court the questions of law involved in the above entitled controversy upon the following agreed statement of facts under section C. S., 626, and ask the court to determine the rights of the parties on said statement of facts.

"1st. That the plaintiffs C. M. Castevens and James Forrest are citizens, residents, and taxpayers of Stanly County, N. C., and are interested in the financial conditions and welfare of said county.

"2d. That T. R. Wolfe, J. V. Barringer, and John L. Little constitute the Board of Commissioners of Stanly County, and as such board have been duly inducted into office and are now discharging the duties of the Board of Commissioners of Stanly County imposed upon them by law.

"3d. That at a continued session of said Board of Commissioners held on 7 August, 1935, at 10 o'clock a.m., T. R. Wolfe (chairman), John L. Little and J. V. Barringer (members), and D. L. Crowell (clerk), being present, the County Board of Education presented a petition and requested the Board of Commissioners of Stanly County to issue school building bonds in order to provide the necessary funds for new school buildings, additions to present school buildings and school furniture, the total cost of above building and equipment not to exceed the sum of $380,000, less 45 per cent Federal grant of $171,000, leaving a balance to be financed by the county of 55 per cent, or $209,000, a copy of which is hereto attached, marked Exhibit 'A,' and asked to be made a part of this agreed statement of facts.

"4th. That when said resolution and request of the County Board of Education was presented to the Board of Commissioners of Stanly County said Board of Commissioners passed the following resolution, to wit: *'Be it resolved,* That this board approve the building and equipment program as set forth in the resolution of the County Board of Education in the maximum amount of $380,000, with the understanding that the Federal Government approve the grant of 45 per cent of the total and the cost to Stanly County is not to exceed 55 per cent. It is the understanding of this board that the Federal Government will purchase bonds of Stanly County issued to finance the above work at an

annual interest rate of not to exceed 4 per cent, in the event the county is unable to sell the bonds on the open market at 4 per cent or less. The secretary of the Board of Education is hereby authorized to make application to the Federal Government in behalf of the Board of County Commissioners of Stanly County for the above grant.'

"5th. That the Board of County Commissioners of Stanly County, North Carolina, met in continued session at the courthouse in Albemarle, N. C., on 26 August, 1935, at 10 o'clock a.m., the following members being present, to wit: T. R. Wolfe, chairman; John L. Little and J. V. Barringer, members; and D. L. Crowell, clerk; members absent, none; when and where a resolution was read, discussed, and passed by said board by the following vote: Ayes, three; noes, none; which said resolution approved the construction of a new jail with plumbing, heating, and electrical work, at a maximum cost of $60,000, with the understanding that the Federal Government approve the grant of 45 per cent of the total, and the cost to Stanly County not to exceed 55 per cent; and the clerk to the Board of County Commissioners of Stanly County was authorized to make application to the Federal Government on behalf of said board for the above grant, copy of said resolution is hereto attached, marked Exhibit 'B,' and asked to be made a part of this agreed statement of facts.

"6th. That the Board of Commissioners of Stanly County, through its secretary, and through the secretary of the Board of Education of said county, are asking the Federal Government for the grants set forth in said resolution and, if same are approved by the authorities of the Federal Government in charge of same, that the Board of Commissioners of Stanly County will issue bonds of said county (a) for school purposes, as set forth in said resolution, in the sum of $209,000, and (b) for the erection of a new jail in the sum of $33,000, provided said commissioners are authorized and empowered under the law to issue said bonds.

"7th. That the erection of a new jail in Stanly County is a public necessity; that several grand juries have recommended to the court that a new jail should be built at once, and the court has ordered the commissioners to take immediate action to build said jail, that the present jail is considered unsafe and insanitary.

"That the erection of a new school building and the repair of old school buildings and the purchase of furniture and equipment for school buildings are necessary expenses of the county of Stanly in order to provide the necessary facilities for all the children in Stanly County with the six months school term as provided by the Constitution of the State.

"8th. That the General Assembly of North Carolina, at its regular session in the year 1927, enacted chapter 443 of its Public-Local Laws

of the year 1927, which provided: 'That the County Commissioners of Stanly County, and the Board of Education of Stanly County and the Board of Road Commissioners of Stanly County are each hereby prohibited from issuing the bonds of said county for any purpose until after the same are approved by a majority of the votes cast on that question at a general election, or at an election duly called for that purpose; provided, this act shall not apply to bonds and notes authorized by the General Assembly of 1927, nor to cases of emergency, such as the destruction of buildings and bridges or other damages done by floods, storms, fire, or other unforeseen events.'

"Then follow some other provisions in regard to issuing the emergency bonds above provided for, which act was ratified on 4 March, 1927, the whole of which act is referred to as fully as if written herein.

"9th. That the Board of Commissioners of Stanly County are seeking to issue the bonds hereinbefore referred to under the terms of the Constitution of North Carolina, Art. VII, sec. 7, for necessary public expenses of the county, and also under the general laws of the State, and especially under chapter 427 of the Public Laws of 1935, known as the 'Emergency County Bond Act of 1935,' and ratified by the General Assembly on 11 March, 1935.

"10th. That the assessed valuation of all the property in the county of Stanly at the time of the ratification of the County Finance Act of 1927, was $31,810,997;

"And the net debt of the county of Stanly, other than for school purposes, at that time was $1,841,000, which was 5.8 per cent of the assessed valuation for that year;

"That the net debt of the county of Stanly for school purposes at that time was $19,000, which was .0003 per cent of the assessed valuation for that year.

"That the assessed valuation of all the property in the county of Stanly on 30 June, 1935, was $22,924,091.

"That the net debt of the county of Stanly, other than for school purposes, on 30 June, 1935, was $1,249,893.44, which was 5.4 per cent of the assessed valuation for that year;

"That the net debt of the county of Stanly for school purposes on 30 June, 1935, was $196,800, which was .007 per cent of the assessed valuation for that year.

"In the meantime, the county of Stanly has assumed all outstanding indebtedness for school purposes of every city, town, and school district, and school taxing district, township, or other political subdivision therein.

"11th. That unless restrained from doing so, the commissioners of Stanly County will proceed to issue the bonds of Stanly County in the

sum of (a) $209,000 for schools, as herein set out, and (b) the sum of $33,000 for the erection of a new jail, as hereinbefore set out.

"12th. That C. M. Castevens and James Forrest, citizens and taxpayers of Stanly County, contend that the Board of Commissioners of Stanly County have no right to issue said bonds: (1) Without a vote of the people as provided in chapter 443 of the Public-Local Laws of the year 1927, set out in paragraph eight hereof; (2) that they have no right to issue same under the constitutional authority or under the general laws of the State, or under chapter 427, Public Laws of 1935, known as 'Emergency County Bond Act of 1935'; (3) that the issue of said bonds would far exceed the power of the county to issue bonds on its present tax values in the county.

"The commissioners, on the other hand, contend that they have a right to issue said bonds, and intend to do so, for the purposes herein named.

"Upon the foregoing agreed statement of facts the plaintiffs and the defendants desire an adjudication.

"Respectfully submitted,

"JAMES D. FORREST,
C. M. CASTEVENS,
Residents and Taxpayers of Stanly County.
J. V. BARRINGER, *Member;*
T. R. WOLFE, *Chairman;*
JOHN L. LITTLE,
Board of Commissioners of Stanly County.
R. L. SMITH & SONS,
Attorneys for Taxpayers.
H. C. TURNER,
Attorney for Stanly County."

The judgment of the court below is as follows: "The above cause coming on to be heard upon the agreed statement of facts at the October Term, 1935, of Stanly County Superior Court, before his Honor, P. A. McElroy, judge presiding; and after a thorough discussion of the facts and the law, the court is of the opinion that chapter 443 of the Public-Local Laws of 1927, which has never been repealed, forbids the county to issue bonds for any purpose without a vote of the people: It is therefore ordered and adjudged that the county of Stanly be and it is hereby forbidden and restrained to issue bonds for building a jail and for the erection of school buildings and improvement of school buildings and the purchase of furniture, as asked for in the resolutions passed by the Board of Commissioners of Stanly County, and as set out in the agreed statement of facts. P. A. McElroy, Judge presiding."

To the signing of the foregoing judgment, the defendants excepted and assigned error, and appealed to the Supreme Court.

R. L. Smith & Sons for plaintiffs.
H. C. Turner for defendants.

CLARKSON, J. The *first* question involved: Is the county of Stanly authorized to issue bonds for the purpose of erecting new school buildings, making additions to old school buildings and purchasing furniture and equipment for the same, cost not to exceed $209,000 to Stanly County, under the constitutional authority, under the general laws of the State, or under chapter 427 of the Public Laws of 1935, known as "Emergency County Bond Act of 1935," without a vote of the people as provided in chapter 443, Public-Local Laws of 1927, relating to Stanly County? We think so, under the facts and circumstances of this case. On the latter aspect of the question, the matter has been decided in *Burt v. Biscoe, ante,* 70. The Acts of 1935, chs. 426, 427, are practically the same on the aspect here considered.

In the agreed statement of facts is the following: "That the erection of new school buildings and the repair of old school buildings and the purchase of furniture and equipment for school buildings are necessary expenses of the county of Stanly in order to provide the necessary facilities for all the children in Stanly County with the six months school term as provided by the Constitution of the State."

On this aspect this matter has also been decided adversely to plaintiffs' contention in *Julian v. Ward,* 198 N. C., 480. At pp. 481-2 it is said: "The question involved: Does a public-local statute forbidding 'the Board of County Commissioners for the County of Randolph' to issue bonds without first submitting the matter to a vote of the people of said county prevent said commissioners, acting as an administrative agency of the State, from issuing bonds for the purpose of purchasing land, building the necessary schoolhouses, and operating the schools in said county as required by the Constitution without submitting the matter to a vote of the people? We think not. The Board of Commissioners for the County of Randolph, acting as an administrative agency of the State, can issue the bonds without a vote of the people, as the public-local statute applies only to local matters." *Reeves v. Board of Education,* 204 N. C., 74; *Evans v. Mecklenburg Co.,* 205 N. C., 560; *Hickory v. Catawba Co.,* 206 N. C., 165; *Taylor v. Board of Education,* 206 N. C., 263; *Hemric v. Comrs. of Yadkin,* 206 N. C., 845.

The amount sought to be borrowed for school purposes is within the limitation fixed by N. C. Code, 1935 (Michie), sec. 1334 (17)—(1927, ch. 81, sec. 17), as Stanly County has assumed all outstanding indebtedness for school purposes. If the bonds are issued under the "Emergency

County Bond Act of 1935," taxes for the payment of principal and interest will not be subject to any limitation imposed by any existing law. Section 7, chapter 427, Public Laws of 1935.

The *second* question involved: Is the county of Stanly authorized to issue bonds for the purpose of erecting a new jail, with plumbing, heating, and electrical work, cost not to exceed $33,000 to Stanly County, under the constitutional authority, under the general laws of the State, or under chapter 427 of the Public Laws of 1935, known as "Emergency County Bond Act of 1935," without a vote of the people, as provided in chapter 443, Public-Local Laws of 1927, relating to Stanly County? We think so, under the facts and circumstances of this case. On the latter aspect of the question this matter has been decided in *Burt v. Town of Biscoe, supra.*

N. C. Code of 1935 (Michie), sec. 1297, in part, is as follows: "The boards of commissioners of the several counties have powers: (9) To erect and repair county buildings—to erect and repair the necessary buildings and to raise, by taxation, the moneys therefore." Section 1317: "There shall be kept and maintained in good and sufficient repair in every county a courthouse and common jail, at the expense of the county wherein the same are situated. The boards of commissioners of the several counties respectively shall lay and collect taxes, from year to year, as long as may be necessary, for the purpose of building, repairing, and furnishing their several courthouses and jails, in such manner as they think proper; and from time to time shall order and establish such rules and regulations for the preservation of the courthouse, and for the government and management of the prisons, as may be conducive to the interests of the public and the security and comfort of the persons confined."

In *Jackson v. Commissioners,* 171 N. C., 379, at p. 382, it is said: "The building of a courthouse is a necessary expense, and the board has full power, in their discretion, to repair the old one or to erect a new one, and in order to do so they may contract such debt as is necessary for the purpose. *Vaughn v. Comrs.,* 117 N. C., 429; *Brodnax v. Groom,* 64 N. C., 244; *Haskett v. Tyrrell Co.,* 152 N. C., 714. It should be borne in mind, however, by the county commissioners that while they are clothed with the necessary power to contract such indebtedness, they have no power to levy a special tax out of which to pay the interest and create a sinking fund, unless they have the special authority of the General Assembly."

In the agreed statement of facts is the following: "That the erection of a new jail in Stanly County is a public necessity; that several grand juries have recommended to the court that a new jail should be built at once, and the court has ordered the commissioners to take immediate

action to build said jail, that the present jail is considered unsafe and insanitary."

N. C. Code of 1935 (Michie), sec. 1321 (a), is as follows: "The board of commissioners of the various counties throughout the State are authorized and empowered to issue bonds or notes for the purpose of borrowing money with which to erect, build, construct, alter, repair, and improve courthouses and jails, and to purchase the necessary equipment and furniture to be used therein."

It is the duty of the county commissioners to provide a sufficient courthouse and keep it in repair. It is their duty both to erect and keep in repair. They are cognate duties, and failure to do them is "neglect of duty." *S. v. Leeper,* 146 N. C., 655.

In the County Finance Act, Public Laws 1927, ch. 81, sec. 8, is the following: "The special approval of the General Assembly is hereby given to the issuance by counties of bonds and notes for the special purpose named in this section, and to the levy of the property taxes for the payment of such bonds and notes and interest thereon. Accordingly, authority is hereby given to all counties in the State, under the terms and conditions herein described, to issue bonds and notes, and to levy property taxes for the payment of the same, with interest thereon, for the following purposes, including therein purchase of the necessary land and, in the case of building, the necessary equipment: (a) Erection and purchase of schoolhouses. (d) Erection and purchase of a courthouse and jails, including a public auditorium within and as a part of a courthouse." N. C. Code of 1935 (Michie), sec. 1334 (8) (a), (d); *Harrell v. Comrs. of Wilson,* 206 N. C., 225 (227).

The before mentioned acts and the "Emergency County Bond Act of 1935" are acts relating to the same subject matter and must be construed *in pari materia.* The erection of a jail is a "necessary expense" and the "special purpose" has the "special approval" of the General Assembly.

It is said in *Glenn v. Commissioners,* 201 N. C., 233 (242) (concurring opinion): "The only way to preserve the vitality of Article V, section 6, and Article VII, section 7, of the Constitution is to adhere to the construction, as stated in the opinion of the Court, that the 'special purpose' for which the 'special approval' of the General Assembly is essential must be for a 'necessary expense' in contemplation of the constitutional provision."

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

Reversed.

STATE v. HEBER HARDY AND KATIE HARDY.

(Filed 11 December, 1935.)

1. Intoxicating Liquor G c: Criminal Law G m—Evidence of possession of intoxicating liquor on prior occasions within year held competent.

In a prosecution for unlawful possession of intoxicating liquor evidence that officers of the law had found liquor on defendants' premises on two previous occasions within a year of the occasion made the basis of the prosecution is competent on the question of knowledge and motive.

2. Intoxicating Liquor B a—Person may possess intoxicating liquor for personal consumption only in structure used exclusively as dwelling.

The provision of N. C. Code, 3411 (j), that a person may legally possess intoxicating liquor in his dwelling for his personal consumption and the consumption of his family and *bona fide* guests is limited by the terms of the statute to a private dwelling occupied and used exclusively as a dwelling, and a person may not lawfully possess intoxicating liquor in a building or structure used and operated by such person as a filling station and dwelling combined when the parts of the structure used for the respective purposes are connected.

3. Intoxicating Liquor B d—

Where a husband has knowledge of his wife's illegal possession of intoxicating liquor on the premises, and permits her to keep it there, the husband is equally guilty with the wife of illegal possession.

4. Criminal Law A c: Intoxicating Liquor G c—

Defendants were indicted, tried, and convicted of having illegal possession of intoxicating liquor before the effective date of a statute repealing the prohibition statute in the county. *Held:* The repeal of the statute after the conviction of defendants does not entitle defendants to be discharged.

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

APPEAL by defendants from *Barnhill, J.*, and a jury, at April Term, 1935, of PITT. No error.

This was a criminal action, begun on a warrant issued in the county court of Pitt County, charging the defendants with receiving, transporting, and possessing whiskey for the purpose of sale. There was a verdict of "Guilty" in the county court, and the defendants appealed to the Superior Court. The case came on to be tried at the April Term, 1935, of the Superior Court of Pitt County, before Hon. M. V. Barnhill, judge presiding, and a jury. There was a verdict of "Guilty of possession of liquor for the purpose of sale."

The facts: The defendants lived at the intersection of Simpson and Washington highways in Pitt County. The living quarters were downstairs in the back of the store, a cafe and filling station were in the front,

facing the highway. The evidence on the part of the sheriff and his deputy was to the effect that they searched the place on Saturday morning, 14 October, 1934. Heber Hardy was not present, but his wife, Katie Hardy, was. Behind the counter was found by the sheriff 8 or 10 bottles recently emptied. The deputy found in the kitchen a gallon jar about half full of whiskey, and also found 3 or 4 empty pint bottles in the kitchen sitting around at various places. In the back was found a ten-gallon keg that smelled very strong of whiskey, and along a path leading across the road and into the woods was found a five-gallon demijohn with about a half-pint of whiskey and some dried apples in the bottom of it. This was about 130 feet from the service station. The empty bottles were strewn around the woods—pint and half-pint bottles. There were connecting doors from the filling station to the residence. They were built there together, there was a door from the residence into the filling station. "Court: Q. There were connecting doors from the filling station to the residence, you say? A. Yes, sir; they were all built together; there was a door from the residence into the filling station."

The deputy sheriff testified, in part: "Q. Did you search Mr. Hardy's station on other occasions? A. Yes, sir. On one occasion we found about five quarts of whiskey in a candy jar. The candy jar was in the bedroom. We searched another time and found the same jar about half full of whiskey in the bedroom. We have made three or four searches." In due time the defendants objected to the foregoing question and answer. Admitted on question of motive or *scienter*. Objection overruled, and the defendants excepted.

The defendant Katie Hardy testified, in part: "I have not sold any whiskey there. I have not had any whiskey there for sale. I did not have the whiskey there that Mr. Pierce found for sale. I had it there for my own use. I have not sold whiskey to anyone at any time. I have never sold it in my life."

The defendant Heber Hardy testified, in part: "I did not know my wife had that whiskey there. It was not my whiskey. I did not buy it. I heard what Sheriff Whitehurst said about finding some bottles in the front room, store. I don't remember whether there were any there or not. There might have been. We sold vinegar and we kept it there by the barrel, and we bought bottles at different times, and used them to put vinegar in. I have not at any time had any whiskey there for sale. I have not sold any whiskey there. I heard what Mr. Pierce said, about finding a large jug or demijohn across the road in the woods, with some whiskey in it. I don't know anything about it. I did not put it out there. That was not my land out there. . . . My wife said this whiskey was in her bedroom. By the bed. I went in there occasionally.

I don't remember whether I saw it there or not. I know she keeps it. That room was her bedroom. Where she and the children slept. That room was independent of the store. There are partition walls between those rooms and the front. Or store rooms. We live in the back part, and the front we use for a station or store. We did not have any other living quarters. But those rooms. We lived in those rooms day and night. . . . I have been indicted two or three times. I think that is about all. I think I was raided out there three times. On one occasion I think they found some whiskey in a candy jar. And on another occasion they found some in a candy jar. One time they found some beer but I was not there. The first time they found some whiskey there they fined me twenty-five dollars, and the second time they turned me loose. This is the third time. . . . The building was used partly as a store and partly as a residence, we lived in the back. The front was the store. A wall cut off the living rooms from the store, and we lived in the back rooms."

It was in evidence that the general reputation of Heber Hardy is bad, and Katie Hardy's reputation for selling whiskey is bad.

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

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

Julius Brown for defendants.

CLARKSON, J. The exceptions and assignments of error by defendants as to the prior searches of defendants' premises cannot be sustained.

In *S. v. Murphy,* 84 N. C., 742 (743-4), it is said: "It is a fundamental principle of law that evidence of one offense cannot be given in evidence against a defendant to prove that he was guilty of another. We have been unable to find any exception to this well established rule; except in those cases where evidence of independent offenses have been admitted to explain or illustrate the facts upon which certain indictments are founded, as where, in the investigation of an offense, it becomes necessary to prove the *quo animo,* the intent, design, or guilty knowledge, etc. In such cases it has been held admissible to prove other offenses of like character," etc. *S. v. Jeffries,* 117 N. C., 727; *S. v. Simons,* 178 N. C., 679; *S. v. Crouse,* 182 N. C., 835; *S. v. Miller,* 189 N. C., 695 (696); *S. v. Dail,* 191 N. C., 231 (232).

In *S. v. Boynton,* 155 N. C., 456 (459-460), it is said: "The State, over defendant's objection, was allowed to show by Watt Britt, J. B. Bryson, and others, that at some time prior to this alleged sale, and

within twelve months, defendant had whiskey in his possession in different quarters and in places in Asheville, N. C., and that at the business places under control and management of defendant," etc. *Hoke, J.*, at p. 461, says: "It tended to show that defendant had and kept whiskey on hand, in prohibited territory, and was prepared and equipped to make the illegal sale charged in the bill of indictment. . . . In 7 Encyclopedia of Evidence, p. 760, the author says: 'Of course, the possession of liquors by the defendant, at the time of the offense charged, is always a circumstance admissible against him, and in general the circumstances under which liquors are kept, and even that they are kept at other places or in other rooms, may be shown.' "

The defendant Katie Hardy's testimony was to the effect: "We have been there a little over a year, I reckon." *S. v. Beam,* 184 N. C., 740, cited by defendants, is inapplicable. In that case the prior crime had been committed 11 years before the one for which defendant was indicted. This was too remote. In the present case the searches were within about one year.

N. C. Code of 1935 (Michie), sec. 3411 (j), is as follows: "The possession of liquor by any person not legally permitted under this article to possess liquor shall be *prima facie* evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this article. But it shall not be unlawful to possess liquor in one's private dwelling while the same is occupied and used by him as his dwelling only. Provided, such liquor is for the personal consumption of the owner thereof, and his family residing in such dwelling, and of his *bona fide* guests when entertained by him therein."

On this aspect the court charged the jury as follows: "Under that warrant three verdicts are possible, guilty as charged, guilty of having whiskey in their possession for the purpose of sale, or guilty of unlawful possession, or not guilty, as you find the facts to be, except as to the defendant Katie Hardy. She admits that she had a certain quantity of whiskey in her possession. The State makes that unlawful, unless she had it in her private dwelling; when the place is occupied as a dwelling only, and according to the evidence in this case this building was not occupied solely as a private dwelling. Whether the Legislature was wise or unwise in passing that law is not for the court or the jury to say. We have no right to change it even though we do not agree with it. . . . Therefore, the court instructs you if you believe what she says about it and find from her testimony and the testimony of officers that she had any quantity of whiskey in her possession, then it would be your duty to return a verdict of guilty of unlawful possession as to the defendant Katie Hardy." The defendants excepted and assigned error to the above portion of the charge.

The act clearly says: "But it shall not be unlawful to possess in one's private dwelling while the same is occupied and used by him as his dwelling only," etc. All the evidence is to the effect that the filling station with bedroom and kitchen were connected and used together. The building *"is not occupied and used by him as his dwelling only."* The statute was no doubt passed to cover the very situation as shown in this case.

The court charged the jury as follows: "If you find from the evidence and beyond a reasonable doubt that Katie Hardy had in her possession on the premises occupied by Heber Hardy, and that he knew she had it there and permitted her to keep it there, then upon that finding it would be your duty to return a verdict of guilty of unlawful possession against him. Because any person who aids and abets another in an offense is equally guilty with the person who committed the act; so if you find from the evidence and beyond a reasonable doubt that he knew she had the liquor there and permitted her to keep it on his premises, a quantity of intoxicating liquor, then that would make him equally guilty." The defendants excepted and assigned error. We do not think that this exception and assignment of error can be sustained.

The rule applicable here is aptly stated in 33 C. J., p. 607, part section 237, "Intoxicating Liquors," as follows: "Unless it is otherwise as the result of statutory enactments, a husband is criminally responsible for illegal sales, or other infractions of the liquor laws, made or done by his wife in his presence, or by his command, or with his knowledge and consent, or when she acts as his servant or agent. And, where a wife keeps in the house of her husband or in the premises which are occupied and controlled by him intoxicating liquors for sale in violation of law, he is criminally liable, if he has knowledge of her intent, unless he uses reasonable means to prevent her from carrying out such intent . . . (p. 608). But the husband has been held liable where the wife, upon her sole responsibility and for her sole benefit, carried on the business of selling liquors illegally in a house occupied by them as a residence, with his knowledge but without his assent, or even though he had often remonstrated with her against making such sales," etc. *People v. Duchow* (Ill.), 163 N. E., 352; *Commonwealth v. Hyland* (Mass.), 28 N. E., 1055; *Commonwealth v. Walsh* (Mass.), 42 N. E., 500; *United States v. Bonham* (S. C.), 31 Fed., 808. In *Buchanan v. State* (Ga.), 128 S. E., 686, it is said: "In this state the husband is recognized by law as the head of the family, and where intoxicating liquors are kept in the house occupied by himself and his family, he is guilty of aiding and abetting in the commission of a misdemeanor, if he knowingly allows such liquors to remain there, irrespective of who owns them or who put them there." *S. v. Myers,* 190 N. C., 239 (243); *S. v. Mull,* 193 N. C., 668 (670).

These defendants were charged with the offense on 14 October, 1934, and convicted and judgment pronounced at April Term, 1935. On this aspect the contention of defendants cannot be sustained. *S. v. Perkins,* 141 N. C., 797 (809); *S. v. Mull,* 178 N. C., 748; *S. v. Foster,* 185 N. C., 674.

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.

ZEB V. GRUBB, TRADING AND DOING BUSINESS AS GRUBB MOTOR COMPANY, v. FORD MOTOR COMPANY, INC.

(Filed 11 December, 1935.)

1. Evidence J a—Parol evidence of separate, subsequent agreement in accord with original written contract, held competent.

Plaintiff's contract with defendant motor company provided that upon the termination of the agency contract defendant might repurchase from plaintiff dealer, at its option, products of defendant in plaintiff's possession at the price paid, plus freight, and that the contract might not be enlarged, varied, or modified except in writing. Plaintiff offered evidence of a parol agreement entered into more than a year thereafter in which plaintiff agreed to resign his agency and defendant agreed to repurchase accessories and equipment in plaintiff's possession at seventy-five per cent of list price. *Held:* Evidence of the separate, subsequent parol agreement in accord with the original written contract was competent.

2. Principal and Agent C b—Agent held to have acted within apparent scope of authority and principal was bound by his agreement.

Plaintiff's automobile agency contract provided that it might not be enlarged, varied, modified, or canceled except by an instrument executed by defendant motor company's president, vice-president, secretary, or assistant secretary. Plaintiff testified that in consequence of differences between him and defendant company, he went to defendant's branch office, and was told that the matter would be taken up by defendant's zone manager, that thereafter he entered into an agreement with the zone manager under which he agreed to resign his agency and defendant company agreed to repurchase equipment on hand at a stipulated price, that he mailed his resignation to the same branch office of defendant, which accepted same on behalf of defendant company. *Held:* Defendant's zone manager had apparent authority, under plaintiff's evidence, to enter the agreement for the resignation of the agency and the repurchase of equipment by defendant, and defendant company's motion to nonsuit on the ground that the zone manager was without authority to make the agreement should be denied.

3. Contracts A d—Plaintiff's evidence held to show sufficient consideration to support contract sued on.

Plaintiff's automobile agency contract provided that it might be terminated at any time at the will of either party. Plaintiff declared on a contract under the terms of which he agreed to resign his agency, and continue to service cars made by defendant until defendant could obtain another dealer, etc., in consideration of defendant's agreement to repurchase equipment on hand. Plaintiff testified that he resigned his agency and performed all other acts to be done by him under the agreement. *Held:* Defendant's motion to nonsuit on the ground that as the agency contract was terminable at will, there was no consideration sufficient to support the contract declared on, should have been denied, since plaintiff's evidence discloses some detriment suffered by plaintiff or benefit accruing to defendant.

4. Trial D a—

On a motion to nonsuit, the evidence must be considered in the most favorable aspect for plaintiff.

APPEAL by plaintiff from *McElroy, J.*, at May Term, 1935, of DAVIDSON. Reversed.

Plaintiff, a former local agent and dealer in products of the defendant motor company, brings this action for damages for breach of contract. He offered evidence tending to show that he had been engaged since 1 June, 1932, in the automobile business in Lexington, under a written contract with the defendant; that in August, 1933, he entered into an oral agreement with defendant through its zone manager to the effect that if he would resign his agency and cancel his contract therefor, the defendant would repurchase from him at seventy-five per cent of list price the parts, accessories, and other equipment which had been sold to him by defendant; that he did so resign and cancel his agency contract, but defendant failed and refused to repurchase said property, whereby he sustained a loss.

The written contract of agency contains the following provisions:

"(c) This agreement may be terminated at any time at the will of either party by written notice to the other party given either by registered mail or by personal delivery, and such termination shall also operate to cancel all orders theretofore received by Company and not delivered."

"(d) Upon termination of this agreement Company may, at its option, repurchase from Dealer all or any part of Company's products in Dealer's possession, and Dealer agrees to sell such products to Company at the price paid therefor plus freight, but less any liens or encumbrances thereon. And Dealer hereby grants Company the right to enter the premises of Dealer upon termination of this agreement and to take

possession of all or any part of said products upon tender of the purchase price thereof, determined as above."

"(h) The terms of this agreement may not be enlarged, varied, modified, or canceled by any agent or representatives of Company, except by an instrument in writing executed by the President, Vice-President, Secretary, or Assistant Secretary of Company, and Company will not be bound by any alleged enlargement, variation, modification, or agreement not so evidenced."

Plaintiff testified that in consequence of some differences that had arisen between him and defendant he went to Norfolk, Virginia, in August, 1933, to see "Mr. Wood" to discuss the matter of his agency.

That Mr. Wood told him he was busy and he would send Mr. Hancock to see him; that Mr. Hancock, who was defendant's zone manager in charge of this territory, came to see him several times and talked with him about the way to conduct the business, about service and repairs, about demonstrators and salesmen and reports, and general survey of the way to operate the Ford business; that on 16 August, 1933, Mr. Hancock "asked me if I would resign, and I told him I would if they would take the parts and equipment off my hands—that I would have too large a loss if I didn't dispose of them. He said if I would continue to service his Ford cars and buy Ford parts from them and look after the cars in the territory until they got a new dealer, they would take them off my hands when they got a new dealer here. The price was to be cost for parts and seventy-five per cent of list price for equipment. I agreed to that." That thereupon Mr. Hancock wrote out the resignation and he signed it and gave it to him. The resignation is in the following words: "Grubb Motor Co., Authorized Ford Dealer, Phone 485, Lexington, N. C., 8-16-33. Ford Motor Company, Norfolk, Va. Gentlemen: We hereby notify you of the cancellation and termination of our Ford Sales Agreement with your Company, dated 1 June, 1932, in accordance with paragraph 9, section E of that agreement, such cancellation to be effective upon receipt of this notice by you. Very truly yours, Grubb Motor Co., by Zeb V. Grubb."

Plaintiff further testified that he in all respects complied with the terms of the agreement on his part; that defendant appointed Wright Motors, Inc., new dealer for the territory, but failed and refused to repurchase the parts and equipment; that thereafter he tried to dispose of said property and put up a sign: "Ford-Service—Genuine Parts, Equipment"—"Former Ford Dealer," but that defendant stopped him by an injunction from the United States Court for infringement of registered trademark "Ford"; that thereafter he instituted this suit.

At the close of plaintiff's evidence, the court sustained motion to nonsuit, and from judgment thereon plaintiff appealed.

Don A. Walser and Martin & Brinkley for plaintiff.
Phillips & Bower and Cansler & Cansler for defendant.

DEVIN, J. The defendant contends the judgment of nonsuit should be sustained on one of three grounds:

(1) That evidence of the oral contract relied on was incompetent.

(2) That the person with whom plaintiff alleges he orally contracted was not authorized to make such a contract.

(3) That the agency contract being determinable at will, there was no consideration to support the oral agreement.

1. The oral agreement to repurchase the Ford parts was entirely separate and apart from the written contract of agency, and did not vary, contradict, or modify any of its terms. The oral agreement was made more than a year later than the agency contract and was in accord with its terms. It was provided in the agency contract that "upon termination of this agreement the company may, at its option, repurchase from dealer, all or any part of company's products in dealer's possession. And the dealer agrees to sell such products to the company at the price paid therefor plus freight."

The plaintiff testified in effect that defendant agreed subsequently by parol to exercise the option given it in the written contract.

It is well settled that the rule that parol evidence will not be admitted to contradict or modify a written contract does not apply when the modification takes place after the execution of the contract. *Freeman v. Bell,* 150 N. C., 146. Nor is it incompetent to prove by parol evidence another and subsequent agreement with respect to the same subject matter. The principle excluding parol evidence has no application to subsequent agreements which change or modify the original contract. *Mfg. Co. v. McPhail,* 181 N. C., 205; *McKinney v. Matthews,* 166 N. C., 580.

2. The rule is well established that one is bound by the acts and agreements of his agent while the agent is acting within the scope of his authority or agency, and equally so when the agent is acting within the apparent scope of such authority or agency.

Here plaintiff testifies that the defendant's Mr. Hancock, who made the agreement for the defendant, was the zone manager in charge of the territory; that plainitff went to defendant's Norfolk branch to see "Mr. Wood" about plaintiff's dealership and was in effect told that Mr. Hancock had been designated to handle it; that this was a matter with reference to the manner of conducting and the continuance of his dealership.

The letter of resignation relied on by defendant was addressed to the Norfolk office of the defendant Ford Motor Company, and from this fact the reasonable inference may be drawn that this was the same office to

which plaintiff had gone and by which the matter had been referred to "Mr. Hancock."

In *R. R. v. Lassiter,* 207 N. C., 413, *Clarkson, J.,* quotes from *R. R. v. Smitherman,* 178 N. C., 595, as follows: "While as between the principal and agent the scope of the latter's authority is that authority which is actually conferred upon him by his principal, . . . such . . . restrictions do not affect third persons ignorant thereof, and as between the principal and third persons, the mutual rights and liabilities are governed by the apparent scope of the agent's authority, which is that authority which the principal has held the agent out as possessing, or which he has permitted the agent to represent that he possesses. . . . The authority must, however, have been actually apparent to the third person, who . . . must have dealt with the agent in reliance thereon, in good faith and in the exercise of reasonable prudence, in which case the principal will be bound by the acts of the agent performed in the usual and customary mode of doing such business." *Bobbitt v. Land Co.,* 191 N. C., 323; *Gallop v. Clark,* 188 N. C., 186.

Under the circumstances testified to by plaintiff, he was justified in dealing with Hancock as the authorized agent of Ford Motor Company, or as acting within the apparent scope of his authority.

3. While the written contract constituting plaintiff a Ford dealer contains the provision, "This agreement may be terminated at any time at the will of either party by written notice to the other," the continuance of this contract seems to have been regarded by the parties, according to plaintiff's evidence, as of some value, and plaintiff's resignation of sufficient benefit to the defendant, or detriment to the plaintiff, to constitute consideration for the oral agreement sued on.

The oral agreement consisted of mutual promises, each to the other, which the plaintiff testifies he performed on his part not only with respect to the surrender of his contract, but also as to the performance of other acts to be done under the agreement.

The principle is stated in *Institute v. Mebane,* 165 N. C., 644:

"A valuable consideration in the sense of the law may consist either in some right, interest, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other. Courts will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to anyone. It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made, as consideration for the promise made to him."

To the same effect is *Exum v. Lynch,* 188 N. C., 392; *R. R. v. Ziegler,* 200 N. C., 396; *Ex parte Barefoot,* 201 N. C., 393; *Warren v. Bottling Co.,* 204 N. C., 288; *Grier v. Weldon,* 205 N. C., 575.

In *Ford Motor Co. v. Kirkmyer,* 65 Fed. (2d), 1001, cited by counsel for defendant, *Circuit Judge Parker,* in a well considered opinion, construed a dealership contract of the Ford Motor Company and reached the conclusion in that case that the contract being terminable at will could not form the basis of an action for damages because of lack of consideration and mutuality. But the facts upon which that opinion was based are distinguishable from those in the case at bar, and do not militate against the position here taken.

The rule is that on a motion for nonsuit the plaintiff's evidence must be considered in its most favorable aspect. Viewing it in this light, we conclude that upon none of the grounds urged by defendant can the nonsuit be sustained.

The plaintiff's evidence was sufficient to have entitled him to have it submitted to the jury with appropriate instructions.

The judgment of nonsuit is

Reversed.

W. P. ODOM ET AL. V. FANNIE DRY ODOM PALMER ET AL.

(Filed 11 December, 1935.)

1. Pleadings D e—

A demurrer admits, for the purpose, the truth of the allegations of fact and challenges the right of the pleader in any view of the matter.

2. Executors and Administrators E b—Funds in heirs' hands from sale of land claimed by them by descent may be attached to pay estate's debts.

Where the heirs at law, in their suit to declare a resulting trust in certain lands deeded by intestate during his lifetime, obtain a consent judgment providing that the lands be sold and part of the proceeds paid to the heirs, the heirs' share of the proceeds are chargeable with the debts of the estate, since their right to the funds is based upon their claim to the land in the capacity of heirs, and their demurrer to the administrators' pleading, alleging the facts and insufficiency of the assets of the estate to pay debts, is properly overruled. C. S., 74.

3. Executors and Administrators E c—Administrators' interplea to claim funds to pay debts held proper in heirs' suit to declare resulting trust.

In the suit of heirs at law to declare a resulting trust in lands deeded by intestate during his lifetime, judgment was entered that the lands be sold and part of the proceeds paid the heirs, and the cause retained. *Held:* An order allowing the administrators to interplead and claim the funds allotted to the heirs in order to pay debts of the estate was proper under the facts.

4. Pleadings A a—

It is the policy and purpose of our procedure to determine all matters in a given controversy in one action whenever possible.

5. Evidence D k—

The admission of the pleadings in the original action and in a former proceeding between the same parties is upheld on authority of *Alsworth v. Cedar Works*, 172 N. C., 17.

6. Judgments L b—Question of dower held not involved in prior suit against widow individually and judgment held no bar to claim of dower.

In a petition to sell land to make assets to pay debts of the estate, intestate's widow asked that the value of her dower right in the land be determined and paid to her from the proceeds of sale. The land was sold and part of the value of the widow's dower right as determined in the proceeding was paid her. Thereafter, the heirs at law sued the widow individually to engraft a resulting trust on other lands which had been conveyed to her by intestate during his lifetime. A consent judgment was entered in the heirs' action decreeing the sale of the land involved and the payment to the heirs of a part of the proceeds. After the sale, but before distribution of the proceeds, the widow and her coadministrator intervened in their representative capacity and claimed the funds allotted to the heirs to pay debts of the estate, including the unpaid balance due the widow upon her claim of dower as determined in the original proceeding, the widow asserting no dower right in the land recovered by the heirs in their suit. *Held:* The failure of the widow to assert her claim for dower in the heirs' action against her individually does not bar her from asserting her claim therefor against the fund as a debt of the estate after her intervention in her representative capacity, the question of dower not being involved in the original suit by the heirs to declare a resulting trust.

7. Trial H b—

In the absence of exceptions to the findings of fact by the court under agreement of the parties, his findings are conclusive. N. C. Constitution, Art. IV, sec. 13.

8. Trial H a—Record held to show agreement of parties to waive jury trial.

Where the case on appeal recites that the parties agreed that the court might render judgment out of term and out of the district, and the judgment recites that the parties agreed to trial by the court and the rendition of judgment out of term and out of the district, appellant's contention that trial by the court had not been agreed upon cannot be sustained, since trial by jury would be impossible under the agreement that judgment might be rendered out of term and out of the district, and there is no conflict between the recitals in the case on appeal and the judgment, nor objection to failure to submit the case to a jury.

APPEAL by plaintiffs from *Alley, J.*, at June Term, 1935, of ANSON.

The facts were these: John W. Odom died intestate in Anson County on 26 April, 1926, leaving him surviving his widow, Fannie Dry Odom (now Fannie Dry Odom Palmer, one of the defendants). The plaintiffs are his children and grandchildren and only heirs at law.

The Bank of Wadesboro and the said Fannie Dry Odom Palmer qualified as administrators of said estate, and in October, 1926, filed a

petition to sell the lands of decedent to make assets to pay debts. All the heirs were duly made parties, and on 29 August, 1927, a decree was made by the clerk of the Superior Court ordering sale of the lands described in the petition, and appointing H. P. Taylor, T. L. Caudle, and H. H. McLendon as commissioners to sell.

Pursuant to said decree said commissioners thereafter sold all of said land except several small parcels, and the entire net proceeds was used to pay debts of the estate.

That in said proceeding to sell land to create assets the defendant Fannie Dry Odom Palmer filed an answer in which she asked that the value of her dower rights in said land according to her expectancy in life be determined and paid to her absolutely out of the proceeds of such sales.

That on 22 February, 1928, the plaintiffs as children and heirs at law of John W. Odom, instituted suit against Fannie Dry Odom Palmer and her husband, C. M. Palmer, and filed complaint alleging that in the lifetime of John W. Odom certain lots in the town of Wadesboro were conveyed to said Mrs. Palmer under such circumstances as to create a resulting trust in favor of John W. Odom, and that she then held the title thereto for the benefit of these plaintiffs as his heirs, and asked the court to so declare, and to require her to account for the rents. The defendant in that action, Mrs. Fannie Dry Odom Palmer, filed a demurrer. When the case came on for trial at the September Term, 1928, of said court, before Stack, J., all the parties being before the court, a compromise was effected and a consent judgment entered, wherein it was adjudged that the plaintiffs and Fannie Dry Odom Palmer were "jointly the owners of the property," and Rowland S. Pruette, H. P. Taylor, and B. M. Covington were appointed commissioners to sell the lots described in the action with directions to pay fifty-five per cent of the net proceeds to Fannie Dry Odom Palmer and forty-five per cent to the plaintiffs. It was further adjudged that all encumbrances on said lots should constitute a liability of the estate of John W. Odom and be paid by his administratrix.

The said judgment contained the following provisions:

"It is further adjudged that the heirs at law of John W. Odom and the administrators aforesaid, shall not plead the statute of limitations against any claims of Fannie Dry Odom (now Fannie Dry Odom Palmer) against the estate of John W. Odom for any money loaned or advanced to the said John W. Odom by her during his lifetime.

"This judgment, however, shall not be construed as an admission of any liability of any claims which Fannie Dry Odom may have against the estate of John W. Odom, such claims being subject to due proof as other claims presented against said estate.

"This cause is retained for such further orders and decrees as may be necessary to be made in order to effectuate the intents and purposes of this judgment."

Pursuant to the directions contained in the judgment of Judge Stack, the commissioners sold the lots described, paid to said Mrs. Palmer fifty-five per cent of the net proceeds, and now hold forty-five per cent thereof for the plaintiffs, amounting to about $13,000.

At March Term, 1935, of Anson the Bank of Wadesboro and Mrs. Fannie Dry Odom Palmer, administrators of the estate of John W. Odom, filed a petition asking to be allowed to make themselves parties to the action in the Superior Court, entitled as above, alleging that all the assets of the estate except a small amount had been exhausted, and that there were debts remaining unpaid amounting to about $14,000. The petition was allowed by the court, and no exception was taken thereto.

By leave of the court thus obtained, the said administrators filed an interplea setting out the condition of said estate and alleging there was due said Fannie Dry Odom Palmer for balance due on the value of her dower rights in the lands sold under the decree of August, 1927, $8,249.22, for money advanced by her, $2,642.55, and that there was due Bank of Wadesboro on note, $2,799.20, and due clerk of the court, $375. And petitioners asked that the forty-five per cent of proceeds of sale of lots now in the hands of commissioners be condemned to pay said debts and be turned over to said administrators for that purpose.

There was no claim for dower in the forty-five per cent of proceeds of sale under the Stack judgment.

The plaintiffs (other than F. O. Clarkson, trustee) filed no reply to this interplea, but moved to dismiss the petition "for that it did not state a cause of action to show any right to the proceeds in question."

Motion denied and plaintiffs excepted.

Plaintiff, F. O. Clarkson, trustee in a deed of trust by Rosa L. Niven, one of the plaintiffs, filed a reply denying, for want of sufficient information, the allegations of indebtedness of the estate, and averring further that the estate had been wasted by the administrators, and denied petitioner's right to have the fund paid over to the administrators of said estate.

By virtue of an agreement of counsel that the court might find the facts and conclusions of law without the intervention of a jury, as of June Term, 1935, Judge Alley entered the judgment appealed from wherein, after finding certain facts, he concluded as a matter of law that the plaintiffs took their proportion of the land and forty-five per cent of the proceeds of sale thereof as heirs of John W. Odom, and that said fund in the hands of the commissioners was subject to the payment of the debts of the estate and the costs of administration. Therefore, the

court ordered the commissioners, Pruette, Taylor, and Covington, to "turn over to the administrators of the estate of John W. Odom the fund derived from the forty-five per cent interest in said lands described in the consent judgment, so that so much thereof as may be necessary may be used by said administrators to pay the balance due on the widow's dower, debts of said estate, and costs and charges of administration."

From this judgment plaintiffs appealed.

A. M. Stack, Fred J. Coxe, James O. Moore, Taliaferro & Clarkson, Pruette & Caudle, and Taylor & Thomas for plaintiffs.

R. L. Smith & Son and Lee Smith for defendants.

DEVIN, J. The plaintiffs' motion to dismiss the petition or interplea on the ground that it did not state facts sufficient to show any right to the proceeds in question, treated as a demurrer *ore tenus,* was properly denied.

A demurrer admits, for the purpose, the truth of the allegations of fact and challenges the right of the pleader in any view of the matter. *In re Champion Bank and Trust Co.,* 207 N. C., 802.

The interplea filed by permission of the court, and without objection, alleges that the fund in question was recovered in a suit by the heirs of John W. Odom; that it was decreed to be paid to the plaintiffs as heirs; that the land which was sold and from which the fund arises belonged to John W. Odom, and that the proceeds now in the hands of commissioners are subject to the payment of the debts of John W. Odom and the costs of administration, there being no other assets sufficient for that purpose. Judge Stack's judgment (attached to the interplea) refers to plaintiffs as heirs of John W. Odom and recognizes the liability of the fund for payment of the debts of his estate.

It is clear that the plaintiffs had no title to the land or to the fund from the sale thereof, except as heirs of their father, John W. Odom, and it therefore came to them charged with the payment of his debts. The fund is still intact and available to pay debts. C. S., 74, *et seq.; Avery v. Guy,* 202 N. C., 152; *McLean v. Leitch,* 152 N. C., 266.

There was no exception entered to the order of the court permitting the administrators to set up this claim to the fund by interplea in the original action. Under the facts in this case the order was proper.

It is the recognized policy and expressed purpose of our present system of procedure that all matters in a given controversy should, as far as possible, be settled in one and the same action. *Guthrie v. Durham,* 168 N. C., 573.

The plaintiffs' objection to the admission of the pleadings in the original action and in a former proceeding between the same parties

is without merit. *Alsworth v. Cedar Works,* 172 N. C., 17. Nor is the widow estopped now to assert her dower rights because of failure to do so in the original action. The question of dower was not involved in the suit against her individually to recover the land, nor did the judgment undertake to adjudicate the question. *Chappell v. Surety Co.,* 191 N. C., 703.

The defendant Fannie Dry Odom Palmer makes no claim for any dower interest in the fund represented by the forty-five per cent of the proceeds of sale of the lots, but for the value of her dower rights in the land sold by the commissioners under the decree of August, 1927, and in that proceeding she had asked that the value of her dower rights in the land therein decreed to be sold be paid to her absolutely out of the proceeds. This amount not having been paid in full, she sets it up now as a debt against the estate.

No statute of limitations is pleaded, nor would such a plea avail the plaintiffs under the facts of this case. *Campbell v. Murphy,* 55 N. C., 357.

The plaintiffs excepted to the judgment, but there was no exception to any of the findings of fact, nor to any specific conclusion of law.

In *Buchanan v. Clark,* 164 N. C., 56, *Walker, J.,* uses this language: "Parties can have their causes tried by jury, by reference, or by the court. They may waive the right of trial by jury by consenting that the judge may try the case without a jury, in which event he finds the facts and declares the law arising thereon. His findings of fact are conclusive, unless proper exception is made in apt time that there is no evidence to support his findings or any one or more of them."

This statement of law is approved by *Brogden, J.,* in *Assurance Society v. Lazarus,* 207 N. C., 63; McIntosh, N. C. Practice and Procedure, sec. 517.

The Constitution of North Carolina, Art. IV, sec. 13, provides: "In all issues of fact joined in any court, the parties may waive the right to have the same determined by a jury; in which case the finding of the judge upon the facts shall have the force and effect of a verdict by a jury."

The case on appeal recites: "After argument of counsel on both sides, it was agreed that the judge might render judgment out of term and out of the district. The question of a jury trial was not mentioned."

In his judgment Judge Alley states: "It was agreed by counsel that the court might find both the facts and the law without the intervention of a jury, and that the court might take the papers and study same and enter judgment out of term and out of the district."

While the agreement of counsel is set out more fully in the judgment than in the "case," there is no material difference nor contradiction.

Manifestly a jury trial would not have been possible under the agreement, nor was objection made to failure to submit the case to a jury.

In the absence of suggestion that the facts as to the agreement were not correctly stated, the findings of the judge are conclusive.

The facts found by the court below fully warrant the judgment.

Affirmed.

STATE v. ED. HESTER.

(Filed 11 December, 1935.)

1. **Criminal Law G l—Testimony of confessions by defendant held properly admitted upon evidence showing that confessions were voluntary.**

   Testimony of statements made by defendant to witnesses immediately after defendant had killed deceased, which statements disclosed that defendant killed deceased after premeditation and with deliberation, is competent when the evidence shows that the statements were voluntarily made in conversations with the witnesses, and that the witnesses did not make any promises or threats.

2. **Criminal Law I g—**

   Defendant's objection to the charge on the ground that it unduly stressed the contentions of the State is not sustained, it appearing that the charge gave the contentions of the State and of the defendant fairly, and fully charged the law applicable to the evidence. C. S., 564.

3. **Criminal Law K e—Statute substituting lethal gas for electrocution applies only to capital crimes committed after effective date of statute.**

   The statute, ch. 294, Public Laws of 1935, substituting execution of a death sentence by lethal gas instead of electrocution, is held to apply, by the terms of the statute, only to crimes committed after the effective date of the statute, 1 July, 1935, and the statute will not support a sentence of death by lethal gas imposed for a capital crime committed prior to the effective date of the statute although defendant was tried and convicted after the effective date thereof.

4. **Criminal Law L f—**

   Where a defendant in a capital case has been sentenced to death by lethal gas instead of by electrocution, as required by statute, the case will be remanded to the Superior Court in order that proper judgment may be imposed.

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

APPEAL by defendant from *Williams, J.*, at June Special Term, 1935, of WAKE. Remanded.

The defendant was indicted and tried for the killing of Paul Honeycutt on 16 May, 1935. The evidence on the part of the State was to the effect that the defendant Ed. Hester and the deceased, Paul Honeycutt,

were members of a group of prisoners working on the Cary prison farm, on 16 May, 1935. The prisoners were engaged in cutting a ditch on said farm, and while the deceased was digging in the ditch the defendant approached him from behind and without warning struck him in the head with an axe, killing him almost immediately. The defendant admits the killing, but claims that the homicide occurred during an altercation between himself and the deceased, during the course of which the deceased advanced upon him with a shovel.

The State's witness, K. B. Jones, testified that just after the killing defendant admitted to him that he killed the deceased, and stated that he got the axe for the purpose of killing him. The State's witness, Tillman McLamb, an eye-witness to the homicide, testified that the defendant approached the deceased from behind and struck him in the head with the axe without warning; that after the deceased was lying in the ditch as a result of the first blow the defendant stepped up closer to the deceased and hit him again in the head. This witness testified that immediately after defendant struck the deceased the witness said, "Well, Hester, it looks like you have killed him," to which the defendant replied, "I hope, by God, I have."

The State's witness, Cyrus Swinson, testified that the defendant came to him a short time before the homicide and borrowed the axe with which he killed the deceased. This was about 15 or 20 minutes before the squad began work in the ditch.

The defendant entered a plea of not guilty. The defendant was convicted of murder in the first degree. The judgment of the court below is as follows: "The prisoner, Ed. Hester, having been duly indicted and tried by a jury duly sworn and impaneled at this term of the Superior Court of Wake County upon the charge of murder, and having been convicted of murder in the first degree for the killing of Paul Honeycutt by verdict of the said jury duly returned in open court, it is therefore ordered and adjudged that the sheriff of Wake County, in whose custody the said prisoner, Ed. Hester, now is, forthwith convey to the State's Prison at Raleigh such prisoner, the said Ed. Hester, and deliver the said prisoner to the warden of the said State's Prison, who, the said warden, on Friday, 23 August, A.D. 1935, shall cause the said Ed. Hester to inhale lethal gas of sufficient quantity to cause the death of the said prisoner, Ed. Hester, and continue the application and administration of such lethal gas until the said prisoner, Ed. Hester, is dead. This 6 July, A.D. 1935. Clawson L. Williams, Judge presiding."

To the signing of the judgment the defendant excepted. The assignment of error as to this and other material exceptions and assignments of error made by the defendant, and the necessary facts, will be considered in the opinion.

STATE *v.* HESTER.

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

Albert Doub and W. H. Sawyer for defendant.

CLARKSON, J. The first contention of defendant is that the court below committed error in permitting the witnesses, K. B. Jones, Tillman McLamb, Elmer McBroom, W. E. Jones, ... Utley, and Clyde Whitaker, to testify as to how the killing took place and to the statement made by the defendant shortly after the killing of the deceased and on the day following. We cannot so hold.

K. B. Jones testified, in part: "He (deceased) was struck once right in the back of the head, along back there, and another time on the side of the head, along here, the left side of the head. I saw Hester at that time. I had a conversation with him. Court: 'Where was he?' Ans.: Out there on the ditch. Court: 'What time was it?' Ans.: About six o'clock. Court: 'Immediately after this?' Ans.: Yes, sir; as soon as I got him straightened out and saw he was dead. Court: 'Did you make any promise to him, offer him any inducement to make a statement to you?' Ans.: No, sir. Court: 'Was any threat or coercion to get a statement from him?' Ans.: No, sir; in fact, I didn't ask him for any statement. Court: 'It was a conversation you had with him?' Ans.: Yes, sir. Court: 'Was the conversation on his part purely voluntary?' Ans.: Yes, sir. I turned around to him after I saw he had killed him, he was about as far as from here to the wall, and I walked on back out that way and I said: 'Thirty, you have played the devil, haven't you?' and he said, 'I have done just what I intended to do.' I said: 'You don't mean to tell me you got the axe with the intention of killing him?' and he said: 'That is exactly what I borrowed it for.' Then I says to him, I said, 'Well, don't you know they will burn you for it?' and he said: 'I reckon they will,' said, 'That is what they ought to have done for killing my brother-in-law.' "

Tillman McLamb testified, in part: "Paul Honeycutt was right beside me and he was looking forwards. Hester came by with the axe on his shoulder with it drawed back with both hands on it and Paul was ditching and when he got right up what you might say behind him, he come down on him on the back of the head with it and knocked him down. At that time Honeycutt was looking the same way he was ditching and Hester was behind him. Honeycutt fell and he fell in the ditch and Hester stepped up closer to him and hit him again on the head. . . . Honeycutt had not said anything to him that I had heard. I was right beside him. He did not turn around and look back that way. I saw Hester that morning when we were going out. I saw him borrow the axe. He did not say anything when he hit Honeycutt the second time.

When Hester got out there and sat down I was standing in about eight feet of where he was sitting. . . . I told him when he sat down out there, I said, 'Well, Hester, it looks like you have killed him,' and he said, 'I hope, by God, I have.' There wasn't any kind of argument between those boys before he hit him. Honeycutt did not do or say anything to him at all that I had heard tell of."

The other witnesses testified to the same effect. There can be no question but that the defendant's statements were voluntarily made. No promises or threats were used. *S. v. Fox,* 197 N. C., 478; *S. v. Anderson,* 208 N. C., 771.

The defendant contends that the court below, in the charge to the jury, unduly stressed the contentions of the State, to the prejudice of the defendant, and impinged C. S., 564. We cannot so hold.

From a careful review of the charge we find that the contentions of both the State and the defendant were fairly given. The law applicable to the facts was in all respects complied with. The charge was full, explicit, and covered every aspect of the case.

The offense for which defendant was convicted was committed on 16 May, 1935. Chapter 294, Public Laws of 1935, the same being the act substituting execution of the sentence of death in North Carolina by the administration of lethal gas, for death by electrocution, was ratified on 4 May, 1935, but, under the provisions of section 6 thereof was not to become effective until 1 July, 1935. Section 4 of this chapter reads as follows: "Nothing in this act shall be construed to alter in any manner the execution of the sentence of death imposed on account of any crime or crimes committed before the effective date of this act." The effective date of the act is 1 July, 1935. As stated, the record shows that the crime of which the defendant Hester was convicted was committed before 1 July, 1935, and his sentence was imposed at a later date. The judge who pronounced the sentence evidently interpreted the language of the statute as substituting asphyxiation for electrocution in cases where the crime was committed before 1 July but the sentence passed afterwards. To this interpretation we cannot agree. The language employed in the statute, when taken in its ordinary sense, plainly signifies that for crimes committed prior to 1 July, 1935, electrocution is retained as a mode of execution.

The language employed in this statute is identical with that employed in chapter 443, Public Laws of 1909, which chapter changed the mode of execution in capital cases from hanging to electrocution. It does not appear that any cases came to this Court for construction of this particular section. However, it is apparent that the act of 1909 was used as a model for the present law.

The General Assembly was doubtless concerned with the fear that an immediate change in the mode of execution whereby electrocution was made to apply to crimes committed before the ratification of the law would violate the Constitution, which prohibits the enactment of *ex post facto* laws—Constitution of North Carolina, Art. I, sec. 32. *S. v. Broadway,* 157 N. C., 598, 72 S. E., 987. Whether that apprehension was well founded or otherwise does not require consideration here. The present law was apparently intended to be, and is, consonant with this provision of the Constitution and fully within constitutional authority; and we interpret it to mean that as to capital crimes committed prior to 1 July, 1935, electrocution is retained as the mode of inflicting death.

While the question involved herein did not arise in connection with the substitution of electrocution for hanging, it is a matter of history that the last man to be hanged in the State of North Carolina was Henry E. Spivey, convicted of murder in the first degree at March Term, 1909, of Superior Court of Bladen County.

Chapter 443, Public Laws of 1909, hereinbefore referred to, was ratified on 6 March, 1909.

Spivey committed his crime, the murder of one Frank Shaw, on 10 December, 1908. At the time of the commission of the offense, execution of the death sentence in North Carolina was by hanging. But at the time of his conviction, at a term of court held in Bladen County beginning on the first Monday after the first Monday in March, 1909—of necessity this would have been subsequent to 6 March, 1909—electrocution had been substituted for hanging, effective in connection with crimes committed subsequent to 6 March, 1909.

And although convicted subsequent to said date, the defendant was sentenced to death by hanging, the late *Associate Justice Adams,* then a Superior Court Judge, imposing the judgment.

Spivey's case was appealed to this Court, but the present question was not raised. See *S. v. Spivey,* 151 N. C., 676. The record in that case, including the sentence, may be found in the files of the Supreme Court Clerk in original document form, No. 243, Seventh District, August Term, 1909.

The exception and assignment of error directed to the judgment imposed is well taken. The case is remanded to the lower court in order that proper judgment may be imposed. *S. v. Shipman,* 203 N. C., 325 (327).

The case is remanded for lawful sentence.

Remanded.

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

ATLANTIC JOINT STOCK LAND BANK OF RALEIGH AND JOSEPH L. COCKERMAN, SUBSTITUTED TRUSTEE, v. I. R. WILLIAMS AND HIS WIFE, LENOIR M. WILLIAMS, MYRTLE WARREN DRAUGHON AND HER HUSBAND, ROBERT A. DRAUGHON, DAVID M. WILLIFORD, TRUSTEE, L. W. ALDERMAN, AND PEOPLES NATIONAL FIRE INSURANCE COMPANY OF DELAWARE.

(Filed 11 December, 1935.)

Deeds and Conveyances C h—Damages for partial breach of covenant of seizin is based on consideration paid and not present value of land.

The measure of damages for partial breach of covenant of seizin is the proportion of the value of the land as to which title fails bears to the whole tract, estimated on the basis of the consideration paid and not on the basis of the increased value of the land when its value has appreciated after the transaction, and where the vendee has in turn sold the land at an increased price, the damages sustained by the purchaser by reason of the partial failure of the covenant of seizin in his deed may not be recovered against the original vendor.

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

APPEAL by defendants I. R. Williams and his wife, Lenoir M. Williams, and Myrtle Warren Draughon and her husband, Robert A. Draughon, from *Grady, J.*, at September Term, 1934, of SAMPSON. No error.

This is an action (1) to recover of the defendants I. R. Williams and his wife, Lenoir M. Williams, and of the defendant Myrtle Warren Draughon, wife of Robert A. Draughon, the amount due on a note for $3,000, executed by the defendants I. R. Williams and his wife, Lenoir M. Williams, payable to the plaintiff Atlantic Joint Stock Land Bank of Raleigh, and assumed by the defendant Myrtle Warren Draughon; (2) for a decree that the sum of $275.00 paid by the defendant Peoples National Fire Insurance Company of Delaware, and now held in trust by the plaintiff Atlantic Joint Stock Land Bank of Raleigh, be applied as a payment on said note; and (3) for a decree foreclosing all equities of redemption of the defendants in and to the lands conveyed by the defendants I. R. Williams and his wife, Lenoir M. Williams, by a deed of trust to secure said note.

At the trial, by stipulation filed in the record, the parties to the action admitted:

1. That on 1 March, 1928, the plaintiff Atlantic Joint Stock Land Bank of Raleigh, in consideration of the sum of $5,250, conveyed to the defendant I. R. Williams, by deed containing the usual covenants of warranty, a tract of land containing 142 acres and fully described in the complaint in this action.

2. That on 1 March, 1928, the defendants I. R. Williams and his wife, Lenoir M. Williams, paid the plaintiff Atlantic Joint Stock Land Bank of Raleigh the sum of $2,250 in cash, and executed to said plaintiff their note for $3,000, with interest from date at the rate of six per cent per annum, both principal and interest being payable in 65 semi-annual installments of $105.00 each, due on 1 September and 1 March each year, successively, for the balance due on said purchase price, which note was secured by a deed of trust on said land.

3. That on 28 March, 1928, the defendants I. R. Williams and his wife, Lenoir M. Williams, in consideration of the sum of $6,500, conveyed the said land, by deed containing the usual covenants of warranty, to the defendant Myrtle Warren Draughon, wife of the defendant Robert A. Draughon.

4. That the defendant Myrtle Warren Draughon paid to the defendants I. R. Williams and his wife, Lenoir M. Williams, the sum of $3,500, and for the balance of said consideration assumed the payment of the $3,000 note secured by the deed of trust executed by the defendants I. R. Williams and wife, relying upon the deeds and covenants therein for a good and indefeasible title in fee simple to said land; the said assumption was contained in the deed from the defendants I. R. Williams and wife, Lenoir M. Williams, to the said Myrtle Warren Draughon, and is in the following words:

"As a part of the consideration of this deed, the said party of the second part does assume the payment of a certain note in the sum of $3,000, executed by I. R. Williams and his wife, to the Atlantic Joint Stock Land Bank of Raleigh, which note is secured by a deed of trust executed by I. R. Williams and wife to the said Atlantic Joint Stock Land Bank of Raleigh, recorded in Book 3, page 246, office of the register of deeds of Sampson County."

5. That said Atlantic Joint Stock Land Bank of Raleigh ratified said assumption agreement and thereafter collected from the defendant Myrtle Warren Draughon and her husband, Robert A. Draughon, the installments falling due on said note and deed of trust until 1 March, 1932, when the said defendants Myrtle Warren Draughon and her husband, Robert A. Draughon, refused to pay said installment and certain taxes due on said land, claiming a defect in the title thereto.

6. That on 30 October, 1931, a tenant house located on said land was destroyed by fire, and the defendant Peoples National Fire Insurance Company of Delaware issued its draft payable to Myrtle W. Draughon and the Atlantic Joint Stock Land Bank of Raleigh, for the sum of $275.00, in settlement of the loss sustained by the destruction of said tenant house; that at the time of said fire and of the issuance of said draft, the defendants had paid all installments due on said $3,000 note;

that the taxes on said land for the years 1929, 1930, and 1931 were unpaid; that the defendants Myrtle W. Draughon and her husband made demand upon the plaintiff Atlantic Joint Stock Land Bank of Raleigh that said sum of $275.00 be applied to the payment of the cost of rebuilding said tenant house as provided in the deed of trust by which the note for $3,000, which had been assumed by the defendant Myrtle W. Draughon, was secured; that said plaintiff refused to comply with said demand, or to rebuild said tenant house; that said plaintiff collected said draft on 14 July, 1932, at which time an installment on said note was due and unpaid, and applied the proceeds of said draft as a payment on said note; that the deed of trust by which said note is secured contains a provision as follows:

"In case any insured building or improvements on said premises are destroyed or damaged by fire or windstorm, the sum from said insurance may, at the option of said parties of the first part, be applied either to the payment of the note secured by this deed of trust, or subject to the regulations of the Federal Farm Loan Board and under the direction of the Atlantic Joint Stock Land Bank of Raleigh, its successors and assigns, to the reconstruction of the building or improvements so destroyed or damaged."

7. That this action was instituted by plaintiffs on 9 June, 1932, against all the defendants, alleging default in the payment of said note and deed of trust, and failure to pay certain taxes due on the land conveyed by said deed of trust, and asking judgment against the defendants I. R. Williams and his wife, Lenoir M. Williams, and the defendant Myrtle W. Draughon on said note, for the foreclosure of the deed of trust by which the said note is secured, and for the sale of said lands by a commissioner to be appointed by the court.

8. That the defendants I. R. Williams and his wife, Lenoir M. Williams, and Myrtle W. Draughon and her husband, Robert A. Draughon, filed an answer to the complaint, alleging defect in the title to the land conveyed by the plaintiff Atlantic Joint Stock Land Bank of Raleigh, to the defendant I. R. Williams, and subsequently by the said I. R. Williams and his wife, Lenoir M. Williams, to the defendant Myrtle Warren Draughon, wife of Robert A. Draughon.

9. That on 6 October, 1932, one Jennie Jackson instituted a proceeding in the Superior Court of Sampson County, to recover a one-third undivided interest in said land; that the plaintiffs and the defendants were made parties to said proceeding; that the defendants Myrtle W. Draughon and her husband filed an answer in said proceeding alleging that they had made valuable improvements on said lands, enhancing its usable value in the sum of $1,500, and giving notice to the plaintiff bank and the defendants I. R. Williams and his wife, Lenoir M. Williams, to

appear and defend the title to the land which they had warranted to the said Myrtle W. Draughon; and that thereupon the plaintiff bank and the defendants I. R. Williams and his wife, Lenoir M. Williams, assumed the defense of said title in said proceeding.

10. That on 11 December, 1933, the said Jennie Jackson recovered judgment in said proceeding for a one-third undivided interest in said land, and was thereafter allotted 55.6 acres as her share of said land; that said share is in the middle of said tract of land, leaving the shares of the defendant Myrtle W. Draughon at the two ends of said tract of land; and that the said defendant has been evicted from the share of said land allotted to the said Jennie Jackson.

11. That neither the plaintiff Atlantic Joint Stock Land Bank of Raleigh nor the defendants I. R. Williams and his wife, Lenoir M. Williams, filed exceptions to the report of the commissioners appointed by the court to partition said land; and that the partition has been duly confirmed.

In response to issues submitted by the court, the jury found that the defendants I. R. Williams and his wife, Lenoir M. Williams, are entitled to recover of the plaintiff Atlantic Joint Stock Land Bank of Raleigh, as damages for the breach of its warranty of the title to the land conveyed by said plaintiff to the defendant I. R. Williams, the sum of $1,750, and that the defendant Myrtle W. Draughon is entitled to recover of the defendants I. R. Williams and his wife, Lenoir M. Williams, as damages for the breach of the warranty in the deed from the said defendants to the said Myrtle W. Draughon, the sum of $2,166.60.

On the admissions in the record and the verdict of the jury, it was adjudged by the court that plaintiff Atlantic Joint Stock Land Bank of Raleigh recover of the defendant Myrtle W. Draughon, as principal, and of the defendants I. R. Williams and his wife, Lenoir M. Williams, as sureties, the sum of $300.00, with interest and costs. It was further ordered that upon default in the payment of the judgment in this action, the land described in the complaint be sold by a commissioner appointed for that purpose, and that said commissioner report his proceedings under the decree to the court.

From the judgment rendered by the court the defendants I. R. Williams and his wife, Lenoir M. Williams, and Myrtle W. Draughon and her husband, Robert A. Draughon, appealed to the Supreme Court, assigning errors in the trial and in the judgment.

J. A. McLeod and McLean & Stacy for plaintiffs.

Butler & Butler for defendants Myrtle W. Draughon and her husband.

Howard H. Hubbard for defendants I. R. Williams and wife.

CONNOR, J. For the purpose of determining the amount for which the plaintiff Atlantic Joint Stock Land Bank of Raleigh is entitled to judgment in this action the court applied as a credit on the note executed by the defendants I. R. Williams and his wife, Lenoir M. Williams, and assumed by the defendant Myrtle W. Draughon, the amount of the damages, as found by the jury, for which the plaintiff is liable to its grantee, I. R. Williams, by reason of the breach of the covenants in its deed to said grantee, and declined to apply as such credit the amount of the damages, as found by the jury, for which the defendants I. R. Williams and his wife are liable to their grantee, the defendant Myrtle W. Draughon, by reason of the breach of the covenants in their deed to said grantee. In this there was no error.

In *Campbell v. Shaw,* 170 N. C., 186, 86 S. E., 1035, it is said: "Where there is a failure of title to a part of the land, or a partial breach of the covenant of seizure, the rule is thus stated: 'The measure of damages for breach of the warranty of title to land is the proportion that the value of the land to which title fails bears to the whole consideration paid. That is, the proportion of the value of the land as to which the title fails bears to the whole, estimated on the basis of the consideration paid. *Lemly v. Ellis,* 146 N. C., 221.' If the vendee has procured a good title to remedy the defect his damages are the amount reasonably paid for buying the outstanding title, not exceeding the original pro rata of the purchase money for that part of the land. It would be error to take the basis of the present actual value of the land where there is evidence that the actual value exceeds the consideration. *Price v. Deal,* 90 N. C., 291; *Bank v. Glenn,* 68 N. C., 36; *Dickens v. Shepperd,* 7 N. C., 526."

The judgment in this action is affirmed.

No error.

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

MOSES FORD v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 11 December, 1935.)

1. Master and Servant E b—Evidence of negligence and proximate cause held for jury in this action under Federal Employers' Liability Act.

Plaintiff was employed in the operation of a ditching machine mounted on a flat car. The evidence favorable to plaintiff tended to show that as plaintiff was climbing on the flat car in the usual manner, with his foot

on the track on which the machine was mounted on the car, the engineer, defendant's *alter ego*, who could have seen plaintiff, pulled the lever moving the shovel without giving signal or warning, and that the machine, which had been held back by the shovel resting on the flat car, rolled down the inclined track and crushed plaintiff's foot. *Held:* The evidence was sufficient to be submitted to the jury on the issues of negligence and proximate cause under the Federal Employers' Liability Act.

2. Trial D a—

On motion to nonsuit, only the evidence favorable to plaintiff will be considered.

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

APPEAL by plaintiff from *Sinclair, J.*, at April Term, 1935, of NASH. Reversed.

This is an action for actionable negligence, brought by plaintiff against defendant, alleging damage. The defendant denied negligence and set up the plea of assumption of risk.

T. J. Truesdale was employed by defendant as the operator of a ditching machine or steam shovel, and had held such position for seven years. The shovel was mounted on a smaller wheel than the usual ones and on a flat car, which was on a sidetrack. The wheels under the steam shovel are eight-inch wheels, they rest on 100-pound rails which run up and down the flat car. Truesdale was loading dirt for repairing the road and was using the shovel to scoop up the dirt, putting it on flat cars along the main line track. The crane and shovel of the ditching machine were operated by means of levers which were pulled back and forth, to and from the operator or engineer. The plaintiff was working for the defendant firing the ditching engine. The plaintiff testified, in part:

"On 21 May, 1932, the ditching machine was up on top of this flat car and the wheels of the ditching machine were on the T-irons that were fastened on top of the flat-car. The ditching machine had a shovel which was operated out on the crane of the ditcher. The flat car was not on a level; it was on a hill. The machine was on the hill of the flat car and the shovel and crane were on the lower part. The machine when not in operation was resting on the end of the flat car. When the shovel was raised off of the flat car in the operation of the machine the machine would roll down because the shovel had been holding it. . . . I had breakfast and came back to the machine. Just as I got to the machine I peeped in the ash can and said, 'Mr. Truesdale, you reckon we better knock this grate?' At that time I was standing on the ground, the distance of that chair from him. He was on the machine ordering. I said, 'Mr. Truesdale, you reckon we better knock the ash pan?' He said, 'No, maybe we can get this load without raking the ash pan.' I

turned and walked to the north end of the flat car and crawled on and started to walking back and just as I got to the machine and placed my foot on the rail and reached up for the hand-hold he reversed the lever and picked up the bucket, which was the shovel. Whenever he picked up the shovel the machine rolled right down on my foot and I hollered to him. I said, 'Back up, you are on my foot.' I hollered and said, 'Hey, back the machine up, it is on my foot.' He looked around like that (indicating), and still moving the lever and the machine was still on my foot. I hollered and hailed him again and he looked around, and I hailed him again and he looked around. I hailed him three times. By that time he had sunk the shovel into the bank and by digging sideways, cater-cornered, that throwed the machine backward off of my foot. I jumped off of the car and sat there on the ground about a minute. It couldn't have been longer that I sat there and hailed him again and he looked. The locomotive fireman was the first one got to me and he looked after my foot and looked up at Mr. Truesdale and he cursed him. It was the wheel of the ditching machine that ran over my foot. . . . There was one step on the machine about three or four feet from the top of the flat car. This step, which was for me to step on, was up on the top of the floor of the machine. At the time when I went to mount the machine Mr. Truesdale was on it and was about four or five feet from me. *He could see me. There won't nothing to keep him from seeing me but some rods to hold the top on the machine, that was the only thing.* When the wheel of the machine rolled on my foot two of my toes, the big one and the one next to it, were cut off and my foot was busted wide open. I am not sure how long I stayed in the hospital but I think it was two months and thirteen days. It was my left foot that was run over. . . . From the time I asked him about the ash pan until the time I was hurt was no longer than it took me to walk from the south end of the flat coach to the north end and get up on the machine. I got up in the place where I usually got up and in the usual manner."

On motion of defendant, at the close of plaintiff's evidence and at the close of all the evidence, the court below rendered judgment as in case of nonsuit against plaintiff. C. S., 567. Plaintiff excepted and assigned error, made other exceptions and assignments of error, and appealed to the Supreme Court.

Cooley & Bone for plaintiff.
Spruill & Spruill and Thos. W. Davis for defendant.

PER CURIAM. The record discloses "It is agreed that this action comes under the Federal Employers' Liability Act."

Under the decisions of the Supreme Court of the United States, an employee in an action of this kind cannot recover for an injury unless there was negligence on the part of the employer, and that negligence was the proximate cause of the injury. In the present case, plaintiff was working under the engineer, who from the facts was the *alter ego* of defendant. Taking the evidence in the light most favorable to plaintiff, we think the questions of negligence and proximate cause were for the jury to determine.

Plaintiff's evidence is substantially as follows: The boiler which plaintiff was supposed to fire was on the ditching machine. When the plaintiff got to the north end of the ditching machine the shovel or bucket was still resting on the north end of the flat car, thereby preventing the wheels of the machine from rolling down the incline, and the engineer, who was on the machine but had not placed the same in operation, was four or five feet from the plaintiff and in a position where he could see the plaintiff. When the plaintiff got to the north end of the ditching machine he placed his foot on the rail, reached up for the hand-hold, and was in the act of getting upon the ditching machine when the engineer moved one of the levers so as to pick up the bucket or shovel, whereupon the wheels of the machine rolled northward on the rails and upon the plaintiff's foot, thereby crushing it. The plaintiff yelled at the engineer three times, but the latter did not pay any attention to him. He continued with the usual operation of the machine until the shovel was sunk into the bank of dirt, which caused the machine to roll backward off of the plaintiff's foot. The plaintiff then jumped off of the car to the ground, where he was discovered by the locomotive fireman before the engineer paid any attention to him. At the time when the plaintiff was injured he was mounting the ditching machine in the usual way. The engineer in charge of the ditching machine gave the plaintiff no signal, notice, or warning whatsoever that he was going to put the machine in operation. The plaintiff testified, "He could see me." *Cook v. Manufacturing Co.*, 182 N. C., 205; *S. c.*, 183 N. C., 48.

The defendant's evidence was to the contrary, but, on a motion to nonsuit, we consider only the evidence most favorable to plaintiff.

For the reasons given, the judgment below is

Reversed.

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

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

(Filed 11 December, 1935.)

Trial H a—

Where the parties submit an agreed statement of facts, the court should render judgment thereon, and it is error for the court to submit the issue involved to the jury, the agreed statement of facts being conclusive unless set aside for mutual mistake or fraud.

APPEAL by defendants from *Williams, J.*, and a jury, at Second June Term, 1935, of WAKE. Error and remanded.

Robert A. Hovis and Kenneth C. Royall for plaintiff.
S. Brown Shepherd and Wm. Vass Shepherd for defendants.

PER CURIAM. The plaintiff and defendants in the agreed statement of facts have this: "The plaintiff and defendants respectfully agree *that the facts relative to this controversy,* in addition to those admitted in the pleadings, are as follows," setting same forth.

This case was remanded that it be determined on "the agreed statement of facts"—208 N. C., 77. In the present case the court below submitted the following issue to the jury:

"Was the note described in paragraph 5 of the complaint a renewal of the note described in paragraph 4 of the complaint?" The jury answered the issue "Yes."

The court below rendered judgment for plaintiff on the verdict. The defendants excepted and assigned error to the submission of the issue. We think defendants' exception and assignment of error must be sustained. The parties to the controversy have agreed to the statement of facts. The court below should render judgment on this agreed statement of facts. Like any other agreement, it stands unless set aside for mutual mistake or fraud.

Error and remanded.

CHARLES L. BRYANT, SR., ADMINISTRATOR OF THE ESTATE OF DAVID BRYANT, DECEASED, v. WOODUS KELLUM, ADMINISTRATOR OF ESTATE OF MAGGIE EVERETT NEWKIRK, DECEASED.

(Filed 11 December, 1935.)

1. Limitation of Actions E c—

Where the statute of limitation is pleaded, the burden is on plaintiff to show that the action was brought within the time allowed by the statute.

2. Limitation of Actions C a—In order for partial payment to prevent bar circumstances must show debtor's recognition of debt as then existing.

Evidence disclosing only that defendant paid plaintiff a sum of money and obtained a receipt therefor, without evidence of the contents of the receipt, or what passed between the parties, is insufficient to show a partial payment on the debt sued on so as to prevent the bar of the statute of limitations, since partial payment, to be effective under the statute, C. S., 416, must be made under circumstances warranting the clear inference that the debtor recognizes the debt sued on as then existing and his obligation to pay same.

APPEAL by plaintiff from *Cranmer, J.*, at April Term, 1935, of NEW HANOVER. Affirmed.

Plaintiff brought his action on a note executed to his intestate, David Bryant, by the defendant's intestate, Maggie Newkirk. The note was for the sum of $500.00, dated 9 May, 1918, due four months after date, and secured by a mortgage on certain real estate. The defendant set up the plea of the statute of limitations. There was no evidence of any credit on said note.

The plaintiff offered evidence tending to show that some time in October, 1932, Maggie Newkirk handed to David Bryant the sum of ten dollars, and that Bryant procured a pencil and paper and wrote a receipt and gave it to Maggie Newkirk. There was no evidence as to the contents of the paper writing or receipt, nor as to what passed between the parties, except that Maggie Newkirk said, "I will do better when I come again."

The court below sustained the motion to nonsuit, and from judgment thereon the plaintiff appealed.

Rountree & Rountree for plaintiff.
G. Dudley Humphrey for defendant.

PER CURIAM. The statute of limitations having been pleaded, the burden of proof was on the plaintiff to show that his action was brought within the time allowed by the statute. C. S., sec. 416, provides that: "No acknowledgment or promise is evidence of a new or continuing contract, from which the statutes of limitations run, unless it is contained in some writing signed by the party to be charged thereby; but this section does not alter the effect of any payment of principal or interest." The last clause of this section has been construed by this Court in numerous cases, wherein it has been uniformly held that a partial payment to have the effect to prevent the bar of the statute of limitations must be made under such circumstances as will warrant the clear inference that the debtor recognizes the debt as then existing and his willingness, or, at

least, his obligation to pay the balance. *Piano Co. v. Loven,* 207 N. C., 96; *Nance v. Hulin,* 192 N. C., 665; *Battle v. Battle,* 116 N. C., 161.

The evidence offered in the case at bar does not bring it within the rule laid down. The judgment of nonsuit is

Affirmed.

STATE v. C. E. CAGLE.

(Filed 11 December, 1935.)

1. Homicide G e—Motion to nonsuit held properly refused where State's evidence shows defendant killed deceased with deadly weapon.

Where the State shows by evidence that defendant killed deceased with a deadly weapon, defendant's motion for judgment as of nonsuit is properly refused, since the State's evidence raises the presumption that defendant is guilty of murder in the second degree, with the burden on defendant to show matters in mitigation or excuse.

2. Criminal Law I g—

If defendant desires fuller or more specific instruction on any point, he should aptly make request therefor.

APPEAL by defendant from *McElroy, J.,* at March Term, 1935, of GUILFORD. No error.

The defendant was indicted for the murder of one Ranney Stack. At the outset of the trial the solicitor announced he would not ask for a verdict of guilty of murder in the first degree but for a verdict of guilty of murder in the second degree or manslaughter, as the evidence might warrant.

The State offered evidence tending to show that the defendant shot and killed the deceased in front of defendant's store, and the defendant, testifying in his own behalf, admitted that he shot and killed the deceased and pleaded self-defense.

The jury returned a verdict of guilty of manslaughter, and from judgment thereon defendant appealed.

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

Gold, McAnally & Gold for defendant.

PER CURIAM. Defendant's motion for nonsuit was properly denied. As was said in *S. v. Johnson,* 184 N. C., 637: "We could not nonsuit the State, . . . for when there is a killing with a deadly weapon, as there was in this case, the law implies malice, and it is, at least, murder

in second degree, and the burden then rests upon the prisoner to satisfy the jury of facts and circumstances in mitigation of or excuse for the homicide, the credibility of the evidence, and its sufficiency to produce this satisfaction being for the jury to consider and decide."

The defendant excepted to several portions of the judge's charge, but upon careful examination of the charge, we find it in substantial accord with the rulings of this Court. If the defendant desired fuller or more specific instruction on any point, request therefor should have been made. *Simmons v. Davenport,* 140 N. C., 407.

The case seems to have been fairly tried. We find

No error.

MRS. J. A. FOX v. THE GREAT ATLANTIC AND PACIFIC TEA COMPANY.

(Filed 11 December, 1935.)

Negligence A c—Patron slipping and falling on floor of store must show negligence in order to recover for injuries sustained.

Evidence tending to show that plaintiff, while a patron in defendant's store, slipped on a beet lying on the floor of the store between vegetable bins and fell to her injury, without evidence as to how the beet got on the floor or how long it had been there, is insufficient to resist defendant's motion to nonsuit, since the doctrine of *res ipsa loquitur* is inapplicable and plaintiff must show negligence on the part of defendant.

APPEAL by the plaintiff from *McElroy, J.,* at May Term, 1935, of GUILFORD. Affirmed.

This is an action to recover damages for personal injuries alleged to have been proximately caused by the negligence of the defendant.

On the morning of 26 June, 1934, between ten o'clock and noon, the plaintiff went to the store of the defendant, on West Market Street in the city of Greensboro, for the purpose of making a purchase of meat, and when she had gotten inside, two or three feet past the entrance, she stepped on a beet which was lying on the floor between the bins, where vegetables were placed for display and sale, which caused her to slip and injure her ankle and back.

There was no evidence tending to show how the beet got on the floor of the aisle between the vegetable bins, or how long it had been there before the plaintiff stepped on it and slipped.

At the close of the evidence for the plaintiff the action was dismissed by judgment as of nonsuit, and the plaintiff appealed.

Younce & Younce for plaintiff, appellant.
Sapp & Sapp for defendant, appellee.

PER CURIAM. Since there is no evidence of how the beet got upon the floor of the aisle, or of how long the beet had been upon the floor before the plaintiff stepped on it, there is no evidence of negligence on the part of the defendant. The defendant is not an insurer of the safety of those who enter its store for the purpose of making purchases, and the doctrine of *res ipsa loquitur* is not applicable. Before the plaintiff can recover she must, by evidence, establish actionable negligence on the part of the defendant, *Bowden v. Kress,* 198 N. C., 559; *Cooke v. Tea Co.,* 204 N. C., 495, and this she has failed to do.

The judgment is

Affirmed.

HELEN G. LINDLEY v. ÆTNA LIFE INSURANCE COMPANY.

(Filed 11 December, 1935.)

Insurance J b—Contention that course of dealing between parties waive prompt payment of premium held untenable under terms of policy.

Where an insurance policy specifically provides that acceptance of premiums by insurer's agents after due date should reinstate the policy only as to losses resulting after such reinstatement, plaintiff's contention that according to the course of dealing between insurer and insured, premiums were accepted and paid at the convenience of insured, and that insurer should accept payment of premium due prior to insured's death which plaintiff tendered subsequent to insured's death, is untenable, as there was no reinstatement of the policy prior to insured's death.

APPEAL by plaintiff from *McElroy, J.,* at May Term, 1935, of GUILFORD.

Civil action to recover on a policy of health and accident insurance.

On 31 January, 1916, the defendant issued to Paul C. Lindley an "Accumulative Disability Policy," renewable from year to year upon payment of annual premium, with provision that in case of death the policy shall be payable to plaintiff.

The renewal premium, due 31 January, 1933, was not paid or tendered until after the death by accident of the insured on 10 June, 1933.

Plaintiff contends that by reason of the course of dealing between defendant's agent and the insured, the annual premiums were accepted and paid "at the convenience" of the insured.

The policy provides: "If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of a premium

by the company or by any of its duly authorized agents shall reinstate the policy, but only to cover accidental injury thereafter sustained and such sickness as may begin more than ten days after the date of such acceptance."

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

H. S. King and Frazier & Frazier for plaintiff.
Sapp & Sapp for defendant.

PER CURIAM. Viewing the evidence in its most favorable light for the plaintiff, the accepted position on motion to nonsuit, it would seem that the policy, in express terms, precludes any recovery by plaintiff, as there was no reinstatement between 31 January and 10 June, 1933.

Affirmed.

STATE v. BRIGHT BUFFKIN.

(Filed 22 January, 1936.)

1. Homicide G d—Evidence held competent as tending to show circumstances attending the homicide.

Deceased was killed shortly after he had driven his car alongside defendant's car, which contained a mixed party of five and was parked on a lonely spot on a lake shore late at night. *Held:* Evidence as to the location of the road and the movements of the cars of defendant and others shortly before the homicide was competent to show the surrounding circumstances.

2. Same—Evidence held competent as tending to show motive actuating defendant in killing deceased.

The State offered evidence tending to show that defendant was riding in his car with a mixed party, that a man driving another car had asked concerning one of the women in defendant's car, and had followed defendant's car, passing it several times as defendant drove to a lonely spot on the shores of a lake; that shortly after defendant parked by the lake another car parked beside it; that the occupants of defendant's car mistook it for the car that had passed them on the road; and that one of the occupants of defendant's car assaulted the driver of the parked car for "butting in" their party, and that defendant, after standing for a moment in front of the cars, walked over and shot the driver of the parked car. *Held:* Evidence of the movements of the cars and the conversations of the parties tending to show that they mistook the deceased for the driver of the car which had attempted to "butt in" on their party was competent as tending to show *animus* and defendant's motive in killing deceased.

3. Same—

In a prosecution for homicide committed with a pistol it is competent for the State to show that defendant had a pistol on his person with one chamber exploded at the time of his arrest a short while after the commission of the crime.

4. Jury A b: Criminal Law L c—Finding of court from evidence that juror is indifferent is not reviewable.

Defendant challenged the competency of one of the jurors during trial on the ground that before trial the juror had expressed an opinion as to defendant's guilt, although he had stated on his *voir dire* that he had formed no opinion. The trial court heard evidence and found as a fact that the witness was impartial and competent. *Held:* The challenge was to the favor rather than a challenge for principal cause, and the finding of the trial court is not reviewable.

5. Jury A b—Held: Juror was in law not related to deceased.

In this prosecution for homicide it appeared that one of the juror's deceased uncle's wife's sister had married the father of deceased. *Held:* The juror was not related to deceased in law either by consanguinity or marriage, and a challenge to the juror's competency was properly denied.

6. Criminal Law H c—When defendant requests time to procure certain witnesses he must file statement of evidence proposed to be elicited from them.

Defendant moved for a continuance, and later moved to set aside the verdict for that he was not given sufficient time to procure certain witnesses. The trial court denied the motions in his discretion upon his finding that no statement in writing had been made or filed as to the evidence proposed to be elicited from or given by the witnesses. *Held:* The findings of the trial court supported his orders denying the motions.

7. Criminal Law I h—Exception to solicitor's reading opinion of Supreme Court not sustained in view of trial court's caution to jury.

Defendant's counsel objected to the solicitor reading to the jury excerpts from a decision of the Supreme Court. The trial court thereupon cautioned the jury that counsel could not read the facts of another case except for the purpose of explaining the law set forth in such case, and that the facts of the case read should not be considered by the jury. *Held:* Defendant's objection cannot be sustained.

8. Homicide H b—

Where, in a prosecution for homicide, the State's evidence discloses that defendant killed deceased with a deadly weapon, defendant contending that he shot in self-defense, defendant's motion for judgment as of nonsuit is properly refused.

9. Homicide B a—Evidence of premeditation and deliberation held sufficient to go to jury on question of murder in the first degree.

The State's evidence tended to show that defendant had parked his car on a lonely spot by a lake late at night, that another car was driven up and parked within a few feet, that one of the occupants of defendant's car went over to the other car, accused the driver of "butting in" on their party, and assaulted him, the driver offering no resistance, and that

thereupon defendant got out of his car, armed with a pistol, stood in front of the car for an appreciable period of time, and then walked over and shot the driver of the car, who was unknown to defendant, without provocation by word or act. *Held:* The evidence was sufficient to be submitted to the jury on the question of premeditation and deliberation.

10. Same—

Proof of motive is not necessary to make out the State's case of murder in the first degree when there is sufficient evidence of premeditation and deliberation.

11. Same—

Premeditation and deliberation may be shown by all the attendant circumstances, and the absence of provocation is a competent circumstance to be considered by the jury in determining the question.

12. Same—

A murder is premeditated if it is thought over and the intent to kill formed, regardless of how short a time elapses before the intent is executed, and it is deliberate if it is committed in a cool state of blood in furtherance of such intent.

13. Criminal Law I g—

Exceptions to the charge based upon its arrangement and to the force of the language used in stating the contentions, without exception to its correctness in stating the law, cannot be sustained.

14. Same—

If the court omits to state any of the contentions of defendant, or incorrectly states the contentions of either party, defendant must call the matter to the court's attention in apt time in order for an exception to be considered on appeal.

APPEAL by defendant from *Williams, J.*, at August Term, 1935, of COLUMBUS.

The defendant was charged with the felonious slaying of D. P. Barefoot. The jury found him guilty of murder in the first degree.

The evidence for the State tended to show that the homicide occurred on the shore of Lake Waccamaw, at a point called Dupree's Landing, about midnight of 9 August, 1935; that the defendant, who was a married man, had driven there with a party in his automobile; that on the front seat with defendant were Mrs. Susie Lineberry and Ted Norris, and that Mrs. Nobles and Cyrus Cliff were on the back seat; that before going to the lake, while in the town of Whiteville, defendant had had some words with the witness Arp relative to Mrs. Nobles' presence in defendant's car, and that on the way to the lake Arp, in his car, had passed defendant's car twice and met it once. That a few minutes after defendant's car had arrived at Dupree's Landing, an isolated point on the sandy shore of the lake, another automobile arrived, driven by the deceased, D. P. Barefoot; that Barefoot was accompanied by the witness

Jim Carey; that he stopped his car, also, on the shore of the lake, about three steps to the right of defendant's car. That defendant was unknown to either Barefoot or Carey. Of the party Carey knew only Susie Lineberry. There were lights on Barefoot's car but not on the defendant's. According to Jim Carey's testimony, Ted Norris got out of defendant's car, went up to Barefoot, who was sitting under the wheel with the glass down, and inquired with an oath why they were butting into their party. Barefoot replied that he was not bothering anybody, just riding around, and Norris struck Barefoot twice without resistance. Whereupon Carey got out on the ground and Norris had some words with him. Then defendant Buffkin got out of his car, came around the front of his car into the space between the cars, and Carey saw a pistol in his belt. Buffkin stood on the ground a few minutes and then walked over to Barefoot's car and shot him through the heart. Buffkin was standing two or three steps from Barefoot's car when he pulled his pistol out, walked up to the car, and shot him. Then defendant pointed his pistol at Carey and said, "If you have anything to say, I will shoot you." Mrs. Susie Lineberry got out of the car and told Buffkin not to shoot, and he said, "I will go, but don't call anybody's name here," and drove off.

Jim Carey testified that he didn't see Barefoot drinking or have a pistol, and that he didn't do anything when struck by Norris, except to turn a little to the right on the seat. No word was spoken by him to Buffkin. It was testified that Mrs. Nobles was married, but it did not appear whether Susie Lineberry (or Susie Price, as she was also known) was or not.

Witness Arp testified that he saw defendant Buffkin, Norris, Cliff, and two girls in an automobile in Whiteville about 10:30 p.m., and had conversation with defendant and asked for Mrs. Nobles; that defendant said she was not in his car; that later he passed Buffkin's car twice and met it once, on the road between Whiteville and the lake. Norris testified that defendant said, after Arp had stopped his car and questioned him about Mrs. Nobles, that he didn't like for anybody to stop his car.

Defendant Bright Buffkin, in his own behalf, testified as to the identity of those who were in the car with him, as to his movements from the time he left his home in Fair Bluff that afternoon until he was arrested at a filling station in West Whiteville shortly after the homicide. He admitted shooting the deceased, but testified he was attacked by Barefoot "with something in his hand," and that he shot in self-defense.

There was verdict of guilty of murder in the first degree, and from judgment thereon imposing sentence of death, defendant appealed.

STATE *v.* BUFFKIN.

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

Greer & Greer and Varser, McIntyre & Henry for defendant.

DEVIN, J. Defendant's counsel, out of abundance of caution, noted numerous exceptions to the evidence, many of which were abandoned. We have examined all the exceptions which were noted as well as those which were discussed in the brief, and decide they cannot be sustained. Some of the questions may have been leading, but were otherwise unobjectionable.

Evidence as to the location of the road, places, and the movements of the defendant and others shortly before the homicide was competent to show the surrounding circumstances.

The testimony as to the movements of Arp, his car, and as to the exclamation in defendant's presence respecting the identity of Arp's car, was, we think, competent. The State was attempting to show, if it could, that some feeling had been aroused in the defendant by reason of Arp's conduct in Whiteville and on the road, and that when a car drove up beside his shortly after he had arrived on the shore of the lake he may have been actuated by the belief that Arp was still trying to "butt in" on his party.

It was competent for the State to show defendant had a pistol on his person with one chamber of the revolver exploded at the time he was arrested.

Nor was there vice in permitting a question to a witness whether Mrs. Lineberry was married or not.

Defendant's counsel, in his able argument before this Court as well as on brief, contended there was error in the ruling of the court below as to two of the jurors, and that a mistrial should have been ordered.

First, as to juror Proctor: Pending the trial, and after the State had rested its case, defendant's counsel asked that the court investigate the qualification of juror A. F. Proctor, alleging they had received information since the jury was impaneled that this juror had previously formed and expressed the opinion that defendant was guilty, whereas while the jury was being selected, on his *voir dire,* the juror had stated he had formed no opinion.

Thereupon the oral testimony of Crom Buffkin, A. E. Spivey, and A. H. Best was heard by the court. Crom Buffkin testified he had heard juror Proctor discuss the case and say he thought they were all guilty and ought to be punished—ought to be lynched. This witness stated he knew defendant but if he was any kin, it was distant. He admitted he had been indicted four or five times for assault with deadly weapon and for whiskey. A. E. Spivey testified he heard juror Proctor

say, in the presence of Crom Buffkin and A. H. Best, that he believed all of them were guilty. That was all he heard him say. Witness admitted he had been in court for driving a car while drunk and for fornication and adultery. A. H. Best testified that on one occasion he heard the case discussed when juror Proctor was present, but did not recall anything Proctor said.

In rebuttal, the State offered evidence that the character of juror Proctor was good, and that the character of Crom Buffkin and A. E. Spivey was bad.

Thereupon the court made the following order:

"Upon the hearing and investigation, the court finds that the said A. F. Proctor was duly summoned, and presented himself before the court, where he was interrogated under oath on the *voir dire* by counsel for the State and the defendant, and that he thereupon stated that he did not know and was not acquainted with the defendant, and was not related to him; that he had formed and expressed no opinion as to the guilt or innocence of the defendant, and had no impression of the case unfavorable to him; that he could go in the jury box and return a verdict, under his oath as juror, guided by the evidence and charge of the court as to the law; whereupon said juror was accepted by the State and the defendant, and along with the other jurors impaneled for the trial of this cause.

"The court further finds that the said Proctor is qualified to serve as a juror in this case, and is an indifferent, impartial juror.

"Wherefore, the motion of the defendant to disqualify and withdraw said juror Proctor and declare a mistrial is denied by the court in the exercise of his discretion."

The finding of the court that the juror was qualified is conclusive and the exception thereto cannot be sustained. *S. v. Potts,* 100 N. C., 457.

The court, in effect, found that the evidence offered to prove the disqualification of the juror was not credible.

This motion was equivalent to what the common law designated as a challenge *propter affectum,* and fell into the category of a challenge to the favor rather than a challenge for principal cause, and the finding as a fact by the trial judge that a juror is indifferent is not reviewable on appeal. *Butler v. Ins. Co.,* 196 N. C., 203.

As to juror Foster Stanley, the defendant's contention was that Stanley was related by marriage to the deceased D. F. Barefoot. It appeared, however, that juror's uncle, Vance Gore (now deceased), had married Lew Baldwin; that Lew Baldwin's sister Alma had married one Barefoot, who was the father of the deceased; or, in other words, that juror Stanley's deceased uncle's wife's sister had married the father of the deceased. This would not constitute relationship by consanguinity

or affinity. The juror was in law not related by marriage to the deceased. *Bliss v. Caille,* 149 Mich., 601; 2 C. J., 378. The objection in that respect was properly overruled.

The defendant further complained that he had not had sufficient time within which to properly prepare his defense, and that two witnesses, Struthers and Carter, could not be procured, and excepted to the denial of his motion for continuance, and later moved to set aside the verdict.

It appears from the record that the homicide occurred on 9 August and trial was begun on the 27th.

Upon these motions the court below found the following facts:

"That during the progress of the trial, and while the jury was being selected, and before the jury was impaneled, the defendant stated that he had information that the juror Foster Stanley, who had theretofore been passed and accepted by the State and the defendant, was related to the deceased D. P. Barefoot, and requested that he be permitted to further examine the juror Stanley upon the *voir dire,* whereupon the court recalled the juror Stanley and reopened the *voir dire* for further interrogation by the defendant of the juror Stanley as to the relationship; that the said juror stated upon said examination that his wife was not related by blood or marriage to the deceased D. P. Barefoot; that he was not related to said D. P. Barefoot, and was not acquainted with him; that the juror's uncle, Vance Gore, a brother of the juror's mother, married a lady named Lew Baldwin; that the said Lew Baldwin was not related to the deceased in any way; if so, the juror did not know it."

"That during the progress of the examination, Hon. Jackson Greer, Sr., of counsel for the defendant, stated he had just had a conversation with one Leon Baldwin, who informed him that Lew Baldwin married Vance Gore, an uncle of the juror, and that Alma Baldwin, the sister of Lew Baldwin, married one Barefoot, who was the father of the deceased D. P. Barefoot; that at the time of the interrogation of the said juror the defendant had not exhausted the peremptory challenges allowed him by law, and had more than two challenges unused; that the defendant did not offer to challenge the said juror for cause, or peremptorily subsequent to said interrogation; that at the time the juror was drawn and called Vance Gore was dead, having died about three years ago, leaving one child surviving; that the said juror Stanley was an indifferent, impartial juror, and was not within the 9th degree of kinship, disqualifying a juror."

"The court further finds that the jurors selected and impaneled for the trial of this case were fair and impartial jurors."

"That the defendant was arraigned on Tuesday, 20 August, at which time he was represented by counsel, and pleaded not guilty; the trial was set for Tuesday, 27 August, and prior thereto and at the prelimi-

nary hearing, or coroner's inquest, on 12 August, the defendant was represented by counsel, Greer & Greer, counsel having stated upon arraignment that the defendant had not finally completed arrangements for representation, whereupon the court offered to appoint counsel to represent the defendant, which was not accepted."

"That the information with respect to the said jurors was brought to the attention of the court as soon as discovered by counsel in the case, and affidavits were filed upon the making of the motion for a new trial for the defendant Buffkin."

"It further appears to the court, and the court finds, that no statement in writing has been made, or filed, as to the evidence proposed to be elicited from or given by the witnesses Struthers or Carter."

"Thereupon, the said motion to set aside the verdict of the jury herein and to grant a new trial is, in the discretion of the court, overruled."

The facts found fully sustain the court's ruling.

Finding of fact by the court upon evidence that the juror was indifferent was conclusive and not reviewable in this Court. *S. v. Potts, supra; Butler v. Ins. Co., supra.*

During the argument to the jury defendant's counsel objected to the solicitor's reading to the jury excerpts from the opinion in *S. v. Daniel,* 139 N. C., 549. Whereupon the court stopped the argument and cautioned the jury, "telling them that counsel was not permitted to argue the facts in any other case or to read facts in any other case for any purpose except to explain and illustrate the application of a principle of law set forth in that case, and that the facts in that case had nothing to do with and should not be considered by the jury in a determination of the case they were trying."

His Honor's ruling was in strict accord with the principle laid down in *S. v. Cameron,* 166 N. C., 379, and *Harrington v. Wadesboro,* 153 N. C., 437.

The motion to nonsuit was properly denied. *S. v. Johnson,* 184 N. C., 637.

And there was evidence sufficient to go to the jury that the homicide was willful, deliberate, and premeditated. *S. v. Lipscomb,* 134 N. C., 689. The State's evidence, which was accepted by the jury, tended to show that the defendant had a party of two women and two other men with him in his car and had parked on a lonely shore of Lake Waccamaw at midnight. The deceased drove up and parked in three steps of him. The deceased did not know the defendant or any of those in the car with him. One of defendant's companions got out of his car, went to deceased's car, accused him of "butting in" on their party, and assaulted him. Deceased offered no resistance. Thereupon defendant got out of his car on the left side, armed with a pistol, walked around the front

of the car to within two or three steps of deceased and stood there several minutes, certainly an appreciable period of time, and then walked up to the deceased's car and shot him through the heart. Deceased had not spoken to defendant, and there was no provocation by word or act. Defendant then threatened to shoot the companion of deceased, Carey, and only when urged by one of the women in defendant's car did he leave, with the warning, "Don't call anybody's name here."

While proof of a motive for the homicide is not necessary where the evidence shows an intentional killing with deliberation and premeditation, the inference is permissible from the facts disclosed as to what transpired between defendant and Arp, coupled with defendant's warning "not to call anybody's name," that defendant was actuated by the purpose to prevent "butting in" on his party. But omitting that, there was ample evidence to show premeditation and deliberation. The State's evidence showed an unprovoked and heartless slaying.

As was said by the Court in *S. v. Lipscomb, supra:* "There was ample time for deliberation and premeditation by the defendant according to any rule that has been laid down upon the subject. No particular time is required for this mental process of premeditation and deliberation. The question always is whether, under all the facts and circumstances of the case, the defendant had previously and deliberately formed this particular and definite intent to kill, and then and there carried it into effect. This is a question for the jury to determine."

"The question as to whether or not there has been deliberation is not ordinarily capable of actual proof, but must be determined by the jury from the circumstances. It has been said that an act is done with deliberation, however long or short a time intervenes after the intent is formed and before it is executed, if the offender has an opportunity to recollect the offense or to be aware of what he is about to do, and its consequences." Citing Kerr on Homicide, sec. 72; *S. v. Benson,* 183 N. C., 795; and *S. v. McCormac,* 116 N. C., 1033.

In *S. v. Walker,* 173 N. C., 780, *Brown, J.,* uses this language: "The numerous cases in our reports upon this subject all declare that when the purpose or design to kill is formed with deliberation and premeditation, it is not necessary that such purpose or design shall be formed any definite length of time before the killing. No particular time is required for this process of premeditation or deliberation. When a fixed purpose to kill is deliberately formed, it is immaterial how long after the purpose to kill is put into execution."

This premeditation and deliberation, like any other fact, may be shown by circumstances, and in determining whether there was such premeditation and deliberation, the jury may consider the entire absence

of provocation and all the circumstances under which the homicide was committed. *S. v. Roberson,* 150 N. C., 837.

In determining the question of premeditation and deliberation, it is proper for the jury to take into consideration the conduct of the defendant, before and after, and all attendant circumstances, and it is immaterial how soon after resolving to kill the defendant carried his purpose into execution. *S. v. Evans,* 198 N. C., 82; *S. v. Miller,* 197 N. C., 445.

In *S. v. Evans, supra, Chief Justice Stacy* quotes with approval from Kerr on Homicide, sec. 72: ". . . the want of provocation, the preparation of a weapon, proof that there was no quarreling just before the killing may be considered by the jury, with other circumstances, in determining whether the act shall be attributed to sudden impulse or premeditated design."

Premeditation means thought over beforehand for some length of time, however short, but no particular time is required for the mental process of premeditation. Deliberation means revolving over in the mind. A deliberate act is one done in a cool state of the blood in furtherance of some fixed design. *S. v. Walker,* 173 N. C., 780; *S. v. Benson,* 183 N. C., 795; *S. v. Evans, supra.*

Defendant made numerous exceptions to the judge's charge; in fact, excepted to almost every clause of it, but points out no particular in which he contends the law was not correctly stated, and complains now only as to its arrangement, and as to the forceful language in which the contentions were stated.

This exception cannot be sustained. *S. v. Johnson,* 161 N. C., 264.

If any of the contentions of the defendant were omitted, or those of either side incorrectly stated, this should have been called to the attention of the court at the time. Failing to do so, he has no good ground for exception. McIntosh N. C. Prac. and Proc., sec. 580.

An examination of the comprehensive and carefully worded charge of the learned judge satisfies us that every phase of the case was properly presented to the jury, and that the definitions of murder in the first degree, murder in second degree, and manslaughter, as well as the law of self-defense, were in accord with the authoritative decisions of this Court.

We have examined the record with the care which the gravity of the issue demands, and we find

No error.

B. BALDWIN DANSBY v. NORTH CAROLINA MUTUAL LIFE INSURANCE COMPANY.

(Filed 22 January, 1936.)

1. Constitutional Law K a—

Under mandate of the Federal Constitution, Art. IV, sec. 1, and the acts of Congress enacted thereunder, the validity and effect of a judgment of another state must be determined by reference to its laws, and the judgment must be given such faith and credit as it would have in the courts of the state rendering it.

2. Judgments N a—

The only defenses that may be interposed to an action on a judgment of another state are that the court rendering the judgment was without jurisdiction, or that the judgment was procured by fraud.

3. *Same*—Upon demurrer in suit on foreign judgment, jurisdiction of foreign court must be determined in accordance with facts pleaded.

Where, in a suit on a judgment of another state, the defendant demurs, the only defense that may be considered is whether the court rendering the judgment had jurisdiction, since whether the judgment was procured by fraud cannot be considered on a demurrer, and the question of jurisdiction will be determined in accordance with the facts alleged in the complaint and recited in the judgment attached thereto, since the demurrer admits for its purposes the facts properly pleaded.

4. Judgments N b—Court of state rendering judgment held to have acquired jurisdiction under its laws as construed by its courts.

This action was instituted upon a judgment by default rendered by a county court of the State of Mississippi upon a policy of insurance issued by a domestic company. It appeared from the complaint and the judgment attached thereto that at the time of instituting action in the courts of Mississippi defendant company was no longer doing business in Mississippi, and process was served on it by service on its Insurance Commissioner, Mississippi Code of 1930, sec. 497, and *alias* summons served by delivering a true copy of same to the resident agent who represented defendant company at the time the policy was issued, and by mailing a copy by registered mail to the home office of defendant company in this State, Mississippi Code of 1930, sec. 4167. *Held:* Under the statutes of the State of Mississippi, as construed by its Supreme Court, the county court of Mississippi obtained jurisdiction of the action, and defendant's demurrer in the action on the judgment of the Mississippi court was properly overruled.

APPEAL by defendant from *Grady, J.*, at September Term, 1935, of DURHAM. Affirmed.

Plaintiff, a citizen of the State of Mississippi, instituted his action against the North Carolina Mutual Life Insurance Company, a North Carolina corporation, in the Superior Court of Durham County, upon a judgment rendered in the county court of Hinds County, Mississippi.

Plaintiff alleged "that on 19 July, 1933, the county court of the First Judicial District of Hinds County, Mississippi, a court of competent jurisdiction, duly and regularly rendered and entered a final judgment in favor of plaintiff in the above entitled action and against the defendant in the sum of $1,316.28," with interest and costs, and plaintiff attached to his complaint a certified and exemplified copy of the judgment as follows: "This cause coming on this day to be heard, this being a regular term of this court for the trial of civil cases, and it appearing to the court that the plaintiff B. Baldwin Dansby is a resident citizen of the First Judicial District of Hinds County, Mississippi, and that the defendant North Carolina Mutual Life Insurance Company is a corporation incorporated under the laws of the State of North Carolina and domiciled at Durham, North Carolina; that on the tenth (10th) day of December, 1921, and for some time prior thereto and thereafter, said defendant was engaged in the Mutual Life Insurance business in the State of Mississippi, and maintained an office in the city of Jackson, Hinds County, Mississippi; that on said date and for some time prior thereto and thereafter, one R. J. Garrett, Jr., a resident of said city, county, and State, was an agent of said defendant, and solicited business for said defendant; that on 10 November, 1921, the plaintiff, upon the solicitation of said agent, applied to the defendant for a policy of insurance, and on 10 December, 1921, said defendant issued and delivered to plaintiff an insurance policy in the sum of two thousand ($2,000.00) dollars, for which plaintiff was to pay a semiannual premium of forty-six and 48/100 dollars ($46.48); that plaintiff paid all of said premiums promptly as the same became due from 10 December, 1921, up to 10 June, 1932, or an aggregate sum of nine hundred seventy-six and 08/100 dollars ($976.08); that on 8 June, 1932, plaintiff, in accordance with the terms and provisions of said policy, applied to defendant for the payment of the cash surrender or loan value thereof, then amounting to five hundred four and no/100 dollars ($504.00), and defendant refused and still refuses to pay plaintiff said amount; that plaintiff filed this suit against said defendant for the recovery of said premiums, together with six per cent (6%) interest per annum from their respective dates of payment; that said defendant is not now engaged in doing any insurance business in the State of Mississippi, and was not so engaged on 28 December, 1932, and has no agent in this State upon whom process may be served, and had no such agent on 28 December, 1932; that on 14 October, 1932, the defendant was duly and legally served with process in the manner and form required by section 497 of the Mississippi Code of 1930; that is to say, by serving a true copy thereof on George D. Riley, Insurance Commissioner of the State of Mississippi; that on 2 December, 1932, an *alias* summons was issued for said defend-

ant, which was duly and legally served upon the defendant on 28 December, 1932, in the manner and form required by section 4167 of the Mississippi Code of 1930; that is to say, by delivering a true copy of same to R. J. Garrett, Jr., a person who was an agent of and represented the within named defendant corporation at the time the transaction out of which this suit arises took place; that on 6 December, 1932, the clerk of the county court mailed a copy of said *alias* summons to the home office of the defendant corporation by registered mail, and filed a certificate herein showing such mailing, and made a minute thereof upon his docket; that said defendant was thereby required to file a plea, answer or demurrer to plaintiff's declaration, but has wholly failed so to do, and neither party having demanded a trial by jury, and the plaintiff being present in court and represented by counsel and announcing ready for trial and demanding judgment against the defendant, the defendant was called in a loud voice, in open court, but came not, wholly making default, in that it failed to appear either by an agent or by attorney, and failed to file any plea whatever, and the court having carefully considered the evidence, both oral and documentary, offered by the plaintiff, is of the opinion that the plaintiff is entitled to recover of the defendant the amount sued for;

"It is therefore ordered and adjudged that B. Baldwin Dansby do have and recover of and from the defendant North Carolina Mutual Life Insurance Company, a corporation, incorporated under the laws of the State of North Carolina and domiciled at Durham, North Carolina, the sum of nine hundred seventy-six and 08/100 dollars ($976.08), being the total amount of the premiums paid under said policy, and three hundred and forty and 20/100 dollars ($340.20), being six per cent (6%) interest per annum on such premiums for their respective dates of payment, up to 10 October, 1932, or the total sum of one thousand three hundred sixteen and 28/100 dollars ($1,316.28), together with six per cent (6%) interest thereon from 10 October, 1932, until paid, and all costs of this, for which and all of which let execution issue."

The defendant demurred on the ground that the judgment sued on was void for the reason that it appeared on its face the court of the State of Mississippi had no jurisdiction to render the judgment because no summons was legally served upon the defendant.

From a judgment overruling the demurrer, defendant appeals.

Hedrick & Hall for plaintiff.
Bryant & Jones for defendant.

DEVIN, J. The only question presented by this appeal is whether the service of the original process in the manner set forth in the Mississippi

judgment was a valid service under the laws of the State of Mississippi. The validity and effect of a judgment of another state must be determined by reference to the laws of the state where rendered.

Art. IV, sec. 1, of the Constitution of the United States commands that full faith and credit shall be given in each state to the judicial proceedings of every other state. And the acts of the Congress enacted in the exercise of the power thus granted specifically directs that judgments "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." *Milwaukee County v. White Co.*, opinion by *Mr. Justice Stone*, U. S. Supreme Court Advance Opinions, Vol. 80, p. 155 (Dec. 9, 1935); 34 C. J., 1128.

When such judgment is made the basis of an action, it is conclusive on the merits in every other state if it appear that the court in which it was rendered had jurisdiction of the parties and the subject matter. *Morris v. Burgess*, 116 N. C., 40; 2 Black Judgments, sec. 857. Recovery upon it can be resisted only on the grounds that the court which rendered it was without jurisdiction. *Milwaukee Co. v. White Co., supra.* Or for fraud in its procurement. *In re Osborne*, 205 N. C., 716. Fraud in the procurement of the judgment, however, could not be considered on a demurrer.

This makes it necessary for us to examine the pertinent statutes of the State of Mississippi and the decisions of the Supreme Court of that State interpreting those statutes.

The judgment rendered by the Mississippi courts recites that the original action was upon a breach of the contract contained in a policy of insurance issued by defendant Insurance Company to plaintiff on 10 December, 1921; that from and subsequent to said date defendant was engaged in the life insurance business in Mississippi, maintained an office in the city of Jackson, in Hinds County, and that R. J. Garrett, Jr., a resident of said county and state, was the agent of defendant upon whose solicitation the policy sued on was obtained; that at the date of issuance of process in that case defendant was not then engaged in doing any insurance business in Mississippi and had no agent in that State upon whom process could be served; that "on 14 October, 1932, the defendant was duly and legally served with process in the manner and form required by section 497 of the Mississippi Code of 1930; that is to say, by serving a true copy thereof on George D. Riley, Insurance Commissioner of the State of Mississippi."

Defendant having demurred, all the facts set out in the complaint and the recital of facts in the judgment attached to and made a part of the complaint, are for the purpose of the demurrer deemed to be true.

Section 497 of the Mississippi Code of 1930 is as follows:

"497. *Venue-actions against insurance companies.*—Actions against insurance companies may be brought in any county in which a loss may occur, or, if on a life policy, in the county in which the beneficiary resides, and process may be sent to any county, to be served as directed by law; and such actions may also be brought in the county where the principal place of business of such corporation or company may be, and in case of a foreign corporation or company, may be brought in the county where service of process may be had on an agent of such corporation or company or service of process in any suit or action, or any other legal process, may be served upon the Insurance Commissioner of the State of Mississippi, and such notice will confer jurisdiction on any court in any county in the state where the suit is filed, provided the suit is brought in the county where the loss occurred, or in the county in which the plaintiff resides."

The language of the statute is sufficiently broad to include both insurance companies doing business in the state and those which had ceased to do business in the state, and there is nothing in the context to indicate a restricted meaning.

So that the recital in the judgment that the summons was duly and legally served with process by serving a true copy thereof on the Insurance Commissioner in the manner required by section 497 would seem to constitute an averment sufficient to show jurisdiction, nothing else appearing.

It is true the judgment proceeds further with the recital that on 2 December, 1932, an *alias* summons was served under section 4167 of the Mississippi Code, which authorizes service of process on any person who represented the corporation at the time of the transaction out of which the suit arose.

Section 4167 is as follows: "Process may be served upon any agent of said corporation found within the county where the suit is brought, no matter what character of agent such person may be; and in the absence of an agent, it shall be sufficient to serve the process upon any person, if found within the county where the suit is brought, who represented the corporation at the time of the transaction out of which the suit arises took place, or if the agency through which the transaction was had be itself a corporation, then upon any agent of that corporation upon whom process might have been served if it were the defendant. . The officer serving the process shall state the facts, upon whom issued, etc., in his return, and service of process so made shall be as effectual as if a corporation of this state were sued, and the process has been served as required by law; but, in order that defendant corporation may also have effectual notice, it shall be the duty of the clerk to immediately mail a

copy of the process to the home office of the corporation by registered letter, the postage and fees of which shall be taxed as other costs. The clerk shall file with the papers in the cause a certificate of the fact of such mailing, and make a minute thereof upon the docket, and no judgment shall be taken in the case until thirty days after the date of such mailing."

The defendant, however, contends that construing this section in connection with the preceding section 4166, it would seem the reference is to corporations doing business in the state.

Section 4166 is as follows: "Any corporation claiming existence under the laws of any other state, or of any other country foreign to the United States, found doing business in this state, shall be subject to suit here to the same extent that corporations of this state are, whether the cause of action accrued in this state or not."

In the argument and in the briefs section 5165 of the Mississippi Code was cited. The material parts of this section are as follows:

"Sec. 5165—No foreign insurance, indemnity, or guaranty company or other insurer shall be admitted and authorized to do business in this state until:

"Third: It shall, by a duly executed instrument filed in his office, constitute and appoint the Commissioner of Insurance, and his successor, its true and lawful attorney, upon whom all process in any action or legal proceeding against it may be served, and therein shall agree that any process against it which may be served upon its said attorney shall be of the same force and validity as if served on the company, and the authority thereof shall continue in force irrevocable so long as any liability of the company remains outstanding in this state. The service of such process shall be made by leaving a copy of the same in the hands or office of the said commissioner. Copies of such instrument certified by the said commissioner shall be deemed sufficient evidence thereof, and service upon such attorney shall be deemed sufficient service upon the principal."

"Fourth: It shall appoint as its agent or agents in this state some resident or residents thereof, other than the said commissioner; such appointment to be made in writing, signed by the president and secretary or manager or general agent, and filed in the office of the commissioner, authorizing the agent to acknowledge service of process for and on behalf of the company, and consenting that service of process on the agent shall be as valid as if served upon the company, according to the laws of this state, and waiving all claims of error by reason of such service."

"Fifth: It shall obtain from the said commissioner a certificate that it has complied with the laws of the state and is authorized to make contracts of insurance."

Our attention has been called to decisions of the Supreme Court of Mississippi construing this statute in cases involving default judgments against foreign insurance companies, the effect of which defendant contends is to hold that, in order to sustain a judgment by default, the requirements of the statute, section 5165, with reference to the execution of the statutory power of attorney to the Commissioner of Insurance upon whom service might be had, must affirmatively appear. *Fire Ins. Co. v. Sayle,* 107 Miss., 169; *National Surety Co. v. Board of Commissioners,* 120 Miss., 706; *Casualty Co. v. Gilmer,* 146 Miss., 22.

But in the latest utterance of the Supreme Court of Mississippi on the subject (1934), in *Brotherhood of Railway Trainmen v. Agnew,* 170 Miss., 614 (155 So., 204), it was held that, where the insurance company had not complied with the requirement to constitute the Insurance Commissioner its agent for service, nor appointed a resident agent, service upon one with whom numerous persons and the insured had dealt was sufficient to sustain a default judgment.

And in another decision between the same parties, *Brotherhood of Railway Trainmen v. Agnew,* 170 Miss., 615 (155 So., 205), rendered by the Supreme Court of Mississippi on the same date, it was held that the recital in the default judgment that service had been had on the person with whom plaintiff and defendant had dealt could be upheld under section 4167 of the Mississippi Code of 1930.

We quote from this last decision the following: "As said by us in the recent case, *Walton v. Gregory,* 170 Miss., 129 (154 So., 717), in respect to the judgments of courts of general jurisdiction, unless the contrary affirmatively appears from the record, all jurisdictional facts are conclusively presumed to have existed, whether there be recitals in the record to show them or not, and this rule applies, although the judgment attacked was rendered by default on constructive service of process alleged to be defective. The presumption mentioned is conclusive on a collateral attack; and on a direct attack, as is the case here, the presumption still stands unless the defendant affirmatively shows that the defect complained of existed as a matter of fact."

This language from the highest court of the state in which the judgment set forth in the complaint was rendered strengthens our conclusion that lack of jurisdiction does not appear on the face of the complaint and the judgment attached thereto.

It appearing from the recitals in the Mississippi judgment that, at the date the contract of insurance was entered into, defendant was engaged in the mutual life insurance business in Mississippi, maintaining an office and an agent in the city of Jackson, which is admitted by the demurrer, it could not thereafter cease business therein, withdraw its

agents, and not be held amenable to an action arising from its alleged breach of said insurance contract, under the provisions of the statute then and now in force in the State of Mississippi.

Giving full faith and credit to the judicial proceedings of that state, the judgment of the court below overruling the demurrer must be

Affirmed.

THOS. L. LAY v. GAZETTE PUBLISHING COMPANY.

(Filed 22 January, 1936.)

1. Libel and Slander A d—

Malice may not be inferred by the jury from a false publication when defendant's uncontradicted evidence rebuts the presumption by showing that the publication was made in good faith through error, and that a correction and retraction was published upon defendant's ascertaining the facts.

2. Libel and Slander D e—

Plaintiff may not recover punitive damage of a defendant in an action for libel or slander in the absence of malice, or wantonness and recklessness on the part of defendant. C. S., 2430.

3. Libel and Slander A b—

Where plaintiff's evidence establishes a false publication, and defendant's evidence shows that the publication was made in good faith through error, and that a correction and retraction was published upon defendant's ascertaining the facts, plaintiff is entitled to recover the actual damage sustained by him. C. S., 2430.

4. Libel and Slander A a—Words published of defendant held actionable per se.

Plaintiff was a textile operative. Defendant publishing company printed in its newspaper a news item falsely stating that defendant had been arrested as a ringleader in a disturbance occurring during a strike. *Held:* The words were actionable *per se* as tending to injure plaintiff by preventing him from securing employment in his calling as a textile operative, entitling plaintiff to recover nominal damages, at least.

5. Libel and Slander D d—Nonsuit should be denied when plaintiff's evidence establishes false publication of words actionable per se.

Where plaintiff in an action for libel introduces evidence tending to show a false publication of words actionable *per se*, defendant's motion for judgment as of nonsuit should be denied, especially when plaintiff introduces evidence of actual damage resulting from such publication.

APPEAL by plaintiff from *Hill, Special Judge,* at May Term, 1935, of GASTON. Reversed.

This is an action to recover damages, both actual and punitive, for the malicious publication by the defendant in the issue of its newspaper, *The Gastonia Daily Gazette,* of 6 September, 1934, of a news item concerning the plaintiff which, it is alleged in the complaint, is false and libelous.

The plaintiff is now and was prior to 6 September, 1934, a textile operative. He is about 33 years of age and prior to said date had been employed from time to time since he was 16 years of age by manufacturers of textiles in Gaston and other counties in North Carolina. He was and is now dependent upon such employment as a means of earning a living for himself and his wife and children. During the year 1934 he was a resident of Lincoln County, North Carolina, where, prior to 6 September, 1934, he had been employed by a textile manufacturer doing business in said county. Commencing during the spring of 1934 and continuing through the summer and until some time during the fall of 1934, there was a strike by textile operatives in Lincoln County, and in other counties in North Carolina. The plaintiff, as a member of the textile union which had ordered the strike, at its commencement joined in the strike. Neither the plaintiff nor his wife, who is also a textile operative, have been able to secure employment by a manufacturer of textiles doing business in North Carolina since the ending of the strike some time during the fall of 1934.

The defendant is the publisher of the *Gastonia Daily Gazette,* a newspaper which circulates throughout Gaston County, and other counties in North Carolina. Among its subscribers and readers are officers and employees of textile mills, and others interested in the manufacture of textiles.

In its issue of 6 September, 1934, the defendant published in the *Gastonia Daily Gazette,* a news item as follows:

"SEVENTY-FIVE PICKETS LOCKED UP IN LINCOLNTON.

"Lincolnton, N. C., Sept. 6.—Seventy-five men and women at the Roseland Mill were jailed this afternoon by Sheriff Forney Reinhart on charges of trespassing. They were interfering with the paying off of a group of Loyal Workers, and became incensed when they did not receive any pay. They created a disturbance on the mill grounds and were promptly arrested and thrown into the county jail. Tom Lay, Local Union Leader, was among the ring leaders arrested.

"Other Union Leaders said that the flying squadron at Shelby had been notified, and that they were en route to Lincolnton to free their seventy-five comrades from jail. County officers here were prepared to resist them. The county jail is full, as the Sheriff has been very active."

Thereafter the plaintiff wrote and caused to be delivered to the defendant a letter as follows:

"LINCOLNTON, N. C., December 31, 1934.

"MR. H. A. QUERRY, Editor,
Gastonia Daily Gazette,
Gastonia, N. C.

"DEAR MR. EDITOR:

The news article printed in the *Gastonia Daily Gazette* on Thursday, 6 Sept., 1934, on the front page of your paper, stating that 'Tom Lay, Local Union Leader, was among the ring leaders,' is false and defamatory and each and every word related in said article hereinafter mentioned concerning me is false and defamatory. The said article in reference more particularly reads as follows:

(Here follows copy of the news item as published by the defendant in the issue of the *Gastonia Daily Gazette* on 6 September, 1934.)

"I hope to hear from you in the immediate future. I want the correction and a retraction made.

Yours truly,
TOM LAY,
Lincolnton, N. C."

Thereafter, in the issue of its newspaper, the *Gastonia Daily Gazette,* dated 2 January, 1935, the defendant published the following:

"TOM LAY WAS NOT ARRESTED SEPT. 6.

"Gazette corrects error relative to arrest of Tom Lay in connection with strike riots.

"On Sept. 6, 1934, the Gazette published a story from its Lincolnton correspondent about the arrest of pickets at the Roseland Mill in Lincoln County. It was stated in the story on the authority of the Lincolnton correspondent that Tom Lay was one of the ring leaders in the strike, and was placed in jail. *The Gazette* learns from Mr. Lay and from the Sheriff of Lincoln County that he was not arrested. In justice to Mr. Lay, this newspaper corrects the mistaken report. Mr. Lay was not arrested. This correction is made in line with the policy of this newspaper in correcting any mistakes in the publications that may be made and it is glad to make the correction in the interest of truth and accuracy."

All the evidence at the trial showed that the plaintiff was not arrested in Lincolnton on 6 September, 1934; that he was not placed in jail in said county; and that he took no part as leader or otherwise in any disorder that day at the Roseland Mill. The plaintiff was a member of the United Textile Workers and was active in presenting the cause of the union to his fellow operatives and to the public. He made speeches and published articles in the local newspapers in support of the union and its policies.

Evidence offered by the plaintiff showed that he is a man of good character, and was a good worker.

A. F. Reinhart, as a witness for the plaintiff, testified as follows:

"I am sheriff of Lincoln County. I took Tom Lay with me to the Roseland Mill on 6 September, 1934, because I wanted a union man to handle the union people. He told them to do what they did peaceably. I have known Tom Lay all my life. His general reputation is good. He was a union man, not prominent, but stood pretty high with the union people. I looked on him as one of their leaders. I did not arrest him on 6 September, 1934, and did not tell anyone that I had."

W. E. Buff, as a witness for the plaintiff, testified as follows:

"I am chief deputy of Lincoln County. I have known Tom Lay off and on for thirty years. His character is good. He went with me and came back with me from the Roseland Mills on 6 September, 1934. There was no disturbance or violence at the mill that day among the people there. They were simply milling around and talking. Tom Lay went to the jail and talked to the 40-odd prisoners there. He told them that he would have them bonded out by sundown. He talked like one in authority."

Robert A. Wood, as a witness for the plaintiff, testified as follows:

"I am superintendent of the Gray Mill. I know Tom Lay. He worked for me about fifteen years ago. His general character and reputation are very good. He was high strung and arbitrary. Outside of that he was all right. He would scrap a little if necessary. He has not applied to me for work since September, 1934."

There was evidence for the plaintiff tending to show that neither he nor his wife had been able to get work as textile operatives since the publication by the defendant in its newspaper of the news item on 6 September, 1934, although both had applied to officers of numerous cotton mills for work.

Evidence offered by the defendant tended to show that the plaintiff is a man of bad character; that he had made no effort to get work for himself since the end of the strike, and that he had objected to efforts by his wife to get work for herself.

Thomas H. Whitesides, as a witness for the defendant, testified as follows:

"I am superintendent of the Thread Spinners Mill, at Lincolnton. Tom Lay lives in our mill village. He has not applied to me for work since the end of the strike. On one occasion his wife, in his absence, applied for work. He came in while she was applying for work and told her that neither he nor she could work on account of their relation to the union. If I knew that a man who had applied to me for work had been a ring leader in a strike, and had interfered with loyal workers, thus creating a disturbance, I would not employ him unless I was sure that he had reformed. If he had not reformed, I would not employ him."

Mike Whitener, as a witness for the defendant, testified as follows:

"I live in Lincolnton. I am superintendent of the Rudisill Spinning Company, known in this case as the Roseland Mill. I have known Tom Lay for eighteen months or two years. His reputation is bad. He has not applied to me for work. I have employed several men since the strike who were convicted of simple trespass at the mill on 6 September, 1934."

A. B. Claytor, as a witness for the defendant, testified as follows:

"I am the editor of the *Lincoln County News*. I reported the article in question to the *Gastonia Daily Gazette*, at Gastonia, N. C. The article was published on 6 September, 1934, substantially as I reported it. There was a considerable crowd standing around the jail in Lincolnton that day. I heard one man say that the officers had Tom Lay. I asked the jailer if Tom Lay had been arrested. He said that he was up there in the jail with the rest of the prisoners. I thanked him and went to my office. I called the *Gazette* office at Gastonia by telephone, and reported the story. I never heard any more about it until some time in January, 1935. Tom Lay was well known in Lincolnton as a union leader. He was active in the strike. I am not a regular reporter for the *Gastonia Daily Gazette*, but from time to time send the *Gazette* news from Lincolnton. I published in my paper substantially the same story about Tom Lay as that published by the defendant. Upon learning that he had not been arrested or placed in jail, I published a correction of the story."

Both H. A. Querry, the editor, and J. W. Atkins, the manager of the *Gastonia Daily Gazette*, testified as witnesses for the defendant. Each said that he had no ill-will or malice toward the plaintiff at the time of the publication, and that in publishing the news item referring to the plaintiff, they relied upon information furnished by Mr. Claytor, editor of the *Lincoln County News*.

At the close of all the evidence, the motion of the defendant for judgment as of nonsuit (C. S., 567) was allowed. The plaintiff excepted.

From judgment dismissing the action as of nonsuit, the plaintiff appealed to the Supreme Court, assigning as error the order of the court allowing defendant's motion for judgment as of nonsuit, and the judgment dismissing the action.

J. L. Hamme for plaintiff.
Bulwinkle & Dolley for defendant.

CONNOR, J. There was no evidence at the trial of this action tending to show affirmatively that the publication by the defendant of the news item in which reference was made to the plaintiff was malicious as alleged in the complaint. Any inference to that effect, which it might have been permissible for the jury to draw from the fact that certain statements in the news item referring to the plaintiff were false, was rebutted by the uncontradicted evidence offered by the defendant to the contrary. For this reason, without regard to the provisions of the statute, C. S., 2430, the plaintiff was not entitled to recover punitive damages in this action. It is a well settled principle of the law of damages that such damages may be awarded by the jury only when the conduct of the defendant resulting in injury to the plaintiff was not only wrongful but also malicious, or wanton and reckless. See *Ford v. McAnally,* 182 N. C., 419, 109 S. E., 91.

All the evidence shows that although certain statements in the news items published by the defendant in its newspaper, and referring to the plaintiff were false in fact, the publication was in good faith, and was the result of an honest mistake, and that there were reasonable grounds for the belief of both the defendant and its correspondent at Lincolnton that the statements were true. The evidence further shows that within ten days after its receipt of the letter of the plaintiff, dated 31 December, 1934, the defendant published in its newspaper a full and fair correction, apology, and retraction, as requested by the plaintiff. For this reason the plaintiff is entitled to recover of the defendant in this action only his actual damages. C. S., 2430. See *Osborn v. Leach,* 135 N. C., 628, 47 S. E., 811. He is not entitled to recover punitive damages, but there was evidence from which the jury could have found that plaintiff had sustained actual damages as the result of the publication by the defendant of a false statement to the effect that he had been arrested for leading and participating in a riot by members of a labor union.

If the statements in the news item published by the defendant in its newspaper and referring to the plaintiff are defamatory and libelous *per se,* the plaintiff is entitled to recover of the defendant at least nominal damages. *Deese v. Collins,* 191 N. C., 749, 133 S. E., 92. Under well settled principles of the law of libel, the publication by the defend-

ant in its newspaper of a false statement that the plaintiff had been arrested in Lincoln County on a charge of leading a riot at the Roseland Mill, participated in by members of the union of which he was a ring leader, was libelous *per se*. Such statement was calculated to injure the plaintiff and to prevent him from securing employment as a textile operative by manufacturers on whom he was dependent for employment. See *Pentuff v. Park*, 194 N. C., 146, 138 S. E., 616.

There was error in the allowance by the trial court of defendant's motion for judgment as of nonsuit, and in the judgment dismissing the action. The judgment is therefore

Reversed.

J. H. BOWEN AND WIFE, PELLA BOWEN, AND DR. E. H. BOWLING, v. THE FIDELITY BANK.

(Filed 22 January, 1936.)

1. Damages F b—

When plaintiff proves breach of contract he is entitled to nominal damages at least, but may recover substantial compensatory damages only upon proof of such damages by the greater weight of the evidence, and that such damages were naturally and proximately caused by the breach of contract.

2. Damages A a—

Compensatory damages are allowed to recompense a party for an injury, and should as nearly as possible place the injured party in the position he would have occupied had he not suffered the injury complained of.

3. Mortgages H p—Mortgagor held entitled to nominal damages only for wrongful foreclosure in absence of showing of actual damages.

Plaintiffs, a mortgagor and a purchaser from the mortgagor of a part of the lands mortgaged, instituted action against the mortgagee for breach of contract, plaintiffs alleging that the mortgagee agreed to release that part of the lands sold from the lien of the instrument upon the assignment to him of the purchaser's note secured by deed of trust on such part, and that the mortgagee breached the contract by causing the original deed of trust on the entire tract to be foreclosed. It appeared that the mortgagor obtained, as the purchase price of the land sold, in addition to the purchase money note hypothecated, certain lots conveyed to him by his purchaser. It further appeared that the mortgagee first foreclosed under the instrument securing the purchaser's collateral note, but that the sale was not consummated because of defect in description, and that the mortgagee later caused the original instrument on the entire tract to be foreclosed. The jury awarded the purchaser substantial damages, but under instructions from the court awarded the mortgagor nominal dam-

ages only. *Held:* In the absence of allegation that the sale of the part of the lands agreed to be released from the lien of the original instrument would have brought a sum sufficient to preserve the mortgagor's equity in the balance of the tract, or of evidence as to its value, the mortgagor is entitled to nominal damages only, since the mortgagor retained title to the lots conveyed to him by his purchaser, and the hypothecated note was credited on his indebtedness to the mortgagee, and he thus received the benefit of the entire purchase price of the part of the lands sold by him, and was in the same position he would have occupied if the mortgagee had not breached his contract.

4. Contracts F c—

In an action for breach of contract, a demurrer cannot be sustained if the allegations of the complaint are sufficient to entitle plaintiff to at least nominal damages.

5. Pleadings G a—

Allegation without proof and proof without allegation are equally fatal.

APPEAL by defendant from *Daniels, Emergency Judge,* at March Term, 1935, of DURHAM. Reversed.

J. H. Bowen and wife brought their action against defendant bank to recover damages for failure to release certain land from a deed of trust which had been executed by E. H. Bowling. Bowen alleged substantially that E. H. Bowling, then the owner of 32.6 acres of land, had executed a deed of trust thereon in the sum of $4,250, and that this deed of trust was held by defendant bank to secure a debt of Bowling in the sum of $1,780; that Bowen agreed to purchase 9.65 acres of this land from Bowling and in payment to give Bowling certain lots valued at $3,400, and, in addition, a note of $1,600 to Bowling, secured by deed of trust on the 9.65 acres, this agreement conditioned upon Bowling's securing release of the 9.65 acres from the operation of the deed of trust on the entire tract of 32.6 acres; that the defendant bank agreed to release the 9.65 acres on condition that Bowling place with it as additional collateral to his notes the $1,600 deed of trust of Bowen to Bowling on the 9.65 acres, and that pursuant to this agreement conveyances were executed and delivered, and the $1,600 paper delivered to Bowling was by him turned over to the bank as collateral to his notes; that the bank failed to release the 9.65 acres and later foreclosed on the entire tract of 32.6 acres, including the 9.65 acres, and title thereto was conveyed to an innocent purchaser, whereby Bowen lost his land. And Bowen asked damages for the market value of the 9.65 acres, less this $1,600 note and deed of trust thereon.

Pending the action, E. H. Bowling was allowed to become a party, and to file an intervening complaint. In his intervening complaint Bowling set forth the transaction substantially as Bowen had done in his complaint, set out in detail the agreement between him and Bowen with

reference to the 9.65 acres (1929), Bowen's agreement to purchase at the price of $5,000, the conveyance to Bowling of lots valued at $3,400, execution of note and deed of trust to Bowling of $1,600 on the 9.65 acres "upon condition that Bowling secure a release of said 9.65-acre tract from the operation of the original deed of trust, which covered the entire 32.6-acre tract, and further upon condition that E. H. Bowling secure release from the First National Bank of Durham of said 9.65-acre tract from the operation of a lien existing by reason of a judgment against E. H. Bowling;" that this was agreed to by all the parties on condition that Bowling turn over the $1,600 note and deed of trust to defendant bank as collateral security for his notes; that the conveyances were executed and Bowling immediately turned over the $1,600 note and deed of trust to defendant bank; that the First National Bank released the lien of its judgment, but that defendant Fidelity Bank failed to release the 9.65-acre tract from its deed of trust.

That thereafter, in September, 1932, the defendant bank instructed the trustee in the $1,600 deed of trust to sell the 9.65 acres under the power contained in the deed of trust; that several sales were made, the last being on 27 October, 1932, in the sum of $1,044, but the sale was not consummated because "the bidder declined to take title to said 9.65 acres of land, suggesting as his only reason that there was some error in the description in the deed of trust;" that thereafter, in January, 1933, defendant bank instructed the trustee to sell under the original deed of trust on the entire tract of 32.6 acres, which was done, and title conveyed to the purchaser, Johnson, in March, 1933.

And the intervening plaintiff Bowling alleges his damages in the following language: "10. That by the wrongful foreclosure on 18 January, 1933, the defendant corporation, the Fidelity Bank, acted in absolute disregard of the solemn contract made with the intervening plaintiff, although the contract had been fully performed on the part of the intervening plaintiff; that the said property containing 9.65 acres was and is a valuable tract of land; that it is one of the few old grist mill sites in this section of North Carolina; that the said mill had been in operation for over a half a century; that on 18 January, 1934, said mill site, containing the 9.65 acres, was well worth the sum of $5,000; that the intervening plaintiff's loss and embarrassment caused by the wrongful acts of the defendant was intensified by reason of the eviction, under the deed of Johnson embracing the 32.6-acre tract, of J. H. Bowen, who had relied upon the representations of E. H. Bowling as to the release contract made with the defendant corporation for Bowen's benefit."

Defendant bank filed answers denying it had agreed to release the land, or that it was liable to either plaintiff.

Both the plaintiff Bowen and the intervening plaintiff Bowling offered evidence in support of the allegations in their complaints, and the defendant likewise offered evidence in contradiction. Plaintiff offered evidence showing that, upon the sale under the original deed of trust on the 32.6 acres in 1933, the land brought $2,700, and that the trustee made report showing that after payment of notes of E. H. Bowling $1,780, note to East Durham branch $333.19, and all taxes and costs of sale, there was no surplus. In the course of examination of intervening plaintiff E. H. Bowling the following questions were asked: "Q. Have you an opinion satisfactory to yourself as to the value of the 22 acres of land? Court: Value of the 22 acres? Mr. Hedrick: 22 acres remaining after taking off the 9.65 acres. (Objection.) Court: As I recall the complaint of Dr. Bowling, his complaint is that he was injured by reason of the sale of 9.65 acres. He does not complain about any injury as to the sale of the rest of it."

The following issues were submitted to the jury, who for their verdict answered them as follows, to wit:

"(1) Did the defendant enter into an agreement to release the 9.65-acre tract of land from the 32.6-acre tract embraced in the $4,250 deed of trust, as alleged in the complaint and in the intervening complaint?"

"A. Yes."

"(2) If so, did the defendant commit a breach of the agreement to release the 9.65-acre tract of land from the $4,250 deed of trust, as alleged in the complaint and in the intervening complaint?"

"A. Yes."

"(3) If so, what amount of damages, if any, is the plaintiff J. H. Bowen entitled to recover?"

"A. $2,400."

"(4) If so, what amount of damage is the intervening plaintiff, Dr. E. H. Bowling, entitled to recover of the defendant?"

"A. $1.00."

There was judgment on the verdict in favor of plaintiff Bowen, from which defendant noted appeal. Defendant, however, abandoned its appeal as to Bowen, and, on motion of appellees, Bowen and wife, the appeal as to them is dismissed.

Upon motion of intervening plaintiff, E. H. Bowling, the court ordered that the verdict on the fourth issue be set aside as a matter of law, and to this ruling defendant the Fidelity Bank excepted and appealed.

Egbert L. Haywood for Dr. E. H. Bowling.

Fuller, Reade & Fuller for defendant, the Fidelity Bank.

DEVIN, J. The only question presented by this appeal is whether the court erred in setting aside the verdict on the fourth issue, as a matter of law.

Upon this issue the court had charged the jury as follows:

"If you have answered the first and second issues 'Yes,' then I charge you that if you believe the evidence in this case, or find the facts to be as it tends to prove, you cannot award to Dr. Bowling more than nominal damages, that is, a small sum of money, for instance, a penny, or dollar, or five dollars, or some such amount. The court further charges you that if you believe the evidence and find the facts to be as they tend to prove, you cannot award to Dr. Bowling any substantial damages because there is no evidence of actual damage suffered by him as a result of the alleged breach of contract."

In a suit for damages for breach of contract, proof of the breach would entitle the plaintiff to nominal damages at least. *Hutton v. Cook,* 173 N. C., 496. But to entitle him to substantial compensatory damages he must both allege and offer evidence sufficient to satisfy the jury by the greater weight thereof that he has suffered substantial damage, naturally and proximately caused by the breach.

This the intervening plaintiff has failed to do.

It has been uniformly held by the courts, and stated by text-writers, that compensatory damages are allowed as indemnity to the person who suffers loss, in satisfaction and recompense for the loss sustained. The purpose of the law is to place the party as near as may be in the condition which he would have occupied had he not suffered the injury complained of. 8 R. C. L., 433. As was said by *Walker, J.,* in the leading case of *Machine Co. v. Tob. Co.,* 141 N. C., 284: "Generally speaking, the amount that would have been received if the contract had been kept and which will completely indemnify the injured party is the true measure of damages for its breach."

Plaintiff's counsel forcefully argued that he was damaged with respect to the balance of the purchase price of the 9.65 acres for which Bowen had given Bowling his note of $1,600. But plaintiff received full value for his land, in that he obtained lots valued at $3,400 and a note of $1,600, which, according to his agreement, was assigned by him to defendant bank as collateral security for Bowling's notes, and Bowling received credit for the $1,600 in the sale of the land in the reduction of and cancellation of his admitted indebtedness to the bank.

He could not, and does not, claim damages on the ground that if the bank had released the 9.65 acres according to contract, the sale of the 9.65 acres so released would have brought a sufficient amount to have reduced the encumbrance on the remaining 22 acres to the extent that some equity therein would have been preserved to him, for the reason that

he alleges the attempted sale of the 9.65 acres under the $1,600 paper was not consummated solely because of a discrepancy in the description of the land, and there was no evidence before the court as to the value of the remaining 22 acres, and as stated by the court below, "he does not complain about any injury as to the sale of the rest of it."

So that, according to the pleadings and testimony disclosed by the record before us, he would have been in no better position if the contract to release had been performed, for he would still have owed his notes to the bank, and the bank still would have held the $1,600 note to be credited, on foreclosure, on all the Bowling notes, as was eventually done.

One of plaintiff's counsel did ask a question as to the value of the 22 acres, but the witness failed to answer, and no exception was noted nor does it appear what the answer to the question would have been.

The defendant filed in this Court a demurrer *ore tenus* upon the ground that the complaint failed to allege any damage sustained by the intervening plaintiff. While a demurrer would not lie because plaintiff upon his allegation was entitled at least to nominal damages, it is a well established principle of law that allegation without proof, and proof without allegation, are equally fatal. *McCoy v. R. R.*, 142 N. C., 384.

It is not enough for the plaintiff Bowling to say he has been damaged. That is a conclusion. He must allege facts sufficient to show that in some material respect he has been damaged and caused to suffer loss.

The defendant contends that from reading section 10 of the complaint, which contains plaintiff's averment of damage, the inference is permissible that the gravamen of the injury complained of, as therein stated, was the embarrassment of the plaintiff, intensified by the eviction of Bowen, who had relied upon the representations of the plaintiff, and that since Bowen, by the verdict of the jury and judgment thereon, has been fully compensated, much of plaintiff's embarrassment has been mollified.

We conclude, therefore, that the first impression of the learned judge who presided over the trial of this case was the correct one, and that plaintiff was only entitled to nominal damages.

The order setting aside the verdict on the fourth issue, as a matter of law, is reversed, and the case is remanded for judgment, in accordance with the verdict as rendered, that the intervening plaintiff, E. H. Bowling, recover of the defendant the Fidelity Bank the sum of one dollar and his costs of action.

Reversed.

CAROLINA MORTGAGE COMPANY, R. W. SHERRILL AND HIS WIFE, MABEL SHERRILL, AND R. HOYLE SMATHERS, RECEIVER, v. J. E. MASSIE.

(Filed 22 January, 1936.)

1. Landlord and Tenant B c—

Lessors are not obligated to keep the premises in repair in the absence of an agreement in the lease in respect thereto.

2. Landlord and Tenant D c—In absence of agreement by lessor to repair, gradual disrepair of premises will not justify abandonment by lessee.

Where lessors do not agree to keep the leased premises in repair, neither the lessee nor the assignee of the lessee may abandon the premises because they become gradually unfit for use, even though the lessee or sublessee give notice and there is evidence that the repairs necessary would cost more than the amount of a year's rent, the lessors not being under obligation to keep the premises in repair in the absence of an agreement to that effect, and the evidence being insufficient to show such damage to the building as would have enabled the lessee or sublessee to surrender the premises under the provisions of C. S., 2352.

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

APPEAL by plaintiffs from *Alley, J.*, at May Term, 1935, of HAYWOOD. New trial.

This is an action to recover rents due under a lease of the Strand Theatre building, located on Main Street in the town of Canton, N. C. In their complaint the plaintiffs allege that the defendant is liable for the rents which are due under the lease, and which are unpaid, as sublessee of the premises described in the lease.

In defense of plaintiffs' recovery in the action the defendant alleges in his answer that the lessors failed to keep the Strand Theatre building in suitable repair during the term of the lease, as it was their duty to do, and that because of such failure he was forced to abandon the premises described in the lease. For that reason the defendant denies liability for the rents which are due and unpaid.

On 5 December, 1928, the plaintiffs R. W. Sherrill and his wife, Mabel Sherrill, as parties of the first part, entered into a contract with M. Buchanan, as party of the second part, by which as owners they leased to the said M. Buchanan the Strand Theatre building, located on Main Street in the town of Canton, Haywood County, North Carolina, for a term of five years, beginning on 1 December, 1928, and ending on 1 December, 1933, and by which the said M. Buchanan agreed to keep said Strand Theatre building for said term of five years, and to pay as rent for the same the sum of $215.00 per month, payable in advance.

The contract, which is in writing, contains the following paragraphs:

"4. The party of the second part hereby agrees that the fixtures in said building, or which shall be placed in said building, shall stand for any rent not paid by him, and this agreement shall constitute a lien on said fixtures and equipment, and in case of default the parties of the first part shall foreclose as provided by law for the foreclosure of chattel mortgages."

"6. The parties of the first part agree to take care of all obligations against the Strand Theatre so as to save the party of the second part harmless by reason of any outstanding indebtedness against the equipment and fixtures which were purchased from the parties of the first part by the party of the second part, and agree to pay any liens or encumbrances against said building that would in any way tend to cause the party of the second part to lose his rights under this lease, and if there shall be an execution sale or foreclosure proceedings against either the equipment and fixtures or the building, then the party of the second part is hereby authorized to pay off said claim and to deduct such amount from the rents due to the parties of the first part herein."

"7. The party of the second part shall have the right to sublease or assign the premises herein described, but the lien on the fixtures and equipment, as hereinbefore set forth, shall remain in force as though no assignment had been made."

The contract and lease was duly recorded in the office of the register of deeds of Haywood County, and thereafter the said M. Buchanan, as lessee, entered into possession of the premises described in the lease, and operated a moving picture show in the building situate on said premises until he assigned the lease to W. H. Odum.

On 28 June, 1929, M. Buchanan assigned all his rights under the lease in and to the premises described therein to W. H. Odum, who assumed all the obligations of the said M. Buchanan under the lease. The said assignment was in writing and was duly recorded in the office of the register of deeds of Haywood County. Thereafter, W. H. Odum entered into possession of the premises described in the lease, as sublessee, and operated a moving picture show in the building situate on said premises until he assigned the lease to the defendant J. E. Massie.

On 12 January, 1933, W. H. Odum assigned all his rights under the lease in and to the premises described therein to the defendant J. E. Massie, who assumed all the obligations of the original lessee under the lease. The said assignment was in writing and was duly recorded in the office of the register of deeds of Haywood County. Thereafter, the defendant J. E. Massie entered into possession of the premises described in the lease and operated a moving picture show in the building situate on said premises until some time after 1 May, 1933, when he abandoned

the premises. He paid all the rents due under the lease prior to and including 1 May, 1933. He has failed and refused to pay rents due for the months of June, July, August, September, October, and November, 1933, contending that he is not liable for said rents, for the reason that the Strand Theatre building had become unfit for occupancy, because of its bad condition, and that the lessors had failed and refused to repair the said building, as it was their duty to do. He contended that he did not breach his contract to pay rents for said building by his abandonment of the premises.

Prior to the execution and registration of the lease dated 5 December, 1928, the plaintiffs R. W. Sherrill and his wife, Mabel Sherrill, had executed a mortgage deed by which they conveyed the premises described in the lease to the plaintiff Carolina Mortgage Company to secure the payment of their indebtedness to said company for money loaned. After the execution of the lease, pursuant to the agreement between the plaintiffs R. W. Sherrill and wife, Mabel Sherrill, and Carolina Mortgage Company, the rents due under the lease were paid by the lessee and the sublessees to the Carolina Mortgage Company and credited on the indebtedness of R. W. Sherrill and his wife, Mabel Sherrill, to said company. During their absence from the State of North Carolina, while the lease was in force, the said R. W. Sherrill and his wife, Mabel Sherrill, authorized and empowered the said Carolina Mortgage Company to collect said rents, to make repairs on and to look after the Strand Theatre building. Prior to the commencement of this action, the plaintiff R. Hoyle Smathers had been appointed receiver in an action brought in the Superior Court of Haywood County by R. W. Sherrill and his wife, Mabel Sherrill, to restrain a sale of the premises described in the lease by the Carolina Mortgage Company, under the power of sale contained in its mortgage. Since this action was begun, the said plaintiff has been discharged as receiver, and the action in which he was appointed has been dismissed.

At the trial of the action evidence was offered by the defendant tending to show that during the term of the lease the Strand Theatre building had gradually become unfit for use as a theatre; that after the defendant went into possession of the premises described in the lease, a crack in the rear wall of the building increased in width, the roof of the building leaked so badly that it was necessary for the protection of patrons of the theatre during a rain to keep buckets and tubs in the building to catch the rain, and the floor became so insecure that it would vibrate as patrons of the theatre walked to and from their seats; and that the reasonable cost of necessary repairs to the building would have exceeded the rent for the premises, under the lease, for one year. This evidence was admitted over the objections of the plaintiffs and subject to their exceptions.

Evidence was further offered by the defendant tending to show that some time prior to 1 May, 1933, the defendant notified the plaintiff Carolina Mortgage Company, to whom he had paid the rents for the premises, as authorized by the lessors, R. W. Sherrill and wife, Mabel Sherrill, in writing, of the bad condition of the Strand Theatre building, and that unless the lessors made the necessary repairs at once, he would move out of the building and surrender the premises. This evidence was admitted over the objection of the plaintiffs and subject to their exceptions.

The plaintiffs, in apt time and in writing, requested the court to instruct the jury as follows:

"The court instructs the jury that the evidence in this case is not sufficient to bring the defendant within the protection of C. S., 2352, and if you are satisfied by the greater weight of the evidence that the defendant has failed and refused to pay the rents for the premises as provided in the lease and contracts offered in evidence, you will answer the second issue 'Yes.' "

The court declined to give this instruction, and plaintiffs duly excepted.

Issues submitted to the jury were answered as follows:

"1. Did the defendant J. E. Massie, on 12 January, 1933, assume in writing and agree to perform the terms, stipulations, and agreements of the lease executed on 5 December, 1928, by R. W. Sherrill and wife, Mabel Sherrill, of the first part, to M. Buchanan, of the second part, and the lease executed by M. Buchanan to W. H. Odum on 28 June, 1929, as alleged in the complaint? Answer: 'Yes.'

"2. Did the defendant commit a breach of said contract of lease, as alleged in the complaint? Answer: 'No.'

"3. What sum, if any, are the plaintiffs entitled to recover of the defendant by reason of such breach? Answer: ....."

From judgment that plaintiffs recover nothing of the defendant by this action, and that the defendant recover of the plaintiffs the costs of the action, the plaintiffs appealed to the Supreme Court, assigning errors in the trial.

Smathers, Martin & McCoy and Johnston & Horner for plaintiffs.
S. M. Robinson and W. R. Francis for defendant.

CONNOR, J. There is no provision in the lease which was executed by the plaintiffs R. W. Sherrill and his wife, Mabel Sherrill, to M. Buchanan, on 5 December, 1928, and thereafter duly assigned to the defendant J. E. Massie, by which the said plaintiffs, as lessors, agreed to keep the Strand Theatre building in good repair. In the absence of

such provision, the said plaintiffs were under no obligation to keep the said building in good repair. In *Salter v. Gordon,* 200 N. C., 381, 157 S. E., 11, it is said: "In the absence of an agreement as to repairs, the landlord is not obligated to keep the building in repair for the benefit of the tenant. *Tucker v. Yarn Mill,* 194 N. C., 756, 140 S. E., 744; *Fields v. Ogburn,* 178 N. C., 407, 100 S. E., 583; *Improvement Co. v. Coley-Bardin,* 156 N. C., 255, 72 S. E., 312." In the last cited case it is said that by the common law the lessor is under no implied covenant to repair, or even that the premises shall be fit for the purpose for which they are rented.

It was, therefore, error to admit evidence at the trial of this action tending to show the bad condition of the Strand Theatre building during the term of the lease, as justifying the abandonment of the premises described in the lease by the defendant, unless, as contended by him, C. S., 2352, was applicable in the trial of this action.

The defendant did not allege in his answer any facts to which the statute is applicable, nor did he rely upon the statute as a defense to plaintiff's recovery in this action. There was no evidence at the trial tending to show such damage to the Strand Theatre building, during the term of the lease, as would have enabled the defendant by compliance with the provisions of the statute to surrender the premises, and relieve himself of liability under the lease.

It was, therefore, error to decline to instruct the jury as requested by the plaintiffs.

In accordance with this opinion, the plaintiffs are entitled to

New trial.

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

STATE v. FRANK T. RHINEHART.

(Filed 22 January, 1936.)

1. Criminal Law I g—Instruction in this case held erroneous as containing expression of opinion by the court.

The instruction of the trial court to the jury in this case *is held* for error as conveying an expression of opinion by the court in violation of C. S., 564, in that the instruction paramounted the character and disinterestedness of the State's witnesses and singled out for special consideration and emphasis testimony of some of the State's witnesses, and at the same time called attention to the unreasonableness of the defend-

ant's testimony, its want of adminiculation, the improbability of defendant's evidence, and the proneness of parties and interested witnesses to swear falsely.

2. Same—Court may not convey expression of opinion to jury as to weight or credibility of the evidence, directly or indirectly.

Under C. S., 564, it is the duty of the trial court to state in his charge in plain and correct manner the evidence given in the case, and declare and explain the law arising thereon, and the court may not express an opinion as to the facts, the weight of the evidence, or the credibility of the witnesses, directly or indirectly, by manner, undue emphasis, arrangement and form of presentation of the evidence, or by the general tenor and tone of the trial.

3. Criminal Law G j—

The instruction of the court in regard to the testimony of defendant in his own behalf *held* not in the usually approved form.

4. Perjury B b—

In prosecutions for perjury it is required that the falsity of the oath be established by two witnesses, or by one witness and adminicular circumstances sufficient to turn the scales against the defendant's oath.

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

CLARKSON, J., dissenting.

APPEAL by defendant from *Rousseau, J.*, at May Term, 1935, of JACKSON.

Criminal prosecution, tried upon indictment in which it is alleged that the defendant did, on 19 February, 1934, feloniously commit perjury upon the trial of an action in a court of a justice of the peace of Jackson County, wherein the State of North Carolina was plaintiff and Alley Turpin, Warfield Turpin, and Dock Turpin were defendants, by falsely asserting on oath that the said Turpins did forcibly and fraudulently kidnap, torture, and mistreat the said Frank T. Rhinehart, etc. The bill conforms to the provisions of C. S., 4615.

There was evidence by the State in support of the indictment, and by the defendant in denial. The witnesses clashed sharply. It is in evidence that the charge of kidnaping grew out of an old feud between the Rhinecharts and the Turpins. There is likewise evidence to the contrary. The proceeding was dismissed by the justice of the peace for want of probable cause.

The defendant excepted to the general tone of the court's charge to the jury—its strong summation of the State's case—to the singling out of the testimony of some of the witnesses for special consideration, and particularly to the following portions:

1. "The State contends . . . that you would have to dispute (disbelieve) all the evidence of these men who are disinterested, men like

Sheriff Mason, ex-Sheriff Maney, the mayor of Waynesville, Deputy Sheriff Welch, and various other witnesses who have no interest in this matter, . . . that the prosecuting witnesses are interested, and that may have an influence on them to swear falsely and tell a lie while on the stand, . . . but that these other witnesses would not come here for the Turpins or anyone else and testify that they saw Dock, Warfield, and Alley Turpin at their home if it had not been true." Exception.

2. "The State contends that if he (Rhinehart) had been hurt like he said, the doctor they called would have been here to show those injuries, and that he wasn't here." Exception.

3. "The State contends you ought . . . not to believe the defendant's evidence for the reason it is unreasonable, . . . that it is all imagination on his part." Exception.

4. "The court instructs you, furthermore, that the defendant Rhinehart is an interested party, . . . it will be your duty under the circumstances to scrutinize his evidence and weigh his evidence cautiously, but after you do scrutinize his testimony, if you believe he has told the truth, then you have the same right to believe him as you would any other witness who went on the stand." Exception.

Verdict: "Guilty as charged in the bill of indictment."

Judgment: Imprisonment in the State's Prison for a period of not less than 18 nor more than 30 months.

Defendant appeals, assigning errors.

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

Monteith & Nicholson and Moody & Moody for defendant.

STACY, C. J. It would seem that by paramounting the character and disinterestedness of the State's witnesses, and at the same time calling attention to the unreasonableness of the defendant's testimony, its want of adminiculation, and the proneness of parties and interested witnesses to swear falsely, the trial court inadvertently conveyed to the jury an expression of opinion prohibited by C. S., 564. *S. v. Hart,* 186 N. C., 582, 120 S. E., 345. The error is just one of those casualties which, now and then, befalls the most circumspect in the trial of causes on the circuit. *S. v. Griggs,* 197 N. C., 352, 148 S. E., 547; *S. v. Kline,* 190 N. C., 177, 129 S. E., 417. Indeed, the case is before us on defendant's statement, the same having become the statement of case on appeal by operation of law. *S. v. Ray,* 206 N. C., 736, 175 S. E., 109.

It is provided by the statute, however, that no judge in giving a charge to the jury, either in a civil or a criminal action, shall give an opinion whether a fact is fully or sufficiently established, that being the true

office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon.

This statute has been interpreted by us to mean that no judge, in charging the jury or at any time during the trial, shall intimate whether a fact is fully or sufficiently proved, it being the true office and province of the jury to weigh the testimony and to decide upon its adequacy to establish any issuable fact. It is the duty of the judge, under the provisions of the statute, to state in a plain and correct manner the evidence given in the case and to declare and explain the law arising thereon, without expressing any opinion upon the facts. *Morris v. Kramer,* 182 N. C., 87, 108 S. E., 381; *S. v. Cook,* 162 N. C., 586, 77 S. E., 759; *Park v. Exum,* 156 N. C., p. 231, 72 S. E., 309. "There must be no indication of the judge's opinion upon the facts, to the hurt of either party, either directly or indirectly, by words or conduct." *Bank v. McArthur,* 168 N. C., p. 52, 84 S. E., 39. And in *S. v. Ownby,* 146 N. C., p. 678, 61 S. E., 630, it was said: "The slightest intimation from a judge as to the strength of the evidence, or as to the credibility of a witness, will always have great weight with a jury and, therefore, we must be careful to see that neither party is unduly prejudiced by any expression from the bench which is likely to prevent a fair and impartial trial."

The judge may indicate to a jury what impression the testimony or evidence has made on his mind, or what deductions he thinks should be made therefrom, without expressly stating his opinion in so many words. This may be done by his manner or peculiar emphasis or by his so arraying and presenting the evidence as to give to one of the parties an undue advantage over the other; or, again, the same result may follow the use of language, or form of expression calculated to impair the credit which might otherwise and under normal conditions be given by the jury to the testimony of one of the parties. *Speed v. Perry,* 167 N. C., 122, 83 S. E., 176; *S. v. Dancy,* 78 N. C., 437. It can make no difference in what way or when the opinion of the judge is conveyed to the jury, whether directly or indirectly, or by the general tone and tenor of the trial. The statute forbids an intimation of his opinion in any form whatever, it being the intent of the law to insure to each and every litigant a fair and impartial trial before the jury. "Every suitor is entitled by the law to have his cause considered with the 'cold neutrality of the impartial judge' and the equally unbiased mind of a properly instructed jury." *Withers v. Lane,* 144 N. C., p. 192, 56 S. E., 855.

It is also suggested as objectionable that the testimony of some of the State's witnesses was singled out for special consideration and emphasis, while attention was directed to the improbability of defendant's evidence, and the jury cautioned to scrutinize the latter, "but after you do scruti-

nize his testimony, if you believe he has told the truth, you have the same right to believe him as you would any other witness who went on the stand." It would seem that the objection is well taken in the light of what was said in the following cases: *S. v. Horne,* 171 N. C., 787, 88 S. E., 433; *S. v. Rogers,* 93 N. C., 523; *S. v. Weathers,* 98 N. C., 685, 4 S. E., 512; *S. v. Rollins,* 113 N. C., 722, 18 S. E., 394; *S. v. Bailey,* 60 N. C., 141; *Starling v. Cotton Mills,* 171 N. C., 222, 88 S. E., 242; *Bowman v. Trust Co.,* 170 N. C., 301, 87 S. E., 46; *Withers v. Lane,* 144 N. C., 184, 56 S. E., 855; *Cogdell v. R. R.,* 129 N. C., 398, 40 S. E., 202.

Nor is the caution to scrutinize the defendant's testimony in the usually approved form. The rule was stated in *S. v. Lee,* 121 N. C., 544, 28 S. E., 552, as follows: "The law regards with suspicion the testimony of near relations, interested parties, and those testifying in their own behalf. It is the province of the jury to consider and decide the weight due to such testimony, and, as a general rule in deciding on the credit of witnesses on both sides, they ought to look to the deportment of the witnesses, their capacity and opportunity to testify in relation to the transaction, and the relation in which the witness stands to the party; that such evidence must be taken with some degree of allowance and should not be given the weight of the evidence of disinterested witnesses, but the rule does not reject or necessarily impeach it; and if, from the testimony, or from it and the other facts and circumstances in the case, the jury believe that such witnesses have sworn the truth, then they are entitled to as full credit as any other witness." *S. v. Deal,* 207 N. C., 448, 177 S. E., 332; *S. v. Beal,* 199 N. C., 278, 154 S. E., 604; *S. v. Ray,* 195 N. C., 619, 143 S. E., 143; *S. v. Beavers,* 188 N. C., 595, 125 S. E., 258; *S. v. Wilcox,* 206 N. C., 691, 175 S. E., 122.

In prosecutions for perjury, it is required that the falsity of the oath be established by two witnesses, or by one witness and adminicular circumstances sufficient to turn the scales against the defendant's oath. *S. v. Hawkins,* 115 N. C., 712, 20 S. E., 623; *S. v. Peters,* 107 N. C., 876, 12 S. E., 74; *S. v. Sinodis,* 205 N. C., 602, 172 S. E., 190.

New trial.

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

CLARKSON, J., dissenting: The record in this case contains some 144 pages and the court below took a long time in trying the action. The charge of the court is 22 pages. In substance, his Honor set forth what the witnesses testified to, both for the State and the defendant. He defined accurately what constituted the crime of perjury and what evidence sufficient to convict. He then gave the contentions of the State

and defendant fully and in detail. He also charged the burden was on the State as to reasonable doubt.

The main opinion gives a new trial solely on exceptions to the charge. By an examination of the charge, no exceptions have been taken to the charge in accordance with the long established rule of this Court. Then, again, if the exceptions were properly taken they were to contentions and the defendant nowhere in the charge objected to the same. *S. v. Sinodis,* 189 N. C., 565. In regard to scrutinizing the testimony of defendant, if the charge is taken as a whole the extract complained of, if error, was not prejudicial or reversible error, as the rule was substantially complied with.

This matter has been thoroughly considered in *Rawls v. Lupton,* 193 N. C., 428, citing a wealth of authorities and the method of exceptions and assignments of error set forth so as the profession can follow same. Speaking to the subject, on p. 431, it is said:

"Under C. S., 643, *supra,* and the decisions of this Court, the appellant must make 'specific' exceptions to the charge of the court below, stating separately in articles numbered the errors alleged.

"For example: Suppose the court below instructed or charged the jury as follows: ('The principle is well established that not only is a person who offers or attempts by violence to injure the person of another guilty of an assault, but no one, by the show of violence, has the right to put another in fear and thereby force him to leave a place where he has the right to be.') To the foregoing charge in parentheses, or quotation, as the case may be, the plaintiff or defendant, as the case may be, excepted.

"Exception No. 1.

"Battery is ('Any unlawful beating, or other wrongful physical violence or constraint, inflicted on a human being without his consent.') To the foregoing charge in parentheses, or quotation, plaintiff, or defendant, as the case may be, excepted.

"Exception No. 2.

"('The actual offer to use force to the injury of another is assault; the use of it is battery; hence, the two terms are commonly combined in the term "assault and battery."') To the foregoing charge in parentheses, or quotation, the plaintiff, or defendant, as the case may be, excepted.

"Exception No. 3.

"Of course, it goes without saying that the appellant shall also set out in the assignments of error any exceptions taken during the trial in apt time to the admission or exclusion of testimony, or to rulings of the court on other matters. Those exceptions relating to the exclusion or admission of testimony, when brought forward into the assignments of error, shall reiterate, verbatim, such testimony. Exceptions to the charge can, if desired, be lettered a, b, c, etc."

By reading the entire charge in this case, it can be seen the wisdom of the rule for taking the charge conjunctive and not disjunctive, there is no error that defendant can complain of. *Rawls v. Lupton, supra,* has been approved in *Chamberlain v. Sou. Dyeing Co.,* 193 N. C., 850; *State v. Ashe,* 196 N. C., 387 (391); *Murphy v. Power Co.,* 196 N. C., 484 (493); *Gibbs v. Tel. Co.,* 196 N. C., 517 (523); *Clark v. Laurel Park Estates,* 196 N. C., 624 (633); *Pruitt v. Wood,* 199 N. C., 788 (791); *Roberts v. Davis,* 200 N. C., 424 (426); *Miller v. Bottling Co.,* 204 N. C., 608 (609); *Lynn v. Silk Mills,* 208 N. C., 7 (13).

In *Clark v. Laurel Park Estates, supra,* at p. 633, we find: "The exceptions to the charge should be made as pointed out in *Rawls v. Lupton,* 193 N. C., p. 428, at p. 432. It is there said: 'Continuity of the charge is necessary with the "specific" exceptions. Anything else is unfair to the trial judge—to have his charge cut up in piecemeal and disconnected.'"

For the reasons stated, I think in the judgment of the court below there is no error.

NEW YORK LIFE INSURANCE COMPANY v. C. T. LASSITER AND WIFE, EUNICE M. LASSITER.

(Filed 22 January, 1936.)

1. Mortgages C f—Purchaser of debt secured by deed of trust held not empowered to appoint substitute trustee under terms of the instrument.

The deed of trust in question was executed to an individual trustee, "its successors and assigns." in trust for a corporate *cestui que trust,* party of the third part, with power to the party of the third part to appoint a substitute trustee without notice to the trustor. The corporate *cestui que trust* sold and assigned the debt to another corporation, which appointed a substitute trustee, who foreclosed the deed of trust under the power of sale contained therein. *Held:* The right to appoint a substitute trustee was confined to the *cestui que trust* named in the instrument, the deed of trust containing no provision that any other party should have the power of appointment, and the statutory procedure for the appointment of a substitute trustee, N. C. Code, 2583, not having been followed, and the exercise of the power of sale by the substitute trustee appointed by the purchaser of the notes secured by the deed of trust conveyed no title.

2. Same—

The trustee named in a deed of trust acts in a dual capacity for the trustor and *cestui que trust* to carry out the provisions of the instrument.

3. Mortgages H h—

Powers of sale in deeds of trust and mortgages will be strictly construed, and all parties to the instrument are entitled to have the power of sale exercised in accordance with its terms.

4. Mortgages A b—

A deed of trust executed to an individual trustee in trust for a corporate *cestui que trust* should convey the legal title to the trustee, "his heirs and assigns forever," and not to him, "its successors and assigns forever."

5. Contracts B a—

A contract must be construed as written.

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

APPEAL by plaintiff from *McElroy, J.*, at April-May Term, 1935, of GUILFORD. Affirmed.

This is a submission of controversy without action. The plaintiff and defendants entered into a contract. The plaintiff was to execute and deliver to the defendants "a good and indefeasible title in fee simple" to a certain piece of land in Guilford County, N. C., describing it. The defendants refused to accept the deed, contending that plaintiff has no such title, hence this controversy.

The material portions of the deed of trust to be considered:

"(1) THIS INDENTURE, Made the 9th day of August, 1929, by and between W. H. Brewer and wife, Eva Hutchinson Brewer, of Guilford County, aforesaid, parties of the first part; B. B. Vinson, of Guilford County, in said State, party of the second part, trustee, and Greensboro Bond and Mortgage Company, a corporation organized under the laws of the State of North Carolina, with its principal office at Greensboro, N. C., *its successors and assigns,* party of the third part. (2) WITNESSETH, That the said parties of the first part, in consideration of one dollar ($1.00), the receipt whereof is hereby acknowledged, the other considerations hereinafter mentioned, do hereby bargain, sell, grant, and convey to the *said party of the second part, trustee, its successors and assigns,* the following real estate, with all improvements, fixtures, and appurtenances, situated in Morehead Township, Guilford County, in said State, and more particularly described as follows," etc.

"(3) TO HAVE AND TO HOLD the same to the said party of the second part, *its successors and assigns forever.* . . .

"(4) The parties of the first part hereby covenant and agree with the party of the third part, *its successors and assigns,* that as long as any part of the debt aforesaid shall remain unpaid, etc. . . .

"(5) Paragraph 6. For any reason satisfactory to itself, by instrument properly executed, acknowledged, and filed for record in the office of the register of deeds in the county wherein this instrument is recorded, *the party of the third part* may appoint a substitute trustee, without notice to any party who, from and after the filing of such appointment in the register's office, shall have and possess all the powers and duties vested in the party of the second part." (Italics ours.)

The judgment of the court below is as follows: "This controversy without action coming on to be heard at April-May Term, 1935, of Guilford Superior Court, before the Hon. P. A. McElroy, judge presiding, and the court being of the opinion upon the facts set out in the case agreed that the deed heretofore tendered by plaintiff to defendants is insufficient to vest in them a good and indefeasible title in fee simple, free from encumbrances save and except *ad valorem* taxes for the year 1935, to a lot or parcel of land described in paragraph one of the case agreed, it is considered, ordered, and adjudged by the court that plaintiff and defendants are under no obligation, one to the other, on account of the contract in writing referred to in paragraph one of said case agreed; and that plaintiff be and it is hereby taxed with the costs. P. A. McElroy, Judge presiding."

The only exception and assignment of error is to the judgment of the court below. The assignment of error and other necessary facts will be set forth in the opinion.

Eugene G. Shaw, Thomas C. Hoyle, and Hobgood & Ward for plaintiff.

Roger W. Harrison for defendants.

CLARKSON, J. The only question presented by the agreed case is whether plaintiff had the power to appoint Eugene G. Shaw substitute trustee in the place of B. B. Vinson, under paragraph 6 of the deed of trust set out in the case agreed. We think not under the facts and circumstances of this case.

In the case agreed it appears that the plaintiff New York Life Insurance Company purchased from the "Greensboro Bond and Mortgage Company, party of the third part in said deed of trust and payee in the note secured thereby, duly endorsed, assigned, and transferred said note to plaintiff, which was at the time of the substitution of the trustee in said deed of trust hereinafter referred to the sole owner and holder of said note."

The plaintiff New York Life Insurance Company, by a certain indenture, reciting the facts, appointed Eugene G. Shaw substitute trustee to execute the power of sale contained in said indenture, as follows: "The said party of the first part has removed and by these presents does remove the said B. B. Vinson as trustee from the said deed of trust, and by these presents does appoint the said Eugene G. Shaw, party of the second part as aforesaid, trustee, under said deed of trust, and does hereby bargain, sell, and convey unto the said Eugene G. Shaw, party of the second part as aforesaid, the legal title to the property described in the said deed of trust, and does hereby vest him with all the powers,

duties and obligations conferred by said deed of trust upon the trustee therein named, and in the same manner and to the same effect as though he had been originally named trustee in said deed of trust."

Shaw duly sold the property, according to the terms of the deed of trust, and it was purchased by defendants. The defendants want the property—if the sale of the substitute trustee gives them a good and indefeasible title in fee simple. The court below held that it did not. In this we find no error.

In *Hussey v. Hill,* 120 N. C., 312 (316), citing numerous authorities, it is said: "A mortgagee is the legal owner of the property which he holds in trust for the payment of the debt, and then for the mortgagor. . . . And the power of sale contained in the mortgage authorized Hussey to foreclose by sale and to convey the legal and equitable title to the purchaser. But when he sold the note to W. L. Hill and assigned the note and mortgage to him, the latter only became the equitable owner—the naked legal estate still remaining in the plaintiff Hussey. This assignment to W. L. Hill did not carry with it the power of sale, and he, only having the equitable estate in the land, could not convey the legal estate."

The trustee in a deed of trust is usually selected to act for both the owner and holder of the indebtedness. As trustee he acts in a dual capacity to carry out the provisions of the deed of trust. The principle is well settled in this jurisdiction, as stated in *Stevens v. Turlington,* 186 N. C., 191 (194), citing numerous authorities: "When a mortgagee transfers to another person the debt which is secured by the mortgage, this ordinarily carries with it the mortgage security, unless the parties agree otherwise." *Horne-Wilson, Inc., v. Wiggins Bros., Inc.,* 203 N. C., 85. In *Trust Co. v. Padgett,* 194 N. C., 727, the language is: "Then the party of the third part or the holder of the bonds hereby secured," etc. The word "or" is used and we construe the contract as written.

We do not think the purchase of the note by plaintiff from the Greensboro Bond and Mortgage Company gave it the power to remove the trustee, B. B. Vinson, and appoint Eugene G. Shaw to act in his stead. Paragraph 6 says: *"The party of the third part may appoint a substitute trustee."* We think this language is confined to the Greensboro Bond and Mortgage Company, a corporation. All parties of a trust deed are entitled to have the power of sale carried out as written. *Mitchell v. Shuford,* 200 N. C., 321. Power of sale in mortgages or deeds of trust is strictly construed. *Alexander v. Boyd,* 204 N. C., 103 (108). *N. C. Mortgage Corp. v. Morgan,* 208 N. C., 743.

We have statutes in this State governing matters of this kind. N. C. Code, 1931 (Michie), sec. 2583, in part, is as follows: "When the sole or last surviving trustee named in a will or deed of trust dies, removes

from the county where the will was probated or deed executed and from the State, or in any way becomes incompetent to execute the said trust, or is a nonresident of this State, the clerk of the Superior Court of the county wherein the will was probated or deed of trust was executed is authorized and empowered, in proceedings to which all persons interested shall be made parties, to appoint some discreet and competent person to act as trustee and execute the trust according to its true intent and meaning, and as fully as if originally appointed," etc. See, also, section 2583 (a), *et seq.; Bateman v. Sterrett, Trustee,* 201 N. C., 59.

Those who entered into the contract said "party of the third part may appoint." If they had intended any other than the Greensboro Bond and Mortgage Company, how easily it could have been written. See *Dowling v. Winters,* 208 N. C., 521. It may be that the trustee, Vinson, would not desire when he agreed to act as trustee to have one who purchased the indebtedness to destroy his trusteeship without notice. The contract provides for arbitrary removal without cause or notice, and we do not desire to extend it beyond the language "the party of the third part"—the corporation that loaned the money.

The usual conveyance to a corporation of land is to the corporation, naming it, and its successors and assigns. This carries the fee-simple title to the land. Whoever drew the deed of trust may have had this in mind, but it was not germane where placed. In 41 C. J., p. 379, part of sec. 128 (c), p. 379 (cited by plaintiff), the disjunction "or" is used and not the conjunction "and," as in the present deed of trust. In C. J., *supra,* it is said: "A power conferred upon the beneficiary to appoint a successor to the trustee is personal to the donee and cannot be exercised by his agent, nor does it pass to those who take by succession from him unless expressly so stipulated. However, where the power is conferred upon the beneficiary, his successor, or assigns, or other legal representatives, no personal discretion is confined in any particular person, but the power may be exercised by any holder or owner of the deed of trust, as, for example, a corporation assignee."

The usual conveyance of land is to a person and his heirs and assigns, and it carries the fee-simple title to the land. This is changed by statute, in N. C. Code, 1931 (Michie), sec. 991, the fee is presumed, though the word "heirs" is omitted.

The draughtsman of the deed in trust seemed to have had in mind the language usually used in conveyances to corporation, viz.: Successors *and* assigns. He did not use successors *or* assigns. There is a vast gulf between the two. It may be noted (1) that the deed of trust says "do hereby bargain, sell, grant, and convey to the said party of the second part, trustee, its *successors and assigns.*" The party of the second part was B. B. Vinson, and it should have been "his heirs and assigns." (2)

"To have and to hold the same to the said party of the second part, *its successors and assigns forever,*" this should have been "his heirs and assigns forever." The draughtsman did not use due care to express the usual legal phrases in such conveyances. We must construe the contract as written. The language used is so ambiguous that we cannot say that plaintiff, purchaser of the note, was given the power to appoint a substitute trustee. The title is not marketable—the plaintiff cannot deliver to defendants, in accordance with its contract, "a good and indefeasible title in fee simple."

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 OF NORTH CAROLINA EX REL. C. J. HANNA, GUARDIAN OF MACK D. FELTON, JR., v. K. L. HOWARD, ADMINISTRATOR OF M. D. FELTON, SR., AND INDIVIDUALLY, THE MASSACHUSETTS BONDING AND INSURANCE COMPANY, AND N. A. TOWNSEND.

(Filed 22 January, 1936.)

1. Limitation of Actions B b—Action to surcharge and falsify administrator's account is not barred when cause of action is concealed by fraud.

Plaintiff guardian instituted this action against the administrator of the estate of the ward's father for misapplication of the funds of the estate by loaning money belonging to the estate to a private corporation without approval of the court, and accepting the corporation's note therefor, plaintiff alleging and offering evidence that the administrator and the former guardian agreed to conceal the existence of the loan by listing the note as cash in the administrator's account and by the acceptance of the note as cash by the former guardian in the distribution of the estate. *Held:* The affirmative answer of the jury to the issue of connivance and agreement between the administrator and the former guardian determines adversely to defendant administrator the issues of the bar of the six- and three-year statutes of limitation pleaded by defendant administrator.

2. Limitation of Actions E c—Exclusion of evidence tending to show that cause of action was not concealed held error.

Plaintiff guardian instituted action against the administrator of the estate of the ward's father for misapplication of the funds of the estate by loaning same to a private corporation without the approval of the court, and accepting the corporation's note therefor. Plaintiff contended that the cause of action was not barred by the statutes of limitation pleaded because the existence of the loan was concealed by connivance and agreement between the administrator and the former guardian by listing the note as cash, and that the true condition of the estate was

withheld from the clerk, and that the purported audit and approval of the administrator's account was fraudulently obtained. *Held:* Testimony of a witness as to a conversation with the clerk in which the loan was disclosed and the parties agreed that the administrator should list the note as cash in his account was erroneously excluded, the testimony being competent on asserted concealment of the loan from the clerk and the administrator's fraudulent procurement of his discharge.

3. Appeal and Error A f—

Where it is made to appear that a party has died pending appeal, the petition of the personal representative that he be substituted as a party will be allowed. Rules of Practice in the Supreme Court, No. 37.

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

APPEAL by defendant K. L. Howard from *Barnhill, J.*, at September Term, 1934, of HARNETT. New trial.

This is an action, instituted 30 March, 1934, by the present guardian of Mack D. Felton, Jr., to recover damages in the sum of $4,500, and interest from 13 January, 1919, from the administrator of the estate of M. D. Felton, Sr., father of the plaintiff's ward, and from the bonding company on the administration bond, and to have "declared a nullity *ab initio*" the former guardianship of N. A. Townsend.

It is alleged by the plaintiff that the administrator, on 13 January, 1919, without obtaining authorization from the courts, loaned to the Dunn Insurance and Realty Company the sum of $4,500, taking therefor the note of said company, endorsed by the former guardian, his brother-in-law and his law partner, all of whom were stockholders in said company; that the said insurance and realty company, the maker of the note, as well as the endorsers thereon, were insolvent; that when the administrator filed his final account and asked for his discharge, his report to the clerk of the Superior Court showed the note of the Dunn Insurance and Realty Company, endorsed as aforesaid, as cash ready for distribution, and that when the administrator settled with the distributees, between 6 December, 1919, and 9 February, 1920, this note was delivered to the former guardian, who gave a receipt therefor as of cash; and that the note is unpaid, long past due, uncollectible and worthless; that said note was turned over to the present guardian (the plaintiff) by the former guardian as an asset of the ward's estate. It is further alleged that the loan of the $4,500 to the Dunn Insurance and Realty Company by the administrator and the acceptance therefor of the note of said company endorsed by its officers and stockholders, the reporting of said note to the clerk of the court as cash, the acceptance of said note by the former guardian and the giving of a receipt therefor as of cash, was all done pursuant to an agreement and connivance between the administrator and former guardian to conceal the existence of said note and of the misapplication of the assets of the estate by the administrator.

The administrator in his answer admits that the loan of $4,500 was made by him to the Dunn Insurance and Realty Company, upon the note of the company, endorsed as alleged, without obtaining any authorization from the courts, and that said note was reported by him to the clerk of the Superior Court as cash, and by him delivered to the former guardian in return for a receipt therefor as of cash. He denies, however, that at the time he took the note and at the time he delivered it to the former guardian that the maker and endorsers thereof were insolvent, and alleges that he took the note in good faith and under legal advice that he was authorized so to do, and specifically denies that there was any agreement or connivance between him and the former guardian to conceal the loan or the existence of the note. The administrator further avers that if the making of the loan or the taking of the note as aforesaid was a technical misapplication of the funds of the estate of his intestate, that any cause of action arising therefrom is barred by the statute of limitations and pleads such statute in bar thereof.

The Massachusetts Bonding and Insurance Company, surety on the administration bond, enters a general denial, avers the want of notice and lack of knowledge of the matters and things alleged in the complaint, and pleads the statute of limitations in bar of recovery.

N. A. Townsend, former guardian, admits the loan to the Dunn Insurance and Realty Company by the administrator, the endorsement by him of the $4,500 note of said company, and the receipt from the administrator by him, as guardian, of said note as cash, but specifically denies any agreement or connivance between him and the administrator to conceal the existence of the loan or of the note.

When the plaintiff had introduced his evidence and rested his case, the court allowed the motion of the bonding company to dismiss the action as to it, apparently upon the ground that any action alleged against the company was barred by the statute of limitations. At the same stage of the trial the court allowed a similar motion of the defendant Townsend, apparently upon the ground that there was no monetary demand made of him and that all of the assets of the ward that had come into his hands had been by him turned over to the present guardian, the plaintiff.

The motion of the defendant Howard for judgment of nonsuit as to him as administrator and individually, made at the close of the plaintiff's evidence, was disallowed, and, after reserving an exception, he offered evidence in rebuttal, and renewed his motion at the close of all the evidence, which was likewise disallowed and exception likewise reserved.

From a judgment based upon the verdict, the defendant Howard, as administrator and individually, appealed to the Supreme Court, assigning errors.

Faircloth & Fisher and H. Paul Strickland for plaintiff, appellee.
Neill McK. Salmon, I. R. Williams, and Ruark & Ruark for defendant Howard, appellant.

SCHENCK, J. We think the motions for judgment of nonsuit lodged by the appellant were properly disallowed.

The issues submitted and answers made thereto were as follows:

"1. Did the defendant K. L. Howard, as administrator of the estate of M. D. Felton, Sr., misapply assets of said estate by loaning $4,500 thereof to the Dunn Insurance and Realty Company, as alleged? Answer: 'Yes.'

"2. If so, did the said K. L. Howard connive and agree with N. A. Townsend, as guardian of M. D. Felton, Jr., to conceal the existence of said note and the misapplication of said assets? Answer: 'Yes.'

"3. What amount, if any, is now due on said note? Answer: '$4,500, with interest from 13 January, 1920.'

"4. Is plaintiff's cause of action barred by the six-year statute of limitations? Answer: 'No.'

"5. Is plaintiff's cause of action barred by the three-year statute of limitations? Answer: 'No.' "

The most serious controversy centered around the second issue, and the answer to it was determinative of the case. If the second issue had been answered in the negative it would have followed, as a matter of law, that the fourth and fifth issues should have been answered in the affirmative, and thereby have precluded the plaintiff's recovery.

Among other allegations of fraud contained in the complaint is the following: ". . . that the true condition of said estate was fraudulently concealed and withheld from the clerk of the Superior Court of Bladen County by said administrator, and that the purported audit and approval of said account was fraudulently obtained, and that the order attempting to discharge said administrator and relieve his bond of further liability was likewise fraudulently obtained, . . ."

J. C. Clifford, an attorney, testified as a witness in behalf of the defendant, and (in the absence of the jury) the following question and answer were propounded to and made by him, which the court, over defendant's exception, excluded, to wit:

"Question: What conversation took place, if any, between you, K. L. Howard, and W. J. Davis, clerk of the Superior Court of Bladen County, at his office in Elizabethtown, when you and Mr. Howard went to see him with reference to auditing the account of K. L. Howard, administrator of M. D. Felton?

"Answer: Mr. K. L. Howard and I went to see W. J. Davis, then clerk of the Superior Court of Bladen County, about the last of Novem-

ber or first of December, 1919. We thereupon told him that we were ready to settle and make final settlement of the estate, but that part of the estate was in a note of the Dunn Insurance and Realty Company in the sum of $4,500, and the Pope note in the sum slightly in excess of $1,000, if I remember correctly, and certain postal certificates of the deceased, and that if he insisted upon it we should wait until these were converted into cash to make the final report, and Mr. Davis asked me, especially, if I regarded the notes as absolutely solvent, and I told him I did. He asked me if the guardian was willing to accept these notes as cash, and I told him that he was. He told me thereupon to report these as cash and make a final settlement and let the guardian take these notes and savings certificates. Accordingly, we prepared the final account."

Since the plaintiff's case is based upon general allegations of fraudulent agreement and connivance between the administrator and the former guardian to conceal the existence of the loan and of the note given therefor in order, *inter alia,* to deceive the clerk of the Superior Court and thereby obtain his discharge as administrator, we think the excluded evidence was relevant to the issue, and competent as tending to prove that the defendant had not deceived or attempted to deceive the clerk as to the existence of the note, but, on the contrary, had advised him of its existence. For the exclusion of this evidence there must be a new trial, and it is so ordered.

It having been made to appear that the defendant K. L. Howard has died pending this appeal, and that Florence C. Howard has qualified as his executrix, it is ordered, upon her petition filed in this Court, that said executrix be substituted as party defendant in lieu of K. L. Howard, administrator and individually. Rules of Practice in the Supreme Court, No. 37, 200 N. C., 811 (835).

New trial.

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

M. E. RAMSEY v. NASH FURNITURE COMPANY.

(Filed 22 January, 1936.)

1. Pleadings D e—

A demurrer admits the truth of all material facts properly alleged, and the demurrer cannot be sustained if the complaint, liberally construed, or any portion of it, presents facts sufficient to constitute a cause of action. C. S., 535.

2. Negligence D a—Ordinarily, contributory negligence cannot be taken advantage of by demurrer.

Contributory negligence must be pleaded in the answer and proved on the trial, the burden on the issue being upon defendant, C. S., 523, and a demurrer to the complaint on the ground of contributory negligence will not be sustained unless upon the face of the complaint itself contributory negligence is patent and unquestionable. The distinction between motion to nonsuit under C. S., 567, and a demurrer to the complaint is pointed out.

3. Negligence A c—Complaint alleging injuries sustained by invitee in fall down elevator shaft held sufficient as against demurrer.

In this action to recover damages sustained by plaintiff when he entered defendant's store as an invitee and fell down an elevator shaft at the rear entrance of the building, the complaint *is held* sufficient to state a cause of action against defendant, and not to show upon its face patent and unquestionable contributory negligence, and defendant's demurrer thereto should have been overruled.

APPEAL by plaintiff from *Clement, J.*, at August Term, 1935, of IREDELL. Reversed.

Plaintiff stated his cause of action as follows:

"2. That the defendant operates a general furniture business in the store building or buildings located at 125 West Broad Street in Statesville, Iredell County; that said building or buildings face at the rear thereof upon an alleyway which is generally used by the public both as pedestrians and in automobiles; and that there is a loading platform and entrance way into the store building or buildings fronting on said alleyway.

"3. That for some years prior to 6 September, 1934, there was situated immediately to the right and well inside of the rear entrance doors a shaft in which was located an elevator which the plaintiff is informed and believes was used to convey passengers as well as goods and merchandise to and from the various floors and departments of said store, which shaft was protected by a sliding door or gate; that at some time prior to 6 September, 1934, the rear of said building or buildings was altered so that the rear entrance doors were moved eastward a distance of approximately ten feet, thereby placing them directly in front of the said elevator shaft; that the entrance to said elevator shaft was changed so that it opened directly into and in front of said rear entrance doors, whereas formerly said entrance had been on the left or westward side of said shaft; that said sliding gate or door protecting the entrance to said shaft was removed and replaced by two lattice doors, which opened outward from said shaft and towards the rear entrance doors, and were secured or fastened to said shaft in the center of the entrance by means of two latches to which were fastened chains which hung down on the outside

directly in front of the rear entrance doors of said building or buildings; that on the opposite side of said shaft there were other lattice doors opening into the interior of said building or buildings from the shaft, so that there was a clear view afforded from the rear entrance doors through said shaft into the interior of said building or buildings; that when said rear entrance doors were opened they barely cleared the shaft and thereby obscured and obstructed any entrance way into the interior of said building or buildings other than through the said shaft.

"4. That on 6 September, 1934, the plaintiff did not know or have cause to know of the said alterations and changes in said building or buildings as set forth in the next preceding paragraph.

"5. That for a number of years prior to 6 September, 1934, it was, and at the date of filing of this complaint still is, the custom and usage of customers and other persons having business with the defendant, its officers and employees to approach said building or buildings from the rear by said alleyway and to use the rear entrance doors in entering said building or buildings, and to use the same means in departing therefrom, which custom and usage was and is well known to the defendant.

"6. That on or about 6 September, 1934, at about the hour of 4 o'clock in the afternoon, the plaintiff, having business in the store of the defendant, approached the rear of said building or buildings by said alleyway, stepped upon the loading platform and approached the rear entrance doors, which at that time were open, and as hereinbefore alleged, obstructed and obscured the way of entrance into the interior of said building or buildings other than through said shaft.

"7. That at the time the plaintiff reached the lattice doors at the entrance of the shaft the elevator had been raised to the second floor, thereby causing said shaft to be dark; that the plaintiff saw no way to enter the interior of said building or buildings except through and by means of said lattice doors; that he saw the chains hanging from the latches on said doors, pulled the one on the right-hand door and opened said door; that he took one step forward and fell a distance of 6 to 6½ feet into said shaft, landing on the concrete floor at the bottom thereof.

"8. That the defendant knew, or by the exercise of due care should have known, that said rear entrance doors were commonly used by the public in entering its place of business, and that the conditions and circumstances surrounding said shaft and its location constituted a dangerous place and a hazard to persons entering its place of business by said rear entrance doors, but in spite of such knowledge carelessly and negligently omitted and failed to provide adequate safeguards and means of warning and protection from such danger and hazard to persons who thus entered said place of business, but in fact invited such persons to

seek to enter the interior thereof through said lattice doors at said entrance by reason of the view of the interior thereof through said doors and the said chains hanging on the outside of said doors of the shaft.

"9. That the negligence of the defendant, as set forth in the next preceding paragraph, was the sole, direct, and proximate cause of the plaintiff falling into said shaft, by reason of which fall the plaintiff sustained injuries of a serious and permanent nature."

Defendant filed answer denying the allegations of negligence, and for a further answer and defense set up plea of contributory negligence.

At the trial defendant demurred *ore tenus,* and the demurrer was sustained on the ground, as stated in the judgment, "that the complaint alleges negligence on the part of the plaintiff which is a bar of his right to recover."

From the judgment sustaining the demurrer the plaintiff appealed.

A. C. McIntosh, A. B. Raymer, and J. Laurence Jones for plaintiff.

J. L. Delaney and Buren Jurney for defendant.

DEVIN, J. The defendant entered a demurrer *ore tenus* to the complaint on the ground that it did not state facts sufficient to constitute a cause of action for that it affirmatively alleged contributory negligence on the part of the plaintiff.

On a demurrer the statute (C. S., 535) requires that we construe the complaint liberally with a view to substantial justice between the parties. The demurrer admits the truth of all the material facts alleged, and every intendment is adopted in behalf of the pleader. A complaint cannot be overthrown by a demurrer unless it be wholly insufficient. If in any portion of it, or to any extent it presents facts sufficient to constitute a cause of action, the pleading will stand. It must be fatally defective before it will be rejected as insufficient. *S. v. Trust Co.,* 192 N. C., 246; *Lee v. Produce Co.,* 197 N. C., 714.

At the outset in the case at bar the appellant raises the question whether a demurrer to the complaint on the ground of contributory negligence will lie.

To remove the uncertainty formerly appearing in the decisions of the Court as to whether the burden of proof should be imposed on the plaintiff to negative contributory negligence or on the defendant to allege and prove it, the following statute was enacted (Acts 1887, ch. 33, now C. S., 523): "In all actions to recover damages by reason of the negligence of the defendant, where contributory negligence is relied upon as a defense, it must be set up in the answer and proved on the trial."

Consequently, it would seem that in order that the defendant may avail himself of the plea of contributory negligence he must set it up in his answer. Failure to so plead it would constitute a waiver. And when so pleaded it must be proven by the defendant by the greater weight of the evidence.

In *Kearney v. R. R.,* 177 N. C., 251, this Court sustained the refusal of the trial judge to grant a prayer for instruction as to the negligence of plaintiff's employee, on the ground that there was no averment in the answer to support such a plea, which would be an allegation of contributory negligence, and that the statute specifically required that such plea should have been set up in the answer.

And in *Hardy v. Lumber Co.,* 160 N. C., 113, it was held (p. 123) that if defendant wished to rely upon plaintiff's negligence, its defense should have been based on proper averment in the answer.

In *Hood v. Mitchell,* 204 N. C., 130, the judgment of the court below overruling a demurrer on the ground of contributory negligence was affirmed. In that case, *Mr. Justice Connor* used this language: "It is rarely the case that the court can hold as a matter of law, upon the allegations of the complaint, or upon evidence offered by the plaintiff, that plaintiff, who has been injured by the negligence of the defendant, cannot recover damages resulting from such injuries, because by his own negligence he contributed to his injuries."

The only case that has been called to our attention in which a demurrer on the ground of contributory negligence has been sustained is *Burgin v. R. R.,* 115 N. C., 673, where the plaintiff alleged in his complaint that he jumped from a running train and was injured.

A demurrer on the ground of contributory negligence was overruled in *Parks v. Tanning Co.,* 175 N. C., 29, but *Brown, J.,* speaking for the Court, cites the *Burgin case, supra,* as authority for the statement that where the contributory negligence of a plaintiff is patent upon the face of his complaint, it may be taken advantage of by demurrer.

So that it must be held that only where on the face of the complaint itself the contributory negligence of the plaintiff is patent and unquestionable, so as to bar his recovery, will the court allow advantage to be taken thereof by demurrer instead of by answer, as required by the statute.

Upon consideration of the complaint in the case at bar, we think the demurrer cannot be sustained on the ground stated by the court below.

Nor can demurrer be sustained for failure to allege facts sufficient to constitute a cause of action for negligence on the part of the defendant.

Plaintiff alleges he was injured while attempting to enter defendant's store on business. Considering the complaint in the most favorable light for the pleader, as we are required to do, we think he sufficiently alleges

a negligent failure of duty on the part of the defendant to an invitee, proximately causing his injury. *Hood v. Mitchell,* 204 N. C., 130.

It is, of course, well understood that where the plea of contributory negligence has been set up in the answer, notwithstanding the burden of proof to establish it is upon the defendant, motion to nonsuit under C. S., 567, may be allowed when contributory negligence of the plaintiff is established by his own evidence. *Elder v. R. R.,* 194 N. C., 617; *Davis v. Jeffreys,* 197 N. C., 712.

For the reasons stated, the judgment of the court below sustaining the demurrer must be

Reversed.

THELMA SMITH, BY HER NEXT FRIEND, W. A. SMITH, v. PAUL MILLER AND JERRY SWAIM.

(Filed 22 January, 1936.)

1. Automobiles C c—Evidence held for jury on issues of negligence and proximate cause in this action to recover for injuries to child struck by car as she crossed highway to enter school bus.

Evidence that the driver of a car going forty to forty-five miles an hour failed to slacken his speed or give any warning as he approached a group of children standing on the highway, some on one side and some on the other, waiting for a school bus driven in front of the car and going in the same direction, that the driver saw, or could have seen in the exercise of reasonable care, this situation, and that he struck and injured one of the children as she ran across the highway to enter the school bus as it stopped, *is held* sufficient to sustain the allegations of negligence and proximate cause as a matter of law, and defendants' motions for judgment as of nonsuit were properly denied. C. S., 2621 (45).

2. Principal and Agent C a: Automobiles D b—Where agency is admitted, declarations of agent held competent to prove that at the time agent was acting within scope of employment.

Where, in an action against the driver of a car inflicting negligent injury and the owner of the car, the owner admits the fact of agency but denies that his agent at the time was acting within the scope of his employment and in furtherance of the principal's business, testimony of declarations of the agent immediately after the accident that at the time he was going after a newspaper for his employer is competent for the purpose of showing that at the time the agent was acting within the scope of his employment.

APPEAL by defendants from *Rousseau, J.,* at September Term, 1935, of FORSYTH. Affirmed.

This is an action to recover damages for personal injuries suffered by the plaintiff, a child six years of age, when she was struck and knocked

down by an automobile owned by the defendant Jerry Swaim, and driven on a State highway in Forsyth County, North Carolina, by the defendant Paul Miller.

It is alleged in the complaint that the plaintiff was injured by the negligence of the defendant Paul Miller while he was driving an automobile owned by the defendant Jerry Swaim; that at the time he struck and injured the plaintiff, the defendant Paul Miller was an employee of the defendant Jerry Swaim; and that the said Paul Miller was driving the automobile owned by the defendant Jerry Swaim when he struck and injured the plaintiff, in the performance of the duties of his employment.

In their answer the defendants deny that the plaintiff was injured by the negligence of the defendant Paul Miller, as alleged in the complaint; they admit that at the time the plaintiff was struck and injured by the automobile, the defendant Paul Miller was an employee of the defendant Jerry Swaim; they deny, however, that the defendant Paul Miller was engaged in the performance of any duty as an employee of the defendant Jerry Swaim when the automobile which he was driving struck and injured the plaintiff.

The action was begun and tried in the Forsyth County court. At the trial issues submitted to the jury were answered as follows:

"1. Was the defendant Paul Miller the agent of his codefendant Jerry Swaim and acting within the scope of and in the execution of his authority at the time of the injury to the plaintiff, as alleged in the complaint? Answer: 'Yes.'

"2. Was the plaintiff Thelma Smith injured by the negligence of the defendants, as alleged in the complaint? Answer: 'Yes.'

"3. What amount of damages, if any, is the plaintiff entitled to recover of the defendants? Answer: '$2,500.'"

From judgment that plaintiff recover of the defendants the sum of $2,500, and the costs of the action, the defendants appealed to the Superior Court of Forsyth County, assigning errors in the trial.

At the hearing of defendants' appeal to the Superior Court, each and all their assignments of error on said appeal were overruled, and the judgment was affirmed. The defendants appealed to the Supreme Court, assigning errors in the rulings of the judge of the Superior Court on their assignments of error in said court, as shown by the record.

Elledge & Wells for plaintiff.
Slawter & Wall for defendants.

CONNOR, J. Where, as in the instant case, there is evidence tending to show (1) that the defendant in an action to recover damages for

personal injuries suffered by the plaintiff was driving an automobile on a highway in this State at a speed of from forty to forty-five miles per hour; (2) that while thus driving the automobile, the defendant approached a group of children, standing near the highway, some on one side, and others on the other side of the highway, and thus awaiting the arrival of a school bus which was approaching the children from the direction in which the defendant was driving, for the purpose of transporting the children to a public school which they were attending as pupils; and (3) that the defendant saw, or in the exercise of reasonable care could have seen, the children in this situation, but did not slacken his speed and give warning of his approach by sounding his horn or otherwise, such evidence is sufficient as a matter of law to sustain the allegation in the complaint that the defendant was driving the automobile in violation of the provisions of C. S., 2621 (45), and was for that reason negligent. See *Towe v. R. R.*, 165 N. C., 1, 80 S. E., 889; *Moore v. Powell*, 205 N. C., 636, 172 S. E., 327; *Fox v. Barlow*, 206 N. C., 66, 173 S. E., 43. In the last cited case it is said by *Brogden, J.*: "Experience demonstrates that children of tender years in and about streets and highways are likely, in obedience to impulse, to run into and across such streets and highways suddenly and without warning. Motorists must know and recognize this fact and govern themselves accordingly, else the criminal and civil laws must be called upon to turn professor." The situation in the instant case was such that the driver must have known as he drove into the group of children that some of them would cross or attempt to cross the highway as soon as the approaching school bus stopped to take the children on as passengers. Every fact and circumstance in the situation that the driver of the automobile saw or should have seen indicated that it was the purpose of the children to enter the bus as soon as it stopped, and that the children on the east side of the highway must necessarily cross to the west side, where the bus would stop.

Where there is evidence, as there was in the instant case, tending to show further that the defendant, while thus driving the automobile recklessly and without due caution for the safety of the children who were standing near the highway, awaiting the arrival of the school bus, which could then be seen by the driver of the automobile approaching the children, struck and injured the plaintiff, a child six years of age, and one of the group of children standing near the highway, as she started to cross the highway from the east to the west side, to enter the bus as soon as it stopped, such evidence is sufficient as a matter of law to sustain the allegation in the complaint that the plaintiff was injured by the negligence of the defendant.

Whether or not, in the instant case, the negligence of the defendant Paul Miller was the proximate cause of the injuries suffered by the plaintiff was clearly a matter for the jury. The submission of the evidence to the jury as tending to establish the liability of the defendant Paul Miller in this case was not error, and the motion of the defendants for judgment as of nonsuit was properly denied by the trial court. There was no error in the ruling of the judge of the Superior Court to that effect.

The defendant Jerry Swaim admitted in his answer that he was the owner of the automobile which the defendant Paul Miller was driving when he struck and injured the plaintiff, and that at said time the said Paul Miller was his employee; he denied, however, that at said time the said Paul Miller was driving the automobile in the performance of any duty to him by reason of his employment. The defendant thus admitted the agency but denied that the act of his agent was within the scope of his authority, or in furtherance of the principal's business.

The defendant objected to testimony offered by the plaintiff tending to show that immediately after the plaintiff was injured, Paul Miller said that at the time he struck and injured the plaintiff with defendant's automobile, he was going after defendant's morning newspaper.

This objection was overruled, and properly so. The testimony was not offered as evidence tending to show that Paul Miller was an employee or agent of the defendant Jerry Swaim. The admission to that effect in the answer of the defendant had been offered in evidence by the plaintiff. There was ample evidence tending to show that Paul Miller habitually drove the automobile owned by the defendant Jerry Swaim as his employee. Therefore, *Brown v. Wood,* 201 N. C., 309, 160 S. E., 281, has no application to the instant case. The testimony was offered as evidence tending to show that at the time the plaintiff was injured by the negligence of Paul Miller, the said Paul Miller was acting within the scope of his employment by the defendant Jerry Swaim. It was competent and properly admitted for that purpose. There was no error in the ruling of the judge of the Superior Court to that effect. See *Brittain v. Westall,* 137 N. C., 30, 49 S. E., 54.

An examination of the charge of the trial judge to the jury discloses no error in the rulings of the judge of the Superior Court on defendant's assignments of error based upon exceptions to the charge.

The judgment affirming the judgment of the Forsyth County court is Affirmed.

JEFFERSON STANDARD LIFE INSURANCE COMPANY v. GARRETT MOREHEAD ET AL.

(Filed 22 January, 1936.)

1. Evidence J a—Parol evidence is not admissible to vary terms of written instrument.

No verbal agreement between the parties to a written contract, made before or at the time of the execution of such contract, is admissible to vary its terms or to contradict its provisions. The exceptions to the general rule are enumerated and discussed by *Stacy, C. J.*

2. Same—Testimony of verbal agreement that instrument should not become effective until happening of condition held competent.

The payee of a note instituted action against the endorsers thereon. The note contained a stipulation that the endorsers should be bound regardless of who did or who did not endorse said instrument with them. Defendants alleged and offered evidence of a verbal agreement with the payee's *alter ego* that the note should not be delivered until twenty-five members of the fraternity executing the note had endorsed same, including a certain named member of the fraternity. *Held:* The agreement was as to a condition precedent to the effectiveness of the instrument and the terms of the endorsement, and evidence of the agreement was competent as to all endorsers who had not participated or acquiesced in the delivery of the note or who had not ratified its delivery prior to endorsement by twenty-five members of the fraternity, since as to them the terms of the endorsement in conflict with the verbal agreement never became effective. The distinction is pointed out when the instrument becomes effective, in which case its terms may not be contradicted by parol.

APPEAL by defendants from *Pless, J.*, at August Term, 1935, of GUILFORD.

Civil action to recover from endorsers $4,700, balance alleged to be due on a promissory note, executed by Alpha Mu Building Corporation to plaintiff, 15 March, 1930, and now owned and held by plaintiff.

In the spring of 1930 the Alpha Mu chapter of the Kappa Sigma fraternity was desirous of building a chapter house for the use of the fraternity at Chapel Hill. Negotiations were had with the Jefferson Standard Life Insurance Company for a loan of $5,000. "The financing of the arrangement," according to plaintiff's president, was "to be made with John Umstead." He was the *alter ego* of the plaintiff in the transaction. The loan was to be secured by deed of trust on real estate, and the understanding was that the note would not be delivered until twenty-five members of the fraternity had endorsed it, including Mr. Charles T. Woollen. Umstead, with knowledge of this understanding, and as a party to it, assisted in getting the signatures of the fraternity members.

Only seven endorsers were actually secured before the note was delivered, and Mr. Woollen was not among them.

The pertinent part of the endorsement, appearing on the back of the note, is as follows:

"We, the undersigned endorsers of this note, . . . hereby agree to remain and continue bound for the payment of the principal and interest provided for by the terms of this note, irrespective of and without regard to any agreement or agreements relative to other endorsement, or without regard to who, in addition to ourselves, may or may not endorse this note."

The defendants tendered the following issue, which was raised by the pleadings and supported by testimony duly proffered:

"Was it a condition that the note sued upon should not be delivered until 25 members of the fraternity had endorsed the same, including Mr. Charles T. Woollen?"

The court declined to submit the issue, ruled out the defendants' proffered testimony, directed a verdict for plaintiff, and entered judgment accordingly.

Defendants appeal, assigning errors.

Smith, Wharton & Hudgins for plaintiff.
Manning & Manning and R. M. Gantt for defendants.

STACY, C. J. The proffered testimony of the defendants was excluded upon the theory that it runs counter to the terms of their written endorsement. *White v. Fisheries Products Co.*, 183 N. C., 228, 111 S. E., 182; *Bank v. Dardine*, 207 N. C., 509, 177 S. E., 635.

It is well-nigh axiomatic that no verbal agreement between the parties to a written contract, made before or at the time of the execution of such contract, is admissible to vary its terms or to contradict its provisions. *Dawson v. Wright*, 208 N. C., 418, 181 S. E., 264; *Coral Gables v. Ayres*, 208 N. C., 426, 181 S. E., 263; *Carlton v. Oil Co.*, 206 N. C., 117, 172 S. E., 883; *Overall Co. v. Hollister*, 186 N. C., 208, 119 S. E., 1; *Ray v. Blackwell*, 94 N. C., 10. As against the recollection of the parties, whose memories may fail them, the written word abides. *Walker v. Venters*, 148 N. C., 388, 62 S. E., 510. The rule undoubtedly makes for the sanctity and security of contracts. *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.

On the other hand, there are a number of seeming exceptions, more apparent than real perhaps, as well established as the rule itself. *Roebuck v. Carson*, 196 N. C., 672, 146 S. E., 708. The decisions are to the

effect that the rule which prohibits the introduction of parol testimony to vary, modify, or contradict the terms of a written instrument, is not violated:

First, by showing a conditional delivery of said instrument. *Thomas v. Carteret Co.*, 182 N. C., 374, 109 S. E., 384; *Garrison v. Machine Co.*, 159 N. C., 285, 74 S. E., 821; *Kernodle v. Williams*, 153 N. C., 475, 69 S. E., 431.

Second, by showing failure of consideration. *Williams v. Chevrolet Co., ante*, 29; *Chemical Co. v. Griffin*, 202 N. C., 812, 164 S. E., 577; *Swift & Co. v. Aydlett*, 192 N. C., 330, 135 S. E., 141; *Pate v. Gaitley*, 183 N. C., 262, 111 S. E., 339; C. S., 3008.

Third, by showing mode of payment and discharge as contemplated by the parties, other than that specified in the instrument. *Bank v. Rosenstein*, 207 N. C., 529, 177 S. E., 643; *Kindler v. Trust Co.*, 204 N. C., 198, 167 S. E., 811; *Wilson v. Allsbrook*, 203 N. C., 498, 166 S. E., 313; *Stockton v. Lenoir*, 198 N. C., 148, 150 S. E., 886; *Bank v. Winslow*, 193 N. C., 470, 137 S. E., 320.

Fourth, by showing that one, ostensibly a joint promisor or obligor, is in fact a surety. *Furr v. Trull*, 205 N. C., 417, 171 S. E., 641; *Barnes v. Crawford*, 201 N. C., 434, 160 S. E., 464; *Welfare v. Thompson*, 83 N. C., 276.

Fifth, by showing that an instrument apparently under seal is a simple contract; provided there is no recital of a seal in the instrument, such as "witness my hand and seal," and it is not required by law to be under seal. *Williams v. Turner*, 208 N. C., 202, 179 S. E., 806; *Baird v. Reynolds*, 99 N. C., 469, 6 S. E., 377; *Yarborough v. Monday*, 14 N. C., 420. Of course, in any event, the maker would have the burden of overcoming the presumption arising from the presence of a seal.

Sixth, by showing the whole of a contract, only a part of which is in writing, provided the contract is not one required by law to be in writing and the unwritten part does not conflict with the written. *Dawson v. Wright, supra; Henderson v. Forrest*, 184 N. C., 230, 114 S. E., 391; *Evans v. Freeman*, 142 N. C., 61, 54 S. E., 847.

Seventh, by showing a subsequent parol modification, provided the law does not require a writing. *Grubb v. Motor Co., ante*, 88; *Fertilizer Co. v. Eason*, 194 N. C., 244, 139 S. E., 376; *McKinny v. Matthews*, 166 N. C., 576, 182 S. E., 1036; *Freeman v. Bell*, 150 N. C., 146, 63 S. E., 682.

Eighth, by engrafting parol trust on legal title, provided the confidence or declaration is not one in favor of grantor. *Jones v. Jones*, 164 N. C., 320, 80 S. E., 430; *Gaylord v. Gaylord*, 150 N. C., 222, 63 S. E., 1028; *Avery v. Stewart*, 136 N. C., 426, 48 S. E., 775; *Sykes v. Boone*, 132 N. C., 199, 43 S. E., 645; *Wood v. Cherry*, 73 N. C., 110. In such

case, clear, strong, and convincing evidence is required. *Speas v. Bank,* 188 N. C., 524, 125 S. E., 398; *Coxe v. Carson,* 169 N. C., 132, 85 S. E., 224; *Lamb v. Perry,* 169 N. C., 436, 86 S. E., 179.

In the instant case the defendants sought to show a contemporaneous oral agreement that the note was not to be delivered, or to become effective as to them, until twenty-five endorsers had been secured. The trial court was of opinion that this evidence was in conflict with the written endorsement. The position is correct as to any endorser, if any, who participated in the delivery of the note or who acquiesced in its delivery prior to its endorsement by twenty-five members of the Alpha Mu fraternity, or who thereafter ratified such delivery. *Thomas v. Carteret, supra.* The moment the instrument became effective with the knowledge and consent of any endorser, it was no longer open to him to contradict the terms of his written endorsement. *White v. Fisheries Co., supra.*

But with respect to those endorsers who, to the knowledge of plaintiff's *alter ego,* never agreed or assented to a delivery of the note prior to its endorsement by twenty-five members of the fraternity, a different principle prevails, for, as to them, the terms of the endorsement never became effective. *Building Co. v. Sanders,* 185 N. C., 328, 117 S. E., 3.

"It is fully understood that although a written instrument purporting to be a definite contract has been signed and delivered, it may be shown by parol evidence that such delivery was on condition that the same was not to be operative as a contract until the happening of some contingent event, and this on the idea, not that a written contract could be contradicted or varied by parol, but that until the specified event occurred, the instrument did not become a binding agreement between the parties." *Bowser v. Tarry,* 156 N. C., 35, 72 S. E., 74.

The case of *White v. Fisheries Co., supra,* cited by plaintiff as controlling, is distinguishable by reason of the fact that in the cited case plaintiff sought to recover for breach of a contemporaneous oral agreement, and set up the amount of his note, which he was compelled to pay, as the measure of damages. There was an endorsement on the back of the note in conflict with the alleged parol agreement. When a written instrument becomes effective, its terms may not be contradicted by parol. Until this time, however, its terms are not operative. *Kelly v. Oliver,* 113 N. C., 442, 18 S. E., 698. Herein lies the distinction between the cases cited by plaintiff and the present case. "The parties to a written contract may agree that until the happening of a condition, which is not put in writing, the contract is to remain inoperative"—Anson on Contracts (Am. Ed.), 318. To like effect are the decisions in *Farrington v. McNeill,* 174 N. C., 420, 93 S. E., 957; *Garrison v. Machine Co.,* 159 N. C., 285, 74 S. E., 821; *Gaylord v. Gaylord,* 150 N. C., 222, 63 S. E., 1028; *Hughes v. Crooker,* 148 N. C., 318, 62 S. E., 429; *Aden v. Doub,*

146 N. C., 10, 59 S. E., 162; *Pratt v. Chaffin,* 136 N. C., 350, 48 S. E., 768. "The manual delivery of an instrument may always be proved to have been on a condition which has not been fulfilled, in order to avoid its effect. This is not to show any modification or alteration of the written agreement, but that it never became operative, and that its obligation never commenced"—*Devens, J.,* in *Wilson v. Powers,* 131 Mass., 539.

The defendants were entitled, under the pleadings and proof, to have the issue tendered by them submitted to the jury, with proper instructions from the court.

It will be noted the action is between the original parties, and the question of contribution is not involved.

New trial.

STATE v. SID LANGLEY, JR.

(Filed 22 January, 1936.)

1. Intoxicating Liquor G d—Evidence held sufficient to support directed verdict in this prosecution for possession of liquor for sale.

Evidence that defendant had over a gallon of intoxicating liquor in a bedroom in the back of a filling station operated by him, together with a siphon and several empty bottles, and that in the front room of the filling station there were several glasses smelling strongly of whiskey, and that defendant had been seen passing pint bottles containing some white liquid to several customers of the station, and that he was arrested as he came out of the back room with a pint bottle of whiskey in his hand *is held* sufficient to overrule defendant's motion for judgment as of nonsuit in a prosecution for possession of intoxicating liquor for the purpose of sale, and under the presumption raised by such possession under the provisions of C. S., 3379 (2), to support a directed verdict of guilty in the absence of evidence explaining such possession or showing that it was lawful.

2. Criminal Law I j—Court may direct verdict when the uncontradicted evidence shows facts sufficient to establish guilt under valid statute.

Where all the evidence at the trial of a criminal action, if believed by the jury, shows facts sufficient under the provisions of a valid statute in force at the time of the alleged crime and at the time of the trial to establish the guilt of defendant, and there is no evidence to the contrary, the court may direct a verdict of guilty if the jury believe the evidence, since the credibility of the evidence alone should be submitted to the jury in such case.

3. Intoxicating Liquor G e—Repeal statute does not affect provisions of C. S., 3379, making possession of liquor for sale illegal.

C. S., 3379, providing that the possession of intoxicating liquor for the purpose of sale is illegal and that possession of more than one gallon of intoxicating liquor shall constitute *prima facie* proof of a violation of the statute is still in force in all the counties of the State, unaffected by ch. 493, Public Laws of 1935, the act of 1935 not being in conflict there-

with, since it purports to repeal only the Turlington Act, Art. 8, ch. 66, C. S., Vol. III, and to provide for sale and possession in the designated counties only by the control boards therein provided for.

SCHENCK and DEVIN, JJ., dissent.

CLARKSON, J., concurs in result.

APPEAL by defendant from *Cranmer, J.*, at August Term, 1935, of NASH. No error.

This is a criminal action in which the defendant was tried in the Superior Court of Nash County *de novo* on a warrant issued by a justice of the peace of said county on 11 August, 1935, and returnable to the recorder's court of Nash County. At the trial in the recorder's court, the defendant was convicted, and from the judgment of said court he appealed to the Superior Court.

The criminal warrant on which the defendant was tried was issued on a complaint in which it was charged that at and in Nashville Township, Nash County, North Carolina, on or about 11 August, 1935, Sid Langley, Jr., did unlawfully, willfully, and feloniously have in his possession about one and one-half gallons of whiskey for the purpose of sale, contrary to the form of the statute and against the peace and dignity of the State.

At the trial, the State offered evidence as follows:

W. C. Cook, a witness for the State, testified: "I am a police officer of the town of Nashville, N. C. On 11 August, 1935, I was going down the Rocky Mount highway and saw a Model T Ford automobile sitting under the service station, which is located on the south side of said highway, about one mile east from Nashville. It is known as Clark's Service Station. Two men were standing on one side of the automobile and two ladies were standing on the other side. As I passed by I saw the defendant put a pint bottle into a pocket of one of the men. I went on to Rocky Mount and later came back by the service station. I then saw a truck sitting under the shelter of the service station. I saw Mr. Langley, the defendant, pass a bottle to the driver of the truck, who was sitting in the cab. I came on to Nashville, and after talking with Sheriff Griffin, we got a search warrant and went back to the service station. When we went in, Mr. Langley was coming from the back room of the service station with a pint of whiskey in his hand. When we went into the back room, which was a bedroom, we found a stone jug with about one and one-half gallons of whiskey in it, and a siphon in the jug. We came back into the front room, and there found two drinking glasses sitting on a counter, with the odor of whiskey in them. The defendant told me that he operated the service station.

"The bottle which I saw Mr. Langley put into the man's pocket and the bottle which I saw him pass to the man in the cab of the truck both

appeared to contain some white liquid, but I did not get close enough to swear whether it was whiskey or not."

John H. Griffin, a witness for the State, testified: "I am a deputy sheriff of Nash County. Upon information which came to me, I obtained a search warrant and went down to search the defendant's place on 11 August, 1935. As I went in I met Langley coming out of his bedroom with a pint of whiskey in his hand. He was coming into the front room, which I reckon you would call the store room. There were three glasses sitting on the counter and they smelled strong with whiskey. There was a jug sitting in the window in the bedroom with one and one-half gallons of whiskey in it, with a siphon in the jug with which to draw the whiskey out. There were several empty bottles in both rooms of the place. That is practically all I know about this case."

The State then offered in evidence a jug of whiskey, a siphon, drinking glasses, and a bottle of whiskey, which were identified as the articles referred to in the testimony of the witnesses.

At the close of the evidence for the State, the defendant moved that the action be dismissed by a judgment as of nonsuit. The motion was denied, and the defendant excepted.

No evidence having been offered by the defendant, the court instructed the jury as follows:

"Gentlemen of the jury, if you believe beyond a reasonable doubt the facts to be as the evidence and testimony of the witnesses tend to show, you will find the defendant guilty."

To this instruction the defendant in apt time excepted.

The jury returned a verdict of guilty. From judgment that he be confined in the county jail for a term of six months, and assigned to work on the State highways, as provided by law, the defendant appealed to the Supreme Court, assigning errors in the trial.

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

Cooley & Bone for defendant.

CONNOR, J. The evidence at the trial of this action was sufficient in its probative force to establish the fact, as alleged in the warrant, that on 11 August, 1935, at the service station located on a highway in Nash County and operated by him, the defendant had in his possession more than a gallon of spiritous or intoxicating liquor. All the facts and circumstances shown by the evidence were sufficient to justify the inference by the jury that the defendant had such liquor in his possession for sale. This was a reasonable and permissive inference without regard to any statutory presumption arising from the quantity of liquor in his possession, under the provisions of C. S., 3379 (2), *S. v. Hammond,* 188

N. C., 602, 125 S. E., 402. Indeed, what other inference, in the absence of any evidence tending to show the contrary, could a jury of intelligent men of good moral character draw from the facts and circumstances shown by all the evidence?

There was no error in the refusal of the trial court to allow defendant's motion for judgment as of nonsuit. C. S., 4643.

If C. S., 3379, is now and was in force in Nash County on 11 August, 1935, as contended by the State, the fact, as shown by all the evidence, that the defendant had in his possession at said time and place more than a gallon of spiritous liquor, was sufficient in itself to show that the defendant had such liquor in his possession for sale, and was therefore guilty of a violation of the statute. In such case, there being no evidence tending to explain such possession, and to show that it was lawful, there was no error in the instruction of the court to the jury. *S. v. Rose,* 200 N. C., 342, 156 S. E., 916. In *S. v. Singleton,* 183 N. C., 738, 110 S. E., 846, it is said: "It is error for the trial judge to direct a verdict in a criminal action when there is no admission or presumption calling for an explanation or reply from the defendant." In the instant case, if C. S., 3379, is applicable, there was a presumption that defendant had the liquor in his possession for sale. There is no evidence tending to show the contrary.

Where all the evidence at the trial of a criminal action, if believed by the jury, shows facts which are sufficient under the provisions of a valid statute in force at the time of the alleged crime and at the time of the trial to establish the guilt of the defendant, and there is no evidence to the contrary, it is not error for the trial judge to instruct the jury that if they believe all the evidence and find the facts to be as the evidence tends to show, they should find the defendant guilty. In such case, only the credibility of the evidence should be submitted to the jury. In the instant case, the fact, as shown by all the evidence, that the defendant had in his possession more than one gallon of spiritous liquor at his service station on a highway in Nash County, on 11 August, 1935, was sufficient proof of his unlawful purpose, if C. S., 3379, was then in force in Nash County.

C. S., 3379, is section 2 of chapter 44, Public Laws of North Carolina, 1913, as modified by section 8 of chapter 97, Public Laws of North Carolina, 1915. It provides that "it shall be unlawful for any person, firm, association, or corporation, by whatever name called, to have or keep in possession, for the purpose of sale, any spiritous, vinous, or malt liquors." It further provides that proof of the possession of more than one gallon of spiritous liquor at any one time, whether in one or more places, shall constitute *prima facie* proof of a violation of the statute. The statute is constitutional and valid, *S. v. Randall,* 170 N. C., 757, 86 S. E., 1042, and is State-wide in its application. It is now and has been

at all times since its enactment in full force and effect in Nash County, and in all other counties in this State, unless, as contended by the defendant, it has been repealed, amended, or modified by chapter 493, Public Laws of North Carolina, 1935, known as the Pasquotank County Liquor Control Act.

It is provided in chapter 493, Public Laws of North Carolina, 1935, that if a majority of the qualified voters of Nash County, at an election to be called by the board of county commissioners of said county, and to be held within sixty days from the date of its ratification, shall vote in favor of the sale of intoxicating liquors in said county under the provisions of said act, then and in that event the provisions of Article 8 of chapter 66, of the Consolidated Statutes of North Carolina, Volume III, known as the Turlington Act, shall not apply to Nash County, and that all laws or parts of laws inconsistent with the provisions of said act shall be repealed. There is no provision in said act expressly or by implication repealing, amending, or modifying C. S., 3379, which is not a part of or included within the provisions of the Turlington Act. Only the provisions of the Turlington Act have ceased to apply to Nash County, as the result of the favorable vote in said county with respect to the application of chapter 493, Public Laws of North Carolina, 1935, to said county. There are no provisions of C. S., 3379, which are inconsistent with any provision of chapter 493, Public Laws of North Carolina, 1935. The latter act does not authorize any person to sell or to have in his possession for the purpose of sale, in Nash County, any spiritous, vinous, or malt liquors, which are intoxicating when used as beverages. Only the Nash County Alcoholic Beverage Control Board, composed of three members appointed by the board of county commissioners of said county, may, under the provisions of the act, sell or have in its possession for the purpose of sale spiritous, vinous, or malt liquors, in Nash County.

We are of opinion, and so hold, that C. S., 3379, is now and has been at all times since its enactment in full force and effect in Nash County, notwithstanding the provisions of chapter 493, Public Laws of North Carolina, 1935.

The judgment in this action is affirmed.

No error.

SCHENCK and DEVIN, JJ., dissent on the ground that there was error in the charge of the court. The evidence established only a *prima facie* case for the State, and it should have been left to the jury to say whether it satisfied them beyond a reasonable doubt that the defendant had intoxicating liquor in his possession for the purpose of sale.

CLARKSON, J., concurs in result.

ELMINA G. MORRIS AND THOMAS S. MORRIS ET UX. v. EMMA MORRIS WAGGONER ET AL.

(Filed 22 January, 1936.)

1. Wills F h—

Where a beneficiary under a will predeceases the testator, the devise or bequest to such beneficiary lapses.

2. Wills E g—

A provision in a devise to a sister and brother that if either should marry, their husband or wife should have no share or control of the property, is inoperative, since the law in such instance would impose the right of dower and curtesy, respectively, on their lands.

3. Wills E b—Devisees held to take life estate with remainder in fee to the survivor under the terms of this will.

Testatrix devised all of her estate to a designated brother and sister, "to use as they please so long as they live." and thereafter provided that if her mother should survive either of the beneficiaries she should share in the estate during her lifetime, and that the "last to survive shall share all the estate to use as they please." Testatrix' mother predeceased testatrix. There was no residuary clause in the will. It appeared that testatrix and her brother and sister named in the will lived together on the home place inherited from their father, until the brother married, and that he then moved to adjacent land, and that testatrix and her sister, both unmarried, continued to live in the home place, and that all three worked together in maintaining the place and in defraying living expenses. *Held:* Construing the will in the light of the facts surrounding the testatrix before, at the time of, and after making the will, the brother and sister named in the will took a life estate in common, with remainder over to the survivor, to the exclusion of other brothers and sisters of testatrix and their children.

4. Wills E a—

In construing a will, the primary purpose is to ascertain the intent of the testator as gathered from the instrument, taking into consideration the attendant circumstances and the condition of testator and his family.

5. Same—

A devise will be construed to be in fee unless it is plainly indicated that testator intended to convey an estate of less dignity. C. S., 4162.

6. Same—

Where a will is susceptible to two constructions, one disposing of the entire estate and the other disposing of only a part, the courts will prefer the construction disposing of the whole estate.

APPEAL by defendants (other than Lou C. Hester and her trustee) from *Clement, J.*, at March Term, 1935, of FORSYTH. Modified and affirmed.

Manly, Hendren & Womble and Elledge & Wells for plaintiffs, appellees.

Parrish & Deal for defendants, appellants.

SCHENCK, J. Elmina G. Morris placed a deed of trust upon certain of the property which is alleged by the plaintiffs to have been devised to her under the will of Cyntha Ann Morris. This deed of trust is held by the trustee to secure an indebtedness to Lou C. Hester. Question was raised by Mrs. Hester as to the sufficiency of her title. Whereupon the plaintiffs, as beneficiaries thereunder, instituted this action, alleging that said will gave to them a fee-simple title to the land involved, or, alternatively, a life estate in common therein, with remainder in fee to the survivor, and requested a construction of said will.

The defendants (other than Lou C. Hester and her trustee), who are the heirs at law of Cyntha Ann Morris, the testatrix, filed answer denying that said will gave to the plaintiffs any more than a life estate in the lands involved, and joined in the request for a construction.

The defendants Lou C. Hester and her trustee filed answer in which they, in effect, joined in the allegations and prayer for relief of the plaintiffs.

The sole question before the court was the construction of the will of Cyntha Ann Morris, which, stripped of the formal parts, is in the following words:

"Being of sound mind and knowing the uncertainty of life, I, Cyntha Ann Morris, do make my only and last will. I bequeath all my estate and future incomes to my brother and sister, Elmina G. Morris and Thomas S. Morris, to use as they please so long as they live. If either marry, their husband or wife shall not share or have any control over any of my estate whatever. If my mother, Eljatha A. Morris, is the longest to survive of these two beneficiaries, she shall share all of my estate her lifetime, after all my expenses and just and honest debts are paid. The last to survive shall share all the estate to use as they please."

The plaintiffs Elmina G. Morris and Thomas S. Morris contend that the will should be construed so as to declare that they "are the owners in fee simple of the property referred to, . . . or, alternatively, that they are the owners of a life estate in said property with the remainder in fee to the survivor."

The appealing defendants, on the contrary, contend that the will should be so construed as to declare that the plaintiffs, "Elmina G. Morris and Thomas S. Morris are entitled to only a life estate in the property of which Cyntha Ann Morris died seized with the remainder in fee to the heirs at law of Cyntha Ann Morris as their interests may appear."

His Honor entered judgment declaring "that the said will of Cyntha Ann Morris shall be considered and the same is hereby construed to give to Elmina G. Morris and to Thomas S. Morris an estate in fee simple in all of the real estate and personal property of the said Cyntha Ann Morris," and taxed the costs against the appealing defendants. From this judgment the defendants, other than Lou C. Hester and her trustee, appealed to the Supreme Court, assigning as error the construction placed upon said will by the court.

At the time she executed the will on 22 August, 1910, the testatrix, Cyntha Ann Morris, was unmarried. She had lived all her life in the home place near Walkertown and lived there at the time of her death. After her father's death many years before, when his real estate was being divided and the commissioners suggested that a division could be more easily accomplished if two of the children would take their shares subject to the dower interest of their mother, the testatrix and her brother, Thomas S. Morris, took their shares subject to the dower interest. The share given to the testatrix embraced the home place and the share given to Thomas S. Morris embraced adjacent land. Cyntha Ann Morris, the testatrix, and her brother, Thomas S. Morris, and her sister, Elmina G. Morris, for many years prior to the marriage of Thomas S. Morris, lived with their mother in the home place. After the marriage of Thomas S. Morris he moved to the adjacent land allotted to him upon the division of his father's estate. Elmina G. Morris has never married and was 62 years of age at the time of this trial. The mother of the testatrix died in 1918 and Elmina G. Morris and Cyntha Ann Morris continued to live together on the home place with Thomas S. Morris until his marriage late in life, and then the testatrix and her sister, two maiden ladies, continued to live on there together until the death of Cyntha Ann. The testatrix was the housekeeper, Elmina worked in the post office and taught school for a salary, and Thomas S. Morris worked about the place and, as Elmina testified, "We all worked there and all helped to bear the expenses—we all worked and put in for our living expenses and everything."

The appealing defendants are brothers and sisters, nephews and nieces and grand-nephews and grand-nieces of the testatrix, together with their husbands and wives, and are forty-three in number. None of these lived with the testatrix. The only persons mentioned in the will are Elmina G. Morris and Thomas S. Morris, and the testatrix' mother, Eljatha A. Morris. The will contains no residuary clause.

Since Eljatha Morris, her mother, predeceased the testatrix, such life estate, or other estates as she may have taken under the will, lapsed and is eliminated from our consideration.

The words to the effect that if either Elmina G. Morris or Thomas S. Morris should marry that their husband or wife should have no share or control of the property devised are void and must be treated as surplusage, since the right of dower and of curtesy attach as a matter of law to all lands of which the husband and the wife, respectively, are seized during coverture.

While the clauses preceding it, standing alone, may have given to Elmina G. Morris and to Thomas S. Morris only a life estate as tenants in common, we think, and so hold, that the final clause, "the last to survive shall share all the estate to use as they please," when read in the light of the facts surrounding the testatrix before, at the time of, and after the making of the will, gave to Elmina G. Morris and Thomas S. Morris a life estate in common with the remainder over in fee to the survivor.

This construction is in accord with the principles enunciated in *Herring v. Williams,* 153 N. C., 231; *Crouse v. Barham,* 174 N. C., 460; and *Ripley v. Armstrong,* 159 N. C., 158, to the effect that the primary purpose in construing a will is to ascertain the intention of the testator from the language used in the will, and that in ascertaining such intention consideration should be given to the condition of the testator and his family and to all of the attendant circumstances surrounding the execution of the will, and it follows C. S., 4162, which provides that when real estate is devised to any person the same shall be construed to be a devise in fee simple unless it is plainly indicated that the testator intended to convey an estate of less dignity, and is also in accord with the well recognized rule of construction that "if . . . a will is susceptible of two constructions, by one of which testator disposes of the whole of his estate, and by the other of which he disposes of a part of his estate only, and dies intestate as to the remainder, the courts will prefer the construction by which the whole of the testator's estate is disposed of, if this construction is reasonable and consistent with the general scope and provisions of the will." *Holmes v. York,* 203 N. C., 709 (712); Page on Wills (2d Ed.), Vol. 1, sec. 815, p. 1383.

This case is remanded to the Superior Court that the judgment therein may be modified in accord with this opinion, that is, so modified as to declare that Elmina G. Morris and Thomas S. Morris are the owners of a life estate in common in the lands described in the complaint, with a remainder in fee therein to the survivor thereof. That part of the judgment taxing the costs against the appealing defendants is affirmed.

Modified and affirmed.

STATE v. CHARLES C. HINSON.

(Filed 22 January, 1936.)

1. Parent and Child A b—Evidence held sufficient for jury on charge of willful abandonment and failure to support minor child.

Evidence that the prosecuting witness and defendant were married in another state and there separated, that later defendant returned to the home of his parents in this State, and that prosecuting witness thereafter returned to live with her parents residing in the same city in this State, bringing with her her infant daughter born of the marriage, and that defendant refused to support said minor child although repeated demands were made on him after the parties had returned to the State, *is held* sufficient to overrule defendant's motion as of nonsuit in a prosecution for willful abandonment and failure to support his minor child, C. S., 4447, the amendment of the statute by ch. 290, Public Laws of 1925, providing that the abandonment by the father of a minor child shall constitute a continuing offense.

2. Same: Criminal Law D a—Offense of willful abandonment and failure to support minor child held committed in this State.

Evidence that the prosecuting witness and defendant were married in another state and there separated, that later defendant returned to the home of his parents in this State and that the prosecuting witness thereafter returned to live with her parents residing in the same city in this State, bringing with her her infant daughter born after the marriage, and that defendant refused to support said minor child although repeated demands were made on him after the parties had returned to this State, *is held* to show that the offense of willful abandonment and failure to support said minor child was committed by the defendant in this State, since the amendment of C. S., 4447, by ch. 290, Public Laws of 1925, provides that the abandonment by the father of a minor child shall constitute a continuing offense, and defendant's prayer for a directed verdict of "not guilty," based upon his contention that the offense, if any, committed by defendant was committed in another State, was properly refused.

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

APPEAL by defendant from *Small, J.*, and a jury, at May Term, 1935, of WAYNE. No error.

This is a criminal action, originally instituted in the court of T. A. Henley, a justice of the peace for Goldsboro Township, Wayne County, N. C., by a warrant of arrest issued by said justice of the peace on information sworn to before said justice of the peace and charging that the defendant, "At and in said county of Wayne, ... Township, on or about 13 March, 1934, did unlawfully, willfully abandon his wife and child and has failed to provide any support for his infant child before or since birth, the said child being the issue of the marriage between affiant and defendant."

On the trial in the Superior Court the defendant was found guilty by a jury. Judgment was pronounced on the verdict, from which defendant excepted and assigned error.

The testimony of the State's witness, Mrs. Winnie Hinson, was to the effect: She was raised in Goldsboro, N. C., and lived there with her father and mother. When she was married she was 17 years of age and was in Baltimore, Md., and married defendant in Elbert City, Md., on 28 August, 1933—he was 20 years old. "I just went up there and we were married and I came back here." Defendant stayed with her until October, 1933. Their child, Christine Viola Hinson, was born on 3 January, 1934, and she came back to Goldsboro 22 February, 1934, bringing their child. Defendant came to Goldsboro on 24 December, 1933, "to live as his home," and is living with his parents. "He hasn't given a penny to her since she was born or before. He has not given the child any clothes. He has not given her any milk, and he has not given her any medicine. I wrote and asked him for some medicine and he wouldn't answer it, wouldn't send it or send the money to get it. I went to the store in Goldsboro, N. C., and asked him for medicine while my child was sick and he wouldn't give it to me. He did not ever give me any. He has never given me any provisions when I asked him for them. He has never given me anything for myself since we have been married except four dollars. . . . I have seen him and had a conversation with him since I have lived in town. He came to see the baby while I was living on Slocumb Street, Goldsboro, N. C., with my father and mother. . . . He came and asked me to live with him, in Goldsboro, N. C. He was going to get a job that month. He said that he would have lived with me a long time ago but for his daddy and brother, but said if he lived with me they would put him on the roads. He has never lived with me. He did not go back. He promised to come back that night, but he didn't come. . . . He did not come back. Since that time he has not provided any support for me. He has not provided food, clothing, or money, or any of the necessities of life for this child. He has never denied that the child was his. He admitted that the child was his in Goldsboro when he came to see me. . . . As a matter of fact, the wedding was the result of my necessity. At that time I was a girl 17 years old, who has become pregnant and Charles married me to give my baby a father. That's the truth of it. . . . He said he would support the child if it wasn't for his daddy, his parents. Said as far as he was concerned he would support the child. This conversation occurred that Sunday afternoon when the baby was about six or seven months old and he has not done anything at all of that sort. . . . I had another conversation with my husband other than the one that I testified to having had when I was on the stand a few moments ago. One night in

Goldsboro, N. C., my sister and I went to walk. I saw him in a girl's house and I knocked on the door and he came out. I asked him to talk with me about the baby and he said he couldn't that night because he was drinking, but that he would talk with me Monday night; and he told me to meet him at the corner. I told him that I didn't want to meet him at the corner; but I met him and he asked me to go to the show with him. I told him I didn't want to go to the show. I asked him what he was going to do about the baby. He cursed the baby and hit me then and said he didn't want to see the baby no more. I had my hands up like this and he hit me on the hand. . . . This conversation occurred on Walnut Street, Goldsboro, N. C., about 7 o'clock at night. . . . The baby at that time was about 3 or 4 months old. I believe this conversation occurred since I testified before Mr. T. A. Henley, the magistrate who conducted the preliminary hearing in this matter. . . . Any way, my husband has not furnished me or my baby any support and hasn't lived with me since we have been back in North Carolina."

Defendant in apt time requested the following prayer for instruction: "The court charges you, gentlemen, that all of the evidence tends to show that the acts of the defendant complained of by the State of North Carolina, and for which he stands charged with the crime of abandonment and nonsupport, as alleged in the warrant under which he has been tried, were committed in the State of Maryland and, therefore, there has been no offense committed by the defendant Charles Hinson in the State of North Carolina, and you, therefore, must return a verdict of not guilty." To the refusal of the court to give the foregoing instruction, the defendant excepted and assigned error.

The defendant introduced no evidence, but made numerous exceptions and assignments of error, and many to the charge of the court below. On the exceptions and assignments of error made by defendant he appealed to the Supreme Court.

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

Scott B. Berkeley for defendant.

CLARKSON, J. At the close of the State's evidence the defendant made a motion in the court below (N. C. Code, 1935 [Michie], sec. 4643) for judgment of nonsuit. The court below overruled this motion, and in this we can see no error.

The defendant was charged with violating N. C. Code, 1935 (Michie), sec. 4447: "If any husband shall willfully abandon his wife without providing adequate support for such wife, and the children which he may have begotten upon her, he shall be guilty of a misdemeanor: Provided,

that the abandonment of children by the father shall constitute a continuing offense and shall not be barred by any statute of limitations until the youngest living child shall arrive at the age of eighteen years." Section 4447, C. S., by chapter 290, Public Laws 1925, was amended by adding the following: "Provided, that the abandonment of children by the father shall constitute a continuing offense, and shall not be barred by any statute of limitations until the youngest living child shall arrive at the age of eighteen years." *S. v. Bell,* 184 N. C., 701.

In *S. v. Jones,* 201 N. C., 424, at pp. 425-6, it is said: "The object of the statute is to enforce the obligation, not by subjecting the father to a civil action at the instance of the children, but by the infliction of punishment for his dereliction. It would be a plain evasion of the legislative intent to hold that by suffering the penal consequences of a single violation of the statute the defendant could consign his destitute children to the embrace of charity and thus absolve himself from liability to further prosecution. Wharton defines a continuing offense as a transaction or a series of acts set on foot by a single impulse, and operated by an unintermittent force, no matter how long a time it may occupy. Crim. Pleading, 474. It is an offense which continues day by day. *S. v. Hannon,* 168 N. C., 215; *S. v. Beam,* 181 N. C., 597. The statute in express terms constitutes the abandonment of children by the father a continuing offense. The prosecution of an offense of this nature is a bar to a subsequent prosecution for the same offense charged to have been committed at any time before the institution of the first prosecution, but it is not a bar to a subsequent prosecution for continuing the offense thereafter, as this is a new violation of the law. 16 C. J., 268, sec. 447. This general principle is fortified by the distinct provision that the statute of limitations shall not bar prosecution until the youngest living child shall arrive at the age of eighteen years."

In *S. v. Cook,* 207 N. C., 261 (262), we find: "The word 'willfully' as used in the statute under which the defendant was charged is used with the same import as in the act relating to willful abandonment of wife by husband, C. S., 4447, and what is said in the case of *S. v. Falkner,* 182 N. C., 793, as to the effect of the use of the word 'willful' in a criminal statute is here applicable. In that case the present *Chief Justice* says: 'Willfulness is an essential element of the crime, and this must be found by the jury. The issue, upon an indictment for a violation of the present law, is the alleged guilt of the defendant. He enters on the trial with the common-law presumption of innocence in his favor. When the State has shown an abandonment and the defendant's failure to provide adequate support, the jury may infer from these facts, together with the attendant circumstances, and they would be warranted in finding, if they are so satisfied beyond a reasonable doubt, that it had been done

intentionally without just cause or legal excuse, *i.e.*, willfully. *S. v. Taylor,* 175 N. C., 833.' To the same effect are the more recent cases of *S. v. Johnson,* 194 N. C., 378; *S. v. Yelverton,* 196 N. C., 64; *S. v. Roberts,* 197 N. C., 662." *S. v. Parker, ante,* 32.

From a careful examination of the whole record, we think the court below tried the case in conformity with the statute on the subject and the decisions of this Court. We do not think that the exceptions and assignments of error to the judgment, refusal to give instructions prayed for by defendant, and those made to the charge of the court below can be sustained.

On the record we see no prejudicial or reversible error.

No error.

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

STATE v. ADAM LEWIS.

(Filed 22 January, 1936.)

1. Homicide B a—Evidence held sufficient for jury on question of premeditation and deliberation.

Evidence that defendant went to the home of deceased and her sister, quarreled with them and assaulted them with a poker, and was disarmed, that later on the same afternoon he went in search of deceased, or her sister, and stated, "If I should happen to go back up the road not to tell nobody where I am going," that he pursued deceased's sister out of the house of a neighbor with a hammer, and quarreled with deceased and her sister in the middle of the street, and that as deceased turned to leave the scene, he cursed her in response to some remark uttered by her, and struck her with the hammer and continued to hit her until she was dead, *is held* sufficient to be submitted to the jury on the question of premeditation and deliberation.

2. Same: Homicide G d—Flight is not evidence of premeditation and deliberation.

Although flight of defendant after commission of the crime is a competent circumstance to be considered by the jury in connection with other circumstances as an implied admission of guilt, in a prosecution for homicide, flight is not evidence of premeditation and deliberation, and where, upon proffer of evidence by the State relating to the search for defendant immediately after the commission of the crime, the court admits the evidence over defendant's objection, remarking at the time that he thought it competent on the question of premeditation and malice, a new trial will be awarded defendant on appeal, although the charge of the court to the jury correctly states the law relating to the scope of such evidence.

STATE *v.* LEWIS.

APPEAL by defendant from *McElroy, J.*, and a jury, at March Term, 1935, of GUILFORD. New trial.

The defendant was tried on a bill of indictment for the murder of Jemima Peoples, on 20 February, 1935. The jury returned a verdict of murder in the first degree with a recommendation for mercy. Defendant was sentenced by the court below to death as provided by law.

The evidence on the part of the State was to the effect that Jemima Peoples was a single woman, 26 years of age, living with her father, Dock Peoples, at Terra Cotta, a colored community on Railroad Avenue, outside the city limits of Greensboro, N. C. The evidence is to the effect that on the afternoon of 20 February, 1935, about 3 o'clock, Adam Lewis, the defendant, killed Jemima Peoples, in a street near her home at Terra Cotta. That the defendant went to the home of the deceased, and a short distance before reaching the home had a conversation with one Columbus Rawley, a colored man. That when the defendant reached the home of Jemima Peoples, that he went in where her sister Elnora Peoples was preparing a meal; and soon after that the defendant began to question Elnora Peoples where she was on Monday night, whereupon she told him that she was at home, and that when he asked Jemima where Elnora was that she said that she was at home; and that the defendant at that time told them both they were liars and threatened to hit Elnora with an iron fire-poker, but that they took the poker out of his hand. That thereafter Elnora left her home and went to the home of one Anderson Watkins, a distance of about 200 yards, and there concealed herself upstairs in the residence; that the defendant and the deceased, Jemima, remained at her home a short time and the defendant picked up a hammer at the Peoples' home and thereafter went in search of Elnora Peoples, who had been his sweetheart for some two years. That he went to the home of Anderson Watkins and inquired about Elnora, and was told that she was not there, and that the defendant went beyond the Anderson Watkins home and not finding the said Elnora Peoples, returned to the home of Anderson Watkins and went through the house, but did not find Elnora. At that time Jemima Peoples had arrived at the home of Anderson Watkins and she and the defendant walked from the Anderson Watkins home to the center of the street or roadway. That Jemima Peoples said something to the defendant, "they stopped, she went to turn around, and as she was turning around the defendant said: 'God damn you, you is, is you?' and hit her with the hammer." (Another version was that before he hit her she said: "I will tell my father.") That he drew back the hammer with his hand and as he did this the said Jemima Peoples was in the act of turning away from him, and that he hit the said Jemima Peoples in the head with the hammer, and she immediately fell to the ground, and that the defendant

continued to hit the said Jemima Peoples in the head with the hammer several different times until she was dead. Soon thereafter Adam Lewis went into the woods nearby and was not seen any more until about midnight that night. The defendant appeared at the home of one Roosevelt Eccles, in whose home defendant has been residing in Terra Cotta, and that upon being apprised of what he did on that afternoon denied that he knew anything about the killing. He stated to the sheriff and some of those with whom he came in contact that he had no recollection of the event of the slaying of Jemima Peoples, but that he did remember going to the home of the said Jemima Peoples on 20 February, 1935, and drew some water and did some other chores, and remembered meeting Columbus Rawley, but did not remember having any quarrel with the deceased or altercation with her or her sister, Elnora.

The defendant was examined by Dr. J. Wesley Taylor, an expert, a specialist in mental and nervous diseases, residing in Greensboro, N. C., and the examination by him and Dr. R. M. Buie, the county health officer of Guilford County, revealed that the defendant is an epileptic, and that Dr. Taylor testified that while a person is suffering from an attack of epilepsy he does not have any recollection of what he does, nor does he have sufficient mentality to know the character and quality of his act, and to know the difference between right and wrong, and that a person during that time might fall prostrate and have no use of his body, or that he might continue to move around, walk and talk and act apparently as other persons, but would not have any recollection of what he did while under the attack of epilepsy.

The defendant made numerous exceptions and assignments of error on the trial, and appealed to the Supreme Court. The material one will be considered in the opinion.

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

Frank L. Paschal for defendant.

CLARKSON, J. At the close of the State'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. (N. C. Code, 1935 [Michie], sec. 4643). The court below overruled these motions, and in this we can see no error.

"In order to constitute deliberation and premeditation, something more must appear than the prior existence of actual malice, or the presumption of malice which arises from the use of a deadly weapon. Though the mental process may require but a moment of thought, it must be shown, so as to satisfy the jury beyond a reasonable doubt that the prisoner weighed and balanced the subject of killing in his mind long enough to consider the reason or motive which impelled him to act, and to form

a fixed design to kill in furtherance of such purpose or motive. *S. v. Thomas,* 118 N. C., 1113. Premeditation is thought beforehand for any length of time, however short. The intent to kill in other degrees of unjustifiable homicide, but to constitute murder in the first degree that intent must be formed into a fixed purpose by deliberation and premeditation. The statute simply divides murder into two classes; murder with a specific premeditated and deliberate intent to take life being murder in the first degree; murder without such intent being murder in the second degree." Jerome's Criminal Code and Digest of N. C. (5th Ed.), p. 466. *S. v. Bittings,* 206 N. C., 798.

In *S. v. Cagle, ante,* 114, it is said: "Defendant's motion for nonsuit was properly denied. As was said in *S. v. Johnson,* 184 N. C., 637: 'We could not nonsuit the State, . . . for when there is a killing with a deadly weapon, as there was in this case, the law implies malice, and it is, at least, murder in the second degree, and the burden then rests upon the prisoner to satisfy the jury of facts and circumstances in mitigation of or excuse for the homicide, the credibility of the evidence, and its sufficiency to produce this satisfaction being for the jury to consider and decide.' "

There is ample evidence of premeditation and deliberation. The evidence, before the defendant went to the house of the deceased: "If I should happen to go back up the road not to tell nobody where I am going." He attempted to assault the two women with a fire-poker and they disarmed him, and his question in reference to what time Nora Peoples came home and on being told saying "both of us was telling a lie."

Nora Peoples leaving the house with defendant pursuing her with a hammer, which he had at the time; his striking Jemima in the head when she was turning around and continuing to hit her with the hammer in the head after she had fallen, until she was dead, and his expressions at the time were sufficient to be submitted to the jury on premeditation and deliberation.

J. S. Phillips, sheriff of Guilford County, testified that he was at the scene of the killing immediately after, about 4 o'clock. That he at once commenced a search for defendant, with 10 or 15 officers, "scoured the whole community. . . . There were a number of colored people helped us as well as white, about 25 or 30, I expect, all told. Q. Did you know how far up and down the railroad track you looked, Mr. Phillips? (Objection by the defendant for that it is immaterial). The Court: I think it is competent in determining premeditation, and it is competent to show malice. Answer: We looked not only on the railroad, but the whole surroundings there, and some of the colored people came to our assistance, and they went and looked for him." Exception and assignment of error by defendant was made to the above.

In *S. v. Stewart,* 189 N. C., 340 (347), is the following: "Flight, it is true, is not in itself an admission of guilt; but, when established, it is a fact which, together with a series of other circumstances, may be associated with the fact in issue as, in the relation of cause and effect, to lead to a satisfactory conclusion. Considered in its proper setting and in its relation to other parts of the charge, the instruction complained of, as we understand it, imports only this—that the jury might consider evidence of flight in connection with other circumstances in passing upon the question whether the combined circumstances were tantamount to an implied admission of guilt, and not that flight *per se* constitutes such an admission or raises a presumption of guilt. When so considered, the instruction is in accord with the authorities in this jurisdiction. *S. v. Tate,* 161 N. C., 280; *S. v. Hairston,* 182 N. C., 851. His Honor took care to say that neither flight nor attempted concealment created a presumption of premeditation and deliberation. *S. v. Foster,* 130 N. C., 666." *S. v. Steele,* 190 N. C., 506 (511). Flight is a circumstance to be submitted to the jury. *S. v. Lawrence,* 196 N. C., 562 (577); *S. v. Bittings, supra* (803); *S. v. Beard,* 207 N. C., 673. Flight is subject to explanation. *S. v. Mull,* 196 N. C., 351.

This Court has said in several cases, including the above cases, that flight is not evidence of premeditation and deliberation. *S. v. Collins,* 189 N. C., 15 (20).

The able, painstaking, and learned judge in the court below tried the case with unusual care. The charge covered every aspect of the controversy, and the law applicable to the facts was fully given. This is all so, but we think, under the authorities, that flight is no evidence of premeditation and deliberation. What was said by the court below was prejudicial and reversible error.

For the reasons given, there must be a

New trial.

L. R. POWELL, JR., AND HENRY W. ANDERSON, RECEIVERS OF THE SEABOARD AIR LINE RAILWAY COMPANY, v. HAMLET ICE COMPANY, A CORPORATION.

(Filed 22 January, 1936.)

Railroads C d—Licensee may not be ejected when occupancy of right of way is not reasonably necessary for railroad purposes.

A licensee may not be ejected from the right of way by a railroad company when occupancy of the right of way is not reasonably necessary for railroad purposes and the demand of the railroad company is not made in good faith in the honest exercise of judgment, and where, in an action in ejectment by a railroad company against a licensee operating an icing platform on the railroad right of way, the defendant alleges that it had

satisfactorily serviced refrigerated cars from its platform for over a decade, that same was built at great expense according to specifications of the railroad and a fruit express company, a customer of the railroad, and that the demand of the railroad company that defendant vacate the right of way was not made in good faith, but in order to destroy defendant's business or force it to sell same to a competitor or the express company at a grossly inadequate price, and that the demand was made pursuant to a conspiracy between the parties, and that possession was not sought for *bona fide* railroad purposes, *it is held* to state a defense to the action in ejectment, and the action of the trial court in striking out the allegations of such defense upon motion was error.

STACY, C. J., dissenting.

APPEAL by defendant from order striking out further defense contained in answer, entered by *McElroy, J.*, at September Term, 1935, of RICHMOND. Reversed.

Varser, McIntyre & Henry and Fred W. Bynum for plaintiffs, appellees.

Smith, Wharton & Hudgins for defendant, appellant.

SCHENCK, J. This is an action, instituted by the plaintiffs, to recover the possession of two tracts of land 100 feet wide, upon which is located the railroad tracks of the Seaboard Air Line Railway Company, one of which tracts the plaintiffs allege the plaintiff railway company owns in fee simple, and over the other it owns a right of way or easement for railroad purposes. The plaintiffs further allege that the defendant is in the unlawful possession of a portion of each of said two tracts of land, and notwithstanding demand has been made upon it to vacate said premises, it refuses so to do.

The defendant denies the plaintiff railway company's ownership of title and easement in the respective tracts of land; and for further defense alleges, in substance, that in 1923 it was compelled by the Seaboard Air Line Railway Company, under penalty of losing its business with the railway company and the Fruit Growers Express Company, to erect its present ice plant in the town of Hamlet, adjacent to the tracks of the railway company; that said plant was erected at an expense in excess of $200,000, and that as a part and parcel of said plant it constructed an icing platform partially upon the right of way of the railway company, a small portion of the same being upon the tract of land alleged to be owned in fee simple by the railway company; that said platform was erected according to specifications furnished by and at the place designated by the plaintiff railway company and the Fruit Growers Express Company, and is what is known as "a forty-car length island platform"; and that since its erection in 1923 said platform has been used in connection with refrigerating cars for said railway company and

its customers, more particularly the Fruit Growers Express Company; that in 1928 the Seaboard Air Line Railway Company, the Fruit Growers Express Company, and the Mountain Ice Company, all of which had mutual and interlocking business interests, formulated a plan for the Mountain Ice Company to locate an ice plant at Aberdeen, 25 miles north of the defendant's plant, and pursuant to this plan the Fruit Growers Express Company and Mountain Ice Company entered into a long-term contract for the purchase and delivery of a large quantity of ice per annum, which contract became burdensome to the express company, and the express company became desirous of being relieved therefrom, and also desirous of obtaining the lucrative business of the defendant for the Mountain Ice Company; and that the Seaboard Air Line Railway Company, Fruit Growers Express Company, and Mountain Ice Company conferred and consummated an agreement to the effect that the plaintiff railway company would demand that the defendant surrender possession of the ground upon which the defendant's icing platform stands, and thereby force its removal or sale to the Mountain Ice Company and/or to the Fruit Growers Express Company, at a ridiculously low and inadequate price; and that pursuant to this agreement, which in law amounted to a conspiracy, the plaintiff railway company made demand for the possession of the two tracts of land described in the complaint; that such action was not for the purpose of getting possession of the land for *bona fide* railroad purposes, but for the false and fraudulent purpose of destroying the business of the defendant, or forcing it to sell its icing platform to the coconspirators of the plaintiff railway company, the Fruit Growers Express Company and the Mountain Ice Company.

The court, upon motion of the plaintiffs, ordered stricken from the answer the further defense, and the defendant excepted and appealed, and the relevancy of the allegations contained in the further defense is the sole question presented to us for consideration. These allegations are to the effect that the plaintiff Seaboard Air Line Railway Company, the Fruit Growers Express Company, and the Mountain Ice Company planned, schemed, and conspired to destroy the business of the defendant, or to force the defendant to sell its business to the coconspirators of the plaintiff railway company at a grossly inadequate price, and that as a result of and as a part of said conspiracy the plaintiffs have made demand and brought this action for the possession of the tracts of land on which the defendant located and constructed its icing platform under the direction of the plaintiff railway company, and where the defendant has operated the icing platform satisfactory to said railway company and its customers since 1923; and that said possession is not sought for *bona fide* railroad purposes, but for the unlawful and fraudulent purpose of destroying, or taking without adequate compensation, the business of the defendant.

It is said in *Hodges v. R. R.*, 196 N. C., 66 (68): "In the absence of a finding, supported by evidence, that the use and occupancy of its right of way is not necessary for railroad purposes, and that such use is in bad faith, and not the result of an honest exercise of its judgment, the courts will not interfere with such use and occupancy." It would seem that the converse of this proposition is true, that is, when there is a finding supported by evidence that the use and occupancy of the right of way is not necessary for railroad purposes, and that such use is in bad faith, and not the result of an honest exercise of judgment, then the courts will not permit such use and occupancy by the railroad company to the detriment of others.

The defendant has laid the foundation by the allegations in its further defense to offer evidence in support of its contention that the plaintiffs in bringing this action are actuated not by an honest judgment that such right of way is necessary for *bona fide* railroad purposes, but by the fraudulent purpose and conspiracy to arbitrarily destroy the business of the defendant, and to enable the coconspirators of the railway company to obtain said business for an inadequate price, by demanding possession of the land upon which said business had been located at the behest of and operated to the satisfaction of the plaintiff railway company and its customers for more than a decade. The allegations are grave ones, but if the defendant can carry the burden of establishing them by competent evidence, we think, under the circumstances of this case, where the plaintiff is a public service corporation, enjoying the extraordinary powers and privileges necessary for the conduct of railroad business, and owing the correlative duties to the public and its patrons, it was error to deny it the right to do so by striking the further defense from the answer.

Reversed.

STACY, C. J., dissenting: I think the ruling of the Superior Court should be affirmed.

The allegations of the further defense are grounded on conspiracy and not on contract, express or implied, or irrevocable license. *B. & O. R. R. Co. v. Potomac Coal Co.*, 51 Md., 327, 34 Am. Rep., 316; 17 R. C. L., 582, *et seq.* The authority relied upon, *Hodges v. R. R.*, 196 N. C., 66, 144 S. E., 528, 59 A. L. R., 1284, deals with the rights of a servient owner, and not with those of a permissive licensee. 22 R. C. L., 861. The action is one in ejectment, and not a proceeding before the Utilities Commissioner. 1935 N. C. Code (Michie), sec. 1112, *et seq.*

The following authorities are in support of the judgment below: *R. R. v. Bunting*, 168 N. C., 579, 84 S. E., 1009; *R. R. v. McLean*, 158 N. C., 498, 74 S. E., 461; *Earnhardt v. R. R.*, 157 N. C., 358, 72 S. E., 1062; *R. R. v. Olive*, 142 N. C., 257, 55 S. E., 263. Compare *Bell v. Danzer*, 187 N. C., 224, 121 S. E., 448.

E. F. DENNIS AND WIFE, GRACIE T. DENNIS, v. C. H. DIXON, RECEIVER OF FIRST NATIONAL BANK OF DURHAM, TRUSTEE, AND NORTH CAROLINA JOINT STOCK LAND BANK OF DURHAM, AND J. L. ASHLEY AND WIFE, MYRA S. ASHLEY, AND JATHER McLAWHORN AND WIFE, EDNA E. McLAWHORN.

(Filed 22 January, 1936.)

Mortgages H p: Election of Remedies A c—Held: Plaintiffs elected to sue for damages for breach of contract to convey and were estopped to maintain action for specific performance against grantees of vendor.

Plaintiffs, trustors in a deed of trust, alleged that the agent of the trustee conducting the foreclosure sale under the power of sale contained in the instrument, bid in the property for the *cestui que trust*, that prior to the sale the *cestui* had agreed in writing to transfer title to plaintiffs if it became the last and highest bidder at the sale, but that the *cestui* transferred title to purchasers in accordance with an agreement made with them prior to the agreement made with plaintiffs, that the purchasers from the *cestui* were present at the sale, either in person or by agent, and knew of the irregularity in the sale, but the complaint did not allege that the purchasers knew of the option contract executed by the *cestui* to plaintiffs. It also appeared from the complaint that plaintiffs were present at the sale and, relying on their option contract, stood by without protest and allowed the ten days for upset bids to expire, and waited nearly three years before taking action against the purchasers from the *cestui*, who entered into possession of the land immediately after the sale and continued in possession until the institution of the action, the title having been conveyed to them less than a year and a half after the sale. The purchasers from the *cestui* demurred to the cause of action to set aside the deed to them. *Held:* The demurrer was properly sustained, since it appears from the face of the complaint that the acts and omissions of plaintiffs constituted an election to rely upon their right of action against the *cestui* for breach of their option contract and estopped plaintiffs from attacking the deeds to the purchasers from the *cestui*.

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

APPEAL by defendants Ashley and McLawhorn from judgment overruling demurrer, entered by *Barnhill, J.*, at May Term, 1935, of CRAVEN. Reversed.

Albion Dunn and Dunn & Dunn for plaintiffs, appellees.
W. B. R. Guion for defendants, appellants.

SCHENCK, J. This action was instituted by the plaintiffs to have declared void a deed from C. H. Dixon, receiver of the First National Bank of Durham, trustee (hereinafter called the receiver-trustee), to the North Carolina Joint Stock Land Bank of Durham (hereinafter

called the land bank), and a deed from the land bank to Myra S. Ashley and Edna E. McLawhorn (hereinafter called the demurrants).

The plaintiffs, in effect, allege that prior to 13 December, 1925, they were the owners of a tract of land in No. 1 Township in Craven County, containing 366 acres, more or less, and that on said date they executed a deed of trust on said land to the First National Bank of Durham as trustee to secure a loan of $5,000 to the land bank, and that subsequently C. H. Dixon was appointed receiver of said national bank and as such took over the duties of the trustee in said deed of trust, and that said deed of trust carried a provision to the effect that the loan secured thereby should be paid in semiannual installments on the first days of January and July, respectively, of each year, and that upon the failure of the payment of any of such installments the whole debt should become due and that the trustee, upon request of the *cestui que trust*, should sell the land and pay the remaining indebtedness from the proceeds thereof. That the plaintiffs failed to make the payments due on 1 January and 1 July, 1932, and thereupon the receiver-trustee, upon demand of the land bank and pursuant to the power of sale contained in the aforesaid deed of trust, advertised the land for sale at public auction, and that the said receiver-trustee employed R. E. Whitehurst, Esq., as his attorney to prepare the advertisements and to conduct the sale and to represent the receiver-trustee in all matters connected therewith, and that the sale of said land was conducted on 23 July, 1932, by said Whitehurst for the receiver-trustee, and that, as the plaintiffs were advised and believed, Whitehurst, at the time of said sale and while he was representing the receiver-trustee as aforesaid, at the direction, upon the instance, and by the procurement of said land bank, which held the notes of the plaintiffs secured by the deed of trust, placed the first, last, and only bid made at said sale on said land in behalf of said land bank, and then and there, while representing the receiver-trustee, declared said land bank to be the purchaser of said land, subject to any raised bid that might thereafter be made, and no raised bid having been made, on 8 August, 1932, the receiver-trustee, pursuant to said sale, executed and delivered to the said land bank a deed in fee simple for said lands, and immediately thereafter the demurrants (Ashley and McLawhorn), pursuant to an agreement theretofore entered into between them and the land bank, went into possession of the lands, and have continuously remained in such possession until the institution of this action. That the sale on 23 July, 1932, was conducted in the manner aforesaid by the said Whitehurst for the purpose of taking title out of the plaintiffs in order that title might be turned over to the said Ashley and McLawhorn in accord with an option which said land bank had theretofore given to them, and that at the time of said sale J. L. Ashley, the husband of Myra S. Ashley, and the agent

of his wife and Edna E. McLawhorn, was present, and was aware of all that transpired at said sale and of the manner in which it was conducted, and was aware that the attorney representing the receiver-trustee was likewise representing said land bank in placing its bid at said sale, and that by reason of the aforesaid circumstances the demurrants had full knowledge of such facts, and by reason thereof not only the deed from the receiver-trustee to the land bank, but also the deed from the land bank to the demurrants were ineffectual and invalid.

The plaintiffs further allege, "for a second and further cause of action," that prior to the sale of said land by the receiver-trustee on 23 July, 1932, namely, "on 15 July, 1932, the defendant land bank contracted and agreed, in writing, with the plaintiff E. F. Dennis that after it became the purchaser of said land at said sale it would reconvey the same to him upon the terms in said written agreement set out, and as an evidence of good faith, the said E. F. Dennis deposited with said bank good and solvent collateral in the amount of $1,700, and up to and beyond the time when an upset bid could have been entered and up to the time that the bank received a deed for said land, the said bank led said plaintiff to believe that it would convey title to him retaining the collateral security and thereby lulling the plaintiff into a sense of security and leading him to fully believe that he would not lose his land if said bank became the purchaser, but that he would eventually get title thereto." That the land bank at the time it entered into the aforesaid agreement with one of the plaintiffs did not intend to reconvey said property to them in the event it became the purchaser, but wrongfully held out hope to the plaintiffs for the purpose of preventing them from making arrangements to redeem the land, and that prior to entering into said agreement with one of the plaintiffs the land bank had wrongfully and unlawfully entered into a similar agreement with the demurrants, Ashley and McLawhorn, to convey said land to them in the event of its purchase thereof, and subsequently did make such conveyance, and that by reason of the wrongful act and conduct of the land bank as aforesaid the plaintiffs were divested of their title to said land and the title thereto was vested in the demurrants, Ashley and McLawhorn, who now hold title thereto under and by virtue of the deed from the land bank. That the land was reasonably worth $15,000, and that by reason of being divested of the title thereto the plaintiffs, after allowing credit for the amount due by them on the notes secured by the deed of trust, have been damaged by the loss of their land in an amount not less than $10,000.

Separate demurrers were filed by the land bank and by Ashley and McLawhorn, both of which were overruled in the Superior Court, and exceptions were taken and notice of appeal given by all of the defendants, but only the appeal of Ashley and wife and McLawhorn and wife was perfected and presented to this Court.

Whatever may be the effect of the allegations of the complaint as they relate to the land bank, we think they fail to state facts sufficient to state a cause of action against the appealing demurrants, and that their demurrer to the complaint should have been sustained.

It appears from the face of the complaint that the plaintiffs knew of the sale, and that they stood by and allowed the sale to be made without making any protest, that they relied upon a written contract with the land bank to sell to them if it became the purchaser, and relying upon this contract, allowed the ten days for upset bids (C. S., 2591) to pass, and waited for nearly three years thereafter (from 23 July, 1932, to 3 April, 1935) before taking any action against the demurrants, who had entered into possession of the land under the land bank immediately after the sale and so remained until 28 September, 1933, when they acquired title thereto from the land bank, and continued in uninterrupted possession thereof till the institution of this action. We think the acts and omissions of the plaintiffs clearly constitute an election on their part to rely upon their right of action against the land bank for breach of the contract that the land bank would convey to them in the event the land bank became the purchaser of the land at the sale under the deed of trust, and having once made an election they are now estopped to say that the deeds are void or voidable—such election being a ratification of the deeds which they now attack. See 19 R. C. L., pars. 432-33, pp. 615-16. There is no allegation in the complaint that the demurrants had any knowledge of the contract between the plaintiffs and the land bank at the time they took deed from the land bank, or that there has been any breach of contract by the demurrants.

Reversed.

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

J. C. DEITZ, JR., v. JOS. H. BOLCH AND P. C. SETZER.

(Filed 22 January, 1936.)

1. Judgments B a—Nature and requisites of judgments by consent.

A consent judgment is an agreement of the parties with the sanction of the court, having the force and effect of a judgment, and its validity depends upon the consent of the parties, either in person or by a duly authorized attorney acting within the scope of his authority, and the court has no authority to modify or amend the judgment except by consent of the parties.

2. Attorney and Client B b—Scope of attorney's authority in regard to suit.

Ordinarily an attorney has implied authority to control and manage the suit in matters of procedure and to make agreements affecting the remedy during the progress of the trial, but an attorney has no implied authority, after the termination or final disposition of the case in which he is employed, to enter an agreement materially affecting the rights of the client.

3. Judgments K a—Held: Defendant in consent judgment was entitled to hearing on petition averring that modification of judgment was entered without his consent by attorney without authorization.

A consent judgment was entered against two defendants, jointly and severally, upon a note, the judgment being signed by the parties and their attorneys, and approved by the court. Thereafter a modification of the judgment was entered by which the liability of one defendant was made primary and the other secondary, the modification being signed by attorneys purporting to act for the parties and approved by the court. Thereafter the defendant, whose liability was made primary by the modification of the original judgment, filed a petition alleging that the modification was made without his consent, and that the attorney purporting to act for him had not been employed by him and was without authority. *Held:* The petitioner was entitled to a hearing upon the petition, since the modification of the judgment was invalid, in the absence of his consent either personally or by duly authorized counsel, and whether his liability on the note was primary or secondary is immaterial, since the original judgment imposing joint and several liability upon defendants, having been consented to by both defendants, stands until modified by consent or until impeached by appropriate action.

4. Judgments K f—

A motion in the cause is the proper procedure to attack a consent judgment on the ground that in fact movant had not consented to the judgment, either personally or by duly authorized counsel.

APPEAL by defendant Bolch from an order entered by *Sink, J.*, at July Term, 1935, of CATAWBA.

Plaintiff J. C. Deitz, Jr., brought his action against the defendants Bolch and Setzer upon two promissory notes, each in the sum of $1,000, alleged to have been signed by Bolch and endorsed by Setzer. The defendants answered admitting the execution of the notes and alleging usury.

At the September Term, 1933, a consent judgment was entered by Warlick, J., that plaintiff recover of defendants jointly and severally $2,166.66. The consent appears on the judgment as follows: "By consent: John C. Deitz, Jr., E. B. Cline, attorney for plaintiff; Jos. H. Bolch, P. C. Setzer; D. L. Russell, Jr., attorney for defendants."

At the September Term, 1934, motion was made before Harding, J., in behalf of defendant Setzer by Thos. P. Pruitt, his attorney, to amend the Warlick judgment of September Term, 1933, so as to show that Bolch was primarily and Setzer secondarily liable thereon, and there-

upon judgment was rendered by Judge Harding, reciting that the action sued on was upon certain promissory notes executed by Bolch as principal and Setzer as endorser, and further that it appeared that E. B. Cline, attorney for Jno. C. Deitz, Jr., and D. Locke Russell, attorney for Jos. H. Bolch in said action, had agreed that the judgment be modified so as to adjudge Bolch primarily and Setzer secondarily liable thereon. Judgment was entered accordingly.

The consent of the parties on the Harding judgment of September, 1934, appears as follows: By consent: E. B. Cline, attorney for plaintiff; D. Locke Russell, attorney for defendant Bolch; Thos. P. Pruitt, attorney for Setzer.

On 12 March, 1935, defendant Bolch filed the following motion:

"Jos. H. Bolch, one of the defendants, after being duly sworn, respectfully showeth to the court:

"That at no time did he ever give D. Locke Russell advice or authority to change the judgment of 1933, signed by Judge Wilson Warlick, to a judgment signed by Judge Harding revoking the judgment of Judge Warlick, in the term of court for September, 1934.

"Affiant further says that the defendant Setzer is an uncle of the said D. Locke Russell, and for reasons best known to himself and defendant (Setzer), knowing that there was not a full and complete settlement between the two defendants, caused and persuaded his nephew, under the influence of parties unknown to the said Bolch and acting as his attorney without his authority, under the law this judgment is null and void for the reason that after court adjourns and the judge leaves the district he cannot change his own judgment.

"The first judgment was signed by consent and the defendant Setzer admitted that he was bound for half of the amount, and the second judgment was signed in the absence of the defendant Bolch with intent to defraud and unload on him the whole judgment.

"Wherefore, he prays that his Honor set aside the second judgment and let the original judgment signed by Judge Wilson Warlick stand."

This motion, after notice to Setzer to show cause, was referred to Sink, J., who, at the July Term, 1935, made an order denying the motion and petition of defendant Bolch, finding as a fact that defendant Bolch was the principal debtor and Setzer secondarily liable thereon, and stating that in his opinion he had no authority to grant the prayer, and that if he had the authority to act, he would hold petitioner bound by the acts of his attorney.

From this ruling defendant Bolch appealed.

Whitener & Stroupe and C. L. Whitener for defendant Bolch, appellant.

No counsel contra.

DEVIN, J. The original judgment in this cause, rendered by Judge Warlick at the September Term, 1933, of Catawba Superior Court, was a consent judgment, signed not only by counsel but also personally by the plaintiff and each of the defendants.

The judgment rendered by Judge Harding at the September Term, 1934, also purports to be a consent judgment and is signed by counsel for plaintiff and by "D. Locke Russell, attorney for defendant Bolch," and by Thos. P. Pruitt, attorney for defendant Setzer.

The last mentioned judgment, entered at the September Term, 1934, is challenged by defendant Bolch on the ground that it modified and amended a judgment previously entered by consent, that the amendment injuriously affected his rights, that he was not present when rendered, that D. Locke Russell had no authority to represent him nor to consent to an amendment affecting his interest, and that D. Locke Russell, who purported to sign the judgment as his attorney, was the nephew of defendant Setzer, in whose favor the amending judgment was entered.

A consent judgment is the judgment of the court only in the sense that the court allows it to go upon the record and have the force and effect of a judgment. It is an agreement of the parties which has the sanction of the court. It derives its validity from the consent of the parties thereto; and hence the court has no power to modify or amend it except by the consent of the parties. *McEachern v. Kerchner,* 90 N. C., 177.

Consequently, the validity of the judgment rendered by Judge Harding in September, 1934, depends upon whether defendant Bolch consented to the amendment. *Edney v. Edney,* 81 N. C., 1; *Hoell v. White,* 169 N. C., 640; *Gardiner v. May,* 172 N. C., 192.

The validity of a consent judgment being based on the contract of the parties, the consent thereto by one purporting to act as attorney must have been authorized, or the attorney must have been acting within the scope of his authority in order to bind the party for whom he professed to act.

It is uniformly held that an attorney at law, by virtue of his employment as such, has control and management of the suit in matters of procedure, and may make agreements affecting the remedy he is endeavoring to pursue. *Chemical Co. v. Bass,* 175 N. C., 426; and under ordinary conditions an implied authority for such agreements during the progress of the suit is presumed from his office and employment. *Harrill v. R. R.,* 144 N. C., 542; *Gardiner v. May, supra.* But this presumed implication of authority will not be held to bind the client to a compromise materially affecting his rights entered into by the attorney without express authority, long after the final disposition of the case in which he was employed.

In *Bizzell v. Equipment Co.*, 182 N. C., 98, the law is thus stated: "In this jurisdiction it has been expressly held that when a judgment has been taken by consent of the attorney, and it appears of record that such consent is pursuant to a compromise which sensibly impairs the client's substantial rights, and on motion made in apt time, it is without express authority from the client, and even contrary to his instructions, such judgment will be set aside." *Bank v. McEwen*, 160 N. C., 414.

In the instant case, the judgment of September, 1934, amending and modifying the consent judgment of September, 1933, to the disadvantage of defendant Bolch, purporting to be by consent and signed by D. Locke Russell as his attorney, was rendered a year after the final disposition of the original action, and the verified petition of the appealing defendant Bolch alleges that the attorney was not employed by him, was without authority to represent him, and that the judgment was entered in his absence.

Though notice of the motion of defendant Bolch to set aside the amended judgment was served on defendant Setzer, the record does not show that he replied to the allegations of the petition.

While it is admitted in the original pleadings that on the notes sued on defendant Setzer was endorser only, yet he personally signed his consent that the judgment thereon should be taken against him and his co-defendant jointly and severally. From this he could not be relieved except by consent of Bolch, or by some appropriate action to impeach the judgment to which he has consented, and this he has not done.

The court below was not without authority to consider the motion raised by defendant Bolch's petition, whether it be treated as motion to set aside the judgment of September, 1934, on account of inadvertence, surprise, or excusable neglect, under C. S., 600, or as irregular, or in the exercise of the power of the court to correct a mistake due to inadvertence or imposition. *Strickland v. Strickland*, 95 N. C., 471; *Cox v. Boyden*, 167 N. C., 320; *Bank v. McEwen, supra.* As was said in *Chavis v. Brown*, 174 N. C., 122: "This being an application to set aside a judgment because this Court was imposed upon by a compromise alleged to be entirely without authority, a motion in the cause supported by affidavits is the proper procedure, and a jury trial is not allowed as a matter of right."

This cause is therefore remanded to the Superior Court of Catawba County for the determination of the issue raised by the motion and verified petition of defendant Bolch, that is whether D. Locke Russell was authorized to consent for and on behalf of defendant Bolch to the judgment of September, 1934, and for such further proceedings as may be lawful and proper.

Reversed.

HALLIE S. WHITE v. J. E. WINSLOW, F. J. FORBES, AND J. E. WINSLOW COMPANY.

(Filed 22 January, 1936.)

Bills and Notes H a—Payee who has pledged note may maintain action thereon against makers.

A payee of a note who pledges same to a third party as collateral security for a debt owed by the payee to such third party does not part with legal title to the note, and has a substantial interest in the note sufficient to enable her, as the real party in interest, to maintain suit thereon against the makers, and judgment on the note is properly entered against the makers offering no defense against recovery when the payee obtains possession of the note during trial and before judgment so that the note may be canceled for the protection of the makers when the judgment is rendered.

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

APPEAL by defendants from *Barnhill, J.*, at March Term, 1935, of PITT. Affirmed.

This is an action to recover on a note for $5,000, executed by the defendants J. E. Winslow and F. J. Forbes, on 1 January, 1930, and payable to the order of the plaintiff, one year after its date. The action was begun on 27 November, 1933.

It is alleged in the complaint that after its execution by the defendants and its delivery to the plaintiff, the note was assigned by the plaintiff to a bank in Greenville, N. C., as collateral security for plaintiff's notes to said bank, aggregating the sum of $1,400; that subsequently plaintiff's notes held by the bank were purchased by the defendant J. E. Winslow Company, a corporation, and that the note sued on was delivered by the bank to said defendant, and is now held by the said defendant as collateral security for plaintiff's notes; and that plaintiff has requested the defendants J. E. Winslow and F. J. Forbes to pay the amount due on their note to the plaintiff in order that she may pay her notes held by the defendant J. E. Winslow Company, which request has been refused by the said defendants.

The allegations of the complaint are admitted in the answer. It is alleged therein that the defendant J. E. Winslow Company has transferred the notes of the plaintiff to A. T. Winslow, of Kansas City, Missouri, and that said A. T. Winslow now holds the note sued on as collateral security for plaintiff's notes, and that for this reason the plaintiff cannot now maintain this action.

When the action was called for trial, a trial by jury was waived by the parties, who submitted to the court an agreed statement of facts, on

which it was agreed that the court should render judgment. The agreed statement is as follows:

"1. That on 1 January, 1930, the defendants J. E. Winslow and F. J. Forbes executed their negotiable promissory note in the sum of $5,000, payable to the plaintiff one year after its date, and that an exact copy of said note appears in paragraph 2 of the complaint.

"2. That during the year 1930 the plaintiff borrowed from the National Bank of Greenville, N. C., the sum of $1,400, and executed her three promissory notes payable to the order of said bank, as evidence of her indebtedness; and that as collateral security for her said notes, the plaintiff assigned the note of the defendants to the said bank.

"3. That some time thereafter the National Bank of Greenville duly transferred plaintiff's notes, together with the note of the defendants to the plaintiff, held by said bank as collateral security, to the State Bank and Trust Company of Greenville, N. C.; that thereafter the State Bank and Trust Company transferred said notes, for value, to J. E. Winslow Company, Inc., of Greenville; and that J. E. Winslow Company, in due course, on 5 May, 1933, transferred, for value, plaintiff's notes, together with defendants' note, to A. T. Winslow, of Kansas City, Missouri.

"4. That at the time of the commencement of this action A. T. Winslow was the holder of plaintiff's three notes payable to the order of the National Bank of Greenville, together with the note of the defendants J. E. Winslow and F. J. Forbes, payable to the order of the plaintiff, which had been assigned to the said A. T. Winslow as collateral security for said three notes of the plaintiff.

"5. That since the commencement of this action the plaintiff has paid the amount due on her three notes held by A. T. Winslow and has received from the personal representatives of the said A. T. Winslow, who has died since the commencement of this action, the note executed by the defendants and payable to her order, and that the plaintiff is now the owner of said note."

The court was of opinion that, upon these admitted facts, the plaintiff is entitled to recover in this action the amount due on the note sued on, and accordingly adjudged that plaintiff recover of the defendants J. E. Winslow and F. J. Forbes the sum of $5,000, with interest on said sum from 1 January, 1931, together with the costs of the action.

From this judgment the defendants J. E. Winslow and F. J. Forbes appealed to the Supreme Court, assigning error in the judgment.

Harding & Lee and F. M. Wooten for plaintiff.
Albion Dunn for defendants.

CONNOR, J. On their appeal to this Court the defendants contend that there is error in the judgment in this action for that it appears from the

agreed statement of facts on which the judgment was rendered that at the commencement of the action the plaintiff was not the owner of the note sued on, and was therefore not the real party in interest with respect to the subject matter of the action.

This contention cannot be sustained. The judgment is fully supported by the decision of this Court in *Ball-Thrash v. McCormick,* 162 N. C., 471, 78 S. E., 303. In the opinion in that case it is said: "The bald question, therefore, is, Can a pledgor who has deposited notes with a bank as collateral sue and recover upon the same if he pays his debt, takes up the collateral notes, and produces them at the trial, so that they can be canceled for the protection of the debtor? We will answer this question in the affirmative, as we think it is in accordance with principle and authority."

See *Simansky v. Clark* (Me.), 147 Atl., 205, 65 L. R., 1316, and notes.

In the instant case the plaintiff did not part with her legal title to the note sued on, as payee, when she pledged her note with a creditor as collateral security. At the date of the commencement of the action she had a substantial interest in the note, which was sufficient to constitute her the real party in interest with respect to the subject matter of the action. At the trial, and before judgment, she had the note in her possession for cancellation by the court, when the judgment was rendered. The defendants who offer no defense to a recovery on the note, are fully protected by the cancellation of the note.

The judgment is

Affirmed.

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

STATE v. PHILLIP BROCKWELL.

(Filed 22 January, 1936.)

1. Constitutional Law B c—

The courts of this State have the power and duty, when the constitutionality of a statute is challenged in a proper proceeding, to declare whether or not the statute is valid. N. C. Const., Art. II, sec. 1; Art. IV, sec. 2.

2. Statutes A e—

A statute will not be declared unconstitutional by the courts unless it appears beyond a reasonable doubt that its enactment was in violation of constitutional limitations, and all reasonable doubt will be resolved in favor of its validity.

3. Constitutional Law C a—Exercise of police power is left largely to the discretion of the General Assembly.

The exercise by the General Assembly of the police power vested in it as the legislative department of the State government is left largely to its discretion, and the power of the courts cannot be invoked to control this discretion, unless its exercise results in an unnecessary interference with the rights of the citizen.

4. Constitutional Law C c—Statute regulating use of milk bottles held void as unnecessary interference with rights of citizens.

Ch. 284, Public Laws of 1933, N. C. Code, 7251 (W), regulating the use of milk bottles and other dairy products containers, *is held* unconstitutional and void as an unwarranted exercise of the police power, since its provisions prohibiting the use of milk bottles by the owner, or person in lawful possession thereof, for purposes other than the distribution of milk bears no relation to the public health, or ordinarily with the susceptibilities of the public, unless such container, after its use for other purposes, is used or intended to be used for the distribution of milk.

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

APPEAL by the State from *Parker, J.*, at September Term, 1935, of WAKE. Affirmed.

This is a criminal action, in which the defendant was tried *de novo* in the Superior Court of Wake County on a warrant issued by a justice of the peace of said county, on 11 June, 1935.

The defendant was charged in the complaint on which the warrant was issued with a violation, on or about 10 June, 1935, of the provisions of chapter 284, Public Laws of North Carolina, 1933 [N. C. Code of 1935, sec. 7251 (W)], which is as follows:

"An act to prohibit the wrongful use of milk bottles, crates, cans, and other containers of dairy products.

"SECTION 1. No person, firm, or corporation shall use or permit to be used a milk bottle or other receptacle designed as a milk container, or container of dairy products, and having the name, brand, or trade-mark of any other person, firm, or corporation thereon, for any purpose other than as a milk container, or as a container of dairy products.

"SEC. 2. It shall be unlawful for any person, firm, or corporation to use or permit to be used any milk bottle, can, crate, or any other container for milk or milk products which has the name, label, trade-mark, or inscription of any other person, firm, or corporation blown, embossed, or marked thereon.

"SEC. 3. That it shall be unlawful for any person, firm, or corporation to purchase milk bottles except from a wholesale dealer, retail store, or dairyman having the same for sale, and it shall also be unlawful for any person, firm, or corporation, other than dealers having the same for sale, to sell any milk bottles; provided, that this act shall not apply to judicial sales.

"SEC. 4. Any person, firm, or corporation or agent willfully violating any of the sections of this statute shall be guilty of a misdemeanor, and shall be subject to a penalty of a fine of not more than fifty ($50) dollars or imprisonment of not more than thirty days for each and every violation thereof.

"SEC. 5. All laws and clauses of laws in conflict herewith are hereby repealed.

"SEC. 6. This act shall be in full force and effect from and after its ratification.

"Ratified this the 20th day of April, A.D. 1933."

At the trial a special verdict was returned by the jury as follows:

"We, the jury, find as a special verdict, from the evidence in this case, that the defendant Phillip Brockwell, on 10 June, 1935, at Raleigh, in Wake County, willfully used a milk bottle designed as a milk container, and having the name, brand, and trade-mark of Wright's Dairy blown or embossed in the glass of said bottle for another purpose than a milk container, that is, he used it for the following purpose: As a container for a specimen of his urine which he brought to the Wake County Health Department for the purpose of an urinalysis.

"There were twenty-seven distributors of milk and dairy products in Wake County on 10 June, 1935. All of these used milk bottles which had their name, label, or trade-mark or inscription embossed or marked on the said milk bottles. Some of them, at times, used milk bottles also that were not marked.

"If the court shall be of the opinion that the defendant Phillip Brockwell is guilty on the foregoing facts, we find him guilty; if the court shall be of the opinion that the defendant Phillip Brockwell is not guilty upon the foregoing facts, we find him not guilty."

The court being of opinion that on the facts set out in the special verdict, the defendant is not guilty, ordered, and adjudged that the defendant be and he was discharged. The State excepted and appealed to the Supreme Court, assigning error in the judgment.

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

Chas. U. Harris for defendant.

CONNOR, J. When the validity of a statute enacted by the General Assembly of this State in the exercise of its legislative authority (Const. of N. C., Art. II, sec. 1) is challenged on the ground that its enactment was in violation of some express or implied limitation upon the exercise of such authority, imposed by the Constitution of North Carolina or by the Constitution of the United States, as in the instant case, the courts of

this State have the power and in a proper case it is their duty, in the exercise of the judicial power vested in them by the Constitution of this State (Const. of N. C., Art. IV, sec. 2), to decide whether or not the statute is valid. In the exercise of this power and in the performance of this duty it is a recognized principle, uniformly applied, that the courts will not adjudge that a statute is void on the ground that its enactment was in violation of a constitutional limitation, unless it so appears beyond a reasonable doubt. If there is any reasonable doubt as to the validity of the statute, such doubt will be resolved in favor of the validity of the statute. This principle is founded upon a proper respect for the intelligence and good faith of a coördinate department of the State government, which derives its authority from and is responsible to the people of the State, as is the case with the judicial department.

The statute involved in the instant case manifestly was enacted by the General Assembly in the exercise of the police power vested in the General Assembly as the legislative department of the government of this State. The exercise of the police power is left largely to the discretion of the General Assembly. The judicial power of the courts cannot be invoked to control this discretion, unless its exercise results in an unnecessary interference with rights of the citizen, for the protection of which the government was established.

In the instant case, conceding that the statute was enacted by the General Assembly for the protection of the public health, and the promotion of decency, we are of opinion that the statute needlessly interferes with property rights. We can discover no relation between the use by an owner or by one in the lawful possession of a milk bottle and the public health, or ordinarily with the susceptibilities of the public, unless indeed the bottle is used or intended to be used thereafter for the distribution of milk.

We concur with the learned judge who presided at the trial of this action in the Superior Court that the statute for the violation of which the defendant was tried is void. The defendant, although he has violated its provisions, has committed no crime and was properly discharged. The judgment is

Affirmed.

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

T. P. SMITH AND WIFE, FRANCES SMITH, v. V. S. BRYANT, TRUSTEE, MORTGAGE SERVICE COMPANY, AND REALTY PURCHASE CORPORATION.

(Filed 22 January, 1936.)

1. Usury B c—

Where there is no evidence that any holder of the note executed by plaintiffs has charged or received interest thereon in excess of six per cent, in an action on the note plaintiffs may not invoke the forfeiture of interest for usury. C. S., 2306.

2. Mortgages H o: Usury B b—Plaintiffs seeking to enjoin consummation of foreclosure for usury must pay principal of debt, with interest.

Where plaintiffs seek to enjoin the consummation of a foreclosure sale on the ground that the debt was tainted with usury, and ask for an accounting, they must tender the principal of the debt, with legal interest, since the penalties for usury may not be invoked when equitable relief is demanded. C. S., 2306.

3. Mortgages H o—Plaintiffs held entitled to determination of issue, raised by pleadings, of whether bid at sale was grossly inadequate.

Where plaintiffs, trustors in a deed of trust, seek to enjoin the consummation of a foreclosure sale had under the power contained in the instrument, and alleged that the price bid at the sale was grossly inadequate, which allegation is denied in the answer, it is error for the court to grant defendants' motion to nonsuit, plaintiffs being entitled to a hearing and a determination of the issue under the provisions of ch. 275, Public Laws of 1933.

4. Same—Where consummation of foreclosure sale is had under ch. 275, Public Laws of 1933, the court may determine the issue.

Where, in a suit to enjoin the consummation of a foreclosure sale under the provisions of ch. 275, Public Laws of 1933, the issue of whether the bid at the sale was grossly inadequate is raised by the pleadings, the parties are not entitled as a matter of law to have the issue determined by a jury, but the court may hear evidence and determine the issue, and should dismiss the action if he should find that the amount of the bid is the fair value of the land, or should enjoin the consummation of the sale if he should find that the bid is grossly inadequate, in which event a resale may be made by the trustee, either under the power contained in the instrument or under orders of the court.

APPEAL by plaintiffs from *McElroy, J.*, at August Term, 1935, of UNION. Error.

This is an action to enjoin the defendant V. S. Bryant, trustee, from executing a deed and thereby conveying to the defendant Realty Purchase Corporation, the land described in the complaint, which was sold under the power of sale contained in a deed of trust executed by the plaintiffs, on the ground that the conveyance of said land will result in irreparable damage to the plaintiffs, for that (1) the debt secured by

said deed of trust is tainted with usury, and (2) that the amount bid for said land at the sale is grossly inadequate, and its conveyance to the purchaser for said amount would be inequitable.

At the trial of the action judgment was rendered as follows:

"This cause coming on to be heard before Hon. P. A. McElroy, judge presiding, and a jury, at August Term, 1935, of the Superior Court of Union County, and a jury having been duly impaneled, and the plaintiffs having offered evidence, and the parties having stipulated as to the dates and amounts of all payments made by the plaintiffs on the loan referred to in the pleadings, and as to the amounts advanced by the holder of the indebtedness for the payment of taxes and fire insurance premiums, and the defendants, who were served with summons and who filed answers in this action, having stated in open court that they waived all claims against the plaintiffs except for the principal sum of $2,500, with interest thereon at six per cent per annum, plus the amounts advanced for the payment of taxes and fire insurance premiums on plaintiffs' property, as stipulated by the parties, with legal interest in said advancements, and would credit said indebtedness with all payments made by the plaintiffs, as stipulated by the parties, crediting each payment first on the interest accrued at six per cent per annum on the date of said payment, and the balance of each payment on the principal; and the plaintiffs having declined to have their indebtedness fixed on said basis, and having declined to pay or tender the balance due on said basis;

"And the defendants having moved for judgment as of nonsuit at the close of the plaintiffs' evidence, and the court being of opinion that there is no evidence to be submitted to the jury tending to show that the lender or its agent, with its knowledge, deducted and retained any part of the $2,500 loan made to the plaintiffs, and being further of the opinion that as a prerequisite to equitable relief by injunction, plaintiffs should pay or tender the principal and legal interest of the loan, after proper credits for payments, and it appearing that the defendants have waived all claims in excess thereof, and that plaintiffs are not entitled to any further equitable relief;

"It is therefore ordered and adjudged that the motion of the defendants be and it is allowed, the restraining order issued herein be and it is dissolved, and this action be and it is dismissed. The plaintiffs are taxed with the costs."

From this judgment the plaintiffs appealed to the Supreme Court, assigning errors in the judgment.

Vann & Millikin for plaintiffs.

W. A. Devin, Jr., John M. Robinson, and H. M. Jones for defendants.

CONNOR, J. In view of the stipulations of the parties at the trial of this action, as recited in the judgment, there was no error in the holding of the trial court that the plaintiffs are not entitled to injunctive relief on the allegation in their complaint that the note secured by the deed of trust executed by them was tainted with usury. Even if this allegation, which was denied in the answer, had been sustained at the trial, the plaintiffs would not have been entitled to such relief, without an offer in their complaint or at the trial to pay the amount received by them for their note, with interest at the legal rate. All the evidence at the trial shows that the plaintiffs received from the first holder of the note the full sum of $2,500. There was no evidence tending to show that any holder of the note has charged or received interest on the same at a rate in excess of six per cent per annum. For that reason the plaintiffs are not entitled to the forfeiture of all interest on the note, in accordance with the provisions of the statute. C. S., 2306.

The principle is well settled by numerous decisions of this Court that where a debtor seeks the aid of a court of equity on the ground that his debt is tainted with usury, he may have the usurious element, if any, eliminated from his debt only upon his paying the principal of his debt, with interest at the legal rate. In such case he is not entitled to the benefit of the statutory penalties for usury. Whether this principle is just and in accord with a sound public policy must be determined by the General Assembly, in the exercise of its legislative power, and not by the courts of the State. This Court must declare and apply the law as it has been written. See *Kenny v. Hotel Co.*, 208 N. C., 295, 180 S. E., 697; *Thomason v. Swenson*, 207 N. C., 519, 177 S. E., 647; *N. C. Mortgage Corp. v. Wilson*, 205 N. C., 493, 171 S. E., 783; *Jonas v. Mortgage Co.*, 205 N. C., 89, 170 S. E., 127; *Edwards v. Spence*, 197 N. C., 495, 149 S. E., 686; *Miller v. Dunn*, 188 N. C., 397, 124 S. E., 746; *Waters v. Garris*, 188 N. C., 305, 124 S. E., 334; *Corey v. Hooker*, 171 N. C., 229, 88 S. E., 236; *Owens v. Wright*, 161 N. C., 127, 76 S. E., 735.

There is no error in the judgment denying the plaintiffs equitable relief on their allegation that the debt secured by their deed of trust was tainted with usury.

It is, however, alleged in the complaint that the amount bid at the sale of the land described in the deed of trust by the defendant Realty Purchase Corporation, to wit: The sum of $2,000, is grossly inadequate, and that the conveyance of the said land for said sum will be inequitable, and will result in irreparable damage to the plaintiff. This allegation is denied in the answer. The issue thus raised between the plaintiffs and the defendants has not been determined by the court. The plaintiffs are entitled, by reason of the provisions of chapter 275, Public Laws of North Carolina, 1933, to have this issue determined. There is error in the judgment dismissing the action. For this reason the action is re-

manded to the Superior Court of Union County that the judge may hear the evidence and determine the issue. At this hearing neither the plaintiffs nor the defendants will be entitled as a matter of law to have the issue submitted to a jury.

If the court shall find that the facts with respect to the amount of the bid for the land are as alleged in the complaint the plaintiffs will be entitled to judgment enjoining the consummation of the sale for said amount. In that case a resale may be made by the trustee in the deed of trust, under the power of sale, or under the orders of the court. See *Woltz v. Deposit Co.*, 206 N. C., 239, 173 S. E., 587.

If the court shall find that the amount bid at the sale heretofore made by the trustee is the fair value of the land and is an adequate price for the same, the plaintiffs will not be entitled to a resale. In that case, the action should be dismissed. See *Barringer v. Trust Co.*, 207 N. C., 505, 177 S. E., 795.

Error.

IN THE MATTER OF THE LIQUIDATION OF THE CITIZENS BANK OF MOUNT OLIVE.

(Filed 22 January, 1936.)

Banks and Banking H a—Stockholder must give notice of appeal from stock assessment within ten days from docketing of assessment.

Although no time is fixed by C. S., 218 (c), within which a stockholder of an insolvent bank must give notice of appeal from the assessment levied against him by the Commissioner of Banks, the statute provides that when the assessment is docketed it shall have the force and effect of a judgment, C. S., 641, and therefore notice of appeal from such assessment must be given within ten days after the docketing of the assessment, with the right of the stockholder, in proper instances, to apply for a writ of *certiorari*, and when notice of appeal is not given within the time required and no application for *certiorari* made, the stockholder loses his right to appeal and the assessment is final and conclusive.

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

APPEAL by A. J. Davis from *Small, J.*, at June Term, 1935, of WAYNE. Affirmed.

On 8 September 1934, the Commissioner of Banks of North Carolina, under the authority of subsection 13 of section 218 (c) of the Consolidated Statutes of North Carolina as amended by chapter 113 of the Public Laws of North Carolina, 1927, levied an assessment of $500.00 on A. J. Davis of Mount Olive, Wayne County, North Carolina, on account of his statutory liability as the owner of five shares of the capital stock of the Citizens Bank of Mount Olive, an insolvent banking corporation then in his hands for liquidation as provided by statute. This

assessment was duly docketed in the office of the clerk of the Superior Court of Wayne County on 10 September, 1934, and thus became, by virtue of the statute, a judgment of the Superior Court of Wayne County.

On 19 September, 1934, an execution was issued by the clerk of the Superior Court of Wayne County to the sheriff of said county commanding the said sheriff to satisfy the said judgment out of the property, personal or real, of the said A. J. Davis, as provided by law, and to make due return of said execution. The said execution was returned endorsed by the said sheriff as follows: "Payment demanded and refused. 20 September, 1934."

Thereafter, on 8 October, 1934, an *alias* execution was issued by the clerk of the Superior Court of Wayne County to the sheriff of said county, commanding the said sheriff to satisfy said judgment out of the property, personal and real, of the said A. J. Davis, as provided by law, and to make due return of said execution. This execution was returned endorsed by the said sheriff as follows: "Served 10 October, 1934, on A. J. Davis. Stay bond given."

On 8 October, 1934, A. J. Davis filed with the clerk of the Superior Court of Wayne County, and caused to be served on the liquidating agent of the Citizens Bank of Mount Olive and Gurney P. Hood, Commissioner of Banks, notice of his appeal from the assessment made against him in this proceeding by the Commissioner of Banks. This notice was accompanied by a stay bond, executed by the said A. J. Davis and a solvent surety. The grounds of the said appeal, as stated in said notice, were:

"(1) That the said assessment is illegal and void for that there is no certificate of stock appearing upon the books or records of the Citizens Bank of Mount Olive in the name of A. J. Davis.

"(2) That the claim of the Commissioner of Banks is barred by the statute of limitations, which statute is pleaded in this cause."

On 12 October, 1934, the Commissioner of Banks filed a written motion in the proceeding that the appeal of A. J. Davis be dismissed for that the notice of said appeal had not been filed within the time required by law.

This motion was heard at June Term, 1935, of the Superior Court of Wayne County, when judgment was rendered as follows:

"This cause coming on to be heard and being heard before his Honor, Walter L. Small, judge presiding, upon motion of Gurney P. Hood, Commissioner of Banks, *ex rel.* Citizens Bank of Mount Olive, to dismiss the appeal herein; and it appearing to the court that the stock assessment for $500.00 was filed against A. J. Davis in the office of the clerk of the Superior Court of Wayne County on 10 September, 1934, and that the said A. J. Davis had knowledge of said assessment on or

before 20 September, 1934, and that the said defendant did not give any notice of appeal from said assessment until 8 October, 1934; and the court being of opinion that said appeal was not in proper time;

"Now, therefore, it is considered, ordered, and adjudged that the appeal of A. J. Davis be and the same is dismissed, at the cost of the said A. J. Davis."

From this judgment A. J. Davis appealed to the Supreme Court, assigning error in the judgment.

J. Faison Thomson and John M. Colton for A. J. Davis.
Robert A. Hovis and Kenneth C. Royall for Commissioner of Banks.

CONNOR, J. The statute providing for the enforcement of the statutory liability of a stockholder of a bank organized under the laws of this State, C. S., 219 (a), and in liquidation by the Commissioner of Banks under statutory authority because of its insolvency, C. S., 218 (c), is as follows:

"After the expiration of thirty days from the date of the filing of the notice of the taking possession of any bank in the office of the clerk of the Superior Court, the Commissioner of Banks may levy an assessment equal to the stock liability of each stockholder in the bank, and shall file a copy of such levy in the office of the clerk of the Superior Court, which shall be recorded and indexed as judgments, and shall have the force and effect of a judgment of the Superior Courts of this State; and the same shall become due and payable immediately, and if not paid, execution may issue at the instance of the Commissioner of Banks against the stockholder delinquent, and actions on said assessments may be instituted against any nonresident stockholder in the same manner as other actions against nonresidents of the State. Any stockholder may appeal to the Superior Court from the levy of an assessment; the issue raised by the appeal may be determined as in other actions in the Superior Court." Subsection 13 of section 218 (c), Consolidated Statutes of North Carolina, as amended by chapter 113, Public Laws of North Carolina, 1927.

No time is fixed by the statute for the giving of notice of an appeal from an assessment by a stockholder or other person against whom the assessment has been levied and duly docketed. It is, however, expressly provided by the statute that when an assessment has been levied and duly docketed, as required by the statute, such docketed assessment "shall have the force and effect of a judgment of the Superior Courts of this State." It follows from this provision that notice of appeal must be given within ten days from the date of the docketing of the assessment in the office of the clerk of the Superior Court of the county in which the bank is located. C. S., 641. While the statute does not pro-

vide for notice to the stockholders prior to the levying of the assessment, such notice is presumed. *Corp. Com. v. Murphey,* 197 N. C., 42, 147 S. E., 667. Each stockholder has constructive notice, at least, of the levying and docketing of the assessment, and if he wishes to avail himself of his statutory right of appeal from the assessment, he must give notice of such appeal within ten days of the docketing of the assessment in the office of the clerk of the Superior Court of the county in which the bank is located. Otherwise, he has lost his right to appeal, and the assessment is final and conclusive.

When a stockholder or other person against whom an assessment has been levied and docketed, as authorized by the statute, has failed to give notice of an appeal within ten days from the date of the docketing, and has therefore lost his right to appeal, he may apply to the judge of the Superior Court for a writ of *certiorari.* In a proper case he will be granted the writ, and thereby be assured a hearing in the Superior Court on his contention that the assessment was illegal.

In Oliver's appeal in *In re Bank,* 208 N. C., 65, 179 S. E., 24, the judgment dismissing the appeal was affirmed. In that case we said: "That the appeal should be taken within a reasonable time, is all that the appellant could claim. We agree with the trial court that a delay of nineteen or twenty months is too long." Nothing was said in the opinion in that case which is inconsistent with the ground on which the judgment in the instant case is affirmed. Whether or not the appeal in the instant case was taken within a reasonable time is immaterial on this record. We agree with the trial court that the appeal was not taken within the proper time—that is, within ten days from the date of the docketing of the assessment.

Affirmed.

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

FRANK PITTMAN v. J. C. DOWNING AND JAMES A. BOYCE.

(Filed 22 January, 1936.)

1. Automobiles C j—Where driver's negligence is established, his motion to nonsuit guest's action on defenses raised by answer is properly refused when there is conflict of evidence on such defenses.

In an action by a guest against the driver of a car to recover damages sustained in a collision caused by the driver's negligence, the driver's motion to nonsuit on the ground of joint enterprise, contributory negligence, C. S., 523, and assumption of risk is properly refused when there is

conflict of evidence as to whether the guest had the right or did control the driving of the car, and as to the issue of contributory negligence and assumption of risk, since a defendant is entitled to nonsuit plaintiff on defenses raised in his answer only when all the evidence, considered in the light most favorable to plaintiff, sustains such defenses.

2. Evidence B b—

The burden of proof is on defendant to establish affirmative defenses pleaded by him in his answer.

3. Trial D a—

Where defendant relies upon affirmative defenses pleaded in his answer, his motion to nonsuit, based upon such defenses, is properly refused unless all the evidence, considered in the light most favorable to plaintiff, sustains the defenses relied upon in bar of recovery.

4. Automobiles C d—Turning car from highway into side road is not negligence when timely warning of purpose to turn is given.

Evidence that the driver of a car gave timely warning before turning his car from the highway into a side road is sufficient to sustain the jury's finding that he was not negligent in so turning, and in the driver's cross action to recover damages sustained in a collision with a car driven by his codefendant, set up in his answer in an action against both drivers instituted by a guest in his codefendant's car, the codefendant's motion to nonsuit the cross action on the ground of contributory negligence is properly denied.

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

APPEAL by defendant J. C. Downing from *Moore, Special Judge,* at June Special Term, 1935, of MARTIN. No error.

This action was instituted in the Superior Court of Martin County to recover of the defendant J. C. Downing damages for personal injuries suffered by the plaintiff Frank Pittman and resulting from a collision on a State highway, in Chowan County, between two automobiles, one owned and driven by the defendant J. C. Downing, and the other owned and driven by James A. Boyce. In his complaint the plaintiff alleges that the collision between the two automobiles, and his resulting injuries, were caused by the negligence of the defendant J. C. Downing in driving his automobile recklessly and at an excessive rate of speed.

In his answer the defendant J. C. Downing denies all allegations of negligence in the complaint, and alleges that the collision was caused by the negligence of James A. Boyce, who was thereupon, on the motion of the said defendant, duly made a party defendant in the action. The defendant sets up in his answer certain defenses to plaintiff's recovery in this action.

James A. Boyce, after he had been made a party defendant in the action, filed an answer in which he admitted the allegations of the complaint, and denied the allegations in the answer of the defendant J. C. Downing. In further answer to the cross action against him set up in

the answer of the defendant J. C. Downing, he alleged that he was injured by the negligence of the said defendant, and prayed judgment that he recover of the defendant J. C. Downing damages for said injuries.

Issues arising on the pleadings were submitted to the jury and were answered contrary to the contentions of the defendant J. C. Downing, and favorably to those of the plaintiff and of the defendant James A. Boyce.

The jury found that both the plaintiff and the defendant James A. Boyce were injured by the negligence of the defendant J. C. Downing, as alleged in their respective pleadings; that neither the plaintiff nor the defendant James A. Boyce, by his negligence, contributed to his respective injuries; and that the plaintiff was not engaged in a joint enterprise with the defendant J. C. Downing at the time of the collision, and had not assumed the risk of a collision on the highway by riding as a passenger in the automobile owned and driven by the defendant J. C. Downing, as alleged in his answer. The jury assessed the damages of the plaintiff at $2,500 and of the defendant James A. Boyce at $1,000.

From judgment that plaintiff recover of the defendant J. C. Downing the sum of $2,500, and that the defendant James A. Boyce recover of his codefendant the sum of $1,000, and that the costs of the action be taxed against the defendant J. C. Downing, the said defendant appealed to the Supreme Court, assigning as error the refusal of the trial court to allow his motions for judgment as of nonsuit, at the close of all the evidence, and to give peremptory instructions to the jury, in accordance with his request.

Elbert S. Peel for plaintiff.

Joseph C. Eagles, Jr., and Kenneth C. Royall for defendant J. C. Downing.

CONNOR, J. On his appeal to this Court, the defendant J. C. Downing does not contend that there was no evidence at the trial of this action tending to show that the collision which resulted in injuries to both the plaintiff and the defendant James A. Boyce was caused by his negligence, as alleged in the complaint and in the answer of the defendant James A. Boyce. He concedes in the brief filed by his counsel, in effect at least, that all the evidence shows that at the time of the collision he was driving the automobile in which the plaintiff was riding as a passenger, and which collided with the automobile which the defendant James A. Boyce was driving, at a rate of speed greatly in excess of forty-five miles per hour, and that there was evidence tending to show that such violation of the statute, C. S., 2626 (46), was at least a proxi-

mate cause of the collision, and the resulting injuries suffered by the plaintiff and by the defendant James A. Boyce.

In support of his assignments of error with respect to the judgment recovered against him by the plaintiff, the defendant contends that all the evidence at the trial shows that at the time of the collision the plaintiff was engaged in a joint enterprise with him, that by his own negligence the plaintiff contributed to his injuries, and that when he entered the plaintiff's automobile as a passenger he assumed the risk of a collision on the highway with another automobile. These contentions are in support of defenses to plaintiff's recovery in this action, which are set up in defendant's answer, and cannot be sustained, for the reason that there is at least a conflict in the evidence as to the facts involved in these defenses. It cannot be held that all the evidence shows that plaintiff, while riding with the defendant as a passenger in defendant's automobile, had the right to control or did control the driving of said automobile. See *Jernigan v. Jernigan,* 207 N. C., 836, 178 S. E., 587. Nor can it be held that all the evidence shows that by his own negligence the plaintiff contributed to his injuries, see C. S., 523, or that he assumed the risk of a collision caused by the negligence of the defendant, as shown by all the evidence at the trial. See *Norfleet v. Hall,* 204 N. C., 573, 169 S. E., 143.

Where, in an action to recover damages for injuries caused by the alleged negligence of the defendant, the defendant not only denies all allegations of negligence in the complaint, but also pleads in his answer defenses available to him in bar of plaintiff's recovery in the action, the burden is on the defendant to sustain the defenses pleaded by him. It follows from this principle that where there is evidence at the trial tending to sustain the allegations of the complaint, the defendant is not entitled to a judgment as of nonsuit, unless all the evidence, considered in the light most favorable to the plaintiff, sustains defenses relied upon by the defendant in bar of plaintiff's recovery.

In support of his assignments of error with respect to the judgment recovered against him by the defendant James A. Boyce, the defendant contends that all the evidence shows that the injuries suffered by said defendant were caused by his own negligence, or at least that said defendant by his own negligence contributed to the injuries suffered by him as the result of the collision. These contentions cannot be sustained. The evidence pertinent to the defenses relied on by the defendant in bar of a recovery in this action by his codefendant was properly submitted to the jury. If the jury believed the testimony offered as evidence by the defendant James A. Boyce, as they evidently did, the said defendant was not negligent in turning his automobile from the highway into the side road. He gave timely warning of his purpose to

do so, and in that case, the collision, and his resulting injuries, were caused by the negligence of the defendant J. C. Downing, as found by the jury.

After a careful review of the evidence in this case, we are of opinion that the assignments of error relied on by the defendant J. C. Downing on his appeal to this Court cannot be sustained.

No error.

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

HAZEL BATSON v. CITY LAUNDRY COMPANY.

(Filed 22 January, 1936.)

1. Appeal and Error J c—Court's findings on motion to dismiss action after nonsuit on ground of res judicata are not ordinarily reviewable.

On a motion to dismiss an action, instituted after nonsuit of a prior action between the parties, on the ground of *res judicata*, the finding by the court, after considering the evidence in both actions, that the evidence offered by plaintiff was substantially the same as that offered on the trial of the cause of action nonsuited, ordinarily will not be reviewed on appeal.

2. Judgments L a—Action instituted after nonsuit is properly dismissed upon finding that evidence in both actions is substantially the same.

The finding by the court that the evidence offered by plaintiff was substantially the same as that offered in a prior action between the same parties which had been nonsuited, is sufficient to sustain the court's judgment dismissing the action on the ground of *res judicata*.

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

APPEAL by plaintiff from *Frizzelle, J.*, at May Term, 1935, of NEW HANOVER. Affirmed.

This is an action to recover damages for personal injuries suffered by the plaintiff on 6 June, 1928, while she was engaged in the performance of her duties as an employee of the defendant.

The action was begun on 5 November, 1934.

In her complaint the plaintiff alleges that on 14 March, 1931, she instituted an action *in forma pauperis* in the Superior Court of New Hanover County against the defendant to recover damages for the personal injuries which she suffered on 6 June, 1928, while she was engaged in the performance of her duties as an employee of the defendant; that at the trial of said action at October Term, 1931, of said court, a verdict

in her favor and against the defendant was returned by the jury; that on the motion of the defendant the verdict was set aside as a matter of law by his Honor, M. V. Barnhill, judge presiding, who thereupon dismissed the action by judgment of nonsuit; and that on plaintiff's appeal to the Supreme Court, the judgment was reversed, and the action remanded to the Superior Court of New Hanover County for further proceedings. See *Batson v. Laundry Co.*, 202 N. C., 560, 163 S. E., 600.

She further alleges that said action was subsequently tried at October Term, 1932, of the Superior Court of New Hanover County, before his Honor, W. A. Devin, judge presiding; that at said trial, at the close of the evidence for the plaintiff, there was a judgment of nonsuit; and that on plaintiff's appeal to the Supreme Court, the judgment dismissing the action as of nonsuit was affirmed on 8 July, 1933. See *Batson v. Laundry Co.*, 205 N. C., 93, 170 S. E., 136.

She further alleges that thereafter, on 28 July, 1933, the plaintiff instituted another action *in forma pauperis* in the Superior Court of New Hanover County to recover of the defendant on the same cause of action as that alleged in the complaint in the action which was begun on 14 March, 1931, and dismissed by judgment as of nonsuit on 8 July, 1933; that at the trial of said action before his Honor, J. Paul Frizzelle, judge presiding, at September Term, 1934, of the Superior Court of New Hanover County, the plaintiff took a voluntary nonsuit; and that thereafter, on 5 November, 1934, this action was begun.

In her complaint in this action, the plaintiff alleges that the personal injuries which she suffered on 6 June, 1928, were caused by the negligence of the defendant in failing to exercise ordinary care to provide for her while she was performing her duties as its employee, a reasonably safe place to work. This allegation is denied in the answer.

In further defense of the action, the defendant pleads the three-year statute of limitations; the judgment of nonsuit in the former action instituted by the plaintiff against the defendant on the same cause of action as that alleged in the complaint in this action, and the contributory negligence of the plaintiff.

At the conclusion of the evidence for the plaintiff at the trial of this action, the defendant moved for judgment dismissing the action.

On the hearing of defendant's motion, the court found from the evidence offered by the plaintiff that the cause of action alleged in the complaint in this action is the same, or substantially the same, as that alleged in the action which was dismissed by judgment of nonsuit on 8 July, 1933; that the evidence for the plaintiff at the trial of this action is the same, or substantially the same, as that offered by the plaintiff at the trial of the former action; and that the decision in the

former action that plaintiff by her own negligence contributed to her injuries is *res judicata,* and conclusive upon the plaintiff in this action.

The court was of the opinion that on all the evidence offered by the plaintiff at the trial of this action she was guilty of contributory negligence, and for that reason could not recover in this action.

The court was further of the opinion that if the cause of action alleged in the complaint in this action is not the same, or substantially the same, as that alleged in the former action, on the facts shown by the evidence for the plaintiff, this action is barred by the three-year statute of limitations.

On the facts found by the court, and in accordance with its opinion that in any event the plaintiff on her own testimony was guilty of contributory negligence which barred her recovery in this action, or that if the cause of action alleged in the complaint in this action is not the same, or substantially the same, as the cause of action alleged in the complaint in the former action, the plaintiff is barred of recovery in this action by the three-year statute of limitations, the motion of the defendant was allowed, and plaintiff excepted.

From judgment dismissing the action, the plaintiff appealed to the Supreme Court, assigning errors, as shown by the record.

Burney & McClelland, Herbert McClammy, and Rountree & Rountree for plaintiff.

Bryan & Campbell and L. Clayton Grant for defendant.

CONNOR, J. At the hearing of the defendant's motion that the action be dismissed for the reason, among others, that the judgment of nonsuit in the former action is a bar to plaintiff's recovery in this action, the court considered the evidence offered by the plaintiff at the trial, and from such evidence found the facts on which the motion of the defendant was allowed. See *Batson v. Laundry Co.,* 206 N. C., 371, 174 S. E., 90. Ordinarily, if there was evidence tending to show the facts on which a motion was allowed, or denied, to be as found by the court, its findings of fact will not be reviewed by this Court. In the instant case we are of opinion that all the evidence shows that the facts are as found by the court. Its findings of fact will not be disturbed.

On the facts found by the court, there was no error in the order allowing the defendant's motion, or in the judgment dismissing the action on the ground that the plaintiff is barred of recovery in this action by the judgment of nonsuit in the former action. In affirming the judgment of Judge Devin (*Batson v. Laundry Co.,* 205 N. C., 93, 170 S. E., 136), this Court, speaking through the late *Justice Brogden,* said: "A liberal interpretation of plaintiff's testimony leads to the

inevitable conclusion that at the time of her injury she was not exercising ordinary care for her own protection, and must therefore bear the consequences of her unfortunate injury."

The judgment is affirmed on the authority of *Hampton v. Spinning Co.*, 198 N. C., 235, 151 S. E., 266.

Affirmed.

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

QUINT L. SORRELL v. SOVEREIGN CAMP, WOODMEN OF THE WORLD, AND J. BOSTWICK COOKE.

(Filed 22 January, 1936.)

Insurance N a—Beneficiary has no vested interest in policy, nor does payment of dues or premiums create lien on policy or proceeds.

In this action involving the right to proceeds from a mutual benefit certificate, it appeared that insured's wife was named beneficiary therein, and kept the certificate in force for a number of years by paying the necessary dues and assessments, that after her death insured's brother, who, upon the death of insured's wife, became the beneficiary under the terms of the certificate as insured's nearest blood relation, kept the certificate in force by paying the dues and assessments until the death of the insured a short time thereafter. The wife left a will in which she attempted to devise her interest in the policy to her nephew. *Held:* Under the terms of the certificate the insured's brother was entitled to the proceeds thereof, to the exclusion of the wife's nephew, the payment of dues or premiums alone being insufficient to create a lien against the certificate, or the proceeds thereof, and the wife at no time having any vested interest as the named beneficiary which she could bequeath by will. C. S., 6508.

APPEAL by the defendant J. Bostwick Cooke from *Harris, J.*, at June Term, 1935, of DURHAM. Affirmed.

This is an action to recover the sum due on a benefit certificate issued by the defendant Sovereign Camp, Woodmen of the World, on 1 June, 1929, to Albert V. Sorrell, who was at said date a member of its local camp, No. 412, Woodmen of the World, located at Durham, N. C.

Albert V. Sorrell died during the month of December, 1934, leaving as his nearest living relative the plaintiff, who is his only surviving brother. He left no wife, child, parent, grandchild, or sister surviving him.

By said certificate the defendant promised to pay to the beneficiary designated therein, at the death of Albert V. Sorrell, a sum of money

to be determined in accordance with the provisions of said certificate. This sum at the date of the trial of the action was $657.57, and had been paid by the defendant into the office of the clerk of the Superior Court of Durham County, pursuant to an order made in the action, to await final judgment.

The beneficiary designated in the certificate at the date of its issue was Quinnette Sorrell, who was at said date the wife of Albert V. Sorrell. She and the said Albert V. Sorrell were divorced from each other during the year 1931. She died on 11 September, 1933. No other beneficiary had been designated in the certificate.

It is provided in the certificate that "in the event of the death of all the beneficiaries designated in the certificate before the death of the member, if no new designation has been made, the benefits shall be paid to the surviving wife and surviving children and adopted children of the member, share and share alike; provided, that such surviving wife shall not be entitled to any benefits if she shall have been divorced; provided, further, that if there be no surviving wife, the surviving children and adopted children, if any, shall be entitled to all such benefits, and if there shall be no surviving children or adopted children, then the surviving wife, if any, shall be entitled to the benefits, but if there be no surviving wife, children, or adopted children, such benefits shall be paid to the next living relative of the member in the following order: parents or surviving parent, grandchildren, brothers and sisters, other blood relations, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, step-father, step-mother, step-children, step-brother, step-sister, and persons dependent upon the member; and blood relatives of the half blood shall share equally with those of the full blood."

The certificate sued on in this action, dated 1 June, 1929, was issued by the defendant in exchange for a certificate issued by the defendant on 27 March, 1913, to Albert V. Sorrell. Quinnette Sorrell, wife of Albert V. Sorrell, was designated as beneficiary in the original certificate. Some time after the issuance of said original certificate, Albert V. Sorrell stopped paying the dues and assessments required to keep said certificate in force, and thereupon Quinnette Sorrell, as the beneficiary designated in said certificate, paid the said dues and assessments until the said certificate was exchanged for the new certificate, dated 1 June, 1929. Quinnette Sorrell paid all the dues and assessments required to keep the new certificate in force until her death on 11 September, 1933. The sums paid by Quinnette Sorrell as dues and assessments required to keep both certificates in force amount to more than $459.00. At her death, Quinnette Sorrell left a last will and testament, containing Item 4, which is as follows:

"I give and bequeath to my beloved nephew, J. Bostwick Cooke, all the personal property of every nature, condition, and kind, including insurance policies, moneys, and other things of value, to him absolutely forever."

After the death of Quinnette Sorrell, the defendant J. Bostwick Cooke paid the dues and assessments required to keep the certificate sued on in force until the death of Albert V. Sorrell. The sums paid by the said defendant as dues and assessments required to keep said certificate in force amount to $38.25.

On the foregoing facts, which were admitted in the pleadings in the action, it was ordered, considered, and adjudged by the court that the plaintiff is entitled to the sum due on the certificate sued on, and that the clerk of the Superior Court of Durham County pay to the plaintiff the sum of $657.57, now in his hands, after first deducting from said sum the costs of the action.

From this judgment the defendant J. Bostwick Cooke appealed to the Supreme Court, assigning error in the judgment.

R. O. Everett for plaintiff.
Charles Scarlett for defendant.

CONNOR, J. On the facts admitted in the pleadings and under the provisions of the benefit certificate sued on in this action, the plaintiff is entitled to the sum which was due on said certificate at the death of Albert V. Sorrell.

The beneficiary designated in the certificate died before the death of Albert V. Sorrell, the insured. He left surviving him no wife or child, no parent, grandchild, or sister. In such case, it is provided in the certificate that the benefits shall be paid to the next living relative of the insured. The plaintiff, as his only surviving brother, is the nearest living relation of Albert V. Sorrell, deceased, and is therefore entitled to the sum due on the certificate at his death.

The defendant J. Bostwick Cooke, who was made a party to the action after its commencement, on his own motion, is not entitled to the sum due on the certificate, or to any part of said sum. He claims under the last will and testament of Quinnette Sorrell, deceased, who was the beneficiary designated in the certificate prior to her death. At no time during her life did she have any vested interest in the certificate which she could bequeath by her last will and testament. C. S., 6508.

Neither Quinnette Sorrell nor the defendant J. Bostwick Cooke had any lien on the certificate or on the sum due on the certificate, for the sums paid by them as dues and assessments required to keep the certificate in force. In *Pollock v. Household of Ruth,* 150 N. C., 211, 63

S. E., 940, it is said: "There may be, and not infrequently are, facts and circumstances existing which would raise an equity in the original beneficiary and which would justify and require a court to interfere for his protection; but the authorities are very generally to the effect that the mere payment of the premiums and dues for a time, without more, and in the absence of a binding contract that the beneficiaries then designated should receive the proceeds of the policy or the benefits arising therefrom, would not support such a claim."

The judgment is

Affirmed.

STATE v. THOMAS WATSON, J. T. SANFORD, ET AL.

(Filed 22 January, 1936.)

Constitutional Law F e: Criminal Law F b—Defendant is not twice put in jeopardy by second arraignment after continuance.

Where each defendant has been separately arraigned and has pleaded to the bill of indictment, following which the cases are continued to the next term of court, defendants are not twice put in jeopardy by a second arraignment when the cases are called for trial the following term. N. C. Const., Art. I, secs. 12, 13, 17.

APPEAL by defendants from *Small, J.*, and a jury, at Special September Criminal Term, 1935, of DURHAM. No error.

At the regular 1935 September Term of criminal court in Durham County, the defendants Thomas Watson and J. T. Sanford were indicted and a true bill found against them for the murder of one Nathan Malone, a colored taxi driver. The defendants were separately arraigned in open court before Judge G. V. Cowper and, after first moving to quash the bill of indictment, pleaded not guilty. The case was then continued, on motion of defendants, to the Special September Criminal Term. When the case was called the defendants, over their objections, were again separately arraigned before Judge Walter Small. The case was tried before a jury, and each of the defendants were found guilty of murder in the first degree and judgment of death was duly pronounced by the court below "by inhaling lethal gas until they are dead." Defendants excepted to the judgment, assigned error, and appealed to the Supreme Court.

The State offered evidence tending to show the following facts: That prior to Monday, August 26, 1935, the defendants Thomas Watson and J. T. Sanford, together with one Moody Johnson, planned to get a taxi to go to Florida. On Monday morning, 26 August, the three planned to rob Nathan Malone and take his taxi and use it for the trip. After

the plan was completed, but before it was commenced, Moody Johnson withdrew from the plan. About dusk dark the two defendants called the deceased on the telephone and, after he came for the defendants and took them in his taxi, Sanford hit the deceased in the head with a hammer and Watson took the wheel and drove the car on a side road, where a scuffle ensued and Nathan Malone was killed and robbed. Early next morning the deceased's body was discovered. The Durham police immediately became active by use of the local police radio, long distance telephone calls, and announcements over radio stations in Richmond, Raleigh, and Columbia. About 11 o'clock a.m., the next day, the defendants were apprehended in Savannah, Georgia, while driving the deceased's taxi. Both confessed that they committed the crime to officers of the law. These confessions were corroborated in every detail.

The charge of the court below covered every aspect of the case, to which no exception was taken. The appellants offered no evidence at the trial. Moody Johnson pleaded guilty to a conspiracy to commit the murder of Nathan Malone. No appeal as to him was taken.

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

C. W. Hall for defendant Thomas Watson.

Allston Stubbs for defendant J. T. Sanford.

CLARKSON, J. The defendants contend that the only question involved on this appeal is: "Where the defendants are charged with first degree murder, and after each has been separately arraigned and pleaded to the bill of indictment, following which the cases were continued to the next term of court, is it reversible error to again arraign the defendants when the cases are called for trial at the next term of court?" We think not.

The defendants say: "We are frank to admit that we have been unable to find any authority for our position."

The Constitution of North Carolina, sec. 12, is as follows: "No person shall be put to answer any criminal charge except as hereinafter allowed, but by indictment, presentment, or impeachment."

Sec. 13: "No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court. The Legislature may, however, provide other means of trial for petty misdemeanors, with the right of appeal."

Sec. 17: "No person ought to be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land."

In 8 R. C. L., p. 134, sec. 114, is the following: "It is an established maxim of the common law, in the administration of criminal justice, constantly recognized by elementary writers and courts of judicature from a very early period down to the present time, that a man shall not be brought into danger of his life or limb for one and the same offense more than once. This rule not only prohibits a second punishment for the same offense, but it goes further and forbids a second trial for the same offense, whether the accused has suffered punishment or not, and whether in the former trial he has been acquitted or convicted.

Sec. 115: "The right not to be put in jeopardy a second time for the same cause is as important as the right of trial by jury, and is guarded with as much care. Accordingly, there will be found in the Constitution of the United States and in the constitutions of most of the states a provision that no person shall for the same offense be twice put in jeopardy, which, however, is but a recognition of the humane rule of the common law, and a plea of former conviction is good under either the Constitution or the common law. The protection thus afforded is not against the peril of second punishment, but against being again tried for the same offense. Jeopardy in its constitutional or common-law sense, has a strict application to criminal prosecutions only. The word signifies the danger of conviction and punishment which the defendant in a criminal prosecution incurs when duly put on trial before a court of competent jurisdiction. The provision of the Constitution of the United States on the subject applies only to proceedings in the federal tribunals, and does not in any way restrict or prescribe the limits of the constitutional provisions and statutory enactments of the several states, though statements to the contrary may be found in some early decisions." See Constitution of United States, Amendment 5.

We see no constitutional question impinged. Defendants were tried on a bill of indictment for murder found by a grand jury. They were tried by a jury and never put in jeopardy twice for the same offense.

Technicalities and refinements have been greatly eliminated in trials in criminal actions. For example: In *S. v. Upton,* 170 N. C., 769 (770), we find: "Even if this had been a trial for a capital felony, it would not have been error for the court to have made a mistrial 'when necessary to attain the ends of justice.' *S. v. Guthrie,* 145 N. C., 495; *S. v. Tyson,* 138 N. C., 627, which is cited in *S. v. Dry,* 152 N. C., 813." *S. v. Ellis,* 200 N. C., 77.

On the record we see no error, prejudicial or otherwise.

No error.

N. R. HUSSEY v. E. B. KIDD, EXECUTOR OF K. H. HUSSEY, AND BAXTER HUSSEY AND OTHERS, HEIRS AT LAW OF K. H. HUSSEY.

(Filed 22 January, 1936.)

1. Pleadings D e—

A demurrer admits the truth of the allegations of fact in the complaint and relevant inferences of fact to be drawn therefrom, but does not admit conclusions of law contained therein.

2. Trusts C b—Heir of wife held not entitled to follow proceeds from sale of land by tenant by the curtesy consummate.

Where a tenant by the curtesy consummate in lands sells such lands by deed of bargain and sale with covenants of seizin, and invests the proceeds of sale in other lands, and thereafter dies, the sole heir at law of his wife, who died seized of the lands, may not recover from the estate of the tenant by the curtesy the funds received by the tenant from the sale of the lands nor claim a lien against the lands purchased with the proceeds of sale, the proceeds of sale belonging to the tenant subject only to the right of action of the purchaser for breach of covenants, and the heir is relegated to an action for the land against the purchaser from the tenant, his title not being rebutted by the tenant's general warranties and covenants of seizin.

APPEAL by the defendants from *Alley, J.*, at May Term, 1935, of MOORE. Reversed.

J. H. Scott and W. R. Clegg for plaintiff, appellee.
M. G. Boyette for defendants, appellants.

SCHENCK, J. The complaint alleges that K. H. Hussey and Mary Eliza Brady Hussey became man and wife in 1880, and that the plaintiff N. R. Hussey was the only child and heir at law born to this union; that Mary Eliza Brady Hussey was the sole owner of a tract of land containing 75 acres, and died intestate on 29 December, 1887; that subsequent to the death of the said Mary Eliza Brady Hussey, K. H. Hussey intermarried with one Mishie Purvis, and that thereafter, on 9 December, 1892, K. H. Hussey and his then wife, Mishie Purvis Hussey, undertook to convey in fee simple to E. S. Maness, by deed with general warranties and covenants of seizin, for the sum of $300.00, the 75-acre tract of land in which K. H. Hussey had only the right of curtesy consummate; that the $300.00 received by K. H. Hussey for the 75-acre tract of land was used to purchase a 116-acre tract of land, deed for which was taken in the name of K. H. Hussey. The complaint further alleges that K. H. Hussey died on ..... February, 1934, leaving surviving him his children as his only heirs at law, namely, the plaintiff,

a child by his first wife, Mary Eliza Brady Hussey, and the defendants (other than the executor), children by his second wife, Mishie Purvis Hussey. The complaint also alleges that the "land (the 75-acre tract) and the proceeds of its sale were the sole and separate property of this plaintiff," and that "K. H. Hussey held said land (the 116-acre tract) in trust for this plaintiff as the sole and only heir at law of his mother, and this plaintiff is entitled to recover the same from the defendants in this action," and that the plaintiff "is entitled to recover of the defendants the sum of $300.00, with interest at the rate of six per cent per annum from 9 December, 1892, the date of the sale of the land (the 75-acre tract) belonging to plaintiff, and the investment of its proceeds in the (other) land (the 116-acre tract) until paid, and that such recovery is a first and prior lien upon the (said later mentioned) land . . . in preference to all other claims by the defendants, heirs at law of K. H. Hussey, deceased, or the estate of K. H. Hussey."

The prayer for relief is to the effect (1) that the plaintiff be declared the owner and entitled to the possession of the 116-acre tract, and (2) that the plaintiff recover of the estate of K. H. Hussey the sum of $300.00, with interest from 9 December, 1892, and that recovery be declared a first lien against any assets in the hands of the executor.

The plaintiff expressed his desire to take a voluntary nonsuit as to any claim to the 116-acre tract, and renounced all right to recover said land in this action, but insisted upon his right to prosecute the action for the funds used in the purchase of said land. Whereupon, the court entered judgment to the effect "that the plaintiff be nonsuited as to his right to prosecute the action as to the land described in the pleadings (the 116-acre tract), but his right to prosecute the action as to the funds used in the purchase of said land that may arise upon the pleadings is retained."

Upon the entering of the aforesaid judgment of voluntary nonsuit as to a portion of the plaintiff's complaint, the defendants demurred *ore tenus* to the remaining portion thereof for that it did not set forth facts sufficient to constitute a cause of action against the defendants, in that it alleges that K. H. Hussey sold and conveyed the 75-acre tract of land of which he was not the owner; and that while the plaintiff, under the facts alleged, might have a cause of action against the purchaser of said lands for the recovery thereof, he would have no cause of action against the defendants for the recovery of the $300.00, alleged to have been paid for said land, as the plaintiff would have no interest in the fund of $300.00 for the reason that K. H. Hussey did not and could not make a valid deed conveying in fee land in which he owned no interest except a right of curtesy consummate, and that under the facts alleged in the

complaint the plaintiff cannot successfully maintain, as a matter of law, that the money constituted a trust fund.

The demurrer was overruled and the defendants reserved exception, and this exception presents a determinative question on this appeal, and renders unnecessary the consideration of the other exceptions subsequently taken during the course of the trial.

While the demurrer admits the truth of the allegations of fact contained in the complaint and the relevant inferences of fact to be drawn therefrom, it does not admit the conclusions of law contained therein. *Scales v. Bank & Trust Co.*, 195 N. C., 772. The allegations to the effect that the proceeds of the sale of the 75-acre tract was the sole and separate property of the plaintiff, and that the $300.00 received by K. H. Hussey for the 75-acre tract and invested by him in the purchase price of the 116-acre tract, constituted a trust fund and a first and prior lien upon the 116-acre tract, or the assets in the hands of the executor, are purely allegations of conclusions of law drawn by the pleader, and as such are not admitted by the demurrer.

Under the alleged facts, we are called upon to determine whether the giving to a third party of a deed, with general warranties and covenants of seizin, by a life tenant by curtesy consummate for land of which his wife died seized, in consideration of cash to him paid, and the use by him of the cash so paid to buy other land constitute a cause of action by the remainderman, the sole heir of the deceased wife, against the estate and the heirs at law of the said late life tenant for the amount of the cash so paid to him, and, if so, does such claim constitute a prior lien upon the land bought with the cash paid by said deed, or upon the assets of estate of the said late life tenant in the hands of his executor.

K. H. Hussey could sell such estate as he had in the land, namely, an estate by the curtesy consummate. *Long v. Graeber*, 64 N. C., 431. However, when he sold the land of which his wife died seized by deed of bargain and sale, with general warranties and covenants of seizin, the right of the heir of his wife to the land was not rebutted by such warranty and covenants, *Johnson v. Bradley*, 31 N. C., 362, and the consideration paid was received by K. H. Hussey for such title as the deed passed, and was his property, subject only to such right of action as the grantee therein may have against him for breach of warranties or covenants of seizin. The plaintiff, as heir at law and remainderman after the life estate of his father, as tenant by curtesy consummate, has no right of action for the consideration paid to his father, since it was paid for such title as his father had and as was passed by the deed.

It would seem that the plaintiff is relegated to his right of action to recover the land from whomsoever may be now in possession thereof and

claiming the same either by or through the deed of K. H. Hussey, which right of action apparently accrued upon the death of K. H. Hussey in 1934.

We conclude that the demurrer *ore tenus* should have been sustained, and for that reason the judgment of the Superior Court is

Reversed.

T. A. HAYWOOD AND OTHERS, COMPOSING THE NORTH STATE ORCHARDS No. 3, v. G. C. MORTON.

(Filed 22 January, 1936.)

1. Vendor and Purchaser F b—Evidence held sufficient for jury on issue of fraudulent misrepresentations by vendor of number of acres.

Where there is evidence that the vendor represented the tract sold to contain a certain number of acres, including two tracts upon which were situate tenant houses, and that in fact it contained a substantially smaller number of acres, and failed to include the tracts upon which the houses were situate, and evidence of facts from which it could be reasonably inferred that the vendor, at the time knew the tract to contain a smaller number of acres, and knew it did not include the tracts upon which the houses were situate, the evidence is sufficient to be submitted to the jury on the issue of vendor's fraudulent misrepresentations in the purchaser's action to recover damages sustained by reason of the shortage.

2. Same—Failure of purchaser to ascertain acreage is not defense when purchaser's failure is due to reliance on vendor's misrepresentations.

A vendor's motion to nonsuit an action by his purchaser for damage resulting from a shortage of acreage in the tract sold on the ground that the purchaser had an opportunity of ascertaining the land purchased, is properly denied when there is allegation and evidence that the purchaser failed to ascertain the acreage because of the vendor's fraudulent representations as to the acreage, and tracts included, which misrepresentations were made to deceive the purchaser.

APPEAL by the defendant from *Alley, J.*, at March Term, 1935, of RICHMOND. No error.

The plaintiffs instituted this action to recover damages alleged to have been sustained by reason of false and fraudulent representations made by the defendant to the plaintiffs relative to the acreage and tracts of land conveyed by a deed from the former to the latter, the principal allegations being in the following words: "That the plaintiffs are advised, believe, and so allege that the defendant represented that he owned 2,600 acres of land, and included in which were the two tracts of 12 acres on which were the two tenant houses for the purpose of inducing these plaintiffs to purchase said tract of land, and that the plaintiffs

relied upon the representations of the defendant that he was conveying to them 2,600 acres of land by warranty deed, and that he had a good title to all of said lands, including the 12 acres on which were the two tenant houses, when, as a matter of fact, the defendant did not own 2,600 acres, nor the two tracts containing 12 acres, . . . and that the said defendant knew or should have known that he did not own the same, and he well knew or should have known that the plaintiffs relied upon his representations, and which representations were false, and that said representations were made for the purpose of inducing these plaintiffs to purchase the land described in said deed and for the amount hereinbefore stated ($50,000). That, relying upon the representations of the defendant as hereinbefore set forth, the plaintiffs purchased said tract of land represented to contain 2,600 acres and on which were the two tenant houses pointed out by the defendant, but discovered shortly thereafter and as soon as a survey of said premises could be had that the defendant did not own but about 2,200 acres of land, and did not own the two tracts of 12 acres on which were the two tenant houses, and by reason of said shortage in acreage and the failure to convey the two tracts of 12 acres, . . . these plaintiffs have been damaged in at least the sum of $6,500." Upon these allegations the plaintiffs ask that they be allowed a credit of $6,500 upon a note of $24,500 given by them to the defendant for part of the purchase price of said lands.

The defendant's answer admits that the deed which he delivered to the plaintiffs called for 2,600 acres, more or less, and that at the time he delivered such deed to the plaintiffs he thought that the two tracts of 12 acres were included within the boundary set out in the deed, and denies that he knowingly made any false or fraudulent representations to the plaintiffs.

The defendant further sets up as a counterclaim the purchase price note of $24,500, less several admitted credits thereon aggregating $8,000, and asked judgment against the plaintiffs for the balance.

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

"1. Did the defendant G. C. Morton falsely and fraudulently represent to the plaintiffs that the boundary of land conveyed by him to the plaintiffs by deed bearing date of 20 June, 1932, contained 2,600 or more acres of land, as alleged in the complaint? Answer: 'Yes.'

"2. Were the plaintiffs injured and damaged by said false and fraudulent representations? Answer: 'Yes.'

"3. What damages, if any, are the plaintiffs entitled to recover? Answer: '$4,000.'

"4. In what amount are the plaintiffs indebted to the defendant? Answer: '$24,500, with interest from 20 August, 1932, subject to credits of $4,000 as of 13 September, 1932, $2,000 as of 8 October, 1932, and $2,000 as of 15 September, 1933.' "

From judgment based upon the verdict to the effect that the defendant recover of the plaintiffs $24,500, subject to the aforesaid credits of $8,000, and interest, and "subject to a credit of $4,000 awarded the plaintiffs as damages under the third issue," the defendant appealed, assigning errors.

Fred W. Bynum and W. R. Jones for plaintiffs, appellees.
Morton & Smith and Vann & Milliken for defendant, appellant.

SCHENCK, J. As is frankly stated in his brief, the appellant relies chiefly for reversal upon his exception to the court's refusal to allow his motion for judgment as of nonsuit.

There was evidence to the effect that the defendant represented to the plaintiffs that the land conveyed by the deed from him to them contained 2,600 acres or more, and that the land so conveyed contained not more than 2,200 acres, and it was admitted by the defendant that he thought and told the plaintiffs that the two tracts of 12 acres upon which two tenant houses were situated were contained in the land conveyed, when as a matter of fact they were not so contained, and there was further evidence from which it could be reasonably inferred that the defendant knew at the time he made the representations as to the acreage, and as to the tracts included therein, that such representations were false. It thus became necessary to submit to the jury the question as to whether the defendant had falsely and fraudulently represented to the plaintiffs that the land conveyed contained 2,600 acres or more, and included the two tracts of 12 acres with the tenant houses thereon.

It is the contention of the defendant that the plaintiffs had opportunity to have a survey made and thereby have ascertained the acreage of the land conveyed, as well as the tracts therein contained, and that the defendant should not be held liable for the plaintiffs' folly or negligence in not ascertaining what land they were buying, and that the court should have either granted his motion for a judgment of nonsuit or directed a negative answer to the first issue.

It is the contention of the plaintiffs that they forewent investigation because of the representations made by the defendant that the acreage was 2,600 or more, and included the two tracts of 12 acres with the tenant houses thereon, and that, therefore, since they relied upon representations which they allege were false, and made for the purpose of deceiving them, the issue of the defendant's liability for the damage caused them by such false and fraudulent representations was properly left to the jury.

The law applicable to this controversy is clearly stated in *Ferebee v. Gordon,* 35 N. C., 350, as follows: "When, therefore, in a contract of

sale the vendor affirms that which he either knows to be false or does not know to be true, whereby the other party sustains a loss, and he acquires a gain, he is guilty of a fraud, for which he is answerable in damages. When, therefore, sued for a deceit in the sale of an article, he cannot protect himself from responsibility by showing that the vendee purchased with all faults, if it appear that he resorted to any contrivance or artifice to hide the defect of the article or made a false representation at the time of the sale."

There was no error in submitting to the jury the question as to whether the defendant made false and fraudulent representations to the plaintiffs as to the acreage of land conveyed and the tracts included therein, as well also as to the *scienter* in making them.

We have examined the assignments of error to the rulings of the court upon certain evidence, as well as those to portions of the charge, and find no error therein.

No error.

ROSA ALLEN v. AMERICAN COTTON MILLS, INC.

(Filed 22 January, 1936.)

Master and Servant C b—In action to recover for injuries to employee sustained in fall as she was walking to work on path not under employer's control, evidence of negligence held insufficient.

Evidence that an employee was injured while walking to defendant's mill to work at night after she had been summoned by defendant's foreman, that she was walking with defendant's foreman and that they had chosen to take a path running through another's back yard rather than the streets leading to the mill, and that the employee was injured when, forced from the middle of the path by a parked car, she stumbled over a manhole cover about four inches above the ground by the side of the path, lost her balance and hit her leg against a nearby iron stake driven in the ground, *is held* insufficient to overrule defendant employer's motion to nonsuit, it appearing from the evidence that the path was not an approach to the mill under the control of the employer, and there being no evidence by whom the manhole cover and stake had been placed, or that the foreman was acting within the scope of his authority in walking back to the mill with plaintiff after he had summoned her to work.

APPEAL by plaintiff from *Pless, J.*, at March Term, 1935, of GASTON. Affirmed.

Action to recover damages for personal injury alleged to have been caused by the negligence of the defendant.

Plaintiff offered evidence tending to show that she was employed in the spinning room of defendant's mill, working on a night shift, and that she sustained an injury to her leg while on her way to work about

12:15 a.m., on 1 February, 1932; that Roy Phillips, overseer of the spinning room, was with her at the time; that her house was 225 yards from the mill.

Plaintiff testified: "I was hurt on pathway going to the mill, ran into a manhole (cover), got overbalanced, and it throwed me into an iron stake and hurt my leg. I went to the mill and worked until six a.m., and then went home. . . . I never did see the stob. I have seen the manhole sitting out on the walkway that went into the mill. I could not see the manhole at the time I stumbled on it. Mr. Phillips had said nothing to me about it. The pathway was used by people going in and out of the mill. I had used the pathway before my injury, had not been on pathway on which I was injured regularly. They were getting up night hands to work. I did not go around with Phillips, he had done got others and we were going on to the mill. He was my boss. I hadn't paid any attention to this manhole before I was hurt. There was no balustrade around it, or any light there. It was dark. The first I knew about the manhole being there on night of the injury was running into it with my right foot and it overbalanced me. Been working for defendant about two years, didn't work regularly. Been working a year on night shift before I got hurt. Mr. Phillips came to my house to wake me. He was going around waking all his help, as was his custom, about 12 o'clock, if they were not up. I was done up. He saw the light in my house and knew I was up. My husband asked him to go with me out there. He was walking kinda to the side along the pathway which led from my house across one or more streets and along the top of an embankment raised above the street, very near the house of Mr. Pledger, might have been eight or nine feet from the door step. I had been along there a time or two before in the daytime. The pathway leads toward the mill to the end of another street when it crossed the end of the street, when it went around the store. It went across another street. Phillips didn't have a lantern or light. The stake was about eleven inches high, a little bit from the manhole which was in the pathway. The manhole was setting in the pathway, both the stake and the manhole were in the pathway. The stake was something like a foot, right beside the manhole. The path was some four or five feet wide."

Roy Phillips, witness for plaintiff, testified: "I did not have to bring help into the mill, but I usually went and seen after that. I had to see if we had enough. I was with Mrs. Allen going back to the mill. She stumbled over a manhole and hit an iron stake. The walkway went through the village. It was around four feet wide. I observed the manhole in daytime before the injury. The top was about four inches from the ground, and was about three feet in diameter. The stake was about twenty inches from the manhole. I saw it there about nine

months before the injury. Looked like an iron pipe all battered up. It didn't stay there more than a day or two after injury. Don't know who took it up. I couldn't see the manhole before I got to it. Plaintiff's home was 225 yards from the mill. We had to cross two or more streets before we got to where she was hurt. Her house faced on a street. I came out into the street leaving her house, walked some distance until I came to a street running perpendicular to that, and crossed the perpendicular street. If we had followed the perpendicular street, we would have gone to a street on which the mill was located without crossing the path. The manhole is a few feet back from Pledger's house where injury occurred. We went between Pledger's house and Calhoun's house into a roadway and on up to the mill. I knew the manhole and stob were there. I was going through the pathway at the time, and the stob was between the roadway and the manhole. I was taking the short cut to the mill. There were two roadways I could have gone. They were perfectly clear. There wasn't anything wrong with the roadway to the mill, perfectly smooth. The embankment is about one and a half feet higher than the roadway. Lots of times I would wake people up, but I didn't make them go with me. When they wanted to go with me, I allowed them. The pathway looked to be four or five feet wide. The manhole was on the edge of the pathway. I was walking on the left side. The manhole was off the path and the stake was on side of walk between manhole and road on left side of manhole. About six inches of manhole came out in the path—pathway left unobstructed except of these six inches of manhole. There were three stakes in a row between manhole and road. The stake we are talking about was about twenty inches from the manhole on opposite side of path I was traveling. Manhole was on my left and stake was on my left—stake farther from the path. Between the manhole and road there was a small ditch. Mrs. Allen was walking beside me nearer the manhole than I was. We left sidewalk that runs along edge of bank. Pledger's automobile was between manhole and house. We took a diagonal course and went around the house and Calhoun's house and passed to edge of Pledger's house in about one and a half feet from it. The Calhoun and Pledger houses are about thirty feet apart, manhole about nine feet from Pledger's house. The manhole was in Pledger's back yard. Have seen barricades between Pledger and Calhoun houses to keep anything from going through there. Barricade was a 2 x 4 put up like a banister, and runs like a pathway on each side to each house, leaving a gap for the pathway. Pledger's car was standing about two feet from manhole, between house and manhole. Someone left car on path which I had been partially traveling, and I left path on account of car, and when Mrs. Allen left path on account of car she hit the manhole and struck the

stake. Defendant did not have anything to do with that car that I know of. The car was in Pledger's back yard, two and a half or three feet from manhole, parallel with house."

Rosa Allen (recalled) testified: "The manhole was on left side of the path. I went to left of the manhole because the car was there in the path, and struck the manhole and fell against the stake. When I walked around manhole it put me between manhole and the street. I went around manhole because car was setting on other side of manhole and house. I went around the manhole because the car was in my way."

At the close of plaintiff's evidence motion for nonsuit was allowed, and from judgment dismissing the action plaintiff appealed.

S. J. Durham and J. L. Hamme for plaintiff.
P. C. Froneberger and A. C. Jones for defendant.

DEVIN, J. It is apparent from an examination of plaintiff's evidence, as disclosed by the record before us, that she has failed to make out a case of actionable negligence on the part of the defendant, and that the motion for judgment of nonsuit was properly allowed. *Atkinson v. Mills Co.*, 201 N. C., 5; *Crawford v. Michael & Bivens, Inc.*, 199 N. C., 224.

While, as stated by *Hoke, J.*, in *Elliott v. Furnace Co.*, 179 N. C., 142, an employer of labor, in the exercise of reasonable care, is required to provide for his employee a safe place in which to do his work, this obligation extending to the approaches to it when these are under the employer's control, under the testimony in the case at bar, there was no duty devolving upon the defendant to protect the plaintiff from an obstruction in a short-cut path that ran through another's back yard, along which plaintiff was walking on her way to the mill. There was no evidence by whom the manhole (cover) and stake were placed there, nor evidence upon which it could be held that the duty of inspecting the path where plaintiff was injured was imposed upon the defendant by reason of control over the premises over which it passed; nor does it appear that witness Phillips was acting under authority from defendant or within the scope of his duties in walking with the plaintiff from her home to the mill. *Atkinson v. Mills Co., supra.*

The judgment of nonsuit is

Affirmed.

STATE v. A. H. DAVIS.

(Filed 22 January, 1936.)

Criminal Law G j—Credibility of defendant testifying in his own behalf is a matter for the determination of the jury.

The court should instruct the jury to examine the testimony of a defendant in his own behalf in order to ascertain whether it is influenced by his interest in their verdict, but that if they should find that his testimony as a witness has not been influenced by his interest, they should disregard the fact of his interest and give the testimony the same weight as that of a disinterested witness, and the charge of the court in this case to the effect that it was the jury's duty to scrutinize the testimony of defendant, which meant they should take into consideration defendant's interest in the verdict, but that the duty to scrutinize did not mean they should not believe his testimony, but that they should give it such credibility as they saw fit, *is held* in substantial accordance with the rule and not to constitute reversible error.

APPEAL by defendant from *Harris, J.*, at March Term, 1935, of ORANGE. No error.

The defendant A. H. Davis was charged with unlawfully causing the death of Mrs. W. W. Martin as the result of culpable negligence in the operation of an automobile on the public highway.

The evidence is not set out in the record, but it is admitted in the case on appeal that there was evidence offered in behalf of the State which tended to show that the defendant was operating his automobile carelessly and negligently; that such carelessness and negligence was culpable and such as to support criminal liability, and that there was evidence sufficient to support a verdict of guilty of manslaughter. The defendant admitted on cross-examination that he had been convicted of receiving stolen goods and had served a sentence of eighteen months therefor.

The defendant excepted to the following portion of the judge's charge: "When a defendant goes on the stand, gentlemen, it is your duty to scrutinize the testimony of the defendant. What I mean by that, gentlemen, by scrutinizing his testimony, you, the jury, should take into consideration the fact that this defendant is testifying in his own behalf. That does not mean that you can't believe what he says. You have a right to believe all he says, or part, or none, your only duty being to scrutinize it, to take into consideration that he is more interested in your verdict than anybody else, because it affects him most, and then give such credibility to his testimony as you see fit. I say that you have a right to believe it all, or part. Your only duty is to scrutinize that testimony as given by the defendant."

There was a verdict of guilty of manslaughter, and from judgment in accordance therewith defendant appealed.

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

P. W. Glidewell and Graham & Sawyer for defendant.

DEVIN, J. The defendant, being charged with involuntary manslaughter growing out of an automobile collision, went upon the stand and testified as a witness in his own behalf.

After a full and accurate charge to the jury covering the other phases of the case, the trial judge, referring to defendant's testimony on the stand, used this language (omitting immaterial words): "When a defendant goes on the stand it is your duty to scrutinize his testimony. What I mean by that is you should take into consideration the fact that he is testifying in his own behalf. That does not mean that you can't believe what he says. You have a right to believe all he says, a part, or none, your only duty being to scrutinize it, that is, to take into consideration that he is more interested in your verdict than anybody else, and then give such credibility to his testimony as you see fit. You have a right to believe it all or part. Your only duty is to scrutinize the testimony given by the defendant."

The defendant contends this language fails to conform to the rule laid down by this Court with respect to the consideration to be given by the jury to the testimony of interested witnesses. That is the only question presented by this appeal.

The latest utterance of this Court on the subject is found in *S. v. Wilcox,* 206 N. C., 694, wherein the following language of the trial judge was held to be objectionable: "It is your duty to scrutinize the evidence of defendant before accepting his evidence as true. . . . The law recognizes that human nature is weak and subject to temptation, and, therefore, the law presumes that when a man is being tried for crime he is laboring under the temptation to do whatever he thinks is necessary to clear himself. For that reason the law makes it your duty to scrutinize the evidence of the defendant before accepting his testimony as true."

In *S. v. Ray,* 195 N. C., 619, this language in the charge of the court below was held erroneous: "In examining their (defendants') testimony, the law requires you to scrutinize their testimony very carefully, examine it thoroughly and carefully because of their great interests in the result of your verdict, and the result it might have on your verdict if they did not speak the truth by reason of their interest in your verdict."

It is apparent that the language quoted in the cases cited differs materially from the charge of the court in the case at bar. Here the judge, in effect, instructed the jury that what he meant by the "duty to scrutinize" was that they should take into consideration the fact that the defendant was testifying in his own behalf; that that did not mean they could not believe all he said, a part, or none of it; that their only duty was to scrutinize it, that is, take into consideration his interest in the verdict and give such credibility to his testimony as they saw fit.

In *S. v. Byers,* 100 N. C., 512, the court instructed the jury that "where the prisoner and his relations went upon the stand the law directed the jury to scrutinize their testimony carefully, because of their interest in the result; that, however, notwithstanding such interest, the jury might believe all they said—or part of it—or none of it—according to the conviction produced upon their minds, of its truthfulness."

This instruction was approved by this Court as being sustained by the cases there cited, and is referred to in *S. v. Ray, supra,* as containing a correct statement of the law.

In *S. v. Ray, supra, Chief Justice Stacy* thus states the law: "It has been held in a number of cases that where a defendant, in the trial of a criminal prosecution, testifies in his own behalf, it is error for the trial court to instruct the jury to scrutinize his testimony and to receive it with grains of allowance, because of his interest in the verdict, without adding that if they find the witness worthy of belief, they should give as full credit to his testimony as any other witness, notwithstanding his interest." *S. v. Graham,* 133 N. C., 645; *S. v. Lee,* 121 N. C., 544; *S. v. Collins,* 118 N. C., 1203; *S. v. Holloway,* 117 N. C., 730.

The earliest case in which this question seems to have been raised was *S. v. Ellington,* 29 N. C., 61. There the mother and sister of the prisoner had testified for him. Their credibility was attacked on account of their interest. The presiding judge charged the jury "that it was their province to determine on it (their credibility), and that it was for them to say whether those witnesses had testified truly, notwithstanding their relation to the prisoner, or had yielded to that human infirmity to which we are liable, and had testified falsely in favor of their son and brother."

This instruction was approved, and *Chief Justice Ruffin,* speaking for the Court, says: "How far these witnesses adhered to their integrity or were drawn aside by interest, in other words, the degree in which the relation actually affected their veracity, was a question for the jury."

The rule seems to be well established in North Carolina that if the judge in charging the jury calls their attention to the fact that a witness is interested in the verdict, and directs them to examine his testimony in order to determine whether or not it has been influenced thereby, he should also instruct them that if upon such examination or scrutiny they find his testimony as a witness has not been influenced by his interest,

they should leave the fact of his interest out of their consideration and give to his testimony the weight of a disinterested or unbiased witness; that is, as unqualified and unaffected by interest; this to be taken into consideration together with all the other matters in evidence affecting his credibility.

While the charge of the court below on this point may not have been entirely free from criticism, we think it substantially complied with the rule laid down, and that the defendant has no just ground of complaint.

No error.

O. N. ALLEY v. S. M. LONG ET AL.

(Filed 22 January, 1936.)

1. Libel and Slander A c—Question of conscious publication of slanderous remarks held for determination of jury upon the evidence.

In an action for slander, a motion to nonsuit on the ground that there was no conscious publication of the slanderous remarks is improperly granted when the evidence shows that a third person was present and heard the slanderous remarks, although he could not have been seen by the person uttering them, and there is evidence of facts sufficient to support the inference that the person uttering the remarks was conscious of the presence of such third person.

2. Same—Third person overhearing publication held not included in the charge so as to negative publication of slanderous remarks.

The evidence disclosed that plaintiff, a shipping clerk in charge of checking out merchandise from the corporate defendant's warehouse, was charged by the individual defendant, the corporation's general manager, with allowing drivers to take out merchandise and selling it and "splitting" with the drivers, the general manager adding that "all the drivers you have over there are crooked," and that the only person overhearing the conversation of the general manager with plaintiff was one of the drivers referred to. *Held:* The driver overhearing the remarks was not directly charged with participating in the crime, and the corporate defendant's motion to nonsuit on the ground that there was no publication sufficient to support an action for slander should have been overruled.

3. Corporations G i—Evidence that corporate agent was acting in scope of authority in uttering slanderous remarks held for jury.

Evidence that the general manager of a corporation, in charge of losses, accused the shipping clerk in charge of checking out merchandise from the corporation's warehouse with allowing drivers to take out merchandise and splitting the purchase price with them, and threatened to ask for the clerk's removal, *is held*, in the absence of a plea of privilege, justification, or mitigating circumstances, C. S., 542, sufficient to be submitted to the jury on the question of whether the general manager was acting within the scope of his authority in uttering the slanderous words in an action therefor against the corporation.

ALLEY *v.* LONG.

APPEAL by plaintiff from *Shaw, Emergency Judge,* at September Term, 1935, of ROCKINGHAM.

Civil action for slander.

The record discloses that on 20 August, 1934, S. M. Long, general manager of the corporate defendant's storage warehouse in Greensboro and "in charge of the Tea Company's business with regard to losses," called the plaintiff into his office and said to him, in the presence of J. E. Collins, that on Friday night of the week before, eight boxes of bananas went out of the warehouse, and they could not have gone out of the back door, as it was locked; they were bound to have gone out on the trucks, and "it shows you are letting them get out, letting the drivers take them and selling them and you splitting with them." And further: "If they don't stop, I will have to ask Mr. Crowder to get a new man to check the trucks in your place. . . . All the drivers you have over there are crooked," etc.

Plaintiff was night shipping clerk for the Crowder Transport Company, an independent contractor, engaged by the Tea Company to do its hauling from the storage warehouse to its several retail stores. Plaintiff's duties were to check the trucks and see that the produce got out.

J. E. Collins, one of the drivers for the Crowder Transport Company, came to the door of Mr. Long's office, while he was talking to the plaintiff. The door was open. Collins testified: "I could hear what was said. I stopped at the door. Mr. Alley could see me, but Mr. Long could not. He was sitting with his back to me. I didn't interrupt them. I just stood at the door and listened until they finished talking, then I walked in and gave him (Long) my tickets."

At the close of plaintiff's evidence the corporate defendant moved for judgment of nonsuit, which was allowed; whereupon the plaintiff suffered a voluntary nonsuit as to the individual defendant, and appealed.

P. W. Glidewell and Allen H. Gwyn for plaintiff.

Brown & Trotter and Thomas C. Guthrie for defendant A. & P. Tea Company.

STACY, C. J. The theory of the nonsuit as to the Tea Company is, that there was no conscious publication of the alleged slanderous remarks on the part of its general manager and codefendant, Mr. Long. This, we think, was a question for the jury under the facts in evidence. *Hedgepeth v. Coleman,* 183 N. C., 309, 111 S. E., 517, 24 A. L. R., 232; *McNichol v. Grandy,* 81 A. L. R., 103.

According to the plaintiff's testimony, "Mr. J. E. Collins was present, while the conversation was going on"; and Mr. Collins testified that he

could hear what was said. True, it is in evidence that Collins was standing at the door and that Long was sitting with his back to the door and could not see him. *Non constat* that he was not conscious of his presence. *McKeel v. Latham,* 202 N. C., 318, 162 S. E., 747.

But the case does not stop here. Even if Collins did overhear the conversation to the knowledge of Long, still the Tea Company contends there was no publication, such as the law requires in defamation, because Collins was one of the drivers of the Transport Company and included in the charge, "all the drivers you have over there are crooks." *Bull v. Collins,* 54 S. W. (2d) (Tex.), 870; *Harbison v. C. R. I. & P. Ry. Co.,* 327 Mo., 440, 37 S. W. (2d), 609, 79 A. L. R., 1.

The language of the declarant, it will be noted, does not charge Collins directly with participation in the looting of the Tea Company's merchandise—only that the drivers were crooked—while full responsibility is placed upon the plaintiff. It would seem that the principle contended for is not available as a shield in the circumstances presently presented. *Marble v. Chapin,* 132 Mass., 225.

The Tea Company also contends that Long was not acting within the scope of his employment in taking the matter up with the plaintiff. *Sawyer v. R. R.,* 142 N. C., 1, 54 S. E., 793. This was a question for the jury under the evidence. *Dickerson v. Refining Co.,* 201 N. C., 90, 159 S. E., 446. Long was "in charge of the Tea Company's business with regard to losses," and he threatened to ask for plaintiff's removal.

It is observed there is no plea of privilege, justification, or mitigating circumstances. C. S., 542; *Hartsfield v. Hines,* 200 N. C., 356, 157 S. E., 16; *Gudger v. Penland,* 108 N. C., 593, 13 S. E., 168; McIntosh Practice and Procedure, 365; 17 R. C. L., 401.

Reversed.

ROY ELLIS, BY HIS NEXT FRIEND, W. C. ELLIS, AND HOKE HARDISTER, BY HIS NEXT FRIEND, G. F. HARDISTER, v. FARMERS BANK AND TRUST COMPANY AND R. L. PHILLIPS.

(Filed 22 January, 1936.)

False Imprisonment A c—Defendant must have willfully procured arrest of plaintiffs in order to be liable in action for false imprisonment.

Evidence that the individual defendant, in attempting to apprehend a thief of the corporate defendant's property, swore out a warrant for a named person, and went with a deputy sheriff to serve the warrant, and that the person so served implicated two others in the theft, that the individual defendant refused to write in the names of such others in the warrant, whereupon the officer, in the individual defendant's presence,

did write in the names of such others and thereafter arrested such others in the absence of the individual defendant, and that they were thereafter acquitted of the charge, *is held* insufficient to overrule defendants' motions to nonsuit in an action for false imprisonment instituted by the persons whose names had been written in the warrant by the officer, since the evidence fails to show that either arrest was willfully procured by the individual defendant, but to the contrary, that the individual defendant expressly declined to write the names of plaintiffs in the warrant and did not request or authorize the officer to make the arrests.

APPEAL by defendants from *Sinclair, J.*, at April Term, 1935, of HOKE. Reversed.

Two civil actions, instituted and pending in the Superior Court of Hoke County, one by Roy Ellis, appearing by his next friend, W. C. Ellis, and the other by Hoke Hardister, appearing by his next friend, G. F. Hardister, both against Farmers Bank and Trust Company and R. L. Phillips, were by consent consolidated for trial, and were tried together on the issues arising on the pleadings in each action.

The issues submitted to the jury were answered in favor of the plaintiff in each action.

The jury found that the plaintiff in each action was illegally arrested, as alleged in his complaint; that the defendant R. L. Phillips, acting as the agent of his codefendant, Farmers Bank and Trust Company, procured the illegal arrest of each of the plaintiffs; and that each of the plaintiffs was entitled to recover of the defendants, as damages, the sum of $875.00.

From the judgment in each action that the plaintiff therein recover of the defendants, jointly and severally, the sum of $875.00 and the costs of the action, the defendants appealed to the Supreme Court, assigning as error, chiefly, the refusal of the trial court to allow their motions for judgment as of nonsuit at the close of all the evidence.

Cox & Cox for plaintiffs.
J. C. Sedberry for defendants.

CONNOR, J. Conceding without deciding that there was evidence at the trial of these actions tending to show that the plaintiff in each action was arrested by an officer of Hoke County, as contended by the plaintiffs (see *Rhodes v. Collins,* 198 N. C., 23, 150 S. E., 492), and that such arrest was illegal because made under a void warrant, we are of opinion that there was no evidence tending to show that either arrest was willfully procured by the defendant R. L. Phillips. We must accordingly hold that there was error in the refusal of the trial court to allow the motions of the defendants, at the close of all the evidence, for judgment as of nonsuit in each action. For this reason, the judgment in each action is reversed.

The evidence at the trial showed that on 24 January, 1935, the defendant R. L. Phillips, cashier of the defendant Farmers Bank and Trust Company, procured the issuance of a criminal warrant by the clerk of the Superior Court of Scotland County, for the arrest of one Willis Allsbrook for the larceny of certain timber, the property of the defendant Farmers Bank and Trust Company, of Rockingham, N. C.; that said warrant was directed to any lawful officer of Moore County, and was returnable to the criminal court of Scotland County; that the defendant R. L. Phillips, accompanied by a deputy sheriff of Scotland County, who had the warrant in his possession, went to Raeford, in Hoke County, and there had a conversation with one George Davis, who was then confined in the county jail of Hoke County; that in said conversation, at which a deputy sheriff of Hoke County was present, the said George Davis implicated the plaintiffs in these actions in the larceny with which Willis Allsbrook had been charged; that after said conversation, the deputy sheriff of Hoke County, in the presence of the said R. L. Phillips and of the deputy sheriff of Scotland County, after the said R. L. Phillips had refused to do so, wrote the names of the plaintiffs, to wit: Roy Ellis and Hoke Hardister, in the warrant which the said R. L. Phillips had procured for the arrest of Willis Allsbrook; and that thereafter the deputy sheriff of Hoke County went to the homes of the plaintiffs in Hoke County with the said warrant for the purpose of arresting each of the plaintiffs under said warrant. Neither of the plaintiffs was at his home when the deputy sheriff went there, but each of the plaintiffs subsequently signed a bond for his appearance at the criminal court of Scotland County to answer the charge made against him in the warrant. Each of the plaintiffs duly appeared as required by his bond, and upon his trial was found not guilty of the larceny with which he was charged.

This evidence did not show that the warrant for the arrest of the plaintiffs was procured by the defendant R. L. Phillips. All the evidence shows the contrary. The said defendant expressly declined to write the names of the plaintiffs or either of them in the warrant which he had procured for the arrest of Willis Allsbrook, nor did he authorize or request the deputy sheriff of Hoke County to arrest either of the defendants. He did not go with the said deputy sheriff to the home of either of the plaintiffs, nor was he present when either of the plaintiffs signed the bond for his appearance at the trial in the criminal court of Scotland County.

There was error in the refusal of the trial court to dismiss the action. For this error, the judgment in each action is

Reversed.

RICHMOND COUNTY v. BOSS SIMMONS ET AL.

(Filed 22 January, 1936.)

Taxation H e: Judicial Sales C a—Bidder at foreclosure sale of tax certificate acquires no rights in land prior to confirmation.

The last and highest bidder at a judicial sale is merely a preferred bidder with no rights in the property in law or equity until his bid has been accepted and confirmed by the court, and where, in a proceeding to foreclose a tax sale certificate, the land has been sold under order but before confirmation of the bid a resale is ordered under the provisions of C. S., 2591, for an advance bid, and pending a resale the taxpayer pays the judgment for the taxes and the county takes a voluntary nonsuit, the last and highest bidder at the sale is not entitled to be made a party to the action and contest the validity of the judgment as of nonsuit, the order of resale being a rejection of his bid and a release of his liability thereunder, and the fact that he had placed the last and highest bid at the sale conferring no rights in the property to him. C. S., 8037.

APPEAL by S. A. Lovan, movant, from *McElroy, J.*, at September Term, 1935, of RICHMOND. Affirmed.

This is an action to foreclose a tax sale certificate issued to the plaintiff by the sheriff of Richmond County. C. S., 8037.

The defendants in whose names the land sold by the sheriff was listed for taxation for the year 1929 were duly served with summons. Neither of the defendants filed a demurrer or answer to the complaint.

On Monday, 5 August, 1934, a judgment by default final was rendered in the action by the clerk of the Superior Court of Richmond County. In this judgment it was ordered and decreed by the court that upon default in the payment of the judgment within ten days from the date of its rendition, the defendants and all persons claiming under them be foreclosed of all rights or equities of redemption, and that the commissioner appointed by the court for that purpose sell the land described in the certificate as provided by law.

At a sale made by the commissioner pursuant to the judgment on 6 September, 1934, S. A. Lovan was the last and highest bidder for said land in the sum of $197.57. This sale was duly reported to the clerk by the commissioner, who recommended that said sale be confirmed. Thereafter, and before confirmation, the commissioner reported to the court that the bid at the sale made by him on 6 September, 1934, had been raised by J. Elsie Webb, who deposited with the court the sum of $20.00 to secure a resale of the land. Thereupon, on 24 September, 1934, a resale of the land was ordered by the clerk of the Superior Court. C. S., 2591. Pursuant to the order of the said clerk, the commissioner advertised the land for sale on 11 October, 1934. On 27

September, 1934, the defendants paid to the plaintiff the full amount of the judgment in this action, and thereupon the plaintiff took a voluntary nonsuit. The action was thereupon dismissed by judgment duly entered by the clerk of the Superior Court of Richmond County.

On 27 October, 1934, S. A. Lovan, the last and highest bidder at the sale made on 6 September, 1934, filed an affidavit with the clerk of the Superior Court of Richmond County, and on the facts stated therein, moved that he be made a party to the action, that the judgment of nonsuit be vacated and set aside, and that the commissioner be ordered and directed by the court, upon the payment by him of the amount of his bid, to make and execute a deed conveying to him the land described in the tax sale certificate.

The motion was denied by the clerk of the Superior Court and on the appeal of the said S. A. Lovan to the judge, the order of the clerk was affirmed. The movant thereupon appealed to the Supreme Court.

M. C. McLeod for plaintiff.
H. S. Boggan for movant.

CONNOR, J. The bid made by S. A. Lovan at the sale made by the commissioner on 6 September, 1934, although duly reported to the court, was not accepted. It was rejected when the order of resale was made by the clerk of the Superior Court under the provisions of C. S., 2591. In the absence of an acceptance of his bid and a confirmation by the court of the sale at which the bid was made, the bidder at a judicial sale, although the last and highest bidder, has no right in law or equity to be made a party to the action or proceeding in which the order of sale was made. When the resale in the instant case was ordered the bidder at the first sale was released from any and all obligations by reason of his bid. *Koonce v. Fort,* 204 N. C., 426, 168 S. E., 672.

Until the acceptance of his bid and the confirmation of the sale at which the bid was made, the last and highest bidder at a judicial sale is merely a preferred bidder, with no rights in law or in equity by reason of his bid. *Davis v. Central Life Ins. Co.,* 197 N. C., 617, 150 S. E., 120; *Cherry v. Gilliam,* 195 N. C., 233, 141 S. E., 594.

As the movant in the instant case had no rights which he could have enforced in this action, it is immaterial to him whether or not there was error in the judgment of nonsuit. In no event was he entitled to a deed to the land described in the tax sale certificate for the foreclosure of which this action was instituted.

There is no error in the order denying his motion. The order is

Affirmed.

HIGH POINT SAVINGS AND TRUST COMPANY, ADMINISTRATOR OF GEORGE H. SYKES, DECEASED, v. MRS. GEORGE E. SYKES BLACKWELDER, RUBY SYKES NOLAND AND HER HUSBAND, H. B. NOLAND, AND GEORGIA SYKES, A MINOR, APPEARING BY HER GUARDIAN AD LITEM, C. B. OVERMAN.

(Filed 22 January, 1936.)

Evidence H a: Trusts C c—Evidence offered to establish resulting trust held properly excluded under hearsay rule.

Certain lands were deeded to husband and wife by entireties. The wife predeceased her husband, and after the husband's death his administrator sought to sell the lands to make assets to pay debts. A daughter of the tenants by entireties resisted the proceeding, claiming an interest in the land as heir at law of her mother, and attempted to show a resulting trust in the lands in her mother's favor by showing that her mother had furnished the major part of the purchase price, although the lands had been deeded to the grantees as tenants by the entireties. In support of her contentions, the daughter offered testimony of a witness to the effect that the wife had told the witness she had furnished a certain amount of the purchase price. *Held:* The testimony was properly excluded under the hearsay rule.

APPEAL by the defendants Ruby Sykes Noland and her husband, H. B. Noland, from *McElroy, J.*, at March Term, 1935, of GUILFORD. No error.

This is a special proceeding for the sale of land owned by plaintiff's intestate, at his death, to make assets for the payment of his debts.

The proceeding was begun before the clerk of the Superior Court of Guilford County, and was transferred to the civil issue docket of said court for the trial of the issue raised by the pleadings. At the trial the issue submitted to the jury was answered as follows:

"Was George H. Sykes the owner and in possession of the land described in the petition at his death? Answer: 'Yes.'"

From judgment that the plaintiff is entitled to an order that the land be sold, and remanding the proceeding to the clerk of the Superior Court for that purpose, the defendants Ruby Sykes Noland and her husband, H. B. Noland, appealed to the Supreme Court, assigning errors in the trial.

Walser & Wright for plaintiff.

R. L. Foust for defendants Mrs. Blackwelder and Georgia Sykes.

David H. Parsons for defendants Ruby Sykes Noland and her husband.

CONNOR, J. At the trial of this action the evidence for the plaintiff showed that on 19 October, 1918, Eva J. Cox, in consideration of the

sum of $1,000, conveyed to George H. Sykes and his wife, Sallie Sykes, the land described in the petition; that Mrs. Sallie Sykes, wife of George H. Sykes, died during the year 1927; that thereafter the said George H. Sykes was married to the defendant Mrs. George H. Sykes Blackwelder; that he died on 28 March, 1929, leaving as his heirs at law the defendant Ruby Sykes Noland, the only child of his first wife, and the defendant Georgia Sykes, the only child of his second wife; and that the said George H. Sykes was in possession of the land described in the petition at his death, claiming title thereto under the deed from Eva J. Cox, and as the survivor of his wife, Sallie Sykes.

In her answer to the petition in this proceeding, the defendant Ruby Sykes Noland denied that her father, George H. Sykes, was the owner and in possession of the land described in the petition as such owner, at the date of his death. She alleged that her mother, Mrs. Sallie Sykes, wife of the said George H. Sykes, paid $700.00 of the purchase price of said land, and that her father, George H. Sykes, paid $300.00 of said purchase price. For this reason she alleged that the said Sallie Sykes and the said George H. Sykes were the owners of said land as tenants in common, and not as tenants by the entireties. These allegations were denied by the plaintiff and by the defendant Georgia Sykes.

At the trial the only evidence offered by the defendant Ruby Sykes Noland to support her allegations was the testimony of a witness that Sallie Sykes had told this witness that she had sold her land in Randolph County, North Carolina, for the sum of $600.00, and that she had used this sum, together with the sum of $100.00 which she had received as rent, in the purchase of the land conveyed to her and her husband by Eva J. Cox. This testimony, upon objection by plaintiff, was properly excluded as evidence in this case. Its admission as evidence would manifestly have violated the hearsay rule under which, subject to certain well recognized exceptions, testimony that the witness had heard a third person make a statement is excluded as evidence. See *Improvement Co. v. Andrews,* 176 N. C., 280, 96 S. E., 1032.

There was no error in the instruction of the court to the jury that if the jury found the facts to be as shown by all the evidence they would answer the issue "Yes."

The judgment is affirmed.

No error.

J. FRANK NEWELL, ADMINISTRATOR OF THE ESTATE OF ODELL NEWELL, DECEASED, v. FRANCES DARNELL AND THE CITY OF WINSTON-SALEM.

(Filed 22 January, 1936.)

Negligence B c: Municipal Corporations E c—Negligence of city, if any, held insulated by intervening negligence of third person.

The evidence disclosed that piles of sand, intended to be spread over defendant city's unpaved sidewalk, had been allowed to remain at intervals along the sidewalk for a period of some two months, that a pedestrian stepped off the sidewalk into the street in order to avoid the piles of sand, and was struck and killed by an automobile driven by the codefendant. There was evidence that the street was straight and unobstructed, and that the driver of the car was guilty of negligence. *Held:* In an action to recover for the pedestrian's death, the defendant city's motion to nonsuit was properly allowed, since, even conceding that the city was negligent, such negligence was insulated by the intervening negligence of the driver of the car, the negligent operating of a car and the resulting injury to a pedestrian, forced into the street by reason of the piles of sand, not being reasonably foreseeable by the city as a result of the condition of the sidewalk.

APPEAL by the plaintiff from *Hill, Special Judge,* at the April Term, 1935, of FORSYTH. Affirmed.

The plaintiff alleged and offered evidence tending to prove that on 21 May, 1934, about 10 o'clock at night, his intestate, an eighteen-year-old boy, and his companion, Paul Knouse, were walking along the sidewalk on the south side of the Waughtown Road in the city of Winston-Salem, where the road was straight and level for some 300 or 400 feet with an unobstructed view, and that at intervals along the sidewalk C. W. A. workers, with the consent of the city, had placed piles of sand to be scattered over the sidewalk, which was unpaved, and that the piles of sand had been there some two months; and that when the plaintiff's intestate and his companion reached the piles of sand they stepped off of the sidewalk and into the street to go around the piles of sand, and that when they were in the street about five feet out from one of the piles of sand the plaintiff's intestate was struck and killed by an automobile driven by the codefendant, Frances Darnell.

The plaintiff further alleged and offered evidence tending to prove that the codefendant Frances Darnell was negligent in driving her car at an unlawful rate of speed and too near the curb, and in failing to keep her car under control, and in giving no signal or warning of her approach, and in failing to see the plaintiff's intestate in time to avoid striking and killing him.

At the close of the plaintiff's evidence the court sustained the motion for judgment as of nonsuit as to the defendant city, and the plaintiff appealed, assigning errors.

Slawter & Wall for plaintiff, appellant.
Parrish & Deal for city, appellee.

SCHENCK, J. Conceding, but not deciding, that the city of Winston-Salem was negligent in allowing the piles of sand to remain upon its sidewalk, the plaintiff specifically alleged and proved several negligent, if not criminal, acts on the part of the defendant Frances Darnell, and we are of the opinion that such negligent acts were the sole and proximate cause of the death of the plaintiff's intestate, for which the defendant city cannot be held liable. The death of the intestate was not the natural or probable consequence of the city's alleged negligence in allowing the piles of sand to remain upon the sidewalk.

"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." *Balcum v. Johnson,* 177 N. C., 213 (216-17).

To hold that the city of Winston-Salem could have foreseen that a third party would operate a car in such a negligent and reckless manner as to run down and kill a person walking near the curb on a straight and level street, in order to avoid going over the piles of sand on the sidewalk, would be, we apprehend, stretching the legal principles by which individuals are held liable for their negligent acts. The law requires reasonable foresight and, when the result complained of is not reasonably foreseeable in the exercise of due care, the party whose conduct is under investigation is not answerable therefor; and when an independent, efficient, and wrongful cause intervenes between the primary negligence and the injury ultimately suffered, the independent cause insulates the primary negligence and is deemed the proximate cause of the injury.

This case is governed by the principles enunciated in *Carter v. Lumber Co.,* 129 N. C., 203; *Lineberry v. R. R.,* 187 N. C., 786; *Herman v. R. R.,* 197 N. C., 718; *Chambers v. R. R.,* 199 N. C., 682; *Hinnant v. R. R.,* 202 N. C., 489; *Ward v. R. R.,* 206 N. C., 530; and *Beach v. Patton,* 208 N. C., 134.

The judgment as of nonsuit as to the defendant city of Winston-Salem is

Affirmed.

L. H. WATKINS ET AL. v. GEORGE A. ISELEY, MAYOR, ET AL.

(Filed 22 January, 1936.)

1. Constitutional Law G a: Municipal Corporations H d—Ordinance requiring liability insurance or bonds for vehicles operated for hire held valid.

An ordinance requiring operators of taxicabs or other motor vehicles for hire to secure liability insurance or enter into bond with personal or corporate surety is a valid exercise of the police power and expressly authorized by statute, C. S., 2787 (36), as amended by ch. 279, Public Laws of 1935, and does not violate the Fourteenth Amendment of the Federal Constitution, the operation of vehicles for gain being a special and extraordinary use of the city's streets, which it has the power to condition by ordinance uniform upon all coming within the classification.

2. Municipal Corporations H e—

Ordinarily, the validity of a municipal ordinance may not be challenged by proceedings to enjoin its enforcement.

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

APPEAL by plaintiffs from *Parker, J.*, at September Term, 1935, of WAKE.

Civil action to enjoin enforcement of ordinance regulating operation of taxicabs for hire on the streets of the city of Raleigh.

The facts are these:

1. In August, 1935, the commissioners of the city of Raleigh, pursuant to C. S., 2787 (36), as amended by ch. 279, Public Laws 1935, duly adopted ordinances in the interest of public safety, requiring every person, firm, or corporation, as a condition precedent to operating taxicabs or motor vehicles for hire in the city of Raleigh, on or after 1 September, 1935, to secure liability insurance, or enter into bond with personal or corporate surety, in amounts as follows: $2,500 covering injury to one person in any single accident; $5,000 covering injury to more than one person in single accident; $250 covering property damage in any single accident.

A violation of the ordinance is made a misdemeanor, punishable by fine of $25 for each offense.

2. Plaintiffs are operators of taxicabs for hire within the city of Raleigh and have operated such taxicabs prior and since the adoption of said ordinances. They have met all the requirements of the city and State laws relative to their business, other than complying with the above ordinances requiring liability insurance or bond with personal or corporate surety.

3. It will be difficult for plaintiffs to give bond with personal or corporate surety, and the lowest annual premium quoted by any local casualty company for liability insurance upon any taxicab for hire in the city of Raleigh is $180.00.

From judgment dissolving the temporary restraining order, and denying the injunctive relief sought, plaintiffs appeal, assigning errors.

Chas. U. Harris for plaintiffs.
Clem B. Holding for defendants.

STACY, C. J. Are the ordinances requiring operators of taxicabs or other motor vehicles for hire in the city of Raleigh to secure liability insurance, or enter into bond with personal or corporate surety, valid exercises of the police power? They are expressly authorized by statute. C. S., 2787 (36), as amended by ch. 279, Public Laws 1935.

The constitutionality of similar legislation was before the Supreme Court of the United States in *Packard v. Banton,* 264 U. S., 140, where *Mr. Justice Sutherland,* delivering the opinion of the Court, dealt with the questions raised on the present appeal as follows:

"The contention most pressed is that the act unreasonably and arbitrarily discriminates against those engaged in operating motor vehicles for hire in favor of persons operating such vehicles for their private ends, and in favor of street cars and motor omnibuses. If the State determines that the use of streets for private purposes in the usual and ordinary manner shall be preferred over their use by common carriers for hire there is nothing in the Fourteenth Amendment to prevent. The streets belong to the public and are primarily for the use of the public in the ordinary way. Their use for the purposes of gain is special and extraordinary and, generally at least, may be prohibited or conditioned as the legislature deems proper. . . . Decisions sustaining the validity of legislation like that here involved are numerous and substantially uniform. (Citing authorities.) . . . The fact that, because of circumstances peculiar to him, appellant may be unable to comply with the requirement as to security without assuming a burden greater than that generally borne or excessive in itself, does not militate against the constitutionality of the statute. Moreover, a distinction must be observed between the regulation of an activity which may be engaged in as a matter of right and one carried on by government sufferance or permission. In the latter case the power to exclude altogether generally includes the lesser power to condition, and may justify a degree of regulation not admissible in the former. See *Davis v. Massachusetts,* 167 U. S., 43."

The cases cited and relied upon by plaintiffs, *S. v. Gulledge,* 208 N. C., 204, 179 S. E., 883, and *S. v. Sasseen,* 206 N. C., 644, 175 S. E., 142, were decided prior to the passage of the 1935 amendment, and are therefore inapposite to the question presently presented.

Moreover, in the light of what was said in *Flemming v. Asheville,* 205 N. C., 765, 172 S. E., 362, it would seem the plaintiffs are infelicitous in the selection of their remedy.

The temporary restraining order was properly dissolved.

Affirmed.

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

JOHN R. WHEELER v. BANK OF EDENTON.

(Filed 22 January, 1936.)

1. Corporations E c—Stockholder held not entitled to maintain suit to recover damages sustained by corporation from breach of contract.

Plaintiff alleged that defendant, in consideration of certain collateral turned over to defendant by plaintiff, agreed with plaintiff not to foreclose for a period of one year against assets belonging to a corporation of which plaintiff was a stockholder and president, that defendant breached the contract by instituting foreclosure proceedings against the corporation within the one-year period, and purchased the property at the sale at a grossly inadequate price. *Held:* The damages alleged to have resulted from the wrongful seizure and purchase of the assets of the corporation at a grossly inadequate price were incurred primarily by the corporation, and in the absence of allegation of demand on the corporation or its receiver, in case of receivership, to bring the action, plaintiff may not maintain the action, the case not coming within the exceptions to the rule that stockholders of a corporation may not maintain an action to recover losses sustained by it unless the representatives of the corporation have failed to act.

2. Banks and Banking C e: Bills and Notes D f: Actions A c—Drawer of worthless check may not maintain action against bank for breach of contract to pay same.

Plaintiff alleged that defendant bank, in consideration of plaintiff's turning over certain collateral, agreed to pay plaintiff's check in a certain amount, although plaintiff's deposit was insufficient to cover same, that the bank breached the contract by failing to pay same, and that plaintiff suffered damage by reason of the breach by being prosecuted and convicted of issuing a worthless check. Plaintiff took no appeal from the conviction for issuing the worthless check. *Held:* Plaintiff was not entitled to maintain the action, since it was based upon a violation of the criminal law of the State by the plaintiff, the conviction being deemed in accordance with law in the absence of an appeal therefrom.

WHEELER *v.* BANK.

APPEAL by the plaintiff from judgment on the pleadings entered by *Moore, Special Judge,* at May Special Term, 1935, of CHOWAN. Affirmed.

The plaintiff, who was a stockholder and president of the Edenton Lumber Company, instituted this action against the Bank of Edenton for an alleged breach of contract between the plaintiff and the defendant, and alleges that he delivered to the defendant certain personal collateral, and in consideration thereof the defendant agreed to carry the indebtedness of the Edenton Lumber Company, upon which the plaintiff was an endorser, for a year without foreclosure, and as long as the present inventory of the lumber company was kept up, and in further consideration thereof the defendant agreed to pay a check for $121.25 drawn to the order of Spivey & Company and certain other outstanding checks drawn by the plaintiff upon the defendant bank. The plaintiff alleges that this agreement was made and the collateral delivered to the defendant on or about 4 September, 1931, and that on 1 October, 1931, the defendant, in violation of the agreement, took charge of said lumber company, and, subsequently, on 28 June, 1932, less than a year after the agreement was entered into, started foreclosure proceedings of a deed of trust securing the notes of the lumber company to the bank endorsed by the plaintiff, and, thereafter, at the foreclosure sale, bought the assets of the Edenton Lumber Company at a grossly inadequate price, and further, that the defendant bank refused to pay the check to Spivey & Company drawn by the plaintiff, and as a result thereof the plaintiff was indicted, tried, and convicted in the recorder's court and the Superior Court of Chowan County for giving a worthless check. The plaintiff's demand for judgment for damages is based upon (1) the alleged unlawful and wrongful seizure and purchase of assets of the Edenton Lumber Company, in which the plaintiff was a stockholder, at a grossly inadequate price, and (2) upon the indictment, trial, and conviction of the plaintiff for giving a worthless check.

The Edenton Lumber Company is not a party to this action and it is not alleged that it would not or could not sue in its own behalf.

The defendant set up the counterclaim that the plaintiff had executed and delivered to it three certain promissory notes, and had endorsed another promissory note held by it, all of which were past due and unpaid, notwithstanding demand for payment thereof had been made, and prayed judgment for the total amount of said notes with interest. In his reply the plaintiff admitted the execution and endorsement of the unpaid past-due notes in the hands of the defendant, as alleged in the counterclaim, and pleaded the "breach of agreement and damages set up in the complaint in bar of recovery."

The court granted the motion of the defendant for judgment on the pleadings for the amount sued for in the counterclaim, and from judgment in accord therewith the plaintiff appealed to the Supreme Court, assigning as error the signing of the judgment.

J. A. Pritchett and John F. White for plaintiff, appellant.
W. D. Pruden for defendant, appellee.

SCHENCK, J. As to the damages alleged to have been suffered by reason of the unlawful and wrongful seizure and purchase at a grossly inadequate price of the assets of the Edenton Lumber Company, it is clear that if such damages were incurred they were incurred directly by the corporation, and only indirectly by the plaintiff as a stockholder. With certain exceptions, into which this case does not fall, a stockholder cannot maintain an action in his own name for damages suffered by a corporation in the absence of an allegation that he had made effort to have the officers and directors of the corporation, or the receiver in case of a receivership, to institute action or take such other steps as were necessary to protect his interest as a stockholder, together with the interest of the other stockholders, and that such representatives of the corporation had failed to act. *Moore v. Mining Company,* 104 N. C., 534; *Ham v. Norwood,* 196 N. C., 762; *Merrimon v. Paving Co.,* 142 N. C., 539.

As to the damages alleged to have been suffered by the plaintiff by reason of the failure of the defendant bank to pay the check given by him to Spivey & Company, which resulted in his indictment, trial, and conviction for giving a worthless check, such conviction in the recorder's court, and in the Superior Court, unappealed from, in the absence of any allegation of fraud on the part of the defendant bank in the procurement thereof, must be presumed to have been regularly and properly had. Such being the case, the plaintiff has suffered no legal wrong for which damages may be recovered. An action never lies when a plaintiff must base his claim, in whole or in part, on a violation by himself of the criminal law of the State, and this principle is not impaired even when the plaintiff is acting under the authority of the defendant. *Lloyd v. R. R.,* 151 N. C., 536, and cases there cited, *Bean v. Detective Co.,* 206 N. C., 125.

Since the plaintiff in his reply admits the execution and endorsement of the past-due notes, now in the hands of the defendant, as alleged in the counterclaim, and merely pleads the "breach of agreement and damages set up in the complaint in bar of recovery" thereon, it is manifest that the defendant was entitled to judgment as entered by the court.

Affirmed.

LUCY BANKS v. J. C. JOYNER, ADMINISTRATOR OF ESTATE OF J. J. AMERSON, AND TOWN OF WELDON.

(Filed 22 January, 1936.)

1. **Municipal Corporations E d: Negligence B c—Pleadings held to allege passive negligence of city insulated by active negligence of driver.**

A guest injured in an automobile accident instituted action against the administrator of the person driving the car at the time of the accident, alleging that her injuries were caused by the driver's negligence. Defendant moved that the town in which the accident occurred be made a party defendant, and upon its joinder, filed answer alleging that the town was negligent in failing to keep its streets in a reasonably safe condition, and that such negligence was the sole proximate cause of the injury. The town filed answer denying negligence on its part and alleging that the negligence of the original defendant's intestate was the sole proximate cause of the injury. Upon the call of the case for trial the town demurred *ore tenus* to the complaint. *Held:* Even construing the complaint and answer of the original defendant, together with the answer of the town under the doctrine of aider, the town's demurrer was properly sustained, since the pleadings allege active negligence on the part of the driver of the car, which insulated the negligence of the town, and must be considered the sole proximate cause of the injury.

2. **Venue C b—Upon dismissal of action as to defendant town, action was properly remanded to county in which defendant administrator qualified and in which plaintiff resides.**

Plaintiff instituted suit in the county of her residence, and the county in which defendant administrator qualified. Upon joinder of a town as a party defendant, the action was removed to the county in which the town is located, C. S., 464. The town's demurrer was sustained and the action dismissed as to it. *Held:* Upon sustaining the town's demurrer, the court properly remanded the action to the county in which it was originally instituted.

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

APPEAL by the defendant Joyner, administrator, from order of *Moore, J.*, sustaining demurrer of the town of Weldon, entered at the January Term, 1935, of HALIFAX. Affirmed.

The plaintiff instituted this action in Wilson County against J. C. Joyner, administrator of J. J. Amerson, deceased, to recover damages for personal injuries alleged to have been caused by the negligent and reckless operation of an automobile driven by defendant's intestate, while she was riding therein as a passenger on the streets of the town of Weldon. Before the time for answering expired the defendant Joyner, administrator, filed a motion alleging that the plaintiff's injuries were caused solely by the negligence of the town of Weldon, in that it

failed to use due care to keep its streets in reasonably safe condition, and asking that said town be made a party defendant, and an order was entered by the clerk of the Superior Court of Wilson County making such town such party. Thereupon, on motion of the town of Weldon, the case was removed from Wilson County to Halifax County. Thereafter the original defendant filed an answer in which he denied any negligence on the part of his intestate, and for further answer averred that any injuries sustained by the plaintiff were due to the negligence of the town of Weldon, and prayed judgment (a) that the original defendant go without day, (b) that any recovery to which the plaintiff might be entitled be had against the town of Weldon, and (c) that if the plaintiff should recover judgment against the original defendant, that then he have judgment over against the town of Weldon. The town of Weldon then filed an answer in which it denied any negligence on its part, and alleged contributory negligence on the part of the plaintiff, and also alleged that the plaintiff's injuries were caused by the negligent and reckless operation of the automobile in which the plaintiff was a passenger, by the intestate of the original defendant and asked (a) that there be no recovery against it by the plaintiff, and (b) that if the plaintiff should recover of the original defendant that there would be no recovery by him over against the town of Weldon.

The case was called for trial in the Superior Court of Halifax County, and after a jury was impaneled and the pleadings read, the town of Weldon demurred *ore tenus* to the complaint and to the further answer of the original defendant on the ground that they did not state facts sufficient to constitute a cause of action against it. This demurrer was sustained and the original defendant excepted.

Upon the sustaining of the demurrer the plaintiff moved to remand the case to Wilson County, which motion was granted, and the original defendant excepted.

From the rulings of the court sustaining the demurrer and remanding the case to Wilson County, the original defendant, J. C. Joyner, administrator of J. J. Anderson, deceased, appealed to the Supreme Court, assigning errors.

Finch, Rand & Finch and W. A. Lucas for plaintiff, appellee.

Kenneth C. Royall and Robert A. Hovis for defendant Joyner, administrator, appellant.

George C. Green for defendant town of Weldon, appellee.

SCHENCK, J. The defendant town of Weldon filed a demurrer *ore tenus* to the complaint of the plaintiff and to the further answer of the

original defendant upon the ground that they did not state facts sufficient to constitute a cause of action against it. If the complaint be considered alone it is manifestly demurrable by the town, since it makes no allegations of actionable negligence against the town; and if the further answer be considered alone, it is likewise demurrable by the town, since it fails to allege or admit any actionable negligence on the part of the intestate of the original defendant and, therefore, failed to allege any joint or concurrent negligence between said intestate and said town; and if the answer of the town be considered along with the further answer of the original defendant in order to supply the wanting allegations of actionable negligence on the part of the intestate of the original defendant, under the doctrine of aider (McIntosh's N. C. Prac. & Proc., par. 447, pp. 458, *et seq.*), as argued by the original defendant, the joint and collective allegations therein contained are still demurrable by the town, since it appears on the face thereof that the negligence alleged against the town, namely, the failure to keep its streets in reasonably safe condition, was passive, and the causal connection between such negligence and the injuries to the plaintiff was broken by the interposition of an independent responsible human action, namely, the alleged active negligence of the intestate of the original defendant in driving his car in a negligent and reckless manner, and such active negligence must be regarded as the sole proximate cause of the damage to the plaintiff. *Ballinger v. Thomas,* 195 N. C., 517; *Baker v. R. R.,* 205 N. C., 329; *Smith v. Monroe, ante,* 41; Wharton's Law of Negligence, Book 1, par. 134, p. 130.

The order removing the case from Wilson County to Halifax County was in accord with our practice so long as the town of Weldon, located in Halifax County, remained a party defendant, C. S., 464, *Cecil v. High Point,* 165 N. C., 431, but when the demurrer was sustained, and the action dismissed as to the town, the ground and reason for the removal ceased, and the case was properly remanded for trial to Wilson County, wherein the plaintiff and the original defendant both reside, and wherein the original defendant is qualified as administrator of a late resident of said county.

Affirmed.

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

ATLANTER BAILEY v. J. P. FERGUSON AND W. T. GRANT COMPANY.

(Filed 22 January, 1936.)

Assault A c—Question of whether defendants used excessive force in protecting their property held for jury upon conflicting evidence.

Evidence for plaintiff tended to show that, while a customer in the corporate defendant's store, she picked up certain merchandise, intending to buy it, that while waiting for a clerk to give it to, for wrapping, she was called to the front door of the store, and that while there she was seized by the individual defendant and a policeman procured by him, forced to return to the store and submit to a search by saleswomen, who handled her roughly. Evidence for the defendants tended to show that the individual defendant gently tapped plaintiff on the shoulder as she was walking down the street with the merchandise concealed about her person, and asked her to return to the store, which she voluntarily did, that she offered to pay for the merchandise "and stop this mess," and voluntarily asked that she be searched to determine that she had no other articles. *Held:* The conflicting evidence should have been submitted to the jury on the question of whether defendants used excessive force under the circumstances in the protection of their property.

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

APPEAL by plaintiff from judgment of nonsuit entered by *Small, J.*, at June Term, 1935, of WAYNE. Reversed.

George E. Hood for plaintiff, appellant.
Dickinson & Bland for defendants, appellees.

SCHENCK, J. This was a civil action to recover damages, both compensatory and punitive, alleged to have been caused by an assault and battery committed upon the plaintiff by the defendant Ferguson, while acting within the scope of his agency and employment by the defendant W. T. Grant Company.

The evidence of the plaintiff tended to show that she went into the store of the corporate defendant on West Walnut Street in the city of Goldsboro to do some shopping, and while in the store she picked up a box of shoe polish and a pair of hose, intending to have them wrapped and to pay for them, that before she was able to find a clerk to wrap the articles she was called to the front door of the store by some friends who were making inquiry as to the whereabouts of her husband, and that she went to the door to look for her husband, still having the polish and hose in her hand and across her arm in plain view, and while she was standing in the front door of the store the defendant Ferguson and a policeman, for whom he had sent, grabbed the plaintiff by each arm and

took her some 50 or 75 feet to the back end of the store to the foot of the stairway, and called two women clerks and told them to take the plaintiff upstairs and search her, and that the defendant Ferguson shoved her upstairs, and the two women clerks took her upstairs and, in searching her, pulled off her coat and hat and ran their hands all over her clothes; that the plaintiff was forced against her will to go upstairs and submit to being searched, and that the women clerks handled her roughly and pulled her clothes off, "just snatched them off." The plaintiff testified that she at all times had the money to pay for and at all times intended to pay for the shoe polish and hose, and that these were the only articles gotten by her in the store.

The evidence of the defendants was in sharp conflict with that of the plaintiff. It tended to show that the plaintiff had the shoe polish and hose concealed about her person, and had taken them outside of the store, and was going down the street with them when the defendant Ferguson overtook her and gently tapped her shoulder to attract her attention, and asked her to return to the store, and that she voluntarily returned and offered to pay for the polish and hose "and stop this mess," and of her own volition asked to be searched that it might be ascertained that she had no other articles, and that neither Ferguson or any other employee of the corporate defendant handled the plaintiff roughly or pulled her clothes off, but that the plaintiff herself took her coat and hat off and invited a search of them and of her person by the women employees in the privacy of the "ladies room."

At the close of all the evidence, upon motion of the defendants, the court entered a judgment of nonsuit, and the plaintiff appealed, assigning errors.

While ordinarily one in possession of property, either as owner or as agent of the owner, has the right to defend and protect it against aggression, and to use such force as may seem to be reasonably necessary to accomplish this end, *Curlee v. Sales,* 200 N. C., 614, and, if sued for the use of such force, may plead that he laid hands on the aggressor gently, *molliter manus imposuit,* in defense of his possession and property, Blackstone's Com., Bk. III, ch. 8, pp. 120-21, still we think the conflicting evidence in this case raises the question as to whether the defendants used excessive force, under the circumstances, in the protection of their property, and, since this is a question for the jury, *Curlee v. Scales, supra,* and cases there cited, it was error to allow the motion for judgment as of nonsuit.

Reversed.

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

BESSIRE & COMPANY, INC., v. MRS. F. A. WARD, EXECUTRIX OF F. A. WARD, DECEASED, AND MRS. F. A. WARD, INDIVIDUALLY.

(Filed 22 January, 1936.)

Executors and Administrators C d—Evidence of agreement against personal liability of executrix for goods bought for estate held for jury.

An executrix, in buying merchandise necessary to the operation of the business of the estate, may escape personal liability therefor by making an agreement with the seller to that effect, and evidence in this case tending to show that the executrix explained to the seller's agent that she was buying the goods to continue operating a dairy belonging to the estate, that he understood the estate would be liable, that the goods were delivered pursuant to the understanding as ordered by the manager of the dairy, that the seller knew the manager was operating the dairy for the estate, and that the seller filed his claim with the estate and received dividends thereon from the estate, and made no demand on the executrix in her individual capacity until the institution of the action, *is held* sufficient to be submitted to the jury on the question of an agreement between the parties that the executrix should not be individually liable, and a directed verdict against the executrix in her individual capacity was error.

APPEAL by Mrs. F. A. Ward, individually, from *Grady, J.*, at September Term, 1935, of DURHAM. New trial.

This action was instituted by the plaintiff against the defendant in her official capacity as executrix of her late husband, and against her individually, for a balance alleged to be due for dairy supplies sold and delivered, and was tried upon the following issues:

"1. Is Mrs. F. A. Ward, as executrix of the estate of F. A. Ward, indebted to Bessire & Company, Inc., and if so, in what amount?

"2. Is Mrs. F. A. Ward, individually, indebted to Bessire & Company, Inc., and if so, in what amount?"

Both issues were answered: "Yes, $1,495.32, with interest from 27 October, 1930," the first by consent, and the second under a peremptory charge from the court to the effect that if the jury found the facts to be as shown by all of the evidence they would so answer the issue.

From a judgment based upon the verdict against the defendant, both as executrix and individually, the defendant individually appealed, assigning errors.

Forrest A. Pollard and Hedrick & Hall for plaintiff, appellee.
Bryant & Jones for defendant, appellant.

SCHENCK, J. The principal assignments of error made by the appellant are to the court's refusal to sustain motions for judgment as of nonsuit and to the peremptory instruction given by the court to the

effect that if the jury believed the evidence and found the facts to be as testified by the witnesses, both for plaintiff and defendant, it would be the duty of the jury to answer the second issue in the sum of $1,495.32, with interest.

The motions for judgment as of nonsuit were properly denied.

This appeal presents the question of the sufficiency of the evidence to be submitted to the jury as to whether the defendant, in contracting with the plaintiff, stipulated against personal liability. If there was such a stipulation, and if the defendant can establish it by competent evidence, the defendant, individually, would not be liable to the plaintiff for the purchase price of the dairy supplies sold and delivered to her as executrix. If such stipulation cannot be established by the evidence, then, under the law, the defendant would be individually liable to the plaintiff for the supplies so sold and delivered. See this case upon former appeal, 206 N. C., 858.

In 11 R. C. L., at page 167, we find this statement of the law: "But when an executor or administrator enters into a contract for the benefit of the estate which he represents, without stipulating against personal liability, his contract is personal, and he is liable to the same extent and may be sued in his individual capacity in the same manner as if the contract had been entered into for his personal benefit."

In *Banking Company v. Morehead,* 116 N. C., 413, it is said: "To hold the executrix bound by an implied promise in the face of an express stipulation, constituting a part of the common understanding that she should in no event be held personally liable, would be to allow a legal fiction to contradict a palpable fact. There is no principle of law which prohibits parties from inserting in a written agreement a provision that an implication, which the law would otherwise raise, shall not arise. The object of the courts in the interpretation of contracts is to arrive at the intent of the parties, where they have not expressed it clearly, or to ascertain the precise terms of the agreement to which two or more minds assented." The same principle of law is apposite to parole contracts, the only distinction being in the method of proof.

Mrs. Ward, the defendant, testified without objection or contradiction that she did not buy the merchandise as an individual, that she conversed with Mr. Davidson, who was the salesman of the plaintiff company, and told him all about the circumstances of continuing the operation of the dairy by the estate and that he understood that the estate was responsible for the payment for the dairy supplies, and that pursuant to this understanding they were delivered from time to time, after having been ordered by the manager of the dairy plant, and that following this understanding the plaintiff company filed its claim against the Ward estate and received dividends thereon from the Ward estate, and

that no bills were sent to or demand made upon her as an individual for payment until this action was begun.

The defendant's witness, Collingwood, testified in effect that he took charge of the dairy as manager soon after the death of Mr. F. A. Ward, and that he was hired by the estate and paid by the estate, and that he knew Mr. Davidson, salesman of the plaintiff company, and had numerous conversations with him, and had told him that he would try to take care of everything that he bought, just as he bought it, and that Mr. Davidson knew that he was running the dairy as manager for the F. A. Ward estate.

Davidson was not introduced as a witness.

We think, and so hold, that the foregoing evidence, when construed, as we must construe it, in the light most favorable to the defendant, was sufficient to be submitted to the jury upon the question as to whether there was an agreement or understanding between the plaintiff and the defendant that there would be no attempt to hold the defendant personally liable, and that his Honor erred in directing an affirmative answer to the second issue instead of submitting the question of the existence of a stipulation against individual liability to the jury.

New trial.

STEVANUS BLOUNT v. C. R. BASNIGHT, D. M. BASNIGHT, AND DAVID BASNIGHT.

(Filed 22 January, 1936.)

Mortgages H p—Notice of sale and deed to purchaser referring to mortgage and mortgage referring to prior deed sufficiently describing property, held to sufficiently identify lands foreclosed.

The deed under which the mortgagor acquired title contained a full and accurate description of the land, and the mortgage referred to the deed by book and page number and identified the land as the same embraced in the deed. The notice of foreclosure sale referred to the mortgage by book and page number, as did the deed to the purchaser at the foreclosure sale. *Held:* Under the doctrine of *id certum est quod certum reddi potest*, the description of the lands in the mortgage, the notice of sale, and the deed to the purchaser were sufficient, and the mortgagor's contention that the sale was ineffectual because of insufficient description in the instruments cannot be sustained.

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

APPEAL by the plaintiff from judgment of nonsuit at the close of evidence of both plaintiff and defendants, entered by *Sinclair, J.*, at January Term, 1935, of WASHINGTON. Affirmed.

Zeb Vance Norman for plaintiff, appellant.
W. L. Whitley and P. H. Bell for defendants, appellees.

SCHENCK, J. This is an action to set aside and to have declared void a deed of foreclosure made by the defendant C. R. Basnight, as mortgagee, to the defendant D. M. Basnight, and a deed made by said D. M. Basnight and wife to the defendant David Basnight.

The plaintiff contends that the evidence supports his allegation that the mortgage and notice of foreclosure sale, as well as the deed made pursuant thereto, are fatally defective in that the descriptions therein contained are insufficient to designate the land described in the complaint. It is admitted that the land described in the complaint was originally conveyed by M. Linyear and wife to the plaintiff's father, John Blount, by deed dated 24 September, 1912, registered in Book 61, at page 414, of the register of deeds for Washington County, and that this deed contains a proper and all sufficient description of the land involved, being 38.08 acres, more or less. The mortgage from the plaintiff Stevanus Blount and his wife to C. R. Basnight, dated 1 April, 1931, registered in Book 110, at page 122, of the register of deeds for Washington County, expressly refers to the original deed and makes the same a part and parcel of the mortgage by the use of the following words: "The above described lands, being the same tract conveyed to John Blount by deed dated 14 September (24), 1912, by deed recorded in Book No. 61, page 414, of the register of deeds' office of Washington County, and reference is made thereto for full description." The notice of foreclosure sale expressly refers to the aforesaid mortgage and identifies it with the following words: "Under and by virtue of the power of sale contained in a certain mortgage executed by Stevanus Blount and wife, Hattie Blount, on 1 April, 1931, recorded in Book 110, page 120 (122), of the register of deeds' office of Washington County, the mortgagors having defaulted in the payment of the debt secured thereby, the undersigned mortgagee will expose for public sale at the courthouse door in Plymouth, N. C., to the highest bidder, for cash, on 30 October, 1933, at 12 o'clock noon, the following described lands: . . ." The deed of foreclosure from C. R. Basnight, mortgagee, to D. M. Basnight also expressly refers to the aforesaid mortgage in the following words: "That whereas, on 1 April, 1931, Stevanus Blount and wife, Hattie Blount, executed and delivered unto the said C. R. Basnight, mortgagee, a certain mortgage, which is recorded in Book 110, page 120 (122), of the register of deeds' office of Washington County, and whereas under and by virtue of the authority conferred by said mortgage and by law provided, the said C. R. Basnight, mortgagee, did, on 30 October, at 12 a.m., at the courthouse door in Plymouth, N. C., expose at public sale the lands hereinafter described, . . ."

With a clear and direct reference in the mortgage to the original deed, which contains an admittedly ample description, and a clear and direct reference in the notice of foreclosure sale to the mortgage, and a clear and direct reference in the deed of foreclosure to the mortgage, it cannot be held that the mortgage, or the sale thereunder pursuant to the notice of foreclosure, was ineffectual to convey title because either the mortgage, notice of foreclosure sale, or deed of foreclosure did not contain a sufficient description of the land involved. *Id certum est quod certum reddi potest.*

The syllabus of *Douglas v. Rhodes,* 188 N. C., 580, which is a fair interpretation of the opinion, is as follows: "Advertisements for the sale of land under foreclosure of mortgage or deed of trust are required by our statute (C. S., 2588) to describe the lands 'substantially' as in the conveyance thereof; and while it may be more advisable to give the exact description, the deed made in pursuance thereof is not necessarily void for lack of such description, as where the land is designated as a well known and certain tract, . . . with reference to the book in the office of the register of deeds where the description is given, with number of page, etc., for a more particular description, it is a sufficient description of the land and will convey the title if the notice of such has been published in accordance with the terms of mortgage or deed in trust." There is no contention that the notice of sale has not been published accordant with the terms of the mortgage and of statute, or that there has been any failure to comply with the foreclosure regulations other than to sufficiently describe the premises.

Since we hold that there was a valid foreclosure sale of his interest in the lands described in the complaint, the plaintiff can have no further concern as to the validity of the deed from D. M. Basnight and wife to David Basnight.

Affirmed.

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

H. A. IKERD v. NORTH CAROLINA RAILROAD COMPANY AND TRAVELERS INSURANCE COMPANY.

(Filed 22 January, 1936.)

1. Master and Servant F a—Right of injured employee to maintain suit against third person tort-feasor.

Construing the amendment of the Workmen's Compensation Act by sec. 1, ch. 449, Public Laws of 1933, *it is held:* An injured employee may maintain an action in his own name against a third person tort-feasor

when the employer has failed to institute such action within six months after the injury, and any recovery should be paid in the same manner as if the employer had brought the action.

2. Statutes B a—

Where the terms of a statute are ambiguous or its grammatical construction is doubtful, the courts may control the language to give effect to what they suppose to have been the real legislative intent.

APPEAL by defendant railroad company from judgment overruling a demurrer entered by *McElroy, J.*, at May Term, 1935, of DAVIDSON. Affirmed.

McCrary & DeLapp for plaintiff, appellee.
Walser & Walser and Linn & Linn for defendant, appellant.

SCHENCK, J. On 11 September, 1934, the plaintiff instituted this action against the defendant railroad company to recover damages for personal injuries alleged to have been suffered in a collision between a truck of the Jewel Cotton Mills, driven by the plaintiff, and the train of the defendant on 14 February, 1934. Upon motion of the plaintiff, the Travelers Insurance Company was made party defendant on 4 April, 1935, and in a supplemental complaint it is alleged that on 15 June, 1934, the plaintiff received an award under the provisions of the Workmen's Compensation Act from the Travelers Insurance Company, the insurance carrier of his employer, the Jewel Cotton Mills, on account of the injuries referred to in his original complaint, and further alleged that six months had passed from the date of the injury to the institution of this action. Whereupon the defendant North Carolina Railroad Company demurred to the plaintiff's complaint and supplemental complaint for that it appeared from the face thereof that there is a defect in parties plaintiff in that this action is not instituted by the plaintiff in his own name and that of his employer, or employer's insurance carrier.

This demurrer calls for a construction of a sentence in section 1, chapter 449, Public Laws of 1933, being an act to amend chapter 120, Public Laws of 1929, known as "The Workmen's Compensation Act," with relation to settlements in cases involving third parties. This act is brought forward in North Carolina Code of 1935 (Michie) as section 8081 (r), and the particular sentence that we are called upon by the demurrer to construe reads as follows: "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." It is evident that the draftsman of the statute either inserted the words "and the employer" through inadvertence, or omitted other words clarifying their meaning. As written, these words have no proper grammatical place in the sentence, and render the whole sentence ambiguous and doubtful. So we are impelled to hold, in construing the sentence, that these words are surplusage, and as such must be disregarded. When they are omitted the sentence has a definite meaning, which meaning is both clear and logical, namely, that if after the expiration of six months from the date of the injury or death, the employer has not commenced an action, the employee, or his personal representative, shall thereafter have the right to bring an action in his own name, and that any amount recovered shall be paid in the same manner as if the employer had brought the action. We think that such construction conforms to the clear purpose of the act as a whole and effectuates the obvious intention of the Legislature. *Fortune v. Commissioners,* 140 N. C., 322. In construing a statute whose terms give rise to some ambiguity, or whose grammatical construction is doubtful, the courts may exercise the power of controlling the language in order to give effect to what they suppose to have been the real intention of the lawmakers. *Whitford v. Insurance Co.,* 163 N. C., 223.

Under the construction we have placed upon the sentence of the statute under consideration it is manifest that the demurrer was properly overruled, and that the judgment of the Superior Court should be Affirmed.

F. L. DAVIS v. TOM W. DOCKERY.

(Filed 22 January, 1936.)

1. Payment A c: Evidence B b—Burden is on defendant to prove payment relied on by him as defense to plaintiff's recovery.

Plaintiff instituted suit to recover the balance alleged to be due on the purchase price of land sold defendant. Defendant admitted the contract to purchase and the amount of the purchase price as alleged by plaintiff, but contended that he had made full payment of the stipulated price. *Held:* The burden of proving the affirmative defense of payment was on defendant alleging same, and it was error for the trial court to place the burden of proof on plaintiff, although the form of the issue was whether defendant breached the contract by failing to pay the full purchase price.

2. Evidence B a: Appeal and Error J e—

The burden of proof is a substantial right, and the erroneous placing of the burden of proof entitles appellant to a new trial.

DAVIS *v.* DOCKERY.

APPEAL by plaintiff from *Alley, J.*, at June Term, 1935, of CHEROKEE. New trial.

This was an action to recover the balance of the purchase price of certain land alleged to be due under a parol agreement to convey. Defendant in his answer admitted the contract to pay the amount alleged and set up plea of payment in full.

There was conflicting evidence on the part of defendant and plaintiff as to manner and amount of payments to be credited on the purchase price of the land.

The court below submitted the following issues to the jury:

1. "Did the plaintiff contract to sell to defendant the tract of land described in the complaint at and for the price of $1,101.60, as alleged in the complaint?"

2. "Did the defendant commit a breach of said contract of purchase, as alleged in the complaint?"

3. "What sum, if any, is plaintiff entitled to recover on account of the purchase price of said land?"

The court instructed the jury to answer the first issue "Yes," as there was no controversy between the parties as to that issue.

Upon the second issue the court charged the jury as follows: "But when you come to the second issue, which is in this language, 'Did the defendant commit a breach of said contract of purchase, as alleged in the complaint?' then it becomes necessary, gentlemen, before you answer that issue to consider what a breach of the contract is, the burden as I have already indicated, being upon the plaintiff to satisfy you by the greater weight of the evidence that the defendant did commit a breach of the contract."

"Now, in this case the plaintiff contends that the defendant committed a breach of the contract because he did not pay all of the purchase price, and the defendant contends that he did pay all of the purchase price, and more. If the defendant has failed and refused to pay the purchase price, why then it would be a breach, but if he has paid the full purchase price, and more, he has not breached it; so, with respect to that, I charge you, if you find by the greater weight of the evidence that Mr. Dockery, the defendant in this case, agreed to pay Mr. Davis the purchase price for these two tracts of land $1,101.60, and you further find by the greater weight of the evidence that he has failed and refused to perform that part of his contract by paying that amount of money, or its equivalent in value in some other way that they agreed on, and still refuses to pay the balance of the purchase price, if you find this to be the fact, by the greater weight of the evidence, why then it would be your duty to answer the second issue 'Yes'; that is, 'Did the defendant

commit a breach of his contract, as alleged in the complaint?' If you fail to so find, it would be your duty to answer the second issue 'No.'

"Now, in this connection, I call your attention to the fact that the burden of proof is on the plaintiff to satisfy you by the greater weight of the evidence that his contentions are true."

The jury answered the second issue in favor of the defendant, and from judgment upon the verdict plaintiff appealed.

Clyde H. Jarrett and Gray & Christopher for plaintiff.
D. Witherspoon, D. H. Tillett, and Moody & Moody for defendant.

DEVIN, J. The only question presented by this appeal is whether there was error in the judge's charge as to the burden of proof on the second issue.

The plaintiff having brought his action to recover a certain amount alleged to be due as the balance of the purchase price of land, the defendant answered admitting the agreement to purchase, and the amount agreed to be paid, and pleaded payment in full as a defense.

There was no controversy as to the agreement, nor as to the amount agreed to be paid, and the court properly instructed the jury to answer the first issue in the affirmative.

While the second issue: "Did the defendant commit a breach of said contract?" is in the form usually employed in actions to recover for breach of contract, when the burden is on the plaintiff to prove both contract and breach, the heart of the controversy here, and the only question being litigated was whether defendant had paid the amount he admitted he had agreed to pay. Regardless of the form of the issue, whether negative or affirmative, in substance, the issue raised was that of payment or nonpayment, and the form of the issue could not change the rule that the burden is on him who pleads payment.

In *Furst v. Taylor,* 204 N. C., 603, *Mr. Justice Clarkson* succinctly states the rule: "It is well settled that the plea of payment is an affirmative one and the burden of showing payment is on the one who relies on same. The burden of proof is a substantial right." *Collins v. Vandiford,* 196 N. C., 237; *Swan v. Carawan,* 168 N. C., 472; *Vaughan v. Lewellyn,* 94 N. C., 472.

"It is a fundamental rule of evidence that the burden is on the party who asserts the affirmative of the issue." *Stein v. Levins,* 205 N. C., 302.

Defendant's admission of the agreement to pay a certain amount, nothing else appearing, would have entitled the plaintiff to judgment on the pleadings. *Stein v. Levins, supra; McCaskill v. Walker,* 147 N. C.,

195. In avoidance, defendant alleged and offered evidence that he had paid the amount in full. "The burden of proof rests upon the party who, either as plaintiff or defendant, affirmatively alleges facts necessary to enable him to prevail in the cause." *Speas v. Bank,* 188 N. C., 524-529.

The learned judge who tried the case below failed to properly instruct the jury that the burden of proof of payment was on the defendant, and for this there must be a

New trial.

STATE v. COLEY CAIN, EDDIE COBB, AND LEROY FAISON.

(Filed 22 January, 1936.)

Criminal Law K d: Burglary C g—Sentence of twenty-five to thirty years imprisonment for violation of C. S., 4236, held within court's discretion.

A sentence of not less than twenty-five nor more than thirty years in the State's Prison, upon a plea of guilty of possession of weapons and implements for house breaking, in violation of C. S., 4236, is within the discretion of the court conferred by the statute, and is not objectionable as a cruel and unusual punishment within the meaning of Art. I, sec. 14, of the Constitution of North Carolina.

APPEAL by defendant Cain from *Parker, J.,* at September Term, 1935, of WAKE. Affirmed.

The bill of indictment charged the defendants with violation of C. S., 4236, in the following language: "Unlawfully, willfully, and feloniously were found armed with dangerous and offensive weapons, to wit: One sawed-off shotgun, one automatic shotgun, one revolver, three forty-five calibre automatic pistols, together with ammunition for all of said arms; one black jack, together with one butcher knife, crowbars, chisels, pliers, drill punches, screwdrivers, nitro-glycerine and soap; ropes, blankets, wire, gloves, and matches, with a felonious intent upon the part of each one of said defendants feloniously, unlawfully, and willfully to break and enter a dwelling and other buildings, and unlawfully, willfully, and feloniously to commit a felony, to wit: larceny, therein."

The second count in the bill of indictment charged that said defendants "were unlawfully, willfully, and feloniously found having in their possession without lawful excuse the following implements, to wit: One sawed-off shotgun; one automatic shotgun; one revolver, three forty-five calibre automatic pistols, together with ammunition for all of said arms; one blackjack, together with one butcher knife, crowbars, chisels, drill

punches, pliers, screwdrivers, nitro-glycerine and soap, ropes, blankets, gloves, wire, and matches, all of which said implements are implements of house breaking."

Each defendant entered plea of guilty, and from judgment that each of them be committed to State's Prison for the term of not less than twenty-five nor more than thirty years, defendant Coley Cain appealed.

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

Chas. U. Harris for defendant Cain.

DEVIN, J. The only question raised by the appeal is whether a sentence of not less than twenty-five nor more than thirty years for violation of C. S., 4236, is "cruel and unusual punishment" within the meaning of Art. I, sec. 14, of the Constitution of North Carolina.

The decision of this Court in *S. v. Swindell,* 189 N. C., 151, is determinative of this appeal.

Violation of C. S., 4236, is denounced as a felony, and the punishment prescribed is "imprisonment in the State's Prison . . . in the discretion of the court."

In the full and well considered opinion by *Mr. Justice Clarkson* in *S. v. Swindell, supra,* it was held that a sentence of thirty years in that case under a statute (C. S., 4209), prescribing punishment by imprisonment "in the discretion of the court," did not violate the constitutional prohibition against cruel and unusual punishment, citing *S. v. Rippy,* 127 N. C., 517.

So that the sentence imposed by the able and upright judge, being within the limits of the discretion conferred by the statute, cannot be held by us to be improper. The uncontradicted evidence produced in the hearing before the court below tended to show preparation and purpose for unusual and violent lawlessness. It was testified that defendant Cain had been for some time a member of the Proctor gang, had been given a year at Williamston, had pleaded guilty to a robbery at this term; that he had been implicated in numerous cases of breaking and entering, robberies and hold-ups; that there were seven or eight warrants out for him for robberies in Wilson, Red Springs, Raeford, and Greensboro, and for shooting a policeman in Greenville. In the stolen automobile in which the defendants were arrested were found two shotguns loaded with buckshot, four pistols, quantity of ammunition, nitroglycerine, soap, gloves, wire, drill punches, and other tools suitable for burglarious breaking. One of the officers who effected the capture testified that while they were searching the defendants, Cain attempted once

or twice to get his hand on his pistol, and that after they reached the jailer's office Cain threatened his life if he ever got out. "He said if he ever got out and put his foot on the ground I belonged to him. He said I wouldn't always have a guard or an army with me." The defendants offered no evidence.

The judgment of the court below is

Affirmed.

GURNEY P. HOOD, COMMISSIONER OF BANKS, ET AL., V. THE MACCLESFIELD COMPANY.

(Filed 22 January, 1936.)

Marshaling A c—Equity will not decree marshaling in favor of second lienor to the prejudice of third lienor.

Plaintiff owned three judgments against the same party, the judgment debtor having real property in two counties. The first judgment was docketed in both counties, the second judgment in one of the counties, and the third judgment in both counties. Plaintiff sold the first and third judgments for separate, valuable considerations to a purchaser. The lands of the judgment debtor in both counties were sold, and plaintiff sought the equity of marshaling to have the funds from the sale of the property in the county in which the second judgment was not docketed first exhausted in satisfying the first judgment. Marshaling in this manner would result in rendering the third judgment valueless. *Held:* Plaintiff is not entitled to the relief sought, since equity will not aid him in thus rendering valueless the third judgment, which he had assigned for a valuable consideration, and since the equity of marshaling attaches not when the successive securities are taken, but at the time the marshaling is invoked, at which time, in the present case, the lien of the third judgment had attached, rendering marshaling in favor of the owner of the second judgment inequitable to the owner of the third judgment, even if the three judgments had been obtained by three separate judgment creditors, the equity of marshaling in such circumstances entitling the owner of the second judgment only to have the first judgment satisfied out of the two funds *pro rata*.

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

APPEAL by claimant, Henry Bridgers, from *Barnhill, J.*, in Chambers, Rocky Mount, 27 July, 1935. From EDGECOMBE.

Civil action for the appointment of a receiver and to marshal the assets of defendant corporation among judgment creditors.

Receivership affirmed on prior appeal, 207 N. C., 857, 176 S. E., 280.

The facts with respect to the equity of marshaling, the only question presently presented, are as follows:

1. On 6 July, 1931, judgment for $14,300, with interest from 5 June, 1931, representing a stock assessment in favor of Gurney P. Hood, Commissioner of Banks, *ex rel.* Pinetops Banking Company v. The Macclesfield Company, was duly docketed in the Superior Court of Edgecombe County, and transcript thereof docketed in the Superior Court of Pitt County on 23 September, 1931.

2. On 3 July, 1933, judgment for $9,060, with interest from 3 July, 1933, representing a stock assessment in favor of Gurney P. Hood, Commissioner of Banks, *ex rel.* North Carolina Bank and Trust Company v. The Macclesfield Company, was rendered in Guilford Superior Court, and transcript thereof duly docketed in Edgecombe Superior Court, 29 July, 1933. No transcript of this judgment was docketed in the Superior Court of Pitt County.

3. On 13 November, 1933, judgment for $3,727.45, with interest from 13 November, 1933, being judgment for plaintiff in the case of Gurney P. Hood, Commissioner of Banks, *ex rel.* Pinetops Banking Company v. The Macclesfield Company, was docketed in Superior Court of Edgecombe County, and transcript of this judgment was duly docketed in Superior Court of Pitt County, 9 December, 1933.

4. On 1 May, 1934, the plaintiff transferred and assigned to Henry Clark Bridgers the two judgments described in paragraphs 1 and 3 above for cash consideration of $16,000 and $3,822.70, respectively.

5. The Macclesfield Company owned lands in Edgecombe and Pitt counties. These have all been sold, preserving to the parties their respective rights and liens.

Upon the foregoing facts it was adjudged in the court below that the plaintiff, as the holder of judgment No. 2, was entitled to require the holder of judgment No. 1, to first exhaust the fund arising from the sale of the Pitt County property before resorting to the funds arising from the sale of the Edgecombe County property. The effect of the marshaling, thus ordered, is to defeat judgment No. 3 from any share in the assets of the defendant company.

From this ruling Henry Clark Bridgers appeals, assigning error.

Gilliam & Bond for plaintiff.
H. H. Philips and Henry C. Bourne for claimant Bridgers.

STACY, C. J., after stating the case: The judgment of the Superior Court is grounded on the assumption that the equity of marshaling existed between the holders of judgments Nos. 1 and 2 at the time judgment No. 3 was docketed in the Superior Courts of Edgecombe and Pitt

counties, and that the subsequent docketing of judgment No. 3 did not affect this prior subsisting equity. *Butler v. Stainback,* 87 N. C., 216; 38 C. J., 1371; 18 R. C. L., 456.

This conclusion overlooks two considerations: (1) That the equity of marshaling does not fasten itself upon the situation when the successive securities are taken, but is to be determined at the time the marshaling is invoked, and (2) that the holder of judgment No. 3 purchased the same from the plaintiff for a valuable consideration. *Harrington v. Furr,* 172 N. C., 610, 90 S. E., 775.

Having received full value for judgment No. 3, the plaintiff is in no position to ask a court of equity to help him render it valueless in the hands of the transferee. *Stokes v. Stokes,* 206 N. C., 108, 173 S. E., 18. "Hurt nobody" is a cardinal tenet of the equity of marshaling. *Jones v. Zollicoffer,* 9 N. C., 623.

The most the plaintiff would be entitled to under the doctrine of marshaling, had he never owned the third judgment, would be to have the first judgment paid ratably out of the two properties. The English rule more nearly applicable to the facts here presented is stated in 18 English Ruling Cases, page 211, as follows:

"Thus the court will not marshal in favor of a second mortgagee as against a subsequent mortgagee, so that if a first mortgage is made of two estates, then a mortgage of one only of the estates, and lastly a third mortgage of both estates, marshaling will not be enforced in favor of the second mortgagee as against the third mortgagee, but the first mortgage will be ordered to be paid ratably out of the two estates. So that the second mortgagee may apply the estate subject to his mortgage in or towards satisfaction thereof, leaving what remains of both estates to satisfy the third mortgage."

Plaintiff was originally the holder of all three judgments. He transferred two of them to claimant Bridgers for valuable considerations. He now seeks, through the doctrine of marshaling, to have the judgment retained by him paid to the exclusion of the one which he sold to Bridgers for $3,822.70. Equity will not aid him in this undertaking. *Newby v. Norton,* 90 Kan., 317, 133 Pac., 890, 47 L. R. A. (N. S.), 302.

Error.

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

GURNEY P. HOOD, COMMISSIONER OF BANKS, ET AL., V. THE MACCLESFIELD COMPANY.

(Filed 22 January, 1936.)

Trusts C d—Resulting trust based upon parol contract to convey may not be established as against receiver representing creditors of trustor.

Petitioner alleged that he paid full purchase price for the lands in question under a parol contract to convey by the owner. The owner of the land, a corporation, was thereafter thrown into receivership, and the lands in question were sold by the receiver. Petitioner seeks to set aside the receiver's sale and recover the lands. *Held:* The receiver represents the creditors, and as to the creditors the parol contract to convey is void, for even if the conveyance had been executed to petitioner, it would not have been valid against the creditors but from its registration, C. S., 3309, and since petitioner is not entitled to recover on the facts alleged, the receiver's demurrer was properly allowed.

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

APPEAL by petitioner, Pinetops Development Company, from *Devin, J.*, at June Term, 1935, of EDGECOMBE.

Petition or motion in the cause to disaffirm sale of lots by receiver and require conveyance to petitioner.

Receivership affirmed on prior appeal, 207 N. C., 857, 176 S. E., 280.

The petition alleges:

1. That the petitioner purchased four lots from The Macclesfield Company in January, 1930, and paid full value therefor.

2. "That under an agreement with The Macclesfield Company made in January, 1930, the said company agreed to hold said four lots in trust for the use and benefit of the Pinetops Development Company, to convey the same as might be directed by the Pinetops Development Company and turn the proceeds of sale over to the Pinetops Development Company or the parties entitled thereto. That neither said trust agreement nor any deed from The Macclesfield Company has been registered in Edgecombe County."

3. That in the above entitled cause the said four lots have been sold by the receiver under order of court, etc.

Wherefore, petitioner prays that the sale by the receiver be disaffirmed and rescinded and order entered directing the receiver to convey said lots to the petitioner.

Demurrer interposed by the receiver upon the ground that the petition does not state facts sufficient to warrant the prayer of the petitioner. Demurrer sustained, and petitioner appeals.

Henry C. Bourne for petitioner.
Gilliam & Bond for receiver.

STACY, C. J. The demurrer was properly sustained, for, as to the receiver who represents the creditors of the insolvent corporation, the alleged parol agreement to convey is void. *Observer Co. v. Little,* 175 N. C., 42, 94 S. E., 526; *Mfg. Co. v. Price,* 195 N. C., 602, 143 S. E., 208. Even if the conveyance had been executed, it would not be valid as against creditors and purchasers for value, "but from the registration thereof within the county where the land lies." C. S., 3309; *Eaton v. Doub,* 190 N. C., 14, 128 S. E., 494.

The principles announced in *Spence v. Pottery Co.,* 185 N. C., 218, 117 S. E., 32, have no application to the facts of the present record.

Affirmed.

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

PERRY A. WEEKS v. GURNEY P. HOOD, COMMISSIONER OF BANKS, ET AL.

(Filed 22 January, 1936.)

Banks and Banking H e—Depositor held not entitled to preference under facts of this case.

A depositor deposited with a bank as collecting agent checks drawn on banks in other states. The checks were collected in due course from the drawee banks and final credit given the bank of deposit the day before it restricted withdrawals to 5 per cent of deposits under an emergency statute. *Held:* The relation of debtor and creditor existed between the bank of deposit and the depositor on the day the bank went on a 5 per cent restricted basis, and upon the bank's subsequent liquidation, the depositor is not entitled to a preference in its assets.

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

APPEAL by plaintiff from *Moore, Special Judge,* at April Term, 1935, of EDGECOMBE.

Civil action to establish preference, or priority of plaintiff's claim to funds in the hands of liquidating agent of insolvent bank.

The facts are these:

1. On 25 February, 1933, the plaintiff deposited with the Tarboro unit of the North Carolina Bank and Trust Company "for collection and credit" two checks, amounting to $2,836.99, "subject to final payment in cash or solvent credits," as shown by deposit slip, one drawn upon the National State Bank, Newark, N. J., and the other upon the First National Bank, Binghamton, N. Y.

2. These checks were paid by the drawee banks and final credit was given to the North Carolina Bank and Trust Company by its corre-

sponding bank, the State-Planters Bank, Richmond, Va., on 2 March, 1933.

3. On 3 March, 1933, the North Carolina Bank and Trust Company went on a 5 per cent restricted basis, and later was placed in liquidation.

4. The plaintiff drew out 5 per cent of his account, including the checks above mentioned, between 3 March and 9 March, 1933. On 20 May, 1933, the plaintiff received a dividend of 12 per cent, or $308.90, from the liquidating agent.

The court, being of opinion that plaintiff was not entitled to a preference, entered judgment of nonsuit, from which he appeals, assigning error.

H. H. Philips for plaintiff.
Gilliam & Bond for defendants.

STACY, C. J. That the relation of creditor and debtor existed between the plaintiff and the North Carolina Bank and Trust Company at the time of the latter's closing is clearly established by what was said in *Arnold v. Trust Co.*, 195 N. C., 345, 142 S. E., 217. See, also, *Bank v. Bank*, 197 N. C., 526, 150 S. E., 34.

The case of *Textile Corp. v. Hood, Comr.*, 206 N. C., 782, 175 S. E., 151, cited and relied upon by plaintiff, is distinguishable by reason of different fact situations.

The judgment denying priority of plaintiff's claim is correct.

Affirmed.

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

MRS. TOMMIE H. BRIDGES v. SHENANDOAH LIFE INSURANCE COMPANY.

(Filed 22 January, 1936.)

1. Insurance M a: Death A a—Presumption of death from seven years' absence.

The absence of a person for seven years without being heard from by those who would be reasonably expected to hear from him if living, raises a presumption that such person is dead at the end of seven years, but not that he died at any particular time during this period.

2. Insurance J b—Policy held forfeited for nonpayment of premiums during insured's seven years' absence raising presumption of death.

Insured paid the first annual premium on the policy in question, and several months thereafter left his domicile and was not heard from by

those who would be reasonably expected to have heard from him if he were alive, for a period of over seven years. No further premiums were paid, and at the expiration of the seven-year period, the beneficiary instituted suit on the policy. *Held:* There was no presumption that insured was dead at the time the second annual premium was due, and the policy was forfeited under its term for failure to pay premiums.

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

APPEAL by plaintiff from *Williams, J.*, at May Term, 1935, of CLEVELAND. Affirmed.

This is an action to recover on a policy of insurance issued by the defendant on the life of Willie B. Bridges, on 3 May, 1926. The plaintiff, the wife of the insured, is the beneficiary named in the policy.

A demurrer to the complaint on the ground that the facts stated therein are not sufficient to constitute a cause of action was sustained.

From judgment sustaining the demurrer and dismissing the action the plaintiff appealed to the Supreme Court, assigning error in the judgment.

C. B. McBrayer for plaintiff.
Ryburn & Hoey for defendant.

CONNOR, J. The facts alleged in the complaint and admitted by the demurrer are substantially as follows:

The policy sued on in this action was issued by the defendant on 3 May, 1926. By said policy the defendant promised to pay to the plaintiff, as the beneficiary named therein, the sum of one thousand dollars, upon receipt at its home office in Roanoke, Virginia, of due proofs of the death of Willie B. Bridges, the insured named therein, while the policy was in force. The premiums on the policy were payable annually, in advance. Upon default in the payment of any premium due on the policy, it was provided that the policy should become void. The premium due at the date of the issuance of the policy, to wit: 3 May, 1926, was paid by the insured. No other or further premium has been paid. No proofs of the death of the insured have been filed with the defendant.

On 26 December, 1926, the insured left his home in Rutherford County, North Carolina. He has not returned to his home, nor been seen or heard from by any member of his family, nor by any relative or friend, since said date. Diligent and repeated searches from time to time for the insured have failed to disclose his whereabouts. More than seven years have elapsed since the disappearance of the insured.

In *Stevenson v. Trust Co.*, 202 N. C., 92, 161 S. E., 728, it is said: "The absence of a person from his domicile without being heard from

by those who would reasonably be expected to hear from him if living raises a presumption that at the end of seven years he is dead, but not that he died at any particular time during this period." This statement of the law is in accord with the decisions in this State and elsewhere.

In the instant case the policy became void upon default in the payment of the premium due on 3 May, 1927. There is no presumption from the facts stated in the complaint that the insured was dead at that date, and that for that reason the premium otherwise required to keep the policy in force was not paid.

On the facts alleged in the complaint the plaintiff is not entitled to recover in this action. The judgment dismissing the action is

Affirmed.

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

CHARLES S. BRYAN v. D. P. STREET.

(Filed 22 January, 1936.)

1. Ejectment A b—Landlord may sue in Superior Court to eject tenant.

A landlord may institute suit in the Superior Court to eject his tenant, the remedy of summary ejectment before a justice of the peace, C. S., 2365, not being exclusive, and in such action the Superior Court certainly acquires jurisdiction where the defendant denies plaintiff's title, controverts the allegations of tenancy, and pleads betterments.

2. Courts A b—

The Superior Court has original jurisdiction of all civil actions whereof exclusive original jurisdiction is not given to some other court. C. S., 1436.

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

APPEAL by plaintiff from *Barnhill, J.*, at May Term, 1935, of CRAVEN.

Civil action in ejectment and to recover rents.

The complaint alleges:

1. That the plaintiff is the owner and entitled to the immediate possession of a lot of land in James City (description not in dispute).

2. That the defendant rented said land from plaintiff's agent and paid rent therefor until about 30 May, 1927, since which time he has wrongfully withheld same from plaintiff, to his damage in the sum of $600, or a rental value of $8 per month.

Wherefore, plaintiff demands judgment (1) for possession of said land, and (2) for $600.

The defendant denied plaintiff's title, set up claim to the premises by adverse possession, and pleaded betterments.

At the close of plaintiff's evidence, "the court sustained the motion for judgment as of nonsuit to that part of the cause of action which seeks a recovery of the land, and thereupon the plaintiff took a voluntary nonsuit in the action to recover rent."

Plaintiff appeals from the involuntary part of the judgment, assigning errors.

R. A. Nunn for plaintiff.
D. H. Willis and Dunn & Dunn for defendant.

STACY, C. J. We were told on the argument the court's ruling was based upon the belief that a landlord may not evict a tenant other than by a summary proceeding in ejectment, commenced before a justice of the peace. C. S., 2365, *et seq.* The law is otherwise. *Ogburn v. Booker,* 197 N. C., 687, 150 S. E., 330. The Superior Court has original jurisdiction of all civil actions whereof exclusive original jurisdiction is not given to some other court. C. S., 1436. "It seems that justices of the peace, as between landlords and tenants, have concurrent jurisdiction with the Superior Courts"—*Furches, J.,* in *McDonald v. Ingram,* 124 N. C., 272, 32 S. E., 677. See, also, *Shelton v. Clinard,* 187 N. C., 664, 122 S. E., 477.

Moreover, it appears that defendant has denied plaintiff's title, controverted the allegation of tenancy, and pleaded betterments. In any event, this would seem to give the Superior Court jurisdiction. *Ins. Co. v. Totten,* 203 N. C., 431, 166 S. E., 316.

Reversed.

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

P. E. BROWN v. BRANSOM BENTON ET AL.

(Filed 22 January, 1936.)

1. Frauds, Statute of, A a—Agreement held original promise not within statute.

Defendants agreed orally to be personally responsible for merchandise shipped to a corporation of which they were the main stockholders, and which they later took over. *Held:* Under the evidence, the agreement was an original promise not coming within the statute of frauds. C. S., 987.

2. Same—Evidence of whether original promise covered subsequent shipment held for jury.

Evidence on behalf of plaintiff tended to show that defendants ordered two or three cars of lumber to be shipped to a corporation of which they were the main stockholders, both defendants being present and promising to be personally responsible therefor. The first car was shipped, and thereafter one of defendants went to plaintiff and told him to ship another car under the same arrangements. The first car was paid for, and plaintiff instituted this suit against the individual defendants to recover the purchase price of the second car. *Held:* The evidence was sufficient to be submitted to the jury on the question whether the original promise of both defendants, made when both were present, covered the second car as well as the first.

APPEAL by individual defendants from *Clement, J.*, at June Term, 1935, of WILKES.

Civil action to recover for car of lumber shipped by plaintiff to B. L. Johnson & Company, Inc., at the instance and request of individual defendants.

The plaintiff originally sought to hold the corporate defendant, as well as the individual defendants, liable for the lumber shipped, but over objection was allowed to amend and declare upon an original promise made by the individual defendants. A voluntary judgment of nonsuit was then taken as to the corporate defendant.

Plaintiff testified: Just prior to 29 March, 1929, Bransom Benton and R. G. Finley came to my lumber plant and ordered two or three cars of dry white pine lumber shipped to B. L. Johnson Company, Inc., at Roaring River. They paid for the first car, shipped 26 March, but not for the second, which was shipped on 9 May. The second car is the one now in suit. The balance due on this car is $546.89, with interest from 9 June, 1929. The understanding was that I should ship and bill the lumber to B. L. Johnson Company, "and they would be personally responsible to me." Just prior to 9 May, 1929, Mr. Benton came down there and said they would need another car, the same as I had shipped before. He said: "The arrangement is you are to ship it and Finley and myself will be responsible for it." I knew that Benton and Finley took over the B. L. Johnson & Company. They were the main stockholders.

From a verdict and judgment for plaintiff against the individual defendants they appeal, assigning errors.

John R. Jones and J. M. Brown for plaintiff.
A. H. Casey for defendant Benton.
J. H. Whicker for defendant Finley.

STACY, C. J. Appellants in their brief seek to avoid liability on the ground that the contract alleged to have been breached is a collateral agreement, resting in parol, and therefore not enforceable under the statute of frauds. C. S., 987. All the evidence is to the contrary. *Newbern v. Fisher,* 198 N. C., 385, 151 S. E., 875.

Plaintiff has declared upon an original promise not within the statute of frauds. *Dozier v. Wood,* 208 N. C., 414; *Peele v. Powell,* 156 N. C., 553, 73 S. E., 234, on rehearing, 161 N. C., 50, 76 S. E., 698; *Sheppard v. Newton,* 139 N. C., 533, 52 S. E., 143.

The only point mooted on trial was whether the promise of the defendants went beyond the first car of lumber and included the second. The jury found that it did. This was an issue of fact determinable alone by the twelve.

The defendant Finley resists recovery on the ground that he was not present when the second car was ordered, and that Benton was not authorized to speak for him at that time. The jury found, however, under proper instructions, that the original authorization, given by both of the individual defendants, was sufficient to cover the second as well as the first car.

The record is free from reversible error, hence the verdict and judgment will be upheld.

No error.

J. A. VINSON v. ANNIE L. O'BERRY ET AL.

(Filed 22 January, 1936.)

1. State E a—Upon allegations of complaint, suit held to be against the State, and was properly dismissed.

In this suit against the North Carolina Emergency Relief Administration and certain officers thereof, the complaint alleged that the "Administration" is a State agency, and sought to recover damages sustained by reason of the agency's interference with plaintiff's contract rights with a city, and to enjoin further interference by the agency. *Held:* A demurrer for want of jurisdiction was properly allowed as to the "Administration" upon the allegation in the complaint that it was an agency of the State, the plaintiff seeking to control and enforce liability against it as such agency, constituting the suit in effect a suit against the State.

2. Same—Officers of State agency must show authority in order to defend action on the ground of sovereign immunity.

Where, in a suit against an agency of the State and certain officers of such agency, the individual defendants defend the action on the ground of sovereign immunity, a demurrer as to the individuals is improperly allowed, since they must show authority.

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

VINSON *v.* O'BERRY.

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

Civil action for injunction and to recover damages for breach of contract and tortious interference with plaintiff's contract rights.

The complaint alleges:

1. That on 6 July, 1934, the defendant North Carolina Emergency Relief Administration entered into an agreement with the city of Goldsboro and the county of Wayne whereby a stockyard was to be constructed on the old Wayne County fairgrounds and used by the defendant in its relief work in caring for certain live stock, with the understanding that all the manure which should accumulate thereon while so used by the defendant would belong to the city and county, this in lieu of rent or other charge for the property.

2. That on 21 November, 1934, plaintiff purchased from the city of Goldsboro and Wayne County "all the manure now in the FERA stockyards in Wayne County, or which may be there from time to time up to and including 6 July, 1936."

3. That the defendants, constituting the North Carolina Emergency Relief Administration in this State, acquiesced in said purchase and agreed to furnish plaintiff two truck drivers in gathering bedding for the stock pen and removing the manure, etc.

4. That the defendants, acting for and on behalf of the North Carolina Emergency Relief Administration, and in violation to plaintiff's rights, have wrongfully converted a portion of said property to the use of the Administration and threaten to continue so to convert the remainder.

Wherefore, plaintiff prays for injunctive relief and for damages.

The defendants entered a special appearance and demurred or moved to dismiss the action for want of jurisdiction. Motion allowed, and plaintiff appeals.

Kenneth C. Royall and J. Faison Thomson for plaintiff.

J. S. Massenburg, W. A. Dees, and Langston, Allen & Taylor for defendants.

STACY, C. J. It is alleged in the complaint that the defendant North Carolina Emergency Relief Administration "is a State agency or association, existing under the laws of the State of North Carolina." Our attention has not been called to any act of Assembly authorizing the creation of such "Administration" (it is doubtless a Federal agency operating under the Federal Emergency Relief Act of 1933), but taking the allegation of the complaint at its face value, the "Administration" would seem to be immune from suit in the Superior Court. *Carpenter v. R. R.*, 184 N. C., 400, 114 S. E., 693. The State is not subject to

suit except as it has consented to be sued. *Beers v. Arkansas,* 20 Howard, 527.

It is true a suit against a State officer or a State agency is not necessarily a suit against the State. *Bain v. State,* 86 N. C., 49. But a suit against an agency which represents the State in action and liability, to control such action and liability, is in effect a suit against the State. *North Carolina v. Temple,* 134 U. S., 22; *Louisiana v. Steele,* 134 U. S., 230; *Smith v. Reeves,* 178 U. S., 436.

Here, it would seem, the suit is against the State, taking the allegations of the complaint to be true that the "Administration" is a State agency engaged in relief work, or in the discharge of a governmental undertaking. *Carpenter v. R. R., supra.* The record consists of the complaint and demurrer, or motion to dismiss.

We conclude that the action was properly dismissed as to the North Carolina Emergency Relief Administration. It does not follow, however, upon the showing presently made, that the plaintiff is without remedy as against the other defendants. *Philadelphia Co. v. Stimson,* 223 U. S., 605; *State v. Wisconsin Telephone Co.,* 172 N. W. (Wis.), 225. One who seeks to defend on the ground of sovereign immunity must show his authority. *Poindexter v. Greenhow,* 114 U. S., 270; *Kneedler v. Lane,* 45 Pa., 238. It is observed the allegation with respect to the individual defendants is not the same in the present complaint as in the complaint filed in the proceeding originally instituted in this Court, *Vinson v. O'Berry, post,* 289.

Error and remanded.

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

J. A. VINSON v. ANNIE L. O'BERRY ET AL.

(Filed 22 January, 1936.)

1. State E b—

The original jurisdiction of the Supreme Court to hear claims against the State may not be invoked upon a complaint which presents no serious question of law, but bases the right to recover upon allegations of fact.

2. Abatement and Revival B b—

Where an action is pending between the parties, plaintiff may not maintain another action involving the same subject matter, although in the first suit he demands damages and in the second injunctive relief.

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

VINSON *v.* O'BERRY.

THIS is a proceeding invoking the original jurisdiction of the Supreme Court to hear an alleged claim against the State.

The allegation of the complaint upon which it is thought the original jurisdiction of the Court may properly be invoked is "that the defendant North Carolina Emergency Relief Administration is a State agency, existing under the laws of the State of North Carolina; and that at all times hereinafter mentioned the defendants Annie L. O'Berry, John H. Bass, Ben W. Southerland, and Jim Coleman were acting in their official capacity as agents and representatives of North Carolina Emergency Relief Administration."

Then follows claim for unliquidated damages arising out of alleged breach of contract and tortious interference with plaintiff's contract rights in almost identical language with that appearing in the complaint filed in the case of *Vinson v. O'Berry,* on appeal from Wayne Superior Court, *ante,* 287.

The defendants named in the summons and complaint demur for want of jurisdiction. The State, appearing specially, moves to dismiss.

Kenneth C. Royall and J. Faison Thomson for plaintiff.

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

J. S. Massenburg and Langston, Allen & Taylor for other defendants.

STACY, C. J. The allegations of the complaint present no serious question of law, and the facts stated therein are not sufficient to invoke the original jurisdiction of the Supreme Court. *Cohoon v. State,* 201 N. C., 312, 160 S. E., 183; *Warren v. State,* 199 N. C., 211, 153 S. E., 864; *Lacy v. State,* 195 N. C., 284, 141 S. E., 886.

Moreover, it appears on the face of the complaint that another action between the same parties, involving the same subject matter, is now pending on appeal from Wayne Superior Court, *Vinson v. O'Berry, ante,* 287, albeit the plaintiff says in his brief he is seeking injunctive relief there and damages here. Still this is not only taking two bites at the cherry, but biting in two places at the same time.

The proceeding must be dismissed for want of jurisdictional showing.

Proceeding dismissed.

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

C. W. OLIVER v. GURNEY P. HOOD, COMMISSIONER OF BANKS, ET AL.

(Filed 22 January, 1936.)

1. Appeal and Error A d—

The denial of a motion to dismiss on the ground that the complaint fails to state a cause of action is not appealable.

2. Same—

The overruling of a demurrer on the ground that the complaint fails to state a cause of action is appealable.

3. Banks and Banking H a—

An action to vacate a stock assessment made under C. S., 218 (c), and to restrain execution thereon is a direct attack upon the summary judgment of assessment.

4. Pleadings D c—

A demurrer admits facts properly pleaded, but not inferences or conclusions of law.

5. Banks and Banking H a—Complaint failing to allege that plaintiff is not owner of stock fails to state cause to vacate assessment.

In an action to vacate a stock assessment made against plaintiff by the Commissioner of Banks under C. S., 218 (c), and to restrain execution upon the summary judgment of assessment, a complaint failing to allege that plaintiff was not a stockholder of the bank at the time of its closing, fails to state a cause of action for the relief sought, and an allegation that there was no certificate of stock standing in plaintiff's name upon the books of the bank at the time is insufficient, since plaintiff may be an equitable owner of stock and liable to assessment notwithstanding such fact. C. S., 219 (a).

6. Pleadings E d—

After judgment overruling defendant's demurrer is reversed on appeal, plaintiff may ask to be allowed to amend his complaint, if so advised. C. S., 515.

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

APPEAL by defendant Hood, Commissioner of Banks, from *Small, J.*, at June Term, 1935, of WAYNE.

Civil action to restrain execution, and to vacate as illegal and void levy of stock assessment made under C. S., 218 (c).

The complaint alleges:

1. That the Citizens Bank of Mount Olive closed its doors on 24 December, 1931.

2. That thereafter the defendant Commissioner of Banks, "illegally and without due process of law," levied an assessment against the plain-

tiff in the sum of $800, as an alleged stockholder in said bank, and docketed same in the Superior Court of Wayne County.

3. That plaintiff is advised, informed, and believes said assessment is void for that: "There was not, at the time said assessment was made by Gurney P. Hood, Commissioner of Banks, any certificate of stock appearing upon the books of record of the Citizens Bank of Mount Olive in the name of C. W. Oliver, the plaintiff herein."

Wherefore, plaintiff prays for restraining order, and that said assessment be declared illegal and void.

Motion by defendant to dismiss and demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action. Motion denied and demurrer overruled. Exception.

Defendant Commissioner of Banks appeals, assigning error.

Langston, Allen & Taylor for plaintiff.

Kenneth C. Royall, D. C. Humphrey, J. C. Eagles, Jr., and Robert A. Hovis for defendant Commissioner of Banks.

STACY, C. J. The ruling on the motion to dismiss is not appealable. *Plemmons v. Imp. Co.*, 108 N. C., 614, 13 S. E., 188. The ruling on the demurrer is. *Griffin v. Bank*, 205 N. C., 253, 171 S. E., 71.

The appeal of the plaintiff from the levy of assessment was before us at the Spring Term, 1935, on a procedural question. *In re Bank*, 208 N. C., 65, 179 S. E., 24.

The present proceeding is a direct attack upon the summary judgment of assessment. *Craddock v. Brinkley*, 177 N. C., 125, 98 S. E., 280; Note, Ann. Cas., 1914 B, 82; 15 R. C. L., 839.

The demurrer admits facts properly pleaded, but not inferences or conclusions of law. *Distributing Corp. v. Maxwell, Comr., ante*, 47; *Phifer v. Berry*, 202 N. C., 388, 163 S. E., 119.

It is not alleged in the complaint that plaintiff was not a stockholder in the Citizens Bank of Mount Olive at the time of its closing, and, for this reason, not liable to assessment. He has carefully avoided making such allegation, it seems. The only ground upon which he seeks to avoid the judgment of assessment is that there was no certificate of stock standing in his name upon the books of the bank at the time of the assessment. *Non constat* that he may not have been an equitable owner of stock. C. S., 219 (a); *Corp. Com. v. McLean*, 202 N. C., 77, 161 S. E., 854; *Darden v. Coward*, 197 N. C., 35, 147 S. E., 671; *Corp. Com. v. Murphey*, 197 N. C., 42, 147 S. E., 667. The complaint is bad as against a demurrer.

It is still open to the plaintiff, however, to ask to be allowed to amend his complaint, if so advised. C. S., 515; *Morris v. Cleve,* 197 N. C., 253, 148 S. E., 253; *McKeel v. Latham,* 202 N. C., 318, 162 S. E., 747; *S. c.,* 203 N. C., 246, 165 S. E., 694.

Reversed.

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

STATE v. LAWRENCE DINGLE AND GERMIE WILLIAMS.

(Filed 22 January, 1936.)

1. Criminal Law K e—

The statute substituting asphyxiation for electrocution applies only to capital crimes committed after the effective date of the statute.

2. Criminal Law L d—

The failure of defendants to file a brief in the Supreme Court works an abandonment of the assignments of error, except, in cases where defendants have been convicted of a capital crime, those appearing on the face of the record, which are cognizable *ex mero motu.*

3. Criminal Law L f—

Where defendants have been sentenced to asphyxiation for a capital crime committed prior to the effective date of the statute substituting asphyxiation for electrocution, the cause will be remanded for proper judgment in the absence of error entitling defendants to a new trial.

APPEAL by defendants from *Rousseau, J.,* at July Term, 1935, of FORSYTH. Criminal prosecution, tried upon indictment charging the defendants Lawrence Dingle and Germie Williams with the murder of one John Gant on 28 April, 1935.

Verdict: Guilty of murder in the first degree.

Judgment: "That Lawrence Dingle and Germie Williams suffer death by inhaling lethal gas."

Defendants appeal, assigning errors.

Attorney-General Seawell for the State.

STACY, C. J. The evidence on behalf of the State tends to show that on Sunday morning, 28 April, 1935, about daybreak, the defendants went to the home of John Gant in Forsyth County with intent to rob him, which they did, and in carrying out their purpose the defendant Williams struck Gant over the head with a piece of iron, inflicting mortal injuries. They then took his money and divided it between them.

The defendants were tried at the July Term, 1935, of Forsyth Superior Court, convicted and sentenced to death by asphyxiation. The judgment is erroneous, as the homicide occurred prior to 1 July, 1935, the day on which the statute changing the mode of execution from electrocution to asphyxiation went into effect. *S. v. Hester, ante,* 99.

The defendants gave notice of appeal in open court, and were allowed to prosecute same *in forma pauperis.* No brief has been filed by the appellants in this Court, which works an abandonment of the assignments of error, *S. v. Hooker,* 207 N. C., 648, 178 S. E., 75; *S. v. Lea,* 203 N. C., 13, 164 S. E., 737, except those appearing on the face of the record, which are cognizable *ex mero motu,* as the lives of the prisoners are involved. *S. v. Edney,* 202 N. C., 706, 164 S. E., 23; *S. v. Goldston,* 201 N. C., 89, 158 S. E., 926; *S. v. Taylor,* 194 N. C., 738, 140 S. E., 728; *S. v. Ward,* 180 N. C., 693, 104 S. E., 531.

No error appears on the record except in the judgment. The cause, therefore, will be remanded for lawful sentences, as was done in *S. v. Hester, supra.*

It is observed that the first name of the defendant Williams is designated "Gernie" in the indictment, while throughout the trial he is spoken of as "Germie," and in the judgment he is styled "Germie Williams." Perhaps a plain case of *idem sonans* (*S. v. Whitley,* 208 N. C., 661; *S. v. Donnell,* 202 N. C., 782, 164 S. E., 352; *S. v. Chambers,* 180 N. C., 705, 104 S. E., 670; *S. v. Drakeford,* 162 N. C., 667, 78 S. E., 308; *S. v. Collins,* 115 N. C., 716, 20 S. E., 452; *S. v. Hare,* 95 N. C., 682; *S. v. Lane,* 80 N. C., 407; *S. v. Patterson,* 24 N. C., 346; 14 R. C. L., 207; 15 R. C. L., 600), but as the cause is to be remanded for proper judgments, this discrepancy will no doubt be eliminated, if deemed material.

Remanded.

NEW YORK LIFE INSURANCE COMPANY v. J. WALTER LAMBETH, ADMINISTRATOR OF JOHN W. LAMBETH, DECEASED.

(Filed 22 January, 1936.)

For digest, see *Ins. Co. v. Lassiter, ante,* 156.

APPEAL by plaintiff from *McElroy, J.,* at 15 April Term, 1935. From GUILFORD. Affirmed.

Plaintiff and defendant's intestate entered into a contract dated 6 July, 1933, by which the plaintiff agreed to sell defendant's intestate a tract or lot of land located on North Main Street in the city of High Point, North Carolina, of the dimensions of 31 feet by 100 feet, as

described in the contract for the price of $26,000. The contract provided that "should the title be unmarketable and be rejected therefor by the purchaser," the sum of $3,000 paid as earnest money by the defendant's intestate would be returned. At the time stipulated in the contract for the completion of the sale, the defendant's intestate notified the plaintiff that the plaintiff's title to the property involved was not marketable, and refused to accept plaintiff's deed therefor.

The defendant's intestate demanded the return of the $3,000 paid as earnest money on said date. This action was commenced by plaintiff against defendant's intestate on 17 April, 1934, for specific performance of the contract. Defendant's intestate answering denied the marketability of the title tendered, and set up counterclaim for the $3,000 earnest money paid, and interest from the date of its return was demanded. During the pendency of the action, the defendant's intestate died and his personal representative, the defendant, was substituted in his stead.

Upon the case coming on to be heard upon agreed statement of facts, the court below rendered the following judgment: "This cause coming on to be heard at the 15 April Term of Guilford Superior Court, before Hon. P. A. McElroy, judge presiding, and being heard upon agreed statement of case filed herein by the plaintiff and defendant, and arguments of counsel for the plaintiff and defendant, a jury trial having been waived, and it appearing to the court, and the court finding as a matter of law upon the facts agreed that the title to the real property described in the complaint, which title was tendered by the plaintiff to the defendant in execution of the terms of the contract of sale, is unmarketable, and the plaintiff is unable, and was unable on 11 July, 1933, to convey to the defendant's intestate, or to said intestate's representative, such title as was contemplated in said contract of sale: Wherefore, upon said facts agreed, it is ordered, adjudged, and decreed that the plaintiff's action be and same is hereby dismissed, and that the plaintiff take nothing by its action. It is further ordered, adjudged, and decreed that the defendant J. Walter Lambeth, administrator of John W. Lambeth, deceased, have and recover of the said plaintiff New York Life Insurance Company the sum of $3,000, with interest thereon from 12 July, 1933, until paid. It is further ordered, adjudged, and decreed that the plaintiff New York Life Insurance Company be taxed with the costs of this action, to be assessed by the clerk. P. A. McElroy, Judge presiding."

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

Eugene G. Shaw, Thos. C. Hoyle, and Frank P. Hobgood for plaintiff.
Dalton & Pickens for defendant.

CLARKSON, J. This case is governed by the decision this day filed in the action of *New York Life Insurance Co. v. C. T. Lassiter and wife, Eunice M. Lassiter, ante,* 156.

From the view we take of the matter it is unnecessary to consider the other contentions set forth in the agreed statement of facts as to the marketability of the title. We do not think the plaintiff can deliver to the defendant a marketable title—a good and indefeasible title in fee simple. The reasons therefor are fully set forth in the case above cited.

The judgment of the court below is

Affirmed.

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

J. N. MILLS v. NEW YORK LIFE INSURANCE COMPANY AND SOLOMON BLOMBERG.

(Filed 22 January, 1936.)

1. Insurance C b—

Payment of the initial premium on a policy of life insurance to insurer's soliciting agent is payment to the company. C. S., 6304.

2. Same—Payment of note for second premium to insurer's agent without obtaining note or insurer's receipt held not payment to insurer.

The policy in question provided that premiums were payable at the home office of insurer and were payable to a duly authorized agent only in exchange for insurer's official receipt. Plaintiff's evidence showed payment of a note given for the second semiannual premium to insurer's authorized agent without obtaining the note or insurer's official receipt, and there was no evidence that insurer ever received any part of the payment. In insured's action against insurer to recover the premium paid after insurer had declared the policy forfeited, *it is held,* insurer's motion to nonsuit was properly allowed, payment to the agent under the circumstances not constituting payment to insurer.

APPEAL by plaintiff from *Cowper, J.,* at April Term, 1935, of DURHAM. Affirmed.

From a judgment of nonsuit as to defendant Life Insurance Company plaintiff appealed.

The facts as disclosed by the record are substantially as follows:

The plaintiff, who is a reputable colored physician of Durham, N. C., took out a policy of insurance in defendant company on 19 August, 1931, and paid the semiannual premium of $208.40 to the soliciting agent, Solomon Blomberg. When the next semiannual premium became due on 19 February, 1932, plaintiff paid $26.25 in cash to Blomberg, and

gave a note to the company for the balance of the premium of $182.15. This note was made payable to the New York Life Insurance Company at Charlotte, N. C., on or before 19 May, 1932, and contains the provision that if not paid when due all rights under the policy would be terminated. Plaintiff testified he later paid the note to Blomberg, but did not get the note or official premium receipt. The company lapsed the policy for nonpayment of the second semiannual premium. The policy of insurance contained the following provision: "All premiums are payable on or before their due date at the home office of the company or to an authorized agent of the company, but only in exchange for the company's official premium receipt signed by the president, a vice-president, a third vice-president, a secretary, or the treasurer of the company, and countersigned by the person receiving the premium. No person has any authority to collect a premium unless he then holds said official premium receipt."

On 26 March, 1934, at the instance of the southern representative of defendant company, Blomberg gave plaintiff his personal check for $208.00, but the check was returned unpaid, with notation "account closed."

Thereafter, on 7 December, 1934, plaintiff instituted this action against the defendants, in the court of a justice of the peace, to recover $200.00 (remitting all over that amount).

At the close of the evidence motion for nonsuit was sustained and from judgment thereon plaintiff appealed.

R. O. Everett for plaintiff.

Smith, Wharton & Hudgins for defendant New York Life Insurance Company.

DEVIN, J. The company admits the payment of the first semiannual premium, but without this admission payment to the soliciting agent Blomberg would constitute payment to the company by virtue of C. S., 6304.

But the payment to Blomberg of the amount of a later premium, becoming due thereafter, would not constitute payment to the company. *Thompson v. Assurance Society,* 199 N. C., 59. There is no evidence the company ever received any part of it, nor is it contended the payment was made in exchange for the official premium receipt required by the insurance contract, and the note given for part of the premium was on its face made payable to the company in Charlotte. Plaintiff testified he later paid this note to Blomberg but without requiring the production of the note or the premium receipt.

The case of *Hughes v. Lewis,* 203 N. C., 775, is not in conflict with the rule laid down in *Thompson v. Assurance Society, supra.* In

Hughes v. Lewis, supra, the facts were the reverse of those in the case at bar. There the insurance company, in attempting to refund to the insured the unearned portion of a premium, paid it to a local agent, who did not pay all of it to the insured, and it was held the company was liable to the insured for the unpaid portion.

Plaintiff has suffered a regrettable loss, but fault therefor may not, in law, be laid at the door of defendant insurance company.

Affirmed.

STATE v. HENRY GRIER.

(Filed 22 January, 1936.)

Homicide H c—Where defendant admits guilt of murder in second degree, the court need not charge the elements of this degree of the crime.

Where, in a prosecution for homicide, the defendant admits his guilt of murder in the second degree, it is not error for the trial court to act upon the admission, and after fully charging the elements of murder in the first degree, and defining murder in the second degree, to instruct the jury to return a verdict of murder in the second degree if they should fail to find any one of the elements of first degree murder, as defined, beyond a reasonable doubt.

APPEAL by defendant from *Phillips, J.,* at June Term, 1935, of FORSYTH. No error.

The bill of indictment charged the defendant Henry Grier with the murder of one Annie Giles, on 5 May, 1935.

The State's evidence tended to show that the defendant (a married man) and deceased had lived together for about four years; that about four months prior to the homicide deceased had left the defendant and had come to live with her sister on East Fourth Street in Winston-Salem; that defendant came to see her there each week. The sister of the deceased testified that nine or ten days before the homicide she heard defendant ask deceased to come back and stay with him again, and that deceased said, "No, she wasn't coming back no more, because it wasn't right to live with him"; that defendant then said, "If you don't come back and stay with me, I am going to kill you," and she replied, "Henry, don't kill me, I want to do right." Thereupon defendant knocked her off the porch and beat her.

The witness further testified that on 5 May, about 8 or 9 p.m., defendant came to the house and went into the room where deceased was, and that in a few minutes she heard deceased say, "Henry, don't," and then a pistol shot and deceased fell to the floor with a bullet in her

brain. When others who were in the house attempted to enter the room defendant said, "Don't come in here, I will kill every one of you," and fired several shots at them.

An examination of the body of deceased showed the bullet had entered her head back of the right ear and had ranged upward into the brain.

The defendant offered no evidence.

During the trial it was admitted by the defendant, through his counsel, that he was guilty of murder in the second degree.

There was a verdict of guilty of murder in the first degree, and from judgment thereon of death by electrocution, defendant appealed.

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

Slawter & Wall for defendant.

DEVIN, J. The only question presented by this appeal is whether the trial judge properly instructed the jury as to murder in the second degree.

There is no other assignment of error.

A careful consideration of the entire record, including the accurate and comprehensive charge of the learned judge, satisfies us that the trial was free from error in this or any other respect. The evidence fully warranted the verdict and judgment.

The court below stated the evidence and the contentions of the State and the defendant at length, and properly instructed the jury as to the law arising thereon. C. S., 564.

The defendant, through his counsel, admitted on the trial that he was guilty of murder in the second degree. There was no error in the court's acting upon this admission. *S. v. Foster,* 130 N. C., 666.

But the defendant sought to escape conviction of first degree murder, and complains now that the court's instruction as to second degree murder was prejudicial in that it was not sufficiently explicit, citing *S. v. Foster, supra.* From an examination of the entire charge in the instant case, however, it is apparent this contention cannot be sustained. We think the charge of the court below in this respect was sufficient. He defined murder in the second degree as well as murder in the first degree, and charged the jury, in effect, if they found from the evidence beyond a reasonable doubt that the killing was willful, deliberate, and premeditated, to return a verdict of guilty of murder in the first degree, and if they had a reasonable doubt as to any element of first degree murder to return a verdict of guilty of murder in the second degree, the defendant having admitted his guilt of the lesser degree of felonious slaying.

No error.

STATE v. WILLIAM LONG.

(Filed 22 January, 1936.)

Criminal Law L a—

The defendant having failed to take any step to perfect his appeal, the appeal is dismissed on authority of *S. v. McLeod, ante*, 54.

MOTION by State to docket and dismiss appeal.

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

STACY, C. J. At the May Term, 1935, Alamance Superior Court, the defendant herein, William Long, *alias* Buster Long, was tried upon indictment charging him with the murder of one Sam Minor on 11 January, 1935. The jury for their verdict say the defendant is "guilty of murder in the first degree." Whereupon, it was adjudged that the defendant suffer death by electrocution.

From the judgment thus entered, the defendant gave notice of appeal to the Supreme Court and was allowed to prosecute same *in forma pauperis*. 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. Pressley, post*, 300.

The motion of the Attorney-General to docket and dismiss the appeal will be allowed on authority of *S. v. McLeod, ante*, 54, and cases there cited.

Appeal dismissed.

STATE v. JOHN PRESSLEY.

(Filed 22 January, 1936.)

Criminal Law L a—

Defendant having failed to take any step to perfect his appeal, the appeal is dismissed on authority of *S. v. McLeod, ante*, 54.

MOTION by State to docket and dismiss appeal.

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

STACY, C. J. At the April Term, 1935, Gaston Superior Court, the defendant herein, John Pressley, was tried upon indictment charging him with the murder of one Vester Glover on 13 April, 1935. The jury for their verdict say: "We find the defendant guilty of murder in the first degree." The judgment of the court was that the defendant suffer death by electrocution.

From the judgment thus entered, the defendant gave notice of appeal to the Supreme Court and by consent was allowed sixty days to make up and serve case on appeal, and the solicitor was given sixty days thereafter to serve exceptions or counter case. 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,* 208 N. C., 352; *S. v. Brown,* 206 N. C., 747, 175 S. E., 116.

The motion of the Attorney-General to docket and dismiss the appeal is allowed on authority of *S. v. McLeod, ante,* 54, and cases there cited.

Appeal dismissed.

JOHN ARTHUR GASKINS v. GROVER C. LANCASTER.

(Filed 22 January, 1936.)

Appeal and Error J a—Refusal to vacate judgment at instance of successful party alleging misinformation at time of trial, held not reviewable.

In proceedings to establish the boundary line between the parties, judgment was entered in accordance with defendant's contentions, and the court surveyor ordered to run the line in accordance therewith. Upon the coming in of the surveyor's report, defendant moved to set aside the judgment and resisted confirmation of the surveyor's report on the ground that he had been misinformed by the surveyor at the time of the trial as to where the line would run. *Held:* The motion was addressed to the discretion of the court, and its ruling thereon is not reviewable.

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

APPEAL by defendant from *Barnhill, J.,* at May Term, 1935, of CRAVEN.

Special proceeding to establish dividing line between the lands of plaintiff and defendant, adjoining landowners.

The matter was heard at the February Term, 1935, on appeal from the clerk, and resulted in a verdict establishing the beginning point of the dividing line between the lands of plaintiff and defendant at "C," as shown upon the map. This was in accordance with defendant's

contention. The court surveyor was thereupon directed to establish the line, beginning at said point, and following the calls in plaintiff's deed. The description in defendant's deed called for plaintiff's line.

On the coming in of the surveyor's report, the defendant resisted confirmation of said report and moved to set aside the judgment entered on the verdict at the February Term because, he says, the surveyor misinformed him at the time of trial as to where the line would run, starting at the point "C" on the map. It does not appear from the record what representations were made by the surveyor to defendant and his counsel at the time of trial. Apparently they were not made in open court.

The court declined the defendant's motion, and entered judgment of confirmation at the May Term, 1935, from which the defendant appeals, assigning errors.

D. L. Ward and Dunn & Dunn for plaintiff.
Barden & Stith and R. E. Whitehurst for defendant.

STACY, C. J., after stating the case: Was it error, upon a *volte face* by defendant, to refuse to undo in May what was done at his instance in February? The defendant invokes the sanction applied in *Thompson v. Funeral Home,* 208 N. C., 178, 179 S. E., 801. Plaintiff relies upon the doctrine announced in *Rand v. Gillette,* 199 N. C., 462, 154 S. E., 746. The motion was addressed to the sound discretion of the trial court, and is not reviewable on appeal. *Goodman v. Goodman,* 201 N. C., 808, 161 S. E., 686.

Appeal dismissed.

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

STATE v. MRS. EDDIE WEBB.

(Filed 22 January, 1936.)

1. Criminal Law K b—

It is error for the court to suspend judgment upon stipulated terms over the objection of defendant.

2. Criminal Law L e—

Where judgment has been suspended over the defendant's objection, the cause will be remanded on appeal in order that final judgment may be entered in order that defendant may appeal to test its validity.

HOOD, COMR. OF BANKS, *v.* MOTOR CO.

APPEAL by defendant from *Hill, Special Judge,* at May Term, 1935, of FORSYTH.

Criminal prosecution, tried upon indictments charging the defendant (1) with reckless driving, and (2) with passing school bus while same was standing on public road discharging school children.

Verdict: Guilty on both charges.

Judgment: On first count, prayer for judgment continued upon condition that defendant pay into the office of the clerk certain sums, designating them, to cover hospital, nurse, and doctor's bills; and on the other charge, prayer for judgment continued on payment of all the costs.

To this judgment the defendant excepts and appeals, assigning errors.

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

H. O. Woltz and Wilson Barber for defendant.

STACY, C. J. As the defendant neither sought nor accepted the indulgence and forbearance of the court, it was error to withhold final judgment, or some judgment in its nature final, so that the defendant might test the validity of the trial by appeal. Such was the holding in *S. v. Burgess,* 192 N. C., 668, 135 S. E., 771. Hence, on authority of the *Burgess case, supra,* the cause will be remanded for judgment. Compare *S. v. Anderson,* 208 N. C., 771; *S. v. Rooks,* 207 N. C., 275, 176 S. E., 752.

Error and remanded.

GURNEY P. HOOD, COMMISSIONER OF BANKS, v. ELDER MOTOR COMPANY ET AL.

(Filed 22 January, 1936.)

1. Pleadings E d: Appeal and Error J a—

Whether the court should allow plaintiff to amend after sustaining a demurrer to the complaint is a matter in its sound discretion, and its ruling thereon is not reviewable. C. S., 515.

2. Banks and Banking H d—

In an action by the statutory receiver on a note executed to the bank, defendant maker set up a counterclaim for the penalty for usury in a sum in excess of the note, and alleged demand for its payment and refusal by the receiver. *Held:* The receiver's demurrer to the counterclaim was properly overruled.

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

TRUST CO. *v.* R. R.

APPEAL by plaintiff from *Devin, J.*, at July-August Term, 1935, of CHATHAM.

Civil action to recover on promissory note.

Defendants denied liability and set up counterclaim for usury in excess of the note sued upon, but omitted to allege that defendants had presented their claim to the liquidating agent, or Commissioner of Banks, and same had been rejected as required by C. S., 218 (c), subsections 10 and 11.

Demurrer *ore tenus* interposed to counterclaim. Demurrer sustained with privilege to amend. Plaintiff excepts.

Counterclaim amended. Demurrer *ore tenus* to counterclaim as amended; overruled; exception.

Plaintiff appeals, assigning errors.

U. L. Spence and W. D. Sabiston, Jr., for plaintiff.
Daniel L. Bell for defendants.

STACY, C. J. Whether the defendants should have been allowed to amend their counterclaim, after demurrer sustained, was a matter addressed to the sound discretion of the trial court, and is not reviewable on appeal. C. S., 515; *McKeel v. Latham,* 203 N. C., 246, 165 S. E., 694; *Morris v. Cleve,* 194 N. C., 202, 139 S. E., 230.

There was no error in overruling the demurrer to the counterclaim as amended. *Griffin v. Bank,* 205 N. C., 253, 171 S. E., 71. Indeed, it might well have been disregarded (C. S., 512), or treated as a motion to dismiss (*Elam v. Barnes,* 110 N. C., 73, 14 S. E., 621), from the refusal of which no appeal lies. *Seawell v. Cole,* 194 N. C., 546, 140 S. E., 85; *Plemmons v. Improvement Co.,* 108 N. C., 614, 13 S. E., 188.

Affirmed.

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

WACHOVIA BANK AND TRUST COMPANY, EXECUTOR OF E. D. VAUGHN, DECEASED, v. SOUTHERN RAILWAY COMPANY, J. H. RICHARDSON, AND J. P. STANTON.

(Filed 22 January, 1936.)

1. Torts B a—

An injured party may sue jointly all persons whose negligence was a proximate cause of the injury in any degree, since none may escape liability unless the total causal negligence be attributable to another or others.

2. Principal and Agent C d—Agent or servant is liable to third person injured by negligence of malfeasance or nonfeasance.

An agent or servant is liable to a third person injured as a result of the negligence of the agent or servant in the performance of his duties in the scope of the employment, whether the negligence consists in positive acts or in failure to perform an affirmative duty for the protection of the public.

3. Removal of Causes C b—Complaint held to allege joint tort against defendants, and cause was not removable for separable controversy.

Plaintiff instituted this action against a railroad company and the engineer operating the train which struck plaintiff's testator, and the watchman on duty at the crossing where plaintiff's testator was injured, the complaint alleging that the engineer failed to give any warning by bell or signal, that the watchman, on duty at the time, failed to warn plaintiff's testator of the approach of the train and did not arrive at the scene until the train was in the intersection, and that plaintiff, relying on the watchman, required by city ordinance to be at the crossing at the time of the accident, was struck as he went upon the crossing, and that testator was not guilty of negligence, and that his death was proximately caused by the concurrent negligence of defendants. *Held:* The complaint stated a cause of action for actionable negligence against defendants as joint tort-feasors, and defendant railroad company's motion to remove to the Federal Court for diverse citizenship and separable controversies was properly denied.

4. Same—The complaint alone will be considered in determining whether cause alleged is joint or separable.

Upon a motion to remove a cause to the Federal Court on the ground of diverse citizenship and separable controversy, the complaint alone determines whether the cause alleged is joint or separable, and where the complaint alleges a joint action, defendants cannot create a separable controversy by setting up separate defenses.

5. Railroad D a—Watchman is liable to third person for injuries caused by his negligence in failing to warn of train's approach.

The complaint liberally construed alleged that plaintiff's testator was struck and killed at a railroad grade crossing, that defendant watchman was on duty at the crossing at the time, and that he negligently failed to warn testator of the approach of the corporate defendant's train, and that such negligent failure was one of the proximate causes of the accident resulting in testator's death. *Held:* The complaint alleged a cause of action for actionable negligence against the watchman, and his demurrer to the complaint cannot be sustained.

APPEAL by defendants from *Rousseau, J.,* at September Term, 1935, of FORSYTH. Affirmed.

This is an action for actionable negligence, brought by plaintiff against all of the defendants as joint tort-feasors, alleging damage.

Wachovia Bank and Trust Company, as executor of E. D. Vaughn, commenced an action in the Superior Court of Forsyth County against the Southern Railway Company, J. H. Richardson, and J. P. Stanton,

seeking to recover for the alleged wrongful death of E. D. Vaughn, who was killed by a passenger train of the defendant Southern Railway Company at the Fifth Street crossing in the city of Winston-Salem, N. C., on 11 April, 1934.

The plaintiff Wachovia Bank and Trust Company, executor, J. H. Richardson, and J. P. Stanton are residents of North Carolina; the Southern Railway Company is incorporated under the laws of the State of Virginia. J. H. Richardson was the engineer of the train which struck the deceased and J. P. Stanton was the crossing watchman, and according to the complaint (liberally construed) he was on duty at the Fifth Street crossing.

The plaintiff alleges the negligence of the defendants in substance: That J. P. Stanton was acting as watchman for the Southern Railway Company at the crossing where plaintiff's testator was killed, in compliance with the requirements of an ordinance of the city of Winston-Salem that a watchman be stationed at this crossing between the hours of 6:00 a.m. and 12:00 at night; that at the time in question the defendant Stanton was on duty at the crossing and was in the house erected for the watchman, and did not warn the plaintiff's testator of the approaching train, and that deceased, relying on Stanton to warn him, started across the tracks; that the watchman Stanton failed to keep a proper lookout for either the train or pedestrians and traffic, and did not emerge from his shelter or rest house until about the time the train was entering the intersection, and was too late for the deceased to be warned of the danger by seeing or hearing the watchman Stanton; that the watchman Stanton was negligent in not warning plaintiff's testator; that J. H. Richardson, the engineer, carelessly and negligently failed to blow any whistle or ring a bell, or give any other warning of the approach of the train, and proceeded at a high, unlawful, and excessive rate of speed into and upon and across the said intersection and struck the said E. D. Vaughn in the back when he was looking in a southeasterly direction and when he was almost across the said intersection, causing injuries from which he died almost immediately thereafter. That the engineer "failed and neglected to keep any lookout for pedestrians. . . . That the defendant Southern Railway Company, its officers, agents, and servants, had the last clear chance to avoid a collision. . . . That the collision was caused by no fault or negligence on the part of the plaintiff's testator, but was due to and proximately arose on account of the careless and negligent conduct of the defendants Southern Railway Company and J. H. Richardson, and J. P. Stanton."

The defendant Southern Railway Company, in apt time, petitioned the clerk of Superior Court of Forsyth County to remove the case to the United States District Court. This was denied. The Southern

Railway Company appealed to the judge of the Superior Court of Forsyth County, and the petition was again denied, and the defendant excepted, assigned error, and appealed to the Supreme Court. While the matter was pending in the Supreme Court the defendant J. P. Stanton was permitted to file a demurrer, and is now before this Court on a demurrer to the plaintiff's complaint on the grounds that it states no cause of action against him.

Hastings & Booe, Fred S. Hutchins, and H. Bryce Parker for plaintiff.

Wm. H. Boyer for defendant J. P. Stanton.

Manly, Hendren & Womble and W. P. Sandridge for Southern Railway Company.

CLARKSON, J. The defendant Southern Railway Company contends: "That no cause of action is stated against the crossing watchman, Stanton (although the allegations of his negligence state a cause of action against the Southern Railway Company). From this it follows that there is a fraudulent joinder of the crossing watchman. With the crossing watchman out of the case, a separable controversy exists between the plaintiff and the Southern Railway Company which entitles the Southern Railway Company to remove this case to the United States District Court." We cannot agree with the contentions of defendant, the Southern Railway Company.

The present action is not founded on contract, but is an action for actionable negligence, instituted against all three defendants as joint tort-feasors.

In *Tudor v. Bowen,* 152 N. C., 441 (443), it is said: "Negligence is essentially relative and comparative. The legal duty we owe to others is the accepted standard, and that duty is measured by the exigencies of the occasion."

" 'The term "negligence" has been defined by the Federal Supreme Court to be the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the situation. Negligence has always relation to the circumstances in which one is placed, and what an ordinarily prudent man would do or omit in such circumstances. *Charnock v. Texas & R. R. Co.,* 194 U. S., 432, 48 L. Ed., 1057.' 2 Roberts Federal Liabilities and Carriers (2d Ed.) (1929), sec. 811, pp. 1558-9." *Hamilton v. R. R.,* 200 N. C., 543 (555).

In the religious realm the duty is thus stated: "We have left undone those things, which we ought to have done; And we have done those things which we ought not to have done; And there is no health in us."

It is well settled that a party injured can sue any or all joint tort-feasors for actionable negligence.

In *White v. Realty Co.*, 182 N. C., 536, at p. 538, is the well settled law in this State: "But if any degree, however small, of the causal negligence, or that without which the injury would not have occurred, be attributable to the defendant, then the plaintiff, in the absence of any contributory negligence on his part, would be entitled to recover; because the defendant cannot be excused from liability unless the total causal negligence, or proximate cause, be attributable to another or others. 'When two efficient proximate causes contribute to an injury, if defendant's negligent act brought about one such cause, he is liable,' *Wood v. Public Service Corp.*, 174 N. C., 697, and cases there cited."

It is conceded in the brief of defendant Southern Railway Company that whether or not a cause of action is stated against the watchman Stanton is to be determined by the law of this State. *Chicago, R. I. & P. R. Co. v. Schwyhart,* 227 U. S., 184.

It may not be amiss to say that the decisions of other jurisdictions are persuasive, but not binding on us. Whatever may be the holdings in other jurisdictions, in this State an agent or servant, under proper allegations of negligence, which is the proximate or one of the proximate causes of the injury, plaintiff being free from blame, and proof to that effect, is liable to third parties for acts of malfeasance or nonfeasance—commission or omission—done in the scope of his employment. *Swain v. Cooperage Co.*, 189 N. C., 528; *Crisp v. Fibre Co.*, 193 N. C., 77; *Givens v. Mfg. Co.*, 196 N. C., 377. The cases of *Mitchell v. Durham,* 13 N. C., 538, and *Brown v. R. R.*, 204 N. C., 25, cited by defendant appellants, is distinguishable, and the case of *Minnis v. Sharpe,* 198 N. C., 364, is not contrary to the position here taken.

In *Barber v. R. R.*, 193 N. C., 691 (693), the charge of the court below was approved, which is as follows: "Our law has also said that where a railroad company maintains a flagman at a railroad crossing, whether voluntarily or by law or custom, the public generally has a right to presume that this safeguard will be reasonably maintained and attended to, and in the absence of knowledge to the contrary, the fact that the flagman is absent from his post, or, if present, is not giving the warning of danger, is an assurance of safety and an ample invitation to cross, upon which a traveler familiar with the crossing may rely and act, within reasonable limitations, on the presumption that it is safe for him to go on the crossing." *Russell v. Railroad,* 118 N. C., 1098 (1109); *Cooper v. Railroad,* 140 N. C., 209; *Shepard v. Railroad,* 166 N. C., 539; *Parker v. Railroad,* 181 N. C., 95.

In 18 R. C. L., p. 818, sec. 272, the editor has this to say about this doctrine of nonfeasance: "Under the general rule of agency, an agent is not liable upon contracts which he makes for his principal, and some such idea of nonliability seems to be the foundation of this doctrine. . . . (p. 819) In recent times much criticism has been directed at this 'attenuated refinement,' as it has been termed; and the tendency is to repudiate the doctrine of nonliability for nonfeasance, and hold the employee accountable whether his act is properly to be described as misfeasance or nonfeasance." We quote the editor of a note in 20 A. L. R., 97, p. 99, as follows: "An agent who violates a duty which he owes to a third person is answerable to such person for the consequences, whether it be an act of malfeasance, misfeasance, or nonfeasance. Stated in this form, there is probably no case to be found to the contrary. But the doctrine laid down by some text-writers, founded on Lord Holt's dictum in *Lane v. Cotton,* 1701, 12 Mod., 488, 88 Eng. Reprint, 1466, has caused much confusion in the decisions over a fictitious distinction between acts of malfeasance and misfeasance and those of nonfeasance. . . . Many of the later cases have, however, abandoned it, as have also most of the recent text-writers."

In Jaggard, Torts, 1895, Vol. 1, p. 289, it is said: "The futility of such reasoning on the word 'nonfeasance' appears fully from the lack of definiteness of the meaning to be given the term. This solemn legal jugglery with words will probably disappear 'if the nature of the duty incumbent upon the servant be considered.' If the servant owe a duty to third persons, derived from instrumentality likely to do harm or otherwise, and he violates that duty, he is responsible. His responsibility rests on his wrongdoing, not on the positive or negative character of his conduct. A wrongful omission is as actionable as a wrongful commission. A driver who injures a third person by his negligence is liable." *Lough v. John Davis & Co.,* 59 L. R. A., 802 (Wash.), 1902, at page 804.

In the case of *Burrichter v. Chicago, M. & St. P. Ry. Co.,* 10 Fed. (2), 165 (Minn., 1925), plaintiff sued railroad and flagman for injuries received at a crossing. The only negligence alleged was the failure of the crossing watchman to warn. The case was appealed on the ground that no cause of action was alleged against the flagman and that the railroad was entitled to have the case removed. Petition to remove to United States District Court was denied. We quote from the opinion, at page 167, as follows: "In this case the complaint alleges a duty on the part of Ryder (watchman) to warn persons who might be using the public crossing of the approach of the defendant railway's car. This duty was not solely a duty to his master, but was clearly a duty to the public as well. For a failure to properly perform, or a failure to per-

form it at all, he would be liable." This case also cites with approval *Morey v. Shenango Furnace Co.,* 112 Minn., 528 (529), 127 N. W., 1134, as follows: "This Court has accepted the view that if a servant owes a duty to a third person, and violates that duty, he is responsible because of his wrongdoing, and not because of the positive or negative character of his conduct."

In the case of *Hough v. Railroad,* 144 N. C., 692, a train dispatcher and telegraph operator were held liable to third parties for failure to properly give orders to the engineer, resulting in a train collision. This is a square holding that railroad employees are liable to third parties for negligence in performance of their duties for which they are employed, and we think the defendant Stanton comes within this rule.

The cases are too numerous to cite which involve accidents and in which the employees of the railroad were held liable for a failure to keep a lookout at the crossing and to warn the plaintiffs, either by horn, bell, whistle, light, or other manner, the employees being engineer, conductor, flagman, fireman, or watchman.

The complaint alleges a joint tort action against J. P. Stanton, and, we think, under the factual situation, rightly so. It seems too well settled that the complaint, having alleged a joint action in tort between the engineer and the Southern Railway Company, that the action is not removable, and there is no separable controversy between the engineer and the Southern Railway Company.

This matter is thoroughly discussed in *Morganton v. Hutton,* 187 N. C., 736 (739), as follows: "In *R. R. Co. v. Herman,* 187 U. S., 63, it is held: 'While an action commenced in a state court against two defendants, one of whom is a resident and the other a nonresident, may be removed to a Circuit Court of the United States by the nonresident defendant if it can be shown that the cause of action is separable and the resident defendant is joined fraudulently for the purpose of preventing the removal of the cause to the Federal Court, such removal cannot be had if it does not appear that the resident defendant is fraudulently joined for such purpose.' The question of the nature of the controversy is governed by the complaint. Whether there is separable controversy is determined by the complaint. *Staton v. R. R.,* 144 N. C., 135; *Hollifield v. Telephone Co.,* 172 N. C., 714; *Patterson v. Lumber Co.,* 175 N. C., 90 (92). And the plaintiff is entitled to have his cause of action considered as stated in complaint. *Hough v. R. R.,* 144 N. C., 700, 702; *Smith v. Quarries Co.,* 164 N. C., 338; *Powers v. R. R.,* 169 U. S., 92; 179 U. S., 135; 200 U. S., 206. In *Powers v. R. R.,* 169 U. S., 92, it is said: 'A separate defense cannot create a separate controversy or deprive the plaintiff of the right to prosecute his own suit to a final determination in his own way, for the cause of action is the subject matter of

the controversy and is what the plaintiff alleges.' Cited in 194 U. S., 138. Also, in *R. R. v. Ide,* 114 U. S., 52, it is said: 'A defendant cannot make an action several which a plaintiff has elected to make joint.'" *Bank v. Hester,* 188 N. C., 68; *Moses v. Morganton,* 192 N. C., 102.

This matter was settled beyond question long ago in *Morganton v. Hutton, supra,* and in *Alabama Southern Ry. v. Thompson,* 200 U. S., 206. In that case an action was brought by the administrator of Florence Jones against the railroad and Wm. H. Mills, as conductor, and Edgar Fullar, as engineer, for actionable negligence. The defendant corporation was organized under the laws of Alabama and the conductor and engineer and plaintiff were citizens of Tennessee, where the action was brought. The opinion (a long one), covering every phase of the law and citing a wealth of authorities, at p. 217, says: "In other words, the right to remove depended upon the case made in the complaint against both defendants jointly, and that right, in the absence of a showing of fraudulent joinder, did not arise from the failure of the complainant to establish a joint cause of action." At pp. 218-19, speaking to the subject, it is said: "Does this become a separable controversy within the meaning of the act of Congress because the plaintiff has misconceived his cause of action and had no right to prosecute the defendants jointly? We think, in the light of the adjudications above cited from this Court, it does not. Upon the face of the complaint, the only pleading filed in the case, the action is joint. It may be that the state court will hold it not to be so. It may be, which we are not called upon to decide now, that this Court would so determine if the matter shall be presented on a case of which it has jurisdiction. But this does not change the character of the action which the plaintiff has seen fit to bring, nor change an alleged joint cause of action into a separable controversy for the purpose of removal. The case cannot be removed unless it is one which presents a separable controversy wholly between citizens of different states. In determining this question the law looks to the case made in the pleadings, and determines whether the state courts shall be required to surrender its jurisdiction to the Federal Courts." *Southern Railway Co. v. Lloyd,* 239 U. S., 496.

In *Crisp v. Fibre Co.,* 193 N. C., 77, at p. 85, it is said: "The facts alleged in the petition for removal neither compel nor point unerringly to the conclusion that the joinder in the instant case is a fraudulent one and made without right. We hold, therefore: (1) That when a motion to remove a suit or action from the state court to the District Court of the United States for trial is made on the ground of an alleged separable

controversy, the question of separability is to be determined by the manner in which the plaintiff has elected to state his cause of action, whether separately or jointly, and, for this purpose, the allegations of the complaint are controlling. *Morganton v. Hutton,* 187 N. C., 736. (2) That when the motion to remove is made on the ground of an alleged fraudulent joinder, the petitioner is entitled to have the state court decide the question on the face of the record, taking, for this purpose, the allegations of the petition to be true. To warrant a removal in such case, however, the facts alleged in the petition must lead unerringly to the conclusion, or rightly engender and compel the conclusion, as a matter of law, aside from the deductions of the pleader, that the joinder is a fraudulent one in law and made without right. *Fore v. Tanning Co.,* 175 N. C., 584." *Cowart v. Suncrest Lumber Co.,* 194 N. C., 787; *Hurt v. Mfg. Co.,* 198 N. C., 1.

The cases cited by the Southern Railway Company of *Johnson v. Lumber Co.,* 189 N. C., 81, and *Cox v. Lumber Co.,* 193 N. C., 28, are distinguishable from the present action. We think the entire complaint as to J. P. Stanton, construed liberally, shows that he at the time of plaintiff's testator's death was on duty, as required by the ordinance and his employment by the railroad company, but not actually at the crossing where he, in the exercise of due care, was required to be, and a cause of action is stated against him.

For the reasons given, the demurrer of J. P. Stanton cannot be sustained. On the record, for the reasons given, the judgment of the court below is

Affirmed.

MRS. KATE L. JENKINS v. A. G. MYERS, RECEIVER OF TEXTILES, INC.

(Filed 22 January, 1936.)

1. Contracts B e—

Whether conditions of a contract are conditions concurrent, precedent, or subsequent, divisible or entire, must be determined from the intent of the parties as expressed in the instrument.

2. Cancellation and Rescission of Instruments A e—

A contract may be rescinded for breach of condition precedent constituting an integral part of the consideration of an entire and indivisible contract.

3. Same—

A contract may not be rescinded for breach of a condition precedent unless the breach is material or substantial.

4. Same—Evidence held to show substantial performance of condition precedent, and plaintiff was not entitled to rescission.

The uncontradicted evidence tended to show that plaintiff agreed with defendant company to exchange her stock in a certain company for stock of defendant company in order that defendant company might obtain control of such other company, and that at the time of the transfer defendant company represented that with the acquisition of plaintiff's stock defendant company would have fifty-one per cent of the stock of such other company, that at the time of the transfer defendant company did not have fifty-one per cent of the stock of such other company, but had stock and executory contracts for the transfer of stock sufficient to equal this amount, and that about one month after the transfer of the stock by plaintiff, defendant company actually took control of such other company, which control was made definite and certain by the later acquisition of stock under its executory contracts. *Held:* As to plaintiff having knowledge of the situation, the breach by defendant company of its representation that it would acquire fifty-one per cent of the stock of such other company upon the acquisition of plaintiff's stock, was not such a substantial breach as to entitle plaintiff to rescind the contract, since the objective of acquiring control of such other company by defendant company was actually accomplished, and plaintiff was in the same position she would have occupied if the condition had been strictly performed.

APPEAL by defendant from *Alley, J.*, at July Term, 1935, of GASTON.

Plaintiff instituted this action on 3 October, 1934, to rescind contract for the exchange of 300 shares of stock in Flint Manufacturing Company for that of certain shares in Textiles, Inc.

In her complaint she alleges (substantially) that on 2 June, 1931, the directors of Textiles, Inc., by resolution, adopted a plan to acquire all or part of the outstanding capital stock of six named cotton manufacturing corporations (including the Flint Manufacturing Company), by exchange, in certain proportions, of shares of Textiles, Inc., for those of the corporations named; that the plan provided Textiles, Inc., would not acquire any part of the stock of any one of said corporations unless it acquired a majority of the voting stock in such corporation; that the plaintiff, then the owner of 300 shares of the common stock of Flint Manufacturing Company, was approached by Textiles, Inc., for the purpose of procuring her exchange of said 300 shares in accordance with the plan; that Textiles, Inc., through its "duly authorized agent, represented and agreed pursuant to the aforementioned resolution that if plaintiff would transfer her 300 shares in Flint Manufacturing Company to Textiles, Inc., in exchange for stock in Textiles, Inc., as provided in resolution, then Textiles, Inc., would have already acquired, or would at once, and as an integral part of the consideration for the transaction, acquire sufficient shares of stock of Flint Manufacturing Company, including shares to be transferred by plaintiff, to amount to 51 per cent of stock of Flint Manufacturing Company, and thus enable

Textiles, Inc., to control Flint Manufacturing Company." That relying upon said representation and agreement, and with distinct understanding that it was a material, integral, and essential part of the consideration for the transaction that additional stock of Flint Manufacturing Company had been or would immediately be acquired, so that Textiles, Inc., would own at least 51 per cent of the stock, plaintiff, on 15 October, 1931, transferred 300 shares of stock in Flint Manufacturing Company and received therefor a total of 3,374 shares of different classes of stock in Textiles, Inc.

That Textiles, Inc., did not perform its said contract in that it failed to acquire sufficient additional stock to give it ownership of 51 per cent thereof, and thereby defeated a substantial object of the contract; that the acquisition of 51 per cent of stock of Flint Manufacturing Company was an integral part of the consideration for the exchange; that the consideration was entire and indivisible, and failure to obtain and acquire at least 51 per cent of said stock goes to root and essence of the contractual agreement, and is a substantial failure of the consideration upon which the agreement was made; that plaintiff has offered to return, and is still ready, able, and willing to return the shares of stock in Textiles, Inc., and restore the *status quo;* that the stock of Textiles, Inc., is worthless, and she prays that the contract between her and Textiles, Inc., be declared null and void, and that the 300 shares of Flint Manufacturing Company be restored to her.

The defendant in his answer admits the plan for exchange of shares of stock as alleged, and that plaintiff transferred her 300 shares in Flint Manufacturing Company for certain shares in Textiles, Inc., but denies the other allegations with respect thereto; admits plaintiff's offer to return the stock, but denies the shares of stock in Textiles, Inc., are worthless, and avers the shares received by plaintiff are worth more than the 300 shares of Flint Manufacturing Company.

J. H. Separk, a witness for the plaintiff, testified in substance that he was active vice-president and director of Textiles, Inc., and that he was also secretary-treasurer of Flint Manufacturing Company. That as an officer and director of Textiles, Inc., he approached plaintiff for the purpose of securing transfer of her stock in Flint Manufacturing Company and had several conversations with her about it; that she did not agree at first, but in the last conversation she decided she had made up her mind to transfer her stock; that he assumed she thoroughly understood it; that a letter had been sent out setting forth the facts, and plaintiff had received one; that he told her that if they acquired that block of her stock they would then have a majority of the voting stock. Textiles, Inc., did not acquire a majority of the voting stock of Flint Manufacturing Company, but they had agreements to transfer a ma-

jority thereof; that after the acquisition of plaintiff's stock, Textiles, Inc., had a majority of the voting stock of Flint Manufacturing Company if the stockholders of Flint Manufacturing Company, who had agreed to exchange their stock for Textiles, Inc., carried through the exchange; that plaintiff's block of stock, together with the agreements they had, constituted more than a majority of the stock; that assuming these agreements to be legal, binding, and enforceable, he was honest in the thought that these, together with plaintiff's stock, would make 51 per cent; that he attended the stockholders' meeting of Flint Manufacturing Company in 1931, 1932, and 1933, after Textiles, Inc., took charge; that plaintiff was present at at least two of these meetings; that his impression was that Textiles, Inc., voted her 300 shares of stock at all these meetings.

F. C. Roberts, witness for plaintiff, testified that he was secretary and treasurer of Textiles, Inc., and also secretary and assistant treasurer of Flint Manufacturing Company. There were 6,798 shares of voting stock in Flint. On 15 October, 1931, Textiles, Inc., did not have actually transferred a majority of the voting stock of Flint. Only 3,184 shares had been actually transferred on the books, and it would require 3,400 shares to constitute a majority. On said date Textiles, Inc., did have a majority of the voting stock of Flint, if the executed agreements to transfer stock be counted as well as stock actually transferred. These agreements were both signed and witnessed. Textiles, Inc., now owns a majority of the shares of voting stock of Flint Manufacturing Company, and the same have been transferred on the books of the company. The additional shares were transferred since the institution of this suit. Plaintiff has been present at every stockholders' meeting of Flint Manufacturing Company that he had attended.

Plaintiff testified in her own behalf that the terms and conditions under which she agreed to make the exchange were that with the acquisition of her 300 shares of Flint stock, Textiles, Inc., would have 51 per cent of the voting shares of Flint—that was part of the agreement; that she would not have transferred her 300 shares if she had known they had not acquired, with her stock, the majority of the stock of Flint Manufacturing Company; that it was summer of 1933 she first learned Textiles had not acquired a majority of Flint stock. Receiver was appointed for Textiles in the summer of 1933. That she had received the letter from secretary of Flint Manufacturing Company about the proposed exchange of stock and had discussed it with Mr. Separk; that Mr. Separk told her they had enough stockholders of Flint signed up so that when they got her stock they would have 51 per cent; that she understood, of course, they would get this 51 per cent transferred; that she knew the stock was held by a number of people, and that these con-

sents to transfer were signed by a number of people, and that it was necessary to get her stock in order to make a majority; that Mr. Separk did not tell her with whom he had these contracts for transfer; that she probably attended the meeting of stockholders of Flint on 21 October, 1931, after she had transferred her stock. At that meeting Textiles, Inc., took charge of Flint; that her understanding when she went into the meeting was that they had acquired 51 per cent of voting power; that she attended meetings in October, 1932, and October, 1933; that she filed complaint in this suit on 20 October, 1934; that her delay in filing suit was due to a money consideration; that she was conferring with her lawyers, and it took her some time to make up her mind. That at stockholders' meeting in 1932, the stock was voted by Textiles, Inc., without objection; that she thought at the time they had 51 per cent.

Defendant offered in evidence circular letter sent out on 6 July, 1931, by secretary of Flint Manufacturing Company to all the stockholders of Flint (including plaintiff), stating the plan of Textiles, Inc., for exchange of stock, setting forth the advantages thereof in the effecting of economy in administration and distribution of products whereby increased profits might be derived, and recommending that it be accepted by the stockholders. Appended to the letter was a form for the execution of agreement to exchange Flint stock for stock in Textiles, Inc., on the basis proposed by Textiles, Inc., containing provision that such transfer was to be made when called for by Textiles, Inc., and when such exchange should be agreed to by at least 51 per cent of common stockholders of Flint Manufacturing Company.

Defendant's motions for nonsuit at close of plaintiff's evidence, and again at close of all the evidence, were overruled, and defendant, in apt time, excepted.

The following issues were submitted to the jury, who answered each of them "Yes."

1. "Did the plaintiff, in consideration of the transfer of her stock in Textiles, Incorporated, agree to transfer and deliver to said corporation 300 shares of stock in Flint Manufacturing Company upon the agreement, understanding, and condition that the said Textiles, Incorporated, had acquired, or would at once, as an integral part of said transaction, acquire sufficient shares of stock, with voting power, of Flint Manufacturing Company, including the shares to be transferred by the plaintiff, to amount to 51 per cent of the stock, with voting power, of Flint Manufacturing Company to enable Textiles, Incorporated, to control Flint Manufacturing Company, as alleged in the complaint?"

2. "Did the plaintiff perform said contract on her part by the transfer and delivery of said 300 shares of stock to Textiles, Incorporated, as alleged in the complaint?"

3. "Did Textiles, Incorporated, fail to have or at once acquire the amount of stock called for by said contract, as alleged in the complaint?"

From judgment on the verdict requiring defendant to return and restore 300 shares of capital stock of Flint Manufacturing Company to the plaintiff, defendant appealed.

P. W. Garland and Tillett, Tillett & Kennedy for plaintiff.
Geo. B. Mason and Ryburn & Hoey for defendant.

DEVIN, J. Plaintiff bases her action for rescission of the executed contract for the exchange of her 300 shares of the common stock of the Flint Manufacturing Company for certain shares of Textiles, Inc., upon the ground that her agreement to do so was dependent upon a condition precedent that Textiles, Inc., had (with plaintiff's stock), or would at once acquire, a majority of the voting stock of Flint Manufacturing Company, and that but for the representation to this effect on the part of Textiles, Inc., she would not have made the exchange, and that upon breach of this condition precedent she is now entitled to rescind the contract and to have her 300 shares in Flint Manufacturing Company restored to her.

Plaintiff's counsel contend in their elaborate and well arranged brief that the representation as to ownership of a majority of the stock of Flint Manufacturing Company was material and important, and constituted an integral part of the transaction, and was a condition precedent, breach of which would entitle plaintiff to a rescission of the contract to exchange the shares of stock. As illustrating and supporting this proposition, they cite the case of *Meinershagen v. Taylor,* 154 S. W., 886 (Mo.).

In that case shares of stock were purchased on the express agreement that those who formerly controlled the company should not be connected with its reorganization, and upon breach of that condition restoration of the *status quo* was sought. The court, however, while recognizing the right to rescind under circumstances properly calling for the application of the principle, denied it to the plaintiff in that case because he had failed to promptly repudiate the contract after knowledge of the facts.

There is authority for the position that while a breach of a condition or covenant in a contract is ordinarily not sufficient reason for its rescission in equity in the absence of fraud, mistake, or some other independent ground of equitable relief, there is a distinction between dependent and independent covenants, a dependent covenant being one which goes to the whole consideration of the contract, breach of which would give the injured party the right to rescind. Black on Rescission and Cancellation, sec. 212.

And in *Huggins v. Daley,* 48 L. R. A., 320, cited by plaintiff, we find the following language: "Where the undertaking on one side is, in terms, a condition to the stipulation on the other (that is, where the contract provides for the performance of some act or the happening of some event, and the obligations of the contract are made to depend on such performance or happening), the conditions are conditions precedent. . . . The nonperformance on one side must go to the entire substance of the contract and to the whole consideration, so that it may safely be inferred as the intent and just construction of the contract that, if the act to be performed on the one side is not done, there is no consideration for the stipulation on the other side." Citing *New Orleans v. Texas & P. R. Co.,* 171 U. S., 334.

In Black on Rescission and Cancellation, sec. 213, it is stated: "The true rule appears to be that rescission or cancellation may properly be ordered where that which was undertaken to be performed in the future was so essential a part of the bargain that the failure of it must be considered as destroying or vitiating the entire consideration of the contract, or so indispensable a part of what the parties intended that the contract would not have been made with that condition omitted."

However, as stated by *Mr. Justice Clarkson* in *Wade v. Lutterloh,* 196 N. C., 116, "Whether covenants are dependent or independent, and whether they are concurrent on the one hand or precedent and subsequent on the other, depends entirely upon the intention of the parties shown by the entire contract as construed in the light of the circumstances of the case, the nature of the contract, the relation of the parties thereto, and other evidence which is admissible to aid the court in determining the intention of the parties." Citing Page on Contracts, Vol. 5 (2 Ed.), sec. 2948; *Edgerton v. Taylor,* 184 N. C., 571.

But we do not think the evidence in the instant case is such as to call for the application of these principles or to entitle the plaintiff to rescission.

The facts in the case are in no material respect controverted. The plaintiff's evidence is uncontradicted. And from this it appears, as disclosed by the record before us, that plaintiff agreed to exchange and did exchange her 300 shares of stock in the Flint Company for certain shares of Textiles, Inc., and she did so upon the representation that with the acquisition of her shares, Textiles, Inc., would have 51 per cent of the voting stock of the Flint Company. She testified: "In conversation with Mr. Separk he told me that they had enough people signed up so that when they got my stock they would have 51 per cent. I understood, of course, that they would get this 51 per cent transferred. I knew that the stock was held by a number of people and that these consents to transfer were signed by a number of people, and that it was necessary

to get mine in order to make a majority." In her complaint she alleged that Textiles, Inc., represented if plaintiff would transfer her 300 shares of stock in the Flint Company, it would have already acquired or would at once acquire sufficient shares of the stock to amount to 51 per cent, "and thus enable Textiles, Inc., to control Flint Manufacturing Company."

The record further discloses that plaintiff made the exchange of her shares of stock on 15 October, 1931, and that on 21 October, 1931, Textiles, Inc., took control and management of Flint Manufacturing Company, and has since continued to exercise control thereof. It was in control, through its receiver, when this suit was instituted, and its control had not been at any time disturbed or threatened.

This control has now been made definitely legal and irrevocable by the actual transfer of the shares of stock which were represented by the agreements to transfer held by Textiles, Inc., at the time plaintiff exchanged her shares.

So that, it is apparent the plaintiff is in substantially the same situation she would have been had Textiles, Inc., on 15 October, 1931, had a majority of the voting stock of Flint Manufacturing Company actually transferred on the stock books of that corporation to its name, instead of holding agreements to transfer, for the ultimate purpose contemplated, to wit, the control of Flint Manufacturing Company by Textiles, Inc., became an accomplished fact on 21 October, 1931. And this was followed by subsequent actual transfer of the stock represented by the agreements to Textiles, Inc.

While the possession by Textiles, Inc., of agreements to transfer the stock when called for might not be held to constitute a strict compliance with the representation that it had "acquired" the stock, as these were but executory contracts to exchange the shares, and might not have been good against the *prima facie* title of an assignee of the certificate, or against a subsequent purchaser for value, without notice, who received transfer of stock by delivery of certificate with assignment properly endorsed thereon (*Castelloe v. Jenkins,* 186 N. C., 166); yet, according to her testimony, she understood the situation, and knew that Textiles, Inc., was thus enabled to take and exercise full control over the Flint Manufacturing Company, and that it did so, accomplishing the very purpose contemplated by the exchange of shares.

"The general rule is that rescission will not be permitted for slight or incidental breaches of the contract, but only for such as are material or substantial. *Highway Commission v. Rand,* 195 N. C., 799; *Ice Co. v. Construction Co.,* 194 N. C., 407; *Moss v. Knitting Mills,* 190 N. C., 644.

Though it be conceded the representation as to the acquisition of a majority of the capital stock of Flint Manufacturing Company was a condition precedent to plaintiff's agreement to exchange her shares of stock, and that this was a material and integral part of the consideration, upon the record before us, we reach the conclusion that there has been a substantial compliance with the representation on the part of Textiles, Inc., and that plaintiff has not been disadvantaged or injured by the asserted breach of such covenant.

It does not affirmatively appear in the evidence that plaintiff has suffered loss by the exchange of her 300 shares of Flint Manufacturing Company stock, but presuming that she has, she is in the same case with a majority of the Flint Company stockholders whose action in making the exchange may have been proven by later events to have been unwise, and for a situation thus caused the courts can afford no legal redress.

For the reasons stated, the defendant was entitled to have his motion for nonsuit allowed.

Reversed.

STATE OF NORTH CAROLINA EX REL. THE ATTORNEY-GENERAL v. HARRY A. GORSON.

(Filed 22 January, 1936.)

1. Attorney and Client E b—Supreme Court has the power to disbar attorneys.

The Supreme Court has the power to revoke a license, issued by it, entitling the licensee to practice law in this State, on the ground that its issuance was procured by fraudulent concealment or by a false representation of a fact material to its issuance.

2. Attorney and Client E a—Concealment of disbarment by another state and false statement of time of study in this State is sufficient for disbarment.

The record in this proceeding disclosed that respondent, at the time of application for license to practice law, concealed from the Supreme Court giving the examination the fact that respondent had been disbarred by the courts of another state for unprofessional conduct, and that he falsely represented to the Supreme Court that he had studied law in this State for a period of two years and had thereby qualified himself to take the examination. *Held:* The fraudulent concealment of the fact of prior disbarment and the false and fraudulent misrepresentation of a fact material to the issuance of the license are sufficient grounds for the revocation of the license by the Supreme Court.

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

THIS proceeding for the revocation of the license issued by the Supreme Court of North Carolina to Harry A. Gorson to practice law in

the courts of this State, and for the disbarment of the said Harry A. Gorson, was begun by a motion in writing filed in the Supreme Court by the Attorney-General of North Carolina.

Pursuant to said motion, notice was issued and served on the said Harry A. Gorson, as respondent in this proceeding, ordering him to show cause, if any he had, why the said license should not be revoked, and why he should not be disbarred for the reasons set out in said motion.

In response to said notice, the respondent Harry A. Gorson appeared in the Supreme Court and moved in writing that the proceeding be dismissed; and, upon denial of his said motion, the said respondent Harry A. Gorson filed an answer to the motion of the Attorney-General, by which he raised certain issues of fact, and set up certain matters in defense to said motion.

It was thereupon ordered by the Supreme Court that the proceeding be and the same was referred to a committee composed of three members of the bar of said Court, to wit: Hon. E. Frank Watson, of Burnsville, N. C.; Hon. W. R. Chambers, of Marion, N. C.; and Hon. S. J. Ervin, Jr., of Morganton, N. C., with the request that said committee, after notice to the Attorney-General and to the respondent Harry A. Gorson, hear evidence pertinent to the issue involved in the proceeding, and report its findings of fact to the Supreme Court, together with its recommendations as to the action of the Court in the premises.

Thereafter, on 12 April, 1935, the committee filed a report of its action in the Supreme Court. The report is substantially as follows:

"Pursuant to the order of the Supreme Court of North Carolina, signed by the Hon. Michael Schenck, Associate Justice, and dated 13 December, 1934, we, the undersigned members of the bar of the said Supreme Court, composing the committee to which this proceeding was referred by the said court, met in the city of Asheville, N. C., on 24 January, 1935, for the consideration of the matters referred to us in said order.

"At said meeting, we heard the testimony of divers and sundry witnesses, whose evidence is found in the record. At said meeting, the Hon. T. W. Bruton, Assistant Attorney-General, was present, representing the Attorney-General of North Carolina; the Hon. J. Will Pless, Sr., was present, representing the respondent Harry A. Gorson.

"The committee finds the following facts:

"1. The respondent Harry A. Gorson attended the law school at Temple University, in Philadelphia, in the State of Pennsylvania, for three years, and graduated therefrom in 1916, with the degree of LL.B.; he was thereafter duly licensed to practice law in the State of Pennsylvania, and began the practice of law in the city of Philadelphia, in 1918.

He thereafter practiced law in the courts of the State of Pennsylvania until he was disbarred in 1929, as hereinafter set forth.

"2. The respondent Harry A. Gorson was disbarred by a judgment and order of the Court of Common Pleas, Number Two, of Philadelphia County, in the State of Pennsylvania, on 29 January, 1929, and by an order of the Supreme Court of Pennsylvania on 2 May, 1929, as set forth on pages 12 and 13 of the motion herein filed by the Attorney-General of North Carolina. Said orders of disbarment were duly entered in a disbarment proceeding duly conducted against the respondent in the courts of the State of Pennsylvania, and were based on findings of fact as set forth on pages 5 to 12 of the motion in this proceeding. The respondent was given due notice of said proceeding and entered a general appearance therein, in person and by counsel.

"3. The respondent did not practice law or engage in any business whatever from the date of his disbarment in the State of Pennsylvania until his admission to the bar of the State of North Carolina, as hereinafter stated. The respondent continued to reside in the State of Pennsylvania until the early part of 1932, when he went to the State of Florida, where he remained for a few months. He moved from the State of Florida to the city of Asheville, in the State of North Carolina, in the early part of 1933.

"4. On 21 August, 1933, the respondent successfully passed the examination given by the Chief Justice and Associate Justices of the Supreme Court to applicants for license to practice law in the State of North Carolina, in accordance with the Rules of said Court, and was thereafter granted license by the Supreme Court of North Carolina to practice as an attorney and counselor at law in the courts of the State of North Carolina.

"5. Prior to passing said examination, and obtaining license to practice law in the State of North Carolina, the respondent filed in the Supreme Court of North Carolina a certificate of his good moral character, signed by Worth McKinney and O. K. Bennett, members of the bar of said court residing at Asheville, N. C., in which they certified that the said Harry A. Gorson was then well known to them, and that he was then of good moral character. At the time of the filing of said certificate the said Worth McKinney and the said O. K. Bennett had known the respondent for from five to eight months.

"The respondent also filed in the Supreme Court of North Carolina a certificate signed by Claud L. Love, director of the Asheville University Law School, of Asheville, N. C., in which the said Claud L. Love certified that Harry A. Gorson had studied law for two years in the Asheville University Law School. The said certificate was untrue, for that the respondent had in fact attended the Asheville University Law School for only about two months.

"Both the said certificates were filed by the respondent as a compliance with the Rules of the Supreme Court of North Carolina, in force during the year 1933.

"6. When the respondent applied to Claud L. Love, director of the Asheville University Law School, for the proficiency certificate required by the Rules of the Supreme Court of North Carolina, as a condition precedent to his examination as an applicant for license to practice law in the courts of the State of North Carolina, he informed the said director that he was a graduate of the Law School of Temple University, in the State of Pennsylvania, and had been licensed to practice law in said state, but was unable to obtain license to practice law in the State of North Carolina, under the Comity Act, for the reason that he had not practiced law in the State of Pennsylvania for five years. The respondent concealed from said director the fact that he had been disbarred by the courts of the State of Pennsylvania, as hereinbefore set out. By means of the said false statement to the effect that he had not practiced law in the State of Pennsylvania for five years, and by means of his concealment of the fact that he had been disbarred in said state, the respondent procured the certificate from the director of the Asheville University Law School, at Asheville, N. C., which he filed with the Supreme Court of North Carolina.

"7. By filing in the Supreme Court of North Carolina the certificate signed by Claud L. Love, director of the Asheville University Law School, in which it was falsely stated that the respondent had studied law in said law school for two years, the respondent Harry A. Gorson practiced a fraud on the Supreme Court of North Carolina, and on the Chief Justice and Associate Justices of said Court, and thereby obtained the privilege of standing the examination conducted by the said Chief Justice and Associate Justices of applicants for license to practice law in the State of North Carolina, on 21 August, 1933.

"8. At the time of his examination by the Chief Justice and Associate Justices of the Supreme Court, the respondent did not disclose to the said Chief Justice and Associate Justices, or to the Supreme Court, either directly or indirectly, that he had been disbarred by the courts of the State of Pennsylvania. No questions were asked the respondent prior to or on his examination as to whether he had been previously licensed to practice law in or been disbarred by the courts of any state other than the State of North Carolina.

"9. Shortly after receiving his license to practice law in the courts of the State of North Carolina in 1933, the respondent began to practice as an attorney and counselor at law in the courts of this State, at Asheville, N. C., and has since continued to practice. While there was evidence from reputable members of the bar of Asheville tending to

show that his professional conduct in Asheville has been under suspicion, there was no competent evidence offered to the committee to justify a finding that the respondent has been guilty of unprofessional conduct during his practice at Asheville.

"The members of the committee are not agreed as to whether or not the respondent practiced a fraud on the Supreme Court of North Carolina or on the Chief Justice and Associate Justices of said Court, by failing to disclose to said Court or to the said Chief Justice and Associate Justices the fact that prior to his application for license to practice law in the State of North Carolina, he had been disbarred by the courts of the State of Pennsylvania, a majority of the committee, namely, two members thereof, being of the opinion that the respondent was under the duty to disclose such fact, and that its concealment amounted to fraud, and a minority, namely, one member thereof, being of the opinion that there was no duty upon the respondent to disclose said fact, and that therefore the failure to disclose the fact of his disbarment does not constitute fraud.

"On the facts found by the committee and set out in this report, the committee concludes that the respondent Harry A. Gorson is not a suitable person to practice law in the State of North Carolina, and therefore recommends that the license issued heretofore to him by the Supreme Court of North Carolina to practice as an attorney and counselor at law in the courts of this State, be revoked, that he be disbarred, and that his name be stricken from the roll of attorneys in the Supreme Court and other courts of this State.

"The committee makes the foregoing recommendations, unanimously, on the ground that the committee is of the unanimous opinion that the defendant Harry A. Gorson practiced a fraud on the Supreme Court of North Carolina, and on the Chief Justice and Associate Justices of said Court, which resulted in his securing his license to practice law in the State of North Carolina, when he filed with said Court, as a compliance with its rules, his proficiency certificate containing a false and fraudulent statement to the effect that he had studied law in the Asheville University Law School for two years.

"The majority of the committee is also of the opinion that the respondent Harry A. Gorson further practiced a fraud on the Supreme Court of North Carolina, which resulted in his procuring his license, when he failed to disclose to said Court, or to the Chief Justice and Associate Justices of said Court, prior to his examination, the fact that he had been disbarred by the courts of the State of Pennsylvania.

"A minority of the committee, namely, the third member thereof, is of the opinion that the only fraud practiced upon the Supreme Court of North Carolina by the respondent was the filing of the false proficiency

certificate as found by the committee, the said third member of the committee being of the opinion that there was no duty on the part of the respondent to disclose to the Supreme Court of North Carolina, or to the Chief Justice and Associate Justices of said Court, the fact of his previous disbarment by the courts of the State of Pennsylvania.

"This 12 April, 1935.

E. F. WATSON,
W. R. CHAMBERS,
S. J. ERVIN, JR."

After the report of the committee had been filed in the Supreme Court, and while it was pending in said Court, the respondent requested the Court to allow him the privilege of presenting oral arguments in support of his contention that the Court should not approve the findings of fact contained in the report, or act in accordance with the recommendations of the committee, and that on all the facts shown by the record the Court should deny the motion of the Attorney-General that his license be revoked, and that he be disbarred, and should dismiss the proceeding.

This request was granted, and thereafter the proceeding was heard on oral arguments and printed briefs by counsel for the Attorney-General and for the respondent.

Attorney-General Seawell and Assistant Attorneys-General Aiken and Bruton for the relator.

J. Will Pless for respondent.

CONNOR, J. Two questions manifestly of grave importance to the people of this State as well as to the members of the bar of this State are presented by the record in this proceeding:

1. Has this Court the power to revoke a license to practice law in this State which this Court has issued under statutory authority and in accordance with its Rules, on the ground:

(a) That at the time he applied for the license the licensee fraudulently concealed from this Court the fact that he had been disbarred by the courts of another state in which he had been duly licensed to practice law, on the finding by the courts of said State that the applicant had been guilty of unprofessional conduct in his relations to his clients involving moral turpitude; or,

(b) That at the time he applied for the license the licensee falsely and fraudulently represented to this Court that he had studied law in a law school in this State for two years, and had thereby qualified himself to take the examination by the Chief Justice and Associate Justices of this Court, as prescribed by statutes and Rules of this Court in force at the time of his application for the license?

2. If this Court has the power to revoke the license on either ground, ought the power to be exercised by the Court on the facts found by the committee of the bar, and approved by the Court in the instant case?

We are of opinion, and so hold, that both questions must be answered in the affirmative. This Court has the inherent power to revoke a license to practice law in this State, where such license was issued by this Court, and its issuance was procured by the fraudulent concealment, or by the false and fraudulent representation by the applicant of a fact which was manifestly material to the issuance of the license. In proper cases, it is the duty of this Court, and this Court will always exercise this power and thereby assure the people of this State and the members of the bar, that licensees who have fraudulently obtained the privilege of practicing law in this State shall not enjoy such privilege when the fraud has been disclosed to this Court, as in the instant case.

It is therefore ordered that the license to practice law in this State which was issued by this Court to the respondent Harry A. Gorson on 21 August, 1933, be and the same is hereby revoked, that said license be surrendered by the said Harry A. Gorson, upon demand, to the clerk of this Court for cancellation, and that the name of the said Harry A. Gorson be stricken from the roll of licensed attorneys and counselors at law of this State.

The motion of the Attorney-General in this proceeding is
Allowed.

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

J. E. ETHERIDGE v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 22 January, 1936.)

1. Master and Servant E c—Whether more than reasonable time elapsed between promise to furnish goggles and injury held for jury.

The evidence disclosed that plaintiff employee, while engaged in scraping rust from a bridge in the performance of his duties in interstate commerce, was injured when a piece of rust flew in his eye, that plaintiff understood the hazards of the work, and some two weeks before the injury had asked his foreman to furnish him goggles for the work, and that the foreman had promised to do so as soon as possible. *Held:* Whether more than a reasonable time elapsed between the promise and the injury and whether the work was so intrinsically dangerous and injury so imminent that a reasonably prudent man would not have relied upon the promise and continued in the employment are questions for the jury under the evidence, the rule being that an employee may rely upon such promise for a reasonable time if the danger is not so imminent that

that a reasonably prudent man would not rely thereon, and that during such time the employer impliedly agrees to assume the risk, and that what is a reasonable time under the circumstances is ordinarily a question for the jury.

2. Same—

Under the Federal rule, assumption of risk is a complete bar to recovery by an employee under the Employers' Liability Act.

3. Same—Where employer promises to remedy defect, it is competent to ask employee whether he relied on promise.

Plaintiff employee testified that, aware of the danger inherent in the work of scraping rust from a bridge preparatory to painting it, he asked his foreman for goggles, and that the foreman promised to furnish same as soon as possible, that he resumed work and was injured about two weeks thereafter when a piece of rust flew in his eye. On cross-examination plaintiff employee was asked whether he thought he would get the goggles and plaintiff's objection to the question was sustained, and defendant excepted. *Held:* Defendant's exception must be sustained, the question being competent on the issue of whether plaintiff employee continued to work in reliance on the promise to furnish goggles.

4. Appeal and Error J e—Record need not show what testimony would have been when question is asked adversary witness on cross-examination.

The general rule that the record must show what the answer or testimony of a witness would have been in order for an exception to the exclusion of the testimony to be considered on appeal, does not apply where the question is asked on cross-examination of an adversary and hostile witness.

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

STACY, C. J., concurs.

APPEAL by defendant from *Small, J.*, and a jury, at November Term, 1934, of HALIFAX. New trial.

This is an action for actionable negligence, brought by plaintiff against defendant, alleging damage. The complaint is as follows:

"That the defendant is and was at the times herein complained of a corporation duly chartered according to law and operating a railroad through the State of North Carolina.

"That on 12 February, 1931, the plaintiff was in the employment of the defendant as a painter and on said day was, as directed by his foreman, preparing a bridge over Black Creek, near Castle Hayne, N. C., to paint the same.

"That while engaged in scraping the rust from said bridge of defendant, a piece of rust flew from said bridge into the left eye of plaintiff and put the same out.

"That it was the duty of the defendant in the exercise of ordinary care to furnish the plaintiff with goggles to protect his eyes from flying rust

when the same was scraped from the iron or steel surface of the bridge preparatory to painting.

"That the plaintiff requested the defendant to furnish him with goggles to protect his eyes against rusty steel chips, and the defendant promised to furnish them.

"That the plaintiff continued to work for the defendant, relying upon the promise of his superior to furnish him with goggles.

"That it was dangerous, as was well known to the defendant, to scrape the rust from the iron or steel without the aid of goggles.

"That the plaintiff, by reason of the negligence above set out, completely lost his left eye and suffered on account of the injury received great physical and mental pain, and has been permanently damaged thereby.

"That the plaintiff, by reason of the negligence of the defendant as herein set out, has been damaged a large amount, to wit: The sum of $5,000.

"Wherefore, plaintiff demands judgment of the defendant for the sum of $5,000, and costs."

In its answer the defendant denies the material allegations of the complaint, and alleges: "That, at the time of the matters and things alleged in the complaint, plaintiff and defendant were both engaged in interstate commerce."

The defendant, further answering, alleges: "That the bridge, which plaintiff declares he was engaged in scraping for the purpose of repainting, is on defendant company's main line between Wilmington, N. C., and Richmond, Va., and is daily used in interstate carriage of freight and passengers on trains operating between Wilmington, N. C., and Richmond, Va. That plaintiff and defendant were, therefore, each and both engaged in interstate commerce at the time of the alleged injury and hurt. That plaintiff was an experienced bridge painter and perfectly familiar with the various duties and requirements of his job, especially with the need of scraping or removing rust from iron or steel structures before painting them. That, in hiring himself to or taking employment with the defendant as a bridge painter he assumed all the usual and ordinary risks incident to his employment, of which the matter complained of was one. Defendant alleges that it has not violated any statute enacted for the safety of its said employee that in any wise contributed to the plaintiff's alleged injury, and pleads the plaintiff's assumption of risk in bar of his recovery herein. Wherefore, defendant prays judgment that it be allowed to go hence without day and have of the plaintiff its cost."

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

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

"2. Did the plaintiff assume the risk of his injury? Answer: 'No.'

"3. What damages, if any, is plaintiff entitled to recover from the defendant? Answer: '$4,500.'

"4. Were plaintiff and defendant engaged in interstate commerce at the time of the injury complained of in the complaint? Answer: 'Yes.'"

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

J. T. Maddrey and George C. Green for plaintiff.

Thos. W. Davis, Spruill & Spruill, and V. E. Phelps for defendant.

CLARKSON, J. This case has heretofore been before this Court—*Etheridge v. R. R.*, 206 N. C., 657. *Brogden, J.*, speaking for the Court, at p. 659, said: "What duty does the law impose upon an employer with respect to furnishing particular tools or appliances to a workman in performing particular types of work? . . . This case is built upon the theory that it was the duty of the defendant in the exercise of ordinary care to furnish goggles to the plaintiff. The leading goggle cases in this State are: *Whitt v. Rand,* 187 N. C., 805, 123 S. E., 84; *Jefferson v. Raleigh,* 194 N. C., 479, 140 S. E., 76." A new trial was granted on the ground (pp. 659-670): "The second question of law involved presents the familiar principle of the competency of evidence of similar injuries or occurrences. . . . The testimony of witness Keeter discloses neither the substantial identity of circumstances nor proximity of time which the law contemplates, and consequently such testimony should have been excluded."

There was evidence by the plaintiff that about two weeks before his injury he asked the foreman for goggles and was promised that he would get them as soon as he could. The plaintiff was corroborated by a fellow worker. The foreman, T. E. Thompson, testifying for the defendant, denied making any such promise, but stated, "If Etheridge had had these goggles at the time the steel particle or rust flew in his eye I do not suppose it could have gotten in his eye." The evidence was conflicting, but sufficient to go to the jury, unless the plaintiff assumed the risk of injury in a hazardous employment. The rule under the Federal Liability Act has been well stated in *Seaboard v. Horton,* 233 U. S., 492 (504-505) (which was quoted by the learned judge below in his charge to the jury), as follows: "When the employee does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment, without objection, or without obtaining

from the employer or his representative an assurance that the defect will be remedied, the employee assumes the risk, even though it arise out of the master's breach of duty. If, however, there is a promise of reparation, then during such time as may be reasonably required for its performance or until the particular time specified for its performance, the employee relying upon the promise does not assume the risk, unless at least the danger be so imminent that no ordinarily prudent man under the circumstances would rely upon such a promise."

It was for the jury to say whether or not there was a promise made by the defendant and relied upon by the plaintiff, and if so, whether or not the time specified by the plaintiff as "around two weeks before I got hurt" was so remote as to take it out of the classification of a "reasonable time" for its performance, and if not, whether the nature of the plaintiff's work was of such a kind that no ordinarily prudent man would regard the danger as so imminent as to refuse to rely upon such a promise. The learned judge below amply and fully instructed the jury upon these points, presenting all phases of the questions involved. In a case strikingly similar in facts to this one (*Anderson v. Fielding* [Minn.], 99 N. W., 357), it was held that what is a reasonable time, in such a case, is, "as a general rule, a question of fact." The plaintiff in that case was engaged in painting a high bridge across the Mississippi, and his work required him to be suspended 160 feet above the water, and while so suspended he fell and sustained serious personal injury. It was in evidence that the plaintiff objected to the use of a single hook, without swivel or double hook to prevent the block from unhooking and falling, that thereupon the defendant's superintendent promised to furnish for his use a safe tackle and block with double hooks; that he relied upon such promise and proceeded to use with due care the block and hook so furnished, and continued to work for two weeks before his fall and injury from the defective appliance. The first promise was two weeks and repeated afterwards. It was held that a servant is not chargeable with the assumption of risk or with contributory negligence as a matter of law by continuing to use for a reasonable time a machine or appliance which he knows to be unsafe, and appreciates the risk of using it, where he has complained of it, and the master has promised to remedy the defect, unless the appreciated danger is so imminent that a man of ordinary prudence would refuse to longer use it unless it was made safe. In this case it was held that "A reasonable time within the meaning of this rule is any period which does not preclude all reasonable expectations that the promise may be kept." After reviewing the evidence, in the light of this rule, the Court continued: "We are of the opinion that whether the defendant continued to use the defective block and hook longer than a reasonable time, and whether the danger of

using it was so imminent that no man of ordinary prudence would continue to use it in reliance on the defendant's promise to remedy the defect, was, upon the evidence, not a question of law, but one of fact which was properly submitted to the jury."

While it is a maxim of English law that "how long a 'reasonable time' ought to be is not defined in law, but is left with the discretion of the judge" (Coke Litt. 50), this applies only where the facts are admitted, or clearly proved, and "Where the question of reasonable time is a debatable one, it must be referred to the jury for decision." *Hoke, J.*, in *Holden v. Royall,* 169 N. C., 676 (678), said: "And, in this State, authority is to the effect that, where this question of reasonable time is a debatable one, it must be referred to the jury for decision. *Claus v. Lee,* 140 N. C., 552; *Blalock v. Clark,* 137 N. C., p. 140;" *Colt v. Kimball,* 190 N. C., 169 (173-4); *Mason v. Andrews,* 192 N. C., 135, 137.

"Why is not the servant entitled to recover upon that ground, entirely irrespective of the ordinary issue of negligence? To an action upon breach of express contract, contributory negligence is no defense. If the master expressly promises to 'take all the risks,' the servant may recover upon this promise, no matter how obvious the risk may be." Shearman & Redfield on the Law of Negligence (6th Ed.), Vol. 1, sec. 215, p. 616.

As was said in *Swift v. O'Neill,* 187 Ill., 337, 58 N. E., 416 (417): "By the promise of the master a new relation is created between him and the employee whereby the master impliedly agrees that the servant shall not be held to have assumed the risk for a reasonable time following his promise." Again, it has been said in *Altman v. Schwab Mfg. Co.,* 104 N. Y. S., 349 (350): "The promise of the foreman to repair the machine, made to the plaintiff to induce him to continue work thereon, constituted a contract on the part of the employer to assume the risk, and relieved the servant therefrom."

It must be borne in mind that under the Federal rule the assumption of risk bars recovery. Plaintiff testified: "I asked Mr. Thompson, the foreman, for goggles when we were at Wallace, around two weeks before I got hurt. He said he would get them for me as soon as he could. I kept on working relying upon the promise that he would get the goggles. The accident to my eye could not have happened if I had had on goggles. Q. Was it dangerous to do the class of work you were instructed to do without the aid of goggles? Answer: Yes. By goggles I mean glasses substantially like the ones I have in my hand. With goggles of this type I could not have gotten the steel particle in my eye." Plaintiff's contention was that he was relying on this promise. On cross-examination of plaintiff, the record discloses he testified: "This case has been tried twice before. I disremember whether I testified in my cross-

examination before that I did not think I would get the goggles when I asked for them. It did not look like I was going to get them. Q. You did not think you would get them?" The plaintiff objected to this question. The court below sustained the objection, and defendant excepted and assigned error. We think this exception and assignment of error must be sustained.

If plaintiff did not think he would get the goggles it was some evidence for the jury to consider that he assumed the risk of the injury and could not recover of defendant. We think the exclusion prejudicial to defendant. To be sure it was on cross-examination, and defendant did not offer to show what plaintiff's answer would be.

In *State v. Martino,* 192 Pac., 507 (509) (N. Mex.), it is said: "It is further to be noted that this witness was asked this question upon cross-examination, and counsel for appellant were not charged with knowledge of what the answer of the witness would be. He was not appellant's witness. Counsel for appellant, therefore, would not be expected to be able to state to the court what the witness would answer. Under such circumstances the rule requiring a statement by counsel, advising the court of the nature of the testimony which witness would give, has no application. 3 C. J., Appeal and Error, secs. 736, 737."

Ordinarily, the general rule that the record must show what the answer or testimony would have been does not apply under the facts here disclosed. In 3 Corpus Juris, Title "Appeal and Error," sec. 737, p. 827, it is said: "Nor does the general rule apply to a question asked upon the cross-examination of a witness called by his adversary."

Upon examination, we have been unable to find in North Carolina, in applying the general rule, where the question was asked on cross-examination of an adversary and hostile witness. The decision in the *Martino case, supra,* seems to be the "logic of the situation."

For the reasons given, there must be a

New trial.

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

STACY, C. J., concurs that the judgment ought not to stand, and is further of opinion that upon the present record, which is different from the record on the first trial, the exception to the refusal to nonsuit should be sustained.

R. J. TUCKER v. G. F. ALMOND AND WIFE, LESTA ALMOND.

(Filed 22 January, 1936.)

1. Executors and Administrators D f: Judgments H a—Ordinarily, judgment against representative is not a lien on lands of estate.

A judgment against an executor or administrator in his representative capacity merely establishes the debt sued on and does not constitute a lien upon the lands of the estate, in the absence of a stipulation in the judgment to the contrary, until leave of court is granted for execution for failure of the representative to pay the ratable part of such judgment. N. C. Code, 131, 132, 166.

2. Deeds C h—Judgments against personal representative held not lien on lands in violation of warranty against encumbrances.

A warranty deed was not registered until several years after the death of the grantor, during which time several judgments were obtained against the personal representative of the grantor. The grantee in the deed sold same after the judgments had been docketed to a purchaser for value by warranty deed. The purchaser instituted this action against his grantor, contending that the judgments against the estate of the original grantor constituted a lien on the land in violation of the warranty against encumbrances. *Held:* Under the provisions of statutes, N. C. Code, 131, 132, 166, the judgments did not constitute a lien on the land in violation of the warranty against encumbrances.

APPEAL by defendants from *McElroy, J.,* at October Civil Term, 1935, of STANLY. Reversed.

This is a controversy without action, as follows:

"Pursuant to section 626 of North Carolina Consolidated Statutes, plaintiff and defendants respectively submit to the court the following agreed facts as a controversy without action, and pray an adjudication thereupon:

"1. That plaintiff and defendants are residents of Stanly County, North Carolina.

"2. That on 7 September, 1922, G. D. Troutman and wife, M. A. Troutman, sold to G. F. Almond the lands hereinafter described for $1,250, and the same date executed, acknowledged, and delivered to the said G. F. Almond a warranty deed to said land: 'It being lots Nos. 128-130-132 in "West End," in the suburb of the town of Albemarle, as shown by blue print made by E. M. Eutsler Engineering Company showing the subdivision No. 2 of the lands contained within the boundaries of a deed of conveyance made by R. L. Lowder and wife, O. B. Lowder, to George D. Troutman, under date of 1 May, 1920, as recorded in the register's office of Stanly County, in Book No. 62, on page 225, etc., said blue print or map being recorded in the office of the

register of deeds of Stanly County, in Book No. 1 of Maps or Plots, on page 225.'

"3. That G. D. Troutman died intestate on 19 April, 1928, and Mrs. M. A. Troutman duly qualified as administratrix of the estate of G. D. Troutman, deceased, on 21 April, 1928, as will appear by reference to Book of Administrators No. 2, page 73, in the office of the clerk of the Superior Court for Stanly County; that subsequently thereto, to wit, 19 January, 1929, D. S. Lippard duly qualified as administrator *de bonis non* of the estate of G. D. Troutman, deceased, as will appear from Book of Administrators No. 2, page 108, in the office of the clerk of the Superior Court for Stanly County.

"4. That on 20 July, 1928, the First National Bank of Albemarle obtained a judgment in the county court of Stanly County against W. H. Cranford, J. C. Bostain, T. R. Burleson, and Mrs. M. A. Troutman, administratrix of the estate of G. D. Troutman, deceased, for $337, together with interest thereon from 16 September, 1925, less a $40 credit as of 8 July, 1925, and the cost of the court, to wit, $16.70; that said judgment was docketed in the office of the clerk of the Superior Court for Stanly County on 20 July, 1928, in Judgment Book No. 6, page 69; that thereafter, to wit, 24 July, 1928, there was paid upon said judgment $122.01; that the balance of said judgment is now due and unpaid.

"5. That C. B. Crook obtained judgment against Mrs. M. A. Troutman, administratrix of the estate of G. D. Troutman, in the Superior Court for Stanly County at the October Term, 1928, of Superior Court for Stanly County, for $220, and interest from 1 September, 1926, and for the cost of the action, to wit, $29.85; that said judgment was docketed on 8 October, 1928, in the office of the clerk of the Superior Court for Stanly County, in Judgment Book No. 6, page 76; that thereafter, to wit, 11 January, 1930, two payments were made upon said judgment, to wit, $124.68 and $43.99, but the balance of said judgment is now due and unpaid.

"6. That the Stanly Bank and Trust Company obtained judgment against D. S. Lippard, administrator *de bonis non* of the estate of G. D. Troutman, deceased, and R. L. Brown, in the Superior Court of Stanly County on 22 September, 1930, for $840, and interest from 31 October, 1929, subject to a credit of $181.14 as of 1 November, 1929, and cost, to wit, $10.60; that said judgment was docketed on 11 July, 1931, in the office of the clerk of the Superior Court for Stanly County in Judgment Book No. 8, page 17, and the entire judgment is now due, subject to the payments above enumerated.

"7. That the Bank of Badin obtained judgment against J. M. Boyett and D. S. Lippard, administrator *de bonis non* of the estate of G. D.

Troutman, deceased, in the Superior Court for Stanly County on 7 September, 1931, for $725, and interest from 15 July, 1930, and the cost, to wit, $11.85; that said judgment was docketed 10 September, 1931, in the office of the clerk of the Superior Court for Stanly County, in Judgment Book No. 8, page 22; that the entire judgment, interest, and cost is now due and unpaid.

"8. That the personal property belonging to the estate of G. D. Troutman, deceased, was insufficient to pay all indebtedness outstanding and due by said estate.

"9. That all of the real property belonging to G. D. Troutman or to the estate of G. D. Troutman, deceased, unless the realty described in paragraph 2 be considered as property of the said G. D. Troutman or of the estate of the said G. D. Troutman, deceased, and may be subjected to the payment of the judgments referred to in paragraphs 4, 5, 6, and 7, has been sold to make assets to pay the debts of the estate of the said G. D. Troutman, and the proceeds derived from said sales have been applied to the payment of the debts of said estate, and D. S. Lippard, administrator *de bonis non* of the estate of G. D. Troutman, deceased, filed his final account and settlement as said administrator in the office of the clerk of the Superior Court for Stanly County on 26 April, 1930, and said account and settlement is recorded in Record of Settlements No. 7, page 562, but said report of said administrator was never approved and confirmed until 10 October, 1935, but J. A. Little, clerk of the Superior Court for Stanly County, has stated that he has known no reason why said report, account, and settlement should not have been approved and confirmed on the date it was filed, to wit, 26 April, 1930.

"10. That on 23 May, 1935, G. F. Almond and wife, Lesta Almond, sold R. J. Tucker the land described in paragraph 2 for $800 and on same date executed and delivered to the said R. J. Tucker a warranty deed therefor; that said deed was properly probated and recorded in the office of the register of deeds for Stanly County on 23 May, 1935, in Book of Deeds No. 99, page 296.

"11. That between 7 September, 1922, and 23 May, 1935, G. F. Almond was in continuous and uninterrupted possession of the land described in paragraph 2 under and by virtue of the deed therein referred to.

"12. That in said deed executed by the said G. F. Almond and wife to R. J. Tucker, the said Almond and wife covenanted with plaintiff that said land was 'free from all encumbrances.'

"13. That the deed executed by G. D. Troutman and wife, M. A. Troutman, to G. F. Almond, dated 7 September, 1922, probated 5 June, 1935, was recorded in the office of the register of deeds for Stanly County on 6 June, 1935, in Deed Book 100, page 30.

"14. That at the time of the execution, delivery, and recordation of the deed executed by the said G. F. Almond and wife to R. J. Tucker, and at the time of the recordation of the deed from G. D. Troutman and wife to G. F. Almond, all of the above referred to judgments were outstanding, and were properly recorded in the office of the clerk of the Superior Court for Stanly County, as alleged.

"15. That plaintiff contends that where a grantor made a conveyance of land on 7 September, 1922, and died 19 April, 1923, which conveyance was recorded 5 June, 1935, that judgments obtained against the administrator of the said grantor's estate prior to the recordation of said deed are encumbrances against said land which was conveyed by the grantee of the intestate to plaintiff on 23 May, 1935. Defendant denies that said judgments are encumbrances against said land. Plaintiff contends that he should recover of the defendants the amount of the purchase price as damages. Defendant contends that said judgments are not encumbrances against said land and, therefore, plaintiff should recover nothing of defendants.

"Respectfully agreed to and submitted by R. J. Tucker, plaintiff, and Lesta Almond and G. F. Almond, defendants. Morton & Smith, attorneys for plaintiff, and W. E. Bogle, attorney for defendants.

"NORTH CAROLINA—STANLY COUNTY.

"R. J. Tucker, plaintiff, and G. F. Almond and wife, Lesta Almond, defendants, each being duly sworn, say that the controversy above set out is a real one, and that this proceeding is instituted in good faith to determine the rights of the parties thereto. R. J. Tucker, plaintiff. G. F. Almond and Lesta Almond, defendants.

"Sworn to and subscribed before me, this 10 October, 1935. Lenna J. Rowland, Notary Public. (Seal.) My commission expires 29 October, 1936."

The judgment in the court below is as follows:

"This controversy without action, coming on to be heard at the October Term, 1935, of the Superior Court of Stanly County, before his Honor, P. A. McElroy, and being heard upon the agreed statement of facts, and it appearing to the court, and the court being of the opinion, that the judgments referred to and set out in said statement of facts of the controversy without action are encumbrances against the land therein described, and that the amount of said judgments exceeds the purchase price of $800 paid for said land by the plaintiff grantee:

"It is therefore ordered, adjudged, and decreed that said judgments be and the same are hereby declared encumbrances against the land described in the facts of the controversy without action, and that the plain-

tiff recover of the defendants the sum of $800, together with interest thereon from the date of the conveyance by the said F. G. Almond and wife, Lesta Almond, to R. J. Tucker, and that said defendants be taxed with the cost of this action. P. A. McElroy, Judge presiding."

The only exception and assignment of error made by defendants was to the signing of the judgment set out in the record.

Morton & Smith for plaintiff.
W. E. Bogle for defendants.

CLARKSON, J. The question involved: Do judgments entered against administrators, as set out in the agreed statement of facts, create an encumbrance on land conveyed by deed prior to his death, when deed is not recorded until after the judgments are docketed against the administrator? We do not think the judgments against the administrator, under the facts and circumstances of this case, were encumbrances against the land in controversy.

In the agreed facts, section 12, is the following: "That in said deed executed by the said G. F. Almond and wife to R. J. Tucker, the said Almond and wife covenanted with plaintiff that said land was 'free from all encumbrances.'"

Black's Law Dictionary (3d Ed.), p. 947—Encumbrance, see Incumbrance—citing a wealth of authorities, says: "Any right to or interest in land which may subsist in another to the diminution of its value, but consistent with the passing of the fee. . . . A claim, lien, charge, or liability attached to and binding real property. . . . An encumbrance may be a mortgage; a judgment lien; an inchoate right of dower; a mechanic's lien; a lease; a restriction in deed; encroachment of a building; an easement or right of way; accrued and unpaid taxes; the statutory right of redemption. . . . Incumbrancer—The holder of an incumbrance, *e.g.*, a mortgage, on the estate of another."

In 7 R. C. L. (Covenants), part sec. 48, p. 1134, is the following: "The contract to convey free from encumbrances ordinarily has reference to encumbrances of liens actually existing when the contract is executed, or thereafter created, or suffered by the act or default of the vendor." Sec. 31, pp. 1136-7: "Encumbrances within the meaning of the covenant against encumbrances include such interests therein or burdens as the following: A paramount right in the lands, a valid tax or assessment; an attachment, judgment, or mechanic's lien; a lien of an outstanding mortgage; a building restriction; and, as a general rule, that great variety of rights or interests in land, comprehended under the general term 'easements.'" *Hahn v. Fletcher,* 189 N. C., 729 (731)—a street assessment termed a statutory mortgage.

In *Eaton v. Doub,* 190 N. C., 14, the facts are entirely different, the judgment liens had attached and execution had been issued.

N. C. Code, 1935 (Michie), sec. 3309, in part, is as follows: "No conveyance of land, or contract to convey, or lease of land for more than three years shall be valid to pass any property, as against creditors or purchasers for a valuable consideration, from the donor, bargainor, or lessor but from registration thereof within the county where the land lies," etc.

N. C. Code, *supra,* sec. 131: "No judgment of any court against a personal representative shall fix him with assets, except a judgment of the judge or clerk, rendered as aforesaid, or the judgment of some appellate court rendered upon an appeal from such judgment. All other judgments shall be held merely to ascertain the debt, unless the personal representative pleading expressly admits assets."

An absolute judgment against the representative neither fixes the defendant with assets nor disturbs the order of administration. It merely ascertains the debt sued on. *Dunn v. Barnes,* 73 N. C., 273, 277.

N. C. Code, *supra,* sec. 132: "All executions issued upon the order or judgment of the judge or clerk, or of any appellate court, against any personal representative, rendered as aforesaid, shall run against the goods and chattels of the deceased, and if none, then against the goods and chattels, lands and tenements of the representative. And all such judgments docketed in any county shall be a lien on the property for which execution is adjudged as fully as if it were against him personally."

N. C. Code, *supra,* sec. 166: "An action may be brought by a creditor against an executor, administrator, or collector on a demand at any time after it is due, but no execution shall issue against the executor, administrator, or collector on a judgment therein against him without leave of the court, upon notice of twenty days and upon proof that the defendant has refused to pay such judgment its ratable part, *and such judgment shall be a lien on the property of the defendant only from the time of such leave granted.*" (Italics ours.)

The admitted facts show that G. F. Almond paid $1,250 for the property in 1922 and sold it for $800 in 1935. The sale by G. F. Almond to R. J. Tucker in 1935 was a *bona fide* sale for value. The whole transaction was in good faith and for value.

We do not think the judgments against the administrator a lien on the property in controversy, and the covenant in the deed "free from all encumbrances" in the ordinary and common acceptance of the words does not make the judgments encumbrances.

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

Reversed.

METROPOLITAN LIFE INSURANCE COMPANY v. PETER DIAL, JR., AND WIFE, SARAH DIAL, AND BETTIE DIAL.

(*Filed 22 January, 1936.*)

1. Trusts C c: Evidence J b—Evidence of conditional delivery of quitclaim deed held competent in grantor's action to establish trust.

The pleadings and facts agreed in this case disclosed that heirs at law owning certain lands by inheritance as tenants in common, in order to partition the lands between them, executed a quitclaim deed to their brother and cotenant, that contrary to the recitals in the quitclaim deed no consideration was paid therefor, and that on the same day the grantee in the quitclaim deed executed back to each of the heirs at law, with the sole exception of defendant appellee, separate tracts agreed upon as their respective shares of the lands, that the grantee in the quitclaim deed retained record title to his part of the lands and to the part that, under the partition agreement, he should have deeded to defendant appellee as her share of the lands, the tracts being contiguous. The grantee in the quitclaim deed executed a deed of trust on the whole tract retained by him. Upon default in the payment of the debt secured by the deed of trust, the trustee foreclosed under its terms, and the *cestui que trust* bid in the property for the amount of the debt, plus interest and taxes advanced, and instituted this action for possession of the entire tract. Defendant appellee set up the partition agreement and sought to establish her title to one-half the tract, claiming a parol trust therein under the facts. The grantee in the quitclaim deed filed answer admitting the trust and alleging that the tract agreed to be reconveyed to defendant appellee was included in the deed of trust by mistake. *Held:* Parol evidence is competent to establish the conditional delivery of the quitclaim deed by defendant appellee under her claim of a resulting trust in the lands, the rule that a grantor in a warranty deed may not set up a parol trust in his favor having no application to the facts disclosed by the record.

2. Mortgages H m—Facts admitted held sufficient to sustain finding that purchaser at sale was not innocent purchaser for value.

The pleadings and facts agreed in this case disclosed that heirs at law owning certain lands by inheritance as tenants in common executed a quitclaim deed to one of the heirs, their cotenant, who in turn deeded separate tracts back to each of the heirs, except one, as their respective shares of the lands, the parties seeking to partition the lands by this means to save costs, the quitclaim deed being supported by no consideration, although it contained a recital to the contrary. The grantee in the quitclaim deed retained record title to the part of the lands agreed upon as his share, and the part agreed upon as the share of the heir, the defendant appellee, to whom no reconveyance was made. Defendant appellee thereafter went into possession of the tract agreed upon as her share of the lands, by building a house thereon and moving her daughter therein as her tenant. Thereafter the grantee excuted a deed of trust on the entire tract to which record title was retained by him, and upon default, the deed of trust was foreclosed and the land purchased at the sale by the *cestui que trust* for the amount of the debt plus interest and taxes

advanced. Defendant appellee claims one-half of the tract under a resulting trust, and gave notice at the sale of her claim. *Held:* The record is sufficient to sustain the finding of the court that the *cestui* purchasing at the foreclosure sale is not an innocent purchaser for value, it appearing that defendant appellee gave actual notice at the sale, and there being badges of constructive notice in the record, possession by defendant appellee and the erection of the house, and the recognition of the trust by the grantee in the quitclaim deed.

APPEAL by plaintiff and defendant Bettie Dial from *Sinclair, J.*, 8 August, 1935. From ROBESON. Affirmed.

The plaintiff and defendant Bettie Dial agreed, in writing, upon a statement of facts which were submitted to his Honor, N. A. Sinclair, holding courts in the 9th Judicial District, in the following words, to wit:

"*Statement of Agreed Case:* The plaintiff and the defendant Bettie Dial agree that the following shall constitute the facts in the foregoing case, and submit the following facts agreed to his Honor, N. A. Sinclair, judge holding courts in the 9th Judicial District. Both plaintiff and defendant Bettie Dial state that the facts involved in this case are as follows, and present the court that their relative rights under the foregoing statement of facts be determined and judgment rendered accordingly.

"1. It is admitted that summons in the above entitled cause was issued 9 March, 1933; duly served on same date, returnable within 30 days therefrom.

"2. It is agreed that the pleadings in this cause and other papers heretofore filed are taken as a part of this statement of agreed facts.

"3. That heretofore Willis Dial died seized and possessed of approximately 585 acres of land located in Pembroke Township, Robeson County, and left surviving him the following named heirs at law, to wit: Nathaniel Dial, John J. Dial, Sallie Sampson, Bettie Dial, Darcus Oxendine, W. W. Dial, Peter Dial, Jr., and widow, Rebecca Dial.

"That Willis Dial died about 1893, intestate. That the above named heirs at law of Willis Dial remained on said 585-acre tract of land as tenants in common up until about 12 February, 1906. That on or about 12 February, 1906, the above named heirs at law of Willis Dial, deceased, met at the old home place and agreed upon a division of the 585-acre tract of land, and a surveyor was procured by the name of Matthews, and that thereupon the lands were surveyed into seven plots, and that each heir at law of Willis Dial, deceased, was to receive his share of said 585-acre tract as per the survey. That in order to facilitate a division of the lands and to save court expense it was agreed between

all the heirs at law of Willis Dial, above named, including Bettie Dial, the defendant herein, that they should execute to Peter Dial, Jr., a quitclaim deed for the 585 acres of land for the sole purpose of Peter Dial, Jr., in turn to convey back to each of the heirs at law of Willis Dial, deceased, their respective shares of 585-acre tract, a copy of which said deed is hereto attached and marked 'Exhibit A.' That while the quitclaim deed hereto attached recites a consideration of ten dollars ($10.00), there was really no consideration paid, but that said deed was made solely for the purpose of facilitating the division and to save cost of court in the division of the lands thereof, and for no other purpose than for the division of the land. That the plaintiff had no actual knowledge of the existence of the parol agreement above recited, or the fact that there was no consideration actually paid in the deed from all of the heirs at law of Willis Dial, deceased, to Peter Dial, Jr. That the said deeds to all of the heirs at law of Willis Dial, deceased, pursuant to the agreement to reconvey by Peter Dial, Jr., to the heirs at law of Willis Dial, deceased, were promptly executed and recorded, as will of record appear, except the deed to Bettie Dial for her share of the 585 acres of land, which deed was never executed.

"4. That Peter Dial, Jr., at that time was unmarried, and Bettie Dial, one of the defendants herein, was also unmarried. That the shares of land that were agreed to be allotted in the division to Peter Dial, Jr., and Bettie Dial, contained about 182.4 acres, of which amount it was agreed Peter Dial, Jr., was to receive half and Bettie Dial was to receive half.

"5. That at the time of the division of the lands and the execution of the deeds, above referred to, Bettie Dial and Peter Dial, Jr., resided in the old home house, which was included in the 182.4-acre tract, and the home house was situate on that portion of the 182.4 acres that Peter Dial, Jr., was to receive as his share of the land. That immediately after the division and the execution of the deeds, both from the heirs at law of Willis Dial to Peter Dial, Jr., and from Peter Dial, Jr., back to the heirs at law under the parol agreement between them, Bettie Dial and Peter Dial, Jr., remained in the old home house up until about 1910, during which time there was no change in the occupancy of the 182.4 acres as between Bettie Dial and Peter Dial, Jr., and it remained the same as before the execution of the quitclaim deed; that in 1910 Bettie Dial erected a house on the northern portion of the 182.4-acre tract, it being the portion that was to go to her and which she claimed under the division, and moved, or caused to be moved, her daughter into said house, and that Bettie Dial has remained in possession, either herself or her tenants or some member of her family, in the northern portion of the 182.4-acre tract since 1910, during which time she has

cultivated, rented, and kept the lands in her possession, using the same in such a way as the land in its nature was susceptible.

"6. That Bettie Dial was born and reared upon the lands above mentioned, and has always lived upon said lands, as above stated, and was in possession thereof at the time of the execution of the deed of trust herein referred to, which is recorded in Book 75, at page 147, and made a part hereof in as full and ample a manner as if the same were herein copied, and did not enter into the execution of said deed of trust and did not know anything about the execution thereof, and that she is, and was then, and was at the time of the institution of this action, in the possession of the northern portion thereof.

"7. That about 1910 the defendant Bettie Dial caused to be erected on that portion of lands that she was to receive under the division a house and, as heretofore stated, moved her daughter into same during 1910, but Bettie Dial remained at the old home herself, living with her brother, Peter Dial, Jr., until about 1918, during which time, from 1910, she had her daughter and other tenants living in the house built in 1910 on the lands that she cleared, to wit, the northern portion thereof.

"8. That after Peter Dial, Jr., had conveyed to his brothers and sisters other than Bettie Dial their portion or portions of the 585-acre tract, the 182.4 acres were marked off in one body by metes and bounds and by visible lines, but no actual dividing line between Peter and Bettie Dial was ever marked through the 182.4-acre tract.

"9. That on or about 13 June, 1927, while Bettie Dial was in possession of the northern portion of the 182.4-acre tract, Peter Dial, Jr., and wife made, executed, and delivered to Raleigh Banking and Trust Company their deed of trust embracing the 182.4 acres of land, it being the same set out and described in the complaint in this cause, to secure the payment of $2,500, and at the same time and as a part of the same transaction Peter Dial, Jr., and wife, Sarah Dial, executed their bond in the sum of $2,500, secured by said deed of trust; that Bettie Dial did not sign the deed of trust or bond above referred to, and did not know anything about the execution thereof, and did not receive any of the $2,500.

"10. That default was made in the deed of trust above referred to, and the lands advertised to be sold on 23 July, 1931, at the courthouse door in Lumberton, N. C., at which time and place Bettie Dial, seeing the advertisement in the newspaper, appeared and objected to the sale of that portion of the lands she claimed, to wit, the northern half thereof, and that pursuant to the sale the trustee executed a deed to the Metropolitan Life Insurance Company, in which deed is embraced the entire tract of 182.4 acres, said deed duly recorded in Book 8-E, page 419, under which deed the plaintiff claims it is entitled to be declared

the owner in fee simple of the entire tract of land set out and described in the complaint.

"11. That said lands were listed for taxation by Peter Dial, Jr., since 1909, and in 1932 it appears from the tax list that Peter Dial listed 120 acres and Bettie Dial 60 acres.

"12. That the Metropolitan Life Insurance Company has paid the taxes upon the entire 182.4 acres of land since 1926 to 1934, both years inclusive.

"13. That Peter Dial, Jr., lived in the old home house, which is situate on the southern portion of said lands, all of his life, and was so living there at the time of the execution of the deed of trust and the sale of the lands thereunder, hereinabove referred to, and also up until the institution of this action and until the appointment of a receiver for the property, and since which date he has rented the same from the receiver. *Respectfully submitted:*

"Winston & Tucker, by Granbery Tucker; Lee & Lee, attorneys for plaintiff.

"David H. Fuller and Britt & Britt, attorneys for defendant.

"Bettie Dial. Bettie Dial (her mark). Witness as to Bettie Dial, D. G. Dial. Bettie Dial, defendant."

"EXHIBIT A.

"NORTH CAROLINA—ROBESON COUNTY.

"This deed, made this 12 February, 1906, by Nathaniel Dial and wife, Mary M. Dial, John J. Dial, Nathaniel Sampson and wife, Sallie Sampson, Elizabeth Dial, Jonathan Oxendine and wife, Dorcas Oxendine, W. W. Dial and wife, Louise Dial, parties of the first part, to Peter Dial, Jr., party of the second part:

"WITNESSETH: That the said parties of the first part, for good causes and considerations, and especially for ten dollars, received for their full satisfaction, have remised, released, and quitclaimed, and by these presents do, for themselves and their heirs, executors, and administrators, justly and absolutely remise, release, and forever quitclaim unto the said Peter Dial, Jr., and to his heirs and assigns all their right and title as they, the said parties of first part, have or ought to have in or to all that tract or parcel of land in Burnt Swamp Township, Robeson County, North Carolina, adjoining the lands of Wash Lowrie, N. A. Brown, and others, and bounded as follows:

"Beginning at a stake by two dead pines and runs as Wash Lowrie's line south 85 east 33.30 chains to his corner at the end of a ditch; thence as his line south 2 west 65.50 chains to his corner, a stake by a pine; thence with Oxendine's and McPherson's lines north 75 east 90

chains to the run of Bear Swamp at the mouth of a ditch on east side of swamp; thence up the run of said swamp to N. A. Brown's line; thence as his line south 70 west 27 chains to his corner; thence south 54 west 38.50 chains to the beginning, containing 585 acres, more or less.

"TO HAVE AND TO HOLD the above described tract or parcel of land unto the said Peter Dial, Jr., his heirs and assigns, and to his only use and behoof in fee simple forever.

"In testimony whereof, the said parties of the first part have hereto set their hands and seals, this day and year above written.

"Signed: Nathaniel × Dial (Seal); Mary M. × Dial (Seal); John J. × Dial (Seal); Nathaniel × Sampson (Seal); Sallie × Sampson (Seal); Elizabeth × Dial (Seal); Jonathan × Oxendine (Seal); Dorcas × Oxendine (Seal); W. W. × Dial (Seal); Louise × Dial (Seal). (All of the above signatures were by his or her mark.)

"Probate in regular form. Registered 30 April, 1906, in Book 5-A, at page 469. Robeson County Registry."

The judgment of the court below was as follows:

"This cause was submitted to the court upon the specific facts set out in the agreed statement of facts and 'the pleadings in this cause and other papers hereinbefore filed are taken as part of this statement of agreed facts.'

"The plaintiff seeks to recover the immediate possession of the land described in the complaint, and other relief. The defendants admit that the plaintiff is entitled to recover one-half (the southern half) of the said land, but contend that the northern half of said land is the property of the defendant Bettie Dial, and is held in trust for her by her codefendant, Peter Dial, Jr.

"The plaintiff contends that Bettie Dial cannot be heard to set up a parol trust upon her deed absolute upon its face, because she is the grantor, and that in any event she is barred from doing so by the statute of limitations.

"The court holds that while it is a well recognized rule of law that a grantor cannot attempt to engraft a parol trust upon his absolute deed, there are exceptions to the rule dependent upon circumstances. The grantor would not be permitted to *introduce* evidence outside the deed for the purpose *over objection;* but in the instant case the plaintiff did not object to such evidence, but agreed that the court should consider facts and circumstances, which in the opinion of the court takes the case out from the operation of the general rule and establishes a parol trust. The deed in question does not give a clear indication upon its face that it intended to convey an absolute title, but strongly indicates that it was given for some other purpose.

"The court further finds that Bettie Dial, while joining as grantor with the five cotenants other than herself and Peter Dial, Jr., was also a grantee to the extent that the common deed conveyed to her in trust the interest of the other five cotenants in the 182.4-acre tract, and it is admitted that she joined in the common deed for the purpose of conveying her interest in the part of the land that the trustee was to convey to those five cotenants for the purpose of partition.

"The answer of Peter Dial, Jr., asserts that he holds the land in controversy under trust for Bettie Dial and his statement as part of the 'pleadings' is to be 'taken as part of the agreed facts'; and he is grantee in the deed and has the right to set up a parol trust in order to perform his duty as trustee in execution of his trust.

"The court is of the opinion, under all the circumstances in evidence, that Bettie Dial is not barred by the statute of limitations, nor does she hold by adverse possession; and the court is also of the opinion that the plaintiff is not an innocent taker for value without notice.

"Upon the consideration of the evidence and the foregoing findings of law: It is considered, adjudged, and decreed:

"1st. That the plaintiff is the owner and entitled to the immediate possession of the southern half of the land described in the complaint.

"2d. That the plaintiff is not the owner and is not entitled to the possession of the land claimed by Bettie Dial, the northern half of the land described in the complaint.

"3d. That the northern half of said tract of land is held in trust by Peter Dial, Jr., for Bettie Dial, and he is hereby ordered and directed to convey it to her in fee simple.

"4th. That a reference be had to ascertain what amount, if any, plaintiff has been damaged by Peter Dial, Jr., in withholding possession from plaintiff, and what amount plaintiff is entitled to recover of Peter Dial, Jr., and Bettie Dial, respectively, as liens upon their respective portions of said land for taxes paid; and C. B. Skipper is hereby appointed referee for that purpose, and directed to report his findings of fact and law to the court, without delay.

"5th. That the defendant Bettie Dial recover of the plaintiff her costs herein expended, to be taxed by the clerk.

"And this cause retained for further orders. This 8 August, 1935. N. A. Sinclair, Judge presiding."

The plaintiff's only exception and assignment of error was to the signing of the judgment. The defendant Bettie Dial's only exception and assignment of error was to the finding of his Honor, N. A. Sinclair, that she does not hold the land by adverse possession.

Winston & Tucker and Lee & Lee for plaintiff.

David H. Fuller, W. S. Britt, and J. C. King for defendant.

CLARKSON, J. Willis Dial, father of the defendant Bettie Dial, died intestate about 1893, seized and possessed of 585 acres of land in Pembroke Township, Robeson County, North Carolina, and left surviving him seven children.

These children were all living on the land at the time of their father's death, and, in 1906, desiring to effect a division in a simple and inexpensive method, they quitclaimed to Peter Dial, Jr., their brother and cotenant, these lands for the sole and specific purpose of dividing the same according to agreed shares. The defendant Bettie Dial, then a young woman, joined in this quitclaim deed.

Peter Dial, Jr., carrying out the provisions of the agreement to divide the land, promptly executed and delivered unto all the heirs of Willis Dial, except Bettie, deeds for their respective shares in and to this land.

Peter Dial, Jr., and the defendant Bettie Dial lived on together in the old home, which was situated on the 182.4 acres (the subject matter of this action), which represented the remainder of the 585 acres after conveying to the other heirs their respective shares. The use and occupancy of these 182.4 acres by Peter and Bettie were under exactly the same circumstances and in the same manner after the execution of the quitclaim deed in 1906, as it was before that time, Bettie claiming the northern half and Peter claiming the southern half of the land.

In 1910, Bettie erected a house on the northern half of this land, and has continued in possession, not only of the house, but also the northern half of this land since that time. Both had an undivided interest therein, which was recognized and respected by the other, and it was understood between them that Bettie, upon a division, was to get the northern half and Peter the southern half thereof.

Bettie Dial was born on this land, was living in the old home at the time of her father's death, and has lived on this land until the present day; she has never executed but one paper, which she did by making her mark, she being unable to read and write, and that one paper was executed by her in the belief that it was necessary in order for her to have her interest, her inheritance, in her father's estate set aside to her; she has never received a deed from Peter Dial, Jr.; has never received a cent from the loan made by the plaintiff to Peter Dial, Jr.; has always claimed her interest in the 182.4 acres which are the subject matter of this action, and has shown that she claimed the same by cultivating the northern portion thereof, renting the same out, receiving the rents therefor, and putting the said northern portion to such use as the nature thereof would permit.

Peter Dial, Jr., and Bettie Dial lived on the 182.4 acres of land, which had definite, known, and visible boundaries. Although there was no actual dividing line between Peter and Bettie, as between them, it was

agreed, upon a division, that she was to have the northern portion and he the southern portion of the 182.4 acres.

Peter Dial, Jr., in his answer admitted that although the title to the land described in the complaint was in his name, yet it was that portion of the estate of his father intended for himself and his sister, Bettie Dial, and that he only claimed one-half of the same; that he lived on one portion of said land and she upon another; and that he had, through an honest mistake, given an encumbrance upon the entire 182.4 acres when he only intended to give an encumbrance upon his interest therein.

On 13 June, 1927, Peter Dial, Jr., and wife, executed to the Raleigh Banking and Trust Company a deed of trust on the entire 182.4-acre tract to secure a loan of $2,500 made to him by plaintiff. On account of default in payment the deed of trust was foreclosed and the land sold thereunder on 23 July, 1931, plaintiff becoming the purchaser at said sale for the amount of its debt, plus accrued interest and taxes, the purchase price being $800.00 in excess of the original debt. Defendant Bettie Dial claims one-half of the tract of land, contending that Peter Dial, Jr., had verbally agreed to transfer legal title to her for one-half of the said tract. Plaintiff instituted this action to recover possession under its title obtained as purchaser at the foreclosure sale.

The court below held: "The court is of the opinion, under all the circumstances in evidence, that Bettie Dial is not barred by the statute of limitations, nor does she hold by adverse possession; and the court is also of the opinion that the plaintiff is not an innocent taker for value without notice." We think, under the facts and circumstances of this case, the holding of the court below correct.

In *Gaylord v. Gaylord,* 150 N. C., 222 (225-6), is the following: "The alleged deed recites a valuable consideration paid by defendant Sam Gaylord, the grantee in the deed; contains a *habendum* 'to have and to hold the said tract of land, free and clear of all privileges and appurtenances thereunto belonging, to the said Sam M. Gaylord and his heirs in fee simple, forever,' and also the covenants, 'that the grantor is seized of the premises in fee simple and hath the right to convey the same; that they are free from all encumbrances, and that the grantor will warrant and defend the title to the same against the lawful claim of all persons,' etc.; and the authorities are to the effect that in a deed of this character, giving on the face clear indication that an absolute estate was intended to pass, either by the recital of a valuable consideration paid or by an express covenant to warrant and defend the title, no trust would be implied or result in favor of the grantor by reason of the circumstance that no consideration was in fact paid (citing numerous authorities). . . . (p. 230) The main current of decision is in this direction, and established that a trust cannot be fastened on an

absolute deed by evidence that the grantee paid no consideration, or that he agreed to take and hold the premises from the grantor (citing authorities). . . . (p. 231) The same position is very well expressed by *Green, J.,* in *Cain v. Cox, supra* (23 W. Va., 594, 605): 'In this state of facts, what was the operation of this deed of 1854, whereby Rezin Cain conveyed this tract of land to his sisters upon a parol trust for his own use? In *Troll v. Carter,* 15 W. Va., 578, this Court decided: "If land be conveyed by a deed of bargain and sale for a merely nominal consideration, the courts of equity will not receive parol evidence to prove that the grantee agreed to hold the land for the grantor's use, as the deed in such a case must have been made for the express purpose of divesting the grantor of his title and vesting the same in the grantee. Such parol evidence, if admitted, would defeat the very purpose for which the deed was made, and must be regarded as contradicting the deed, and the general rule of evidence requires in such cases the rejection of parol evidence." ' "

The principle in the *Gaylord case, supra,* is well settled law in this jurisdiction. It is not applicable in the present action.

In 1893 Willis Dial died seized and possessed of some 585 acres of land, which descended to his heirs at law—some seven in number. They were tenants in common of the entire tract. On 12 February, 1906, they agreed upon a division and the land was surveyed in seven plots, and each heir at law was to receive his or her share of the said 585 acres of land, as per the survey. To facilitate a division, without consideration, a quitclaim deed of the land was made to Peter Dial, Jr., who in turn conveyed to each heir at law (as he had agreed to do) his or her share, with the exception of Bettie Dial. He neglected to do this, although Bettie Dial was recognized by Peter Dial, Jr., at all times as the owner of one-half of the 182.4 acres, and was in possession with her brother, Peter Dial, Jr., and later in possession of the northern half, in the division with her brother.

In *Power Co. v. Taylor,* 191 N. C., 329 (332), is the following: "Partition deeds between tenants in common operate only to sever the unity of possession and convey no title. *Harrington v. Rawls,* 136 N. C., 65; *Harrison v. Ray,* 108 N. C., 215." *Burroughs v. Womble,* 205 N. C., 432.

In *Wallace v. Phillips,* 195 N. C., 665 (670), it is said: "Ordinarily, when there is a partition of realty, by deed or action, between tenants in common, it only severs the unity of possession and conveys no title." Parol evidence is permissible to show the facts constituting the possession, manner of acquiring it, and the length of time the possession has existed. *Lewis v. Lewis,* 192 N. C., 267 (268).

The deed in the present action was executed and delivered for the purpose of a partition between the heirs at law—theretofore agreed upon. The grantee, Peter Dial, Jr., carried out the agreement as to five of the heirs at law, but failed to convey to Bettie Dial. Peter Dial, Jr., was a naked trustee—no consideration passed. It was a conditional delivery—this could be shown by parol. *Jefferson Standard Life Ins. Co. v. Morehead, ante,* 174. In fact, Peter Dial, Jr., in his answer says: "That the title to said land was in the name of this defendant, being that portion of the estate of his father intended for himself and his sister, Bettie Dial, the codefendant, and that he held the same in trust, this defendant living on one portion of said lands, and his said codefendant on another portion thereof, and that at the time of the execution of the said deed of trust, this defendant was under the impression that he had a right to execute a mortgage or deed of trust upon his interest in said land, which was about 100 acres, and that he thought when he signed said deed of trust that he was only executing the same against his said interest," etc.

In the judgment is the following: "The answer of Peter Dial, Jr., asserts that he holds the land in controversy under trust for Bettie Dial and his statement as part of the 'pleadings' is to be 'taken as part of the agreed facts'; and he is grantee in the deed and has the right to set up a parol trust in order to perform his duty as trustee in execution of his trust."

On this aspect of the case plaintiff in its brief does not state this as one of the questions involved, nor is it considered in its brief. It does except to the judgment.

The second question involved: "Was the court in error in holding upon the agreed statement of facts that plaintiff is not an innocent purchaser for value without notice?" We think not.

In the findings of fact is the following: "That default was made in the deed of trust above referred to, and the lands advertised to be sold on 23 July, 1931, at the courthouse door in Lumberton, N. C., at which time and place Bettie Dial, seeing the advertisement in the newspaper, appeared and objected to the sale of that portion of the lands she claimed, to wit, the northern half thereof, and that pursuant to the sale the trustee executed a deed to the Metropolitan Life Insurance Company, in which deed is embraced the entire tract of 182.4 acres, said deed duly recorded in Book 8-E, page 419, under which deed the plaintiff claims it is entitled to be declared the owner in fee simple of the entire tract of land set out and described in the complaint." Before plaintiff purchased the land it was notified by Bettie Dial of her claim.

In the findings of fact is also the following: "That the plaintiff had no actual knowledge of the existence of the parol agreement above

recited, or the fact that there was no consideration actually paid in the deed from all of the heirs at law of Willis Dial, deceased, to Peter Dial, Jr."

In *Wynn v. Grant,* 166 N. C., 39 (45), it is said: "'Constructive notice from the possession of the means of knowledge will have the effect of notice, although the party was actually ignorant, merely because he would not investigate. It is well settled that if *anything appears* to a party calculated to attract attention or stimulate inquiry, the person is affected *with knowledge* of all the inquiry would have disclosed.' *Bunting v. Ricks,* 22 N. C., 130; *Le Neve v. Le Neve,* 2 White and Tudor's Leading Cases in Equity, 144; *Wittkowsky v. Gidney,* 124 N. C., 437; *Blackwood v. Jones,* 57 N. C., 54; *May v. Hanks,* 62 N. C., 310; *McIver v. Hardware Co.,* 144 N. C., 478. The rule is thus put in *Wilson v. Taylor,* 154 N. C., 211: 'A party who may be affected by notice must exercise ordinary care to ascertain the facts, and if he fails to investigate when put upon inquiry, he is chargeable with all the knowledge he would have acquired if he had made the necessary effort to discover the truth,' citing *Hulbert v. Douglas,* 94 N. C., 122; *Bryan v. Hodges,* 107 N. C., 492." *West v. Jackson,* 198 N. C., 693 (694); *Austin v. George,* 201 N. C., 380 (381); *Hargett v. Lee,* 206 N. C., 536 (539).

Some of the badges of constructive notice are as follows:

(a) The ownership of 585 acres by the heirs of Willis Dial, deceased.

(b) That there were seven heirs of Willis Dial, among them the defendant Bettie Dial.

(c) The execution, not of a warranty deed, but a quitclaim deed to these 585 acres by six of these heirs to the seventh heir, Peter Dial, Jr., for "good causes and consideration, and especially for ten dollars."

(d) Deeds by this seventh heir, Peter, on the same day the said quitclaim deed was executed to each of five of these heirs for a portion of the 585 acres, but no deed to Bettie.

(e) The continued possession of the defendant Bettie, the sixth grantor in said quitclaim deed, of a portion of the 585 acres, which had not been conveyed to the other five grantors, her possession and use being the same after as it was before the execution of said quitclaim deed in 1906.

(f) The erection of a house by the defendant Bettie on the northern half of the remainder of 585 acres (the 182.4-acre tract, which is the subject matter of this action), and her full occupation and use of said house together with the northern half of these lands as her own; claiming it, cultivating it, renting it, and in every way using it as her own.

(g) Recognition by the grantee Peter of her interest in said lands.

(h) And finally, notice given by Bettie at the foreclosure sale of the land when the plaintiff became the purchaser.

In *Grimes v. Andrews,* 170 N. C., 515 (524), we find: "The judge left the tenth issue undisturbed, we presume, for the purpose of ascertaining whether the defendants had been in possession, claiming the land as their own, as bearing on the question of notice to plaintiff of defendant's equity, growing out of the alleged parol trust, the general rule being that possession constitutes such notice. *Justice Dillard* said, in *Heyer v. Beatty,* 83 N. C., 289: 'The rule in equity undoubtedly is that a party taking with notice of an equity takes subject to that equity; that is to say, he is assumed to take and hold only such interest in the property conveyed as his vendor might honestly dispose of, having due regard to the equities existing against him in favor of others. Adams Eq., 151; *Webber v. Taylor,* 55 N. C., 9; *Maxwell v. Wallace,* 45 N. C., 251. And the kind of notice spoken of in said rule may be an actual or constructive notice. In this case there is no pretense of actual notice to the plaintiff of the right claimed by defendant, but it is plainly implied, from the terms in which the instruction was asked, that the defendant claimed only to affect the legal title of the plaintiff with a trust from a notice by construction from the mere fact of his possession at the time of the sale. Possession is suggestive of title or right in the possessor, and a prudent man should and would inquire into such apparent right before trading with another; and if he do not, it is but just to the rights of the party in possession to hold the purchaser as affected with notice of the equities in his favor,' " citing numerous authorities.

This matter, under the statement of agreed case, was left to the court below, who found "that the plaintiff is not an innocent taker for value without notice," and there was evidence to support the finding.

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

Affirmed.

ISAAC BUNN v. W. G. HOLLIDAY AND J. W. WHITAKER, TRADING AS HOLLIDAY & WHITAKER, AND R. C. DUNN, TRUSTEE.

(Filed 22 January, 1936.)

1. Mortgages H j—

The purchase of property at a foreclosure sale of a deed of trust by the *cestui que trust* will be upheld in the absence of fraud and collusion.

2. Mortgages H p—Plaintiff held estopped to attack validity of foreclosure sale.

The *cestui que trust* purchased the land in question at the foreclosure sale of the deed of trust, and thereafter rented the land to the former owner for three years, the rent for each year being paid by the former

owner. *Held:* The former owner is estopped by his acquiescence and attornment to the purchaser from attacking the validity of the foreclosure sale.

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

APPEAL from *Devin, J.*, at March Term, 1935, of HALIFAX. Affirmed.

This is an action brought by plaintiff against the defendants to set aside a trustee's sale of certain land, alleged to be owned by plaintiff, and declare same null and void. To have marked "paid and satisfied in full" certain mortgages and deeds of trust on the property, which were duly recorded. To recover judgment against defendants Holliday and Whitaker for a sum set forth, and to declare plaintiff the owner of the land and that he be given possession of the same.

The defendants denied the material allegations of the complaint, and set up the plea of *res judicata* and estoppel.

T. T. Thorne and L. L. Davenport for plaintiff.
Dunn & Johnson and Geo. C. Green for defendants.

PER CURIAM. At the close of plaintiff's evidence the defendants in the court below made a motion for judgment as in case of nonsuit, C. S., 567. The court below allowed the motion, and in this we can see no error.

The record discloses: "It was admitted that the plaintiff theretofore was the owner of two tracts of land situate in Halifax County, North Carolina, one tract containing 239.15 acres, and the second tract containing eleven acres, more or less, all known as home place and farm of the plaintiff. It was further admitted that the plaintiff executed his note to the defendants to secure an indebtedness of $1,725, secured by the said lands, which said note was due and payable on 15 December, 1929, and it was further admitted that the defendant R. C. Dunn was attorney for the defendants. It was further admitted that the property had been sold by R. C. Dunn, trustee, in a deed of trust executed by the plaintiff to R. C. Dunn, to secure the said note of $1,725 to Holliday and Whitaker, and that at such sale Holliday and Whitaker became the purchasers of said land for the sum of $1,000, and are now in the possession of said lands. The defendants further admitted that R. C. Dunn, trustee in the said deed of trust, foreclosed the said deed of trust by selling said lands to satisfy said debt at the request of the defendants Holliday and Whitaker."

The plaintiff testified, in part: "I moved to this place in January, 1909, and lived there from then until a month or two ago, when they had the sheriff move me off—16 January, 1935. . . . I raised a

family there. When I was operating the farm I worked four mules regularly, and sometimes five, and since Mr. Holliday and Mr. Whitaker have had the place they work six regularly. In 1931, the year they took it away from me, I raised some tobacco, peanuts, and cotton. Since 1931 I have not had any tobacco, only had peanuts, cotton, and corn. In 1931, when Mr. Holliday and Mr. Whitaker took it, the 267 acres and improvements were worth anywhere from $12,000 to $13,000. . . . The paper is 'Holliday and Whitaker *v.* Isaac Bunn.' They really put me out; kicked everything I had out in the yard, and it was raining and sleeting at the time. My wife and I executed a deed of trust to R. C. Dunn on 8 April, 1929. I went to see Mr. J. W. Whitaker about getting the money. At the time there was a prior encumbrance on the land of between $3,100 and $3,300, to the Joint Stock Land Bank of Raleigh. It was one of the thirty-three-year mortgages and I was up on the installments. The reason I borrowed the money through Mr. Holliday and Mr. Whitaker was because I owed a note to the Scotland Neck Bank and it was being liquidated, and the agent told me something had to be done. . . . I went back, they said they would make the loan of $1,600 if I would agree to pay $125.00 bonus and I would make the note for $1,725 instead of $1,600. . . . I had to agree, under the conditions, to pay the $125.00 if he would give me a reasonable time to work it out. . . . The $25.00 for writing the paper was taken out of the $1,600 he let me have. The actual cash I got was $1,575. . . . It went on until December, 1930, and on or before 15 December I got a letter from the trustee saying that Mr. Whitaker and Mr. Holliday had placed in his possession the paper to be collected by paying the money or foreclosure, and to come to see him at once in Enfield. I went to see the trustee and he said he did not know anything he could do but would see Mr. Whitaker. . . . After running around with some friends to see everybody, I was not successful in getting the money and the trustee proceeded to foreclose, and that is what happened in 1931. That was about February, 1931. The trustee sold the land. I was a little late in getting to town and did not get there in time for the sale. Five months after the sale I went to Mr. Whitaker's office and he said he was the only and successful bidder for the price of $1,000. In my opinion the 267 acres of land and improvements were worth between $12,000 and $13,000 at that time. When Mr. Whitaker and Mr. Holliday took the property in like they did, they came to the field where I was at work. I was working five mules at the time. I asked Mr. Whitaker if they had to foreclose at that time; that my father was old, and asked him was there no way we could stay and rent and pay off what we owed. Mr. Holliday was there and he said I must get off at once. Mr. Whitaker said he thought they could handle what they wanted in the other

houses and let me stay on, and that is what I did. There was nothing else in sight and that is why I agreed to rent from Mr. Whitaker, because he told me he would allow me to rent to try to pay off the indebtedness I owed and try to regain my home. It must have been in the month of March when I was talking to Mr. Whitaker and Mr. Holliday about renting the land because ten days had expired for raising the bid. I rented the land for that year and two other years. . . . The one-half I turned over to them each year was around $700 to $800. I mean they got that much from me as rent for the years 1931, 1932, and 1933. . . . At the time of the sale of the land all the buildings I have described as being on the land were in good condition; they are in fair shape now."

It is well settled in this jurisdiction that the *cestui que trust* has a right to buy at the trust sale unless fraud or collusion is alleged and proved. *Monroe v. Fuchtler,* 121 N. C., 101 (104); *Hayes v. Pace,* 162 N. C., 288; *Winchester v. Winchester,* 178 N. C., 483; *Simpson v. Fry,* 194 N. C., 623. See *Hinton v. West,* 207 N. C., 708. The principle is different as between mortgagor and mortgagee. *Lockridge v. Smith,* 206 N. C., 174.

After the sale by the trustee and the purchase by the defendants Holliday and Whitaker of the plaintiff's land, the plaintiff, who was *sui juris,* rented the land from them and for several years paid the rent to them. We think from plaintiff's testimony that he is estopped and the nonsuit was proper. Plaintiff's attornment is sufficiently unequivocal and acquiesced in for so many years and has barred any action, if one ever existed. From plaintiff's testimony the case is a distressing one and his misfortune is to be deplored, but we must abide by contracts where there is no fraud or mistake alleged and proved.

The judgment of the court below is

Affirmed.

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

T. B. DIXSON v. C. E. JOHNSON REALTY COMPANY.

(Filed 22 January, 1936.)

1. Appeal and Error L a: L d—

The decision of the Supreme Court on a former appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal.

2. Frauds, Statute of, E a—Party obtaining forbearance during life of written contract by extending its terms by oral agreement may not plead statute of frauds to defeat action on oral agreement.

Defendant executed a written contract to repurchase a certain lot from defendant at any time within a year from the sale if plaintiff was not satisfied with the lot. Thereafter the agreement to repurchase was extended for one year by a writing attached to the contract and signed by defendant's authorized agent. During the life of the written contract, plaintiff made demand on defendant for the execution of the agreement, and defendant, or its agent, obtained forbearance on the part of plaintiff by agreeing orally to extend the contract for another year. *Held:* Upon institution of suit by plaintiff on the contract during the period of the parol extension, defendant is precluded from defeating plaintiff's recovery by pleading the statute of frauds.

APPEAL by defendant from *Hill, Special Judge,* at April Term, 1935, of FORSYTH. No error.

This was an action to recover on the following contract:

"'We Sell the Earth'

C. E. JOHNSON REALTY COMPANY

Real Estate and Fire Insurance

Reputation Our Capital : : Reliability and Promptness

Winston-Salem, N. C.

November 6, 1928.

"C. E. Johnson Realty Company hereby agrees to refund to T. B. Dixson the full purchase price of $4,837.80 for Lot No. 14 in 'Stratford Place,' with 6% interest, on November 6, 1929, in the event the above named purchaser should not be entirely satisfied with purchase of said lot.

Yours very truly,

"Attest: C. E. JOHNSON REALTY CO.,

"(Signed) R. C. Johnson, By (Signed) C. E. Johnson,

Sec. Pres."

"We hereby agree to renew the above contract and extend the terms and guarantee for another twelve months to November 6, 1930.

C. E. JOHNSON REALTY CO.,

"(Signed) By (Signed) R. C. Johnson, Treasurer.

"M. A. Biggs, Witness."

The prayer of plaintiff in his complaint was for "such other and further relief in the premises as to the court shall seem proper."

The evidence discloses that demand was made by plaintiff on defendant, or its duly authorized agent, within the time limit for the performance of its written contracts, and defendant failed and neglected to perform and appealed to plaintiff to give another year in which to perform its contract, promising to put same in writing. This extension of time and forbearance was given by plaintiff with the assurances made by defendant and relied on by plaintiff, which later the extension of performance was denied and repudiated by defendant. The plaintiff was at all times ready, able, and willing to perform his part of the contract. The present action was instituted on 5 November, 1931, within the extension time for performance.

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

"1. Did the plaintiff and the defendant, on 6 November, 1928, enter into a written contract by the terms of which the defendant agreed to refund to the plaintiff the full purchase price of $4,837.80 for Lot No. 14 in Stratford Place, with 6 per cent interest, in the event the plaintiff should not be entirely satisfied with the purchase of said lot on 6 November, 1929, as alleged? Answer: 'Yes.'

"2. If so, did the plaintiff and defendant thereafter contract and agree in writing to extend the terms of said alleged agreement and continue same until 6 November, 1930, as alleged? Answer: 'Yes.'

"3. Did the plaintiff elect and offer to sell, and was he ready, able, and willing to convey said parcel of land to the defendant, within the time specified in said alleged agreements? Answer: 'Yes.'

"4. Did the plaintiff and the defendant, before 6 November, 1930, orally contract and agree to extend the provisions of said alleged agreements for a further period of twelve months, and until 6 November, 1931? Answer: 'Yes.'

"5. If so, did the plaintiff, within the time specified in said alleged oral agreement, elect and offer, and was he ready, able, and willing to convey to the defendant the said parcel of land? Answer: 'Yes.'

"6. Did the defendant, within the time specified in said alleged oral agreement, decline and refuse to accept a conveyance of said property and pay therefor the sum of $4,837.80, with interest, as alleged? Answer: 'Yes.'"

The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court.

Ingle & Rucker for plaintiff.

Parrish & Deal and Calvin Graves, Jr., for defendant.

PER CURIAM. This action has heretofore been before this Court. 204 N. C., 521. At the close of plaintiff's evidence and at the close of all the evidence (C. S., 567) the defendant made motions in the court below for judgment as in case of nonsuit. The court below refused these motions, and in this we can see no error. We think the plaintiff's evidence on the trial in the court below substantially the same as was set forth in the former appeal.

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.

In the previous opinion we quoted from *Alston v. Connell,* 140 N. C., 485 (491-2), and we quote in part again as follows: "The extension having been given at Thomas Connell's request and for his convenience, when the extended agreement itself and all the circumstances clearly implied that he regarded it as a valid and binding contract, and that he intended to live up to its terms, the law will not permit him now to repudiate its obligations, invoke for his protection the statute of frauds and defeat the plaintiff's recovery, who had forborne a timely performance by reason of Thomas Connell's request and in reasonable reliance on his assurance. This position is in accord with sound principles of justice and is well sustained by authority."

It is too technical to contend that the pleadings with the issues and charge of the court below are insufficient to support the judgment and are contradictory. We do not think there is such a variance between the allegations, proof, and issues that could be held as prejudicial or reversible error. The issues were largely in the discretion of the court.

We think there was plenary evidence, direct and circumstantial, of the authority of Biggs, who made the extension of forbearance, and this with the knowledge and acquiescence of defendant. The underlying principle of law involved in this case is embodied in the broad idea of justice that where one forbears from performing an act at the request of and for the benefit of another, the latter will be precluded from later taking the position that the former has lost the protection of his rights by such forbearance. Defendant's business covered some territory—"We sell the Earth."

In the judgment of the court below, we find

No error.

MRS. GEORGE HILL v. R. D. CLARK AND MARY CLARK.

(Filed 22 January, 1936.)

Appeal and Error A d—Appeal in this case dismissed as premature.

At the close of the evidence the trial court intimated he would instruct the jury that plaintiff would be entitled to recover only nominal damages, whereupon plaintiff submitted to a voluntary nonsuit, and appealed. *Held:* The ruling of the trial court did not go to the heart of the matter or take the case from the jury, and the appeal is dismissed.

APPEAL by plaintiff from *Cranmer, J.*, at April Term, 1935, of BEAUFORT. Appeal dismissed.

Plaintiff brought her action for damages for alleged breach of contract for the cultivation of certain land. Defendants denied the breach. There was evidence by both plaintiff and defendants in support of their allegations. At the close of the testimony the trial judge intimated he was of opinion the jury should be instructed that the plaintiff would be entitled to recover only nominal damages. Upon such intimation, plaintiff submitted to a voluntary nonsuit and appealed.

E. A. Daniel for plaintiff.
Ward & Grimes for defendants.

PER CURIAM. The appeal was improvidently taken. The ruling of the court did not go to the heart of the matter and did not take the case from the jury, but left open essential issues of fact still to be determined. *White v. Harris,* 166 N. C., 227.

Appeal dismissed.

STATE v. HOWARD WELLS.

(Filed 22 January, 1936.)

Criminal Law L d—

Exceptions not brought forward and discussed in appellant's brief will be deemed abandoned. Rule of Practice in the Supreme Court No. 28.

APPEAL by defendant from *Rousseau, J.*, at October Term, 1935, of FORSYTH.

Criminal prosecution, tried upon indictment charging the defendant, in five different counts, with violations of the prohibition laws.

Verdict: "Guilty of possession and transporting intoxicating liquors."

Judgment: On the count for transporting, 12 months on the roads; on the count for possession, 2 years on the roads, to be suspended for five years on good behavior.

Defendant appeals, assigning errors.

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

Phin Horton, Jr., for defendant.

PER CURIAM. No reversible error has been made to appear in the trial of the cause. The exception to the judgment does not seem to have been brought forward and discussed in appellant's brief. Hence, it is deemed to be abandoned. *S. v. Lea,* 203 N. C., 13, 164 S. E., 737. "Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." Rule 28, Rules of Practice in Supreme Court; *In re Beard,* 202 N. C., 661, 163 S. E., 748.

No error.

A. H. McCORMICK ET AL. v. M. O. JACKSON.

(Filed 22 January, 1936.)

Fraud A b—Promissory representations may not be made the basis for action for fraud.

Plaintiffs alleged that defendant induced them not to sell their land by falsely representing that defendant could later obtain a much higher price for same. Defendant demurred to the complaint for failure to state a cause of action. *Held:* The demurrer was properly sustained, mere promissory representations not being generally regarded as fraudulent in law.

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

APPEAL by plaintiffs from *Warlick, J.,* at May Term, 1935, of BUNCOMBE.

Civil action for fraud in preventing sale of land and failure to make sale as promised or represented.

It is alleged in the complaint that in 1926 plaintiffs were induced to forego sale of their 600-acre tract of land, situate in Buncombe County, upon the promise and representation of the defendant that he could obtain a better price therefor; that defendant was thereupon given the

exclusive right to sell plaintiffs' land, upon representations which later proved to be fraudulent, and that said representations were repeated from time to time until their falsity was discovered in May, 1931. That plaintiffs have been damaged by reason of the decline in the value of their land. This action was instituted 16 November, 1934.

Demurrer interposed upon the ground that the complaint does not state facts sufficient to constitute a cause of action. Demurrer sustained.

Plaintiffs appeal, assigning error.

Edward H. McMahan for plaintiffs.
J. A. Patla for defendant.

PER CURIAM. Promissory representations, looking to the future, such as to what an agent or optionee can do with property, how much he can make on it, or what he can gain by handling it, are not generally regarded as fraudulent in law. *Nat. Cash Reg. Co. v. Townsend,* 137 N. C., 652, 50 S. E., 360, 70 L. R. A., 349; *Williamson v. Holt,* 147 N. C., 515, 61 S. E., 384, 17 L. R. A. (N. S.), 240; 15 R. C. L., 252-253. Compare *Kamm v. Flink,* 113 N. J. L., 582, 175 Atl., 62, 99 A. L. R., 1, and note.

The allegations of the present complaint seem to fall within this principle.

While, of course, the statute of limitations is not raised by the demurrer, it is observed that plaintiffs have waited more than three years after the discovery of the alleged fraud to bring their action. C. S., 441, subsec. 9.

Affirmed.

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

UTAH LITTLE AND WIFE, ROXIE LITTLE, v. N. K. HARRISON, TRUSTEE, AND W. M. GREEN.

(Filed 22 January, 1936.)

1. Mortgages H h: H p—Trustor attacking foreclosure for failure of due advertisement has burden of overcoming recitals in trustee's deed.

The recital of due advertisement contained in the trustee's deed is *prima facie* evidence thereof, and the trustor attacking the foreclosure on the ground that due advertisement was not made has the burden of overcoming such *prima facie* evidence, and when his evidence fails to show

that the sale was not advertised as provided by law, defendant's motion to nonsuit is properly allowed, although the evidence may not affirmatively show due advertisement.

2. Same—Foreclosure sale must be advertised for twenty-one days.

An attack of a foreclosure sale under power of sale contained in the deed of trust on the ground that the sale was not advertised for 22 consecutive days is unavailing, since ch. 96, Public Laws of 1933, changed the statutory minimum for such advertisement from 22 days to 21 days.

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

APPEAL by plaintiffs from judgment of nonsuit, entered at the close of their evidence, by *Moore, Special Judge,* at Special June Term, 1935, of MARTIN. Affirmed.

H. L. Swain for plaintiffs, appellants.
Hugh G. Horton and J. C. Smith for defendants, appellees.

PER CURIAM. This is an action, instituted by the plaintiffs, to set aside a deed of foreclosure given by the defendant Harrison, trustee, to the defendant Green.

The plaintiffs assign as error the signing of the judgment, and base their exception upon the contention that there was sufficient evidence to be submitted to the jury that the deed of trust given by them to the defendant Harrison as trustee to secure their debt to the defendant Green had not been properly foreclosed for the reason that the advertisement of the foreclosure sale had not complied with the terms of the deed of trust and the statute governing foreclosures, since (1) the advertisement had not been posted at the courthouse and three other public places, and (2) since the advertisement in the newspaper had not been for a duration of 22 days.

There is a recital in the trustee's deed that the sale was duly advertised, and this is *prima facie* evidence in favor of the regularity of the execution of the power of sale in a deed of trust, and if there was any failure to advertise properly, the burden was on the plaintiff to show it. *Jenkins v. Griffin,* 175 N. C., 184; *Lumber Co. v. Waggoner,* 198 N. C., 221.

A perusal of the evidence leaves us with the impression that it was insufficient to be submitted to the jury upon the failure to post the advertisement at the courthouse and three other public places. While this evidence may not affirmatively show that such advertisement was so posted, when read in the light most favorable to the defendants, it fails to show that such advertisement was not so posted, and, the burden being upon the plaintiffs to establish the failure to properly advertise, the judgment for nonsuit was correctly entered.

The second contention that the property was not advertised for 22 consecutive days is untenable for the reason that ch. 96, Public Laws 1933, changed the statutory minimum for such advertisement from 22 days to 21 days. N. C. Code of 1935 (Michie), sec. 687 (b).

Affirmed.

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

M. E. REEVES, ADMINISTRATOR OF W. F. THOMPSON, DECEASED, R. A. WADDELL, AND BANK OF SPARTA v. KEMP MILLER.

(Filed 22 January, 1936.)

Deeds A f—Deed of gift not registered in two years is void.

Where a deed appearing on its face to be a deed of gift is not registered in two years from its execution as required by C. S., 3315, it is void, and may be set aside in an action by creditors of the grantor regardless of whether it was executed in defraud of creditors.

APPEAL by defendant from *Pless, J.*, at May Term, 1935, of ALLEGHANY.

This was an action to set aside deed to defendant from Jno. J. Miller, his father, upon the ground that said deed was voluntary and in fraud of the rights of plaintiffs, who were creditors of Jno. J. Miller.

The deed in question was dated 15 May, 1929, and was not recorded until 20 June, 1932, after the death of Jno. J. Miller. The only consideration recited in the deed was one dollar, and there was no other evidence of consideration.

In answer to issues submitted, the jury found that the said deed was made with intent to hinder, delay, or defraud creditors, and that Jno. J. Miller did not retain property sufficient and available to pay his creditors.

From judgment on the verdict, defendant appealed.

R. A. Doughton, R. F. Crouse, and Sidney Gambill for plaintiffs.
Trivette & Holshouser and W. H. McElwee for defendant.

PER CURIAM. It is unnecessary to consider the exceptions discussed in defendant's brief, as the deed attacked by the plaintiffs in this action appears on its face to be a deed of gift, and was not registered within two years as required by C. S., 3315.

The deed was therefore void. *Booth v. Hairston,* 195 N. C., 8.

No error.

STATE v. J. R. LIBBY.

(Filed 22 January, 1936.)

Criminal Law G m—Plea of guilty on prior trial may be proved in subsequent trial for the same offense.

Defendant pleaded guilty in the municipal court, but on appeal to the Superior Court pleaded not guilty. *Held:* Proof of the plea of guilty on the prior trial is competent in the Superior Court, and the introduction of the original warrants, fully identified as the records of the municipal court, for the purpose of corroborating the evidence of the plea in the municipal court, is without error, and is not objectionable as proof of proceedings in a court of record by evidence outside the record.

APPEAL by defendant from *McElroy, J.*, and a jury, at June Term, 1935, of GUILFORD. No error.

The defendant J. R. Libby pleaded guilty in the municipal court of the city of High Point for three violations of the Turlington Act and gave notice of appeal to the Superior Court of Guilford County at the June, 1935, Term of the Superior Court sitting in Guilford County, North Carolina, before a jury, with Judge P. A. McElroy presiding.

The defendant was again convicted of the aforementioned three violations of the Turlington Act on three warrants sworn out in the High Point municipal court.

The court consolidated the cases for judgment, and all of the cases were consolidated with the consent of the counsel for the defendant for judgment, and the defendant was sentenced to serve eighteen months in the county jail of Guilford County, North Carolina, to be assigned to work under the State Highway and Public Works Commission. The defendant excepted, assigned error, and appealed to the Supreme Court.

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

Gold, McAnally & Gold for defendant.

PER CURIAM. The defendant contends: "There is the fundamental principle of evidence that proceedings in a court of record are evidenced by the record, and proof outside of the record is inadmissible to establish such proceedings, without proof of the loss or destruction of the record. *Gauldin v. The Town of Madison,* 179 N. C., 461."

The above is well settled by law, but is not applicable on the present record. The defendant, in the High Point municipal court, pleaded guilty on three warrants charging him with the unlawful sale of intoxicating liquor. He was sentenced and appealed to the Superior Court

and pleaded not guilty, and was tried and convicted by the jury, and again sentenced, and appealed to the Supreme Court. In the Superior Court the evidence was plenary as to the unlawful possession of intoxicating liquor as charged in the warrants. The original warrants were sent up on the appeal, and defendant was tried on same. The warrants were introduced and identified by officers present at the hearing when the defendant pleaded guilty in the High Point municipal court. They were offered to show the date and in corroboration of defendant's plea of guilty. The warrants themselves show the plea of guilty and were fully identified as the records in the High Point municipal court.

It is well settled that a plea of guilty on a prior trial may be proved in a subsequent trial for the same offense.

In the trial in the court below, we see no prejudicial or reversible error.

No error.

E. D. WOODY AND WIFE, PANTHEA WOODY, v. PRUDENTIAL LIFE INSURANCE COMPANY OF AMERICA.

(Filed 22 January, 1936.)

1. Usury C b—

The burden is on plaintiff, seeking to recover the statutory penalty for usury, to show that a commission charged on the loan, and constituting the basis of the claim, was received by the lender.

2. Limitation of Actions A b—

Where an action to recover the penalty for usury is not instituted until more than two years after the last payment of interest, the action is barred by the statute of limitations. C. S., 442.

3. Usury A a—

A sum paid as an attorney's fee in a settlement between the parties after foreclosure of the property securing the debt and the repurchase of the property by the trustor by paying the original debt, *is held* not usurious under the evidence in this case.

APPEAL by plaintiffs from *Grady, J.*, at September Term, 1935, of DURHAM.

Plaintiffs instituted this action on 22 January, 1935, to recover the penalty for usury alleged to have been exacted by the defendant. In the complaint plaintiffs alleged that from a loan made by the defendant in 1926, the sum of $209.00 was deducted and received by the defendant for making the loan, and that in July, 1934, a further sum of $50.00 was paid by the plaintiffs in excess of the legal rate. Defendant denied that it charged or received the $209.00, and in its answer alleged that if

plaintiffs paid this sum it was a commission which was not received by the defendant. The defendant further alleged that the item of $50.00 was an attorney's fee paid by the plaintiffs in a settlement after a foreclosure sale. Defendant also pleaded the statute of limitations.

Plaintiff E. D. Woody testified that the negotiations with respect to the loan were had with one S. B. Frink, who filled out an application for the loan on the defendant's blank; that the amount of the loan was $3,000, secured by deed of trust on his home, but that $209.00 was deducted from the amount for negotiating the loan; that thereafter he kept up his payments on principal and interest to 5 July, 1932, and thereafter made no other payments; that in July, 1934, the trustee in the deed of trust advertised and sold the property and the defendant bid it in for $2,500; that in August, 1934, he secured a loan from the Home Owners' Loan Corporation and paid off his debt, including interest, taxes, and cost of sale, the defendant accepting Home Owners' Loan Bonds therefor.

At the conclusion of plaintiffs' evidence, motion for nonsuit was allowed, and from judgment thereon plaintiffs appealed.

Bennett & McDonald for plaintiffs, appellants.
Basil M. Watkins for defendant, appellee.

PER CURIAM. The judgment of nonsuit must be sustained. The receipt by the defendant of the alleged usury of $209.00 does not sufficiently appear, and, if it did, the statute of limitations is a complete bar. No payments of interest were made after 5 July, 1932.

The other item of $50.00 was an attorney's fee, paid by the plaintiffs in a settlement made after a sale of the premises had been made in July, 1934, and under the evidence in this case this could not be held to be usurious. C. S., 442; *Trust Co. v. Redwine,* 204 N. C., 125.

On the record before us the judgment of nonsuit is

Affirmed.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1936

GURNEY P. HOOD, COMMISSIONER OF BANKS OF THE STATE OF NORTH CAROLINA, EX REL. NORTH CAROLINA BANK AND TRUST COMPANY v. NORTH CAROLINA BANK AND TRUST COMPANY AND MARGARET E. BRAND, EXECUTORS OF THE LAST WILL AND TESTAMENT OF R. A. BRAND, DECEASED.

(Filed 26 February, 1936.)

1. Banks and Banking H c—

The Commissioner of Banks acts in a capacity equivalent to a receiver in taking over the assets of an insolvent bank, C. S., 218 (c), and in such capacity represents the depositors and other creditors in the collection and distribution of the assets of the bank.

2. Banks and Banking H a—Statutory liability of stockholders of bank creates a trust fund for the benefit of creditors.

The statutory liability imposed upon stockholders of an insolvent bank is created, not for the benefit of the bank, but for the benefit of depositors and other creditors, and constitutes a fund in the nature of a trust fund in the sense that it should be maintained intact and be available upon insolvency for equitable distribution among all creditors.

3. Same—

By provision of C. S., 219 (c), an administrator, executor, guardian, or trustee is not personally liable for the statutory liability on bank stock held in their representative capacities, but such liability attaches to the estate or funds in their hands.

4. Same—Failure of trustee to sell bank stock for reinvestment held not to relieve estate of statutory liability.

It appeared from the statement of facts agreed that, under the terms of testator's will, certain shares of bank stock, together with other property, were bequeathed to named executors and trustees, testator directing that the income from the estate be paid his wife during her life, then to his children, and the *corpus* of the estate paid his grandchildren upon the death of his children. The bank and testator's wife were named co-executors and trustees under the will. After testator's death the stock was changed on the books of the bank from testator's name to the "executors of the estate." Thereafter, one of the children, representing the beneficiaries and the testatrix, went to the trust officer of the bank and advocated the sale of the bank stock for reinvestment, which the trust officer declined to do, stating that the stock of the bank was a good investment. Later the bank became insolvent and was taken over by the statutory receiver. The executors thereafter filed their final settlement, and defendant executrix resisted the assessment of the statutory liability on the bank stock against the estate. *Held:* Conceding that the bank breached its duty as trustee in failing to sell the stock for reinvestment, C. S., 4018, its wrongful act will not relieve the estate of the statutory liability to the prejudice of depositors and creditors of the bank, who had no notice of the terms of the trust, and were entitled to regard the statutory liability as additional security, and notice to the bank not being notice to the depositors and other creditors, since the fact of the establishment of the trust did not appear upon the books of the bank.

5. Same—

The principle that a corporation cannot relieve a stockholder of liability for the balance due on unpaid stock to the prejudice of creditors of the corporation applies to the statutory liability of bank stockholders.

6. Same—Trust estate held liable for statutory stock assessment, although ultimate beneficiaries were minors.

Under the provisions of C. S., 219 (c), the trust estate is liable for the statutory assessment on bank stock owned by it, regardless of the method by which the trust is established, and where shares of bank stock appear on the books of the bank in the name of "executors," the statutory liability thereon of the estate may not be defeated by showing that the stock was held by the executors as executors and trustees under the will for the benefit of minor ulterior beneficiaries, the beneficiaries of the income from the trust estate being of age, and there being nothing on the books of the bank to disclose the trusteeship.

7. Equity A c—

The maxim that equity regards that as done which ought to be done will not be enforced to the injury of innocent third parties.

STACY, C. J., and CLARKSON, J., dissenting.

HOOD, COMR. OF BANKS, *v.* TRUST CO.

APPEAL by defendant Margaret E. Brand, executrix, from *Clement, J.*, at May Term, 1934, of GUILFORD. Affirmed.

Plaintiff Commissioner of Banks, under the authority conferred by the statute, levied an assessment against all the stockholders of the failed North Carolina Bank and Trust Company for the amount of stock held by each, and among them against the defendants, executors of the last will and testament of R. A. Brand, deceased, for the stock liability on five hundred shares, of the par value of ten dollars each, and docketed judgment against them for five thousand dollars. From the assessment so levied, the defendant Margaret E. Brand in apt time appealed to the Superior Court.

In the Superior Court the case was submitted without a jury upon the following agreed facts:

"1. The North Carolina Bank and Trust Company was a banking corporation, organized under the laws of the State of North Carolina, with its principal office in Greensboro, Guilford County, North Carolina, and a branch office in Wilmington, New Hanover County, North Carolina, and as such was authorized to do a trust business. On 20 May, 1933, the plaintiff declared said bank insolvent, took possession thereof, and filed in the office of the clerk of the Superior Court of Guilford County notice of his action and of the reason therefor. On 22 June, 1933, the plaintiff levied an assessment equal to the stock liability of each stockholder against all of the stockholders of the North Carolina Bank and Trust Company, and on 3 July, 1933, filed a copy of said levy in the office of the clerk of the Superior Court of Guilford County; that said assessment was recorded and docketed in said office as a judgment for $5,000 in favor of the plaintiff and against the defendants; that a transcript of said judgment was also docketed in the office of the clerk of the Superior Court of New Hanover County. Thereafter Margaret E. Brand requested the North Carolina Bank and Trust Company, as her coexecutor and cotrustee under the will of R. A. Brand, deceased, to appeal from said levy and assessment, but it refused so to do, and an appeal was thereupon filed by said Margaret E. Brand within the time prescribed by law.

"2. R. A. Brand died a resident of New Hanover County, on or about 24 June, 1930, leaving a last will and testament, a copy of which is hereto attached as 'Exhibit A,' and made a part hereof as if fully set out herein. Said will was duly admitted to probate in the office of the clerk of the Superior Court of New Hanover County on or about 28 June, 1930, at which time the North Carolina Bank and Trust Company and Margaret E. Brand qualified as executors of the estate of said decedent.

"3. R. A. Brand died leaving and surviving him the following children, to wit: Robert A. Brand, Jr., Etta Brand Adams, and Margaret Brand Taliaferro; and the following grandchildren, to wit: Margaret Brand and Martha June Brand, children of Robert A. Brand, Jr.; Margaret Brand Taliaferro, Lucy Taliaferro, and Carolyn Davis Taliaferro, children of Margaret Brand Taliaferro; and Lawrence Adams, III, a child of Etta Brand Adams. All of said children and grandchildren are now living, and all of said grandchildren are now minors under the age of twenty-one years.

"4. Margaret E. Brand is now and was at all times herein mentioned wholly inexperienced in business, and the North Carolina Bank and Trust Company, through its trust department, at Wilmington, held itself out as competent and qualified to manage the estate of her deceased husband, R. A. Brand, and to advise the said Margaret E. Brand in all matters connected therewith in which she was interested as coexecutor and cotrustee, and, except as hereinafter stated, said bank, through its trust department, at all times handled the active management of said estate, kept all records, and received and disbursed all funds, merely calling upon the said Margaret E. Brand for her signature whenever same was necessary.

"5. At the time of his death, R. A. Brand owned five hundred shares of stock of the North Carolina Bank and Trust Company of the par value of $10.00 per share. Immediately after his death said stock came into the possession of the executors of his estate, and was transferred on the books and records of the bank to 'North Carolina Bank and Trust Company and Margaret E. Brand, executors of the last will and testament of R. A. Brand, deceased,' in which name it has remained at all times since.

"6. On numerous occasions during a period of approximately two years prior to the beginning of the liquidation of the North Carolina Bank and Trust Company, Robert A. Brand, Jr., one of the legatees under his father's will, acting on behalf of himself and of his mother and the other beneficiaries under said will, consulted the trust officer of the North Carolina Bank and Trust Company at Wilmington and urged the sale of said stock and a reinvestment of the proceeds therefrom in Government Bonds or other similar securities, but said trust officer, who had assumed the active management of said estate on behalf of said bank, stated to the said Robert A. Brand, Jr., that said stock was a good and safe investment and should be retained, and in spite of protests by the said Robert A. Brand, Jr., on behalf of himself, his mother, and the other beneficiaries under his father's will, said trust officer, acting on behalf of said bank, declined to sell or dispose of said stock.

"7. On or about 23 May, 1933, at the suggestion of the North Carolina Bank and Trust Company, said bank and Margaret E. Brand filed in the office of the clerk of the Superior Court of New Hanover County a final accounting as executors of the estate of R. A. Brand, deceased, and thereupon all of the property and assets of said estate were transferred and delivered to the North Carolina Bank and Trust Company and Margaret E. Brand, as trustees, upon the terms, conditions, and uses set forth in the last will and testament of R. A. Brand, deceased, and the North Carolina Bank and Trust Company and Margaret E. Brand qualified and are now acting as trustees of said estate.

"Upon the foregoing facts, the plaintiff contends that the estate and funds in the hands of North Carolina Bank and Trust Company and Margaret E. Brand, as executors and trustees under the will of R. A. Brand, deceased, are liable for the payment of the $5,000 assessment herein referred to, and the defendant Margaret E. Brand contends that said estate was not a stockholder in the North Carolina Bank and Trust Company at the time it suspended business, or within sixty days prior thereto, and that said estate is not liable for said assessment."

The material portions of the will of R. A. Brand are as follows:

"Second: I give, devise and bequeath unto my said Executors all of the rest and residue of my estate, of whatsoever nature, kind, description, whether real, personal, or mixed, and wheresoever situate, in trust nevertheless for the following uses and purposes, and none other, that is to say: That my said Executors shall have and hold said property for the sole use and benefit of my beloved wife, Margaret E. Brand, for and during the term of her natural life and pay the net income arising therefrom unto my said beloved wife, Margaret E. Brand, for and during the said term, in quarterly installments."

"Third: After the death of my beloved wife, Margaret E. Brand, I direct my said Executors to pay, in equal proportions, to my said three (3) children (Etta S. Brand Adams, Margaret E. Brand Taliaferro, and Robert A. Brand, Jr.), in quarterly payments, the net income, rents, profits and interest arising from my estate, and at the death of my said three children, I direct my said Executors to divide the property remaining in my said estate between my grandchildren, share and share alike, absolutely, unconditionally, and in fee simple forever."

"Fourth: I hereby authorize, direct and empower my said Executors, in their sound discretion, both concurring, to sell or otherwise dispose of, any or all of the real estate, except my present dwelling, save as hereinafter provided that I may die seized or possessed of, and hold and reinvest the proceeds arising from said sale, or other disposition, of my said real estate to and for the same uses, trusts, and purposes that they held said property in its unconverted state, as hereinbefore set forth."

"Fifth: I hereby constitute and appoint my wife, Mrs. Margaret E. Brand, and North Carolina Bank and Trust Company of Wilmington, North Carolina, my lawful executors."

Upon the foregoing facts, judgment was rendered in the court below that the assessment levied against the defendants be affirmed, and that the appeal therefrom be dismissed. From this judgment defendant Margaret E. Brand, executrix, appealed to this Court.

Brooks, McLendon & Holderness for appellee.
Stevens & Burgwin for appellant.

DEVIN, J. It is admitted that the shares of stock in question belonged to defendant's testator, R. A. Brand, and that upon his death they passed to his executors under the provisions of his will. The will devises and bequeaths all of testator's property, both real and personal, to his executors in trust to have and hold the same for the use and benefit of his wife, the defendant Margaret E. Brand, to pay to her the net income therefrom during the term of her natural life, and after her death the net income, "rents, profits, and interest," to be paid to his three children, and at the death of his children, the remaining property to be divided among his grandchildren.

After the death of R. A. Brand the said shares of stock in the North Carolina Bank and Trust Company were transferred on the books of the bank to "North Carolina Bank and Trust Company and Margaret E. Brand, executors of the last will and testament of R. A. Brand, deceased." In their names the stock has remained at all times since.

After the bank had closed and the plaintiff Commissioner of Banks had taken over its assets and affairs for the purpose of liquidation, the named executors filed their final settlement as such.

The plaintiff herein is acting in a capacity equivalent to that of a receiver (C. S., 218 [c]; *Blades v. Hood, Comr.*, 203 N. C., 56), in the performance of his duty to collect and distribute all the assets of the bank for the benefit of its depositors and creditors. To that end he stands in the place of and represents the creditors.

The question presented by this appeal is whether bank stock, held by executors and trustees under a will, can avoid assessment for the statutory liability of stockholders, on the ground that the bank, one of the executors and trustees, negligently retained the shares of stock instead of selling them for proper investment, in breach of the trust created by the will.

The appellant contends that for this reason, and for the further reason that under the terms of the will the *corpus* of the estate was devised to

the testator's grandchildren as ultimate takers, the estate was not liable to assessment as stockholder, within the meaning of the statute, at the time the bank failed.

To determine this question, it becomes necessary to examine the pertinent statutes in force at the time and the decisions of this Court with reference to the nature and effect of the liability of the holders of bank stock to assessment for the benefit of depositors and creditors, on failure of the bank.

I. The statute, C. S., 219 (a), which imposes liability upon holders of bank stock, is as follows:

"The stockholders of every bank organized under the laws of North Carolina, whether under the general law or by special act, shall be individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such corporation, to the extent of the amount of their stocks therein at par value thereof, in addition to the amount invested in such shares. . . . The term stockholders shall apply not only to such persons as appear by the books of the corporation to be stockholders, but also to every owner of stock, legal or equitable, although the same may be on such books in the name of another person."

This statute was originally enacted by the North Carolina General Assembly of 1897, ch. 298, and was taken from section 12 of the National Banking Act of 1864, Rev. St. U. S., 5151.

The quoted provisions of the statute are very broad in their terms and impose liability upon every owner of stock in a bank "for all contracts, debts, and engagements of such corporation," not for the benefit of the corporation but for the benefit of the depositors and other creditors. The liability of stockholders is statutory and attaches by virtue of the statute, to the owners of stock, and is imposed by statute for the benefit of depositors and creditors. *Smathers v. Bank,* 155 N. C., 283.

"The statutory liability of stockholders is created exclusively for the benefit of corporate creditors. It is not to be numbered among the assets of the corporation, and the corporation has no right or interest in it." Cook on Stock and Stockholders, sec. 218. It is an additional security for creditors. *Hill v. Smathers,* 173 N. C., 642.

In *Smathers v. Bank,* 135 N. C., 410, it is stated that the statute imposing the liability of stockholders, "incorporates in the contract of subscription the additional obligation that, if necessary to pay the debts of the corporation, the subscriber will pay an amount in addition to his subscription equal to the par value of his stock. This obligation is in trust for the security of the creditors. The corporation may not, as against creditors, relieve him from the obligation."

In *Foundry Co. v. Killian,* 99 N. C., 501 (decided in 1888), it was held that the unpaid subscriptions to stock (and same rule applies to

the statutory liability, *Smathers v. Bank,* 135 N. C., 410), constitute a trust fund for the benefit of the creditors of the corporation—a trust fund pledged for the payment of the debts of the corporation, citing *Sawyer v. Hoag,* 17 Wall., 620.

In *Smathers v. Bank,* 135 N. C., 410, *Mr. Justice Connor,* delivering the opinion, uses this language: "The doctrine that the capital stock of a corporation constitutes a trust fund has been accepted and acted upon by this Court," and he quotes with approval from 10 Cyc., 553, the following: "It is a favorite doctrine of the American courts that the capital stock and other property of a corporation are to be deemed a trust fund for the payment of the debts of the corporation." *Foundry Co. v. Killian, supra; Cotton Mills v. Cotton Mills,* 115 N. C., 475; *Bank v. Cotton Mills,* 115 N. C., 507.

It is an essential American doctrine, based upon the principle first enunciated by *Judge Story,* that the capital stock of a corporation is a trust fund to be preserved for the benefit of creditors. *Foundry Co. v. Killian, supra.*

"Statutes making stockholders individually liable to creditors create a right flowing directly from the stockholder to creditors." Thomp. Corp., sec. 3560.

It is apparent from these and many other authorities, which could be cited, that it is the purpose of the statutes imposing the liability of stockholders to provide security, frequently referred to as a "trust fund," for the depositors and creditors, in addition to the security furnished by the tangible property of the bank. *Fuller v. Service Co.,* 190 N. C., 655; *Redrying Co. v. Gurley,* 197 N. C., 56.

As pointed out by *McRae, J.,* in *Bank v. Cotton Mills,* 115 N. C., 507, the words, "trust fund," used in this connection, are not to be understood in the strict sense to import a direct and express trust attaching to the property, but mean that all the assets will be equitably distributed for the benefit of all creditors.

Illustrating the nature and effect of the principle that the stockholder's liability constitutes a fund to be preserved for the benefit of depositors and creditors, we have the rule that such liability may not be set off against the bank's liability to depositors and creditors. As was held in *In re Trust Co.,* 197 N. C., 613, a depositor, who is also a stockholder of an insolvent bank, is not entitled to have the total amount of his deposit applied as payment on his assessment. Only the dividends apportioned to him as a depositor may be so applied. *Pritchard v. Hood, Comr.,* 205 N. C., 790.

II. But the defendants in the case at bar are not individually and in their own right the owners and holders of the stock in question. It was bequeathed to them as executors and trustees to be held for the pur-

poses expressed in the will of R. A. Brand. At common law, when stock was recorded on the books of the corporation in the name of a trustee for others, the trustee was personally liable as if the absolute owner; though the estate of a deceased shareholder was liable when shares came into the hands of an executor. Cook on Stock & Stockholders, secs. 244-248.

That rule, however, has been generally changed by statute. The North Carolina statute appertaining to those who hold stock in a representative capacity, originally enacted in 1893 (C., 471), now C. S., 219 (c), is as follows: "Persons holding stock as executors, administrators, guardians, or trustees shall not personally be subject to any liabilities as stockholders, but the estate and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust fund would be if living and competent to hold stock in his own name."

This provision extends to every trust relation, however created, and attaches liability to the estate and funds in the hands of the trustee. *In re Trust Co.*, 203 N. C., 238.

The exemption of the personal liability of the trustee is limited to cases where there is a probability of some estate to respond to the liability. *Trust Co. v. Jenkins,* 193 N. C., 761; 7 C. J., 770.

The appealing defendant contends that her codefendant, the bank, was negligent in the administration of the trust created by the will, in that, in spite of her protest, it continued to hold the shares of its own stock as a part of the fund until the bank became insolvent and was closed; that it was the duty of the bank to have invested the fund which came into its hands under the terms of the will in accordance with the statute, C. S., 4018.

While the fund came into the hands of defendants impressed with a trust, to be held for the purposes declared in the will, a portion of the fund, to wit, the five hundred shares of stock in question, came into their hands in the form of an investment which had been selected and apparently approved by the testator; yet, conceding the bank committed a breach of duty in failing to sell the shares when salable and reinvesting the fund, can the deposit creditors of the bank be made to suffer on that account? There was no notice to them of the terms of the trusteeship. They were only chargeable with notice of the manner in which the names of the stockholders appeared on the stock books of the bank, and had a right to rely in making deposits on the statutory liability of the stockholders as additional security for their deposits. *Trust Co. v. Jenkins, supra.*

And a breach of duty on the part of one of the trustees or of the bank could not injuriously affect the rights of creditors without notice. The

stock liability was to creditors an additional security, and notice to the bank is not necessarily notice to depositors or creditors. *Trust Co. v. Jenkins, supra.*

"The governing officers of a corporation cannot, by agreement or other transaction with the stockholders, release the latter from their obligation to pay, to the prejudice of creditors, except by fair and honest dealing and for a valuable consideration. Such conduct is characterized as a fraud upon the public, who were expected to deal with them." *Drug Co. v. Drug Co.*, 173 N. C., 502.

"The creditors of a company may well ask that the fund upon which they relied (the capital stock subscribed) shall really exist and be held sacred to discharge corporate liabilities." *Foundry Co. v. Killian, supra.*

The Court was here speaking of unpaid stock subscription, but the principle applies to the statutory liability of bank stockholders. *Smathers v. Bank,* 135 N. C., 410.

"The liability which attaches to the ownership of the stock, which was held by him as a guardian, is statutory, and therefore would bind the estate of the wards in his hands." *Smathers v. Bank,* 155 N. C., 283.

"The corporation may not, as against creditors or other stockholders, relieve him from the obligation of stock liability." *Smathers v. Bank,* 135 N. C., 410. Nor can stockholders evade liability by any private or secret arrangement that may have been entered into among themselves. *Foundry Co. v. Killian, supra.*

It was held in *Trust Co. v. Jenkins, supra,* that where the rights of depositors and creditors of the bank are involved, it was immaterial that the officers of the bank had notice of the conditions under which stock was held by a trustee. The liability imposed by statute upon stockholders of a bank is for the benefit of the depositors and creditors and not for the bank.

In *Corp. Com. v. McLean,* 202 N. C., 77, the defendants in that case sought to avoid the statutory liability on the ground that those from whom they had purchased the shares had perpetrated a fraud upon them, but this Court denied relief on that ground, stating that "to hold otherwise would defeat the purpose of the statute, which is to provide an expeditious proceeding for the enforcement of the statutory liability of all persons who are stockholders of an insolvent banking institution at the date of its insolvency."

Corporation Com. v. McLean, supra, is cited with approval in *Commissioner of Banks v. Carrier,* 202 N. C., 850, where a stockholder sought to escape liability for assessment by allegation that her purchase of stock was induced by fraud of the officers of the bank. There it was

held she was not entitled to have her purchase of stock canceled to the detriment of the depositors and creditors of the bank, she having held the stock for two years and having exercised the privileges of a stockholder.

In *Scott v. Deweese,* 181 U. S., 202, it is stated: "If the subscriber became a shareholder in consequence of fraud practiced upon him by others, whether they be officers of the bank or officers of the Government, he must look to them for redress, and is estopped as against creditors to deny that he is a shareholder within the meaning of sec. 5151 (C. S., 219 [a]), if at the time the rights of creditors accrued he occupied and was accorded the rights appertaining to that position."

It has been held that where stock is left by will or descends to an infant, the estate in the hands of the guardian is liable for the assessment. 7 C. J., 770; *Clark v. Ogilvie,* 111 Ky., 181.

In *Clark v. Ogilvie,* 111 Ky., 181, the father of the infant defendants died while owning certain shares of stock in a national bank. This stock came into the hands of defendants' guardian, who continued to hold it until the bank failed. Upon action by the receiver of the bank the guardian admitted these facts and judgment was rendered against the estate of the wards. The Federal statute, 5152, U. S. Revised Statute, is in the same words as C. S., 219 (c). Subsequently, the defendants, then of age, set up that the guardian had violated the trust in holding the stock. It was held that, while the personal judgment against the infant defendants was unauthorized, the judgment was properly entered against the estate of the wards in the hands of the guardian. Further referring to section 5152, U. S. Rev. St., our C. S., 219 (c), the Kentucky Court used this language: "It will be observed that in fixing the liability of stockholders of a national bank, so far as the persons beneficially owning stock may be under the legal disability of infancy are concerned, as well as instances where the stock is held by executors, administrators, or other trustees, it is the estate and not the person that is made liable for assessment. The infants could not bind themselves by contract, or otherwise, as stockholders of the bank, nor could their father have bound them, had he intended to do so, by having this stock conveyed to them directly."

Mr. Justice Connor, speaking for the Court in *Corp. Com. v. McLean, supra,* uses this language: "The only issues of fact that may be raised by such an appeal (from an assessment against stockholders), ordinarily, are: (1) Was the appellant a stockholder of the insolvent banking corporation at the date of the assessment? (2) If so, how many shares did he own at said date?"

The fact that the bank itself, coexecutor, was negligent in that it retained the shares and, together with the appealing defendant (though over her protest), maintained the status of holders of the stock in the

capacity of executors as shown by the stock books of the bank, could not change the rule of liability as against the claims of depositors and creditors.

It was held in *Hood, Comr., v. Darden,* 206 N. C., 566, that when the bank became insolvent after the death of a testator who owned shares therein, judgment should be rendered against his executrix for the stockholders' liability, payable out of the funds of the estate, the liability being contractual, though no preference was created for priority of payment of such assessment from the assets of decedent's estate.

In *Corp. Com. v. Latham,* 201 N. C., 342, it was held that where bank stock was transferred before the failure of the bank, and in good faith, to trustees for infants "without any estate," no personal liability was imposed on the transferor. There the trustees were legally capable of holding the stock. C. S., 219 (d), exempts from personal liability those who in good faith transfer stock to any person of full age.

While an unlawful investment in, or negligent retention, of bank stocks among trust funds would subject the trustee to individual liability, it does not follow that the *cestui que trust* should be entitled to have the fund relieved of liability at the expense of creditors who deposited their money in the bank on the faith of the liability of the stock to assessment for their benefit.

In *In re Trust Co.,* 203 N. C., 238, *Adams, J.,* thus states the law: "It is an established rule of law that a transfer of stock in a corporation must be made to a person who is not only legally capable of holding the stock, but is legally bound to respond when an assessment is made. . . . An infant cannot be held liable on his subscription, for he is without legal capacity to bind himself by contract. . . . To transfer stock directly to a minor leaves the transferor liable for assessment. *Early v. Richardson,* 280 U. S., 496."

However, in *Hood, Comr., v. Martin,* 203 N. C., 620, and in *Hood, Comr., v. Paddison,* 206 N. C., 631, it was held that the fact that a stockholder was induced to purchase the stock by the false and fraudulent representation of the president of the bank as to the condition of the bank, could be set up as a defense to the enforcement of an assessment for stock liability, when the stockholder had acted with promptness and diligence. And *Chamberlain v. Trogden,* 148 N. C., 139, is cited as authority for this holding.

The reasoning in *Hood, Comr., v. Martin, supra,* is based to some extent on the fact that by statute, in the final settlement of the bank's affairs, after all the depositors and creditors have been paid in full, the surplus should be distributed pro rata to the stockholders, and that under the facts and circumstances of that case it would be inequitable for the officer of the bank, a stockholder, who perpetrated the fraud, to profit by his wrong.

Considering it in that aspect, due weight seems not to have been given the view that in the event there be a surplus after all the depositors and creditors are paid in full (which in the nature of things would rarely happen), such inequity should be corrected among the shareholders in the division of the surplus, rather than at the expense of innocent creditors, who deposited their money in the bank in faithful reliance on the security of the liability of all stockholders as their names appeared on the stock books of the bank.

Chamberlain v. Trogden, supra, cited in *Hood, Comr., v. Martin, supra,* was an action on a note given for subscription to the capital stock of a manufacturing corporation. Fraud on the part of the officers of the corporation in procuring the subscription was set up as a defense to the note. It was determined in that case, however, that the defendant there had not exercised due care and diligence in discovering the fraud and repudiating the contract, and his defense was not sustained, recovery being had on the note. In delivering the opinion of the Court, *Hoke, J.,* uses this language: "The weight of authority in this country seems to establish that, under exceptional circumstances, the subscriber may avail himself of the position suggested (right to rescind) even after insolvency. (Citing authorities from other jurisdictions.) All of the authorities, however, are to the effect that, in order to do so, the subscriber must act with promptness and due diligence, both in ascertaining the fraud and taking steps to repudiate his obligation."

So that, applying the rule in *Hood, Comr., v. Martin, supra,* to the case at bar, the appealing defendant cannot be said to have acted with the diligence and promptness necessary to make this defense available, even if it had been predicated on the fraud of an officer of the bank. There is here no contention that fraud was practiced upon her. There is no imputation of lack of good faith. She bottoms her defense upon a negligent breach of duty on the part of her coexecutor and trustee. In the facts agreed, she states her contention as follows: "The defendant Margaret E. Brand contends that said estate was not a stockholder in the North Carolina Bank and Trust Company at the time it suspended business, or within sixty days prior thereto, and that said estate is not liable for said assessment." The facts agreed further set forth that on numerous occasions one of the legatees, acting for her, urged the trust officer of the bank to sell the stock for reinvestment, but the trust officer maintained the stock was a good and safe investment and declined to sell it. With full knowledge of the facts, and without taking any action to require her coexecutor to comply with her request, the shares of stock were permitted to remain on the stock books of the bank in the name of herself and the bank as executors of R. A. Brand for nearly three years, and until the bank was closed.

The appealing defendant's counsel, Mr. Burgwin, in his able oral argument and in his brief, calls our attention to *Rutledge v. Stackley,* 162 S. C., 173, 160 S. E., 429, as authority for his position. There the owner of bank stock, in good faith, transferred the shares to trustees for his minor children, and it was held by a divided court that neither the trustees personally nor the estates of the infants were liable to assessment on failure of the bank, citing *Early v. Richardson,* 280 U. S., 496. However, it is pointed out in the dissenting opinion that in *McNair v. Darragh,* 31 F. (2d), 906, a different conclusion from that in *Early v. Richardson, supra,* seems to have been reached, and that the Supreme Court of the United States denied writ of *certiorari* to review it. (*Gamble v. Darragh,* 280 U. S., 563.)

We are also referred to the case of *Mobley v. Phinizy* (Ga. App.), 155 S. E., 73. In the last named case it appears that one who owned certain shares of stock in a bank, by will created a trust estate for the benefit of his imbecile son, appointing trustees with full power to manage the estate. Included in this fund, so set apart, were seven shares of bank stock. After the death of the testator the trustees acquired 139 other shares of stock in the bank, an investment not authorized by law, and all these shares were held by them as trustees at the time the bank failed. It was held that the estate of the incompetent was not liable to assessment under the terms of the banking act for the benefit of depositors, nor under the terms of the charter of the bank, and that any such liability was the liability of the trustees making such illegal investment.

The reasoning upon which this case was decided seems to have been based on the view that when the bank issued stock to the trustees as trustees, it was apprised of the fact that it was dealing with trust funds, and therefore participated in the mismanagement of trust funds, and was *in pari delicto* with the trustees; that, though depositors knew nothing of these illegal investments, the bank was one of their own selection, and if they selected a bank whose officials disregarded the law and participated in illegal investment, they should suffer rather than one who was *non compos mentis.*

While we are not disposed to follow this line of reasoning to the conclusion reached, the facts in the Georgia case, as well as those in the South Carolina case, are distinguishable from those in the case at bar.

Here the stock was at all times held by the defendants as executors of R. A. Brand, and there was nothing to take it out of the rule of liability fixed by the statute. The will of R. A. Brand made the defendant Margaret E. Brand the beneficiary for her life, and those who took the income in succession to her were also of full age at the time the bank failed. There was nothing on the books to indicate a trusteeship for the benefit of minors.

It is interesting to note that it was held in *McNair v. Darragh,* 31 F. (2d), 906, *Circuit Judge Stone* delivering the opinion, that when shares of bank stock were transferred, in good faith, to defendant as trustee for infant children, the liability for assessment on failure of the bank fell, not upon the transferor, but on the estate, in accordance with the provisions of Rev. St., 5152 (C. S., 219 [c]). It is stated in the opinion in this case that it was to remedy the uncertainty which arose where stock was held by an executor, guardian, or trustee, that the quoted section, Rev. St., 5152, was enacted to make certain in all instances the liability for assessment. We quote further from the opinion in this case:

"It states that the executors, administrators, guardians, or trustees shall not be personally subject to the stockholder liability for stock belonging to the estate. Also, the section states that the estates and funds in their hands shall be liable. It states the extent of the liability of such funds to be the same as the 'person interested in such trust funds would be, if living and competent to act and hold the stock in his own name.' 'If living,' as thus used, refers, of course, to where the stock was owned by a deceased person whose estate is in course of administration and refers back to 'executors, administrators,' 'competent to act and hold the stock in his own name,' clearly primarily carries the thought of guardianship or trusteeship, and specifically covers the point of incompetency. As the only reason suggested here by appellant why appellee should be held personally liable, is the incompetency of the minors, under the trust, and as section 66 specifically covers trusts, declares trustees not personally liable, and declares the trust estate liable to the extent that the beneficiary would be 'if . . . competent to act and hold the stock in his own name,' we think the section exactly fits this situation. It is one kind of the situations which the statute was enacted to cover. See *Fowler v. Gowing,* 165 F., 891 (C. C. A., 2)."

The defendant seeks to invoke the equitable principle set forth in the maxim: "Equity regards that as done which ought to be done." This salutary principle, that equity will sometimes consider that property has assumed certain forms with which it ought to be stamped, or that the parties will perform certain duties or carry out the terms of contracts which they ought to fulfill, will not be enforced to the injury of innocent third parties. *Casey v. Cavanoc,* 96 U. S., 467, 21 C. J., 201.

Though it may have been due to the negligence of the bank in failing to dispose of the shares of stock when salable, still the appealing defendant and her codefendant, as executors, were the holders thereof when the bank closed, and the estate to which the stock belonged as a part thereof must bear the burden of the liability to assessment rather than the loss fall upon the depositors and creditors for whose benefit the statute created the liability.

The question of the liability of the bank to the estate of R. A. Brand for alleged breach of trust is not presented by this appeal.

Therefore, upon consideration of the facts agreed as shown by the record and an examination of the pertinent statutes as interpreted by the authorities cited, we conclude that the defendants were holding the shares of stock in question, as executors of R. A. Brand, deceased, at the time the bank closed, and that pursuant to the provisions of the statute the estate and funds in their hands must be held liable for the assessment levied by the plaintiff Commissioner of Banks.

The learned judge who heard the case below properly decided that the defendant's appeal should be dismissed.

Affirmed.

STACY, C. J., dissenting: The question is this: Will the statutory liability of stockholders in a bank be enforced against one who appears as a stockholder only by reason of the faithlessness of the bank? The answer should be, No.

We have held that fraud on the part of an officer of a bank in the sale of its stock will release the purchaser of this statutory liability. *Hood, Comr., v. Martin,* 203 N. C., 620, 166 S. E., 793. The conclusion rests upon the principle that the statute existent at the time enters into and becomes a part of the contract of stock subscription, and that no contract, or its complement, will be enforced which is grounded upon a wrong. *Hood, Comr., v. Paddison,* 206 N. C., 631, 175 S. E., 105.

It is not after the manner of equity "to condone a little evil that good may come of it." It is submitted that in the instant case the plaintiff is seeking to gather grapes from the thorn-bush which the bank planted. He invokes the trust-fund doctrine to take from the defendants, through the wrong of the trustee bank, not "exclusively for the benefit of corporate creditors," as said in *Hill v. Smathers,* 173 N. C., 642, 92 S. E., 607, but that its general assets may be increased. Under the 1927 amendment to the statute, ch. 113, sec. 13 (d), Public Laws 1927, the liability of the stockholders is made "immediately available as general assets of the bank for distribution as other assets." It was upon this amendment that the *Martin case, supra,* was decided, and distinguished from *Hill v. Smathers, supra.*

Undoubtedly the bank could not recover in the instant case because of its breach of trust, yet all sums collected by the plaintiff are to "become immediately available as general assets of the bank." Thus by indirection is accomplished that which is not permitted to be done directly. The whole difficulty arises from the failure of the bank in the first instance to discharge its trust obligation to the defendants. *Fisher v.*

Fisher, 170 N. C., 378, 87 S. E., 113. Supposed rights bottomed upon this neglect ought not to stand. *Nullus commodum capere potest de injuria sua propria.* Broom's Legal Maxims, sec. 279; *Parker v. Potter,* 200 N. C., 348.

CLARKSON, J., dissenting: R. A. Brand died on 24 June, 1930. He had $5,000 (500 shares, par value of $10.00) in stock in the N. C. Bank and Trust Company. Under his will he left same to the *N. C. Bank and Trust Company* and Margaret E. Brand, executors and trustees for certain purposes. "Immediately after his death said stock came into the possession of the executors of his estate and was transferred on the books and records of the bank to 'N. C. Bank and Trust Company and Margaret E. Brand, executors of the last will and testament of R. A. Brand, deceased.'" Nothing else appearing, the stock would be assessable "for all contracts, debts, and engagements of such corporation." But equity steps in and halts the legal hand by showing gross negligence—the twin of bad faith and fraud.

On or about 23 May, 1935, the *North Carolina Bank and Trust Company* and Margaret E. Brand, executors, filed in the office of the clerk of the Superior Court the final account, and thereupon all the property and assets of the estate were transferred and delivered to the *North Carolina Bank and Trust Company* and Margaret E. Brand, as trustees, upon the terms, conditions, and uses set forth in the will of the said R. A. Brand.

In the agreed statement of facts set forth in the record, pages 1-5, it is admitted that the said Margaret E. Brand is and was wholly inexperienced in business, and the *North Carolina Bank and Trust Company* held itself out as competent and qualified to manage the estate of her deceased husband and to advise the said Margaret E. Brand in all matters connected therewith, and that at all times said bank, through its trust department, handled the active management of the estate, kept all records, received and disbursed all funds, merely calling upon the said Margaret E. Brand for her signature whenever the same was necessary.

In the agreed statement of facts, the exact findings are as follows: "On numerous occasions *during the period of approximately two years* prior to the beginning of the liquidation of the *North Carolina Bank and Trust Company,* Robert A. Brand, Jr., one of the legatees under his father's will, acting on behalf of himself and of his mother and the other beneficiaries under said will, consulted the trust officer of the *North Carolina Bank and Trust Company* at Wilmington and *urged the sale* of said stock and a *reinvestment of the proceeds* therefrom in Government Bonds or other similar securities, *but said trust officer,* who had assumed the active management of said estate on behalf of said bank, stated to the said Robert A. Brand, Jr., *that said stock was a good*

and safe investment and should be retained, and in spite of protests by the said Robert A. Brand, Jr., on behalf of himself, his mother, and the other beneficiaries under his father's will, *said trust officer, acting on behalf of said bank, declined to sell or dispose of said stock."*

In the main opinion, the cases cited and relied on by the Commissioner of Banks do not touch the equitable defense of the widow and infant beneficiaries under the will of R. A. Brand. In fact, no case in the main opinion deals with the factual situation in the present case. I think the cases of *Hood, Comr., v. Martin,* 203 N. C., 620, and *Hood, Comr., v. Paddison,* 206 N. C., 631, are applicable to the facts on the present record.

In the *Paddison case, supra,* pp. 634-5, it is said: "The defendant, as a defense, alleged and set up actionable fraud on the part of the president of the bank, in the purchase of the stock. Whatever may be the English decisions and some of the American decisions, this Court has held that actionable fraud, if shown, is a good defense. In *Chamberlain v. Trogden,* 148 N. C., 139 (140-1), speaking to the subject, citing numerous authorities, is the following: 'There is some conflict of authority as to the right of the subscriber to rescind his subscription or maintain a defense to his obligation therefor on the ground of fraud, after the corporation has become insolvent and its affairs have passed into the possession and control of a receiver of the bankruptcy court, or other method of general adjustment, primarily for the benefit of creditors. The English cases and some courts in this country have held that, under conditions indicated, it is no longer open to the subscriber to maintain such a defense. These English decisions, however, are said to be based to some extent on the construction given to certain legislation on the subject, and the weight of authority in this country seems to establish that, under exceptional circumstances, the subscriber may avail himself of the position suggested even after insolvency. . . . All of the authorities, however, are to the effect that, in order to do so, the subscriber must act with promptness and due diligence, both in ascertaining the fraud and taking steps to repudiate his obligation.' The president of the bank has authority to make the alleged contract. *Warren v. Bottling Co.,* 204 N. C., 288 (290)."

The cases cited by defendant are also in point: *Rutledge v. Stackley,* 162 S. C., 173, 160 S. E., 429; *Mobley v. Phinizy* (Ga. App.), 155 S. E., 73.

The question involved: More than two years before the liquidation of the *North Carolina Bank and Trust Company,* a stockholder in said bank died, leaving a last will and testament, in which he appointed the *North Carolina Bank and Trust Company* and his widow as executors. In the will, the *corpus* of his estate is devised to his minor grandchildren.

As a part of his estate, there comes into the hands of his executors (who afterwards qualified as trustees), five hundred shares of *North Carolina Bank and Trust Company stock*, the *North Carolina Bank and Trust Company* as executor and trustee, although urged to do so by the devisees under the will, refused to sell said stock and reinvest the proceeds, but retained the stock until the liquidation of the bank. Is the estate of the minors liable for the statutory stock assessment? I think not, under the facts and circumstances of this case.

In *Stroud v. Stroud,* 206 N. C., 668 (671), it is said: "It is well settled as the law of this State and elsewhere that neither an executor, an administrator, nor a guardian is an insurer of the assets of the estate committed to his custody and care. In *DeBerry v. Ivey,* 55 N. C., 370, it is said: 'An executor, like other trustees, is not an insurer, nor to be held liable as such in taking care of the assets which come into his hands, nor in collecting them. He is answerable only for that *crassa negligentia,* or gross neglect, which evidences bad faith. The estates of deceased persons are deeply concerned in the existence of such a principle. If an executor was put into the position of an insurer—answerable for any neglect, however slight—unprotected by an honest endeavor to perform his duties, honest and reasonable men would rarely be found willing to incur the responsibility; and those only would incur it who calculated possible gain and loss.' See *Thigpen v. Trust Co.,* 203 N. C., 291, 165 S. E., 720."

Was the *North Carolina Bank and Trust Company* guilty of "gross negligence, which evidences bad faith?" I think so, under the findings of fact in this action. The stock totalling $5,000 was in the North Carolina Bank and Trust Company and the *North Carolina Bank and Trust Company* was one of the executors and trustees of the will of R. A. Brand, Sr. The trust officer of the bank assumed the active management of the estate. The *North Carolina Bank and Trust Company* knew, or in the exercise of ordinary care should have known, the condition of the bank. For a period of approximately 2 years prior to the liquidation of the bank, on numerous occasions, Robert A. Brand, Jr., one of the legatees under his father's will, and acting on behalf of himself and his mother, one of the executors and trustees, and the other beneficiaries of the will, consulted and urged the *trust officer* to sell the stock in the *North Carolina Bank and Trust Company,* and to reinvest the proceeds therefrom in Government Bonds or other similar securities. The *trust officer,* who knew, or in the exercise of due care should have known, the condition of the bank, stated to Robert A. Brand, Jr., representing the other executor and trustee, his mother, and the beneficiaries under his father's will, that the stock was a good and safe investment and should be retained, and *in spite of the protests,* the *trust officer,* acting on behalf of the bank, declined to sell or dispose of the stock.

Under these facts, should this widow and the children and grandchildren, minors, under the will of Robert A. Brand, Sr., not only lose the $5,000 in the *North Carolina Bank and Trust Company,* but also be assessed an additional $5,000? I do not think so.

"Equity looks upon that as done which ought to have been done. 1 Story Eq. Jur., sec. 64 G. Equity will treat the subject matter, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been; not as the parties might have executed them," citing numerous authorities. Black's Law Dictionary, 3d Edition, page 675.

"No man can serve two masters: for either he will hate the one, and love the other, or else he will hold to the one and despise the other. Ye cannot serve God and mammon." Matthew, 6th chapter, 24th verse.

The *North Carolina Bank and Trust Company,* in its dual capacity, looking solely to the interest of its bank, was grossly negligent, evidencing bad faith, in its duty as executor and trustee, in not selling the stock, and it thus caused the loss. The plaintiff Commissioner of Banks, when he took charge of the *North Carolina Bank and Trust Company,* took it *cum onere,* and had no authority under the provisions of N. C. Code, 1931 (Michie), sec. 218 (c), subsec. 13, to levy the stock assessment. The wrong was done—gross negligence and bad faith were shown—when plaintiff took charge of the bank, and plaintiff, in good conscience and fair dealing, is estopped to make this assessment.

In 92 A. L. R., p. 463-4, it is said: "And it has been held, also, that an administrator, who, as director of a bank, has opportunity, and owes a duty, to inform himself as to its financial condition, cannot excuse his negligence in retaining stock of the bank for nearly four years, up to the time of its failure, without making any attempt to dispose of it, although he holds the stock as an asset of the estate, on the advice of a guardian and mother of infant beneficiaries that it should be so allowed to remain."

"*Mills v. Hoffman* (1883), 92 N. Y., 181. The Court pointed out that the duty of administering the estate was upon the administrator, and not upon the guardian or mother of the infants, and that it was not claimed that they had any knowledge or means of ascertaining the true condition of the bank.

"And the facts that the testatrix in a letter, the contents of which are communicated to her executor, has indicated a desire not to have any of her securities changed and a purpose of purchasing long-term securities with this object in view, and that the party communicating this information to the executor, a daughter of the testatrix and a life beneficiary, expresses a similar desire not to have the securities changed, will not, it seems, relieve the executor from responsibility for loss resulting

from retention of such securities and investment thereof in proceeds authorized by law. See *Wotton v. DeReau* (1901), 59 App. Div., 584, 69 N. Y. S., 753 (affirmed without opinion in 1901), 167 N. Y., 629, 60 N. E., 1123.

"But if a majority of the beneficiaries request a sale of stock by the personal representative, this fact may, it seems, require prompt action on his part. It appears that in *Hiddingh v. Denyssen* (1887), L. R., 12 App. Cas. (Eng.), 624—P. C., in which executors were held responsible for failure for about eighteen months to dispose of shares of stock belonging to the estate (it being held that six months would be a reasonable time for them to sell the shares), those interested in the estate had, about the close of the six-months period, requested the executors to dispose of the stock. The view was taken that the executors, having been called upon by the major portion of the heirs to do as soon as possible the duty which the law laid upon them, were bound to delay no longer.

"And an administrator has been held liable for failure to sell speculative securities when requested to do so by a preferred distributee, even though his delay in doing so was due to the insistence of secondary distributees who hoped to secure a better price by a later sale.

"In the reported case (*Re Mellier* [Pa.], *ante,* 430), where the decedent's estate consisted of speculative securities, and an agreement was entered into among those claiming the estate by which one of the claimants was entitled to payment of a certain sum in satisfaction of her claim, it was held that the administrator could not, except at his own risk, refuse to comply with the demand of such claimant, as preferred distributee, that he sell the securities which were declining in value on the market, in order to realize funds for payment of the amount to which she was entitled, although his refusal to sell, or delay in selling, was due to objection on the part of the secondary distributees, who insisted that the securities should be held in the hope of a later rising market, which might give them a share, or an increased share, in the estate, after payment of the preferred distributee. So that, where the securities were finally sold for less than the amount required to pay the preferred distributee, the administrator was surcharged with the value of the securities belonging to the estate as of the date when demand was made by such distributees for their sale."

N. C. Code, 1931 (Michie), ch. 78, Trustees, Art. 1, sec. 4018, 4018 (a), makes provision for trustees, guardians, executors, administrators and others acting in a fiduciary capacity to invest surplus funds in certain securities, and are protected in so doing.

In Perry on Trusts & Trustees, 7th Edition, Vol. 1, sec. 465, in part, it is said: "If no directions are given in a will as to the conversion and investment of the trust property, trustees, to be safe, should take care to

invest the property in the securities pointed out by the law. It is true that a testator during his life may deal with his property according to his pleasure, and investments made by him are some evidence that he had confidence in that class of investments; but, in the absence of directions in the will, it is more reasonable to suppose that a testator intended that his trustees should act according to law. Consequently, in states where the investments which trustees may make are pointed out by law, the fact that the testator has invested his property in certain stocks, or loaned it on personal security, will not authorize trustees to continue such investments, even though requested to do so by the beneficiary, beyond a reasonable time for conversion and investment in regular securities, and what is a reasonable time must depend upon the circumstances of each party in the case."

From the facts in this case, I do not think that N. C. Code, 1931 (Michie), sec. 219 (c), or *Corporation Commission v. McLean,* 202 N. C., 77, contrary to the positions here taken.

The plaintiff in its brief says: "And notwithstanding the request for a sale of the stock, it appears that the stock was permitted to remain upon the bank's records in the name of the estate, without any effort being made to force a sale by appealing to the courts for relief." It was the *duty* of the *North Carolina Bank and Trust Company* to sell without the beneficiaries appealing to the court. The beneficiaries, for two years, made urgent requests and in spite of same, the *North Carolina Bank and Trust Company* refused to sell. It is responsible alone for the consequences and should not be allowed to take advantage of its own wrong.

The *North Carolina Bank and Trust Company,* acting in a dual capacity, under the facts disclosed in this case, was subjected to the imperative duty of selling said stock.

> "If self the wavering balance shake,
> It's rarely right adjusted."—ROBERT BURNS.

While a trustee who holds bank stock subject to assessment is relieved of personal liability thereon, and creditors have the right to collect the assessment out of the assets of the trust, such trustee loses his right to exemption "if he retains stock when he should convert it, and thereafter assessment is made." Bogert: "The Law of Trusts and Trustees," Vol. 3, p. 2146, sec. 720. In such a case a different principle applies, and, as between the trustee and the *cestui que,* the trustee should bear the assessment, because of his breach of trust. Bogert, *supra.*

It may be conceded that the relationship between the trustee and the bank was known to the stockholders, that such relationship was contractual, and if the trustee is solvent that he is liable, for the faithless-

ness of the trustee is not denied, but that is not the point at issue here. The question is whether the trust-fund doctrine can be used to take from the defendants, through the wrong of the trustee bank, that its creditors may have more. No equity can be founded upon a wrong. It is obvious that a beneficiary cannot be held responsible for the acts of a faithless trustee. If it appear to be a hardship to creditors that they are without remedy, as regards an insolvent trustee, the answer is that the hardship is no more than would be the case with any other insolvent holder of bank stock. The position of creditors is the same in any event, but to hold that the beneficiaries of a trust estate, in the face of a negligent trusteeship, must be made to suffer because of his faithlessness, rather than creditors, would be to set at naught equitable principles that are fundamental in our law. Upon this altar the defendants are to be sacrificed for the benefit of the bank's creditors. Has not the solicitude for creditors thus reached the stage of a "Vaulting ambition, which o'erleaps itself, and falls on the other?" (Shakespeare—Macbeth.)

IN RE UNITED BANK AND TRUST COMPANY, JOHN S. MICHAUX, ADMINISTRATOR C. T. A., D. B. N., OF THE ESTATE OF J. T. CHILCUTT, DECEASED.

(Filed 26 February, 1936.)

1. Banks and Banking H a—

The failure of a bank trustee to sell for reinvestment shares of the bank stock belonging to the trust estate does not relieve the estate of the statutory liability upon the insolvency of the bank, the fact of the trust and its terms not appearing from the books of the bank.

2. Same—

The liability of a bank trustee to the trust estate for its negligent failure to sell for reinvestment shares of stock of the bank belonging to the trust estate cannot be set up as a counterclaim or set-off against the statutory liability of the estate upon the insolvency of the bank.

CLARKSON, J., dissenting.

APPEAL by John S. Michaux, administrator, from *Alley, J.*, at October Term, 1934, of GUILFORD. Affirmed.

Upon the failure of United Bank and Trust Company, the Commissioner of Banks levied an assessment for the stock liability on fifty-two shares of stock, against the estate of J. T. Chilcutt. In apt time John S. Michaux, administrator *c. t. a., d. b. n.,* gave notice of appeal to the Superior Court, and in that court filed the following answer and defense to said assessment:

"1. That J. T. Chilcutt died in Guilford County, on or about 5 November, 1930; that he left a last will and testament, which was duly probated in the office of the clerk of the court of said county, and naming therein Greensboro Bank and Trust Company as executor. That a copy of said will is hereto attached, marked 'Exhibit A,' and the same is asked to be taken as a part of this paragraph as fully as if herein set forth in detail.

"2. That on or about ....., 1932, Gurney P. Hood, liquidating agent of United Bank and Trust Company, filed a petition requesting that it be relieved of the duties and responsibilities as executor and trustee under the will of J. T. Chilcutt, whereupon the court entered an order relieving said United Bank and Trust Company as executor and trustee, and appointed in its stead the present defendant, John S. Michaux, administrator *c. t. a., d. b. n.,* of J. T. Chilcutt, deceased.

"3. That subsequent to the execution of said will the Greensboro Bank and Trust Company changed its corporate name and became United Bank and Trust Company, and said United Bank and Trust Company qualified as executor on ....., 1930.

"4. That on or about 29 December, 1931, United Bank and Trust Company became insolvent and closed its doors on said date, and the plaintiff Gurney P. Hood, Commissioner of Banks, acting under and by virtue of his authority as Commissioner of Banks, took over the affairs of said United Bank and Trust Company as liquidating agent.

"5. That at the time of the death of J. T. Chilcutt, he owned and possessed as a part of his estate fifty-two shares of stock in United Bank and Trust Company. That said stock was taken by the executor under the will, and has since been in the possession of said executor.

"6. That under and by virtue of the terms of the will, a copy of which is attached, marked 'Exhibit A,' said United Bank and Trust Company assumed the duty and responsibility to administer said estate in accordance with the terms of the will; that among other duties it was the duty of said executor and trustee to convert said stock into cash with which to provide the trust funds herein specified; that under and by virtue of the terms of the will it was the reasonable duty of the executor and trustee to sell said fifty-two shares of stock or convert same into cash as aforesaid, and thereby avoid further liability to the estate on account of the holding of said stock.

"7. That if said executor or trustee had any authority to retain said stock as an investment for the purpose of carrying out any of the terms of the will, then it was its duty to have said stock transferred upon the books of the corporation to itself as trustee, or to some other person as trustee; that for thirteen months or more after the death of J. T. Chil-

cutt, United Bank and Trust Company, as executor and trustee, failed, refused, and neglected to take any steps whatsoever to convert said stock into cash or to reinvest or to transfer the stock on the books of the corporation, and as a result of such negligence and such failure the present defendant is called upon to respond for the liability.

"8. That the said fifty-two shares of stock at the time of the death of J. T. Chilcutt were reasonably worth $5,200, and said stock retained said value for a reasonable time thereafter, during which time the said executor and trustee could, by the exercise of due care and prudence, have converted same into cash or otherwise disposed of same.

"9. That if the court should be of the opinion that any liability exists against this defendant by reason of the ownership of said fifty-two shares of stock of J. T. Chilcutt, then such liability results directly from the negligence and carelessness of said bank as herein set forth, and said negligence and carelessness and the resulting liability is hereby pleaded as a bar and offset or a counterclaim or defense against any claim or assessment asked for in said notice.

"10. That any claim, judgment, or assessment which may be entered against this defendant under and by virtue of section 218 (c) of the Consolidated Statutes is hereby appealed from to the Superior Court in term, as provided in said section and notice of such appeal is hereby given.

"Wherefore, this defendant prays that nothing be assessed against him and that no amount be adjudged to be due on account of the stock ownership by J. T. Chilcutt; that he receive such other and further relief as he may be entitled to under the law and according to the facts."

The plaintiff's demurrer *ore tenus* was sustained by the court below, and from the judgment dismissing the appeal John S. Michaux, administrator, appealed to this Court.

P. W. Glidewell and Allen H. Gwyn for appellant.

M. F. Douglas and Smith, Wharton & Hudgins for appellee.

DEVIN, J. The judgment is affirmed on authority of *Hood, Comr., v. North Carolina Bank and Trust Company and Margaret E. Brand, ante,* 367.

The statute (C. S., 219 [c]), provides that the estate and funds in the hands of executors, administrators, guardians, and trustees shall be subject to the liability of stockholders prescribed by C. S., 219 (a).

Nor can the alleged negligence of the bank be set up as a counterclaim or set-off against the stockholders' liability. *In re Trust Co.,* 197 N. C., 613.

Affirmed.

CLARKSON, J., dissenting: It appears in the record that Gurney P. Hood, Commissioner of Banks, "demurred *ore tenus* to the defense on the ground that said answer and appeal failed to state sufficient facts to constitute a valid defense to the assessment." I cannot agree.

The record imports verity. On it we find that J. T. Chilcutt had 52 shares of stock, of the value of $5,200, in the Greensboro Bank and Trust Company. The corporate name was changed to United Bank and Trust Company. Item 10 of his will was mandatory that this stock "shall be by my executor converted into cash," and, as trustee, "to be by it loaned or invested at its discretion and the net income paid annually or oftener to the Methodist Protestant Children's Home, located near High Point, N. C." The answer, for the purpose of this demurrer *ore tenus,* is taken to be true. It is alleged: "That for thirteen months or more after the death of J. T. Chilcutt, the United Bank and Trust Company, as executor and trustee, failed, refused, and neglected to take any steps whatsoever to convert said stock into cash, or to reinvest or to transfer the stock on the books of the corporation, and as a result of such negligence and such failure, the present defendant is called upon to respond for the liability."

The bank, as executor, delayed in its positive and directed duty, under the will, for some 13 months. The executor knew, or in the exercise of due care should have known, that the bank was gradually sinking into insolvency, but by its negligent delay allowed the stock, valued at $5,200, to become perhaps worthless. Now, through the Commissioner of Banks, it levies an assessment of $5,200. The bank was acting in a dual capacity and had a positive duty to perform. I think by its negligence the Commissioner of Banks, who took it *cum onere,* cannot now levy the assessment. See dissenting opinion in *Gurney P. Hood, Commissioner of Banks, v. N. C. Bank and Trust Co. and Margaret E. Brand, ante,* 367.

MRS. ADA V. WHITEHURST AND HER HUSBAND, CECIL WHITEHURST, MRS. FLOSSIE NOSAY AND HER HUSBAND, HENRY NOSAY, AND MRS. SOPHIA MORGAN AND HER HUSBAND, J. C. MORGAN, V. R. L. HINTON, E. V. HINTON, W. E. HINTON. MRS. IDA SAWYER AND HER HUSBAND, LEE SAWYER, MRS. RUTH MORGAN HINTON, AND SOPHIA, CHARLES L., AND JOHN L. HINTON, THE LAST THREE BEING INFANTS, APPEARING HEREIN BY THEIR GUARDIAN AD LITEM, MRS. RUTH MORGAN HINTON.

(Filed 26 February, 1936.)

1. Wills D n—Judgment setting aside will does not affect title of devisees' vendees for value without notice.

Where the devisees named in a will, which has been duly probated in common form, sell and dispose of part of the lands devised to innocent

purchasers for value without notice, and thereafter caveat proceedings are instituted and the will set aside, the heirs at law, by operation of the judgment setting aside the will, become tenants in common in the lands not disposed of, but the title conveyed by the devisees named in the paper writing to purchasers for value without notice, or knowledge of facts from which a purpose to file caveat proceedings could be intimated, is not affected, the probate in common form being conclusive evidence of the validity of the will until it is attacked by caveat proceedings duly instituted. C. S., 4145, 4158.

2. Same—Devisees named in probated will held not liable for rents and profits except from date of judgment setting the will aside.

Where devisees named in a will, which has been duly probated in common form, enter into possession of the lands and receive rents and profits therefrom, and several years thereafter caveat proceedings are filed and the will set aside, and there is nothing in the record to show that the persons named devisees in the paper writing had any knowledge or intimation that the validity of the will would be attacked or any evidence that they procured the execution of the paper writing by undue or fraudulent influence, the devisees named in the paper writing are the owners of the lands from the date of the probate of the paper writing in common form until final judgment of the Superior Court setting aside the will, the probate in common form being conclusive evidence of the validity of the will until it is set aside by judgment in caveat proceedings, C. S., 4145, and heirs at law of the testator who were not named as devisees in the paper writing may recover of the devisees therein named their proportionate part of the rents and profits received by the devisees after the rendition of the judgment in the caveat proceedings, but may not recover rents and profits received by the devisees during the period between the probate of the will and the rendition of the judgment in the caveat proceedings, or for the occupation of the land by the devisees, the devisees being cotenants in common as heirs at law of testator.

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

APPEAL by defendants from *Devin, J.*, at June Term, 1934, of PASQUOTANK. Error and remanded.

This is an action for an accounting by the defendants to the plaintiffs for rents and profits received by the defendants from lands described in the complaint, and owned by the plaintiffs and defendants as tenants in common since the death of John L. Hinton in 1910; for judgment that plaintiffs recover of the defendants the amounts found by said accounting to be due to the plaintiffs by the defendants, and that said amounts are liens on the undivided interests of the defendants in said lands; and for the partition of said lands among the plaintiffs and defendants according to their respective interests in the same by commissioners appointed by the court for that purpose.

The action was begun in the Superior Court of Pasquotank County on 4 February, 1922. Pleadings were filed during the year 1928. At November Term, 1929, the action was referred to a referee for trial.

Thereafter, on 6 October, 1933, the referee filed his report, setting out therein his findings of fact and conclusions of law, as he was ordered and directed to do by the court.

From the evidence offered at the several hearings by him, the referee found the following facts:

(1) John L. Hinton died in Pasquotank County, North Carolina, on or about 18 January, 1910. At the date of his death he was a widower, his wife, Sophia Hinton, having died on or about 20 October, 1907. He left surviving him the following named children, to wit: C. L. Hinton, R. L. Hinton, W. E. Hinton, E. V. Hinton, Mary F. Hinton, and Ida Sawyer, wife of Lee Sawyer, and the following named gradchildren, to wit: Ada V. Whitehurst, now the wife of Cecil Whitehurst, Flossie Nosay, now the wife of Henry Nosay, and Sophia Morgan, now the wife of J. C. Morgan, the said grandchildren being the children of his son, John C. Hinton, who died on or about 9 June, 1900.

Mary F. Hinton, daughter of John L. Hinton, deceased, died intestate on or about 26 August, 1917, leaving as her heirs at law her brothers, C. L. Hinton, R. L. Hinton, W. E. Hinton, and E. V. Hinton, her sister, Ida Sawyer, and her nieces, Ada V. Whitehurst, Flossie Nosay, and Sophia Morgan, children of her deceased brother, John C. Hinton.

C. L. Hinton, son of John L. Hinton, deceased, died intestate on or about 31 August, 1919, leaving surviving him his widow, Ruth Morgan Hinton (now Alley), and his three children, Sophia, Charles L., and John L. Hinton.

Ida Sawyer, daughter of John L. Hinton, deceased, died on or about 3 November, 1927, having first made and published her last will and testament, by which she devised and bequeathed all her property, both real and personal, to her husband, Lee Sawyer, and to her children, John M., Will Lee, Eddie, and Emma Sawyer. She died after this action was begun.

(2) After the death of John L. Hinton, to wit: On 29 January, 1910, his sons, C. L. Hinton and R. L. Hinton, propounded for probate in common form by the clerk of the Superior Court of Pasquotank County, North Carolina, as the last will and testament of the said John L. Hinton, deceased, a paper writing in words as follows:

"I, John L. Hinton, being at this time in good health and mind, do make, publish and declare the following to be my will and testament,

"I give to my wife, Sophia M. Hinton, for and during her natural life, all the property I have in this State except the Gordon Farm in Camden Co., and after her death, I give the same to my six children, Mary F. Hinton, Sophia Ida Hinton, Charles L. Hinton, E. V. Hinton, W. E. Hinton, and R. L. Hinton, to share alike. I give to my four

sons above named all the property I have in other States, to share alike. The Gordon Farm I give to Mrs. John C. Hinton, during her life, then to her four children, her son, John, to have the buildings, fifty acres around the house, and thirty acres of woods, the remainder to the other three children, share alike in said Gordon Farm, where they now reside.

"I appoint my sons C. L. Hinton and R. L. Hinton to be my executors to my will herein set forth.

"Signed and sealed this September 4, 1902.

"Witnesses: JOHN L. HINTON. (Seal.)
GEO. B. PENDLETON,
WM. T. OLD."

(On the face of the said paper writing and across the devise of the Gordon Farm appears the following:)

"I revoke the gift of the Gordon Farm. May 18, 1906.
JOHN L. HINTON."

The said paper writing, with the codicil thereto, was duly probated in common form by the clerk of the Superior Court of Pasquotank County, as the last will and testament of John L. Hinton, deceased, and was thereafter duly recorded in the office of said clerk. C. L. Hinton and R. L. Hinton, who were named therein as executors of John L. Hinton, deceased, duly qualified as such executors.

(3) After the probate in common form of the last will and testament of John L. Hinton, deceased, the devisees therein named, except Sophia M. Hinton, who had died before the death of the testator, entered into possession of all the lands in this and other states of which the testator died seized and possessed, and received all the rents and profits from said lands, in accordance with their respective interests in said lands under the said last will and testament. From time to time they executed deeds by which certain of said devisees became the sole owners of certain tracts of said lands, and such owners have conveyed said tracts of land to purchasers who are now in possession of said tracts of land. The said devisees have received from time to time the purchase price of certain of the lands devised to them and have appropriated to their own use the amounts so received. One-sixth of the amounts so received by said devisees aggregates the sum of $26,375.

The said devisees have sold and conveyed timber standing and growing on certain of the lands devised to them, and have received from the purchasers of said timber the purchase price for said timber. One-sixth of the amount received by said devisees as the purchase price for timber sold by them is $1,189.57.

(4) The said devisees have collected and received as rents for the lands devised by said last will and testament, and not located in this State, the sum of $109.00 per year, for the years 1910 to 1931, inclusive.

(5) 6,000 acres of the lands owned by John L. Hinton, deceased, at the date of his death, and located in this State, were and are arable lands. The rental value of this arable land for the years 1910 to 1931, inclusive, was $4.00 per acre. One-sixth of the total rental value of said lands for said years is $84,000.

(6) Prior to the death of Mary F. Hinton, on or about 26 August, 1917, her brothers and her sister had conveyed to her all their right, title, and interest in and to certain tracts of land devised in the last will and testament of John L. Hinton, deceased, upon her agreement to convey all her right, title, and interest in other tracts of said land to them or to certain of said devisees. She had failed to execute deeds in accordance with said agreement. Shortly after her death, Ada V. Whitehurst, Flossie Nosay, and Sophia Morgan, as heirs at law of the said Mary F. Hinton, deceased, at the request of the devisees named in the last will and testament of John L. Hinton, deceased, signed deeds conveying to certain of said devisees all their right, title, and interest in certain lands devised in the last will and testament of John L. Hinton, deceased, and subsequent to his death conveyed by certain of the devisees to others of said devisees in severalty. The execution of said deeds by the said Ada V. Whitehurst, Flossie Nosay, and Sophia Morgan was procured by false and fraudulent representations made to them by devisees named in the last will and testament of John L. Hinton, deceased, and was without consideration.

(7) Ada V. Whitehurst, Flossie Nosay, and Sophia Morgan, the children of John C. Hinton, the deceased son of John L. Hinton, deceased, who with their husbands are the plaintiffs in this action, and R. L. Hinton, E. V. Hinton, W. E. Hinton, Ida Sawyer, wife of Lee Sawyer, and Sophia, Charles, and John L. Hinton, the children of C. L. Hinton, a son of John L. Hinton, deceased, who died subsequent to the death of his father, who are defendants in this action; were the heirs at law of John L. Hinton, deceased, living at the date of the commencement of this action.

(8) On or about 30 September, 1918, Ada V. Whitehurst and her husband, Cecil Whitehurst, Flossie Nosay and her husband, Henry Nosay, and Sophia Morgan and her husband, J. C. Morgan, heirs at law of John L. Hinton, deceased, filed with the clerk of the Superior Court of Pasquotank County a caveat to the probate in common form of the last will and testament of John L. Hinton, deceased, in which they alleged that the paper writing probated in common form as such last will and testament on 29 January, 1910, is not the last will and testa-

ment of John L. Hinton, deceased, for the reason (1) that at its date the said John L. Hinton did not have sufficient mental capacity to make a will, and (2) that the signature of the said John L. Hinton on said paper writing was procured by undue and improper influence exerted upon the said John L. Hinton. The allegations in the caveat were denied in the answer filed by the propounders.

At the January Term, 1920, of the Superior Court of Pasquotank County, the issues raised by said caveat were submitted to a jury, and answered as follows:

1. Was the execution of the paper writing propounded as the last will and testament of John L. Hinton procured by undue influence? Answer: Yes.

2. At the time of the execution of said paper writing on 4 September, 1902, did the said John L. Hinton have sufficient mental capacity to make and execute a valid will? Answer: No.

3. Is the paper writing propounded, and every part thereof, the last will and testament of John L. Hinton, deceased? Answer: No.

4. Was the caveat filed more than 7 years after the original probate of the will in controversy and more than three years after Mrs. Ada V. Whitehurst and Mrs. Flossie Nosay each had attained the age of twenty-one years? Answer: Yes.

5. Were the caveators, Mrs. Whitehurst, Mrs. Nosay, and Mrs. Morgan, each married to their present husbands during her minority, and have they since their marriage been at all times under coverture? Answer: Yes.

On the verdict, it was ordered, adjudged, and decreed by the court that the paper writing propounded for probate in solemn form as the last will and testament of John L. Hinton, deceased, is not such last will and testament, and that the probate in common form of such paper writing as such last will and testament be and the same was set aside.

This judgment was affirmed on the appeal of the propounders to the Supreme Court of North Carolina. See *In re Hinton's Will,* 180 N. C., 206, 104 S. E., 341.

(9) The plaintiffs and the defendants, who are the only heirs at law of John L. Hinton, deceased, living at the date of the commencement of this action, are as tenants in common seized in fee, and in the possession of all the lands owned by John L. Hinton at the date of his death, except such portions of said lands as are now owned by purchasers for value claiming title under the paper writing which was probated in common form as his last will and testament, without notice. The plaintiffs own an undivided one-sixth and the defendants an undivided five-sixths interest in said lands.

(10) The execution of the paper writing which was probated in common form as the last will and testament of John L. Hinton, deceased, was procured by the fraud of the defendants, or by the fraud of their ancestors in title, and their possession of the lands owned by John L. Hinton since his death has been wrongful and fraudulent as against the plaintiffs.

(11) The lands of which the said John L. Hinton died seized and possessed and which have not been sold and conveyed to purchasers for value and without notice can be actually divided and partitioned among the parties to this action in accordance with their respective interests therein. These lands are specifically described in the report of the referee.

The referee's conclusions of law are as follows:

1. The *feme* plaintiffs are the owners of an undivided one-sixth interest in all the lands of which their grandfather, John L. Hinton, was seized and possessed at the date of his death, except such parts of said lands as are now owned by purchasers for value, and without notice, who claim title to the lands conveyed to them under the paper writing which was wrongfully probated in common form as the last will and testament of John L. Hinton, deceased. These lands are designated in the findings of fact, contained in the report of the referee, and are numbered 1 to 142, inclusive.

2. The defendants R. L. Hinton, E. V. Hinton, and W. E. Hinton are each the owner of an undivided one-sixth interest in all the lands of which their father, John L. Hinton, was seized and possessed at the date of his death, except such parts of said lands as are now owned by purchasers for value, without notice, who claim title under the paper writing which was wrongfully probated in common form as the last will and testament of John L. Hinton, deceased, such interest, however, being subject to liens and charges in favor of the plaintiffs, as hereinafter set out.

3. The defendant Lee Sawyer, surviving husband of Ida Sawyer, and John M., Will Lee, Eddie, and Emma Sawyer, children of Ida Sawyer, deceased, are the owners jointly of an undivided one-sixth interest under the last will and testament of Ida Sawyer, deceased, in all the lands of which John L. Hinton, father of Ida Sawyer, deceased, was seized and possessed at the date of his death, except such parts of said lands as are now owned by purchasers for value without notice, who claim title under the paper writing which was wrongfully probated in common form as the last will and testament of John L. Hinton, deceased, such interest, however, being subject to liens and charges in favor of the plaintiffs as hereinafter set out.

4. The defendants Sophia, Charles L., and John L. Hinton, children of C. L. Hinton, deceased, are the owners, jointly, of an undivided one-sixth interest, as heirs at law of C. L. Hinton, and the defendant Ruth Morgan Hinton (now Alley), is entitled to dower in an undivided one-sixth interest, as widow of C. L. Hinton, in all the lands of which John L. Hinton, father of C. L. Hinton, deceased, was seized and possessed at the date of his death, except such parts of said lands as are now owned by purchasers for value, without notice, who claim title under the paper writing which was wrongfully probated in common form as the last will and testament of John L. Hinton, deceased, such interest, however, being subject to liens and charges in favor of the plaintiffs as hereinafter set forth.

5. The deeds from the plaintiffs, as heirs at law of Mary F. Hinton, deceased, to certain of the defendants and to ancestors of the other defendants, having been executed by the plaintiffs without consideration, and having been procured by false and fraudulent representations made to the plaintiffs by said defendants, or their ancestors, are void, and should be canceled.

6. The plaintiffs are entitled to recover of the defendants, jointly and severally, (1) one-sixth of the total amount collected and received by the defendants or their ancestors as rents and profits from the lands which descended to the plaintiffs and defendants, at the death of John L. Hinton, as tenants in common, to wit: the sum of $84,000; (2) one-sixth of the total amount collected and received by the defendants or by their ancestors as the purchase price of lands which descended to the plaintiffs and the other heirs at law of John L. Hinton, at his death, and which were subsequently sold and conveyed by said defendants or their ancestors to purchasers for value, without notice, to wit: the sum of $26,375; and (3) three times one-sixth of the total amount collected and received by the defendants or by their ancestors as the purchase price of timber sold and conveyed by the defendants or by their ancestors from lands which descended to the plaintiffs and the other heirs at law of John L. Hinton, at his death, to wit: the sum of $1,189.57.

7. The plaintiffs are entitled to a lien on the five-sixths undivided interest of the defendants in all the lands of which John L. Hinton died seized and possessed, and which have not been conveyed by the defendants or by ancestors of the defendants to purchasers for value, without notice, for the amounts which the plaintiffs are entitled to recover of the defendants as hereinbefore set out, and that said amounts should be charged upon the said five-sixths undivided interest in said lands.

8. The *feme* plaintiffs are entitled to hold in severalty their interest in the lands which descended to them and to the other heirs at law of John L. Hinton, at his death, and which are now owned by them as

tenants in common, and are also entitled to have the interests of the defendants in said lands sold for the payment of the amounts due to the plaintiffs by the defendants as hereinbefore set out, if such sale be necessary.

After the report of the referee had been filed, the defendants in apt time filed numerous exceptions to the findings of fact and to the conclusions of law set out in said report. These exceptions were heard at June Term, 1934, of the Superior Court of Pasquotank County. At this hearing it was agreed that judgment might be rendered by the presiding judge out of Pasquotank County, and after the expiration of the term.

Thereafter judgment was rendered as follows:

"This cause coming on to be heard before the undersigned judge at June Term, 1934, of the Superior Court of Pasquotank County, and being heard on exceptions to the report of the referee heretofore filed;

"And it appearing that all the parties are properly before the court and represented by counsel, and that all the defendants have been made parties by proper service of process, and that any irregularity of service as to some of the defendants has been later cured, and that other defendants whose rights have accrued since the institution of this proceeding have been made parties by proper orders and have adopted the pleadings and exceptions filed by the other defendants;

"And the defendants having waived the right of jury trial of the issues raised by these exceptions;

"Now, therefore, after considering the pleadings, the evidence reported by the referee, the referee's report, defendants' exceptions thereto, and argument of counsel, it is now ordered, adjudged, and decreed that each and all the findings of fact and conclusions of law of the referee, as hereinafter modified, are found and adopted by the court, and the said report as hereinafter modified is in all respects approved and affirmed.

"That each and all of the defendants' exceptions to the referee's report be and the same are hereby overruled.

"That the referee's finding of fact No. 15, and conclusion of law No. 8, with respect to rents and profits received by the defendants from 6,000 acres of open land over a period of 21 years, are hereby modified and amended so as to fix the amount with which the defendants' shares are chargeable in the partition herein decreed at $63,000, instead of $84,000, as found by the referee, which said amount so found is in excess of any amount received by the plaintiffs from lands of John L. Hinton occupied by them during said period.

"That the referee's finding of fact No. 17, and conclusion of law No. 9, as to waste found to have been committed by defendants in the cutting and sale of timber, are hereby modified and amended so as to strike out the assessment of treble damages and to allow only simple

damages and fix the amount with which the defendants' shares are chargeable in the partition herein decreed as the amount received by defendants for the timber sold, with interest, which would be one-third of the amount set out in conclusion of law No. 9, to wit: $1,189.57, with interest from 4 February, 1922.

"That the referee's finding of fact No. 12, and conclusion of law No. 6, are hereby found and adopted by the court, and it is adjudged that defendants' shares in the land herein decreed to be partitioned are chargeable with the amounts found by the referee to have been received by the defendants from the sale of lands of which John L. Hinton died seized which were sold and conveyed by said defendants, to wit: the sum of $26,375, with interest from date set out in said report.

"The court further finds that defendants and their ancestors in title acted together and with common purpose and benefit in taking possession of the lands of which the said John L. Hinton died seized, and that they jointly received rents and profits therefrom, together with the purchase price of the lands and timber conveyed as set out in the referee's report, and the court adjudges that defendants' shares in said lands, which said shares together constitute 5/6ths thereof, are chargeable with said amounts in the partition of said lands herein decreed, jointly, so far as the plaintiffs are concerned.

"But if any of the said defendants desire to assert equities, rights, and liabilities among themselves with respect thereto, nothing in this judgment shall be held to preclude them from so doing, hereafter, either in this cause or in other proper proceeding for that purpose.

"That plaintiffs together are entitled to hold in severalty their one-sixth interest in the lands which descended to them from John L. Hinton, and of which he died seized, and this cause is remanded to the clerk of the Superior Court of Pasquotank County for the appointment by said clerk of commissioner, who shall make actual partition of said lands, allotting to plaintiffs one-sixth in value thereof, and to defendants, together, five-sixths in value thereof, as near as may be, charging defendants' five-sixths share therein with the amounts with which defendants' share is found to be chargeable in this proceeding, as found and approved by this court, as hereinbefore set out, which said amounts are decreed to be liens upon defendants' five-sixths share in said lands.

"That the plaintiffs have and recover of the defendants the costs of this proceeding, to be taxed by the clerk, including an allowance of $300 to the referee and of $ ..... to the stenographer.

"By consent of the parties, this judgment is rendered out of term, out of the county, and out of the district.

"Dated at Oxford, N. C., 26 June, 1934.

W. A. DEVIN, *Judge.*"

After the foregoing judgment had been filed in the office of the clerk of the Superior Court of Pasquotank, the following addendum thereto was filed in said office:

"As an addendum to the judgment entered in this cause and bearing date 26 June, 1934, it is ordered, adjudged, and decreed by the court that the shares of the defendants in the lands which descended to them as heirs at law of John L. Hinton are chargeable, jointly, so far as plaintiffs in this cause are concerned with the respective amounts as decreed in said judgment that plaintiffs should recover of the defendants, to wit: $63,000, for rents and profits, together with interest as found by the referee in his report filed in this cause, and with the sum of $1,189.57, with interest thereon from 4 February, 1922, for damages for waste committed by defendants, and the further sum of $26,375, with interest from date as set out in the said referee's report, which said last item represents the amount received by the defendants from the sale of certain lands of which said John L. Hinton died seized and possessed; and it is further ordered, adjudged, and decreed by the court that the said respective amounts attached as liens on the said lands of the said defendants, which they inherited from the said John L. Hinton, as of the date of the filing of the complaint in this cause, to wit: 31 December, 1928, and the said lien as of said date is hereby specifically declared and adjudged by the court.

"By consent, judgment in the cause is rendered out of term, and out of the county and as of the above term. This 5 July, 1934.

W. A. DEVIN, *Judge Presiding.*"

To the foregoing judgment and addendum, the defendants in apt time excepted, and appealed from said judgment to the Supreme Court, assigning errors as appear in the record.

J. H. Hall and McMullan & McMullan for plaintiffs.

Manning & Manning, Thompson & Wilson, Worth & Horner; and W. I. Halstead for defendants.

CONNOR, J. There is no error in the judgment in this action that plaintiffs, as heirs at law of John L. Hinton and of his daughter, Mary F. Hinton, both of whom died intestate, are now the owners of an undivided one-sixth interest, and that defendants, who are the remaining heirs at law of the said John L. Hinton and of the said Mary F. Hinton, are now the owners of an undivided five-sixths interest, in all the lands of which the said John L. Hinton died seized and possessed, except such of said lands as are now owned by purchasers for value, without notice, who claim title to the lands conveyed to them under devisees named in

the paper writing which was probated in common form as the last will and testament of John L. Hinton, on 29 January, 1910. The plaintiffs have no right, title, or estate in and to such lands. See *Newbern v. Leigh,* 184 N. C., 166, 113 S. E., 674, 26 A. L. R., 266. In that case it was held by this Court that the setting aside of a duly probated will does not affect the title of grantees for value of devisees who had no knowledge or intimation that the will would be attacked, where, as in this State, there is a statute providing that probate in common form is conclusive evidence of the validity of the will, until the probate is set aside, and the will declared void, in a proper proceeding instituted for that purpose, C. S., 4145. All persons who claim in good faith under a will which has been duly probated in common form as provided by statute in this State are protected by its provisions, until the probate is attacked by a caveat proceeding instituted as provided by statute. C. S., 4158.

Nor is there error in the judgment that plaintiffs, as tenants in common with the defendants, are entitled to an accounting by the defendants for the rents and profits which the defendants have collected and received from the lands of which plaintiffs and defendants are seized and possessed as tenants in common. One who has received more than his share of the rents and profits from lands owned by him and others as tenants in common is accountable to his cotenants for their share of such rents and profits. In the absence of an agreement or understanding to the contrary, he is ordinarily liable only for the rents and profits which he has received. He is not liable for the use and occupation of the lands, but only for the rents and profits received. 47 C. J., 465.

There is error in the judgment that plaintiffs recover of the defendants the amounts set out in the judgment, and that the plaintiffs are entitled to a lien on the interest of the defendants in said land for said amounts. For this reason, the action is remanded to the Superior Court of Pasquotank County, with direction that an accounting be had in said court in accordance with this opinion, to determine in what amounts, if any, the defendants are indebted to plaintiffs on account of rents and profits received by the defendants from the lands of which plaintiffs and defendants are now seized and possessed as tenants in common.

From the date of the probate in common form of the last will and testament of John L. Hinton, deceased, to wit: 29 January, 1910, to the date of the final judgment of the Superior Court in the caveat proceeding instituted by the plaintiffs, the defendants and their ancestors were the owners and in the lawful possession of all the lands of which John L. Hinton died seized and possessed. These lands were devised to them by the last will and testament of John L. Hinton, which was duly probated in common form on 29 January, 1910. This probate was conclusive evidence of the validity of said will, until the same was set aside by the

judgment in the caveat proceeding. There is no evidence in the record in this appeal tending to show that at any time prior to the institution of the caveat proceeding, the defendants, or their ancestors, had any knowledge or intimation that the plaintiffs would attack the validity of the will under which they claimed. Nor is there any evidence in the record tending to show that any of the devisees in said will procured its execution by John L. Hinton by undue or fraudulent influence. For that reason, the defendants and their ancestors were entitled to the rents and profits of the lands devised to them until the probate was set aside and the will adjudged void. C. S., 4145.

The defendants are accountable to the plaintiffs for rents and profits received by them from the lands which are now owned by them as tenants in common, since the date on which it was finally adjudged that the paper writing under which they claimed is not the last will and testament of John L. Hinton, deceased. When such accounting has been had, the plaintiffs will be entitled to judgment in this action for their share of the rents and profits which the defendants have collected and received from the date of said judgment.

Error and remanded.

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

STATE v. JAMES B. CARDEN.

(Filed 26 February, 1936.)

1. Criminal Law L e—

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

2. Criminal Law I c—

The denial of a motion by defendant that counsel allowed by the court to assist the solicitor should be required to state by whom they were retained, will not be held for error.

3. Same—Trial court has discretionary power to allow private counsel to assist the solicitor in the prosecution.

The trial court has discretionary power to allow private counsel to assist the solicitor in the trial of the case, it being the duty of the court to permit only such assistance as fairness and justice may require, and such power does not impinge the provisions of Art. I, sec. 11, of the Constitution of North Carolina.

4. Homicide G c—Held: Proper predicate was laid for admission of testimony of dying declarations.

Evidence tending to show that defendant shot his wife five times, that immediately after the shooting she told the witness she knew she was going to die and that her husband had shot and killed her, that she substantially repeated these declarations in the hospital two days thereafter, and died the following day from her wounds, *is held* sufficient predicate for the admission of testimony of the declarations.

5. Criminal Law G r—

Testimony that the witness had known the person in question seven or eight years and had been in her company off and on during that period, is sufficient foundation for the witness' testimony that the character of such person was good, although the witness states that she had never heard her character discussed.

6. Same—Answers of witness on cross-examination by defendant held conclusive on defendant under the facts of this case.

Defendant's exception to the exclusion of evidence contradicting the statement of a State's witness, made on defendant's cross-examination of the witness as to collateral matters incriminating the witness, is not sustained, the answers elicited by defendant on cross-examination being conclusive, since they do not tend to connect the witness directly with the cause or the parties, or tend to show motive, malice, temper, disposition, conduct, or interest of the witness toward the cause or parties, and the exclusion of the evidence by the court in its discretion is not held prejudicial or reversible error.

APPEAL by defendant from *Clement, J.*, and a jury, at April Special Term, 1935, of DURHAM. No error.

The defendant was indicted for the murder of his wife, Vera Carden, on 4 May, 1934. The jury rendered a verdict of murder in the first degree, and judgment was rendered in the court below of death by electrocution.

The deceased, Vera Carden, died as the result of a pistol shot wound on 7 May, 1934. The evidence shows that she was shot by her husband, the defendant, on 4 May, 1934.

Upon the calling of the above case for trial, the solicitor announced in open court that with his permission Judge Jas. R. Patton, Jr., of Durham, and Major L. P. McLendon, of Greensboro, would assist in the prosecution. Thereupon the defendant, in open court, through counsel, requested the court to require the private prosecution to state in open court by whom they were retained. The motion was denied, and the defendant excepted. The defendant excepted to his Honor's ruling denying the motion to require the attorneys to state by whom they were retained.

The evidence introduced by the State tended to show: That prior to 4:00 o'clock p.m., 4 May, 1934, Vera Carden, wife of defendant James

B. Carden, lived in F. P. Rochelle's house, located on the north side of West Peabody Street, being No. 1024; that a hall ran north and south through the house; that the west side was occupied by F. P. Rochelle, 86 years old, the owner, and his grown son; that the east side was occupied by Vera Carden, deceased, her nine-year-old son, James B. Carden, Jr., and Miss Nina Hunter, who was then living with Mrs. Carden, and had been for two years; that the house was near the middle of the block, and from the rear running north was a frequented path leading to west Main Street; that the deceased worked in the Erwin Cotton Mills, and returned to her home Friday afternoon about four p.m., where she found her husband, James B. Carden, the defendant, and Miss Hunter.

That the defendant James B. Carden had gone to his wife's home by way of the path leading through from Main Street, Friday, 4 May, 1934, a little after twelve o'clock, and asked Miss Hunter if Vera, his wife, had come from her work; was informed that she would not be there until 3:30 p.m.; he then asked where Mr. Rochelle was, whom he was told was on the porch; he said he would go out and talk to him. The defendant ate dinner with Miss Hunter about one p.m., and sent Mr. Rochelle to his sister's home on Gregson Street to get a suit of clothes for him. Mr. Rochelle failing to get the right suit, the defendant went himself and got another suit, changed his clothes, and requested Miss Hunter to press his clothes, which she said she might do. After he changed his clothes, he showed a gun to Miss Hunter, with bullets; took the gun out of his pocket. He said he had the right size of bullets to fit, was going to settle things and was going to fix them and was going to fix them right, so he went out on the porch and sat there until his wife came from work. Was on the porch when his wife returned. She spoke and came into the room where Miss Hunter was. Was followed by the defendant. The defendant, the deceased, and Miss Hunter then sat down in chairs in the room. The deceased then asked Miss Hunter, "Nina, what did you have for dinner?" The deceased said she was hungry and started to tell something. After defendant came in and sat down, in about a minute or two Miss Hunter went out and left the deceased and the defendant alone in the room. In about a minute after Miss Hunter left the room, had gone in the hall, she heard a shot and scream. Then went on the back porch and around the house to Mrs. Cates next door. Saw the defendant go out on the porch, get his hat, and walk straight back through the hall and out the back door and on through the path toward Main Street, the way he always came and went from his sister's home to his wife's. Miss Hunter went in the room, found the deceased lying on her back on the day bed with her head on the pillow. She was bloody and asked for some water. Said she was burning up. Miss Hunter got some water, bathed her face, and

took off her shoes. Found the deceased was shot. One shot was fired, followed by an interval, and then four others in quick succession. Shooting occurred about four o'clock p.m. An ambulance was called and the deceased was taken to the hospital, at which place she died on the following Monday morning, her death being caused by the bullet wounds above described.

That the defendant and his deceased wife had had trouble. That while living with her in Orange County, in 1928, he had been indicted for an assault upon his wife. In December, 1932, he had been indicted for an assault upon his wife, and required to remain separate and apart from her for a year. That he left the city of Durham and went to Richmond, where he remained until March, 1934, when he returned to Durham on account of the death of his father. That he had made threats that he was going to kill his wife. That the deceased had instituted a suit against the defendant for a divorce on 1 May, 1934. Summons was served upon defendant on 2 May, 1934. That the plaintiff had charged him with being an ex-convict and the defendant stated at the time he read about the divorce action in the paper that the reference to his being an ex-convict hurt him; that the shooting occurred on 4 May, 1934; that after the homicide, about 4:00 p.m., 4 May, 1934, the defendant left the home of his wife through the back way and went to his sister's, Mrs. J. F. Williams, where he was living on Gregson Street, about two blocks away. That while there one Thomas Lee Wrenn had called to see him. Found defendant washing blood off his hands and asked him if he had had a fight, and he said yes. He went to the sidewalk to the car, where Wrenn was. Went back into the house, at which time the officers came up and went into the room and found Carden in the kitchen of his sister's home. That he was arrested and searched by the officers. A bottle containing whiskey was found upon him, which the defendant drank while being searched, and asked where the pistol was, defendant said he had thrown it away. The officers found one bullet in the defendant's pocket. On the way to the station Officer Roberts asked the defendant how he came to shoot his wife, and the defendant said, "I do not know how come me to do it"; and when asked how he came to get the blood on his arm, defendant said, "I picked her up and laid her on the bed." The defendant seemed to be right much drunk when he was taken back to jail after talking to Burgess at 7:30 o'clock, though he was arrested at 4:30 o'clock p.m., and was rather nervous, and a heavy odor of whiskey was on his breath.

That the deceased made a declaration to Miss Nina Hunter prior to her death that the defendant had shot her, and told Miss Hunter in the presence of O. B. Wagoner, deceased's brother, that the defendant shot her first through the head and she fell and after she fell he just kept

shooting and shot her four or five times, and also told Dr. W. B. McCutcheon that Buck, her husband, had shot her. The deceased's bedroom was on the east side of the house, facing the north side of Peabody Street; that the door was in the west side of the room leading into the hall; that upon entering the room toward the east from the hall, to the left or to the north behind the door was the day bed, the head of same being against the north wall of the room; that behind the door of the west wall, about three feet from the floor, was a bullet; that in the north wall, about five feet from the floor, were three holes located a little to the right of the day bed; that a discharged ball fell from the day bed to the floor when the officer pulled the cover back on said day bed; that there were no other indications of bullet holes in the room except those mentioned.

That the autopsy showed that the deceased was shot five times; first, below the lobe of the right ear, the bullet lodging beneath the skin on the left cheek; second, the bullet entered the left side of the abdominal wall, ranged downward, penetrated the liver, struck the wall of the stomach, and was recovered in the small intestines; third bullet passed through the right breast 3½ inches of the right nipple and ranged downward; fourth bullet shattered her right thumb, and the fifth bullet entered the back to the left of the spine just under the left shoulder, emerged from the left axilla, it penetrating her lung and causing death.

Mrs. Martha Murphy testified, in part: "Some time about seven or eight months before the homicide, and just before the defendant left Durham to go to Richmond, I heard him make the statement that he was going away, but when he came back he was going to get her (referring to his wife). Said she had made trouble for him and he was going to get her. He said he was going to kill her. He said he was going to kill her and the boy, wasn't no use to leave him here."

The defendant testified as to what took place, as follows: "I remember my wife telling me to go and eat supper with her, and I told her, no, I didn't believe I cared for anything; my wife was then in the bedroom; that was the room I was in. And I told her I was going down to see if I could not collect the money that was taken from me, and I remember her saying—she told me that I was too drunk, and I said, 'Well, I am going anyway,' and so I reaches up to get the gun off the chifferobe and when I gets the gun she grabs hold of the gun and in the tussle she gets shot. From there I guess I must have gone to my sister's. I don't remember what happened after the shooting; I guess I must have went to my sister's. I am not sure. I did not have any intention to kill my wife. I did not have any feeling against her. I reached up after the gun and my wife tried to take the gun away from me, and the gun began to fire. I told my wife I was going to take the gun with me.

She told me I was too drunk. I did not know that I had shot my wife or that she was shot, not until she come and sit down in front of me, she comes over and sits down in front of me, when I realized that, I was on my knees in the floor and she comes and sits down in front of me and when she sits down, she lays down on the carpet, she told me, and she says, 'I believe I am shot.' After the pistol went off, she come over and sit down in front of me on the floor and I was on my knees at the time. The pistol started to firing and I must have fell about the same time, I guess. From there I was at my sister's house and they brought me down to the police station. After the pistol ceased firing my wife came over and sat down in front of me and said, 'I believe I am shot.' I don't remember whether I picked her up and put her on the day bed or not. I did not have any feeling against my wife. I loved her and my boy. I was taken down to the police station and have been in jail since that time."

He testified that he had had trouble with the prosecuting witness, Miss Hunter, and denied that he had made threats against his wife, or assaulted her. Miss Nina Hunter testified: "Buck (defendant) didn't threaten me, he threatened her (his wife). . . . I have never been arrested. . . . The trouble in 1932, when he left his wife, was not on account of me. . . . I have never had any trouble with Mr. Carden."

Mrs. J. F. Williams testified: That she is the sister of the defendant. That she was at home on Friday, 4 May, about four o'clock p.m., when defendant came there. He was in a drunken condition and informed her that Vera, his wife, was shot, to go and see her.

Mrs. Christine Gray, daughter of Mrs. J. F. Williams and a niece of the defendant, testified: Defendant came to Mrs. Williams' home between two and three o'clock Friday, 4 May. He was drinking and talked as if he was insane.

Mrs. M. L. Rigsbee, cousin of defendant: Was at Mrs. Williams' ten days before the homicide. Saw defendant and Mrs. Vera Carden, his wife, together. Defendant said, "Here she is, May Lee, isn't she sweet." He kissed her and they all had dinner together. The defendant and deceased were affectionate.

There was other testimony to like effect. There was evidence to the effect that a short time prior to the shooting (some few days) defendant "spent Monday night at my house. He was nervous. He was hitting the side of the house and punching about, almost a wreck. Looked like a maniac. Spent part of Tuesday night at my house. Would get up and down during the night, plundering around, and groaning. Talking about his money being gone. . . . The defendant busted in the back door open, with a knife open in his hand. Defendant in dazed condition. Acted like a crazy man."

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.

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

A. R. Wilson and R. O. Everett for defendant.

CLARKSON, J. The charge of the court below is not in the record, and the presumption of law is that the court below charged the law applicable to the facts.

The first contention of defendant: Did his Honor err in overruling the motion of defendant to require the private prosecutors to state by whom they were retained? We think not.

In *S. v. McAfee,* 189 N. C., 320 (321), we find: "A solicitor is the most responsible officer of the court, and has been spoken of as 'its right arm.' He is a constitutional officer, elected in his district by the qualified voters thereof, and his special duties prescribed by the Constitution, Art. IV, sec. 23 (Judicial Department), 'and prosecute on behalf of the State in all criminal actions in the Superior Courts, and advise the officers of justice in his district.' It is said in *Lewis v. Comrs.,* 74 N. C., p. 198: 'A solicitor is not a judicial officer.'"

In *S. v. Lea,* 203 N. C., 13 (26), it is said: "The appearance of counsel for the prosecution, other than the solicitor of the district, was a matter which the trial court necessarily had under its supervision. The solicitor at no time relinquished control of the case, nor does it appear that the assistance of other counsel was not requested or welcomed by him. But without regard to situations, different from the one now in hand, we hold that on the present record, the matter was in the control and sound discretion of the presiding judge."

In 22 R. C. L. (Prosecuting Attorneys), p. 93, it is said: "At common law criminal prosecutions were generally carried on by individuals interested in the punishment of the accused and not by the public. The private prosecutor employed his own counsel, had the indictment found and the case laid before the grand jury, and took charge of the trial before the petit jury. While under the present practice officers are appointed or elected for the express purpose of managing criminal business, the old practice survives in most jurisdictions to the extent that counsel employed by the complaining witness or by other persons desirous of a conviction are permitted to assist the prosecuting attorney in the conduct of the prosecution, and, as a general rule, no valid objection can be raised by the accused to allow the prosecuting attorney to have the assistance of private members of the bar. . . . (p. 94) It is

within the discretion of the trial court to allow special counsel to aid the prosecuting attorney in the prosecution of a case, and such discretion will be interfered with only on a showing of abuse thereof. . . . In all such cases it is within the discretion of the court to appoint competent counsel to assist, or to permit counsel employed by private parties, or even volunteers, to appear for that purpose."

Allowing the solicitor to have private counsel to assist him is largely in the discretion of the trial judge, whose duty it is to prevent injustice and oppression, and only to permit such assistance as fairness and justice may require.

Art. I, sec. 11, of the Constitution of N. C., is as follows: "In all criminal prosecutions every man has the right to be informed of the accusation against him and to confront the accusers and witnesses with other testimony, and to have counsel for his defense, and not be compelled to give evidence against himself, or to pay costs, jail fees, or necessary witness fees of the defense, unless found guilty."

We do not think that the permission by the court of assistant counsel to the solicitor impinges this provision.

In *Handley v. State* (Ala.), 106 So., 692 (694-5), it is said: "Special counsel may appear in the prosecution as an assistant to the solicitor and with the consent of the court. The management of the case remains with the official representative of the state, in whose name the special counsel appears. The consent of the state is all the authority needed by special counsel; hence, a motion by defendant to require special counsel to show his authority is properly overruled (citing Ala. cases). 'In the absence of statute, the state cannot be compelled to disclose the names of private prosecutors or informers, especially where it is not shown that defendant will be prejudiced by the want of such information.' 16 C. J., 801; *State v. Fortin,* 106 Me., 382, 76 A., 890, 21 Ann. Cas., 454; *Barkman v. State* (Tex. Cr. App.), 52 S. W., 69. The rule is founded upon the public policy that encourages the citizen to give aid in the detection and punishment of crime. . . . The official representative of the state has the first duty to see that no abuses arise, and a failure of duty in this regard will not be presumed unless made to affirmatively appear."

The defendant did not request the court below to find the facts upon which his motion was based, so that this Court could determine if his objection was well founded. The trial court exercised its discretion, and on the facts of this record we see no error.

We think the evidence of Nina Hunter as to the dying declarations of Vera Carden competent. "The court: Said what? Ans.: Said she was not going to live, said she would not even live until they got her to the hospital if they did not get her there pretty quick because she was

bleeding to death. . . . Q. After you got in the room and after she made the statement to you that she did not expect to live? Ans.: What did she say then? Q. Yes, what did she say then with reference to who shot her? Ans.: She told me that Buck had shot her—she called me by my name when I first got there. Q. Said what? Ans.: Said Buck had shot her and had killed her. Q. Did she make any further statement about how the shooting occurred? . . . Ans.: Yes, she said when she got up, she was fixing to leave the room, and when she got up, she went to reach over in the chair behind the door to get her apron to go in the kitchen, she said when she got up was when he shot her the first time. . . . I went to the hospital on Sunday afternoon and was there Sunday night. She said she was going to die Sunday afternoon. On that occasion she said that Buck had shot her and killed her. She called her husband Buck. She called him that all the time. . . . *She told us she was going to die* and she wanted to see all the folks, Sunday afternoon about five o'clock; well, she said her husband had killed her, she told that over again, said that he had killed her. She told about the same thing she did the first day; she said when she got up out of her chair, he shot and the first shot went through her head and she fell, said when she fell, he just kept shooting and shot her four or five times, she said he shot her five times, which was correct, and kept shooting her, and after shooting her he picked her up and pitched her over there on the day bed."

In *S. v. Wallace,* 203 N. C., 284 (288), we find: "Dying declarations are an exception to the rule which rejects hearsay evidence, but the conditions under which they are admitted by the courts have often been defined. At the time they are made the declarant must be in actual danger of death and must have full apprehension of his danger; and when the proof is offered death must have ensued. *S. v. Mills,* 91 N. C., 581. These declarations are received on the general principle that they are made in extremity—'when,' as said by Eyre, C. B., 'the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth. A situation so solemn, and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice.' *Rex v. Woodcock,* 168 Eng. Reports, 352." *S. v. Layton,* 204 N. C., 704; *S. v. Ham,* 205 N. C., 749; *S. v. Dalton,* 206 N. C., 507.

The exception and assignment of error "as to the evidence of Mrs. Cates, who testified that Nina Hunter's character was good but upon examination admitted that she had never heard it discussed," cannot be sustained. The witness further testified: "(Question by the court): How long did you live near her, madam; how long have you known her?

Ans.: Been knowing her seven or eight years. Q. What opportunity have you had of knowing her character? Ans.: Well, I have been in her company and been off with her. Q. Off and on over that period of time? Ans.: Yes, sir." *S. v. Steen,* 185 N. C., 768.

The exception and assignment of error made by defendant as to the exclusion of evidence contradicting Nina Hunter, as to incriminating matters, etc., asked her on cross-examination and denied by her, cannot be sustained.

In *S. v. Patterson,* 24 N. C., 346 (353), *Gaston, J.,* says: "It is well settled that the credit of a witness may be impeached by proof that he has made representations inconsistent with his present testimony, and whenever these representations respect the subject matter, in regard to which he is examined, it never has been usual with us to inquire of the witness, before offering the disparaging testimony, whether he has or has not made such representations. But with respect to the collateral parts of the witness' evidence, drawn out by cross-examination, the practice has been to regard the answers of the witness as conclusive, and the party so cross-examined shall not be permitted to contradict him. Of late, however, it is understood that this rule does not apply in all its rigor, when the cross-examination is as to matters which, although collateral, tend to show the temper, disposition, or conduct of the witness in relation to the cause or the parties. His answers as to these matters are not to be deemed conclusive, and may be contradicted by the interrogator." *S. v. English,* 201 N. C., 295.

In *S. v. Jordan,* 207 N. C., 460 (461), is the following: "The general rule is that answers made by a witness to collateral questions on cross-examination are conclusive, and that the party who draws out such answers will not be permitted to contradict them; which rule is subject to two exceptions, first, where the question put to the witness on cross-examination tends to connect him directly with the cause or the parties, and second, where the cross-examination is as to matter tending to show motive, temper, disposition, conduct, or interest of the witness toward the cause or parties. *S. v. Patterson,* 24 N. C., 346; *S. v. Davis,* 87 N. C., 514; *Cathey v. Shoemaker,* 119 N. C., 424; *In re Craven's Will,* 169 N. C., 561. It is clear that the testimony of the defendant elicited on cross-examination is not within either of the exceptions to the general rule, since its sole purpose was to disparage and discredit the witness."

The answers of Nina Hunter to the collateral matters on cross-examination were conclusive. At least, on this record the exclusion of such evidence was not prejudicial or reversible error. The matter was largely in the discretion of the court below.

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

No error.

J. C. QUEEN v. W. M. DEHART, T. J. FERGUSON, AND T. C. QUEEN.

(Filed 26 February, 1936.)

1. Appeal and Error B b—

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

2. Trial F c—

The refusal to submit an issue tendered will not be held for error when the issues submitted to the jury, tendered by the same party, are sufficient to embrace every phase of the controversy upon the theory upon which the case was tried.

3. Judgments L b—Judgment exempting endorser from liability on note held not to bar action against him by payee on original contract.

In an action on a note by a holder by endorsement one of the makers successfully resisted recovery on the ground that his signature was conditioned upon the signature of another party who had failed to sign the note, and the payee paid the judgment on the note. Thereafter the payee instituted this action, alleging that he had entered into a contract with the three defendants under which he delivered to defendants certain time and checking deposits in a closed bank, defendants agreeing that if the choses in action were accepted and canceled under an agreement for the reopening of the bank in which defendants were interested, defendants would execute to plaintiff their note for the amount of the choses in action, that the bank had reopened, that only two of defendants had executed the note, the subject matter of the first action, and that the original contract had been breached entitling plaintiff to recover the amount stipulated in the contract. *Held:* The judgment in the action on the note will not support a plea of *res judicata* as to the maker successfully resisting recovery on the note, plaintiff's action on the original contract being a claim in a different right, and the defendant failing to sign the note not being a party to the prior action.

4. Contracts E a—Contract obligating defendant to execute note to plaintiff held breached upon defendant's successfully resisting recovery on the note on the grounds that his signature was conditional.

Plaintiff delivered to defendants certain time and checking deposits in a closed bank, defendants agreeing that if the choses in action were accepted and canceled under an agreement for the reopening of the bank in which they were interested, they would execute to plaintiff their note for the amount of the choses in action. The bank was reopened and two of defendants executed the note to plaintiff but the third defendant refused to execute the note. One of defendants who had executed the note successfully resisted recovery by a subsequent holder on the ground that his signature was conditioned upon the signing of the note by all three defendants, and plaintiff payee was forced to pay the judgment on the note, and instituted this action on the original contract. *Held:* The defendant successfully resisting recovery on the note breached the original contract, since as to him the note was void under his defense of conditional signature, and the execution of the void note did not discharge his obligation

under the original contract to execute a note to plaintiff upon the acceptance and cancellation of the choses in action against the bank, of which he had obtained the benefit, nor did the failure of one of defendants to sign the note affect the liability of the other defendants under the original contract, nor did plaintiff's acceptance of the note in good faith without intimation that the defendant would resist recovery thereon upon the defense of conditional signature, constitute a release of liability of such defendant.

5. Money Received A c—Under facts of this case, instruction that law raised in plaintiff's favor an implied promise to pay held not error.

An instruction to the jury that if plaintiff turned over to defendants certain choses in action against a bank, and if defendants received said choses in action and used them for the purposes intended, and never restored same to plaintiff, said choses in action being the consideration of the contract under which defendants promised to execute a note in plaintiff's favor for the amount of the choses in action, that the law would imply a promise on the part of defendants to pay plaintiff the amount called for in the contract, although one defendant refused to execute the note called for in the contract, *is held* without error under the facts of this case.

6. Appeal and Error J e—

An exception to the admission of testimony cannot be sustained when the party excepting to its admission introduces testimony during the trial of the same import as that excepted to.

7. Trial G c—

A verdict is not complete until accepted by the court, and the court has the discretionary power upon the coming in of a doubtful verdict to have the jury again retire and make the verdict clear.

8. Contracts C b—Conflicting evidence as to agreement of parties for discharge of contract obligation by different method held for jury.

In this action on a contract, a defendant contended that plaintiff agreed to release him from the obligation of the contract upon the defendant's transfer to plaintiff of certain shares of stock in a bank, and that defendant transferred to plaintiff the stock in accordance with the agreement, and that the other parties to the contract agreed to the release of the defendant. Defendant's evidence tending to establish the defense was contradicted by evidence introduced by plaintiff. *Held:* The conflicting evidence was properly submitted to the jury, and its verdict in plaintiff's favor is sustained.

9. Trial E g—

A charge of the court will be construed as a whole, and an exception to the charge will not be sustained when the charge, so construed, is not prejudicial to appellant.

APPEAL by defendants W. M. DeHart and T. J. Ferguson from *Alley, J.*, and a jury, at July-August Term, 1935, of SWAIN. No error.

This is an action brought by plaintiff against defendants to recover $3,975.80, including interest, due upon the following contract:

"NORTH CAROLINA—SWAIN COUNTY.

Jan. 2, 1931.

"This is to certify that J. C. Queen is turning over to W. M. DeHart, T. C. Queen and T. J. Ferguson my certificate
November 13-29 $ 900.00
June 5-30 2,255.00
Check 746.10 Amounting to $3,901.10 of Citizens Bank of Bryson City, N. C., with the understanding that if accepted by the State Corporation Commission on the amount demanded for the reopening of the said bank then the said W. M. DeHart, T. C. Queen & T. J. Ferguson is to give his note due December 20, 1932, with interest if certificate of deposit up to November 21, 1930, at 4%. If not accepted by Corporation Commission then the above is to be returned.

"Witness:

R. G. COFFEY. (Signed) W. M. DEHART,
R. G. COFFEY. T. C. QUEEN,
R. G. COFFEY. T. J. FERGUSON."

The plaintiff alleges that he complied with the above contract and the bank reopened. The note in controversy, which was given, is as follows:

"$3,975.80. Bryson City, N. C., April 3, 1931.

"On December 20, 1932, for value received, we promise to pay to J. C. Queen $3,975.80. Negotiable and payable at Citizens Bank, Bryson City, N. C., The drawers and endorsers of this note severally waive presentment and notice of protest and guarantee its payment any time after maturity without interest.

(Signed) W. M. DEHART,
T. C. QUEEN."

The plaintiff endorsed and transferred the note to one Ed. Floyd, who in turn transferred same to one R. E. Andrews, who brought suit on the note. On the trial of the action DeHart denied liability on the grounds that his execution of the note was conditional upon the signing of the same by defendant T. J. Ferguson.

Plaintiff alleged that "Upon a verdict of the jury, sustaining the contentions as to said DeHart, the action was dismissed as against him and judgment rendered against this plaintiff and Ed. Floyd (no service of process having been had on said T. C. Queen), for the amount of said note, and that this plaintiff has been required under said judgment to pay same. That the said defendants, by reason of their failure and

refusal to execute the note to plaintiff, as provided for in their said agreement, and their failure and refusal to pay to said plaintiff on or before 20 December, 1932, the amount provided to be paid under said agreement, breached said contract, to plaintiff's great damage, in the sum of $3,975.80, with interest thereon from 20 December, 1932. That the plaintiff is advised and believes and now avers that the defendants and each of them, by reason of the breach of said contract and their failure and refusal to comply with same, became and are indebted to this plaintiff in the full sum of $3,975.80, together with interest thereon from 20 December, 1932; and this plaintiff further avers that he has made demand for payment of said amount upon the defendants, and each of them, and payment has been refused."

The defendant W. M. DeHart denied the material allegations of the complaint, and alleged as a further defense that "It was further agreed, that before said agreement should become effective and binding upon any of these defendants, that plaintiff would obtain the signatures or execution of a note in said sum signed or executed by all of the defendants; and that should the plaintiff fail to obtain the signatures and execution of said note by any one or more of said defendants, said contract and agreement so entered into should not be valid and binding upon any of the parties to same; that the defendant T. J. Ferguson refused to sign and execute said note, or the plaintiff, at least, failed to obtain the signature and execution of said note by the defendant T. J. Ferguson, which plaintiff alleges was a breach of the agreement herein set out, and of the conditions upon which said contract was executed." He further pleaded estoppel—*res judicata* the judgment in the Andrews action. The judgment in that case says: "It is therefore considered, ordered, and adjudged and decreed that the plaintiff R. E. Andrews have and recover nothing against the defendant W. M. DeHart in this cause."

The defendant DeHart also alleged as a further defense: "That if said contract and note had been completed and executed as agreed and made valid, then and in that event this defendant would be and would have been liable to the plaintiff for only one-third of the amount claimed, for the reason that as part of said agreement it was agreed by and between the plaintiff and the defendants, who signed said paper writing set out in the pleadings, that each party signing said contract was to be liable to the plaintiff for only one-third of the amount named in said contract, and no more, and this defendant says and alleges, as heretofore set out, that he is not liable to the plaintiff in any sum and does not owe plaintiff anything, but in the event that it should be found that this defendant is indebted to the plaintiff in any sum, defendant is only indebted to plaintiff in the sum of one-third of the amount mentioned and set out in said paper writing, copied and described in the pleadings."

The defendant T. J. Ferguson answered, denying the material allegations of the complaint, and as a further defense alleged that he turned over to plaintiff, with the consent of defendants T. C. Queen and W. M. DeHart, 5 shares of stock in the Citizens Bank of Bryson City, N. C., and plaintiff released him from any liability on the contract.

The issues submitted to the jury and their answers thereto succinctly show the controversy, which are as follows:

"1. Did the defendants execute the contract in writing, dated 2 January, 1931, as alleged in the complaint? Ans.: 'Yes.'

"2. Did the plaintiff and the defendants, at the time of the execution of said contract in writing, enter into a supplementary oral contract under the terms of which it was agreed that the said written contract should not be binding and effectual, unless and until all the defendants executed and delivered to the plaintiff their note for the amount called for by said written contract, as alleged by the defendants? Ans.: 'No.'

"3. Did the plaintiff and the defendants, at the time of the execution of said written contract, enter into a supplementary oral contract under the terms of which it was agreed that the liability of each of the defendants should be limited to one-third of the amount called for by said written contract, as alleged by the defendants W. M. DeHart and T. J. Ferguson? Ans.: 'Yes.'

"4. Did the plaintiff and the defendant T. J. Ferguson enter into an oral contract under the terms of which it was agreed that the said Ferguson should be released from his obligation under said contract upon the delivery to the plaintiff of five shares of stock in the Citizens Bank and borrowing of $500.00 to be used by J. R. Jenkins in the opening of said bank, as alleged by the defendant T. J. Ferguson? Ans.: 'No.'

"5. Did the defendant W. M. DeHart commit a breach of said contract, as alleged in the complaint? Ans.: 'Yes.'

"6. What amount, if anything, is the plaintiff entitled to recover of the defendant W. M. DeHart? Ans.: '$1,325.27, with interest.'

"7. Did the defendant T. J. Ferguson commit a breach of said contract, as alleged in the complaint? Ans.: 'Yes.'

"8. What amount, if anything, is the plaintiff entitled to recover of the defendant T. J. Ferguson? Ans.: '$1,325.27, with interest.'"

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

I. C. Crawford and Black & Whitaker for plaintiff.
Edwards & Leatherwood for W. M. DeHart.
B. C. Jones for T. J. Ferguson.

QUEEN *v.* DEHART.

CLARKSON, J. At the close of plaintiff's evidence and at the close of all the evidence the defendants W. M. DeHart and T. J. Ferguson, in the court below, made motions for judgment as in case of nonsuit. C. S., 567. The court below overruled these motions, and in this we can see no error.

The defendants saw fit to try the case on the issues appearing in the record. In fact, the defendant DeHart agreed to the issues and prayed for an additional one: "In apt time the defendant W. M. DeHart tendered the following issue, which he requested the court to submit to the jury, as follows: 'That the defendant W. M. DeHart hereby tenders the issues prepared and submitted to the court, and, in addition thereto, the following issue: Q. Is the plaintiff J. C. Queen entitled to bring, prosecute, and recover in this action as against the defendant W. M. DeHart?' "

First. We consider the exceptions and assignments of error of W. M. DeHart. It is well settled in this jurisdiction that a case will be reviewed on the same theory on which it was tried in the court below, and appellants may not have a case heard on a different theory from that on which it was tried. We see no error in refusing the issue tendered by W. M. DeHart on the facts of this case. We think there was sufficient competent evidence on the part of plaintiff to sustain the issues.

We do not think that the defendants' plea of *res judicata* can be sustained. The note given by W. M. DeHart and T. C. Queen was endorsed and transferred to Ed. Floyd and then to R. E. Andrews, who instituted suit on same against W. M. DeHart, T. C. Queen, and J. C. Queen. No service of summons was had upon T. C. Queen (brother of plaintiff J. C. Queen), who filed no answer. W. M. DeHart set up the defense that the note was not to be binding on him unless signed by T. J. Ferguson, and won. Ferguson was not a party to this suit. The plaintiff alleged that he had to repay Andrews the amount which Andrews had paid for the note. The present action is on the original contract.

If W. M. DeHart signed the note conditionally, he did not comply with his written contract—this was a breach of his written contract. He did not give "his note," but gave a conditional note, according to his version. DeHart, although he admits getting plaintiff's property and refusing to pay him or return it, claims he is absolved because the contract called for a note, which, although he signed, the jury in the former case found he had only signed conditionally, and, thus, as to him, the note was void. In other words, the execution and delivery by him to the plaintiff of a void note completely discharged his obligations under the contract. This is his main defense. We cannot agree with him. He also alleges that if the contract was binding he was only liable for one-third of the amount claimed.

In *Gillam v. Edmonson,* 154 N. C., 127 (130), we find: "The doctrine is that an estoppel of record will bind parties and privies as to matters in issue between them, but it does not conclude as to matters not involved in the issue, nor when they claim in a different right." *Price v. Edwards,* 178 N. C., 493.

We see no error in the court below refusing DeHart's prayer for special instructions on the ground of estoppel or *res judicata.* The plaintiff in the present action "claims in a different right." The action is bottomed on the original contract. Under the original contract all the conditions of the contract were complied with—entitling plaintiff to recover. He delivered to W. M. DeHart, T. C. Queen, and T. J. Ferguson the certificates of deposit and check totaling $3,901.10, this was accepted by the Corporation Commission and the bank reopened. Under this contract the defendants became indebted to the plaintiff for the amount. The giving of the note was a collateral matter for plaintiff's benefit, and if defendants had not given a note this would not relieve them of their liability on the contract. The fact that W. M. DeHart and J. C. Queen signed the note and T. J. Ferguson would not did not release any of the defendants from their liability to pay the indebtedness.

The defendants excepted and assigned error to the charge of the court below (which cannot be sustained), as follows: "Then another principle of law would apply. And that is, if you find by the greater weight of the evidence that at the time of the execution of the contract the plaintiff Queen turned over to the defendants the certificates of deposit and a check for his account that was subject to check, and that that was to be the consideration for the execution of this contract and the note, and you find that the defendants received it and used it for the purposes intended, and kept it, and that it has never been restored, that the certificates and the check have never been restored to the plaintiff J. C. Queen, then the law would raise in favor of the plaintiff a promise on the part of the defendants to pay him the amount the contract called for."

The court below, to sustain this portion of the charge, quoted from *Montgomery v. Lewis,* 187 N. C., 577 (579-80), the latter part of which we quote: "It must not be forgotten that the object of the present action is not to correct, or even to set aside or modify, the defendant's deed, or to obtain relief against its apparent effect. The deed remains intact; but the object is to recover the value of the lot, the retention of which by the defendant would constitute unearned benefit or 'unjust enrichment.' Williston says, 'The principle of justice which requires the return of money paid under a mistake requires that other benefits received under a similar mistake should likewise be restored.' Contracts, Vol. 3, sec. 1575. The suit has its foundation in the doctrine of *quasi*-contracts—obligations occupying a field between contract and tort.

They are imposed or created by law without regard to any agreement on the part of the party bound, because his promise is fictitious and his liability arises from implication of law, as when a person by wrongfully detaining or appropriating the property of another becomes liable to the owner for its reasonable value. 13 C. J., 233 (10); 6 R. C. L., 588 (7)." We think the charge consonant with the facts in the case.

The defendants excepted and assigned error to the following questions, which cannot be sustained: "Q. Prior to the time you entered suit, did Mr. DeHart ever come to see you and endeavor to settle this matter with you? Ans.: Yes, he did; I had a conference with Mr. DeHart after this note had been executed. Q. What did he say in regard to the paper? Ans.: Mr. DeHart came to my house, I don't remember the date exactly, and he said he had a check for one-third of this note and asked me if I would accept it on his payment, and I told him I would not. Q. Why didn't you accept the check? Ans.: Because I wouldn't release him." The defendant DeHart contends that this was incompetent, as it was an unaccepted offer of compromise.

In *Montgomery v. Lewis, supra,* at p. 578, it is said: "The defendant excepted to certain evidence on the ground that it embodied a rejected offer of compromise. It is true, if a person offer to compromise a demand he does not thereby necessarily admit that it is just, but if pending a compromise he makes a distinct admission of an independent fact, the admission may be received in evidence."

As a defense in this case, defendant DeHart contends that if he owes anything, it was only one-third, and the jury so found on an issue not objected to by him. If DeHart ever had a valid objection, he has waived it. He testified: "Cling Queen told me that Ferguson had not signed the note. When I found this out, I went to J. C. Queen's home; I went to see Candler and got $1,300.00, and went to see him about that note, and I wanted to pay one-third, and I told him that was what I had come for, but he wouldn't take it."

In *Shelton v. R. R.,* 193 N. C., 670 (674), it is said: "It is thoroughly established in this State that if incompetent evidence is admitted over objection, but the same evidence has theretofore or thereafter been given in other parts of the examination without objection, the benefit of the exception is ordinarily lost. *Smith v. R. R.,* 163 N. C., 143; *Tillett v. R. R.,* 166 N. C., 515; *Beaver v. Fetter,* 176 N. C., 334; *Marshall v. Tel. Co.,* 181 N. C., 410."

Defendants W. M. DeHart, T. C. Queen and T. J. Ferguson were interested in the reopening of the bank, DeHart being a stockholder and director and Queen and Ferguson being stockholders. Defendant T. C.

Queen, who is a brother of plaintiff, did not deny liability on the contract or note. We see nothing in the contention of DeHart in reference to the court below having the jury retire and make clear a doubtful verdict.

In *Allen v. Yarborough,* 201 N. C., 568 (569), it is said: "Before a verdict is complete it must be accepted by the court for record. *S. v. Godwin,* 138 N. C., 582; *S. v. Bagley,* 158 N. C., 608; *S. v. Snipes,* 185 N. C., 743. This does not imply, however, that in accepting or rejecting a verdict the presiding judge may exercise unrestrained discretion. It is his duty to scrutinize a verdict with respect to its form and substance and to prevent a doubtful or insufficient finding from becoming a record of the court. *S. v. Bazemore,* 193 N. C., 336. But his power to accept or reject the jury's finding is restricted to the exercise of a limited legal discretion. He may direct the jury to reconsider their verdict if it is imperfect, informal, insensible, repugnant, or not responsive to the issues or indictment, or if it cannot sustain a judgment (citing authorities). *S. v. Arrington,* 7 N. C., 571, it was said, 'When a jury returns with an informal or insensible verdict, or one that is not responsive to the issues submitted, they may be directed by the court to reconsider; but not where the verdict is not of such description.' "

We think the charge did not impinge N. C. Code, 1935 (Michie), sec. 654.

Second. We consider the exceptions and assignments of error of T. J. Ferguson. What is said as to the liability of DeHart is applicable in some respects to Ferguson, and we will not repeat. Ferguson's plea savors of "confession and avoidance." He admits signing the contract sued on and his primary liability thereunder. He seeks to avoid this liability by reason of an alleged verbal agreement with plaintiff, releasing him from his obligation.

Ferguson testified, in part: "I signed the contract that was introduced in evidence with T. C. Queen and W. M. DeHart. We all signed it together at my dairy farm. Will DeHart, Mr. Coffey and Queen brought the contract to my place and called me out and we discussed it, and that was where I signed it, and DeHart turned over to me five shares of bank stock for signing that contract. I never had any contract with the bank. I signed the contract and right at the same time he turned over to me the bank stock. At the time of the signing of the contract we discussed it and each one said he would be liable for one-third of that contract, T. C. Queen, W. M. DeHart, and myself would all go one-third, and I signed the contract with that understanding. The contract calls for a note, but I never signed the note. Later, after signing the contract, I had a conversation with Mr. J. C. Queen about his releasing me from the contract. I turned over to him the five shares of bank stock and he agreed to release me from any liability on the contract. I turned

over the bank stock to him and he agreed to release me from the contract, and there was a further consideration that I was to go and borrow for Bob Jenkins a sufficient amount to reopen the bank." On the other hand, this was contradicted by plaintiff J. C. Queen.

The evidence was *pro* and *con*. The jury took plaintiff's version of what occurred—that Ferguson was never released from his contract. We do not think the charge complained of, exception and assignment of error 11, which deals with the 4th issue, by Ferguson, prejudicial from the pleadings and evidence and the theory on which the case was tried. In fact, Ferguson, in his answer, says: "Thereupon this answering defendant went to the plaintiff herein, carrying with him the five shares of stock that had theretofore been delivered to him by his codefendant, W. M. DeHart, and stated to the plaintiff herein that he would deliver said bank stock to the plaintiff if the plaintiff would release him from the contract theretofore signed and take the place of this answering defendant upon said contract and upon said note, and the plaintiff agreed thereto. . . . And the agreement to take said stock and release this answering defendant from said contract was made and entered into in the presence of this answering defendant's codefendant, T. C. Queen, who consented to said release. . . . This answering defendant went to the place of business of his codefendant, W. M. DeHart, and explained the whole transaction and release to him, to which he readily agreed." At least the charge complained of did not amount to prejudicial or reversible error.

Later, unobjected to, the court charged the jury on this aspect: "I have already explained to you what the breach of a contract is; in short, it is a failure to comply with the terms, agreements, and stipulations of a contract, and if Ferguson did not make the trade with Mr. Queen whereby he was released, as contended by him, then I understand he does not contend he has complied with the contract. I understand he admits he and the other defendants received the amount of the certificates and the checking deposit of the plaintiff, and that he has not been restored, and if you find those to be the facts, and answer the 4th issue 'No,' then I charge you that would be a breach of the contract on the part of Mr. Ferguson, and if you find by the greater weight of the evidence it would be your duty to answer the 7th issue 'Yes.' If you fail to so find it would be your duty to answer that issue 'No.'"

We think that the charge as to the greater weight of the evidence on the different issues is correct. The charge of the able and learned judge in the court below comprised 29 pages. Taking same as a whole, if there was error, it was harmless. On the whole record we see no prejudicial or reversible error, and think that substantial justice has been had between the parties to the litigation.

No error.

GURNEY P. HOOD, COMMISSIONER OF BANKS, EX REL. CITIZENS BANK AND TRUST COMPANY, AND H. H. TAYLOR, LIQUIDATING AGENT OF THE CITIZENS BANK AND TRUST COMPANY, v. SARAH C. STEWART, EXECUTRIX OF THE ESTATE OF JOHN W. STEWART.

(Filed 26 February, 1936.)

1. Executors and Administrators C c—Executrix may not bind estate on note for debt incurred wholly after testator's death.

Plaintiff's complaint alleged that testatrix executed a note to plaintiff in her representative capacity, and it appeared from the face of the complaint that the note was executed subsequent to the death of testator, and the complaint did not allege that the note was executed for a debt existing at the time of testator's death. *Held:* A judgment by default against the estate for want of an answer is irregular as contrary to the course and practice of the courts, the estate not being liable on the note upon the facts alleged, since a personal representative may not bind the estate by contract arising wholly out of matters occurring after the death of the testator, and the judgment also failing to comply with statutory provisions relative to judgments against estates of decedents. N. C. Code, 130, 131.

2. Judgments K f—Judgment by default on complaint failing to state cause of action is irregular and may be set aside on motion.

A judgment by default on a complaint stating a good cause of action in a defective manner is erroneous, and may be corrected only by appeal, while a judgment by default on a complaint wholly insufficient to state a cause of action is irregular, and may be set aside by motion in the cause upon a showing of merit and the absence of laches.

3. Same—

C. S., 600, has no application to a motion to set aside a judgment on the ground that the judgment is irregular.

4. Judgments K d—Judgment against estate held irregular under facts of this case, and was properly set aside upon motion in the cause.

Judgment by default was entered against the estate upon a complaint alleging the execution of a note to plaintiff by the executrix of the estate, but failing to allege that the note was for a debt existing at the date of testator's death. Thereafter the executrix filed a motion in the cause to set aside the judgment, the heirs at law not being made parties. *Held:* The judgment against the estate was irregular and was properly set aside upon the executrix' motion, the motion to set aside having been made within a reasonable time, and a meritorious defense having been shown on behalf of the estate.

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

APPEAL by defendant from *Barnhill, J.*, at May Term, 1935, of CRAVEN. Reversed.

The judgment of the clerk of the Superior Court fully sets forth the contentions of the litigants, and is as follows:

"This cause coming on to be heard upon motion of the defendant Sarah C. Stewart, made in behalf of herself and in behalf of all other legatees and devisees under the will of John W. Stewart, to set aside and vacate the judgment heretofore entered in this cause, and being heard by L. E. Lancaster, Esq., clerk of the Superior Court, after notice to the plaintiffs, the parties being represented by counsel, the court finds:

"That John W. Stewart died testate on or about 24 November, 1919, his will being dated 25 June, 1919, and admitted to probate on 28 November, 1919, and recorded in the office of the clerk of the Superior Court of Craven County in Will Book I, page 53.

"That Sarah C. Stewart, widow of John W. Stewart, qualified as executrix of said will on 29 November, 1919, and duly advertised for creditors to present claims against said estate as prescribed by law, said advertisement being completed six weeks after 29 November, 1919.

"That said will contained no power or direction to the executrix to borrow money or to convey real estate, and that there has been entered no order of court authorizing or empowering said executrix to borrow money or to execute any note for the same in the name of the estate.

"That on 14 January, 1933, the plaintiffs herein instituted an action in the Superior Court of Craven County, and in the complaint alleged, among other things:

" 'That on 30 June, 1930, for value received, the defendant Sarah C. Stewart, executrix of the estate of John W. Stewart, executed and delivered to the Citizens Bank and Trust Company her promissory note, under seal, as executrix of the estate of John W. Stewart, for the sum of eleven thousand dollars, payable ninety days from date, in words and figures as follows:

" ' "$11,000. New Bern, N. C., June 30, 1930.

" ' "On or before ninety days from date, I promise to pay to the order of the Citizens Bank and Trust Company the sum of eleven thousand dollars, with interest at six per cent per annum from and after maturity. For value received. This note is secured by deed of trust of even date herewith.

" ' "Witness our hands and seals: Sarah C. Stewart, Executrix of the Estate of John W. Stewart, (Seal)." '

"That no answer was filed by defendant and judgment by default was entered on 13 February, 1933, and docketed in Judgment Docket Y, page 213, office of the clerk of the Superior Court of Craven County, in the following words:

" 'It is therefore, on motion of Warren & Warren, attorneys for plaintiff, ordered and adjudged that plaintiff herein recover of the defendant

Sarah C. Stewart, executrix of the estate of John W. Stewart, the sum of eleven thousand dollars, and interest thereon at six per cent from 30 September, 1930, together with cost of this action, to be taxed by the clerk. L. E. Lancaster, Clerk Superior Court, Craven County.'

"That said action was taken more than 13 years after the death of John W. Stewart; more than ten years after the qualification of the executrix and the publication of notice to creditors; more than ten years after the two-year statutory period of administration had expired; more than ten years after the date required for the filing of final account; more than twelve years from the beginning of the representative capacity of Sarah C. Stewart, executrix, and more than ten years after the lapse of the two-year period prescribed by law for joint liability of heirs for debts of deceased.

"That the action in which said judgment was rendered was not predicated upon a debt of the deceased person, J. W. Stewart, outstanding unpaid at the date of the death of said deceased person, nor was the same predicated upon an executory contract maturing beyond the lifetime of the said J. W. Stewart, nor was the same a renewal of an obligation of the deceased person, J. W. Stewart.

"That the complaint filed in this cause does not state a cause of action against the estate of J. W. Stewart or against his executrix as such.

"Upon the foregoing findings of fact, the court concludes as a matter of law that said judgment is irregular and is not taken in accordance with the due course and practice of the Superior Court of Craven County, North Carolina, and not in accordance with section 130 of the Consolidated Statutes of North Carolina.

"That the debt sued on was not the debt of the estate of John W. Stewart, and that the addition of the words 'Executrix of the estate of John W. Stewart,' appended to the signature of said note, was mere surplusage, and does not have the effect of binding the estate of John W. Stewart.

"That the attempt to charge the estate of J. W. Stewart with an unauthorized debt, evidenced by said note, was in law a fraud upon the heirs, devisees, and legatees of said J. W. Stewart.

"That the plaintiff was fixed with knowledge in law and in fact of the limitation upon the authority of Sarah C. Stewart, executrix, at the time of the alleged execution of said note, and that said note was void as an obligation of the estate of John W. Stewart, and that the judgment rendered thereon is void, and that the same should be and is hereby set aside and entry to this effect shall be made on the judgment docket in this court and certified to Jones County and such other county as transcript may have been docketed. This order is without prejudice to plaintiffs to bring and maintain an action against Sarah C. Stewart, individually.

"This 14 May, 1935. L. E. Lancaster, Clerk Superior Court, Craven County."

Plaintiff excepted, assigned error, and appealed to the Superior Court.

The judgment in the court below was as follows:

"This is a motion in the cause filed before clerk of the Superior Court in Craven County to set aside a judgment rendered by the clerk, 13 February, 1933, and in the event said judgment is not set aside as to Sarah C. Stewart, individually, then that said judgment be reformed by striking therefrom the words, 'Executrix of the estate of J. W. Stewart,' as will appear by written motion filed. The clerk entered an order vacating and setting aside said judgment, from which the plaintiffs appealed. This cause now comes on to be heard upon said appeal before the undersigned judge, at the May Term, 1935, Craven County Superior Court.

"Upon hearing said motion it appears to the court that summons herein was issued 17 August, 1932, and returned, 'Sarah C. Stewart, executrix, not to be found in Craven County'; that thereafter the clerk entered an order for *alias* summons dated 19 September, 1932; that *alias* summons was issued 28 September, 1932, and, together with a copy of complaint, was served on the defendant 5 October, 1932; that apparently thereafter, to wit, 13 January, 1933, another order for *alias* was issued and an *alias* summons was issued 13 January, 1933, and said summons, without a copy of the complaint, was served on the defendant 14 January, 1933; that judgment by default was entered 13 February, 1933, will appear of record. Motion to set aside and vacate the judgment, as above recited, was filed 22 April, 1935.

"The complaint, upon which said judgment is based, sets out and recites a note in the sum of eleven thousand dollars, dated 30 June, 1930, signed: 'Sarah C. Stewart, Executrix Estate of John W. Stewart,' which date was subsequent to the death of the testator, John W. Stewart. It is not alleged in the complaint that said note was executed for a debt in existence at the time John W. Stewart died, which was a liability of the estate of the said John W. Stewart. The heirs at law of John W. Stewart, other than Sarah C. Stewart, are not parties to the motion to vacate said judgment, but the defendant undertakes in behalf of herself and said heirs to make and enter said motion.

"The plaintiffs filed before the clerk a motion to dismiss the motion filed by the defendant, which appears of record.

"While the court, upon the foregoing facts, is of the opinion that said judgment is ineffectual to create any lien upon the estate of John W. Stewart, or upon the property acquired by the heirs under the will, it is further of the opinion that it is without power to determine said question in this proceeding. The court is further of the opinion that said

judgment is regular and is sufficient in substance and form to create a lien against the property of Sarah C. Stewart, individually, and that as to said defendant no sufficient cause appears for vacating or annulling the same.

"It is therefore ordered and adjudged by the court that the judgment entered by the clerk vacating said judgment be and the same is hereby set aside and annulled, and said judgment is reinstated.

"This judgment is without prejudice to the rights of the heirs of John W. Stewart to institute an action to remove any cloud said judgment may cast upon the property held by them. This 15 May, 1935. M. V. Barnhill, Judge presiding."

To the foregoing judgment and findings of fact, the defendant excepted, assigned error, and appealed to the Supreme Court. The other material facts will be set forth in the opinion.

Ward & Ward and Warren & Warren for plaintiff.

W. T. Woodley, R. E. Whitehurst, and R. A. Nunn for Sarah C. Stewart.

CLARKSON, J. In the judgment of the clerk is the following: "That the complaint filed in this cause does not state a cause of action against the estate of J. W. Stewart, or against his executrix as such. Upon the foregoing findings of fact, the court concludes as a matter of law that said judgment is irregular and is not taken in accordance with the due course and practice of the Superior Court of Craven County, North Carolina, and not in accordance with section 130 of the Consolidated Statutes of North Carolina."

In the judgment of the court below we find: "The complaint, upon which said judgment is based, sets out and recites a note in the sum of eleven thousand dollars, dated 30 June, 1930, signed: 'Sarah C. Stewart, Executrix Estate of John W. Stewart,' which date was subsequent to the death of the testator, John W. Stewart. It is not alleged in the complaint that said note was executed for a debt in existence at the time John W. Stewart died, which was a liability of the estate of the said John W. Stewart. The heirs at law of John W. Stewart, other than Sarah C. Stewart, are not parties to the motion to vacate said judgment, but the defendant undertakes in behalf of herself and said heirs to make and enter said motion."

In *Snipes v. Monds,* 190 N. C., 190 (191), is the following: "An executor cannot, by any contract of his, fasten upon the estate of his testator liability created by him, and arising wholly out of matters occurring after the death of the testator," citing numerous authorities. *Ins. Co. v. Buckner,* 201 N. C., 78.

In *Allen v. Armfield,* 190 N. C., at p. 870-1, we find: "A personal representative is not answerable in his official character for a cause of action not created by the decedent. As the Court said in *Whisnant v. Price,* 175 N. C., 611, the uniform rule is that no action will lie against the personal representative of the deceased person except upon some claim which existed against the deceased in his lifetime and for a claim accruing wholly in the time of the administration, the administrator is liable only in his personal character. *Snipes v. Monds, ante,* 190." *Hall v. Trust Co.,* 200 N. C., 734, 739.

For the court to render a judgment against Sarah C. Stewart, executrix of the estate of John W. Stewart, it was necessary for the complaint to allege such liability as set forth in the above cases. This was not done in the complaint. The clerk and the court below both found that the complaint filed in the cause does not allege a cause of action against the estate of John W. Stewart; that the note was not executed for a debt in existence at the time John W. Stewart died, which would make it a liability of the estate. There is no allegation in the complaint that Sarah C. Stewart contracted individually, so as to bind her personally, and we do not think an implication arises on the present record. *Banking Co. v. Morehead,* 116 N. C., 413; *Bessire & Co. v. Ward, ante,* 266.

To collect this judgment plaintiff must do something more than issue execution. N. C. Code, 1935 (Michie), sec. 130, provides: "All judgments given by a judge or clerk of the Superior Court against a personal representative for any claim against his deceased shall declare: (1) The certain amount of the creditors demand. (2) The amount of assets which the personal representative has applicable to such demand. Execution may issue only for this last sum, with interest and costs." Section 131: "No judgment of any court against a personal representative shall fix him with assets, except a judgment of the judge or clerk, rendered as aforesaid, or the judgment of some appellate court rendered upon an appeal from such judgment. All other judgments shall be held merely to ascertain the debt, unless the personal representative by pleading expressly admits assets." Section 132: "All executions issued upon the order or judgment of the clerk, or of any appellate court against any personal representative, rendered as aforesaid, shall run against the goods and chattels of the deceased, and if none, then against the goods and chattels, lands and tenements of the representative. And all such judgments docketed in any county shall be a lien on the property for which execution is adjudged as fully as if it were against him personally." Section 136: "If it appears at any time during, or upon, or after the taking of the account of a personal representative that his personal assets are insufficient to pay the debts of the deceased in full, and that he died seized of real property, it is the duty of the judge or clerk,

at the instance of any party, to issue a summons in the name of the personal representative, or of the creditors generally, to the heirs, devisees, and others in possession of the lands of the deceased, to appear and show cause why said lands should not be sold for assets," etc. Section 75; *Tucker v. Almond, ante,* 333.

There is a difference between (1) a defective statement of a good cause of action, and (2) a statement of no cause of action; that is, if the complaint is wholly insufficient to make out a cause of action. N. C. Practice and Procedure in Civil Cases (McIntosh), p. 461.

We think a judgment by default on the former is erroneous and must be appealed from, the latter is irregular and can be set aside in a reasonable time where merit is shown and there is no laches. Then, again, in an action against a decedent's estate the above sections of the statute must be considered, for example, section 130: "All judgments given by a judge or clerk of the Superior Court against a personal representative for any claim against his deceased *shall declare,*" etc. Under the facts and circumstances of this case, we think the judgment was irregular.

In *Finger v. Smith,* 191 N. C., 818 (819-20), it is said: "A judgment may be valid and unassailable, or it may be irregular, erroneous, or void. An irregular judgment is one rendered contrary to the course and practice of the court, as, for example, at an improper time; or against an infant without a guardian; or by the court on an issue determinable by the jury; or where a plea in bar is undisposed of; or where the debt sued on has not matured; and in other similar cases (citing authorities). . . . (p. 820) An erroneous judgment is one rendered according to the course and practice of the court, but contrary to law, or upon a mistaken view of the law, or upon an erroneous application of legal principles, as where judgment is given for one party when it should have been given for another; or where the pleadings require several issues and only one is submitted; or where the undenied allegations of the complaint are not sufficient to warrant a recovery; and in other cases involving a mistake of law," citing numerous authorities.

C. S., 600, relating to mistake, surprise, and excusable neglect, has no application on the present record. *Foster v. Allison Corp.,* 191 N. C., 166; *Wellons v. Lassiter,* 200 N. C., 474 (477); *Newton & Co. v. Mfg. Co.,* 206 N. C., 533.

"To set aside a judgment for irregularity it is necessary to make a motion in the cause before the court which rendered the judgment, with notice to the other party; the objection cannot be made by appeal, or an independent action, or by collateral attack. The time for such motion is not limited to one year after the judgment is rendered, but it must be made by the party affected and within a reasonable time, to show that he has been diligent to protect his rights. The application should also show

that the judgment affects injuriously the rights of the party, and that he has a meritorious defense; otherwise, it would be useless to set aside the judgment." N. C. Prac. & Proc. in Civil Cases, McIntosh, part sec. 653, pp. 736-7.

In 1st Freeman on Judgments (5th Ed.), sec. 217, p. 422, it is said: "A judgment may undoubtedly be vacated for prejudicial irregularity. . . . (Sec. 218, pp. 424-5.) A judgment is said to be irregular whenever it is not entered in accordance with the practice and course of proceeding where it was rendered. The irregularities which have been treated as sufficient to justify the vacations of judgments are very numerous, and it is not possible to prescribe any test by which, in all jurisdictions, to determine whether or not a particular irregularity is such as to require the vacation of a judgment. When the irregularity does not go to the jurisdiction of the court, its action will be largely controlled by the promptness with which the application is made, and by the consideration whether or not the irregularity is one which could have operated to the prejudice of the applicant. . . . (Sec. 219, p. 432.) A judgment on the pleadings rendered under a misapprehension as to their allegations may be vacated for 'irregularity.'"

In *Snow Hill Live Stock Co. v. Atkinson,* 189 N. C., 250, suit was begun 24 March, 1921, tried at April Term, 1923, and judgment entered on verdict against plaintiff. Neither complaint nor answer had been filed. Plaintiff was not present and did not know of the trial until after adjournment of the court. At December Term, 1924, plaintiff's motion to set aside the judgment was overruled by Judge Barnhill. Upon appeal, *Stacy, J.,* reversing the decision of Judge Barnhill, said, for the Court (p. 251): "It could hardly be maintained that this is not an irregular judgment, as it was entered contrary to the usual course and practice of the court. *Becton v. Dunn,* 137 N. C., 559; *Gough v. Bell.* 180 N. C., 268. Apparently it is based on neither allegation nor sufficient finding by the jury, and the plaintiff is taxed with the costs, which would seem to make it also an erroneous one, though an erroneous judgment should be corrected by appeal. *Duffer v. Brunson,* 188 N. C., p. 791."

In *Knott v. Taylor,* 99 N. C., 511 (515), it is said: "All irregular judgments are in a sense erroneous, but they may be set aside in a proper case for such irregularity, if application be made within a reasonable period of time. *Lynn v. Lowe,* 88 N. C., 478, and numerous cases there cited; *Williamson v. Hartman,* 92 N. C., 236; *Fowler v. Poor,* 93 N. C., 466." *Taylor v. Caudle,* 208 N. C., 298.

In *White v. Snow,* 71 N. C., 232 (235), a judgment is held to be irregular when "the complaint is insufficient to warrant any judgment for the plaintiff. . . . A plaintiff must be careful to take only such judgment as is authorized by his complaint."

Under the facts and circumstances of this case, we think that the judgment was irregular, the time in which the motion was made reasonable, and the applicant has a meritorious defense.

For the reasons given, the judgment of the court below must be Reversed.

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

J. L. McGRAW, ADMINISTRATOR OF THE ESTATE OF W. R. PENDRY, v. SOUTHERN RAILWAY COMPANY AND F. T. DUGGINS.

(Filed 26 February, 1936.)

1. Appeal and Error L a—

The decision of the Supreme Court on a former appeal constitutes the law of the case, both in subsequent proceedings in the trial court and upon a subsequent appeal.

2. Master and Servant E b: E c—Evidence held for jury on issues of negligence and assumption of risk under Employers' Liability Act.

Evidence tending to show that plaintiff's intestate, a flagman on defendant's train, was standing on the rear platform of the train as the train was backing out of a switch in shifting operations, that he was required to be at such place in the course of his employment, and that he was thrown therefrom to the track by a violent, sudden, unusual, and unnecessary jerk when the engineer decreased the speed of the train from five or six miles per hour to one mile per hour in two car lengths, and that the train continued backing after it had been thus slowed down, and ran over and killed plaintiff's intestate as he lay upon the track, where he had been thrown by such unnecessary and violent jerk, and that the end of signal whistle had broken off in intestate's hand as he was holding on to it as a handhold in accordance with the custom of defendant's employees, and that the signal whistle was defective, causing it to thus break off as intestate was holding on to it, and depending on it to protect him from the movement of the train, *is held* sufficient to be submitted to the jury upon the issues of negligence and assumption of risk in an action under the Federal Employers' Liability Act, an employee under the act assuming only the risk of ordinary jolts and jars, but not unusual, violent, and unnecessary ones.

3. Bill of Discovery A b—

By the terms of the statute, N. C. Code, 902, evidence elicited from a witness upon examination prior to trial under the provisions of N. C. Code, 900, may be read at the trial.

4. Bill of Discovery A a—

The old equitable bill of discovery has been abolished by statute and examination of the adverse party substituted therefor, and the statute is remedial and should be liberally construed. N. C. Code, 899, *et seq.*

5. Bill of Discovery A b—Party is not entitled to cross-examine witnesses at trial upon reading of their testimony taken upon prior examination.

Where the examination of witnesses prior to trial is had under the provisions of N. C. Code, 900, *et seq.*, and the testimony elicited from the witnesses read at the trial, the party against whom such evidence is introduced is not entitled as a matter of right to cross-examine such witnesses, although they are present at the trial, the right to object to the competency of the evidence and cross-examine the witnesses being available to the party only at the time the examination of the witnesses is had.

6. Evidence K b—

The admission of testimony of experienced trainmen, found by the court to be experts, as to the cause and effect of the stopping of a train from a given speed to a given lower speed, within a certain distance, *is held* without error.

7. Appeal and Error B b—An appeal will be determined in accordance with the theory of trial in the lower court.

Where, in an action brought under the Federal Employers' Liability Act against the railroad company and the engineer of the train to recover for plaintiff's intestate's death, the individual defendant admits the allegation of the complaint that intestate was killed while engaged in interstate commerce, and the individual defendant does not object to the submission of the usual issues in an action under the Federal Act, or request special instructions on the issue of damages, the individual defendant may not contend in the Supreme Court that the damages recoverable against him should not have been determined in accordance with the Federal Act.

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

STACY, C. J., dissents.

APPEAL by defendants from *McElroy, J.*, and a jury, 15 October, 1934. From FORSYTH. No error.

This is an action for actionable negligence, brought by plaintiff against defendants, alleging damage. The evidence on the part of plaintiff and his contentions are to the effect: That the deceased, W. R. Pendry, was a man of forty-four years of age, earning about $225.00 per month, in good health, and while in the line of duty as an employee of the defendant Southern Railway, was killed, due to the negligence of the defendant railway and the defendant F. T. Duggins, the engineer, by being run over by the train upon which he was employed. That the deceased left Winston-Salem on the night of 16 April, 1932, as a flagman on the defendant Southern Railway Company's train, and carried out his duties on the said train as it went south to its destination at Mooresville, North Carolina. That the train left Mooresville, North Carolina, as number fifty-two, about 4:10 a.m., on the morning of 17 April, 1932, and came north to Barber's Junction, reaching there about 4:40 a.m. That the train pulled into the west "Y" switch at Barber's Junction, set off one car, and left twenty cars to be brought on to

Winston-Salem, sitting on the west "Y." That the deceased, together with other members of the train crew, spent about an hour switching there at Barber's Junction, making up the rest of the train to be brought into Winston-Salem, which, after being assembled, consisted of nineteen additional cars; that these cars were backed by the engine into the west "Y" switch and connected by the deceased, with the original part of the train. That after the entire train was gotten together it consisted of an engine, thirty-nine cars, a large number of which were loaded, and a caboose. That the engine was standing about six or eight car lengths west of the "Y" switch on the Asheville pass track, and the caboose on the rear end was standing just in the clear, off the Mooresville main line, in the south switch of the west "Y." That, after the train being so made up, the deceased, in the line of his duties, proceeded toward the rear of the train where, standing on the front end of the cab, he gave the back-up signal, proceeded through the cab to the rear end, and was standing on the rear end, holding on to the signal whistle, and on the lookout, protecting the rear of the train. That he was so situated and standing on the rear of the train because his lantern and brake stick were found inside of the cab, where it was his custom to leave them; that the rules of the company required him to so protect the rear end, and a special order had been issued by the superintendent of the Winston-Salem Division, especially ordering such a protection of the rear end of every train that backed out of the west "Y" on to the Mooresville main line. That this position is also supported by the usual custom in force among railroad men in performing a duty of this kind, and by the further fact that when his body was found the whistle from the rear end of the train that was there for him to use as a signal in making this movement was found near his body.

Plaintiff contends that from all of these facts the indication is that the deceased was, immediately prior to his death, standing on the rear platform, performing his duties in the usual and customary way. That defendant engineer, Duggins, after receiving the signal of the deceased to back the train out of the west "Y," started to back the train from the place where it was standing after being made up, and that when the engine passed the switch of the west "Y" on the old pass track, where the brakeman, Daniels, was standing, that the train had reached a speed in backing of from five to six miles per hour; that immediately after passing the said switch and brakeman, Daniels, the engineer, Duggins, by the manipulation of the controls on the engine, reduced the speed of said train from five to six miles per hour to one mile per hour, or practically a stop, within two car lengths, and that in making such a stop the deceased was thrown from the rear end on to the track. That after

making such a slow-up movement and after throwing the deceased on to the track, the engineer, Duggins, continued to back out of the west "Y" switch, backed over the deceased, and thereby caused his death.

That such a stopping of the train was negligent and careless. That the train, consisting of an engine, thirty-nine cars, and a caboose, was heavily loaded, carrying a maximum tonnage allowed on that road, backing over a slight hump and down a grade; that it contained approximately twenty feet of slack, and that, under these circumstances, such a slowing up of the train did produce an unusual, violent, and unnecessary jerk on the rear of the train, and, furthermore, the kind of jerk that the deceased was not expecting, due to the custom and practice of continuing to back out in this particular movement of the train, and that the action of such stopping on the rear of the train jerked the deceased to the track, and that in continuing to back the train ran over the deceased after he was thrown to the track, thereby causing his death. That such an operation of the engine was negligent, in that such a stop under the existing conditions and the immediate continuation of backing the train could only have been produced by the use of the independent brake on the engine; that the effect of the use of such a brake was to apply the brake on the engine only, thereby stopping the engine immediately, with no braking power applied to the cars, which caused a violent run-out of the slack contained in the train and an especially violent run-out of the train due to the track being down grade, and that such an operation of the train produced a sudden, unusual, violent, and unnecessary jerk on the rear of the train, one not anticipated by the deceased, Pendry, who was riding the rear of the train, who, caught unawares by such a stop, without warning and of such a violent nature, was thrown from the rear end to the track, where he was run over and killed by the continued backing of the train.

That the stop caused the deceased to be thrown from the rear end of the train and the body of the deceased started dragging along the track at approximately five and one-half rail lengths south of the west "Y" switch, designated as point "B"; that these rail lengths carried in length from thirty to thirty-three feet, and one witness testified it was approximately one hundred and seventy-five to two hundred feet south of this switch point; that figuring the length of the train as it was constituted, after being made up, from a point two car lengths south of the west switch on the west "Y," designated as point "C," that the rear end of the train would have been somewhere between one hundred and sixty and two hundred feet south of the south switch of the west "Y," designated as point "B" at the time the stop was made.

That the death of the deceased was due to the negligence of the defendant Southern Railway Company in that the said defendant failed to

maintain its equipment, and especially the whistle on the rear of the said train, in a safe and usable condition; that the said whistle was constructed of a pipe approximately three-fourths of an inch in diameter, extending through a sill in the rear platform of the cab, and supported in such a manner that it was of almost an immovable character, and used by the deceased and other employees as a handhold to protect them from the movements of the train and used especially when it was their duty to be ready to use the said whistle in back-up movements by blowing the same; that the said equipment and whistle was unsafe and in an unusable and dangerous condition, which condition was known, or should have been known, to the defendant, in that the said whistle was made of a defective pipe of a weak and unsubstantial nature, and that when the deceased, Pendry, standing on the rear of the cab, experienced a sudden, violent, unusual, and unnecessary jerk caused by the sudden slowing up or stopping of the train he had hold of the whistle or grabbed hold of the whistle as a handhold; that the said whistle, due to its faulty construction, gave way and, as a result thereof, the movement of the train threw him to the track, where he was run over and killed. That the death of the deceased was due to the negligence of the defendants in that, after bringing the train to a stop to pick up the head brakeman, Daniels, and without warning or a signal from the rear of the train, and after the deceased, W. R. Pendry, was thrown from the said train, that the defendants continued backing, negligently and carelessly, in violation of rules, and ran over the said Pendry before he could recover from the fall from the rear end of the train, thereby causing his death.

The plaintiff contends that from all of this evidence the deceased's death was due to and proximately caused by the negligence of the defendants. That on the third issue the answer should be "No," because that, although the deceased, Pendry, assumed ordinary risks incident to his employment as a flagman by the defendant railroad company, that he did not assume the risk of negligence of the railroad company, and that the acts and conduct on the part of the railroad and the defendant Duggins were not such acts as a man of ordinary prudence would assume in accepting any employment. That on the question of damages, the three issues should be answered for substantial sums.

The widow, Mrs. Ruth Pendry, was absolutely dependent on her husband for a livelihood; that he was a man forty-four years of age, earning from two hundred to two hundred and fifty dollars per month; that he had a number of years seniority with the defendant railroad company, and would shortly have been in a position to earn a much larger sum; that from such earnings, and at such an age, he could reasonably have been expected to live for a long period of time, and contribute during those years large sums to the maintenance, comfort and care of the

widow; that because she has been deprived of such support she has been greatly damaged. That there are two children, dependent upon the efforts of the deceased; that the daughter was fifteen years of age at the time of his death, had reached the ninth grade in school, and could reasonably have expected from her father, with such an income, to be supported, educated, and prepared for life. That there was a son, thirteen years of age, in the seventh grade at school, who could reasonably have expected to have been supported and educated by his father until he was prepared for some vocation in life. That both of these children could reasonably have anticipated, if their father had lived his natural life, to have inherited from him a savings which he accumulated during those years of expectancy.

A map of the locality was introduced in evidence, setting forth in detail the tracks on the "Y," main track, etc.

The evidence on the part of defendants, and their contentions, were contrary to that of plaintiff. They set up the plea of contributory negligence and assumption of risk.

The issues submitted to the jury, and their answers thereto, were as follows:

"1. Was the plaintiff's intestate killed by the negligence of the defendants, as alleged in the complaint? Ans.: 'Yes.'

"2. Did the plaintiff's intestate, by his own negligence, contribute to his own death, as alleged in the answer? Ans.: 'No.'

"3. Did the plaintiff's intestate assume the risk of being killed, as alleged in the answer? Ans.: 'No.'

"4. What amount of damages, if any, is the plaintiff entitled to recover for the widow, Mrs. Ruth Pendry? Ans.: '$12,000.'

"5. What amount of damages, if any, is the plaintiff entitled to recover for the infant, Mary Lillian Pendry? Ans.: '$2,500.'

"6. What amount of damages, if any, is the plaintiff entitled to recover for the infant son, W. R. Pendry, Jr.? Ans.: '$3,000.' "

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

Elledge & Wells and Parrish & Deal for plaintiff.
Manly, Hendren & Womble and W. P. Sandridge for defendants.

CLARKSON, J. 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. N. C. Code, 1935 (Michie), sec. 567. The court below overruled these motions, and in this we can see no error.

This case was here on appeal from judgment of nonsuit (see 206 N. C., 873). *Brogden, J.,* wrote a thorough opinion, setting out the facts and law. The nonsuit was overruled and also the opinion evidence which was not allowed in the court below was held to be competent. The Court said, at p. 882: "In other words, was Pendry on the rear of the train? Was there an 'unusual, violent, and unnecessary' jerk of the train that threw him off to his death? These are controverted questions. However, the Court is of the opinion that there was sufficient evidence to be submitted to the jury within the contemplation of the Federal rule."

"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; *Power Co. v. Yount and Robinette v. Yount,* 208 N. C., 182 (184).

We think the evidence on the present appeal is perhaps stronger than that offered by plaintiff on the former appeal, and sufficient to have been submitted to the jury. In fact, defendants say: "While the evidence offered by the plaintiff upon the former appeal was substantially the same as the evidence offered at this trial," etc. The plaintiff was killed on 17 April, 1932. The railroad authorities on the same day sent out a telegram to different employees: "Indications are he fell from the rear of the train or was killed by hoboes." All the evidence shows that he was not killed by hoboes. The evidence of plaintiff indicates that he was on the caboose car, which was on the rear of the train, and plaintiff was on the rear platform of the caboose car in the line of his duty. It also indicates that he was thrown off by the carelessness and negligence of the engineer in the manner of the movement of the train, which produced a sudden, unusual, violent, and unnecessary jerk on the rear end of the train. *Hamilton v. R. R.,* 200 N. C., 543 (553). After being thrown off he was run over and dragged some distance, and near his body was a whistle that was broken from the cab. This whistle was attached to the rear of the caboose car. It was a piece of pipe and showed a fresh break. The evidence indicates that he was holding on to the signal whistle. He had left his lantern and brake stick on the inside of the cab. The rules of the company required him to be on the rear end of the caboose car that backed out of the "Y." The whistle from the rear end of the caboose, used as a signal in making a movement, was found near his body, broken. This was used by the employees as a handhold, and was defective. When the sudden, unusual, violent, and unnecessary jerk took place, the whistle broke and plaintiff's intestate was thrown off the caboose car, run over and dragged. Along the track where he was dragged was found the broken whistle, his pistol, watch, etc. The evi-

dence on the part of plaintiff was clearly sufficient to be submitted to the jury as to how this faithful employee met his death. All the evidence indicated that plaintiff's contentions were correct, and so found by the jury.

One of the main contentions of defendant was that the evidence of certain employees and agents of defendant railroad, taken before the commissioner and read to the jury, constitutes the cornerstone of the plaintiff's case. Without it, the plaintiff cannot conceivably recover. To this line of evidence defendants excepted and assigned error. We do not think they can be sustained.

N. C. Code, 1935 (Michie), sec. 899, abolishes the old equitable bill of discovery. In its place we have section 900: "A party to an action may be examined as a witness at the instance of any adverse party, and for that purpose may be compelled, in the same manner and subject to the same rules of examination as any other witness, to testify, either at the trial or conditionally or upon commission. Where a corporation is a party to the action, this examination may be made of any of its officers or agents." *Chesson v. Bank,* 190 N. C., 187. The statute is remedial and should be liberally construed. *Abbitt v. Gregory,* 196 N. C., 9 (11). The plaintiff complied with the practice and procedure in the application for examination. *Bailey v. Matthews,* 156 N. C., 78 (81). Section 901 provides for examination before trial "at the option of the party claiming it." Section 902: "The party to be examined, as provided in the preceding section, may be compelled to attend in the same manner as a witness who is to be examined conditionally; but he shall not be compelled to attend in any county other than that of his residence or where he may be served with a summons for his attendance. The examination shall be taken and filed by the judge, clerk, or commissioner, as in case of witnesses examined conditionally, and may be read by either party on the trial." *Phillips v. Land Co.,* 174 N. C., 542; *Beck v. Wilkins-Ricks Co.,* 186 N. C., 210 (212). Section 904: "The examination of the party thus taken may be rebutted by adverse testimony."

If defendants desired to introduce the railroad employees and agents that plaintiff had theretofore examined before the complaint was filed, they could have done it. They were in court and defendants could have gotten their evidence. In the trial of a cause the keystone is to find the truth. Defendants had the opportunity to use these witnesses in the trial, but did not do so. We cannot see why they should now complain.

The defendants contend: "In each instance the witness whose testimony had been taken before the complaint was filed and pursuant to the clerk's order was present in court at the time his testimony was read to the jury and under subpœna for the plaintiff. In each instance the court declined to permit the defendants to cross-examine these witnesses.

In each instance the court ruled that the defendants would be permitted to interpose no objection to any part of the testimony of any of these witnesses, to which the defendants had not objected when the examination was had before the commissioners." The defendants had a right, when the testimony was taken, under the statute, to object and except to incompetent evidence, and to cross-examine the witness. If this was not done, the fault lies with the defendants. The defendants say: "We think that the examination taken by the plaintiff before complaint is filed may be used by the plaintiff only as information to enable the plaintiff intelligently to frame a complaint and may not be offered by the plaintiff at the trial of the cause." We cannot nullify the clear language of the statute, "and may be read by either party on trial."

It was in evidence that the court below admitted opinion evidence of experienced trainmen, found by the court to be experts, on the cause and effect of the stopping of a train from a given higher speed to a given lower speed, within a certain distance. This was in accordance with the former holding by *Brogden, J.*, at p. 880, where the opinions are cited to sustain the admissibility of this kind of expert evidence. The testimony of J. C. Burford as to what another freight train did at Barber's Junction did not show such a similarity as to make the evidence permissible under the rule, at least the exclusion was not prejudicial.

The defendant Duggins contends that his liability is not controlled by the Federal Employers' Liability Act. The plaintiff, in the complaint, par. 5, alleged: "That at the time of the plaintiff's intestate's injury, hereinafter referred to, the defendants were engaged in interstate commerce, and the deceased, as an employee of the defendant Southern Railway Company, was also engaged in such commerce." The defendant Duggins in his answer says: "Par. 5. The allegations of article five are admitted."

The issues are those usually submitted in an action under the Federal Employers' Liability Act. There was no objection by defendant Duggins to these issues as to him. He asked no prayer for instruction as to him on the question now presented as to damages. If he ever had any legal rights to the contention now made, he waived them. He cannot now change the theory on which the case was tried in the court below. *Ammons v. Fisher,* 208 N. C., 712 (715). We think the charge as to assumption of risk correct.

Taking the charge as a whole, on every aspect, and on the measure of damages we can see no prejudicial or reversible error. All the evidence indicates that plaintiff's intestate was a faithful employee of defendant railroad for long years, and was killed in the line of his duty.

We have read the long record (276 pages) and able briefs of the litigants. The learned judge tried this long and complicated case with unusual care, following the prior opinion of this Court. We see on the entire record no prejudicial or reversible error.

For the reasons given, in the judgment of the court below we find No error.

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

STACY, C. J., dissents.

JOHN BEN JACKSON, BY HIS NEXT FRIEND, GOEBEL PORTER, v. GEORGE F. SCHEIBER AND ROBERT PEARSON.

(Filed 26 February, 1936.)

1. Automobiles D b—Evidence held sufficient to make out prima facie case that servant was acting in scope of employment at time of injury.

Evidence that a house servant was permitted to use the employer's car in doing errands for the employer, and that the employer often allowed the employee to drive the car to the employee's house for articles of clothing for himself, and that on the occasion in question the employer sent the employee to get a suit of clothing from a cleaning establishment for the employer and take same to the employer's apartment, that the employee, after getting the clothes from the cleaners, stopped at his house on the way to the employer's apartment in order to give instructions about his own clothes, that the house was about one thousand feet from the employer's apartment, and that the injury was inflicted as the employee was driving from his house to the employer's apartment, *is held* sufficient to make out a *prima facie* case that at the time of the injury the employee was acting within the scope of his employment, the deviation from the direct route being minor in its nature.

2. Master and Servant D b—

Ordinarily, a master is not liable for a willful and intentional injury inflicted by the servant to vent his personal spite and hatred, although at the time the servant is on his master's business.

3. Automobiles D b—Owner held not liable for injury inflicted by driver willfully and out of personal hatred and malice.

The competent evidence on the issue of defendant owner's liability tended to show that animosity existed between defendant's driver and the plaintiff, that the driver had threatened the plaintiff, and that at the time of the injury the driver backed his car past plaintiff, started the car forward, and deliberately struck plaintiff, while he was sitting several feet off the unobstructed road. *Held:* Defendant owner's motion to

nonsuit was properly allowed, since the evidence, even though sufficient to show that the driver was about his master's business at the time, showed that the driver stepped aside from the course of his employment and inflicted the injury willfully to carry out his threat, and that he was motivated by spite and hatred personal to himself.

4. Evidence E b—Testimony of employee defendant in recorder's court held incompetent as to employer defendant in Superior Court.

Plaintiff sued the driver of a car and his employer to recover for injuries inflicted by the driver. All of plaintiff's evidence tended to show that the driver willfully inflicted the injury out of spite and personal enmity. In the recorder's court the driver testified to the effect that the injury was accidental, and such testimony was introduced upon the trial in the Superior Court upon appeal. *Held:* The driver's testimony in the recorder's court was competent as against himself, but incompetent as against the employer, and is insufficient to raise a conflict in the evidence upon the employer's defense that the injury was inflicted by the driver willfully and out of personal hatred and malice, and the employer's motion to nonsuit was properly allowed.

APPEAL by plaintiff from *Cowper, Special Judge,* at 18 February, 1935, Special Civil Term. From MECKLENBURG. Affirmed.

This is an action for actionable negligence, brought by plaintiff against defendants, alleging damage. The defendants denied the material allegations of the complaint and set up the plea of contributory negligence. The evidence on the part of plaintiff was to the effect that John Ben Jackson, the plaintiff, was struck by a Chrysler automobile driven by defendant Robert Pearson, on South Alexander Street, between Hill and Vance streets, in the city of Charlotte, N. C., about 6:30 o'clock on 14 April, 1934. It was daylight. Pearson stopped the automobile in front of his house on the west side of South Alexander Street, the automobile entering from East Hill Street, and went into his house. Plaintiff was facing east, sitting on an oil can, about 2½ feet west of the drain.

Grady James, a witness for plaintiff, testified, in part: "After Robert Pearson backed up to East Hill Street he started forward. I did not pay any more attention to him until I heard a 'zoom.' I saw the car as it came down Hill Street. When it got four or five yards from Ben, it cut to its left straight towards Ben. I called to Ben and threw my hand out towards him. About that time the front bumper of the car caught Ben. After the car passed it threw up a cloud of dust. Pearson did not blow his horn as he came towards us. The next time I saw Ben he was in East Vance Street. He was lying on his face. Ben was about one block from where he was struck. I ran down there. When I got there Pearson was gone. . . . South Alexander Street at that place is dirt. It is about 18 feet wide. There was room for two cars to pass to the west of John Ben when he was sitting on the oil can."

Lloyd Thomas, a witness for plaintiff, testified in part: "Pearson's house is on the west side of the street. He (Pearson) came out of the house and backed north on Alexander Street. He backed up pretty speedy, about 15 or 20 miles per hour. He stopped at Hill Street. When Pearson backed north on Alexander Street, John Ben was on the east side of the street, sitting on an oil can. John Ben was sitting about two and one-half feet west of a little drain and about fifty feet south of where Pearson stopped the car in Hill Street. Robert Pearson started the car forward and drove south on South Alexander Street. He was going 20 or 25 miles per hour when he ran into John Ben, who was still sitting on the oil can. The right part of the front bumper hit John Ben and dragged him about one block."

Bradley Lee, a witness for plaintiff, testified in part: "I saw the car start off at full speed. It went straight until it got almost to John Ben. At that time it cut towards John Ben and hit him with the front bumper. If the car had gone straight, it would have missed John Ben about two and one-half feet. The car passed me with John Ben on the fender. I went down to where John Ben was lying. He had his face down in Vance Street, east of South Alexander Street."

John Ben Jackson, the plaintiff, testified in part: "My house is on the west side of South Alexander Street, and I crossed over to the east side and sat down on an oil can. That can was in the grass over between the drain and the fence. The fence is on the east side of the grass. The drain is on the west side of the grass. While I was sitting there I saw Robert Pearson. I saw him get in the car and back up the street. He got in the car down at his house, No. 816. That was south of where I was sitting. That was about as far as from where I am now to the second radiator in the courthouse. After Robert Pearson got in the car he backed up to the street. He was driving a Chrysler car. He backed clean up to Hill Street, passing by me. When he got to Hill Street the car stopped and started down on South Alexander Street again, the same street he was on when he was backing. I did not watch the car until it struck me. I was sitting with my back turned to Grady James and was talking back over my shoulder. I first whirled around with my face to him. I was not looking at the car when it struck me. I was talking to Grady James. Between the time Robert Pearson backed the Chrysler car by me until I was struck, I had not changed my position except to turn on the can. The can had not moved. I was sitting on the can both times. I do not remember being dropped from the automobile in Vance Street. The first thing I knew after the accident, my mother and brother was in the room with me in the Good Samaritan Hospital. It was Tuesday evening when I first woke up. I don't remember nothing between the Saturday I was struck and Tuesday. When I woke up I

was hurting all over. My face and head were hurting and both my wrists. I could not see. . . . (Cross-examination.) I was between the drain and the fence in the grass plot. I was not sitting in the traveled part of the highway. There was more than twenty feet between the drain and the curb on the west side and there was more than twenty feet between me and the curb on the west side. There was nothing in the street except this automobile. There were no other passing vehicles. I saw Pearson as he backed by me. . . . In order to hit me he had to get some part of his automobile over to the east of the drain out of the roadway, and at that time he had over twenty feet of clear roadway. . . . Pearson and I had had some difficulty before this. I had shot at him. I don't remember the exact date. It was in March and this happened in April. He is the only person I have shot at. I was in my back yard when I shot at him. I can't remember the date. I have said that the last time I had seen Pearson before I got hurt that he told me he was going to get me if it was the last thing he ever did. I don't know how long that was before he hit me. . . . (Question by plaintiff's counsel): You have testified about shooting the defendant Robert Pearson. Just explain why you shot at him. Plaintiff explained the quarrel. Recross-examination: Q. The question I asked you is, haven't you stated that Pearson ran into you on purpose? Ans.: Yes, sir. Q. And that's the statement you make now, isn't it? Ans.: Yes, sir. As to whether or not Pearson ever said anything to me about whether he ran into me on purpose or not, he did. He said where I could hear it that he intended to run over me and would do it again if he had the chance. I heard him say that one night when we was at a little party."

George F. Scheiber, the defendant, was examined by plaintiff, and testified in part: "On 14 April, 1934, in the afternoon, I instructed Pearson to go on an errand for me. I told him to go up town in my car and I told him to go to Wright's Cleaning place, which is on South Tryon Street, adjacent to the Catholic Church. He took my car and left with it on that trip. I told him to get a suit of clothes for me from Wright's Cleaners establishment and bring it back to the Addison Apartments. I didn't tell him exactly what streets to drive over or how to go. I just told him to make that trip for me. . . . When my car was brought home by Pearson immediately after the John Ben Jackson accident it had my suit in it and I got my suit. . . . As to whether I told him to go home at all, it would hardly be in my scope to tell him to go home at all. . . . I think he went in the car. When the reasons were justifiable, I allowed him to go to that community in the car." The witness further testified that heretofore when Pearson went out

with his car he allowed him to go to his house for articles of clothing, etc. It was in evidence that on the day in question he went to his home to tell his mother to have him a clean shirt for Sunday.

Edith Thomason, a reporter who took the testimony of Robert Pearson in the recorder's court, testified in part: "In that court he testified: Didn't you hit this boy and carry him down to the corner? Ans.: Yes, sir. I didn't know I hit him. Q. You knew this boy was sitting up there on this oil can? Ans.: I don't know what kind of a can he was sitting on. He was sitting six feet in the street." (To the foregoing and like questions the defendants objected. Objections sustained as to defendant Scheiber. Plaintiff excepted.) By the court: "The court understands that you do not introduce any of this evidence as it bears on the issue of negligence against Pearson?" By Mr. Gover: "Not against anybody, solely for the purpose of showing any bearing it may have on the question of whether this accident was intentionally inflicted."

The court below allowed the case to be submitted to the jury on the usual issues as to defendant Pearson. The jury rendered a verdict for plaintiff, and assessed the damages at $300.00. The defendant Scheiber introduced no evidence and the court below sustained a motion of nonsuit as to him. The plaintiff excepted, assigned error, and appealed to the Supreme Court. The plaintiff made numerous exceptions and assignments of error, and appealed to the Supreme Court.

C. H. Gover, Wm. T. Covington, Jr., and Hugh L. Lobdell for plaintiff.

John M. Robinson and Hunter M. Jones for defendant Scheiber.

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

The plaintiff, while sitting near the east side of South Alexander Street, was struck by an automobile which belonged to the defendant George F. Scheiber, and which was being driven by the defendant Robert Pearson. Pearson was employed by Scheiber as a house servant and had gone to a cleaning establishment to get a suit of clothes for his employer. At the time of the collision he was carrying the suit to the Addison Apartments, in accordance with Scheiber's instructions. On the return trip to the apartment house he stopped by his own house on South Alexander Street, which was approximately 1,000 feet from the Addison Apartments, to see his mother and have her to get him a clean shirt for Sunday. The plaintiff was struck after Pearson came out of his home, backed his car north along Alexander Street past the plaintiff, and then started forward south on Alexander Street.

We think on the entire record there was evidence that Robert Pearson, the defendant, was in the employment of his codefendant when the injury was inflicted on John Ben Jackson, the plaintiff. The deviation was of a minor nature, and the evidence was sufficient to make out a *prima facie* case to be submitted to a jury.

In *Duncan v. Overton,* 182 N. C., 80, we find that: The owner had put his son in charge of the automobile with instructions to drive himself and his baggage to college in Raleigh, and there to put the car in a garage for repairs. Instead of going to the garage, the son met other students at the depot in Raleigh and was driving them out to the college at the time the plaintiff was injured. At p. 82, *Clark, C. J.,* speaking for the Court, says: "The father having placed his son in charge of the machine to bring it from Nashville to A. & E. College at Raleigh, and then to the garage, is responsible for injuries accruing from the negligence of his agent while in charge of the machine on that errand, and is not released therefrom by an incidental divergence in discharging the duty entrusted to him before the driver reached the garage, such as is testified to in this case." *Lazarus v. Grocery Co.,* 201 N. C., 817; *Puckett v. Dyer,* 203 N. C., 684.

The matter has been recently discussed by *Schenck, J.,* in *Lertz v. Hughes Bros., Inc.,* 208 N. C., 490, and sustains the view here taken.

The general principle is thus stated in 2 Blashfield Cyclopedia of Automobile Law (1927, ch. 60, p. 1404): "The question whether a servant, in deviating from the direct route in performing work for the master, thereby departs from the scope of employment, will depend upon the degree of deviation and of the attending circumstances; and, if the deviation is slight and not unusual, it may be determined by the court as a matter of law that he is still engaged in his master's business, so as to render the latter liable for his negligence in driving, as, for instance, a variation of a couple of blocks in a city or congested traffic and varying conditions."

In fact, the able attorneys for defendant do not seriously controvert the law on this aspect, and in their brief contend that the question involved is as follows: "In an action against the owner of an automobile on account of injuries sustained through acts of owner's servant in driving the automobile when all the evidence of the plaintiff tends to show that the injury was intentionally inflicted, and there is no evidence tending to show the contrary, was it error to nonsuit the plaintiff as to the owner?" We think not, under the facts and circumstances of this case.

The plaintiff John Ben Jackson was a witness in his own behalf. He had shot Robert Pearson, the defendant, in a quarrel. He testified on cross-examination: "In order to hit me he had to get some part of his automobile over to the east of the drain, out of the roadway, and at

that time he had over twenty feet of clear roadway. . . . I have said that the last time I had seen Pearson before I got hurt that he told me he was going to get me if it was the last thing he ever did." (Recross-examination): "The question I asked you is, haven't you stated that Pearson ran into you on purpose? Ans.: Yes, sir. Q. And that's the statement you make now, isn't it? Ans.: Yes, sir."

There was evidence that plaintiff was not in the street, and where he was sitting that Pearson had to go out of his traveled way to hit him. Where a servant commits a willful and intentional injury to vent his spite and hate, although while on his master's business, ordinarily the master is not liable.

In *Daniel v. Railroad,* 136 N. C., 517 (522-3), we find: "It is not intended to assert that a principal cannot be held responsible for the willful and malicious acts of the agent when done within the scope of his authority, but that he is not liable for such acts, unless previously expressly authorized or subsequently ratified, when they are done outside of the course of the agent's employment and beyond the scope of his authority, as when the agent steps aside from the duties assigned to him by the principal to gratify some personal animosity or to give vent to some private feeling of his own (*McManus v. Crickett,* 1 East., 106), and, as is forcibly stated by Lord Kenyon in the case cited, quoting in part from Lord Holt: 'No master is chargeable with the acts of his servant but when he acts in the execution of the authority given him. Now when a servant quits sight of the object for which he is employed, and without having in view his master's orders pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and his master will not be answerable for his acts." *Southwell v. R. R.,* 189 N. C., 417 (419); *S. c.,* 191 N. C., 153, 275 U. S., 65, 72 Law Ed., 157.

It is said by *Hoke, J.,* in *Foot v. Railroad,* 142 N. C., 51 (53-4): "The breach of duty can be and frequently is intentional and willful, and yet the act may be negligent; and it is only when there has been designed injury caused, or an intended damage done, that the idea of negligence is eliminated." *Roberts v. R. R.,* 143 N. C., 176; *Jones v. R. R.,* 150 N. C., 473; *Norman v. Porter,* 197 N. C., 222. Sherman & Redfield on Neg., secs. 3 and 4. Accordingly, we find the term "willful and wanton negligence" is coming to be not infrequently used both in the decisions and textbooks. 1 Thompson Com. on Neg., sec. 21; 2 Thompson, sec. 1626; *Railway v. Bryan,* 107 Ind., 51; *Express Co. v. Brown,* 67 Miss., 261.

The facts on this record disclose that Robert Pearson, when he inflicted the injury, stepped aside and did an individual wrong, to carry

out his threat, spite, and hate, and the purpose was personal to himself, and he alone is liable to plaintiff under the facts and circumstances of this case.

Pearson was not a witness in the trial below. What he said in the recorder's court was evidence against himself, but, as to defendant Scheiber, it was hearsay and incompetent, and properly excluded. The type of evidence excluded, and which plaintiff excepted and assigned error to, we do not think competent.

In *Wimberly v. R. R.*, 190 N. C., 447, it is said: "Animadverting on a similar situation in *Shell v. Roseman,* 155 N. C., 94, *Allen, J.,* said: 'We are not inadvertent to the fact that the plaintiff made a statement on cross-examination as to a material matter, apparently in conflict with his evidence when examined in chief, but this affected his credibility only, and did not justify withdrawing his evidence from the jury. *Ward v. Mfg. Co.,* 123 N. C., 252.'" *Shaw v. Handle Co.,* 188 N. C., 236; *In re Fuller,* 189 N. C., 512; *Southwell v. R. R.,* 191 N. C., 153, at p. 165.

We see no such conflict as set forth in the above cases on the entire record in this case that would require the case to be submitted to the jury.

For the reasons given, the judgment must be

Affirmed.

MARIE M. MEARES v. MRS. MARY E. WILLIAMSON ET AL.

(Filed 26 February, 1936.)

1. Wills E f—Will held to authorize executor to pay for special medical attention necessary for testator's wife.

The will in question directed the executor to pay testator's wife rentals and interest on choses in action belonging to the estate, but if said income was less than a stipulated amount, that the *corpus* of the estate be used to the extent necessary to pay her the minimum stipulated amount, and further provided that in the event the wife should need special medical attention or nurses, the executor should see that she be given every care and attention, and pay any necessary expenses therefor in excess of the amount stipulated. Testator's wife contracted a chronic physical disease and suffered mental illness, necessitating special medical care and nursing, and the executor employed a trained nurse for her care. Executor refused to pay the nurse the amount her services were reasonably worth, contending that as the income from the estate was insufficient, the expenditures for the benefit of the wife were limited to the amount stipulated in the will, and that he could not bind the estate for matters arising wholly after testator's death. The trial court found, upon supporting

evidence, that the special medical attention and nursing were necessary to the wife in her afflicted condition, and that the amount claimed by the nurse was the reasonable value of her services. *Held:* Under a proper construction of the will, the executor was authorized to incur liability for such special, necessary medical attention, and judgment that the estate was liable for the reasonable worth of the nurse's service is upheld.

2. Executors and Administrators C c—

The principle that an executor cannot bind the estate on matters arising wholly after the death of testator does not apply when the will expressly authorizes the executor to incur such liability.

3. Executors and Administrators D h—

An action to recover for personal services rendered testator's wife, involving a construction of the will and an accounting, is properly brought in the Superior Court. C. S., 135.

4. Appeal and Error J c—

Findings of fact by the trial court are conclusive on appeal when supported by any competent evidence.

APPEAL by C. E. Taylor, executor of Emory D. Williamson, from *Frizzelle, J.*, at February Term, 1935, of COLUMBUS. Affirmed.

The judgment of the court below is as follows:

"This cause coming on to be heard and being heard at the February Term of Court, before J. Paul Frizzelle, and the plaintiff and defendant having waived a jury trial and agreed that the cause may be heard by the court without the intervention of the jury, and after hearing the evidence, the court makes the following findings of facts and enters judgment accordingly:

"1. The plaintiff Marie M. Meares is a registered nurse, residing in Lumberton, North Carolina. That Emory D. Williamson died domiciled in Columbus County, leaving a last will and testament, which was duly admitted to probate and registered in the office of the clerk of the Superior Court of Columbus County, copy of which will is hereby attached, marked Exhibit 'A,' and made a part of this judgment. That thereafter C. E. Taylor qualified as executor under the last will and testament and entered upon the duties of his trust, and is now exercising said duties.

"2. That heretofore, to wit, 19 December, 1931, Mrs. Mary E. Williamson became critically ill, and at that time plaintiff Marie M. Meares was employed as nurse for Mrs. Mary E. Williamson, who, by reason of a protracted illness, became an invalid from the date of said employment, 19 December, 1931, until the present time, being both physically and mentally incapacitated, now being committed to Westbrook Sanitarium, Richmond, Virginia, which is an institution for mental diseases.

"3. That by reason of the physical and mental condition of the said Mrs. Mary E. Williamson, it was necessary that she should have special care and attention, including the attention of a trained nurse, the said Mrs. Mary E. Williamson having no children, and her husband being dead, nor having any immediate relatives to care for her.

"4. After her employment the said Marie M. Meares, registered nurse, continued to nurse and care for the said Mrs. Mary E. Williamson continuously from 19 December, 1931, to 2 August, 1932, both at Baker Sanatorium, Lumberton, N. C., and at her home in Cerro Gordo, N. C. That during this period of time said Marie M. Meares was paid the sum of $150.00 per month, save and except the last month in said period by special agreement she accepted $75.00 for this one month. The court finds that the said Marie M. Meares rendered faithful and efficient service during this period of time mentioned, and that such services were necessary for the care and protection of the said Mrs. Mary E. Williamson, who was both physically and mentally unable to care for herself. That the said Marie M. Meares was on duty for 18 hours each day, and said services were well worth the sum paid by the executor.

"5. On 2 August, 1932, plaintiff having been on duty for many months, was directed by her physician, Dr. H. M. Baker, to take a month's vacation, and during this time Mrs. Mary E. Williamson was returned from her home at Cerro Gordo, N. C., to Baker Sanatorium, Lumberton, N. C. That on 2 September, 1932, plaintiff Marie M. Meares returned to her duty as nurse for Mrs. Mary E. Williamson, going with her to her home in Cerro Gordo, N. C., and remaining with her on constant duty 18 hours each day, from 2 September, 1932, to 15 February, 1933. That during said period of time Mrs. Mary E. Williamson was physically and mentally unable to care for herself, being an invalid from a protracted illness, and the court finds as a fact, by reason of her condition, it was necessary for her to have special medical attention and nursing.

"6. The said Marie M. Meares had made demand upon the executor, C. E. Taylor, for payment of her services from 2 September, 1932, to 15 February, 1933, at the rate of $150.00 per month, and the said executor has refused to make payment. He admits the services were performed, but contends that he is without power under the will to make any payment to the plaintiff Marie M. Meares, contending that he cannot expend more than $125.00 each month, while Mrs. Williamson remained at her home, and that he has paid said amount to Mrs. Mary E. Williamson each month during said period of time from 2 September, 1932, to 15 February, 1935.

"7. Shortly after Mrs. Mary E. Williamson entered Baker Sanatorium for treatment, on or about the first of January, 1932, the defendant executor, C. E. Taylor, came to the hospital and advised Dr. H. M.

Baker, the physician in charge, to do everything necessary for the comfort and care of Mrs. Mary E. Williamson, and to secure all necessary services for her, and that upon this authorization Dr. Baker continued the nurse, Marie M. Meares, in the services of Mrs. Williamson, and the court finds as a fact from the testimony of Dr. H. M. Baker that such services were necessary and proper for the care and protection of Mrs. Williamson. That shortly after Marie M. Meares was so employed, defendant executor, C. E. Taylor, advised Mrs. Williamson, in the presence of Marie M. Meares, to keep this nurse as long as she needed her, and after then the said defendant executor, C. E. Taylor, continued to pay this nurse for her services from 19 December, 1931, to 2 August, 1932. That the services of the plaintiff were reasonably worth the sum of $150.00 per month, and she made demand upon the defendant executor to pay this amount, and he has refused to do so, stating that he had no authority to make any payment to her for services during this period, having already paid to Mrs. Mary E. Williamson $125.00 per month for said period of time. The court finds as a fact that during this period of time from 2 September, 1932, to 15 February, 1933, the sum of $125.00 per month was not sufficient to pay her necessary expenses and to furnish her necessary medical attention and nursing. The court finds as a fact that during said period of time Mrs. Mary E. Williamson was an invalid from a protracted illness and needed special medical attention and nursing, and that such special medical attention and nursing constituted necessary expenses in excess of the monthly or annual amount belonging to Mrs. Williamson under her husband's will, and her condition required the expenditure of additional money by the executor, as provided for under item six (6) of the last will and testament, which reads as follows: 'It is my will and desire that my executors hereinafter named shall, after paying the cost of administration, and the annual taxes on my estate, out of the real estate rentals and interest on any money due my estate, pay any balance or residue of said rentals and interest on money to my beloved wife in equal monthly installments, as far as practicable, and in the event that the residue of said rentals and interest on money does not amount to one hundred and twenty-five ($125.00) dollars per month, or $1,500.00 per year, then my will and desire is that my beloved wife be paid by my executors, hereinafter named, a sum sufficient to make one hundred and twenty-five ($125.00) dollars per month out of any money in their hands belonging to my estate; and it is my will and desire further that in the event that my beloved wife should need special medical attention or nurses, my executors, hereinafter named, shall see that she has every care and attention, that my executors, hereinafter named, pay any necessary expenses incurred in this way, if it be in excess of the monthly or annual amount above mentioned bequeathed to my beloved wife.'

"8. The court finds as a fact from the evidence introduced that the estate of Emory D. Williamson, now being administered by the defendant executor, C. E. Taylor, has considerable value at this time, not less than $17,000, and the court further finds that Mrs. Williamson is now in bad health and a woman of considerable age.

"The executor having refused to pay the amount due said plaintiff for her services, her only recourse was to bring suit in the Superior Court of Columbus County, which having assumed jurisdiction of the case, it being necessary to construe the will of Emory D. Williamson, this court now has jurisdiction to pass upon the claim of the said plaintiff, as to whether or not she is entitled to recover judgment against the executor, C. E. Taylor, for her services.

"The court finds as a fact that the executor authorized Dr. H. M. Baker to employ such nurses as he deemed necessary to care for Mrs. Mary E. Williamson, and following this authorization, Dr. Baker employed Marie M. Meares as nurse for Mrs. Williamson, and at all times after such authority was given, while Marie M. Meares was acting as such nurse, her services were needed and necessary, and she was directed by Dr. Baker to remain with the patient until she was finally discharged by him on 15 February, 1933.

"Upon the foregoing facts, it is ordered, adjudged, and decreed that the plaintiff Marie M. Meares shall have judgment against the defendant C. E. Taylor, executor of Emory D. Williamson, in the sum of eight hundred fifteen and no/100 dollars ($815.00), with interest from 15 February, 1933, together with the costs of this action, to be taxed by the clerk of the court. J. Paul Frizzelle, Judge presiding."

To the foregoing judgment the defendant C. E. Taylor, executor, excepted and assigned error and appealed to the Supreme Court. The defendant C. E. Taylor, executor, made numerous exceptions and assignments of error. The material ones will be set forth in the opinion.

E. J. and L. J. Britt and McLean & Stacy for plaintiff.

Varser, McIntyre & Henry for C. E. Taulor, executor of Emory D. Williamson.

CLARKSON, J. The defendant C. E. Taylor, executor of Emory D. Williamson, makes the following exception and assignment of error: "For that the trial court overruled appellant's demurrer *ore tenus* to the complaint, for that the complaint did not state a cause of action in that it alleged only a transaction occurring after the death of E. D. Williamson and during the executor's time." We do not think, under the facts and circumstances of this case, the exception and assignment of error can be sustained.

In *Hailey v. Wheeler,* 49 N. C., 159 (161), it is said: "No authority is found to support the position that an action can be maintained against a defendant, as executor, for money had and received by him, after the death of the testator. It would do violence to all principle. It is the duty of an executor to pay off the *debts of his testator* in a prescribed order. It is not possible to conceive how a debt of the testator can be created by matter occurring wholly in the executor's time."

This principle is well stated by *Varser, J.,* in *Snipes v. Monds,* 190 N. C., 190. *Hood, Comr., v. Stewart, ante,* 424. We do not think the principle above set forth applicable to the facts in the present case. We think the present debt sued for is "wholly in the executor's time," under the language of the will.

Item 6 of the will of Emory D. Williamson (dated 17 July, 1914, and duly probated) is as follows: "It is my will and desire that my executors, hereinafter named, shall, after paying the cost of administration, and the annual taxes on my estate, out of the real estate rentals and interest on any money due my estate, pay any balance or residue of said rentals and interest on money to my beloved wife in equal monthly installments, as far as practicable, and in the event that the residue of said rentals and interest on money does not amount to one hundred and twenty-five ($125.00) dollars per month, or $1,500.00 per year, then my will and desire is that my beloved wife be paid by my executors, hereinafter named, a sum sufficient to make one hundred and twenty-five ($125.00) dollars per month out of any money in their hands belonging to my estate; *And it is my will and desire further that in the event that my beloved wife should become an invalid or have any protracted illness, and should need special medical attention or nurses, my executors, hereinafter named, shall see that she have every care and attention, that my executors, hereinafter named, pay any necessary expense incurred in this way, if it be in excess of the monthly or annual amount above mentioned bequeathed to my beloved wife.*" (Italics ours.)

The court below found the following facts: "The court finds that the said Marie M. Meares rendered faithful and efficient service during the period of time mentioned, and that such services were necessary for the care and protection of the said Mrs. Mary E. Williamson, who was both physically and mentally unable to care for herself. That the said Marie M. Meares was on duty for 18 hours each day, and said services were well worth the sum paid by the executor. On 2 August, 1932, plaintiff having been on duty for many months, was directed by her physician, Dr. H. M. Baker, to take a month's vacation, and during this time Mrs. Mary E. Williamson was returned from her home at Cerro Gordo, N. C., to Baker Sanatorium, Lumberton, N. C. That on 2 September, 1932, plaintiff Marie M. Meares returned to her duty as nurse

for Mrs. Mary E. Williamson, going with her to her home in Cerro Gordo, N. C., and remaining with her on constant duty 18 hours each day, from 2 September, 1932, to 15 February, 1933. That during said period of time Mrs. Mary E. Williamson was physically and mentally unable to care for herself, being an invalid from a protracted illness, and the court finds as a fact, by reason of her condition, it was necessary for her to have special medical attention and nursing."

We think there was sufficient competent evidence to sustain the above findings of fact. We also think there was sufficient competent evidence to base the findings of fact, as follows: "The defendant executor, C. E. Taylor, came to the hospital and advised Dr. H. M. Baker, the physician in charge, to do everything necessary for the comfort and care of Mrs. Mary E. Williamson, and to secure all necessary services for her, and that upon this authorization Dr. Baker continued the nurse, Marie M. Meares, in the services of Mrs. Williamson, and the court finds as a fact from the testimony of Dr. H. M. Baker that such services were necessary and proper for the care and protection of Mrs. Williamson," etc.

There was corroborative evidence to like effect as to the employment of Miss Meares. C. E. Taylor, the executor, testified in part: "Q. And the last thing you said to Miss Meares was to take care of her? A. I think possibly when I said goodbye I asked her to take good care of Mrs. Williamson. I don't think I saw Miss Meares any more until December. Q. And you left Mrs. Williamson under the care of Dr. Baker as a physician and Miss Meares as a nurse? A. I recognized Miss Meares only as Dr. Baker's instrument. I didn't know whether she was there all the time, or whether they would change from time to time. I left it entirely up to Dr. Baker to keep a nurse with her or not. . . . I would be delighted to pay Miss Meares if the court authorizes it, and relieves me, but my construction of the will— . . . If I am wrong in the construction of the will, there is no other alternative but to pay; if the court says pay, it will be paid if we have to sell a house."

We think the action was properly brought in the Superior Court. N. C. Code, 1935 (Michie), sec. 135. *S. v. McCanless,* 193 N. C., 200.

The testator, Emory D. Williamson, and his wife had no children. No doubt, realizing that his wife was growing old and had no one to care for her, it seems he took unusual precaution, in clear language, to have his executor to charge his estate for her care if she broke down in health. He speaks of her as his beloved wife, and says, (1) should she become an invalid, (2) or have any protracted illness, (3) and should need special medical attention or *nurses.* Then he makes it mandatory on his executors that they "shall see that she have *every care* and

attention." His executors to "pay any necessary expense incurred in this way, if it be in *excess* of the monthly or the annual amount above mentioned bequeathed to *my beloved wife.*"

What did the plaintiff do (undisputed): "I worked eighteen hours out of the twenty-four. I massaged her limb, which was swollen, and administered medicine, prepared her trays, and was with her constantly. I was the only white lady there at the time. I had to look after her and bathe her. I slept in the next room with my door open. Her physical and mental condition during the particular period for which I received no pay was very bad. She could not walk around. She would get up sometimes and should not have. She could not walk unless I helped her, and we had to keep her on a special diet. Her kidney condition was bad, and she would contract cold very easily, and she could not sleep and her mental condition was very bad. . . . In the middle of the night she would try to get out and she would stay awake all night. She would walk around if she could and sit there and talk all night. During that time I imagine I stayed up all night about a half-dozen times. I always stayed up until about one o'clock. I would go on duty the next day from seven to eight, whenever she woke up. I prepared her tray and took it in the room. I looked after sending out the laundry and buying groceries and things of that kind. During that time I took her to Lumberton once a month to the hospital for examination, when she was able to go. At this time Mrs. Williamson is in Westbrook's Sanitarium. I think that is a hospital for mental diseases. She has been there since before last Christmas."

Dr. H. M. Baker, in charge of Baker Sanatorium at Lumberton, N. C., corroborated plaintiff, and testified that Mrs. Williamson "has chronic nephitis—Bright's disease."

We think the legal question as to liability is set at rest in *Carter v. Young,* 193 N. C., 678 (683), where it is said: "No higher obligation rests upon the courts of this State than that which requires them to effectuate the purpose and intent of a testator, clearly expressed in his last will and testament, with respect to the maintenance and support of a dependent child, who was during the lifetime of the testator the object of his affection and solicitude. The courts have ample power to discharge this obligation." See *Woody v. Christian,* 205 N. C., 610. How much more is this duty imposed, in a proper case, as the present one, in reference to an aged and invalid woman—"One whom the finger of God had touched."

It is well settled in this jurisdiction that if there is any sufficient competent evidence to support the findings of fact by the court below they are binding on us. We think there was competent evidence to support

the findings of fact. We think the trial court made no error in the admission of testimony complained of. From a careful examination of the record, the numerous exceptions and assignments of error made by C. E. Taylor, executor, cannot be sustained. We find on the record no reversible or prejudicial error.

For the reasons given, the judgment is

Affirmed.

ARTHUR ANDERSON, EXECUTOR OF O. L. PITTMAN, DECEASED, v. ELMA ANDERSON BRIDGERS, NETTIE ANDERSON, MANIZA ANDERSON, MATTIE SPEED AND HUSBAND, EUGENE SPEED, MAMIE P. DEBRULE, JESSIE P. MAYO AND HUSBAND, H. L. MAYO, HELEN P. MORNING AND HUSBAND, WILLIAM MORNING, A. J. PARKER, JR., AND WIFE, TINY PARKER, MARGARET P. MARKS AND HUSBAND, SHADE MARKS, MABEL PARKER, WILLIAM D. PARKER (MINOR), LEE PARKER AND WIFE, MAUDE PARKER, ISABELLE PARKER (MINOR), JOSEPHINE ANDERSON (MINOR), J. H. PITTMAN AND WIFE, LENA PITTMAN, R. C. PITTMAN AND WIFE, LILLIAN MITCHELL PITTMAN, FANNIE PITTMAN WEEKS AND HUSBAND, RUSSELL WEEKS, WESLEY PITTMAN, TINY PITTMAN ANDERSON AND HUSBAND, HAMPTON ANDERSON, MRS. LENA PITTMAN WEEKS, JOHN PITTMAN AND WIFE, MILDRED SHIPP PITTMAN, S. B. PITTMAN, ROLAND PITTMAN AND WIFE, SELMA PITTMAN, JUANITA MARKLE AND HUSBAND, S. R. MARKLE, AND HOBSON L. PITTMAN (ORIGINAL PARTIES DEFENDANT), AND WILLIAM LOUIS POTEAT, F. H. BROOKS, AND R. L. MCMILLAN, TRUSTEES OF THE NORTH CAROLINA BAPTIST STATE CONVENTION (ADDITIONAL PARTIES DEFENDANT).

(Filed 26 February, 1936.)

1. Wills E a—Intention of testator must prevail in construction of will.

In construing a will the intention of the testator must prevail, and in ascertaining his intention, the language of the will, the setting, home and family conditions of the testator, and other relevant circumstances may be considered.

2. Wills E f—Trustees of church held entitled to one-third of net estate under the will in this case.

The will involved in this case stipulated that it was the testator's desire to devise and bequeath his wife one-third of the estate, certain collateral kin one-third, and "to religious and charitable purposes, one-third of my estate," and the following paragraph devised and bequeathed "all the rest and residue of my estate, which I estimate to be about $15,000," to the trustees of the Baptist State Convention, with direction to them as to the investment and distribution of the funds. Thereafter testator executed a codicil to the will stating that he had directed in his will that one-third his entire estate be given to religious and charitable purposes without

specifying the names of the beneficiaries, and directing that one-third his entire estate be paid to the named trustees, to be held in trust and used as directed in the will. Testator had no children. His wife died prior to the execution of the codicil. It was in evidence that testator was a deeply religious man and profoundly interested in his church. The personal property was insufficient to pay debts and the real property was sold to make assets, the parties agreeing that all the real property be sold and their respective interest paid out of the proceeds, the sale of all the realty not being necessary to pay debts. *Held:* One-third the net estate should be paid the named trustees for the purposes specified in the will, it appearing from the will and codicil that such was testator's intention, and that he did not intend the devise and bequest to them to be treated as a technical residuary devise and bequest to be defeated by the insufficiency of the personalty to pay debts.

3. Wills E i—Judgment stipulating amount due certain beneficiary under the will without adjudicating amount due other beneficiaries held not error under the facts of this case.

In a special proceeding to sell lands of the estate to make assets to pay debts, a trustee beneficiary under the will enjoined such sale, alleging that the executor had construed the will erroneously as devising and bequeathing the trustee only the residuary estate out of which debts of the estate should first be paid, and prayed that the sale be enjoined until the rights of the parties could be determined by a construction of the will. Thereafter the sale of all lands of the estate was had under agreement of the parties that their respective rights in the estate be paid out of the proceeds. The court entered final judgment that the trustee was entitled to one-third the net value of the estate, without adjudicating the rights of other beneficiaries, some of whom were not parties to the action. *Held:* It appearing that there is no ambiguity in the will as to the trustee's right to one-third the net value of the estate, the judgment adjudicating the trustee's interest, without adjudicating the interest of the other beneficiaries is affirmed, leaving the respective rights of the other beneficiaries in the remaining two-thirds of the estate to be later determined.

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

APPEAL by all parties, except trustees of the Baptist State Convention, from *Moore, Special Judge,* 1 April, 1935. From EDGECOMBE. Affirmed.

O. L. Pittman died on 1 April, 1930, leaving a last will and testament and codicils, which were filed and probated on 9 April, 1930. Plaintiff duly qualified as executor of the estate of said testator before the clerk of the Superior Court of Edgecombe County, N. C., on 9 April, 1930, and at once entered upon the administration of his testator's estate.

This is an action, brought by plaintiff against the defendants, devisees and legatees of the last will and testament of O. L. Pittman, deceased, to sell land to pay the debts of the estate. After exhausting the personal property, the outstanding debts amount to the sum of about $9,000.

Commissioners were appointed and the land duly sold. After the payment of debts, this controversy concerns how the remainder should be distributed under the last will and testament of O. L. Pittman.

On this appeal, the paragraphs of the will and codicils to be construed are as follows:

Paragraph 6, in part, is as follows: "It is my desire and intention to so distribute my estate by this my will as to give my wife one-third of my estate, my brother, J. H. Pittman, during his life, and then to his children, one-ninth of my estate, the children of my deceased brother, Bisco Pittman, one-ninth of my estate, and my sister, Carolina Anderson, during her life and then to her children, one-ninth of my estate, including herein the $1,175.00 given to her son, H. O. Anderson, in Item 5 of this my will, and *to religious and charitable purposes, one-third of my estate.*"

Paragraph 7 is as follows: "I give, devise, and bequeath all the rest and residue of my estate, of any kind and description, which I estimate to be about $15,000.00, to W. C. Tyree, J. P. Hackney, Noah Biggs, W. N. Jones, and D. L. Grove, trustees of the State Baptist Convention, and their successors in office, to be by them held upon the following uses and trusts, viz.: one-third thereof shall be invested in good interest-bearing securities or loans and the interest and profits thereof be paid annually to the Baptist State Mission Board, to be by them used in their discretion in aid of weak churches within the limits of the Roanoke Association. One-third thereof shall be invested in good interest-bearing securities or loans and the interests and profits thereof be paid annually to the Board of Managers of the Thomasville Orphanage, to be used by them in their discretion in the aid and support of that branch of said orphanage known as the Kennedy Home. One-third thereof shall be invested in good interest-bearing securities or loans and the interest thereof paid annually to the deacons, or those in charge, of the Gethsemane Baptist Church at Cherry's Cross Roads, in No. 6 Township, Edgecombe County, North Carolina, to be used by them in the repair of the church and in maintaining the churchyard or cemetery around the church, and should there be more than sufficient for these purposes, such surplus they shall pay on the salary of the pastor of that church. But should the said Gethsemane Church be permitted to go down and to be abandoned, then and in that event the bequest for its benefit shall terminate, and the third of the residue of my estate herein given said trustees for the benefit of said church shall revert to my estate."

The will was made and executed on 25 April, 1913. A codicil was made 31 July, 1924, and another codicil was made 26 February, 1927, which, in part, is as follows: "I, O. L. Pittman, of the county and State aforesaid, do hereby make this codicil to my last will and testament

made by me and dated on the 25th day of April, 1913, which I hereby ratify and confirm, *except as the same shall be changed hereby.* . . . (8) Since in my will and testament I have directed that one-third of my entire estate to be given to religious and charitable purposes without specifying the names of such religious and charitable institutions, it is therefore my will and desire and *I do hereby give and bequeath and devise one-third part of my entire estate* to the said W. C. Tyree, J. P. Hackney, Noah Biggs, W. N. Jones, and D. L. Grove, trustee of the State Baptist Convention, and their successors in office, to be held in trust and used as directed in Item 7 of my will and testament." (Italics ours.)

Dr. William Louis Poteat, F. H. Brooks, and R. L. McMillan, trustees of the North Carolina Baptist State Convention, in their answer say, in part:

"That it appears clear to these answering defendants that the testator intended that the trustees of the Baptist State Convention have and receive under and by virtue of his will one-third of his entire estate, and that according to the allegations and prayer for judgment in the petition herein, the said trustees of the North Carolina Baptist State Convention will receive nothing under the terms and conditions of said will.

"That the executor of said will has undertaken to set forth an interpretation of the same, evidently under and by virtue of the provisions of sections 87 and 88 of the Consolidated Statutes of the State of North Carolina, which interpretation these answering defendants say is improper, and not in keeping with the intention of the testator clearly expressed both in the original will and in the second codicil, and is not in keeping with the provisions of the law of the State of North Carolina; that these answering defendants state that the executor of said will should not take it upon himself to interpret the will clearly in favor of certain devisees and against the interest of other devisees named in said will, and knowing that the interpretation of the will, the provisions of which are seriously contested as in this case, is the duty and within the province of the court, these answering defendants pray that this will be interpreted by the court, and that the sale of any of said real estate by the executor or by any one for him or in his behalf be stayed until such interpretation is had.

"That according to the interpretation of the will placed thereon by the executor of the estate in his petition, the trustees of the North Carolina Baptist State Convention would be eliminated and would not share or participate in the assets of said estate, when in truth and in fact it appears both in the original will and in said codicil thereto that the testator clearly intended that the said trustees would have and receive

one-third of the entire estate after the payment of debts from the proceeds of real estate, if this became necessary, as it now appears is necessary, and it clearly appears from said will as the intention of the testator that there are no special bequests or devises in the said will having any advantages or taking any priority whatsoever over and above any other bequests or devises, and these answering defendants respectfully pray and urge that the court interpret this will setting forth the intention of the testator to the effect that said trustees will share equally in said estate according to the terms of said will, receiving one-third of said estate after the payment of debts, and that by proper decrees the court direct and instruct the executor to proceed accordingly.

"Wherefore, the said William Louis Poteat, F. H. Brooks, and R. L. McMillan, trustees of the North Carolina Baptist State Convention, pray for judgment:

"First: That this proceeding be placed before the judge of this court for the interpretation of said will;

"Second: That the executor be ordered and directed to withhold said sale and be further ordered not to dispose of any of the assets of said estate of any nature or kind whatsoever for the payment of debts or for other purposes until further orders are issued by this court;

"Third: That the petitioner be required to pay the costs herein;

"Fourth: For such other and further relief as the court may consider just and proper in the premises, both in law and in equity."

At January Term, 1935, Moore, Special Judge, rendered the following judgment, in part:

"Now, therefore, the following is construed, interpreted, found, decreed, and adjudged to be the intention and will of the said O. L. Pittman, deceased, constituting the will and disposition of his entire estate:

"*Judgment:* It is the will of the testator, O. L. Pittman, that, after the payment of all proper cost, charges, and fees in this cause, and all proper cost, charges, and fees connected with administering said estate, the remainder of his estate, which is money now in the hands of his executor, shall, according to the provisions of said will, be paid over and delivered to the owners and those entitled thereto, and the said executor and J. G. Anderson, his attorney, are hereby directed to make such payments, as follows:

"First: One-third of said net estate to W. L. Poteat, R. L. McMillan, and F. H. Brooks, trustees of the North Carolina Baptist State Convention, and their successors in office, as provided in the sixth and seventh items of the original will and in item eight of the second codicil, to be used by said trustees according to the uses and trusts set forth by the testator in the seventh item of the original will."

At April Term, 1935, Moore, Special Judge, rendered the following judgment, in part:

"Whereas, on 24 January, 1935, at the January Term of the Superior Court of Edgecombe County, the undersigned presiding judge entered a judgment in the above entitled cause, interpreting and construing the will of O. L. Pittman, deceased, late of Edgecombe County, at which time it was represented to and it appeared to the undersigned judge that all proper parties were in court, and that all of said parties requested and desired that the court construe said will;

"And whereas certain parties claiming an interest in said estate now move the court to set aside said judgment as irregular, for that said parties were not in court at said time, either by counsel or in person;

"And whereas, the only issue arising under the petition and answer herein, which the court was called upon and requested to answer at said January Term, was 'To what part of the net estate of O. L. Pittman, deceased, if any, are the trustees of the North Carolina Baptist State Convention entitled?' . . .

"Now, therefore, it is ordered and adjudged that the said judgment be and the same is hereby set aside, and the following is construed, interpreted, found, decreed, and adjudged to be the intention and will of the said O. L. Pittman, deceased, as to the interest, if any, of the trustees of the North Carolina Baptist State Convention, in and to said estate, which estate consists solely of cash on hand, in the hands of the executor and his attorney: The trustees of the North Carolina Baptist State Convention, namely: William Louis Poteat, R. L. McMillan, and F. H. Brooks, and their successors in office, shall receive from the net estate of the said O. L. Pittman, deceased, after the payment of debts properly owing by said estate, and the costs of administration, and the costs properly chargeable herein, one-third of said net estate, as provided in the sixth and seventh items of the original will and in item eight of the second codicil, which funds shall be used by said trustees according to the uses and trusts set forth by the testator in the seventh item of the original will, and the executor of said estate, and J. G. Anderson, his attorney, are hereby ordered and directed to make said payment of said one-third of said net estate to said trustees. This 9 April, 1935. Clayton Moore, Special Judge presiding."

To the above judgment all parties, with the exception of the trustees of the North Carolina Baptist State Convention, except, assign error, and appeal to the Supreme Court.

W. S. Wilkinson and H. H. Philips for Elma Anderson Bridgers et al.

R. L. McMillan and T. O. Moses for Trustees of the N. C. Baptist State Convention.

CLARKSON, J. The question involved: Under the last will and testament and codicils of O. L. Pittman, deceased, were the trustees of the N. C. Baptist State Convention to receive one-third of the net estate of O. L. Pittman, deceased? We think so.

It is well settled that the intention of the testator is the polar star in the construction of wills. To sense the intention, the language used in the will, the setting, surroundings of the testator, the home conditions, family relations, and numerous other matters are to be considered.

O. L. Pittman, a man who had no children, made his last will and testament on 25 April, 1913. On 31 July, 1924, he executed a codicil, and on 26 February, 1927, he executed another codicil. His wife was living when he prepared his will and his first codicil, but she died before the second codicil was written. The testator died on 1 April, 1930, and his will, with the codicils, was duly probated and recorded on 9 April, 1930.

The testator was deeply interested in his church. He was a regular member and attendant of Gethsemane Baptist Church in Edgecombe County, N. C., and attended the services of this church in storm and sunshine. The language of his will itself shows his deep interest in the progress of the Kingdom. The will indicates that his life was patterned after what is written in James, ch. 1, verse 27: "Pure religion and undefiled before God and the Father is this, To visit the fatherless and widows in their affliction, and to keep himself unspotted from the world."

The one-third of his estate, which he left in paragraph 7 of his will and codicil, was to the trustees of the N. C. Baptist State Convention, in trust. (1) One-third part was to go to the Baptist State Mission Board to aid certain weak churches. (2) One-third part to the Board of Managers of the Thomasville Orphanage for those orphans in the Kennedy Home. (3) One-third part to his beloved church—the Gethsemane Baptist Church, at Cherry's Cross Roads, Edgecombe County, N. C., for repair of church, maintaining churchyard or cemetery, or pastor's salary.

In the last codicil, dated 26 February, 1927, a few years before he died, his last words (saving and excepting appointing his executors) are: "8. *Since in my will and testament I have directed that one-third of my entire estate to be given to religious and charitable purposes* without specifying the names of such religious and charitable institutions, it is therefore my will and desire and I do hereby give and *bequeath and devise one-third part of my entire estate* to the said W. C. Tyree, J. P. Hackney, Noah Biggs, W. N. Jones, and D. L. Grove, trustees of the Baptist State Convention, and their successors in office, to be held in trust and used as directed in Item 7 of my will and testament." (Italics ours.)

The successors in office of the trustees of the N. C. Baptist State Convention are now Dr. William Louis Poteat, F. H. Brooks, and R. L. McMillan.

In a careful reading of the last will and testament, and codicils of O. L. Pittman, there may be some conflict in certain provisions, but construing the will and codicils as a whole, we think the paramount intent of this childless man was that one-third part of his entire estate was to go to certain weak churches, orphans, and his home church, as before indicated.

Under the record in this case, we do not feel inclined to pass on any question but that considered by the court below. As to those entitled to the remaining two-thirds of the estate, under the will, this can be determined hereafter.

Under the equitable jurisdiction of this Court, we see no reason why the trustees of the N. C. Baptist State Convention should not on this appeal be declared to be entitled to one-third of the net estate of O. L. Pittman, in accordance with the judgment appealed from. In construing the will, we see no ambiguity as to what the trustees of the N. C. Baptist State Convention are entitled to. The language is clear and unequivocal as to what the testator meant: *"Since in my last will and testament I have directed that one-third of my entire estate to be given to religious and charitable purposes,* etc." If there had been any ambiguity, these last words in the codicil set all doubt at rest, and we do the same.

For the reasons given, the judgment is

Affirmed.

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

E. H. BOWLING v. THE FIDELITY BANK.

(Filed 26 February, 1936.)

1. Pleadings D e—

A demurrer *ore tenus* on the ground that the complaint is insufficient to state a cause of action will not be sustained unless the complaint is wholly insufficient, construed in the light favorable to the pleader. C. S., 535.

2. Mortgages H r—Trustor held entitled to maintain action for breach of cestui's agreement to bid in and convey property to trustor's son.

Plaintiff trustor alleged that the *cestui que trust* agreed to purchase the property at the foreclosure sale of the deed of trust and to convey same

to plaintiff's son, the *cestui* to receive from the son a deed of trust securing a note signed by the son, the plaintiff and plaintiff's brother, and the note to include certain items of indebtedness of the makers to the *cestui* not embraced in the original deed of trust, that plaintiff had breached the contract by purchasing the property at the sale and conveying same to a stranger, and that plaintiff had at all times been ready, able, and willing to perform his part of the contract. Defendant *cestui* demurred *ore tenus* to the complaint for its failure to state a cause of action for that plaintiff could not maintain an action on an agreement to convey the land to plaintiff's son. *Held:* The demurrer should have been overruled, the complaint alleging the contract and its breach by defendant, and defendant's interest not being affected by the fact that the conveyance was to be made to the plaintiff's son and not to plaintiff.

3. Same—Contract for purchase of property at sale by cestui and conveyance to trustor's son held not demurrable for indefiniteness.

Plaintiff trustor alleged that the *cestui que trust* agreed to purchase the property at the foreclosure sale of the deed of trust and to convey same to plaintiff's son, the *cestui* to receive from the son a deed of trust securing a note signed by the son, the plaintiff and plaintiff's brother, and the note to include certain items of indebtedness of the makers to the *cestui* not embraced in the original deed of trust. Defendant *cestui* demurred *ore tenus* for that the complaint failed to state the amount for which the note should be executed, its maturity date and interest rate, and failed to allege that plaintiff and other makers agreed to pay same upon maturity, and that the deed of trust agreed to be given would have to be foreclosed upon the nonpayment of the note upon its maturity. *Held:* The demurrer should have been overruled, since the complaint alleges the contract with sufficient definiteness as against the demurrer, and defendant's remedy being by motion to have the allegations made definite and certain, which motion, to be effective, must be made before demurring. N. C. Code, 537.

4. Abatement and Revival B b—Plea in abatement on ground of pending action should have been overruled, the actions not being identical.

In this action to recover damages for defendant *cestui's* breach of contract to buy in the property embraced in the deed of trust at the foreclosure sale and to convey a certain part thereof to plaintiff's son, it appeared that the *cestui* bought in the property at the sale and conveyed the entire tract to a stranger, and that in a prior action instituted by a third person involving the part of the tract not agreed to be reconveyed to plaintiff's son, plaintiff had intervened. Defendant filed a plea in abatement on the ground that there was a prior action pending between the same parties involving the same subject matter. *Held:* The plea in bar should have been overruled, since the actions involve separate tracts of land and the two actions are not identical for the purpose of the plea under the recognized tests.

APPEAL by plaintiff from *Grady, J.*, at September Civil Term, 1935, of DURHAM. Reversed.

This is an action for breach of contract instituted by plaintiff against defendant to recover damages. The plaintiff in his complaint alleges

that the defendant's agent, L. D. Kirkland, for and on behalf of defendant, made the following contract with plaintiff:

"That the defendant corporation did then and there, through its duly authorized agent, solemnly promise that they would order a sale of the land then remaining embraced in the deed of trust (22.95 acres), which had been put up by B. P. Bowling as collateral security; further, that the bank would buy the property in at the foreclosure sale; further, that they would make an exchange of deeds with a son of E. H. Bowling, giving a deed embracing 22.95 acres to said son and taking back a deed of trust on the entire 22.95-acre tract, along with a note of even date, said note to accompany the deed of trust and to be signed by E. H. Bowling, B. P. Bowling, and the son of E. H. Bowling; *Provided,* the said E. H. Bowling and the said B. P. Bowling refrain entirely from participation in the bidding at the foreclosure sale; *Provided further,* that said E. H. Bowling and B. P. Bowling refrain from having other financial backers or friends bid at the foreclosure sale for them; *Provided further,* that the amount of the note to be made upon the making of the deed by the bank and the surrender of the new deed of trust include: (1) an item of $660.97, which represented the amount remaining due on the note then held by the defendant, said note having been made by E. H. Bowling and wife, Mattie J. Bowling, to a branch bank of the defendant corporation, it being that certain instrument given for the Watts Street Church building fund and the security for which having been ample at the time of the loan, had at this time become worthless; (2) an item of $250.00, represented by a noted dated February, 1932, signed by E. H. Bowling and B. P. Bowling, for which no security had ever been given; further, that a second mortgage be given by the son of E. H. Bowling after the deed of trust had been given to the bank to take the place of the latter of the bank then in existence, promising B. P. Bowling that all over and above the amount owed the bank upon the foreclosure of the original B. P. Bowling deed of trust would be paid to the said B. P. Bowling; that to each and every one of these conditions the said E. H. Bowling did then and there agree on behalf of himself and as agent for B. P. Bowling, and did then and there faithfully promise for himself and as authorized agent of B. P. Bowling to fulfill each and every one of the conditions; that the said E. H. Bowling now alleges that he was then ready and willing to perform each and every act, and that he has always been ready and willing to carry out the refinancing agreement then and there entered into.

"That pursuant to the agreement entered into with the said Fidelity Bank, through its agent, L. D. Kirkland, said E. H. Bowling refrained from participation in the bidding on the sale which the bank ordered made by not attending the sale; that the said E. H. Bowling, informed

of the solemn agreement which he had made with the defendant for the refinancing of the property, and apprised the said B. P. Bowling of the mutual promises and considerations, whereupon the said B. P. Bowling did by word and deed ratify each and every part of the said agreement, and that he likewise relying upon the promises of the defendant was lulled to sleep and did not attend the sale.

"That shortly prior to 18 January, 1933, the defendant corporation, the Fidelity Bank of Durham, in open violation and absolute disregard of the fiduciary refinancing agreement made with the plaintiff E. H. Bowling, and the original debtor, B. P. Bowling, while the said E. H. Bowling and B. P. Bowling, in full reliance on the promises of the defendant were lulled to sleep, did, in collusion with Dr. N. M. Johnson, and in flagrant disregard of the rights of the plaintiff, order the trustee to sell the entire 32.6-acre tract, and in furtherance of their wrongful and collusory scheme, the said Fidelity Bank did, on 18 January, 1933, cause the foreclosure sale to be made, bidding the property in at a price ridiculously below its real value, and immediately after receiving the deed from the trustee, deeded the entire tract of 32.6 acres to the same Dr. N. M. Johnson who had declined to take title to the 9.65-acre tract, having given as his only reason some suggested error in the title, said deed for 32.6 acres being made to Dr. Johnson on or about 23 March, 1933, by deed recorded in Book of Deeds 108, page 428, in the office of the register of deeds of Durham County, all to the great damage, embarrassment, and grief of the said E. H. Bowling, the plaintiff in this cause.

"That the first time Dr. Bowling learned of the wrongful acts of the defendant corporation was upon his receiving a statement of the disbursements from the trustee and, upon being informed by the trustee, after the ten days allowed by law for making an increased bid had elapsed, that the bank had instructed him, the trustee, to sell the entire 32.6 acres; that, then learning of the breach of trust on the part of the bank for the first time, the plaintiff then and there went over and informed the bank's agent of the intention of seeking redress at law. . . .

"That the said property containing 22.95 acres, of which the plaintiff was wrongfully deprived, was and is now well worth $10,000, and that there was, on 18 January, 1933, and is now, located on said property an eight-room house to which the plaintiff and all his family had become greatly attached, a large amount of timber, and the trails and approaches to the river from the adjoining land of the plaintiff.

"Wherefore, the plaintiff prays: (1) That he have and recover of the defendant $10,000 for the damages incurred by the loss of the 22.95-acre tract of property, plus accrued interest since 18 January, 1933.

(2) That the cost of this action, to be taxed by the clerk, be recovered of the defendant. (3) That he have such other and further relief to which he may be entitled."

The defendant in its answer denied the contract as alleged by plaintiff, and set forth its version in detail of the transactions between the plaintiff and defendant. "And as a further answer and defense to the matters and things set out in said complaint, and as a bar to the further prosecution of this action, this defendant says: That there is another action pending between the plaintiff and it for the same cause of action set out and alleged in the complaint herein, to wit, an action pending in the Superior Court of Durham County, North Carolina, originally instituted by J. H. Bowen against this defendant and commenced by summons issued by the clerk of the Superior Court of Durham County, North Carolina, on 31 July, 1934, in which the plaintiff in this action, upon his own motion, was permitted to and did become a plaintiff and file a complaint therein on 22 November, 1934, to which reference is hereby expressly made for the ascertainment of the cause of action therein alleged. This defendant hereby pleads the pendency of said action in bar of the prosecution of this action, and of any recovery herein."

The defendant demurred *ore tenus* to the complaint, on the ground that the complaint does not state facts sufficient to constitute a cause of action, and set up as a plea in bar the pendency of another action between the same parties involving the same subject matter.

The judgment of the court below is as follows: "This cause coming on to be heard, and the defendant having entered a demurrer upon the ground that the complaint does not state facts sufficient to constitute a cause of action, and having also demurred upon the ground that there is another action now pending in this court between the same parties and involving the same subject matter, and the complaint and answer in said action having been read to the court by counsel, and it having been admitted that the instant action was commenced after the institution of the former action, and the court being of opinion that the plaintiff cannot maintain this action; it is therefore considered, ordered, and adjudged and decreed that the demurrer be sustained. And it is further considered, ordered, and adjudged and decreed that the plea in bar in the defendant's action of the pendency of another action is sustained, and this action is dismissed. The costs in this action will be taxed against the plaintiff by the clerk of the court. Henry A. Grady, Judge presiding."

The plaintiff excepted and assigned error: (1) That the court below sustained the demurrer *ore tenus;* (2) sustaining defendant's plea in bar; (3) to the judgment as signed, and appealed to the Supreme Court.

Egbert L. Haywood for plaintiff.
Fuller, Reade & Fuller for defendant.

CLARKSON, J. The *first* question involved: Was his Honor below correct in sustaining the defendant's demurrer *ore tenus* to the complaint upon the ground that said complaint did not state facts sufficient to constitute a cause of action? We think not.

We think that the complaint alleges a contract made by defendant with plaintiff and a breach, in reference to refinancing the lien held by defendant on the 22.95 acres of land owned by plaintiff. The contract also sets forth other conditions. The plaintiff alleges that "he has always been ready and willing to carry out the refinancing agreement then and there entered into." Plaintiff alleges "damages incurred by the loss of the 22.95-acre tract of property."

The defendant demurred *ore tenus* to the complaint "on the ground that the complaint does not state facts sufficient to constitute a cause of action; in that it is alleged in the complaint that the defendant entered into a contract to purchase the property therein referred to, to wit, 22.95 acres of land, at a sale to be made by G. T. McArthur, trustee, in the deed of trust herein referred to, and to convey it to a son of the plaintiff, and to take from him his note secured by a deed of trust upon said 22.95 acres, said note to bear the same date as said deed of trust and to be signed by the plaintiff, his brother, B. P. Bowling, and his son, and that it therefore appeared from the face of the complaint that if there was any breach by the defendant of a contract to sell said land it was a breach of contract to sell it to a son of the plaintiff, and not to the plaintiff. In the second part of the demurrer the grounds in support of the statement that the complaint did not state facts sufficient to constitute a cause of action are that the complaint failed to allege the amount of money to be represented by the note which it was alleged that the defendant agreed it would take from a son of the plaintiff, and that it failed to allege any maturity date or rate of interest to be paid thereon, and that it failed to allege that if the son of the plaintiff should receive a deed from the defendant for said land and execute said note, that either he or the other makers or endorsers of said note would or could pay it when it became due, and that therefore there was no certainty that the plaintiff's son would have been able to retain said land and keep it, because if the note was not paid the land would be sold pursuant to the terms of the deed of trust to satisfy the indebtedness."

In McIntosh N. C. Practice & Procedure in Civil Cases, p. 361, it is said: "The failure to state a cause of action, to be objected to by demurrer *ore tenus,* must be a defective cause of action, and not a defective statement of a good cause of action."

In *Blackmore v. Winders,* 144 N. C., 212 (215-16), we find: "It may be said that a complaint cannot be overthrown by a demurrer unless it be wholly insufficient. If in any portion of it, or to any extent, it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading will stand, however inartificially it may have been drawn, or however uncertain, defective, or redundant may be its statements, for, contrary to the common-law rule, every reasonable intendment and presumption must be made in favor of the pleader. It must be fatally defective before it will be rejected as insufficient." N. C. Code, 1935 (Michie), sec. 535. *In re Trust Co.,* 207 N. C., 802.

We do not see how defendant is concerned about the property under the contract being conveyed to plaintiff's son. Plaintiff alleges that defendant agreed in the refinancing arrangement to convey to his son, and breached its agreement. Plaintiff was ready and willing to carry out his part of the agreement. Defendant cannot call to its aid its own alleged breach.

N. C. Code, 1935 (Michie), part sec. 537, is as follows: "When the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not present, the court may require the pleading to be made definite and certain by amendment."

The matter has been settled in this jurisdiction. In *Allen v. Railway Co.,* 120 N. C., 548 (550), it is thus stated: "When there is a defective cause of action, although in due form, the plaintiff cannot recover unless the court in its discretion, on reasonable terms, allows an amendment. When a good cause of action is set out, but defective in form, the court may require the pleadings to be made definite and certain by amendment. The Code, secs. 259 and 261 (N. C. Code, 1935 [Michie], secs. 534 and 537). For this purpose, however, the objector must move in apt time. It is too late after demurrer or answer. *Stokes v. Taylor,* 104 N. C., 394. This motion is addressed to the discretion of the court. *Conley v. Railroad,* 109 N. C., 692; *Smith v. Summerfield,* 108 N. C., 284. The court may *ex mero motu* direct the pleadings to be reformed. *Buie v. Brown,* 104 N. C., 335." *Ins. Co. v. Griffin,* 200 N. C., 251 (255).

The *second* question involved: Was his Honor correct in sustaining the defendant's plea in bar of an alleged similar action pending set up in the defendant's answer? We think not.

In *Bank v. Broadhurst,* 197 N. C., 365 (369-70), quoting from 1 C. J., p. 66, par. 83, we find: " 'Four leading tests have judicial sanction in determining whether or not the causes of action are the same for the purpose of abatement by reason of the pendency of a prior action: (1) "Clearly, in order to hold the subsequent suit to be necessary, it is an

essential prerequisite that the judgment in the former or prior action should be conclusive between the parties and operate as a bar to the second." (*Williams v. Gaston,* 148 Ala., 214, 216, 42 S., 552.) In other words, if a final judgment in the former suit would support a plea of *res adjudicata* in the subsequent suit, the suits were identical for this purpose; otherwise, they are not. (2) Many cases apply the following test: Was full and adequate relief obtainable in the prior action? If so, the second action was improperly brought and is abatable; if not, the objection will be overruled. This, as we shall see, is a generally recognized rule. (3) A test having the support of some of the cases is this: Will the same evidence support both actions? (4) A fourth test supported by English and Canadian authorities is: Could the bill in the second suit have been procured by a fair amendment of the first?' "

E. H. Bowling owned two tracts of land—total acreage 32.6. The present controversy concerns one, 22.95 acres. J. H. Bowen instituted an action against defendant for breach of contract in reference to the mill site, 9.65 acres, and plaintiff intervened in that cause. *Bowen v. Bank, ante,* 140. We see no such identity between the two actions as to base a plea of abatement.

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

Reversed.

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF HERMAN R. ROEDIGER, DECEASED.

(Filed 26 February, 1936.)

1. Wills C g—Interlineations and annotations made on will by testator held not to effect revocation of will under the facts.

Where testator, in his own handwriting, makes certain interlineations and annotations upon his will, which had been properly executed, and marks through certain words of the will, and it appears that such alterations are insufficient to constitute a holographic will and were made with the intent of altering the will at some future date in accordance with the notations, but that such alterations were not made with the intent to revoke the will in whole or in part, such interlineations and annotations are insufficient to show a revocation of the will, intent to revoke being essential to revocation by defacement or obliteration of the will by testator under the provisions of C. S., 4133.

2. Appeal and Error K b: F a—Where error vitiating judgment appears on face of record, judgment may not be affirmed.

When it appears from the face of the record that errors in the trial were committed which renders the judgment void, the judgment cannot be affirmed on appeal, even though such errors are not assigned on appeal as grounds for reversal of the judgment. C. S., 1412.

IN RE WILL OF ROEDIGER.

3. Infants G b—Corporation may not be appointed next friend of infant.

Only a person whose fitness has first been ascertained by the court is eligible for appointment by the court as next friend of a minor to institute suit, and neither a foreign nor domestic corporation may be appointed next friend of an infant. Rule of Practice in the Superior Courts, No. 16; C. S., 450.

4. Wills D a: Jury C b—Court may not try issue raised by caveat.

The probate of a will in solemn form is a proceeding *in rem*, and the issue raised by the caveat must be tried by a jury, C. S., 4159, and the propounder and caveator may not waive trial by jury and submit the issue to the court under an agreed statement of facts.

APPEAL by Security National Bank of Greensboro, N. C., next friend of the infant children of Herman R. Roediger, deceased, from *Pless, J.*, at August Term, 1935, of GUILFORD. Error and remanded.

This is a proceeding for the probate in solemn form of a paper writing propounded as the last will and testament of Herman R. Roediger, who died in the city of Greensboro, N. C., on 12 April, 1935.

On 20 April, 1935, Barbara Nevada Roediger, widow of Herman R. Roediger, offered for probate in common form by the clerk of the Superior Court of Guilford County a paper writing purporting on its face to be the last will and testament of Herman R. Roediger, deceased. After hearing evidence offered by the propounder, and after an inspection of the paper writing, it was ordered by the said clerk that said paper writing be and the same was probated as the last will and testament of the said Herman R. Roediger, eliminating certain interlineations and annotations made by the testator with a pencil and appearing on the face of said paper writing. Barbara Nevada Roediger, who was named in said last will and testament as the executrix of the said Herman R. Roediger, thereafter duly qualified as such executrix.

Thereafter, on 16 May, 1935, the Security National Bank of Greensboro, N. C., pursuant to an order made by the clerk of the Superior Court of Guilford County, as next friend of the infant children of Herman R. Roediger, deceased, to wit: Anne Roediger, Herman R. Roediger, Jr., Charles Roediger, and Richard Roediger, filed a caveat to the probate of the said paper writing as the last will and testament of Herman R. Roediger, and alleged in said caveat "that the paper writing of which 'Exhibit A' is a copy was not and is not the last will and testament of said Herman R. Roediger, deceased, for the reason that Herman R. Roediger, prior to his death, and subsequent to the execution and attestation of said paper writing, canceled or obliterated certain material portions and words contained therein by drawing lines through parts of same with the intent to annul the will, and by making in his handwriting certain pencil interlineations, all of which is shown on copy of said

will hereto attached as 'Exhibit A'; that said cancellations or obliterations, which were made in material portions of said will, rendered said will void and of no effect, because it eliminated any testamentary disposition of the property of Herman R. Roediger, and because the pencil interlineations made in the handwriting of Herman R. Roediger were not executed with the same dignity and formality as was required for the original will."

Upon the filing of said caveat, the proceeding was transferred to the Superior Court of Guilford County, for the trial of the issue raised by the caveat at term time, as required by statute. Citations were duly issued to Barbara Nevada Roediger, widow of Herman R. Roediger, and to Barbara Nevada Roediger, executrix of Herman R. Roediger. Thereafter, as widow and as executrix, the said Barbara Nevada Roediger filed an answer to the caveat, in which she denied that prior to his death, and subsequent to the execution and attestation of said paper writing as his last will and testament, the said Herman R. Roediger canceled and thereby revoked the said paper writing as his last will and testament.

When the proceeding was called for trial at August Term, 1935, of the Superior Court of Guilford County, judgment was rendered as follows:

"This cause coming on to be heard before the Hon. J. Will Pless, Jr., judge presiding, and being heard without the intervention of a jury, upon agreement of counsel for the propounder and for the caveator, upon an agreed statement of facts, with the further agreement that the court sitting as a jury may find such additional facts from the evidence as are necessary to a proper determination of this cause; thereupon the court finds the following facts, which are agreed to by the parties hereto:

"I. That the Security National Bank of Greensboro, North Carolina, is a corporation, duly organized and existing under and by virtue of the laws of the United States of America, with its principal office located in Greensboro, North Carolina; that on 11 May, 1935, Security National Bank of Greensboro, N. C., was duly appointed next friend of Anne Roediger, Herman R. Roediger, Jr., Charles and Richard Roediger, minors, by the clerk of the Superior Court of Guilford County.

"II. That on 12 April, 1935, Herman R. Roediger died in Guilford County, North Carolina, and left surviving him his wife, Barbara Nevada Roediger, and the following children: Anne Roediger, Herman R. Roediger, Jr., Charles Roediger and Richard Roediger, all of whom are minors.

"III. That on 25 April, 1935, Barbara Nevada Roediger, through her attorney, Sidney J. Stern, presented to the court a paper writing for the purpose of having the same probated as the last will and testament

of Herman R. Roediger; that a photostatic copy of said paper writing, marked 'Exhibit A,' is attached hereto and made a part hereof as if fully set out; that thereupon the clerk of the Superior Court admitted said paper writing to probate with the elimination of all pencil marks and notations thereon, as the last will and testament of the said Herman R. Roediger, and thereafter, on 20 April, 1935, Barbara Nevada Roediger obtained from the clerk of the Superior Court of Guilford County letters of administration as executrix of the estate of the said Herman R. Roediger.

"IV. That on ..... May, 1935, Security National Bank of Greensboro, North Carolina, as the next friend of the daughter and sons of the late Herman R. Roediger, as aforesaid, and as the only other person interested in the estate of Herman R. Roediger, except Barbara Nevada Roediger, filed with the clerk of the Superior Court of Guilford County a caveat to the paper writing probated as the last will and testament of Herman R. Roediger.

"V. That on 28 May, 1930, Herman R. Roediger executed a last will and testament, a photostatic copy of which is attached hereto, marked 'Exhibit B,' and made a part hereof as if herein fully set out.

"VI. That on 15 October, 1934, Herman R. Roediger executed a last will and testament which was in the form required by law, and had no pencil marks and notations, as was shown on said will when same was admitted to probate by the clerk of the Superior Court of Guilford County; that Herman R. Roediger was confined in the Clinic Hospital in the city of Greensboro, North Carolina, for several months prior to his death on 12 April, 1935; that on or about the last day of February, 1935, the said Herman R. Roediger requested his secretary to bring his will, dated 15 October, 1934, to him at said hospital; that pursuant to said request the secretary took said will from the safe in the office of the said Herman R. Roediger in the city of Greensboro, North Carolina, and delivered it to the said Herman R. Roediger, who retained possession of it for a period of six to eight weeks, when he delivered said will to his secretary and requested her to replace it among his private papers in the safe in his office, which was accordingly done by said secretary; that after the death of Herman R. Roediger the paper writing which has been probated in the office of the clerk of the Superior Court of Guilford County without the pencil marks and notations, was found among the private papers of Herman R. Roediger in the safe in his office; that it is agreed among the parties hereto that the pencil marks and notations, as shown on said paper writing, were made by the late Herman R. Roediger during the period of time that he had possession of said will while in the Clinic Hospital, as aforesaid.

"VII. That the pencil marks and notations, as shown on the will probated in the office of the clerk of the Superior Court, were made in the handwriting of Herman R. Roediger, and that the paper writing which was probated in the office of the clerk of the Superior Court was never republished by the said Herman R. Roediger after the placing of the pencil marks and notations thereon by him.

"VIII. It is agreed that the deed to the home place, same being known and numbered as 624 North Elm Street, was in the joint names of Herman R. Roediger and Barbara Nevada Roediger; that all household and kitchen furniture therein was owned by the said Barbara Nevada Roediger, save and except the piano, which belonged to Anne Roediger.

"IX. That the parties hereto were unable to agree upon the legal effect of the pencil marks and annotations on 'Exhibit A,' which were placed therein by the said Herman R. Roediger in the manner aforesaid, and what, if any, is the testamentary value of said paper writing, and if of any testamentary value, whether or not the same revokes the alleged will theretofore made by him on 28 May, 1930.

"In addition to the above facts, which were agreed upon by the parties, the court finds the following facts:

"That Herman R. Roediger intended at some time to revise his will in accordance with the pencil notations shown on the will marked 'Exhibit A,' and that he intended to insert into the said revised will the words which were interlined in pencil, and that such pencil interlineations and marks thereon were made by him and intended for the purpose of showing his desires in the revision of his will. However, the court further finds as a fact from the physical appearance of the paper writing and from the agreed facts that he did not intend his interlineations and pencil lines drawn through the written portion of the will to constitute his revised will.

"Upon the foregoing facts found, the court holds as a matter of law that the action of the testator in interlining and striking out parts of his will evidenced his desires in connection with the revision of his will, but that they were not a sufficient cancellation or obliteration of the same to revoke the said will, or any part thereof.

"Upon the foregoing facts found, it is considered, ordered, and adjudged that the paper writing executed by Herman R. Roediger, deceased, dated 15 October, 1934, and every part thereof as propounded, without interlineations and erasures, is the last will and testament of the said Herman R. Roediger, and it is further ordered that the caveator pay the cost of this proceeding, to be taxed by the clerk."

Security National Bank of Greensboro, N. C., next friend, excepted to the judgment and appealed to the Supreme Court.

D. Newton Farnell, Jr., for caveator.
Sidney J. Stern and Beverly C. Moore for propounder.

CONNOR, J. The judgment in this proceeding is supported by the facts set out in the agreed statement of facts submitted to the court by the propounder and by the caveator, supplemented by the facts found by the court, with their consent. If the paper writing which was propounded for probate as the last will and testament of Herman R. Roediger, deceased, was written during his lifetime, and signed by him, and was subscribed in his presence by two witnesses, at least, no one of whom was interested in the devise and bequest of his estate, in accordance with the provisions of C. S., 4131, then said paper writing is the last will and testament of the said Herman R. Roediger, deceased, and should be probated in this proceeding as such, unless such last will and testament was subsequent to its due execution revoked by the testator, in accordance with the provisions of C. S., 4133.

On all the facts set out in the judgment, the said last will and testament was not revoked by the testator by its cancellation or obliteration, in whole or in part, as provided by the statute. The interlineations and annotations made by the testator after his execution of the said last will and testament, and appearing therein at the time it was offered for probate, do not affect its validity, and were properly eliminated by the court in its judgment. See *In re Love,* 186 N. C., 714, 120 S. E., 479, and authorities cited in the opinion in support of the decision in that case. A paper writing duly executed as a last will and testament is not revoked in whole or in part by cancellation or obliteration, unless the testator defaced or obliterated said paper writing, or some material clause or words therein, with intent thereby to revoke the same, in whole or in part. A defacement or obliteration, although made by the testator, is not alone sufficient to show the revocation of a last will and testament duly executed by the testator.

The judgment in this proceeding, however, cannot be affirmed, for errors appear on the record, which, although not assigned on this appeal as grounds for the reversal of the judgment, require the consideration of this Court. These errors preclude this Court from affirming the judgment. C. S., 1412. *Wilson v. Lumber Co.,* 131 N. C., 163, 42 S. E., 565; *Thornton v. Brady,* 100 N. C., 39, 5 S. E., 910. Manifestly, this Court cannot affirm a judgment when it appears from an inspection of the record that there were errors in the trial in the Superior Court, which show that the judgment is void.

I. The children of Herman R. Roediger, deceased, who are interested in his estate, and therefore entitled under C. S., 4158, to file a caveat to the probate in common form of a paper writing propounded as his

last will and testament, are all infants. They have no general or testamentary guardian. For that reason they must appear in this proceeding by a next friend, C. S., 450, appointed by the clerk of the Superior Court of Guilford County, as provided by Rule 16 of the Rules of Practice in the Superior Courts of this State. 200 N. C., 842.

This rule is as follows: "In all cases where it is proposed that infants shall sue by their next friend, the court shall appoint such next friend, upon the written application of a reputable, disinterested person closely connected with such infant; but if such person will not apply, then upon the like application of some reputable citizen; and the court shall make such appointment only after due inquiry as to the fitness of the person to be appointed."

The appointment in the instant case of Security National Bank of Greensboro, N. C., a corporation, as next friend of the infant children of the deceased, was not authorized by the rule. Only a person, whose fitness has first been ascertained by the court, is eligible for appointment by the court as next friend. The rule does not contemplate or authorize the appointment of a corporation, whether organized under the laws of this State or under the laws of another state, or of the United States, as next friend. There was error in the appointment of a corporation as next friend of the infant children of Herman R. Roediger, deceased, in this proceeding.

II. When a caveat to the probate in common form of a paper writing propounded as the last will and testament of a deceased person has been filed as provided by C. S., 4158, and the proceeding which was begun before the clerk of the Superior Court having jurisdiction, has been transferred to the Superior Court for trial of the issue raised by the caveat at term time, as provided by C. S., 4159, the issue must be tried by a jury and not by the judge. A trial by jury cannot be waived by the propounder and the caveator. Nor can they submit to the court an agreed statement of facts, or consent that the judge may hear the evidence and find the facts determinative of the issue. The propounder and the caveator are not parties to the proceeding in the sense that they can by consent relieve the judge of his duty to submit the issue involved in the proceeding to a jury.

In the instant case, it was error for the judge to render judgment on the facts agreed upon by the propounder and the caveator, and supplemented by the facts found by him, with their consent. The proceeding was *in rem,* and could not be controlled by the propounder and the caveator, even with the consent and approval of the judge. In that respect it is distinguishable from a civil action.

For the errors appearing on the record, the proceeding is remanded to the Superior Court of Guilford County, in order that a next friend of

the infant caveators may be appointed by the court in compliance with Rule 16, Rules of Practice in the Superior Courts, and for the trial by a jury of the issue raised by the caveat, and of such other relevant issues as the judge may in his discretion submit to the jury.

We deem it proper to say that the record in this appeal shows that the proceeding was conducted in the Superior Court in good faith, and that the errors in the record which preclude this Court from affirming the judgment were manifestly inadvertent on the part of the clerk, the judge, and counsel for the propounder and the caveator. We cannot, however, affirm the judgment, because the judgment is not supported by the verdict of a jury, and the infant caveators do not appear in the proceeding by a next friend duly appointed in compliance with the rule prescribed by this Court, pursuant to its statutory authority. C. S., 1421.

Error and remanded.

T. E. ALLISON, ROBERT W. DOCKERY, AND ALL OTHER PERSONS SIMILARLY SITUATED, v. C. R. SHARP, REGISTRAR FOR WARD NO. 2, IREDELL COUNTY; HUGH G. MITCHELL, CHAIRMAN BOARD OF ELECTIONS OF IREDELL COUNTY; L. P. McLENDON, CHAIRMAN, STATE BOARD OF ELECTIONS; AND THE STATE BOARD OF ELECTIONS OF NORTH CAROLINA.

(Filed 26 February, 1936.)

1. Elections A a—C. S., 5939, requiring applicant to prove to satisfaction of registrar ability to read and write Constitution held valid.

The provisions of N. C. Code, 5939, that a person presenting himself for registration shall, before he is registered, prove to the satisfaction of the registrar his ability to read and write any section of the Constitution, is valid, since such qualification is prescribed by the Constitution, Art. VI, sec. 4, and authority therein granted the Legislature to enact general legislation to carry out the provisions of the article, Art. VI, sec. 3, and the provision of the act placing the duty upon the registrar being logical and reasonable, and not constituting class legislation, since its provisions apply to all classes, and there being an adequate remedy at law if a registrar, in bad faith or in abuse of power or discretion, should refuse to register a person duly qualified.

2. Actions B g—Validity of election statute held properly challenged by this proceeding under Declaratory Judgment Act.

While the Declaratory Judgment Act does not authorize the bringing of an action not founded upon a legal controversy, and does not authorize the courts to give advisory opinions upon moot or abstract questions, the act specifically authorizes parties whose rights, status, or other legal relations are affected by a statute, ordinance, contract, etc., to obtain a declaration of rights, status, or other legal relations thereunder, and the

act *is held* to afford a means of testing the validity of a statute requiring persons presenting themselves for registration to prove to the satisfaction of the registrar their ability to read or write any section of the Constitution, plaintiffs and all the people of the State being vitally affected by the statute in controversy. N. C. Code, 628 (b) (h).

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

CONNOR, J., concurs in result.

APPEAL by plaintiffs from *Clement, J.,* at July Term, 1935, of IREDELL. Affirmed.

This is an action, brought by plaintiffs against defendants (under Public Laws 1931, ch. 102, N. C. Code, 1935 [Michie], secs. 628[a], *et seq.,* known as the Uniform Declaratory Judgment Act), for the purpose of declaring unconstitutional N. C. Code, 1935 (Michie), sec. 5939. The defendants demurred to the complaint. The court below sustained the demurrer and plaintiffs excepted and assigned error, and appealed to the Supreme Court.

W. Avery Jones and Hosea V. Price for plaintiffs.

Attorney-General Seawell and Assistant Attorney-General Aiken for defendants.

CLARKSON, J. The question involved: Is the act in question, N. C. Code, 1935 (Michie), sec. 5939, unconstitutional? We think not.

As to the demurrer of defendants on the ground of misjoinder of parties plaintiff and defendant to the action, we do not think it necessary to consider.

The Uniform Declaratory Judgment Act (N. C. Code, 1935 [Michie], sec. 628[2]), is as follows: "Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree."

Section 628(b) is as follows: "Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder. A contract may be construed either before or after there has been a breach thereof."

Section 628(h), in part, is as follows: "In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the Attorney-General of the State shall also be served with a copy of the proceeding and be entitled to be heard." *Edgerton v. Hood, Comr.,* 205 N. C., 816; *Wright v. McGee,* 206 N. C., 52; *Farnell v. Dongan,* 207 N. C., 611; Borchard on Declaratory Judgments, p. 549, par. 2.

The following and other constitutional amendments were submitted to the people of this State—Acts of General Assembly of North Carolina, Adjourned Session 1900, passed on 13 June, 1900, and ratified at General Election, 1900. We give in part the Suffrage Amendment of 1900 material to be considered in this controversy:

"Sec. 1. Every male person born in the United States, and every male person who has been naturalized, twenty-one years of age, and possessing the qualifications set out in this article, shall be entitled to vote at any election by the people of the State, except as herein otherwise provided.

"Sec. 2. He shall have resided in the State of North Carolina for two years, in the county six months, and in the precinct, ward, or other election district in which he offers to vote, four months next preceding the election; *Provided,* that removal from one precinct, ward, or other election district to another in the same county shall not operate to deprive any person of the right to vote in the precinct, ward, or other election district from which he has removed until four months after such removal. No person who has been convicted, or who has confessed his guilt in open court upon indictment, of any crime, the punishment of which now is, or may hereafter be, imprisonment in the State's Prison, shall be permitted to vote, unless the said person shall be first restored to citizenship in the manner prescribed by law.

"Sec. 3. Every person offering to vote shall be at the time a legally registered voter as herein prescribed, and in the manner hereafter provided by law, and the General Assembly of North Carolina shall enact general registration laws to carry into effect the provisions of this article.

"Sec. 4. Every person presenting himself for registration shall be able to read and write any section of the Constitution in the English language; and before he shall be entitled to vote, he shall have paid, on or before the first day of May of the year in which he proposes to vote, his poll tax for the previous year, as prescribed by Article V, section 1, of the Constitution," etc.

The residence under the above Suffrage Amendment in the State has been reduced to one year, and the poll tax provision has been eliminated. Const. N. C., Art. VI, secs. 1 and 2. *S. v. Carter,* 194 N. C., 293.

To carry into effect the above Suffrage Amendment, the General Assembly (1901, ch. 89) enacted "An act to provide for the holding of elections in North Carolina." Sec. 12, in part, is as follows: "Every person presenting himself for registration shall be able to read and write any section of the Constitution in the English language, and shall show to the satisfaction of the registrar his ability to read and write any such section when he applies for registration, and before he is registered." The Constitution above set forth and the above statute have been unquestioned law of this State for over a third of a century.

The Constitution and act of the General Assembly which we are called upon to construe are:

(1) Article VI, sec. 4, of the Constitution of North Carolina, in part: "Every person presenting himself for registration shall be able to read and write any section of the Constitution in the English language," etc. The provisos we do not quote, as they are immaterial, the time limit having expired—1 December, 1908.

(2) N. C. Code, 1935 (Michie), sec. 5939, in part: "Every person presenting himself for registration shall be able to read and write any section of the Constitution in the English language, and shall show to the satisfaction of the registrar his ability to read and write any such section when he applies for registration, and before he is registered," etc. This act was passed (Public Laws 1901, ch. 89, part sec. 12) to carry into effect the provisions of Article VI, sec. 4, and other provisions of the Constitution of 1900, *supra.*

The language of the Constitution is mandatory that "every person presenting himself for registration *shall* be able to read and write any section of the Constitution in the English language," etc. The Constitution says "presenting himself for registration." Someone has to determine whether or not the person shall be able to read and write any section of the Constitution in the English language. Section 5939, *supra,* puts this duty on the registrar "to show to the satisfaction of the registrar his ability to read and write any such section when he applies for registration and before he is registered." The Constitution gives the General Assembly the right to enact this legislation. Laws 1900, *supra,* part sec. 3: "And the General Assembly of North Carolina shall enact general registration laws to carry into effect the provisions of this article." This gives in clear and unmistakable language the right to the General Assembly to pass the act complained of—sec. 5939, *supra.* This is unquestionably a reasonable provision, and the registrar is the logical person to carry out the provisions of the Constitution. Then, again, the registrar has to pass on other qualifications of the voter contained in the Constitution.

We think the act of the General Assembly is constitutional. If a registrar, in bad faith or in abuse of power or discretion, should refuse

to register one duly qualified, that is when they come within this constitutional requirement and other provisions of the Constitution as to age, residence, sanity, citizenship, etc., then there is a remedy provided by law. The act of the General Assembly is no class legislation, but applicable to all the citizens of the State. In fact, in the final analysis, plaintiffs do not challenge the constitutionality of Article VI, sec. 4, but only the statute passed to carry into effect the provisions of that section of the Constitution. It seems that so far as plaintiffs are concerned, the action is moot or academic. The plaintiffs seek no affirmative relief whatsoever in the action, allege no bad faith or abuse of power or discretion on the part of the defendant Sharp, the registrar, but just do not like the law of their State. The only relief prayed for in their complaint is that section 5939, *supra,* be declared unconstitutional.

The Uniform Declaratory Judgment Act "does not extend to the submission of the theoretical problem or a 'mere abstraction,' " and "it is no part of the function of the courts, in the exercise of the judicial power vested in them by the Constitution, to give advisory opinions, or to answer moot questions, or to maintain a legal bureau for those who may chance to be interested, for the time being, in the pursuit of some academic matter." *Stacy, C. J.,* in *Poore v. Poore,* 201 N. C., 791 (792). To the same effect see *Carolina Power and Light Co. v. Iseley,* 203 N. C., 811. Nor is an *ex parte* proceeding brought to determine the petitioner's racial status within the scope or purview of the act. *Ex parte Eubanks,* 202 N. C., 357.

In the T.V.A. decision, delivered by *Chief Justice Hughes* of the U. S. Supreme Court (17 February, 1936), the same principle is declared: "The judicial power does not extend to the determination of abstract questions. . . . Claims based merely upon 'assumed potential invasions' of rights are not enough to warrant judicial intervention. *Arizona v. California,* 283 U. S., 423, 462. The act of 14 June, 1934, providing for declaratory judgments, does not attempt to change the essential requisites for the exercise of judicial power. By its terms, it applies to 'cases of actual controversy,' a phrase which must be taken to connote a controversy of a judicial nature, thus excluding an advisory decree upon a hypothetical state of facts."

However, in the instant case, the plaintiffs and all the people of the State are vitally affected by the statute in controversy. While there was another remedy at law available to them, they have challenged the constitutionality of the statute under which they contend that the registrar refused them registration. Under such circumstances and conditions, the Uniform Declaratory Judgment Act affords a ready means of testing its validity, as pointed out in Borchard's Declaratory Judgments, p. 549, as follows: "In countries, and especially in federal states, where the constitutionality or validity of statutes and ordinances

can be judicially challenged, and where the declaratory judgment is known, it is a regular practice to use this simple device to attack the constitutionality or validity, or the construction or interpretation, of a statute or municipal ordinance. Section 2 of the Uniform Declaratory Judgment Act specifically authorizes any person affected by 'a statute, municipal ordinance, contract, or franchise,' to have determined 'any question of construction or validity' thereunder, and section 11 provides that 'In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the Attorney-General of the State shall also be served with a copy of the proceeding and be entitled to be heard.' "

It would not be amiss to say that this constitutional amendment providing for an educational test (ratified by the people of the State at the general election of 1900, by vote of 182,217 for and 128,285 against), brought light out of darkness as to education for all the people of the State. Religious, educational, and material uplift went forward by leaps and bounds.

	1900	*1934*
Value of white school property	$839,269	$94,910,979
Value of colored school property	258,295	12,170,324
White teachers and principals	5,753	16,815
Colored teachers and principals	2,567	6,531
White enrollment	270,447	614,784
Colored enrollment	130,005	280,741

The State now educates 895,525 children between the ages of 6 and 21 years—Const. of N. C., Art. IX, sec. 2. 614,784 white and 280,741 colored. The rich and poor, the white and colored, alike have an equal chance and opportunity for an elementary and high school education. It may be of interest to state that this Commonwealth has an eight-months school, under State control, and is now being operated without a cent of tax on land. It goes without saying that judging the future by the past the school system will naturally improve as the years go by.

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.

CONNOR, J., concurs in result.

ROSA WINBORNE, H. H. PHILIPS, NEXT FRIEND OF LEMUEL FENTRESS, ARMENTRIA FENTRESS, MELVIN FENTRESS, MELVINA FENTRESS, LLOYD FENTRESS, AND ERSOLINE FENTRESS, MINORS, AND H. H. PHILIPS, ADMINISTRATOR OF THE ESTATE OF ANNIE DANCY MEEKS, DECEASED, v. FRANK H. LLOYD AND EDGECOMBE HOMESTEAD AND LOAN ASSOCIATION.

(Filed 26 February, 1936.)

1. Evidence K b—Testimony of expert as to mental capacity of person in question at time of execution of instruments held competent.

A medical expert testified to the effect that he had attended the person in question for a period of twelve years, that he had last observed her twelve days before her execution of the instruments attacked by plaintiff, that at the time he last observed her she was mentally irresponsible from senile dementia, which condition would not improve, but would get worse with time. *Held:* An exception to his testimony as to the mental incapacity of the person in question at the time of her execution of the instruments, on the ground that the witness had not observed such person sufficiently near the time of the execution of the instruments, cannot be sustained.

2. Appeal and Error F a—Assignment of error to court's remarks must be supported by exception appearing of record.

An assignment of error to the remarks of the court to the jury must be supported by an exception appearing of record, and may not be presented by an exceptive assignment of error appearing for the first time in appellant's brief, although an exception to the remarks need not be entered in the record until after verdict.

3. Appeal and Error J e—

Where it appears from the facts and attendant circumstances appearing of record that the court's remarks to the jury during trial could not have prejudiced appellant, such remarks cannot be held for reversible error.

4. Appeal and Error J g—

Where the answer of the jury to one of the issues determines the rights of the parties, assignments of error relating to another issue need not be considered on appeal.

5. Wills D k—

The finding by the jury that an alleged testator did not have sufficient mental capacity to execute a will is sufficient to support judgment for caveator, irrespective of the issue of fraud or undue influence.

6. Trial E g—

Where the charge is correct when read contextually as a whole, an exception thereto on the ground that it was biased will not be sustained, certainly in the absence of a request by appellant that other or further contentions or instructions be given.

7. Appeal and Error J e—

An exception to the exclusion of testimony cannot be sustained when the record fails to show what the testimony of the witness would have been had he been allowed to testify.

8. Wills D h—Letters offered in evidence by caveator held competent as links in chain of circumstances tending to show fraud.

In this action to set aside a purported will and certain other instruments executed in favor of propounder, caveator offered in evidence certain letters written by the attorney who had drawn up the papers, and who had testified for propounder, which letters were written a few days after the execution of the instruments, and stated that testatrix had engaged the writer to settle her business affairs, and that he desired to cash for her certain certificates of stock. One of the instruments attacked assigned the certificates of stock to propounder. *Held:* The letters were competent as links in a chain of circumstances tending to show fraud and undue influence in the procurement of the execution of the instruments and as tending to contradict certain phases of the attorney's testimony for propounder.

9. Evidence I b—Where parts of letters are admitted in evidence, adverse party may not introduce other parts unless they are competent or tend to explain parts admitted.

Where a party introduces in evidence parts of certain letters, it is competent for the adverse party to introduce the other parts of the letters in evidence when such other parts tend to explain the parts introduced, but this rule does not extend to allow such adverse party to introduce in evidence an *ex parte* statement enclosed in the letters, which statement does not tend to explain the portion of the letters introduced.

THIS is a civil action in the nature of a caveat, tried at the October Term, 1935, of EDGECOMBE, before *Cranmer, J.*, and a jury. No error.

The plaintiffs sought to have set aside and declared null and void the following paper writings, to wit: (a) The purported last will and testament of Annie Dancy Meeks; (b) the transfer, assignment, and delivery of certain paid-up stock in the Edgecombe Homestead and Loan Association; (c) a deed from Annie Dancy Meeks to Frank H. Lloyd, recorded in the Edgecombe registry, in Book 324, at page 514; and (d) the transfer and assignment of certain moneys on deposit in the defunct North Carolina Bank and Trust Company.

The defendant Frank H. Lloyd was the beneficiary under said purported will, and was also the beneficiary or grantee of the transfer of the homestead and loan stock, the deed for lands situate in Edgecombe County, and the assignment of moneys on deposit in the defunct bank and trust company.

Annie Dancy Meeks died in Washington, D. C., on 19 January, 1934. The purported will in controversy was signed on 10 November, 1933, and the other paper writings in controversy were signed on 11 November, 1933.

The plaintiffs alleged that said will and each and all of the other paper writings referred to were invalid, null and void, for that the said Annie Dancy Meeks, at the time of the signing of said instruments, did not have sufficient mental capacity to execute the same, and for that the signing of the same was procured by fraud or undue influence on the part of the defendant Frank H. Lloyd.

The defendant Frank H. Lloyd, on the other hand, avers that said paper writings were executed by the said Annie Dancy Meeks when she was possessed of full testamentary capacity, and of full understanding; and the defendant Lloyd further averred that no fraud or undue influence was brought to bear upon the said Annie Dancy Meeks by him or anyone else to procure her execution of said instruments, or either of them.

The Edgecombe Homestead and Loan Association admitted that at the time of her death Annie Dancy Meeks was the owner of 21 paid-up shares of its stock of the par value of $100.00 each, and that it was indebted on account of said shares in the sum of $2,100, together with dividends, to either the distributees, legatees, assignees, or administrator of said Annie Dancy Meeks, and offered to pay such amount to such person or persons as may be declared by the court entitled to receive the same.

The issues submitted and answers made thereto were as follows:

"1. Did Annie Dancy Meeks, at the time of the execution of the paper writing purporting to be her will, to wit, 10 November, 1933; and at the time of the execution of the paper writing purporting to be a deed for a lot in Tarboro, dated 11 November, 1933, and at the time of executing the paper writing purporting to be an assignment of stock in the Edgecombe Homestead and Loan Association, and the paper writing purporting to be an assignment of bank deposit, each dated 11 November, 1933, have sufficient mental capacity to execute the same? Answer: 'No.'

"2. Was the execution of the said paper writings procured by the fraud and undue influence of Frank H. Lloyd? Answer: 'Yes.'"

From judgment for the plaintiffs, based upon the verdict, the defendant Frank H. Lloyd appealed to the Supreme Court, assigning errors.

H. H. Philips for plaintiffs, appellees.

T. O. Moses, G. H. Leggett, and Geo. M. Fountain & Son for defendants, appellants.

SCHENCK, J. We will take up the exceptions as grouped by the appellant in his assignments of error.

First assignment of error: Exceptions 1, 2, 3, 4, 5, 6, and 7. These exceptions, according to the brief of the appellant, raise two questions: "(A) The competency of questions and answers, and (B) the competency of the trial judge's remarks."

The questions objected to were propounded by the plaintiffs to their witness, Dr. J. G. Raby. Each of the questions was framed as follows: "In your opinion, did Annie Dancy Meeks, on 10 November, 1933, have sufficient mental capacity, . . . either to make a will or to execute a deed, or to execute an assignment of personalty?" to which the witness answered in each instance "No." Counsel for appellant stated that the basis of his objection was that the witness had stated that the last time he saw Annie Dancy Meeks was on 29 October, 1933, and the date fixed by the question was 10 November, 1933. This objection is untenable. The witness, an admitted medical expert, testified that he had treated Annie Dancy Meeks off and on for 12 years, and in his opinion she was suffering from senile dementia, an incurable condition due to old age, which grows progressively worse until death, and that by reason of this condition she had become "mentally incapacitated, feeble, and crazy," on 29 October, 1933, and that this condition continued up till 10 November, 1933, and until her death, and further, in his opinion, on 10 November, 1933, she did not have sufficient mental capacity to make a will. The witness further said: "I would say that a person couldn't recover from senile dementia unless they could get this nature reversed and get younger; it is due to old age. No, sir; they don't recover from senile dementia." We think that the expert knowledge of the physician as to the cause, symptoms, and effect of senile dementia and the opportunity he had of observing Annie Dancy Meeks for 12 years prior to and up to within 12 days of the date in question, namely, 10 November, 1933, rendered him a competent witness to express an opinion upon her mental condition at that time, the date the documents in question were signed.

"The competency of the trial judge's remarks" is first raised in the brief of the appellant. No exception is noted to these remarks in the record proper, and in the first assignment of error, under which the appellant discusses such remarks, there is no mention made of them. It is said in *S. v. Bryant,* 189 N. C., 112 (115): "The fact that exception was not entered at the time the remark (of the judge) was uttered is immaterial. The statute is mandatory, and all expressions of opinion by the judge during the trial, in like manner with the admission of evidence made incompetent by statute, may be excepted to after the verdict." But this does not mean the appellant can make the remarks of the judge the basis of exceptive assignment of error for the first time in his brief, as has been attempted in this case. Exceptions must appear in

the record, some as having been noted during the course of the trial and some, as in the case of an exception to the charge, as having been noted after verdict, but all must appear in the record and be preserved in the assignments of error. *Yellowday v. Perkinson,* 167 N. C., 144; *Rawls v. R. R.,* 172 N. C., 211; *Pleasants v. R. R.,* 95 N. C., 195; *Lytle v. Lytle,* 94 N. C., 522.

The portion of the record containing the remarks of the judge of which the appellant complains in his brief is as follows:

"By defendant's counsel: I will state the basis of the objections. He stated the last time he saw her was on 29 October, 1933.

"By the court: The doctor is an admitted medical expert, and he testified at that time she was suffering from senile dementia, and was crazy practically, and he was medical man enough to know whether that condition would change." While, as aforesaid, there is no objection in the record to the remarks of the judge, we are of the opinion that the remarks, even if exception had been properly noted thereto, "should not be held for reversible error because, from the facts and attendant circumstances disclosed in the record, it appears that they . . . could have reasonably had no appreciable effect on the result." *S. v. Jones,* 181 N. C., 546.

Second assignment of error: Exception 8. This exception is abandoned in the appellant's brief.

Third and eighth assignments of error: Exceptions 9, 19, 20, 21, 22, 23, 24, and 25. These exceptions, according to appellant's brief, present for the Court's consideration two "interlocking questions," namely, "(A) Was there sufficient evidence . . . of undue influence, sufficient for that issue to go to the jury? (B) Was not his Honor's charge couched in language so extreme and severe . . . as to irremediably injure the defendants before the jury on all of the issues?"

While the evidence of fraud and undue influence was largely if not entirely circumstantial, we are inclined to the opinion that it justified the submission of the second issue, but however this may be, the finding of the jury on the first issue that Annie Dancy Meeks did not have sufficient mental capacity to execute the will, and other documents, renders unnecessary any discussion of the assignments of error on the second issue, as it is well settled that the finding by the jury that an alleged testator did not have sufficient mental capacity to execute a will is sufficient to support a judgment for the caveator, irrespective of the issue of fraud or undue influence. *In re Rawlings' Will,* 170 N. C., 58.

We have examined the charge and cannot agree that it is so biased as to be prejudicial to the appealing defendant. When read contextually and as a whole it is a correct statement of the evidence and a clear

declaration of the law arising thereon. The appellant did not request that any other or further contentions or instructions be given.

Fourth assignment of error: Exceptions 10 and 11. These exceptions are abandoned in the brief of appellant.

Fifth assignment of error: Exception 12. Appellant sought to elicit from the witness J. A. Norris, an attorney of Washington City, testimony relative to certain legal requirements in the probate of wills in the District of Columbia, and excepted to the court's sustaining an objection to the question propounded to the witness. The exception is untenable, since it does not appear from the record what the answer of the witness would have been to the question to which objection was sustained. *Newbern v. Hinton,* 190 N. C., 108, and cases there cited. However, the information which the unanswered questions seem to indicate the defendant sought from the witness was subsequently given by the witness in his further examination.

Sixth and seventh assignments of error: Exceptions 13, 14, 15, 17, and 18. These exceptions present the inquiry (1) as to whether certain letters written by J. A. Norris to the Edgecombe Homestead and Loan Association and introduced by the plaintiffs were competent evidence, and, (2) if so, was it not competent for the appellant to have introduced in evidence copy of report of Dr. Whitby, psychiatrist, of his examination of Annie Dancy Meeks, which was enclosed in said letters?

These letters tended to show that the will was executed one day (10 November, 1933), and the deed for land and transfer of stock and deposit the following day, and that J. A. Norris, the attorney who drew all of the papers and who had been called as a witness for the appellant, wrote, on 13 November, 1933, two or three days later, that he had been engaged by Annie Dancy Meeks to settle her business affairs, and that delivery of the stock certificates had been made to him, and that his client desired to cash them, and were competent as links in a chain of circumstances tending to show fraud and undue influence in the procurement of the signing of the paper writings involved, and to contradict certain phases of the testimony of Norris.

The purported report of the psychiatrist, which appellant contends should have been admitted in evidence when offered by him, was enclosed, along with other documents, in one of the letters. While ordinarily when one portion of a letter, document, or conversation is introduced in evidence the opposing side may introduce any other portion thereof which is explanatory of the portion theretofore introduced, it does not follow that such letters, documents, or conversations in their entirety become competent simply because written or had at the same time, the remaining portions thereof must throw light upon or explain that portion which has been already introduced—*a fortiori,* an *ex parte* statement enclosed in a letter, and otherwise incompetent, would not become

competent unless it explained the letter in which it was enclosed. 10 R. C. L., pars. 101, 102, pp. 935-6. The purported report of the psychiatrist in no way explained the letter of Norris to the Homestead and Loan Association.

The evidence in this case was in sharp conflict. It was admitted under proper rulings by the court and submitted to the jury under a fair and impartial charge. The issues were answered in favor of the plaintiffs. The judgment must be affirmed.

No error.

IN THE MATTER OF THE ADOPTION OF ANN FOSTER, A MINOR CHILD.

(Filed 26 February, 1936.)

1. Parent and Child A c—

The right of the mother, if a suitable person, to the custody of her minor illegitimate child is not absolute, but may be voluntarily relinquished by her for the good of the child as determined by her.

2. Adoption A a—Mother held to have waived right to notice of proceedings for adoption of her minor child.

Where a mother has voluntarily relinquished control of her child and agreed in writing that it might thereafter be adopted by some suitable person approved by the superintendent of public welfare of the county, the mother thereby waives her right to notice of any proceeding thereafter instituted for the adoption of the child.

3. Adoption B c—Petitioners, relying on parent's relinquishment of child, held entitled to adopt child as against parent later seeking custody.

Where a mother has voluntarily relinquished custody of her minor illegitimate child, and agreed that it might thereafter be adopted by some suitable person approved by the superintendent of public welfare of the county, and thereafter proceedings for adoption of the child are instituted by suitable persons, who are given custody of the child by the court pending final judgment, and who assume obligations for the care and support of the child, the mother, upon her later marriage, is not entitled to have the adoption proceedings dismissed upon petition filed in the proceedings by herself and husband, and the original petitioners in the proceedings, who are found by the court to be suitable persons and able to care for the minor, and who relied upon the mother's voluntary relinquishment of the child and incurred obligations upon the strength thereof, are entitled to judgment decreeing final adoption of the child.

APPEAL by Mildred Van de Sande and her husband, J. N. Van de Sande, from *Harding, J.*, at June Special Term, 1935, of MECKLENBURG. Affirmed.

IN RE FOSTER.

This is a proceeding for the adoption of Ann Foster, the minor child of Mildred Foster, now Mildred Van de Sande, wife of J. N. Van de Sande.

The proceeding was begun on 11 September, 1933, by a petition filed with the clerk of the Superior Court of Mecklenburg County, by Norman D. Doane and his wife, Cleora C. Doane, under the provisions of chapter 207, Public Laws of North Carolina, 1933.

An order was entered in the proceeding by the court directing the superintendent of public welfare of Mecklenburg County to make a careful and thorough investigation of the matters alleged in the petition, and to report, in writing, to the court his findings with respect to said matters.

After the report of the superintendent of public welfare had been filed, an interlocutory order was entered in the proceeding by the court, by which the child, Ann Foster, was committed to the custody and care of the petitioners, Norman D. Doane and his wife, Cleora C. Doane, for a term of one year, and until a final order of adoption should be entered in the proceeding in accordance with the prayer of the petition. It was provided in said interlocutory order that if a final order of adoption should be made in the proceeding the said final order should be retroactive, and be deemed to have been effective to all intents and purposes from the date of the filing of the petition. It was further provided therein that pending the making of a final order of adoption, the said Ann Foster should be and remain the ward of the court, and should be under the supervision of the superintendent of public welfare of Mecklenburg County. The interlocutory order was entered on 21 September, 1933.

Before the expiration of one year from the date of the said interlocutory order, to wit: On or about 1 March, 1934, Mildred Van de Sande and her husband, J. N. Van de Sande, filed a petition in the proceeding in which on the facts alleged therein they prayed the court to vacate and set aside the interlocutory order entered on 21 September, 1933, to remand the said Ann Foster to the custody and care of the petitioners, and to dismiss the proceeding.

The original petitioners, Norman D. Doane and his wife, Cleora C. Doane, filed an answer to the petition of Mildred Van de Sande and her husband, J. N. Van de Sande, in which on the facts alleged therein they prayed the court to deny the prayer of said petition, and to make a final order of adoption in the proceeding in accordance with the prayer in their petition. The proceeding was thereupon docketed in the Superior Court of Mecklenburg County for the trial of issues of fact raised by the pleadings.

The proceeding was heard at June Special Term, 1935, of the Superior Court. At said hearing a trial by jury of the issues of fact raised

by the pleadings was waived, and by consent of the parties the judge heard the evidence and found the facts, which are substantially as follows:

1. The petitioner, Mildred Van de Sande, prior to her marriage to the petitioner, J. N. Van de Sande, on 20 October, 1930, at Greensboro, N. C., gave birth to an illegitimate child, who is the child referred to in the petitions in this proceeding as Ann Foster. The petitioner, J. N. Van de Sande, is not the father of said child. At the date of its birth, Mildred Van de Sande, who was then Mildred Foster, was about nineteen years of age. She lived with her father and mother in their home in the city of Charlotte, Mecklenburg County, North Carolina. After the birth of her child, Mildred Foster returned, with her child, to the home of her father and mother in the city of Charlotte, and continued to live in said home, with her child, until 15 July, 1932. During this time she was wholly dependent upon her father and mother for the support of herself and of her child. Both her parents resented the presence of the child in their home and insisted that if the said Mildred Foster continued to live with them she must make provision for her child elsewhere. The attitude of her parents towards her and towards her child made the said Mildred Foster very unhappy. Finally, on or about 15 July, 1932, some time after she had attained the age of twenty-one, and when her child was nearly two years of age, Mildred Foster delivered her child, Ann Foster, to a representative of the Junior League of the city of Charlotte, and at the same time signed a paper writing in words as follows:

"PARENT'S RELEASE.

"NORTH CAROLINA—MECKLENBURG COUNTY.

"I, Mary Foster, mother of Ann Foster, a minor child, born on the 20th day of October, 1930, at 502 S. Cedar Street, Greensboro, county of Guilford, State of North Carolina, hereby relinquish all right, care, and custody of the said Ann Foster to the Superintendent of Public Welfare, county of Mecklenburg, State of North Carolina, and hereby give my consent to the said Ann Foster being legally adopted for life by person or persons approved by the Superintendent of Public Welfare of the county of Mecklenburg, State of North Carolina; and hereby give my consent to the name of the said child being changed to such name as the foster parents may select.

"I, Mary Foster, hereby give my consent to the above voluntarily, of my own free will and accord, without force or duress of any kind.

MARY FOSTER. (Seal.)

"Sworn to and subscribed before me, this the 14th day of July, 1932.

"(Notarial Seal.) WINIFRED B. KENDRICK,
Notary Public."

2. On the day she signed the release, and delivered her child to the representative of the Junior League, Mildred Foster was informed that when the child was removed from her home its whereabouts thereafter would be unknown to her. She said, "It is breaking my heart to give up my baby, but there is nothing else to do." She was distressed and unhappy, nervous and worried by the attitude of her parents, which compelled her to give up her child.

3. Immediately after the child was delivered by Mildred Foster to the representative of the Junior League of the city of Charlotte, it was taken before the judge of the domestic relations court of the city of Charlotte, who, after a hearing, adjudged the said child to be dependent and neglected, and thereupon, at their request, ordered that the said child be placed in the custody and care of Norman D. Doane and his wife, Cleora C. Doane, for a period of six months, with the privilege at the expiration of said period of instituting a proceeding for the adoption by them of said child. At this hearing the release signed by Mildred Foster, mother of Ann Foster, was exhibited to the court. She had, however, no notice of said hearing or of the entry of the order with respect to the custody and care of Ann Foster. Pursuant to this order, Ann Foster was placed in the custody and care of Norman D. Doane and his wife, Cleora C. Doane, where she has remained since the date of said order.

4. The petitioners, Mildred Van de Sande and J. N. Van de Sande, were married to each other during the month of August, 1933. Before their marriage, Mildred Van de Sande informed J. N. Van de Sande of the birth of Ann Foster, and of the circumstances under which she had surrendered the possession of her child. Soon after their marriage, in August, 1933, Mildred Van de Sande appeared in the domestic relations court of the city of Charlotte and moved that the motion of the custody of Ann Foster be reopened. The motion was denied, and the said Mildred Van de Sande appealed, but subsequently abandoned her appeal. Thereafter, both Mildred Van de Sande and her husband, J. N. Van de Sande, visited Ann Foster in the home of Norman D. Doane and his wife, Cleora C. Doane, but made no demand for the possession of the said Ann Foster.

5. The original petition in this proceeding was filed on 11 September, 1933; no notice of the filing of the said petition or of the pendency of this proceeding for the adoption of Ann Foster by Norman D. Doane and his wife, Cleora C. Doane, was given to Mildred Van de Sande or to her husband, J. N. Van de Sande. On or about 1 March, 1934, the said Mildred Van de Sande and her husband, J. N. Van de Sande, filed their petition in the proceeding, and thereby made themselves parties to the proceeding for all purposes as if they had been made parties at the commencement of the proceeding.

6. Norman D. Doane and his wife, Cleora C. Doane, "during the period that Ann Foster has been in their custody, have given her the best of care and attention, have made plans for the future welfare of said child, and are in all respects willing and amply able to provide a good home for her and give her a good education; they are both persons of splendid character and reputation."

7. Mildred Van de Sande and J. N. Van de Sande are happily married to each other; at the date of the commencement of this proceeding they were both residents of the city of Charlotte, but have since moved to the State of Pennsylvania, where they now reside; they have a good home in which the child, Ann Foster, could be cared for, supported, and educated; J. N. Van de Sande is employed by a large corporation and receives a salary of from $175.00 to $200.00 per month; he has prospects of promotion and of increase in salary; he is ready, willing, and able to care for, support, and educate Ann Foster if she be committed to the custody and care of his wife, Mildred Van de Sande. Both Mr. and Mrs. Van de Sande are persons of good character and are suitable persons to have the custody and care of Ann Foster.

8. "The interest, education, and future welfare of the said child will be best promoted and cared for in the home of Mr. and Mrs. Norman D. Doane, and it will be for the best interest of said child, Ann Foster, that she remain in the home of Mr. and Mrs. Doane, whom she knows as her father and mother, and a final decree of adoption awarding the custody of the said child to Mr. and Mrs. Norman D. Doane, for life, should be made in this proceeding, with an order that the name of said child shall be changed to Ann Doane."

On the foregoing facts, it was considered, ordered, and adjudged by the court (1) that the petition of Mildred Van de Sande and her husband, J. N. Van de Sande, be denied; and (2) that the petition of Norman D. Doane and his wife, Cleora C. Doane, be allowed.

From judgment ordering that letters of adoption be issued in this proceeding to Norman D. Doane and his wife, Cleora C. Doane, and that the name of Ann Foster be changed to Ann Doane, in accordance with the prayer of the original petition, Mildred Van de Sande and her husband, J. N. Van de Sande, appealed to the Supreme Court, assigning error in the judgment.

H. I. McDougle, Paul R. Ervin, and P. C. Whitlock for appellees.
Uhlman Alexander and Cansler & Cansler for appellants.

CONNOR, J. It is well settled as the law of this State that the mother of an illegitimate child, if a suitable person, is entitled to the custody and care of such child, even though there be others who are more suitable. *In re Shelton,* 203 N. C., 75, 164 S. E., 332; *Ashby v. Page,* 106

N. C., 328, 11 S. E., 283. The right of the mother to the custody and care of such child, which the law recognizes, and which in proper cases the courts will enforce, may, however, be forfeited or relinquished by her. The right is not universal or absolute. *Brickell v. Hines,* 179 N. C., 254, 102 S. E., 309. It must yield to the best interest of the child, as determined by the mother, or by the courts. *Atkinson v. Downing,* 175 N. C., 244, 95 S. E., 487.

In the instant case, at the time she voluntarily delivered her child into the possession of a representative of the Junior League of the city of Charlotte and agreed in writing that her child might thereafter be adopted in a proper proceeding by any person or persons, who should be approved by the superintendent of public welfare of Mecklenburg County, the mother relinquished her right to its custody and care in the future, and waived her right to notice of any proceeding thereafter instituted for its adoption. She has no just cause of complaint that no notice was given to her of the commencement or of the pendency of this proceeding. The circumstances as disclosed by the record under which she surrendered her child and agreed to its adoption by a stranger excite sympathy for her, but cannot be invoked to restore to her rights which she voluntarily relinquished.

The facts found by the court show that the petitioners in this proceeding relied upon the voluntary act of the mother of the child, and thereby assumed obligations to the child, which were properly considered and deemed determinative by the court in its disposition of the matters involved in this proceeding.

We find no error in the judgment. It must be and is

Affirmed.

LEE PARKER, TRUSTEE OF THE ESTATE OF R. O. JEFFRESS, DECEASED, v. GURNEY P. HOOD, COMMISSIONER OF BANKS, EX REL. CENTRAL BANK AND TRUST COMPANY OF ASHEVILLE, N. C.

(Filed 26 February, 1936.)

1. Banks and Banking H e—Where bank, acting as trustee under a will, commingles funds of estate, estate is not entitled to preference.

A bank, acting as trustee under a will, received the assets of the estate and commingled moneys belonging to the estate with its general assets and exchanged securities of the estate for other securities. Upon its insolvency, a successor trustee was appointed, to whom was turned over the securities belonging to the estate which were held by the bank at the time of its insolvency in the account of the estate, and the successor trustee brought action claiming a preference in the assets of the bank for

the moneys commingled and the amount by which the securities of the estate were depreciated by exchange of such securities by the bank. *Held:* As to the funds of the estate commingled with the general deposits of the bank the relation of debtor and creditor existed, and the exchange of securities by the bank brought in no new money to the bank, and plaintiff trustee is not entitled to a preference in the assets of the bank.

2. Same—

Where plaintiff is not entitled to a preference in his suit against the receiver of an insolvent bank on a debt due by the bank, judgment should be entered for plaintiff for the amount of the debt as a general claim, and judgment that plaintiff recover nothing is error.

3. Appeal and Error J c—

Findings of fact by a referee, approved by the trial court and supported by competent evidence, are ordinarily conclusive on appeal.

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

APPEAL by plaintiff from *Warlick, J.*, at January Term, 1935, of BUNCOMBE. Modified and affirmed.

R. O. Jeffress, of Haywood County, N. C., died on 10 November, 1922, having first made and executed a last will and testament, which was duly admitted to probate in the said county of Haywood in the office of the clerk of the Superior Court of said county. Under the terms of said will certain specific devises and bequests were made and the remainder of his property, either real, personal, or mixed, whatever kind or character and wherever situated, of which he was seized and possessed, was bequeathed and devised by the said testator unto the Central Bank and Trust Company of Asheville, N. C., and its successors and assigns, to be held in trust upon the terms and conditions and for the uses and purposes set out in said will. The said Central Bank and Trust Company was named in said will as executor as well as trustee, and duly qualified as executor, and accepted the trust, as set out and contained in said will. That the said Central Bank and Trust Company duly administered the said estate as executor, and after the same had been fully administered there was left in its hands assets to the amount of $107,259.08, which it transferred to itself as trustee in accordance with the last will and testament of the said R. O. Jeffress, all as shown by its final account duly filed in the office of the clerk of the Superior Court of said Haywood County.

The Central Bank and Trust Company became insolvent and is being liquidated by the proper legal authorities. On account of the inability of the said Central Bank and Trust Company to administer the said trust created under the terms of the said will, the Independence Trust Company, a State banking corporation of the city of Charlotte, N. C., was, on 7 January, 1931, appointed successor trustee to the said Central

Bank and Trust Company upon due petition and according to law, and the said Independence Trust Company accepted said successor trusteeship, and entered upon its duties as such, and called upon the Corporation Commission, through and by its then liquidating agent, to deliver to said Independence Trust Company all of the assets and securities which came into the hands of the said liquidating agent as the property of the said Jeffress estate, and pursuant to said request and demand certain securities were delivered to said Independence Trust Company by the then liquidating agent, with the consent of the Corporation Commission.

The said Independence Trust Company, in its capacity as successor trustee, within the time allowed by law, and upon the proper parties filed proof of its claim for preference, and that within the time allowed by law the said claim was denied by the liquidating agent in charge as a preferred claim. Thereafter, within the time allowed by law, the said Independence Trust Company, as successor trustee, on 17 August, 1931, instituted in the Superior Court of Buncombe County, N. C., a certain civil action entitled, "Independence Trust Company, Trustee of the Estate of R. O. Jeffress, deceased, *v.* Gurney P. Hood, Commissioner of Banks, and G. N. Henson, Liquidating Agent of the Central Bank and Trust Company of Asheville, North Carolina"; the summons in said action was issued on 17 August, 1931, and duly served by the sheriff of Wake County, North Carolina, on 18 August, 1931. The said action was instituted for the purpose of establishing a preferred claim against the defendant and creating the plaintiff in its capacity aforesaid as a preferred creditor of said Central Bank and Trust Company.

Thereafter, and during the pendency of said civil action above referred to, to wit, 20 May, 1933, the said Independence Trust Company failed to open its doors on account of its insolvency, and Gurney P. Hood, Commissioner of Banks of North Carolina, thereupon took due possession and control of the management and affairs of the said Independence Trust Company, as provided by the statutes of North Carolina, and thereafter, to wit, on 23 December, 1933, Lee Parker, the plaintiff herein, upon proper application, after the resignation of the Independence Trust Company as successor trustee, was duly appointed successor trustee of the estate of R. O. Jeffress, deceased, by the clerk of the Superior Court of Haywood County, North Carolina, and such appointment was duly approved by the Hon. Felix E. Alley, resident judge of the Superior Court of Haywood County, and the said Lee Parker, the plaintiff herein, duly filed his bond and otherwise in all respects fully and completely complied with all of the requirements of his said order of appointment, and is now the duly qualified and acting successor trustee of the estate of R. O. Jeffress, deceased.

On 5 March, 1934, upon due petition made and filed in the Superior Court of Buncombe County, N. C., the said Lee Parker, plaintiff herein, was, by order of the judge of the Superior Court of North Carolina presiding over and holding the regular courts for Buncombe County, N. C., designated as party plaintiff in the above entitled action and granted the right to prepare and file a supplemental complaint in said action.

The prayer for judgment was as follows:

"Wherefore, the plaintiff prays judgment against the herein defendant as follows:

"1. That the plaintiff, as trustee of the estate of R. O. Jeffress, deceased, have and recover the sum of $69,019.42, with interest thereon from 27 October, 1930; that the said amount be constituted a judgment lien against the assets of the said Central Bank and Trust Company, and that the herein defendant be ordered to pay the same out of the said assets first coming into his hands as and for a preferred claim against the said Central Bank and Trust Company.

"2. That the plaintiff, as trustee of the estate of R. O. Jeffress, deceased, be declared a preferred creditor of the said Central Bank and Trust Company, and his claim be declared entitled to preference and be paid out of the assets first coming into the hands of the within defendant and before payment to general creditors of said Central Bank and Trust Company.

"3. That the defendant be required to make full disclosure to the court of all the transactions of the said Central Bank and Trust Company with respect to the said estate; that the defendant be required to disclose what, if any, solvent securities came into the hands of the said liquidating agent, which were acquired by the said Central Bank and Trust Company by the exchange therefor of sound securities of the Jeffress estate, and for which sound securities the said Central Bank and Trust Company took or assumed to take worthless or unsound securities, for the account of the Jeffress trust estate.

"4. That the value of the assets of said estate, which came into the hands of the Central Bank and Trust Company, and the value of the assets which the said liquidating agent turned over to this plaintiff, be appraised by the court, and treated and held by plaintiff as security, and that the plaintiff have judgment against the defendant for preference in payment to the amount of $69,019.42, with interest on whatever amount is determined by the court to be the difference between the value of the assets received by the said Central Bank and Trust Company, as aforesaid, and the value of the assets coming into the hands of this plaintiff from the said liquidating agent.

"5. For the costs of this action, and

"6. For such other and further relief as to this court may seem proper and just."

The defendant denied the material allegations of the complaint, and denied that plaintiff was entitled to a preference, and further prayed that the action be dismissed.

The matter was referred to J. G. Merrimon, referee, who in an elaborate report found the facts and made his conclusions of law, and denied the preference. Numerous exceptions and assignments of error were made to the report by plaintiff. The court below overruled the exceptions and assignments of error made by plaintiff, and rendered the following judgment:

"This cause coming on to be heard, upon the report of J. G. Merrimon, referee, and upon the exceptions filed by the plaintiff to said report, and having been heard, and the court being of the opinion that the evidence fully sustains the referee's findings of fact and his conclusions of law thereon; It is accordingly ordered and adjudged that the plaintiff's exceptions and assignments of error to said referee's report be and each of them is hereby overruled, and the report of the said referee be and it is in all respects, both as to findings of fact and conclusions of law, confirmed. It is further ordered that the plaintiff take nothing by his writ, and that the defendant go hence without day and recover his costs, to be taxed by the clerk. Wilson Warlick, Judge presiding."

The plaintiff made numerous exceptions and assignments of error, and appealed to the Supreme Court.

J. Y. Jordan, Jr., for plaintiff.

Johnson, Rollins & Uzzell, C. I. Taylor, and Alfred Barnard for defendant.

CLARKSON, J. We think it unnecessary to go into a long discussion of this case. We think the judgment of the court below denying plaintiff a preference correct, but a judgment for the plaintiff should have been rendered for the debt due by the Central Bank and Trust Company to plaintiff.

The referee, in an able and carefully prepared report, covering every aspect of the controversy, both the facts and law, has this to say: "In view of the decision in the case I have cited, *Cocke v. Hood,* 207 N. C., 14, and the many authorities which I have read, I have felt compelled to find and conclude that the plaintiff in this case is not entitled to the relief demanded in his complaint, and that judgment should be entered for the defendant, and the costs to be fixed by the court. . . . It is impossible to state how much time I did spend in investigation of the

law involved in this case, for, as stated, my sympathies—if I were permitted to have any—were with the plaintiff. I regret my inability to afford the relief demanded, especially so, as the general creditors will not receive anything in the way of dividends according to my information, and it was only after long research and investigation that I have become convinced that there was no other decision which I could render. If I am in error, I am very glad that the court will have the opportunity to correct me."

There was evidence to support the referee's findings of fact and his judgment was confirmed by the court below "In all respects, both as to findings of fact and conclusions of law." These findings of fact are ordinarily conclusive on this Court. The funds were intermingled and commingled in the Central Bank and Trust Company, and the transaction was one of debtor and creditor; and in other respects in the shifting of the funds there was no new money. *Bank v. Corporation Commission,* 201 N. C., 381; *Hicks v. Corporation Commission,* 201 N. C., 819. We think the case of *Andrews v. Hood, Comr.,* 207 N. C., 499, distinguishable.

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

Modified and affirmed.

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

HUGH L. MAUNEY v. METROPOLITAN LIFE INSURANCE COMPANY.

(Filed 26 February, 1936.)

1. Insurance K f—Effect of incontestability clauses in general.

An incontestability clause in a policy of life insurance precludes insurer, after the lapse of the time therein stipulated, from setting up the defense of fraud in the procurement of the policy, and all other defenses except nonpayment of premiums.

2. Courts B b—Recorder's court held to have no jurisdiction to grant affirmative equitable relief.

The Superior Courts are given exclusive original equity jurisdiction, except such equity jurisdiction as is directly given courts inferior to the Superior Courts by statute, and a recorder's court not given equity jurisdiction, ch. 390, Public-Local Laws of 1931, is without power to decree the cancellation and rescission of an insurance policy for fraud upon such defense raised by insurer in an action instituted by insured to recover disability benefits in a sum within the jurisdiction of the recorder's court, since such decree affords affirmative equitable relief and goes beyond the power of the court to consider equitable matters raised merely as a defense to an action within its jurisdiction.

3. Insurance K f—Held: Insurer failed to set up fraud in court of competent jurisdiction within time allowed in incontestability clause.

In order for insurer to rescind for fraud a policy containing an incontestability clause, it is necessary that insurer, within the time allowed in the incontestability clause, bring an action therefor or set up such defense in an action instituted in a court having jurisdiction to grant the affirmative relief of rescission, and such defense set up by insurer within the time allowed in the policy in an action on the policy instituted by insured in a recorder's court having no equitable jurisdiction, is insufficient, and the incontestability clause will prevent the insurer from setting up the defense in a second action in the Superior Court thereafter instituted by insured after expiration of the time provided in the contract in which insurer might contest the policy. In this case judgment was rendered in the recorder's court decreeing rescission, and insured appealed, took a voluntary nonsuit in the Superior Court, and instituted a new action.

4. Judgments L b—Judgment rendered by court without jurisdiction is void and will not bar subsequent action.

In an action for disability benefits instituted by insured in a recorder's court, within the time allowed in the incontestability clause for rescission by insurer, judgment was rendered in insurer's favor adjudging that insured recover nothing, and that the policy be canceled and rescinded for fraud in its procurement. Insured appealed, but took a voluntary nonsuit in the Superior Court, and thereafter instituted a new action, after the expiration of the time allowed in the policy for rescission by insurer, to recover disability benefits accruing since the rendition of the judgment in the recorder's court. *Held:* The recorder's court was without jurisdiction to grant the affirmative equitable relief of rescission, and its judgment of recission was void and does not bar insured from setting up in the second action the incontestability clause in the policy to prevent insurer from setting up the right to rescind the policy for fraud in its procurement.

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

APPEAL by the defendant from *Warlick, J.*, at February Term, 1935, of BUNCOMBE. No error.

The issues submitted to and answers made by the jury were as follows:

"1. Did the defendant issue and deliver to the plaintiff its policy No. 6809832-A, and were all premiums due on said policy paid or either tendered up to and including 2 November, 1932? Answer: 'Yes,' by consent.

"2. Has the plaintiff been continuously totally disabled as the result of bodily disease from engaging in any business or occupation and performing any work for compensation or profit from 19 November, 1931? Answer: 'Yes.'

"3. Did the plaintiff, on or about 21 March, 1932, file with the defendant due proof of his disability? Answer: 'Yes.'

"4. Is the defendant, by reason of the incontestability clause in the policy and in the disability clause attached thereto, precluded from

setting up the defenses of fraud pleaded in the answer? Answer: 'Yes.'

"5. What amount, if any, is the plaintiff entitled to recover of the defendant on account of the disability benefits pleaded in the complaint? Answer: '$1,074.15, and interest at 6 per cent.'

"6. What amount, if any, is the plaintiff entitled to recover of the defendant on account of premiums paid under protest, subsequent to the plaintiff's disability? Answer: '$104.82.' "

From judgment based on the verdict, the defendant appealed, assigning errors.

Johnson, Rollins & Uzzell for plaintiff, appellee.

Harkins, Van Winkle & Walton and P. W. Garland for defendant, appellant.

SCHENCK, J. There is no conflict in the evidence. It all tends to show the issuance of the policy, the payment of premiums, the total and permanent disability of the insured from the date claimed, the notice to the insurance company of such disability, and the institution of this action after the expiration of two years from the issuance of the policy. The two-year incontestability clause in the policy sued on is made applicable to the "Supplemental Contract" for "Total and Permanent Disability" by these words: "No other provisions of said policy shall be held or deemed to be a part hereof, except (a) the provisions of said policy as to incontestability shall apply hereto, . . ." The amounts contained in the answers to the fifth and sixth issues were agreed upon by the parties.

The controversy centers around the fourth issue.

The defendant issued an income policy, fifty-three-year endowment, upon the life of the plaintiff for six thousand dollars, dated 2 February, 1931, by the terms of which the defendant agreed to waive further payment of premiums and to pay certain benefits to the plaintiff, should he become totally and permanently disabled, the terms and conditions under which said benefits were payable being fully set forth therein. About May, 1931, the plaintiff permitted said policy to lapse for nonpayment of premiums, and, upon application, the policy was reinstated 28 September, 1931. About March, 1932, plaintiff made application to the defendant for benefits under the policy, and the defendant tendered to the plaintiff the return of all premiums, with interest, and notified him that it would resist and contest any payment under the policy, which return premiums the plaintiff declined to accept.

On 1 September, 1932, the plaintiff instituted an action in the recorder's court of Cleveland County to recover the amount of benefits under said policy on account of alleged total and permanent disability from

19 November, 1931, till the institution of the action, namely, $480.00. The defendant filed an answer in said recorder's court, in which it alleged that it had been induced to issue the policy by reason of false and fraudulent statements as to the condition of the health of the plaintiff, which were made in his written application for insurance dated 26 January, 1931, and that the defendant had been induced to reinstate said policy by reason of similar false and fraudulent statements made in the plaintiff's application for reinstatement of the policy dated 28 September, 1931.

The cause came on for trial in the recorder's court on 7 October, 1932, and judgment was rendered in favor of the defendant, from which the plaintiff appealed to the Superior Court of Cleveland County. The case pended on appeal in the Superior Court of Cleveland County until the March Term, 1934, thereof, when the plaintiff took a voluntary nonsuit, and thereafter, on 8 June, 1934, instituted this action in the Superior Court of Buncombe County.

At the trial of the instant case his Honor, Warlick, J., held that the judgment in the recorder's court of Cleveland County was a bar to the recovery by the plaintiff of the amount sued for in that court, but was not a bar to the recovery of additional benefits accruing after that suit was instituted, and permitted the plaintiff to offer evidence tending to establish that such additional benefits had accrued.

Judge Warlick refused to permit the defendant to introduce evidence to sustain its alleged defense based upon the procurement of the policy by false and fraudulent statements as to the condition of the plaintiff's health, made in his applications for insurance and reinstatement, for the reason that the instant action was commenced after the time limit in the incontestability clause had elapsed, and charged the jury that if they found the facts to be as shown by all the evidence they would answer the issues as shown in the record.

The court's ruling denying the defendant the right to introduce evidence tending to establish its defenses based upon allegations of fraud in the procurement of the policy, and holding that the incontestability clause was applicable to this case, were made the bases of the defendant's exceptive assignments of error.

The first question presented to us for determination is whether the judgment in the recorder's court of Cleveland County is a bar to the plaintiff's setting up the incontestability clause of the policy. That judgment is as follows:

"This cause, coming on to be heard before the undersigned recorder *pro tem* for the recorder's court of Cleveland County, on 7 October, 1932, and being tried, and after the introduction of evidence by the plaintiff and defendant and the argument of attorneys, the court is of

the opinion that the plaintiff is not to recover anything from the defendant in this action, and the issues of fact are answered in favor of the defendant;

"Now, therefore, it is order, adjudged, and decreed by the court that the plaintiff take nothing by this action. It is further ordered that the policy of life insurance sued upon by the plaintiff be and the same is hereby canceled and this action dismissed, and the costs are taxed against the plaintiff."

It is well settled in this jurisdiction that a clause in a policy of life insurance making it incontestable after a given time covers the defense of alleged bad health of the insured at the time of delivery, and also that of false and fraudulent statements alleged to have been made by the insured in his application, as well as all other defenses except nonpayment of premiums. *Hardy v. Insurance Co.,* 180 N. C., 180, and cases there cited.

The recorder's court of Cleveland County had jurisdiction of the amount sued for, namely, $480.00, by reason of alleged disability benefits accruing up to the time of the institution of the action therein, and the holding of the Superior Court that that portion of the recorder's judgment to the effect that the plaintiff take nothing was a bar to his recovery of that amount in this action is not appealed from. However, that portion of the judgment of the recorder's court which provides that the life insurance policy sued upon by the plaintiff be canceled was void, since it was an attempt to administer equitable relief, namely, cancellation or rescission, and the recorder's court of Cleveland County is without equitable jurisdiction.

Professor McIntosh, in his valuable work, N. C. Prac. and Proc., par. 62, p. 60, in speaking to the subject of the jurisdiction of our courts, says: "The Superior Court, prior to 1868, had exclusive equity jurisdiction, to be administered in accordance with the procedure existing in the English court of chancery. The new Constitution abolished the distinction between the two systems of procedure, but left the rights and remedies to be administered by the Superior Court, with all the powers formerly exercised by it as a court of equity. Such jurisdiction is still exclusive, in the absence of statutes conferring it upon some other court." The recorder's court of Cleveland County was created by chapter 243, Public-Local Laws of 1911, and an examination of this statute, and of the amendment thereto, chapter 390, Public-Local Laws of 1931, fails to reveal that any equitable jurisdiction has been conferred upon the court thereby created. While the recorder's court of Cleveland County, in like manner as a justice of the peace, may have the right to allow an equitable defense, this does not extend to it the right to affirmatively administer equitable relief. See cases cited under par. 62, N. C. Prac. and Proc., *supra.*

The setting up in the answer in the recorder's court of the defense of fraud in the procurement of the policy, and the tendering of the amount of premiums theretofore paid, was nothing more than notice by the defendant to the plaintiff of its intention to rescind the policy. It was not a rescission thereof for the reason that the company alone could not rescind it, nor could the company procure a valid judgment rescinding it from a court without equitable jurisdiction. It was necessary for the insurer, within the time allowed in the incontestability clause, to bring suit in a court of competent equitable jurisdiction for the cancellation of the policy to prevent it from remaining binding and enforceable by the insured. *Trust Co. v. Insurance Co.*, 173 N. C., 558. "Like other written contracts, it (the policy) may be set aside or corrected for fraud or for mutual mistake; but, until this is done, the written policy is conclusively presumed to express the contract it purports to contain." *Wilson v. Insurance Co.*, 155 N. C., 173 (175).

The court was correct in holding that the judgment of the recorder's court was not a bar to the plaintiff's setting up the incontestability clause in this action, and, since such clause was so set up, the court was also correct in ruling that the evidence tending to show the ill health of the plaintiff or false and fraudulent statements in his applications for insurance and reinstatement was incompetent, since under the two-year incontestability clause the policy could be contested in this action, instituted more than two years since the issuance of the policy, only upon the ground of nonpayment of premiums.

In the trial and judgment in the Superior Court we find

No error.

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

EDWARD DALTON SMITH v. NEW YORK LIFE INSURANCE COMPANY.

(Filed 26 February, 1936.)

1. Insurance K a—Rule that knowledge of local agent will be imputed to insurer held not applicable under facts of this case.

Plaintiff's evidence disclosed that he told insurer's soliciting agent that he had had trouble with his eyes and had had them treated, but that upon medical examination for the policy he failed to disclose that he had had an operation on one eye a little over a year before the examination and an operation on the other eye less than a year prior thereto, although the examination blank specifically called for the disclosure of such information and plaintiff signed same immediately below a declaration that he

had read same carefully and that each of his answers was full, complete, and true. Six years after the policy became effective, plaintiff became practically blind, and instituted this suit on the disability provision of the policy. *Held:* The disclosure to the soliciting agent that he had had trouble with his eyes and had been treated for them is insufficient to impute to insurer knowledge that insured had been in a hospital and had his eyes operated upon, especially in the face of his statement to the contrary made to the medical examiner of the company.

2. Insurance I b—Insurer held entitled to rescission of disability clause for fraud.

Where plaintiff's evidence in an action on the disability clause of a policy of insurance establishes that the disability provisions in his policy were procured by false statements and the suppression of material facts as to insurability, made by insured to insurer's medical examiner, plaintiff may not recover, and insurer is entitled to judgment rescinding the disability provisions upon the return of premiums paid therefor, with interest, the disability clause expressly providing that the provisions of the incontestability clause should not apply to the disability insurance.

3. Insurance R c—

The evidence in this case *is held* to show that insured's disability resulted from a disease existing prior to the issuance of the policy, which, by the terms of the policy, was excluded from the disability benefits.

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

APPEAL by plaintiff from *Barnhill, J.*, at May Term, 1935, of PITT. Affirmed.

This is a civil action to recover disability benefits upon a $5,000 life insurance policy containing a provision known as a total and permanent disability clause, which is to the effect that upon the insured's becoming disabled by injury or disease that wholly prevents him from performing any work or engaging in any business for remuneration or profit, occurring after said insurance policy took effect and before the insured was 60 years old, he shall be entitled to a waiver of further premiums and $10.00 per month for each $1,000 insurance set forth in the face of the policy, upon proof that the insured will be continuously and totally disabled for life.

It is admitted by the defendant that a policy with the total and permanent disability clause was issued by it to the plaintiff on 8 October, 1926, and that the premiums were paid thereon up to the time of filing claim thereunder, and that proof of claim was duly made in August, 1932, by the plaintiff for the sum of $50.00 per month from September 1, 1932. However, the defendant averred in its answer that the policy was procured by false and fraudulent representations made in the application therefor, and that the disease causing plaintiff's disability existed prior to the issuance of the policy, and declined to pay the disability

benefits, and gave notice of its election to rescind the provision for such benefits in the policy, and tendered the amount of premiums theretofore paid therefor.

The plaintiff declined to accept the tender of the amount of premiums paid and filed a reply wherein he alleged that if any false statements were made in the application for the insurance policy, they were made with the knowledge of the defendant's soliciting agent and medical examiner of their falsity, and that the company thereby waived any defense grounded upon such statements, and is estopped to set up such defense, and that the disability occurred after the issuance of the policy.

The case came on for trial and at the close of the plaintiff's evidence the court granted the defendant's motion for judgment as of nonsuit, and further ordered and adjudged, upon the pleadings and evidence, that the permanent disability provision in the policy be canceled. From this judgment the plaintiff appealed, assigning errors.

S. J. Everett for plaintiff, appellant.
Albion Dunn for defendant, appellee.

SCHENCK, J. The provision of the policy under which the plaintiff claims 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 should be noted that the disability benefits under the policy are specifically excepted from the incontestability clause thereof, said clause being in the following words: "This policy shall be incontestable after two years from its date of issue, except for nonpayment of premium, and except as to provisions and conditions relating to disability and double indemnity benefits."

The plaintiff contended and offered his own testimony and other evidence tending to prove that his eyes were good when the policy was issued and took effect in 1926, and gave him no trouble at that time, and that he was in good health and under no disability until January, 1932, and that he filed claim in August, 1932, and that when the policy was sold to him in 1926 he was not nineteen years old and had several years before been a pupil in a school conducted by the agent of the defendant who solicited his insurance, that he was wearing glasses at the time, and told her about his eyes having been treated, and that he accepted the statement of that agent when she told him that the treatment of his eyes made no difference; that the agent filled out the application and sent him

to the doctor, that the doctor had personally known him for nine years, and had had an office within 50 yards of his father's store, where the doctor was seen by the plaintiff practically every day, and where the plaintiff went several times a week; that in making the examination the doctor asked him only four or five questions and nothing about his eyes, although he had glasses on at the time and would have told him about his eye treatment if the doctor had asked him; that in signing the paper containing the questions and answers he did as directed by the doctor, and did not know he was responsible for what the doctor had written, and in putting his name on the paper he obeyed the doctor, whom he, as a child, had obeyed many times before; that he is now totally and permanently disabled by practical blindness caused by glaucoma simplex.

The "Answers to the Medical Examiner," which is a part of the policy upon which this action is based and which was introduced in evidence, contains, among other questions and answers, the following: "7. A. Have you had any accident or injury or undergone any surgical operation? Yes, appendicitis, 12 years ago. Operation. Recovery. 7. B. Have you been under observation or treatment in any hospital, asylum, or sanitarium? Yes, appendicitis. . . . 8. D. Have you consulted a physician for or suffered from any ailment or disease of the skin, middle ear, or eyes? No. . . . 10. Have you consulted a physician for any ailment or disease not included in your above answers? Yes, malaria fever, 1922, two weeks, moderate, recovery."

The plaintiff stated on cross-examination that the first time he went to the hospital for trouble with his eyes was in 1925, and that before that he had consulted Dr. Daniels of New Bern and bought glasses, and that Dr. Daniels had told him that he had a decayed nerve of the right eye, and that about six months after consulting Dr. Daniels he went to Johns Hopkins Hospital and there consulted Dr. McLean for treatment on 16 September, 1925, and that Dr. McLean performed an operation on his eye, he bored a hole in it and put a little gold wire in the eye, that Dr. McLean operated the first time he consulted him, and that the eye did not pain him any more until 1926, at which time he made a second visit to Dr. McLean and he performed another operation in his other eye and told him that the condition which existed in September, 1925, had spread to the other eye, that the operation on his left eye was a different operation, a trephine, the doctor just opened the eye but did not put a wire in this one.

On further cross-examination the plaintiff also stated: "I found my statement in the application was false; I did not know it then; I found out it was false when the company sent me the check for the return premiums; the statement about my eyes is not true, but I didn't make it; the one about not having consulted a physician in the last five years is not true; if the operation on the eyes was a surgical operation, my

statement that the operation for appendicitis was the only operation I had had was not true; I don't know if I would call the eye operation a surgical operation. When I stated that malaria was the only disease I had had, that was not true. I don't know that I would call it a surgical operation. Except as to my eyes I had not been treated by a doctor within five years next to the date of the policy, except for malaria."

When asked why he did not tell about the operations on his eyes at the time he was asked if he had consulted a doctor about any other disease, the plaintiff said: "I don't know. I didn't have my mind on my eyes then. I had on glasses; it looks to me like he would have asked me about my eyes." The plaintiff further testified that he knew he was undergoing a physical examination for the purpose of finding out whether he was able to get the policy, and when asked why he did not tell the doctor what he told the soliciting agent, said: "I thought he was going to make the examination; I didn't know it was a questionnaire"; and further stated, "If he didn't find it out, I was not going to tell him; it looks to me like he could find it out; I knew it; I never told him because he didn't ask me anything about it, and I knew at the time that I had had treatment for my eyes, that a wire had been put in my right eye, and that it had been drained, and that another operation had been performed on my left eye during my second trip to Baltimore."

It appears from the plaintiff's own testimony that he withheld from the medical examiner of the company the fact that he had been but a short time previously to Johns Hopkins Hospital in Baltimore and had had an operation performed upon one eye within shortly over a year before making the application for insurance, and upon the other eye in considerably less than a year before. It is also apparent that the representations made by the plaintiff to the defendant's medical examiner to the effect that he had not been in a hospital and that he had not been treated by any physician except for appendicitis and malaria, when as a matter of fact he had been in the hospital and had both of his eyes operated on, were false representations of material facts.

The questions and answers contained in the medical examination are followed by this provision: "On behalf of myself and of every person who shall have or claim any interest in any insurance made hereunder, I declare that I have carefully read each and all of the above answers, that they are each written as made by me, and that each of them is full, complete, and true, and agree that the company believing them to be true shall rely and act upon them," and immediately following this provision is the plaintiff's signature.

The attending physician's report on the claim for disability filed by the plaintiff on 18 August, 1932, shows that his "first consultation in the present disability" of the plaintiff was held on 16 September, 1925, and that the date of the "onset of the present disability" was about

September, 1924, and that his diagnosis of the "disease . . . causing the present disability" was glaucoma simplex.

We do not think that this case falls within those cases which hold that, in the absence of fraud or collusion between the insured and the soliciting agent, the knowledge of the agent, when acting within the scope of the powers entrusted to him, of any misstatement of facts will be imputed to the company, although the policy contains stipulations to the contrary, and that such imputed knowledge constitutes a waiver of any defense upon the ground of such misstatements and is an estoppel to the setting up of such defense. The distinction between those cases and the instant case is that in the former the agents of the insurers were informed of the true facts, but did not convey them to the insuring companies by truthfully filling out the answers to the questions contained in the applications or otherwise, whereas in the instant case there was a suppression of the truth from the medical examiner who filled out the questionnaire, by which he was deceived, and which caused him to convey to the company false information, the falsity of which was known to the insured but unknown to the medical examiner, or the insurer. The fact that the plaintiff had told the soliciting agent that he had had trouble with his eyes and had had them treated, and the facts that the medical examiner of the company knew him from boyhood and knew he wore glasses were not sufficient to impute to the company knowledge of the fact that he had been in a hospital and had his eyes operated upon—especially is this so in the face of this statement to the contrary made to the medical examiner of the company.

We conclude and hold that by reason of the false statements of material facts made by the plaintiff to the medical examiner of the defendant, and of the suppression of material facts as to his insurability, the plaintiff is not entitled to recover in this action, and that the defendant is entitled to have the disability provisions of the policy sued upon rescinded upon the return by it to the insured of the amount of the premiums paid therefor, with interest.

It would seem further that the total and permanent disability clause of the policy was not applicable to the plaintiff's present disability for the reason that the evidence tends to show that it did not occur after the policy sued on took effect, since, according to the report of the physician filed with the application for disability benefits, the "onset of the present disability" was in 1924, and that his "first consultation in the present disability" was in 1925, and that the policy did not take effect until 1932.

The judgment of the Superior Court is

Affirmed.

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

R. H. RIGSBEE, EXECUTOR, v. W. J. BROGDEN, ADMINISTRATOR.

(Filed 26 February, 1936.)

1. Life Estates B c: Executors and Administrators D f—Estate of life tenant is liable for taxes assessed prior to his death as preferred claim.

A life tenant is liable for taxes assessed against the property during his lifetime, C. S., 7982, and when he dies without paying same they constitute a claim against his estate for taxes assessed previous to his death within the meaning of C. S., 93, and are payable in the third class stipulated by the statute fixing priority of payment of claims against the estate of an insolvent.

2. Same—Assessments for public improvements assessed prior to death of life tenant do not constitute preferred claim against his estate.

Street and sidewalk assessments constitute a lien against the property not collectible out of other properties belonging to the owner, and by provision of statute a life tenant of the property is not liable for the whole assessment, C. S.. 2718, but such assessment is to be proportioned between the life tenant and remainderman, C. S., 2720, and upon the death of the life tenant the assessments for public improvements levied against the property prior to his death do not constitute a preference against his estate payable in the third class of priority as a tax assessed on the estate prior to his death. C. S., 93.

3. Same—Charges for water and gas connections, incurred prior to death of life tenant, do not constitute preferred claim against his estate.

Charges for water and gas connections, incurred during the lifetime of a life tenant and unpaid at his death, do not constitute a preferred claim against his estate as taxes assessed on the estate prior to his death, C. S., 93, since in no event would such charges stand upon a higher plane than assessments for permanent improvements. C. S., 2710 (4), 2718.

4. Same—Tax-sale certificate in the hands of remainderman does not constitute preferred claim against the estate of life tenant.

A tax-sale certificate in the hands of a remainderman, representing taxes paid by the remainderman during the lifetime of the life tenant, may not be proved as a preferred claim against the estate of the life tenant, since the remainderman's sole remedy upon the tax-sale certificate is by foreclosure under the provisions of C. S., 8028.

5. Life Estates B d: Executors and Administrators D d—Proof of life tenant's receipt of proceeds of fire insurance does not alone entitle remainderman to amount thereof from life tenant's estate.

A remainderman proving that the life tenant received the proceeds of a fire insurance policy on the property and failed to account therefor prior to his death does not entitle the remainderman to recover the entire amount of the proceeds of the policy from the estate of the life tenant, since the life tenant may have been entitled to part of the proceeds, or may have spent the proceeds of the policy in repairing the damage caused by the fire, and where the remainderman shows receipt of the proceeds of the

policy by the life tenant and failure on the part of the life tenant to account therefor before his death, without more, the remainderman is not entitled to judgment therefor against the estate of the life tenant.

APPEAL by defendant from *Harris, J.,* 10 May, 1935, at Raleigh. From DURHAM.

Civil action to determine liability of decedent's estate for (1) unpaid taxes levied on life estate prior to death of life tenant; (2) street and sidewalk assessments and water and gas connections assessed prior to death of life tenant; (3) tax-sales certificate purchased by plaintiff; (4) insurance collected by life tenant and unaccounted for prior to his death.

The pertinent facts are:

1. That A. M. Rigsbee died in 1922, leaving a last will and testament in which he devised certain real estate in the city of Durham to his son, W. T. Rigsbee, for life, remainder over in the event of the life tenant's death without issue.

2. That W. T. Rigsbee, the life tenant, died without issue, 22 August, 1931, and W. J. Brogden was duly appointed administrator *c. t. a.* of his estate.

3. That during the years 1929, 1930, and 1931 the county and city taxes assessed against said property amounted to $15,170.51, which have not been paid. In addition, plaintiff in his official capacity holds tax-sales certificate for remainder of 1930 and 1931 taxes, amounting to $1,949.68, or $1,502.98.

4. That street and sidewalk assessments and water and gas connections amounting to $549.03 were also assessed against said property during the lifetime of W. T. Rigsbee, which have not been paid.

5. That in March, 1931, the life tenant collected $4,571 from fire insurance policies covering damage to buildings situate on said property, and has never made any accounting therefor to plaintiff as representative of the remaindermen, or otherwise.

6. That the estate of W. T. Rigsbee is insolvent.

7. That since the institution of this action, and pending the appeal, the defendant administrator *c. t. a.* has died, and Sumter C. Brawley, Jr., has been duly appointed in his stead.

Upon these, the facts chiefly pertinent, it was adjudged in the court below:

1. That the taxes levied by the city and county against said property prior to the death of the life tenant, together with the street and sidewalk assessments and charges for water and gas connections, including the tax-sales certificate held by the plaintiff, be paid by the administrator of W. T. Rigsbee's estate as preferred claims in the "Third Class" under C. S., 93.

2. That plaintiff is entitled to participate as a general creditor on account of the insurance funds, amounting to $4,571, collected by the deceased during his lifetime and unaccounted for to plaintiff, or otherwise.

From the judgment thus entered, the defendant appeals, assigning errors.

Hedrick & Hall and L. P. McLendon for plaintiffs.

Brawley & Gantt for Mattie R. Bitting, Sallie Rigsbee, and Mary E. Middleton.

Bryant & Jones and Egbert L. Haywood for Zoa L. Haywood and Rosa R. Fulford.

Fuller, Reade & Fuller for defendant administrator.

STACY, C. J. This is an administration suit, brought under C. S., 135, to determine the liability of decedent's estate for the items enumerated in the complaint, and to fix the order or priority of their payment, if liability be found. *Fisher v. Trust Co.*, 138 N. C., 90, 50 S. E., 592.

It is conceded on all hands that with the exception of the homestead rights and the rights of a widow, which generally are superior to the claims of creditors, the debts of a decedent must be paid, if he leave anything with which to pay them, and if his estate be not sufficient to pay his debts in full, then they are to be paid in classes, with those of the last class, if and when reached, sharing ratably in what is left. C. S., 93; *Fertilizer Co. v. Bourne*, 205 N. C., 337, 171 S. E., 368; *Trust Co. v. Lentz*, 196 N. C., 398, 145 S. E., 776; *Murchison v. Williams*, 71 N. C., 135.

Putting aside matters of procedure, we go to a consideration of the questions raised by the appeal:

1. Taxes assessed during the lifetime of a decedent, on land in which he held a life estate, remain unpaid at his death. Are they entitled to preferential payment out of the personalty left by him? In other words, are taxes assessed upon a life estate prior to the death of the life tenant, "taxes assessed on the estate of the deceased previous to his death," within the meaning of C. S., 93, "Third Class"? We agree with the trial court that this question should be answered in the affirmative.

It is provided by C. S., 7982, that "every person shall be liable for the taxes assessed or charged upon the property or estate, real or personal, of which he is tenant for life," etc. It follows, therefore, as the life tenant is liable for the taxes assessed upon his life estate prior to his death, such taxes fall in the "Third Class" under the statute, and are to be regarded as "taxes assessed on the estate of the deceased previous to his death." C. S., 93. Such was the holding in *Coleman v. Coleman*,

5 Redfield Reports (N. Y.), 524, under a like statute and on a similar state of facts. See, also, *Penn's Executors v. Penn's Executors,* 120 Ky., 557, 87 S. W., 306; *Brodie v. Parsons,* 23 Ky., 833, 64 S. W., 426; *Gates v. Wirth,* 181 Ia., 19, 163 N. W., 215; *Lantz Estate v. McDaniel,* 99 Ind. App., 233, 190 N. E., 130. This conclusion is likewise supported, in tendency at least, by the decision in *Sherrod v. Dawson,* 154 N. C., 525, 70 S. E., 739.

The fact that the remainderman is given the right of forfeiture and redemption under C. S., 7982, in case the life tenant suffer the land to be sold for taxes, is in recognition of the duty resting upon the life tenant to keep the property free from tax liens, so that it may pass to the remainderman unencumbered by such liens. *Penn's Executors v. Penn's Executors, supra.*

2. Are street and sidewalk assessments, assessed against the property proir to the death of the life tenant, to be regarded as "taxes assessed on the estate of the deceased previous to his death"? The law answers this question in the negative.

Such assessments are not taxes levied against the owner, but are charges upon the land, laid with reference to supposed benefits accruing thereto, and if the land benefited be not sufficient in value to pay the assessments in full, the deficiency is not collectible out of other properties belonging to the landowner. *Carawan v. Barnett,* 197 N. C., 511, 149 S. E., 740; *High Point v. Brown,* 206 N. C., 664, 175 S. E., 169; *Felmet v. Canton,* 177 N. C., 52, 97 S. E., 728; *Canal Co. v. Whitley,* 172 N. C., 100, 90 S. E., 1; 25 R. C. L., 174.

It is provided by C. S., 2718, that assessments for permanent improvements, such as street and sidewalk assessments, duly laid or levied on real estate in the possession or enjoyment of a tenant for life or for years, "which constitute a lien upon such property, . . . shall be paid by the tenant for life or for years, and the remaindermen after the life estate, or the owner in fee after the expiration of tenancy for a term of years, pro rata their respective interests in said real estate"; and further, in C. S., 2720, if such assessments are paid by any one of the interested parties, "the party paying more than his pro rata share . . . shall have the right to maintain an action in the nature of a suit for contribution against the delinquent party . . . and be subrogated to the right of the city . . . to a lien on such property for the same." Thus, it would seem, the deceased was never liable for the full amount of said assessments, conceding the validity of these statutes for present purposes. *Raleigh v. Peace,* 110 N. C., 32, 14 S. E., 521. And even if the plaintiff were in position to maintain an action for contribution and subrogation under the statute, which he is not, still this would not place his claim in the category of "taxes assessed on the

estate of the deceased previous to his death." *Saluda v. Polk County,* 207 N. C., 180, 176 S. E., 298; *Statesville v. Jenkins,* 199 N. C., 159, 154 S. E., 15.

3. Are charges for water and gas connections, incurred during the life of the life tenant and unpaid at his death, "taxes assessed on the estate of the deceased previous to his death"? The answer is, No.

In no event would such charges stand upon a higher plane than assessments for permanent improvements. C. S., 2710 (4); C. S., 2718; *Justice v. Asheville,* 161 N. C., 62, 76 S. E., 822.

4. Is the tax-sales certificate in the hands of the plaintiff provable as a preferred claim against the estate of the deceased? The answer is, No. C. S., 7989 (a), has no application to the facts of this case.

Foreclosure and redemption are the pertinent remedies of the individual holder of the certificate and the owner of the land. Foreclosure by civil action is the "sole right and only remedy to foreclose the same" afforded the plaintiff under the statute. C. S., 8028; *Wilkes Co. v. Forester,* 204 N. C., 163, 167 S. E., 691. "The applicable statutes create a lien for purchasers at tax sales, and also prescribe the procedure for enforcing said lien. 'Foreclosure' is the process provided for turning the lien into money." *Logan v. Griffith,* 205 N. C., 580, 172 S. E., 348. "The courts everywhere are in accord upon the proposition that if a valid statutory method of determining a disputed question has been established, such remedy so provided is exclusive and must be first resorted to and in the manner specified therein"—*Bar Association v. Strickland,* 200 N. C., 630, 158 S. E., 110, quoted with approval in *Maxwell, Comr., v. Hinsdale,* 207 N. C., 37, 175 S. E., 847.

Nothing was said in *Fertilizer Co. v. Bourne, supra,* which properly interpreted, militates against our present position. And it is conceded that an election of remedies would have been open, had the county or city purchased the certificate. *New Hanover County v. Whiteman,* 190 N. C., 332, 129 S. E., 808; *Shale Prod. Co. v. Cement Co.,* 200 N. C., 226, 156 S. E., 777; *Wilmington v. Moore,* 170 N. C., 52, 86 S. E., 775.

5. Is plaintiff entitled to prove claim for insurance funds collected by life tenant on account of fire damage to buildings situate on the property and unaccounted for to the remaindermen? The answer is, No.

The failure of the life tenant to render an accounting to plaintiff as representative of the remaindermen of insurance funds collected on account of fire damage to buildings situate on the property, without more, does not render his estate liable therefor. Certainly not for the whole amount. *Batts v. Sullivan,* 182 N. C., 129, 108 S. E., 511; *King v. St. Mut. Fire Ins. Co.,* 54 Am. Dec., 683, and note. Compare *Miller v. Asheville,* 112 N. C., 759, 16 S. E., 762. It is conceded that as life

tenant he rightfully collected said insurance, perhaps was entitled to a portion of it; and *non constat* that he may not have used the same in repairing the damaged buildings. In other words, receipt of such insurance funds by the life tenant, though unaccounted for to remaindermen, does not *ipso facto* import liability against his estate. Something more must be made to appear. *Middleton v. Rigsbee,* 179 N. C., 437, 102 S. E., 780. The facts agreed are too meager to warrant a judgment against the estate for the full amount of said funds. However, as the estate is insolvent and will be consumed in the payment of preferential claims, the question apparently is academic. It has not been debated on brief.

Plaintiff very properly says in his brief: "It is frankly admitted that the administrator would not be chargeable with the sum of $800.00 which was paid out by him in good faith prior to notice of the claims asserted by the plaintiff through the institution of this action, because it has been held in *Mallard v. Patterson,* 108 N. C., 255, that the administrator shall not be chargeable for assets he may have disbursed before the commencement of the plaintiff's action when the plaintiff sued on a claim that had not been presented within twelve months from the first publication of notice to creditors."

The result, therefore, is an affirmance in part and a reversal in part of the judgment below. Let the cause be remanded for judgment accordant herewith.

Error and remanded.

JANET GAFFNEY v. LUMBERMEN'S MUTUAL CASUALTY COMPANY, UNITED STATES FIDELITY AND GUARANTY COMPANY, JOHN WILSON, Z. B. PHELPS, AND C. M. ALLRED.

(Filed 26 February, 1936.)

Torts B b—C. S., 618, providing for contribution between tort-feasors, does not apply to liability of insurance carriers of tort-feasors.

Plaintiff obtained judgment jointly against the drivers of two cars for injury to plaintiff caused by their concurrent negligence. Upon return of execution against both defendants unsatisfied, plaintiff instituted this suit against the driver of one of the cars and the carrier of liability insurance on the car driven by him under the "omnibus clause" of the policy. Defendants asked that the driver of the other car, the owner thereof, and the carrier of liability insurance thereon be made parties defendant, and set up a cross action against such defendants for contribution under the provisions of C. S., 618. The insurer joined on motion of the original defendants demurred to the cross actions of each of the original defendants. *Held:* The demurrer should have been sustained, since the

provisions of C. S., 618, by express terms, applies only to joint tort-feasors and to joint judgment debtors, and the demurring defendant was neither, since its liability under the policy is contractual and not founded on tort, and no judgment had been recovered against it by any of the parties.

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

APPEAL by the defendant United States Fidelity and Guaranty Company from judgment overruling demurrer to cross actions of the co-defendants, entered by *Harding, J.*, at May Term, 1935, of MECKLENBURG.

J. Laurence Jones for United States Fidelity and Guaranty Company, appellant.

Goebel Porter and Henry E. Fisher for Lumbermen's Mutual Casualty Company and C. M. Allred, appellees.

SCHENCK, J. The plaintiff Janet Gaffney was injured in an automobile collision between two automobiles, one owned by G. R. Leiter and operated by C. M. Allred, and the other owned by Z. B. Phelps and operated by John Wilson. She instituted an action in the Superior Court of Mecklenburg County against the respective owners and drivers of said automobiles. The case came on for trial and the Superior Court entered judgment of nonsuit as to both of the owners, and the case proceeded to the jury upon issues drawn against the two drivers, and the jury found that the plaintiff was injured by their joint and concurrent negligence and assessed damages at $5,000. From judgment based upon the verdict the defendant C. M. Allred appealed. No appeal was taken by the defendant John Wilson. Upon the appeal of Allred, the judgment of the Superior Court was affirmed in *Gaffney v. Allred,* 207 N. C., 553. The automobile owned by Leiter and driven by Allred was covered by a liability insurance policy issued by the Lumbermen's Mutual Casualty Company. The automobile owned by Phelps and driven by Wilson was covered by liability insurance policy issued by the United States Fidelity and Guaranty Company.

After the affirmation of the judgment of the Superior Court the plaintiff had execution to issue against both Allred and Wilson, and upon same being returned unsatisfied, she brought this action to recover $5,000, the amount of the judgment, against the Lumbermen's Mutual Casualty Company and C. M. Allred under what is known as the "omnibus clause" of the policy issued by said casualty company to Leiter, which clause, in effect, provides (1) that the terms and conditions of the policy are so extended as to be available to any person (with certain exceptions) while riding in or operating the automobile described therein with permission of the named assured, and (2) that the

insolvency or bankruptcy of an assured shall not release the casualty company from payment of damages for injury sustained or loss occasioned during the life of the policy, and that in the event of an execution against an assured being returned unsatisfied, in an action brought by the injured, by reason of such insolvency or bankruptcy, an action may be maintained by the injured person against the casualty company for the amount of any judgment obtained against an assured, not exceeding the limits of the coverage of the policy.

The Lumbermen's Mutual Casualty Company filed answer to the complaint and denied that it was liable to the plaintiff in any sum, and asked that the United States Fidelity and Guaranty Company, John Wilson, the driver of the Phelps car, and Z. B. Phelps, be made parties defendant, and set up a cross action against said guaranty company and Wilson, wherein it alleged that Wilson was insolvent and that execution against him had been returned not satisfied, and that the United States Fidelity and Guaranty Company was liable under its policy issued to Phelps for that portion of the liability on the joint judgment of the plaintiff for which Wilson is responsible.

Paragraph 18 of the cross action of the casualty company is as follows: "That if any judgment is rendered against this defendant on account of the joint and concurring negligence of John Wilson and C. M. Allred, which resulted in a joint judgment in the amount of $5,000 in favor of Miss Janet Gaffney against John Wilson and C. M. Allred, this defendant asks for a judgment over against the said United States Fidelity and Guaranty Company and the other defendants, as provided by the statute regulating contribution between joint tort-feasors."

The defendant C. M. Allred filed answer to the complaint and practically adopted the cross action of the Lumbermen's Mutual Casualty Company, and alleged that John Wilson was insolvent, and that execution against him had been issued by the plaintiff and had been returned not satisfied, and that the United States Fidelity and Guaranty Company was liable under its policy issued to Z. B. Phelps for that portion of the liability on the joint judgment of the plaintiff for which Wilson is responsible.

Paragraph 14 of the cross action of Allred is as follows: "That this defendant asks for a judgment over against John Wilson and Z. B. Phelps and United States Fidelity and Guaranty Company under and as provided by the statute 618 regulating contributions between joint tort-feasors."

The Lumbermen's Mutual Casualty Company and C. M. Allred, in setting up their cross actions against the United States Fidelity and Guaranty Company, relied upon the provisions of section 618 of the Consolidated Statutes.

To these cross actions the United States Fidelity and Guaranty Company filed a demurrer upon the ground that said actions failed to state facts sufficient to constitute any cause of action against it, the demurrant. This demurrer presents the single question as to whether the cross actions of the Lumbermen's Mutual Casualty Company and of C. M. Allred, respectively, have stated facts sufficient to bring them within the provisions of section 618 of the Consolidated Statutes. If such cross actions fall within such provisions the demurrer was properly overruled, and if they do not fall within such provisions the demurrer was improperly overruled.

The provisions of section 618 of the Consolidated Statutes, all of which are designed to furnish relief or protection to two classes of persons, and no others, namely, joint judgment debtors and joint tort-feasors, are as follows: (1) Those who are jointly liable as judgment debtors, either as joint obligors or as joint tort-feasors, may pay the judgment and have it transferred to a trustee for their benefit, and such transfer shall have the effect of preserving the lien of the judgment against the judgment debtor who does not pay his proportionate part thereof to the extent of his liability; (2) joint tort-feasors against whom judgment has been obtained may, in a subsequent action therefor, enforce contribution from other joint tort-feasors who were not made parties to the action in which the judgment was taken; (3) joint tort-feasors who are made parties defendant, at any time before judgment is obtained, may, upon motion, have the other joint tort-feasors made parties defendant; (4) joint judgment debtors who do not agree as to their proportionate liability, by petition in the cause, in which it is alleged that any other joint judgment debtor is insolvent or a nonresident and cannot be forced under execution to contribute to the payment of the judgment, may have their proportionate liability ascertained by court and jury; and (5) joint judgment debtors who tender payment of judgment and demand in writing transfer thereof to trustee for their benefit, and are refused such transfer by judgment creditors, may not thereafter have execution issued against them upon said judgments.

The allegations of the cross actions of the defendant Lumbermen's Mutual Casualty Company and of the defendant C. M. Allred fail to bring the defendant United States Fidelity and Guaranty Company within any of the foregoing provisions, since the guaranty company is, under said allegations, neither a joint tort-feasor nor a joint judgment debtor with the casualty company or with Allred—nor with anyone else. There is no allegation that the guaranty company has committed any tort or that any judgment has been taken against it. Such liability as the guaranty company has to any of the parties to this action, or to the former action, exists by virtue of its policy issued to Z. B. Phelps,

and is purely contractual. A most liberal construction of the statute will not permit the writing into it of the liability insurance carrier of tort-feasors when only tort-feasors and judgment debtors are mentioned therein.

The judgment overruling the demurrer of the United States Fidelity and Guaranty Company is

Reversed.

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

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MARIE RICE v. SWANNANOA-BERKELEY HOTEL COMPANY, A CORPORATION.

(Filed 26 February, 1936.)

1. Trial E c—Denomination of special instructions of law "contentions" held prejudicial error.

In apt time defendant tendered a request for special instructions embodying principles of law, correctly stated, applicable to the evidence. The trial court gave the jury the instructions requested, and then instructed the jury that the requested instructions given constituted the defendant's contentions. *Held:* The designation of the special instructions of law as "contentions" of defendant constitutes reversible error, since it may have misled the jury to defendant's prejudice.

2. Appeal and Error F a—

Where appellant, in apt time, excepts and assigns error to the charge, a formal objection to the charge is not needed in order for the exception to be considered on appeal. N. C. Code, 590 (2).

APPEAL by plaintiff from *Oglesby, J.*, at Regular December Term, 1935, of BUNCOMBE. Affirmed.

This action was commenced and tried in the general county court of Buncombe County, N. C., before his Honor, J. P. Kitchin, judge, and a jury. The action was for actionable negligence, brought by plaintiff against defendant, alleging damage.

The plaintiff, a professional dancer and performer, was a guest in defendant's hotel, and was injured about 12:45 the night of 21 December, 1934, by slipping and falling on the floor. The gravamen of the complaint is to the effect that defendant was negligent in having an excessively slippery condition of the floor near the elevator, and not lighted sufficiently. That without notice of the dangerous condition of

the floor, the plaintiff went to the elevator, as was her custom, to go to her room, and slipped and fell. She alleged that the proximate cause of her injury was the dangerous condition of the floor.

The defendant denied the material allegations of the complaint, and alleged: "That on or about the night of 21 December, 1934, prior to, at, and after plaintiff fell, as aforesaid, defendant, through its employees, was engaged in scrubbing and washing the lobby floor of said Swannanoa-Berkeley Hotel, and that in all respects said work was conducted in a reasonable, proper, careful, and prudent manner. That prior to said fall, plaintiff was present in said lobby during the greater part of said scrubbing and washing, and well knew the temporary condition of said floor, and, up to the moment of said fall, was repeatedly warned and cautioned by the defendant that the portion thereof which was in the process of scrubbing was slippery, and was further warned and requested by the defendant to keep off the same; notwithstanding said warnings, and in willful disregard thereof, the plaintiff deliberately, knowingly, negligently, and willfully went over and upon such portion of said floor in the proximity of said elevator, and by her own negligence caused and contributed to any injuries she may have sustained, and such negligence is hereby pleaded in bar of recovery."

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? Ans.: 'Yes.'

"2. Did the plaintiff by her own negligence contribute to her injury, as alleged in the answer? Ans.: 'No.'

"3. What damages, if any, is the plaintiff entitled to recover of the defendant? Ans.: '$3,500.'"

The general county court rendered judgment on the verdict. The defendant made numerous exceptions and assignments of error and appealed to the Superior Court. On certain exceptions and assignments of error made by defendant, the Superior Court sustained same and rendered the following judgment, in part: "It is further ordered, decreed, and adjudged that the verdict of said general county court be and is hereby set aside, the judgment of said court reversed, and the above cause remanded for a new trial." The plaintiff excepted and assigned error to the judgment of the Superior Court, and made other exceptions and assignments of error and appealed to the Supreme Court.

Zeb. F. Curtis and Geo. F. Meadows for plaintiff.
Adams & Adams for defendant.

CLARKSON, J. The trial of this action was in the general county court of Buncombe County, N. C. From a careful examination of the

record and charge by the judge in that court we see no error, except in one particular. The judge of the Superior Court sustained the following exception and assignment of error made by defendant in the general county court: "I charge you, gentlemen, that the charge I incorporated given by the defendant was its contention, one of its contentions, which it is entitled to have heard."

In the record is the following: "Defendant has asked me to give you these instructions: *First:* A hotel or innkeeper is not an insurer of the safety of his guests, but is only required to exercise ordinary care in the maintenance and operation of his hotel, that is to say, that degree of care which an ordinarily prudent man in a similar relation and under like conditions and circumstances would exercise, and as to the first issue, that of negligence on the part of the defendant, the burden is upon the plaintiff to satisfy you by the greater weight of the evidence that the defendant has violated this rule in some respect, and unless you do so find, you should answer the first issue 'No.' *Second:* The washing of the floor was not in itself negligence, as it was an obligation or duty on the part of the defendant to keep it washed, and as to the first issue the burden is upon the plaintiff to show you by the greater weight of the evidence that the defendant in some respect failed to exercise ordinary care in washing the floor, and that such failure was the proximate cause of the injury, if you should find that plaintiff was injured. *Third:* The burden of the second issue as to contributory negligence is upon the defendant to satisfy you by the greater weight of the evidence that the plaintiff by her own negligence contributed to such injury as you may find she received, if any, but if you find from all the evidence, and the greater weight thereof, that the plaintiff saw the floor during the period it was being washed, and after being warned that the floor was slick, and that she knew, or should have known, of its condition, then the court charges you that her use of such floor under the conditions above outlined would be negligence, and if such negligence was the proximate cause of the injury, the plaintiff would be guilty of contributory negligence and you would answer the second issue 'Yes.' *Fourth:* If you shall find from all the evidence that the floor or lobby of the hotel was slick during the period it was being washed and there was danger of slipping or falling in attempting to walk across the same, and shall further find that the plaintiff saw, or should have seen, by the exercise of due care, the condition and danger of said floor, and shall further find that she knew she could have reached her room by way of the stairs without crossing any portion of the floor then being washed, but that she continued and stepped on the floor then being washed and slipped and fell, then plaintiff (if you find such conduct was negligence, as I have defined negligence to you), and that it was one of the proximate causes

of her injury, that the floor and stairway were both equally accessible and available to the plaintiff, and she knew of the condition of the floor at the time she crossed upon it, then you would be warranted in answering the second issue 'Yes,' the burden being upon the defendant to so satisfy you—I changed that fourth a little bit. You may retire, gentlemen."

Then follows: "The court: I charge you, gentlemen, that the charge I incorporated given by the defendant was its contention, one of its contentions, which it is entitled to have heard."

Whatever the trial court may have intended, the ordinary and natural meaning of the words is that the jury was to consider defendant's *instructions* as *contentions*. This may have misled the jury, and we think it is prejudicial and reversible error. To designate *special instructions of law,* correctly stated, applicable to the evidence of the case, and given by the court as *contentions of the parties,* is error.

N. C. Code, 1935 (Michie), sec. 590, is as follows: "(1) If an exception is taken upon the trial, it must be reduced to writing at the time with so much of the evidence or subject matter as may be material to the exception taken; the same must be entered in the judge's minutes and filed with the clerk as a part of the case upon appeal. (2) If there is error, either in the refusal of the judge to grant a prayer for instructions, or in granting a prayer or in his instructions generally, the same is deemed excepted to without the filing of any formal objections."

The defendant, under subsection 2, *supra,* in apt time made the exception and assignment of error, as is required by the statute, and "without the filing of any formal objections" has been the practice from "time whereof the memory of man runneth not to the contrary." N. C. Code, 643; *Paul v. Burton,* 180 N. C., 45 (47); *Cherry v. R. R.,* 186 N. C., 263 (265); McIntosh, N. C. Prac. and Proc. in Civil Cases, *supra,* sec. 580, p. 642. See, also, McIntosh, sec. 575, *et seq.,* p. 633, *et seq.*

We have been impressed in the many cases coming to this Court from the general county court of Buncombe County, N. C., with the careful and painstaking manner with which the able and learned judge of that court tries the cases. There is an old saying that "accidents happen in the best regulated families"—so it is with judges.

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

Affirmed.

CHARLIE LEE LEONARD v. PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA

(Filed 26 February, 1936.)

Insurance R c—Evidence held sufficient to be submitted to jury on issue of insured's total and permanent disability.

Plaintiff brought this action on a disability clause in a policy of life insurance. Plaintiff's testimony was to the effect that he was a farmer, that for over ninety days prior to filing claim for disability he had been unable to work in his occupation, that he had become extremely nervous, was internally sore, that he had repeatedly attempted to work on the farm but was able to work only for very short periods of time, and plaintiff introduced testimony of witnesses that from their observation of plaintiff, he was unable to do the work of a farmer with reasonable continuity, together with testimony of a medical expert that plaintiff was suffering from nervous disorder which caused him to become fatigued very easily. Defendant insurer introduced testimony of a medical expert that from his examination of plaintiff, plaintiff could perform part of the work of a farmer but not all. Other portions of the testimony of the witnesses did not support plaintiff's contention of total disability. *Held:* All the evidence, considered in the light most favorable to plaintiff, was sufficient to be submitted to the jury on the question of whether plaintiff was totally and permanently disabled within the meaning of the policy.

APPEAL by the plaintiff from *Cranmer, J.,* at October Term, 1935, of NASH. Reversed.

It is admitted by the pleadings that on 23 October, 1924, the defendant issued to the plaintiff a life insurance policy in the amount of $2,000, which contained a permanent total disability provision to the effect that if the insured became totally and permanently disabled before reaching the age of 60 years that the company would waive the payment of all future premiums and pay to the insured a monthly income of $30.00, such waiver to be effective and the first such monthly payment to become due and the period of liability to commence as of the date of receipt at the home office of the company of due written proof of such disability. The policy also contained the following: "Permanent Total Disability as used herein, is defined to mean: (1) . . . (2) Disability caused by accidental bodily injury or disease which totally prevents the insured from performing any work or engaging in any occupation or profession for wages, compensation, or profit, and which shall have totally and continuously so prevented the insured for not less than ninety days immediately preceding the date of receipt of due written proof thereof; or (3) . . ." It is also admitted that the defendant received notice of a total and permanent disability claim from the plaintiff more than 90 days later, 18 January, 1934, the date such disability is claimed and alleged to have commenced.

The plaintiff introduced his evidence and at the conclusion thereof the defendant moved to dismiss the action and for judgment as of nonsuit, which motion was allowed, and from judgment entered accordingly, the plaintiff appealed, assigning errors.

I. T. Valentine for plaintiff, appellant.
J. M. Broughton and W. H. Yarborough for defendant, appellee.

SCHENCK, J. The sole question presented by this appeal is whether the plaintiff's evidence was sufficient to be submitted to the jury upon the question of his permanent total disability as defined in the policy.

The plaintiff testified as follows: "I have worked on the farm all my life. I have never done anything else but farm, never done anything but that. I have done anything that come to hand on the farm, grubbed plant beds, worked in new grounds, made corn, tobacco, cotton, and peas. I plowed, primed tobacco, cured tobacco, raised tobacco, and pulled fodder. Along about the first of the year 1934 I was feeling nervous and troubled a little with internal soreness, or maybe two years prior to that, I was slightly bothered about working, and I had to take some little treatment from Dr. Martin once and from Dr. Coppedge. The first of January, 1934, I became so sore and nervous I could not do anything. I had to quit work, my genital organs were sore, swollen, and inflamed. I was swollen and sore in my back, hip, feet, and hands. My fingers were stiff in the morning and I was nervous. My heart troubled me only on exertion, getting around pretty brisk made my heart work faster and made me much more nervous. I was disabled because of soreness in my genital organs and through my body and hip joints and feet and stiffness in my fingers and it knocked me out completely. I have been continuously unable to work on the farm since 18 January, 1934, and I am still in that condition. I was directed by the defendant, the insurance company who issued the policy, to go to Dr. Paul Whitaker, in Kinston, for an examination. I was directed to go to Dr. Paul Whitaker for examination after I filed my claim for disability. Dr. Paul Whitaker examined me at that time and at the request of the defendant I have again offered myself today for examination by Dr. Paul Whitaker, and he examined me again today. Owing to the internal soreness and impairment to my digestion, about 18 January, 1934, I got so I could not eat, I had to live on a very restricted diet, such as milk and a few eggs and things like that, and I couldn't sleep any at nights. Sometimes I would go all night and not sleep any at all, sometimes sleep half a night. In the early spring of last year I tried to do some light work, such as feeding a fertilizer sower, and I found I couldn't. When I attempted to I became sore and nervous and

had to give it up. The first of June I was feeling some better, taking treatment all the time, and I felt improved up some and I decided to try to chop cotton. I chopped cotton about a day and a half, not very hard. I would stop and rest awhile at the end of a row, and this same genital trouble became worse, and it made me very nervous and made my heart run faster. When I would be out trying to chop I would get tired and get to the end of the row and rest some, and then chop another row. I have found since then most any time in riding about any distance I couldn't do any riding much and driving makes this whole side sore (indicating his right side), makes my hip joint extremely sore. If I drive from my residence to Nashville or Rocky Mount and back home I am laid up for two or three days and I can't sleep but very little. I drove to Mr. Wood's store and Mr. Walker's store, two miles, this year, and I haven't been to town as much as once a month. Some of my neighbors have seen me trying to work and I have discussed with them my condition and I have told some of my neighbors I couldn't work. I have been to two doctors this year. Since having to stay very quiet and keep from being sore and suffering I have got to be very forgetful. It seems like my power of concentration is not as good as before. I don't own any farm land. My brother Clyde and I have lived with our mother on her farm. I had charge of my mother's farm from 1920 until January of last year. My brother Clyde has had charge of it since then. I cannot continue to perform with reasonable continuity any work on the farm."

C. Clyde Leonard, brother of the plaintiff, testified, among other things, that his brother, prior to January, 1934, was able and did do manual labor, such as mauling, plowing, chopping, working tobacco, and anything that came to hand on the farm, but that "since 18 January, 1934, has not been able to carry on with reasonable continuity the usual work of a farmer. Since January, 1934, he has tried chopping a little in June and the latter part of May, and he had to quit. It made him sore. I saw in his face expressions of pain. He told me how he suffered. He could not rest at night if he did any work hardly, and it made him sore to work. I have looked after the farm since January, 1934."

Dr. C. T. Smith, a medical expert, testified that he had examined the plaintiff and that "my diagnosis was that he had neurasthenia, condition of the nerves in which he gets fatigued very easily, and does not have the stamina to carry on," and that "in my opinion Mr. Leonard is not able to carry on with reasonable continuity the essential duties of a farmer."

R. L. King testified that he was a neighbor of the plaintiff and had known him for 20 years and saw him often, and that "from my observation of Mr. Charlie Lee Leonard I don't think he could carry on with reasonable continuity the reasonably essential work of a farmer on the farm he was living on in January, 1934."

A. W. Jenkins testified that he had known the plaintiff all his life, and that up to 1 January, 1934, he had done practically all kinds of work on the farm, and further, that "I have an opinion satisfactory to myself from my observation and knowledge of Mr. Leonard as to whether he is, or has been since January, 1934, able to carry on with reasonable continuity the essential elements necessary for farming operations, and in my opinion he cannot, with any accuracy. There might be times when he could, but I do not think he could be depended on."

Dr. Paul Whitaker, of Kinston, testified that he had examined the plaintiff at the behest of the defendant, first on 12 September, 1934, and again on the day of the trial, and in response to the following question made the following answer: "Question. I will ask you this question, if in your opinion the plaintiff, when you examined him on 12 September, 1934, and now, I ask you if he could, in your opinion, follow, do with reasonable continuity, substantially all of the material acts necessary to the prosecution of the business of a farmer in the usual and customary manner of a farmer? Answer. I think he could do part of them, and part of them he could not."

While there are other portions of the testimony of these witnesses that do not tend to support the contentions of the plaintiff, all of the evidence, when construed in the light most favorable to the plaintiff, we think was sufficient to be submitted to the jury, and therefore hold that the trial judge erred in sustaining the motion for judgment as of nonsuit.

This case is governed by *Bulluck v. Insurance Co.*, 200 N. C., 642, where it is emphasized that the policy of the law of this State, in cases of this kind, is to submit conflicting evidence to the jury upon the theory that in the last analysis the jury is the weigh-master of the evidence. Also, in the same case, in construing a disability provision similar to the one in the instant case, it is said: "The reasoning of the opinions seems to indicate that engaging in a gainful occupation is the ability of the insured to work with reasonable continuity in his usual occupation, or in such an occupation as he is qualified physically and mentally, under all the circumstances, to perform substantially the reasonable and essential duties incident thereto. Hence, the ability to do odd jobs of comparatively trifling nature does not preclude recovery. Furthermore, our decisions and the decisions of courts generally, have established the

principle that the jury, under proper instructions from the trial judge, must determine whether the insured has suffered such total disability as to render it 'impossible to follow a gainful occupation.'" See, also, *Fields v. Insurance Co.*, 195 N. C., 262; *Baker v. Insurance Co.*, 206 N. C., 106.

Reversed.

D. J. BREECE v. THE STANDARD OIL COMPANY OF NEW JERSEY, INC.

(Filed 26 February, 1936.)

1. **Contracts F c—Judgment on the pleadings on unambiguous contract is error when pleadings allege that the contract was procured by fraud.**

Where a contract is not ambiguous, and it appears from the pleadings and admissions of counsel that plaintiff is not entitled to recover under its terms, the construction of the contract is for the court, and the court may ordinarily give judgment on the pleadings in defendant's favor, but where plaintiff alleges that his signature to that part of the agreement defeating recovery was procured by the false and fraudulent representations of defendant, and sufficiently alleges each of the elements of fraud, judgment on the pleadings in defendant's favor is error, plaintiff being entitled to sustain with evidence, if he can, the fraud as a ground for rescission of the agreement.

2. **Cancellation and Rescission of Instruments A b—Pleading held to sufficiently allege fraud as ground for rescission of contract.**

Plaintiff brought suit to recover rents for a filling station subleased to defendant oil company. The oil company set up in its answer a supplemental agreement between the parties, which provided that defendant should not be liable for any further rents until a certain amount of gasoline had been sold at the station, and it was admitted that the stipulated amount of gasoline had not been sold. Plaintiff alleged that his signature to the supplemental agreement was procured by the false and fraudulent representation by defendant that the agreement was not intended as a waiver of plaintiff's right to collect rents from defendant as they accrued, that the representation was made with knowledge and intent that plaintiff should rely thereon, that plaintiff did rely thereon to his damage. *Held:* Plaintiff sufficiently alleged fraud in the procurement of the supplemental agreement, entitling him to the relief of rescission if he can establish the allegations by evidence.

APPEAL by plaintiff from *Frizzelle, J.*, at September Term, 1935, of CUMBERLAND. Reversed.

This action is over certain agreements, the last one only we think necessary to set forth to show the material aspect of the controversy:

"SUPPLEMENTAL AGREEMENT OF D. J. BREECE AND C. H. FARRELL.

"Standard Oil Company of New Jersey,
Charlotte, North Carolina.

"GENTLEMEN:

"We, the undersigned D. J. Breece, owner and lessor of the certain piece of property located in the city of Fayetteville, known as the 'Person Street Filling Station,' and C. H. Farrell, the lessee of the said service station, hereby acknowledge payment from the Standard Oil Company of rent in advance on the said Person Street Filling Station in the sum of $1,500, to be applied to the basis of 1c per gallon on the gasoline and other motor fuel sold through the said station from the date that certain sub-lease from C. H. Farrell to Standard Oil Company of New Jersey, dated February 27, 1931, becomes effective until 150,000 gallons have been sold. Or otherwise refunded.

"It is further understood and agreed that the rights of the Standard Oil Company of New Jersey under the sub-lease given it by Mr. C. H. Farrell shall not be in any way annulled or abrogated until there has been sold through this service station 150,000 gallons of 'Standard Gasoline and Esso,' and that no additional rental will be required of the Standard Oil Company of New Jersey by either Mr. C. H. Farrell or Mr. D. J. Breece, until after the sale of the 150,000 gallons of 'Standard Gasoline and Esso' through the station. Or otherwise refunded.

"H. T. SAWYER, C. H. FARRELL,
H. T. SAWYER, D. J. BREECE."

(Duly acknowledged before a notary public, 15 June, 1932, and recorded.)

The plaintiff, by way of reply to defendant's setting up the above supplemental agreement of D. J. Breece and C. H. Farrell as a waiver or estoppel, alleges: "That it is denied by this plaintiff that under the terms of the written instrument, set out in paragraph 5 of the defendant's answer, that this plaintiff waived his right to collect the rents accruing to him under the terms of the lease from C. H. Farrell, either from the said C. H. Farrell or the Standard Oil Company, but if, upon a proper interpretation and construction of said paper writing it should be determined that this plaintiff had waived his rights under said paper writing to collect said rents from the Standard Oil Company, this plaintiff avers and alleges that his signature was obtained to said instrument by the false and fraudulent statements of the defendant, which statements were known by said defendant at the time they were made to be

false and fraudulent, and were made for the purpose of deceiving this plaintiff, which statements did actually deceive this plaintiff and cause him to place his signature to said paper writing, the plaintiff relying upon the statements made to him by the said H. T. Sawyer, at the time he signed said paper writing, to the effect that it was not intended as a waiver to his rights to collect the rents as they accrued to him from the Standard Oil Company in case the Standard Oil Company should assume the operation of said service station, and the said defendant is now attempting, after false and fraudulent procuring his signature to said paper writing, to use the same to deprive this plaintiff of the rents accruing to him under his lease."

The judgment of the court below is as follows: "This cause coming on to be heard at this term of the court, before the undersigned judge and jury, and after the pleadings were read, and upon admission of the counsel for the plaintiff that the defendant Standard Oil Company of New Jersey had not sold more than one hundred and fifty thousand (150,000) gallons of gasoline, as set out in the contract or receipt, registered in Book 17, at page 387, registry of Cumberland County, and referred to in the pleadings; and the defendant, through its counsel, having moved for judgment upon the pleadings; and the court being of the opinion, after argument of the counsel and upon admissions of the plaintiff, that the motion should be sustained. It is, thereupon, ordered, adjudged, and decreed that the plaintiff recover nothing on the cause of action alleged in the complaint, and that the defendant recover its costs, to be taxed by the clerk. J. Paul Frizzelle, Judge presiding."

The plaintiff made the following exceptions and assignments of error, and appealed to the Supreme Court: "(1) That the court erred in allowing defendant's motion for judgment upon the pleadings and admission as shown by plaintiff's exception. (2) That the court erred in refusing to submit the issues tendered by the plaintiff and in refusing to allow plaintiff to offer evidence in support of the issues as shown by plaintiff's exception. (3) That the court erred in signing judgment upon the pleadings and admission, as shown by plaintiff's exception."

Downing & Downing for plaintiff.
Rose & Lyon and Varser, McIntyre & Henry for defendant.

CLARKSON, J. The only question involved in this controversy is: Did the court below err in allowing the defendant's motion for judgment upon the pleadings and the signing of the judgment as set out in the record? We think so.

The plaintiff sets up actionable fraud or deceit to rescind the "Supplemental Agreement of D. J. Breece and C. H. Farrell." The allegations of plaintiff in this respect fully comply with the rule as to the necessary

averments or ingredients of fraud to rescind a contract. *Corley Co. v. Griggs,* 192 N. C., 171; *Stone v. Doctors' Lake Milling Co.,* 192 N. C., 585.

In *Belk's Dept. Store v. Ins. Co.,* 208 N. C., 267 (270), is the following: "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 relations 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 court's 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."

We see no ambiguity in the supplemental agreement. The language is plain and clear. The only relief is actionable fraud or deceit to rescind it, which is made in plaintiff's reply. The allegations in plaintiff's reply setting forth the fraud is well pleaded. Whether on a trial it can be substantiated is another question.

In *Colt v. Kimball,* 190 N. C., 169 (172-3), written by *Varser, J.,* in an able opinion, we find: "It is defendant's duty to read the contract, or have it read to him, and his failure to do so, in the absence of fraud, is negligence, for which the law affords no redress. The defendant's duty to read or have read to him the contract is a positive duty of which he is not relieved, except in cases of fraud (citing numerous authorities). Therefore, it was error to admit the evidence over plaintiff's objection. *Farquhar Co. v. Hardware Co.,* 174 N. C., 369; *Moffitt v. Maness,* 102 N. C., 457; *Murray Co. v. Broadway,* 176 N. C., 151. This principle lies at the very foundation of all contracts. Its violation, if permitted by the courts, would strike down one of the safeguards of commercial dealing. The resultant injury would be far reaching. The integrity of contracts demands its universal enforcement. *Potato Co. v. Jenette,* 172 N. C., 3. Defendant's testimony shows that he is a man of education and prominence, accustomed to the transaction of business, and of much experience, with more than an average education; who has served on the board of education for Vance County for many years. It was his duty, unless fraudulently prevented therefrom, to read the contract, or, in case he was not able to read the fine print without stronger glasses, to have it read to him. This rule does not tend to impeach that valuable principle which commands us to treat each other as of good character, but rather enforces along with it, the salutary principle that each one must 'mind his own business' and exercise due diligence to know what he is doing." This matter is further discussed, citing authorities, in *Oil and Grease Co. v. Averett,* 192 N. C., 465; *Oliver v. Hecht,* 207 N. C., 481.

In *Dorrity v. Building & Loan Assn.*, 204 N. C., 698 (701), the negligence that would bar a recovery is thus stated: "(1) Where the person signing the agreement was illiterate or otherwise incapable of understanding the writing; (2) where there is positive misrepresentation of contents of the paper writing of such type and character as to deceive a person of ordinary prudence and the person signing such agreement reasonably relied upon such misrepresentation; (3) where the party procuring the signature resorted to some device, scheme, subterfuge, trick, or other means of preventing or interfering with the reading of the paper or reasonably tending to throw a person of ordinary prudence off guard." *Dallas v. Wagner*, 204 N. C., 517; *Mitchell v. Strickland*, 207 N. C., 141; *Bank v. Dardine*, 207 N. C., 509.

We think, on the allegations of plaintiff in his reply setting up fraud, his exceptions and assignments of error are well taken.

For the reasons given, the judgment is

Reversed.

CAMILLA CLINE v. P. L. CLINE,

and

C. L. CLINE v. P. L. CLINE.

(Filed 26 February, 1936.)

Judgments C b—Failure of clerk to endorse judgment on verified statements does not render his judgments by confession thereon invalid.

Where verified statements, sufficient in form and contents under the statute to confer jurisdiction on the clerk to render judgments by confession, are filed in the office of the clerk, and the clerk enters on his judgment docket the judgment which the debtor authorized the court to render on each statement, but fails to endorse the judgment of the court on the verified statements, such failure is an irregularity, but does not affect the validity of the judgments by confession, which the entries on the judgment docket show were rendered by the court, and such judgments are erroneously set aside upon motion thereafter made by a subsequent judgment creditor. C. S., 624, 625.

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

APPEAL by Camilla Cline and C. L. Cline, respondents, from *Sink, J.*, at July Term, 1935, of CATAWBA. Reversed.

On 30 August, 1934, the United States Fidelity and Guaranty Company after due notice in writing to Camilla Cline and to C. L. Cline, appeared before Wade H. Lefler, clerk of the Superior Court of Catawba County, and moved in writing that certain entries appearing on pages

47 and 78, respectively, of Judgment Docket T, in his office, be stricken from said judgment docket, for the reason that, as alleged in said motion, said entries were inadvertently and erroneously made by the clerk of said court. The movant is a judgment creditor of P. L. Cline, owning an unsatisfied judgment against him for the sum of $2,200, which was duly docketed and indexed in the office of the clerk of the Superior Court of Catawba County on 1 June, 1931.

At the hearing of said motions, an inspection of Judgment Docket T in the office of the clerk of the Superior Court of Catawba County, showed entries on pages 47 and 78, respectively, as follows:

"Camilla Cline vs. P. L. Cline. } Judgment before R. M. Yount, C. S. C. C. S. C. costs $3.00—see Rev. Book Docketed Jan. 28, 1931.

"Confession of judgment rendered in favor of the plaintiff and against the defendant in the sum of $650.00 and costs."

"C. L. Cline vs. P. L. Cline. } Judgment before R. M. Yount, C. S. C. C. S. C. costs $3.00, pd. to use of pltff. Docketed March 17th, 1931.

"Confession of judgment rendered March 17, 1931, for the sum of $575.00, and interest on same from March 15th, 1929."

On pages 359 and 364, respectively, of the Minute Book in the office of the clerk of the Superior Court of Catawba County, are the following records:

"CONFESSION OF JUDGMENT.

"North Carolina—Catawba County.

In the Superior Court, Before the Clerk.

"Camilla Cline vs. P. L. Cline.

"1. P. L. Cline, the defendant in the above entitled case, hereby confesses judgment in favor of Camilla Cline, plaintiff, for six hundred fifty dollars ($650.00), and authorizes the entry of judgment therefor against P. L. Cline on 27th day of January, 1931.

"2. The confession of judgment is for debt or for a debt now justly due from P. L. Cline to the said plaintiff Camilla Cline, arising from the following facts:

"P. L. Cline borrowed from Camilla Cline $425.00 at one time to use towards the purchase price of an automobile, which said car is the

property of P. L. Cline, and certificate of title was issued in the name of P. L. Cline. The remainder of the money I borrowed at another time for the personal use of P. L. Cline, and said money was used for the benefit of P. L. Cline, making a total of $650.00 borrowed from Camilla Cline. P. L. Cline really owes interest on this amount of $650.00, but this judgment is not confessed for any interest, but only for the principal sum of $650.00. Of this amount of $650.00, $225.00 is in the form of a note, or balance on a note, made and executed by P. L. Cline to Camilla Cline several years ago, or during the year 1926, which said sum of $650.00 is due to said plaintiff Camilla Cline over and above all just demands that he has against Camilla Cline, the plaintiff. (Signed) P. L. CLINE.

"P. L. Cline, being duly sworn, says that the facts stated in the above confession are true, and that the amount of the judgment confessed is justly due the plaintiff Camilla Cline. P. L. CLINE.

"Subscribed and sworn to before me, this the 27th day of January, 1931. G. P. DRUM,

Deputy Clerk of Superior Court."

"CONFESSION OF JUDGMENT.

"North Carolina—Catawba County.

In the Superior Court, Before the Clerk.

"C. L. Cline vs. P. L. Cline.

"1. P. L. Cline, the defendant in the above entitled case, hereby confesses judgment in favor of C. L. Cline, plaintiff, for five hundred seventy-five dollars ($575.00), and interest, since March 15th, 1929, and authorizes the entry of judgment therefor against P. L. Cline, defendant, on the 17th day of March, 1931.

"2. The confession of judgment is for a debt now justly due from P. L. Cline to the said C. L. Cline, plaintiff, arising from the following facts:

"On March 15, 1928, P. L. Cline executed and delivered to C. L. Cline his promissory note in the sum of $575.00, with interest at the rate of six per cent, and the note was due one day after date. On the back side of said note is credited interest for one year, or the sum of $34.50, and there remains unpaid the principal and interest since March 15, 1929. This note was executed for money received from C. L. Cline, every dollar cash, which said sum of $575.00, and interest since March 15, 1929, is due to the said plaintiff over and above all just demands that P. L. Cline has against C. L. Cline. (Signed) P. L. CLINE.

"P. L. Cline, being duly sworn, says that the facts set out or stated in the above confession are true, and that the amount of the judgment confessed is justly due the said C. L. Cline, the plaintiff.

P. L. CLINE.

"Sworn to and subscribed before me, this the 17th day of March, 1931.

R. M. YOUNT,
Clerk of Superior Court."

The minute book in the office of the clerk of the Superior Court of Catawba County does not show a record of any judgment rendered by the clerk of said court on either of the verified statements filed in said court by P. L. Cline, nor is a judgment endorsed on either of the said verified statements by said clerk. The only record of a judgment by confession on either of said statements is the entry on Judgment Docket T.

After hearing the motion in each of the above entitled causes, the clerk found that no judgment was endorsed on the verified statements filed in each of said causes, or otherwise rendered, and that the entries appearing on pages 47 and 78, respectively, of Judgment Docket T, in his office, were inadvertently and erroneously made by his predecessor, and thereupon ordered that said entries be stricken from said judgment docket.

From these orders the respondents, Camilla Cline and C. L. Cline, appealed to the judge of the Superior Court of Catawba County.

At the hearing of these appeals, judgment was rendered as follows:

"The causes entitled as above, coming on to be heard on appeal from the clerk of the Superior Court of Catawba County, and being consolidated by consent for the purpose of the further hearing of the same, and it appearing that the movant, the United States Fidelity and Guaranty Company is a proper party to prosecute the petition and motion, and it further appearing, and the court so holding, that no judgment was rendered in either of said causes, it is, on motion of C. W. Bagby and W. A. Self, counsel for petitioner and movant, considered and adjudged that the judgment of the clerk appealed from in each cause be and the same is affirmed.

H. HOYLE SINK,
"July Term, 1935. *Judge Presiding.*"

The respondents excepted to the judgment and appealed to the Supreme Court, assigning error in the judgment.

W. A. Self, Chas. W. Bagby, and C. D. Swift for movant.
C. D. Moss and Jonas & Jonas for respondents.

CONNOR, J. The statements in writing, signed and duly verified by the debtor, P. L. Cline, and filed by him with the clerk of the Superior Court of Catawba County—one on 27 January, 1931, and the other on 17 March, 1931—are in full compliance with the requirements of the statute, C. S., 624, and therefore were sufficient, both as to form and as to contents, to confer jurisdiction on the court of the parties and of the subject matter of the proceeding.

Speaking of the statutory requirements for a proceeding for the entry of a judgment by confession, in *Smith v. Smith,* 117 N. C., 348, 23 S. E., 270, *Clark, J.,* says: "If the statutory requirements are not complied with, the judgment is irregular and void, because of a want of jurisdiction in the court to render judgment, which is apparent on the face of the proceedings. *Davidson v. Alexander,* 84 N. C., 621; *Davenport v. Leary,* 95 N. C., 205." *E converso,* where the statutory requirements with respect to the form and contents of the statement have been fully complied with, as in the instant case, the court acquires jurisdiction, and a judgment by confession, as authorized by the debtor in the statement, is valid for all purposes.

The only question presented on the record in this appeal is whether a judgment was rendered by the court on each of the statements filed with the clerk by the debtor. This question must be answered in the affirmative.

The statute, C. S., 625, provides that where a statement, setting out the amount of his debt, and the facts out of which his debt arose, has been signed and duly verified by the debtor, and has been filed with the clerk of the Superior Court of the county in which the debtor resides, the clerk shall endorse upon the statement the judgment of the court, and shall enter said judgment on his judgment docket. In the instant case, the clerk entered the judgment which the debtor authorized the court to render on each statement, on his judgment docket. He failed to endorse the judgment on the verified statement. This failure was an irregularity which does not affect the validity of the judgment, which the entry on the judgment docket made by the clerk, or under his immediate supervision, shows was rendered by the court.

There is error in the order affirming the orders of the clerk. The motions of the movant should have been denied.

Reversed.

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

THOMAS WHITESIDE, BY HIS NEXT FRIEND, H. H. TURNER, v. THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

(Filed 26 February, 1936.)

1. **Insurance M e—Plaintiff must show incapacity to give notice of disability during period prescribed in policy.**

Where insured contends that his failure to give notice of disability within one year of its inception, as required by the policy, was due to mental incapacity excusing such failure, he must show such mental incapacity during the period specified, and where his evidence is insufficient to show such incapacity during the stipulated period, evidence of mental incapacity after the expiration of the one-year period and that he was thereafter committed to a hospital for the insane is immaterial.

2. **Same—Evidence held insufficient to show mental incapacity sufficient to excuse insured's failure to give notice of disability.**

The policy in suit required insured to give insurer notice of disability within one year from the inception of the disability. Insured contended that his failure to give notice as required by the policy was excused by mental incapacity rendering him incapable of giving such notice. Plaintiff's evidence tended to show that during the one-year period after the inception of the disability as contended by him, he worked at several jobs, wrote letters to his wife, would have days when his mind was good, but was irritable, unreasonable, peculiar, etc., and that his condition grew worse, but that he was not committed to hospital for the insane until three years thereafter. *Held:* Plaintiff's own evidence failed to show mental incapacity during the one-year period sufficient to excuse his failure to give notice of disability, and insurer's motion to nonsuit should have been allowed.

3. **Insurance R c—Evidence held insufficient to show insured was totally disabled while the policy was in force.**

Plaintiff was insured under a group policy providing disability benefits to those becoming totally and permanently disabled while insured under the master policy, each employee's insurance thereunder to terminate upon the termination of his employment. Insured brought action claiming that he was disabled at the time of the termination of his employment, but his evidence tended to show that for over a year after the termination of his employment he was employed at intervals on several jobs of the general nature of his former employment. *Held:* The evidence was insufficient to show permanent and total disability while the insurance was in force, and defendant insurer's motion to nonsuit should have been allowed.

APPEAL by plaintiff and defendant from judgment rendered by *Oglesby, J.*, 11 December, 1935. From BUNCOMBE. Plaintiff's appeal, dismissed. Defendant's appeal, reversed.

This was an action, instituted in the general county court of Buncombe County, 31 October, 1934, to recover on a provision against total and permanent disability contained in a certificate of insurance issued

to plaintiff Thomas Whiteside by the defendant, the Equitable Life Assurance Society, under a group insurance policy for employees of the Donora, Pennsylvania, plant of the American Steel and Wire Company.

The certificate was dated 12 May, 1930. Plaintiff had been employed by said company at Donora, Pennsylvania, since 1923, and had ceased working there 1 October, 1930, and had not since been employed by said company.

The total and permanent disability provision in the certificate of insurance issued to plaintiff was as follows: "In the event that any member, while insured under the aforesaid policy, and before attaining age 60, becomes totally and permanently disabled by bodily injury or disease and will thereby presumably be continuously prevented, for life, from engaging in any occupation or performing any work for compensation of financial value, upon receipt of due proof of such disability before the expiration of one year from the date of its commencement, the society will, in termination of all insurance of such member under the policy, pay equal monthly disability installments, the number and amount of which shall be determined by the table of installments below; the number of installments being that corresponding to the nearest amount of insurance shown in the table, while the amount of each installstallment shall be adjusted in the proportion that the amount of insurance on such member's life bears to the amount used in the table in fixing the number of installments. The amount of insurance herein referred to shall be that in force upon the date on which said total and permanent disability commenced."

It was in evidence that plaintiff was committed to the South Carolina State Hospital for the Insane on 25 October, 1933, and there remained until 1 May, 1934, when he left without permission, but the records of the hospital were changed to parole after a parole blank had been signed by the plaintiff's mother.

Plaintiff admits that Thomas Whiteside discontinued employment with the American Steel and Wire Company on 1 October, 1930, when the certificate of insurance terminated according to the provisions thereof, and that Thomas Whiteside has never furnished the defendant with notice or proof of disability as provided in said certificate and group insurance. But plaintiff contends that prior to the discontinuance of his employment the plaintiff became totally and permanently disabled and so mentally deficient as to excuse his failure to give the notice required by the terms of the policy and certificate.

Upon the testimony offered the trial court submitted issues to the jury, who answered them in favor of the plaintiff.

From the judgment on the verdict in the county court, defendant appealed to the Superior Court, assigning as error, among other excep-

tions, the overruling of its motion for nonsuit. In the Superior Court the presiding judge overruled defendant's exception for failure to nonsuit, but remanded the case to the county court for a new trial for certain errors in the admission of testimony, and from these rulings both sides appealed to the Supreme Court.

Geo. F. Meadows and J. W. Haynes for plaintiff.
Parker, Bernard & DuBose for defendant.

DEVIN, J. On the defendant's appeal, the only point for consideration is whether plaintiff has offered evidence sufficient to go to the jury on the issues as to total and permanent disability and as to mental and physical inability to give the defendant notice thereof, according to the terms of the certificate. This requires an examination of the testimony in the most favorable light for the plaintiff.

Since the plaintiff seeks to excuse his failure to give notice and furnish due proof of his disability within one year from 1 October, 1930, we are concerned only with the evidence as to his mental and physical condition during that period, and evidence that he thereafter became insane and incapable in October, 1933, could have no direct bearing on the determinative question.

Plaintiff offered the testimony of Ola Whiteside, his wife and the beneficiary under the certificate, E. B. King, C. F. Williams, and Dr. O. L. Miller; but it appears that witness Miller only knew him since 17 October, 1931, witness King since February, 1932, and witness Williams since October, 1933.

Ola Whiteside testified in substance that she and plaintiff were married in 1917; that she kept the certificate of insurance; that plaintiff left Donora, Pennsylvania, in October, 1930, and went to Knoxville, Tennessee; that she did not go with him, but did join him there a month later, and they lived there together eight months, and then she left him and went to her home in Inman, South Carolina, plaintiff remaining in Knoxville; that while there he worked for the Pittsburg Plate Glass Company for two weeks at $12.00 per week; at the Atkins Hotel two weeks at $10.00 per week; and plaintiff had testified in examination before the clerk that he had worked on a concrete river bridge at Henry Street in Knoxville. Witness Ola Whiteside further testified that plaintiff left Knoxville soon after she did and came to Asheville to his people; that he later went to Red Bank, New Jersey, and Hudson, New York; that she was not with him, but he wrote to her sometimes and wrote letters to her while he was at Red Bank and Hudson; that in September, 1933, he came to Inman, South Carolina, and 25 October, 1933, was committed to the South Carolina hospital. As to his mental condition,

she testified: "He would have a very good mind today and tomorrow would be altogether different;" that this began in the summer of 1930. "When he quit work he was ill-tempered and unreasonable. His condition got worse until I left him in September, 1931. He would get a job and couldn't keep it very long. He would keep it two or three days and quit. Then we got to where we couldn't get along at all. He would just fuss, growl, and fight all the time. That is why I left him." Asked her opinion as to the condition of his mind, she answered: "Well, I knew something was wrong with him, but I didn't know he was plumb crazy until they carried him to the hospital," 25 October, 1933.

Witness King testified he saw plaintiff in Asheville as often as once a week or twice a month from February, 1932, to August, 1932. "His conduct was fairly good, only his mental condition seemed to be poor, and he is not vigilant, little peculiar." The witness Dr. Miller testified he saw him first 17 October, 1931, in Asheville, "found him in nervous state of excitement," and prescribed for him; that he "considered him insane type of insanity."

Plaintiff bottoms his case on *Rhyne v. Ins. Co.*, 196 N. C., 717 (reaffirmed in same case, 199 N. C., 419), and contends the evidence offered brings it within the rule there promulgated. In that case it was held that a stipulation in a contract of insurance requiring the assured to furnish proof of disability within a specified time ordinarily would not include cases where strict performance was prevented by the total incapacity of the assured to act in the matter, resulting from no fault of his own, and that performance within a reasonable time either by the assured after regaining his senses, or by his representative after discovering the policy, would suffice.

In the *Rhyne case, supra,* the policy was paid up to 15 May, 1927. There was evidence the insured became insane in February, 1927, and was committed to the State Hospital for the Insane 19 August, 1927, and that guardian qualified 29 September, 1927, and notice given and claim made shortly thereafter. In that case the jury found on sufficient evidence that insured was so insane as to be incapable of knowing that he had insurance or that he was required to pay a premium thereon, incapable of knowing that he was totally disabled or that he was required by the terms of the policy to furnish proof thereof.

It is apparent the evidence in the case at bar does not bring it within the rule laid down in the *Rhyne case, supra.* It is insufficient to show either total and permanent disability from bodily injury or disease to the extent that he was prevented from engaging in any occupation or performing any work for compensation of financial value, or mental incapacity, within one year, to give notice and furnish proof of such disability. *Carter v. Ins. Co.*, 208 N. C., 665; *Hill v. Ins. Co.* 207

N. C., 166; *Boozer v. Assurance Society,* 206 N. C., 848; *Thigpen v. Ins. Co.,* 204 N. C., 551; *Watkins v. Ins. Co.,* 201 N. C., 681.

The defendant's motion for judgment of nonsuit should have been sustained.

This disposition of the case renders it unnecessary to consider the matter presented by plaintiff's appeal.

On defendant's appeal, Reversed.

On plaintiff's appeal, Appeal dismissed.

ANNIE E. VICK, KATE A. TICKLE, BEN E. VICK, JAMES R. VICK, AND EMMA VICK DIXON v. MARGARET W. WINSLOW, C. J. WINSLOW, E. C. WINSLOW, TRUSTEE, AND J. H. VICK.

(Filed 26 February, 1936.)

1. Quieting Title A b—

In an action under C. S., 1743, to remove cloud upon title it is not required that plaintiffs show possession of the land in controversy.

2. Quieting Title B d—Plaintiffs' evidence showing prima facie title in them and that defendants' title is void as to plaintiffs held sufficient to overrule defendants' motion to nonsuit.

In this action to remove cloud upon title, plaintiffs made out a *prima facie* case by showing that they are the ulterior beneficiaries under the will of the common source of title, and then introduced in evidence a decree confirming sale of the land to make assets by the executor of the testator under whose will they claim, deed made pursuant to the sale, quitclaim deed from the purported heirs of the grantee in the commissioner's deed, a deed of trust from the grantee in the quitclaim deed, and a foreclosure deed of the deed of trust, defendants being the trustor, trustee and *cestui* in the deed of trust, and the purchaser at the sale. *Held:* Plaintiffs' evidence did not disclose that they were made parties to the proceedings to sell land to make assets, or that the grantors in the quitclaim deed were the heirs at law of the grantee in the commissioner's deed, or that the grantee in the commissioner's deed was dead, and defendant's motion to nonsuit was erroneously granted, plaintiffs being entitled to go to the jury upon the evidence establishing a *prima facie* record title in themselves, and that the decree and deeds by and through which defendants claim were void as to plaintiffs.

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

APPEAL by the plaintiffs from *Moore, Special Judge,* at April Term, 1935, of EDGECOMBE. Reversed.

H. H. Philips for plaintiffs, appellants.

George M. Fountain and Henry C. Bourne for defendants, appellees.

SCHENCK, J. This is an action, brought under C. S., 1743, by the plaintiffs against the defendants, who it is alleged claim an estate or interest in the real estate described in the complaint adverse to the plaintiffs for the purpose of determining such adverse claim, wherein the plaintiffs and defendants claim from a common source, namely, J. B. White.

The plaintiffs introduced in evidence the will of J. B. White, which was admitted to probate on 30 May, 1891, and devises the land in controversy to his wife, Charlotte White, for her lifetime and to T. H. Cherry after the death of his wife to hold in trust for the use and benefit of his daughter, Mary Vick, during her life, and after her death "to such child or children as my said daughter may have living at the time of her death, or may have issue born of their bodies, such issue to stand in the place of and take such share as his or her parent would have taken had such parent been living at the time of the death of my said daughter." Miss Annie Vick, one of the plaintiffs, testified that her mother was the Mary Vick mentioned in the will of J. B. White, and that the children of the said Mary Vick were herself, Kate Tickle, Emma Vick Dixon, Ben Vick, and James R. Vick, making five in all, all being plaintiffs in this action, and that her mother had only three other children, all of whom died in infancy; that J. B. White was her grandfather and was dead, and that Mary Vick, her mother, died on 2 March, 1910, and that Charlotte White, widow of J. B. White, died on 22 April, 1898, and that Thomas H. Cherry, named in the will of J. B. White as trustee and executor, has been dead for more than 16 years. This evidence makes out a *prima facie* record title in the plaintiffs.

The plaintiffs further introduced in evidence (1) a decree dated 7 May, 1892, in the case of Thomas H. Cherry, executor of J. B. White, against Charlotte White, Calvin Savage and wife, Bettie, Rebecca Savage and Lafayette Savage, confirming a sale made by Thomas H. Cherry, as commissioner to sell the land in controversy, to M. L. Woolard, and directing him, upon the payment of the purchase money, to apply the same to the charges of administration and the debts of the estate of J. B. White; (2) a deed for said land from Thomas H. Cherry, commissioner, made pursuant to said decree, to M. L. Woolard, dated 10 May, 1892; (3) a quitclaim deed from Ida M. Adams, guardian of Jacquelin Woolard and Soloman Woolard to J. H. Vick, for the land in controversy, dated 28 March, 1901; (4) a deed of trust with power of sale from J. H. Vick to E. C. Winslow, trustee for C. J. Winslow, dated 1 April, 1916; and (5) a foreclosure deed from E. C. Winslow, trustee, to Margaret W. Winslow, dated 24 March, 1926.

The plaintiffs rested their case and the defendants moved for a judgment as of nonsuit, which motion was sustained, and from the judgment entered accordingly the plaintiffs appealed, assigning errors.

The evidence fails to establish such adverse possession, either in the plaintiffs or defendants, as would ripen into title, but since this action was instituted under C. S., 1743, the plaintiffs did not have to rely upon possession to maintain it. *Hoke, J.*, in *Satterwhite v. Gallagher,* 173 N. C., 525 (528), in writing of the statutes which are codified as C. S., 1743, says: "Having reference to the broad and inclusive language of the statute, the mischief complained of and the purpose sought to be accomplished, we are of opinion that the law, as its terms clearly import, was designed and intended to afford a remedy wherever one owns or has an estate or interest in real property, whether he is in or out of possession, and another wrongfully sets up a claim to an estate or interest therein which purports to affect adversely the estate or interest of the true owner and which is reasonably calculated to burden and embarrass such owner in the full and proper enjoyment of his proprietary rights, including the right to dispose of the same at its fair market value." See, also, *Speas v. Woodhouse,* 162 N. C., 66; *Plotkin v. Bank,* 188 N. C., 711.

The proceeding in which the decree was rendered confirming the sale of the land in controversy to make assets to pay the cost of administration and the debts of the estate of J. B. White by its caption tends to show that the plaintiffs in this action were not parties thereto, and the plaintiffs testified that they had never been served with any process therein. Likewise, there is nothing in the record to show that Jacquelin Woolard and Soloman Woolard were the heirs at law of M. L. Woolard, the grantee in the deed made pursuant to said decree. Indeed, there is nothing in the record to establish the fact that M. L. Woolard, grantee in said deed, is dead, or that he ever conveyed the land in controversy to Jacquelin Woolard and Soloman Woolard, or to any other person. Therefore, it does not follow that the decree and deeds introduced in evidence by the plaintiffs establish the title of J. H. Vick, and of E. C. Winslow, trustee, and of Margaret W. Winslow, as contended by the defendants. Such decree and deeds, standing alone, tend to show only a cloud upon the title of the plaintiffs, which they seek in this proceeding to have removed.

The plaintiffs having offered evidence establishing a *prima facie* record title in themselves to the land in controversy, and evidence tending to show that the decree and deeds by and through which the defendants claim are void as to the plaintiffs and constitute a cloud upon the title of the plaintiffs, we hold that his Honor erred in granting the de-

fendants' motion for judgment as of nonsuit, and that the plaintiffs are entitled to have the case submitted to the jury upon the evidence produced.

Reversed.

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

STATE OF NORTH CAROLINA ON RELATION OF CARL PHILLIPS v. R. B. SLAUGHTER.

(Filed 26 February, 1936.)

1. Elections I a—

The result of an election will not be disturbed, nor one in possession of an office removed, unless the votes illegally counted or refused are sufficient to alter the result of the election.

2. Pleadings D e—

A demurrer admits allegations of fact properly pleaded, but not conclusions of law.

3. Statutes B a—

Statutes *in pari materia* must be construed with reference to each other.

4. Elections F a—Absentee ballot law is applicable to municipal elections.

Construing N. C. Code, 5960, *et seq.*, known as the Absentee Ballot Law, with N. C. Code, 6055, *et seq.*, known as the Australian Ballot Law, *it is held* that the Absentee Ballot Law is applicable to municipal elections, and the machinery for its application in such elections is clearly provided.

APPEAL by the respondent from judgment overruling demurrer entered by *Warlick, J.*, at September Term, 1935, of GRAHAM. Reversed.

T. M. Jenkins for relator, appellee.
R. L. Phillips for respondent, appellant.

SCHENCK, J. This action was instituted by the relator, Carl Phillips, to have himself declared the duly elected mayor of the town of Robbinsville, and to remove the respondent, R. B. Slaughter, from said office. To the complaint of the relator the respondent filed a demurrer upon the ground that it failed to state facts sufficient to constitute a cause of action, in that it failed to allege that sufficient illegal votes had been cast for the respondent, or that sufficient legal votes for the relator had been refused, to alter the result of the election.

The relator alleges that in the municipal election held in and for the town of Robbinsville, on 7 May, 1935, he, the relator, "received 68 legal votes in said election and 81 votes were cast and counted for the defendant R. B. Slaughter, according to the official count."

The relator further alleges that in said election there were eight illegal votes cast for the respondent by nonresidents of Robbinsville, naming them, and that one legal vote tendered for the relator was illegally refused by the election officials. If these allegations be admitted, as they must be for the purposes of the demurrer, the count would stand 68 plus one, or 69, for the relator, and 81 minus 8, or 73, for the respondent, still leaving the respondent a majority of 4. The result will not be disturbed, nor one in possession of an office removed, because of illegal votes received or legal votes refused, unless the number be such that the correction would show a majority for the contesting party. *DeLoatch v. Rogers,* 86 N. C., 358; *Hendersonville v. Jordan,* 150 N. C., 35.

However, the relator further alleges "that of the eighty-one votes cast and counted for defendant in said election, . . . at least twenty votes included and counted therein were illegal, for that in said election twelve absentee votes were cast by absent voters who were out of said town on the election day," and that if these twelve absentee votes be also subtracted from the votes cast for the respondent there would be left (73 — 12) 61 votes for the respondent, which would make the vote 61 to 69, thereby giving the relator a majority of 8.

The demurrer admits the truth of the facts alleged, that is, that 12 absentee ballots were cast for the respondent, but it does not admit the conclusion of law set forth in the complaint, namely, that the 12 absentee ballots, because cast in a municipal election, were illegal. *Tea Co. v. Hood, Comr. of Banks,* 205 N. C., 313; *Phifer v. Berry,* 202 N. C., 388.

The demurrer presents this question of law: Is absentee voting permitted in municipal elections? If such absentee voting is so permitted, the demurrer should have been sustained, but if such absentee voting is not so permitted, the demurrer was properly overruled.

The absentee ballot law became a part of the general election law by chapter 23 of the Public Laws of 1917, and is now brought forward as article 9, chapter 97, North Carolina Code of 1935 (Michie), being sections 5960, *et seq.* The first sentence of section 5960 is as follows: "In all primaries and elections of every kind hereafter held in this State, any elector who may be absent from the county in which he is entitled to vote or who is physically unable to attend at the polling place for the purpose of voting in person shall be allowed to vote as hereinafter provided." Then follows the provision as to how an elector who "desires to vote by absentee ballot because of his absence" may do so.

Twelve years after the enactment of the absentee ballot law what is generally known as the Australian ballot law was enacted by chapter 164 of the Public Laws of 1929, and is brought forward in Michie's Code of 1935 as Article 18, chapter 97, sections 6055 (a-1), *et seq.* Section 6055 (a-1) repealed the principal election laws theretofore in effect and enacted new provisions in lieu thereof. Section 6055 (a-2) provides that: "The provisions of this subchapter shall be applicable to all counties, cities, towns, townships, and school districts in the State of North Carolina, without regard to population or number of inhabitants thereof." Section 6055 (a-3) provides for the preparation and distribution of ballots for national, State, county, municipal, and district offices in towns, counties, districts, cities, and other political divisions by the State Board of Elections, county board of elections, and by municipal authorities conducting such elections. Section 6055 (a-39) provides that "The ballots to be furnished absentee electors under the provision of section 5963 of the Consolidated Statutes of North Carolina and acts amendatory thereof shall be the same as the official ballots hereinbefore designated." It will be noted that section 5963 of the Consolidated Statutes is a part of Article 9, chapter 97, and provides for the furnishing by the chairman of the county board of elections or registrar of the precinct of ballots to absent voters. Section 6055 (a-42) is as follows: "With respect to all municipal primaries and elections, wherever in this subchapter appear the words 'county board of elections' shall be deemed to be written the words 'city or town governing body'; and wherever appear the words 'chairman of board of elections' shall be deemed to be written the words 'mayor of town or city.'"

Article 9 and Article 18 of chapter 97 (entitled "Elections") of the North Carolina Code of 1935 (Michie) being *pari materia,* must be construed with reference to each other, and when so construed it is manifest that the absentee ballot law is applicable to municipal elections and the machinery for its application in such elections is clearly provided.

Holding as we do that absentee voting is permitted in municipal elections, it follows that the 12 absentee ballots alleged to have been cast for the respondent were not illegal, and since they are not illegal, all other allegations in the complaint may be admitted and still the complaint will not state facts sufficient to state a cause of action against the respondent, since he would, under such allegations, still have a majority of four over the relator.

The judgment below is

Reversed.

THOMAS MARCELLUS DILLING v. FEDERAL LIFE INSURANCE COMPANY.

(Filed 26 February, 1936.)

Insurance R a—Whether accident was exclusive and independent cause of disability held for jury upon conflicting evidence.

Insured under a policy of accident and health insurance suffered an accidental injury, and accepted from insurer a fixed amount in settlement for all claims for the injury under the policy. About three months thereafter, insured accidentally fell and became totally disabled. ***Held:*** Whether the disability resulted solely from the first accident or whether the first accident was a contributing cause of the disability, in which events insurer would not be liable under the terms of the policy, or whether the disability resulted independently and exclusively from the second accident, in which event insurer would be liable, is a question for the determination of the jury upon conflicting evidence.

APPEAL by plaintiff from *Clement, J.*, at the February, 1935, Regular Civil Term of MECKLENBURG. Reversed.

The plaintiff sues the defendant on Policy 66010 in the Federal Life Insurance Company, of Chicago, Ill. In said policy is the following: "Schedule of Accident Monthly Indemnities—Part Two—(A) Or if such injuries, independently and exclusively of all other causes, wholly and continuously shall disable the insured from the date of accident from performing any and every kind of duty pertaining to his occupation, so long as the insured lives and suffers said total disability, the company will pay a monthly indemnity of eighty dollars, but in no event for a period in excess of sixty months."

There is no question as to the premiums being paid and the policy being in force. The plaintiff filed a claim with defendant for an injury and gave a receipt to defendant for $173.00, "In full advance settlement of all claims accrued or to accrue under Policy No. SPRT 66010 on account of injury sustained on Feby. 27 (28), 1931."

In plaintiff's statement to defendant of his injury is the following: "I was injured Feb. 28, 1931. Hour AM. 7 P.M. Here state fully and precisely what you were doing at the time accident occurred. Walking along street. Where were you when the accident occurred? (Describe immediate surroundings.) On North Brevard Street. How did the accident happen? Driver applied brakes, car skidded and hit ankle. Day and hour after I was injured on which I quit work. Feb. 28, 1931, hour 7:30 P.M. What parts of your work or duties can you attend to since injury? None. . . . If paid at once, without requiring further proofs, what number of days' indemnity are you willing to accept in full payment of your claim for the injury? Sixty days."

The plaintiff brought the present action on 2 March, 1933, and among other things in his complaint alleges: "That the plaintiff has notified the defendant of his disability due to the accident, in which his disability has continued up to the present time, due to the accident, which the said defendant has injured (insured) the plaintiff against but the defendant has refused, failed, and still refuses to pay any amount of the monthly installments, as provided by the policy, since the plaintiff was last injured. That the injuries sustained on or about 25 May, 1931, have resulted in a permanent disability of the plaintiff and that he has been wholly and continuously disabled from date of said accident from performing any and every kind of duty pertaining to his occupation, and the said disability will continue the rest of his life. That the total and permanent disability that the plaintiff is now suffering from, which has been total and permanent since 25 May, 1931, and is and will remain total and permanent for the remainder of plaintiff's life, resulted independently and exclusively of all other causes or injuries, from the accident and injury he sustained on 25 May, 1931."

The defendant denied the material allegations of plaintiff and set up the settlement of 28 February, 1931, in bar of recovery, and further says that defendant has no knowledge of any accident other than the one for which settlement was made. The court below nonsuited the plaintiff, and he excepted and assigned error and appealed to the Supreme Court.

Carswell & Ervin for plaintiff.
J. Laurence Jones and J. L. DeLaney for defendant.

CLARKSON, J. At the close of the 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 allowed the motion at the close of all the evidence and in this we think there was error.

The learned judge in the court below seems to have been uncertain as to the sufficiency of evidence to be submitted to the jury. The motion for nonsuit at the close of all the evidence was first denied. In the record it appears, "During the argument of counsel, the court sustained the defendant's motion for judgment as of nonsuit."

The able counsel for defendant, as usual, states succinctly defendant's contentions as follows: "We submit that the plaintiff has not shown a disability due independently and exclusively of all other causes to his alleged fall on 25 May, 1931. But on the contrary the record shows the accident of 28 February, 1931, to be the sole cause of his present disability, or at least that the two accidents joined and concurred in pro-

ducing his disability. We respectfully submit that the judgment of nonsuit should be sustained."

After a careful review of the evidence, which we will not repeat, as the case goes back for trial, we think the matter in controversy should have been left for a jury to determine. The evidence was *pro* and *con* on the question involved, therefore it should have been submitted to a jury.

In *Penn v. Insurance Co.*, 160 N. C., 399 (404), rehearing (*S. c.*, 158 N. C., 29), is the following: "Reasoning from the authorities cited in the briefs filed by both parties in the appeal, and in the former opinion of the Court, and the admittedly correct proposition above stated, it appears that under policy contracts such as the one under consideration, three rules may be stated: (1) When an accident caused a diseased condition, which, together with the accident, resulted in the injury or death complained of, the accident alone is to be considered the cause of the injury or death. (2) When at the time of the accident the insured was suffering from some disease, but the disease had no causal connection with the injury or death resulting from the accident, the accident is to be considered as the sole cause. (3) When at the time of the accident there was an existing disease, which, coöperating with the accident, resulted in the injury or death, the accident cannot be considered as the sole cause, or as the cause independent of all other causes."

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

Reversed.

JESS N. FORE v. THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

(Filed 26 February, 1936.)

Insurance R c—Whether employee was disabled at time of termination of employment held for jury under conflicting evidence.

Plaintiff was insured under a group policy providing benefits to those insured thereunder for disability occurring while the policy was in force as to them, and that the insurance of each employee should terminate upon the termination of the employment. Defendant insurer's evidence was to the effect that plaintiff voluntarily quit his employment to enter into business for himself, that he thereafter operated a filling station and a restaurant, and continued in the restaurant business until within a few days of the trial. Plaintiff's evidence tended to show that he quit his employment because he was sick and unable to work, that he had a racking cough, and that while he was able to do little odd jobs, selling Coca-Cola and the like, he had not been able to do any work with reasonable continuity since he quit his employment, and introduced medical expert

testimony to the effect that he was suffering with pulmonary tuberculosis caused by working in close proximity to vats of acid in the plant of the employer under the group policy. *Held:* The conflicting evidence on the question of whether plaintiff was disabled at the time of quitting his employment was properly submitted to the jury, and defendant insurer's motion to nonsuit was correctly denied.

APPEAL by the defendant from *Oglesby, J.*, at November Term, 1935, of BUNCOMBE. No error.

This is a civil action, commenced in the general county court of Buncombe County, to recover on a certificate of life insurance providing for the payment of certain sums of money in the event the insured should become totally and permanently disabled while said certificate was in force, which said certificate was issued to the plaintiff by the defendant under a group policy of insurance in favor of the American Enka Corporation. It is provided in said certificate and group policy that in the event any employee, while insured under the aforesaid policy and before attaining the age of 60 years, becomes totally and permanently disabled by bodily injury or disease and will thereby presumably be continuously prevented for life from engaging in any occupation or performing any work for compensation of financial value, the society, upon receipt of due proof of such disability, will pay certain disability benefits. It is further provided in said certificate and group policy that the insurance upon any employee shall automatically cease upon the termination of his employment by the holder of the group policy.

The plaintiff admits that after 26 September, 1934, he did not work for the American Enka Corporation, but alleges that on or before that date he became totally and permanently disabled within the meaning of the certificate and group policy.

The defendant contends that the plaintiff voluntarily quit his employment with the American Enka Corporation on 26 September, 1934, after working a full day and after having worked regularly for many months theretofore, and that he received compensation for his services up to and including that date, and that on said date the plaintiff served notice upon the American Enka Corporation that he was quitting his employment for the purpose of entering business on his own account. The defendant further contends that the plaintiff did, immediately after quitting his employment, enter business for himself by operating a filling station in West Asheville, which he carried on for some three or four months, and, upon disposing of said filling station, opened a restaurant in the city of Asheville, which he operated until within a few days of the trial of this action.

The case was tried in the general county court upon the following issue:

"Did the plaintiff become totally and permanently disabled by bodily injury or disease, on or before 26 September, 1934, to such extent that he will presumably be continuously prevented for life from engaging in any occupation or performing any work for compensation of financial value?"

The issue was answered in favor of the plaintiff and from judgment based on the verdict the defendant appealed to the Superior Court, assigning errors.

The case came on for hearing in the Superior Court, and the defendant announced that it would abandon all exceptions taken in the general county court except those relating to the motions for judgment as of nonsuit and to the signing of the judgment. The judge of the Superior Court overruled the appellant's exceptions and entered judgment affirming the judgment of the general county court, to which the defendant excepted and appealed to the Supreme Court, assigning errors.

Cecil C. Jackson for plaintiff, appellee.
Parker, Bernard & DuBose for defendant, appellant.

SCHENCK, J. The sole question presented on this appeal is whether the plaintiff became totally and permanently disabled while insured by the certificate issued to him under the group policy issued by the defendant to the American Enka Corporation.

The plaintiff, as a witness in his own behalf, testified that he went to work for the American Enka Corporation on 31 December, 1932, and continued to work there until about 26 September, 1934; that he worked in the spinning department, where there were two vats of acid on each side of the machine at which he worked, holding something like 300 gallons of acid, and after he had worked a while in this acid he began to lose weight and to take a hacking cough and had quite a bit of trouble in his throat, which caused him to go to see a doctor, who gave him an examination; that he left the employment of the American Enka Corporation because he was sick and wasn't able to work; and that since he has been away from this employment he has been sick, with no strength, underweight about 22 or 23 pounds, and has had a hacking cough, and when he tries to do any work he gives out and cannot do it.

Dr. Donald S. Tarbox, an admitted medical expert, testified for the plaintiff that he found the symptoms from which the plaintiff was suffering to be those most commonly found in pulmonary tuberculosis, and that the X-ray examination of the plaintiff by Dr. Murphy confirmed his findings. Dr. Tarbox further testified that he had an opinion satisfactory to himself as to what caused the plaintiff's condition, and that it was that the present respiratory infection was irritation of the lungs and

the toxic effect of the fumes of sulphuric acid; and that in his opinion the plaintiff would not make such a recovery as to get well and return to his ordinary work.

The defendant's witness, H. G. Setzler, testified in effect that he was the overseer of the spinning department of the American Enka Corporation, and that the plaintiff worked under him, and gave him notice on 26 September, 1934, that he was quitting work, and that the plaintiff said he was quitting because he was going into business for himself in West Asheville, and that he, the witness, made a memorandum of this statement in his book at the time it was made, and that plaintiff did not say anything about being sick or disabled.

The defendant offered testimony of other witnesses tending to show that the plaintiff worked full time up to and including 26 September, 1934, and received full pay therefor, and immediately after quitting his work he opened a filling station and later a restaurant, and had continuously worked up to the time of the trial of this action.

The plaintiff, in rebuttal, testified in his own behalf that he did not tell Mr. Setzler, his overseer, that he was quitting work to go into business for himself, but told him that he was quitting for some time on account of his health, and that while he had been able to do some little odd jobs, selling Coca-Cola and the like, he had not been able to continuously do any work for profit since 26 September, 1934.

There was other adminicular evidence for both plaintiff and defendant.

This case is distinguished from *Boozer v. Assurance Society,* 206 N. C., 848, relied upon by the defendant. The plaintiff in that case was discharged for violation of the rules of his employer, and up to the time of such discharge was able to and did fully perform all the duties of his employment, and did not suffer total disability until some months after his discharge. In the instant case the evidence as to the physical condition of the plaintiff at the time he ceased to work for the holder of the group policy, and as to the reasons for his quitting such work, as well also as to his physical condition since that time, was conflicting and clearly raised an issue for the jury. *Fields v. Assurance Company,* 195 N. C., 262; *Bulluck v. Insurance Company,* 200 N. C., 642; and *Gossett v. Insurance Company,* 208 N. C., 152, and cases therein cited.

There was no error in the action of the judge of the Superior Court in sustaining the denial of the motions for judgment as of nonsuit or in affirming the judgment of the general county court.

No error.

PASQUOTANK COUNTY; W. O. ETHERIDGE, W. L. THOMPSON, J. D. HATHAWAY, JR., W. T. LOVE, SR., J. C. JENNINGS, E. P. CARTWRIGHT, J. H. PERRY, BEING AND CONSTITUTING THE BOARD OF COMMISSIONERS FOR PASQUOTANK COUNTY; DAN W. MORGAN, A. W. STANTON, AND W. G. COX, BEING AND CONSTITUTING THE COUNTY BOARD OF EDUCATION FOR PASQUOTANK COUNTY; AND THE FIRST AND CITIZENS NATIONAL BANK OF ELIZABETH CITY, N. C., FINANCIAL AGENT OF PASQUOTANK COUNTY, v. GURNEY P. HOOD, COMMISSIONER OF BANKS, EX REL. SAVINGS BANK AND TRUST COMPANY OF ELIZABETH CITY; H. G. KRAMER, TRUSTEE, AND W. O. CRUMP, SUBSTITUTE TRUSTEE.

(Filed 26 February, 1936.)

1. **Estoppel C b—Held: Bank receiver was estopped by his conduct from denying validity of pledge by the bank.**

   The cashier and president of a bank pledged certain securities to secure county funds which the bank had on deposit in its official capacity of county treasurer. Upon the insolvency of the bank, the county and the statutory receiver treated the securities, in the course of liquidation, as having been validly pledged to the county. *Held:* The receiver is estopped by his conduct from denying the validity of the pledge on the ground that the pledge of the securities had never been authorized by the board of directors of the bank nor accepted by the board of county commissioners.

2. **Banks and Banking H e: Public Officers C b—Penalty provided by C. S., 357, held inapplicable to demand against bank receiver for county funds held by the bank in capacity of county treasurer.**

   A bank which had been duly acting as county treasurer became insolvent and closed its doors. At the time of its closing, the bank had on deposit funds of the county which it had secured by the pledge of certain securities to the county in lieu of bond. The securities were liquidated by the statutory receiver, together with all assets belonging to the bank, and an amount collected thereon sufficient to pay all depositors and creditors of the bank, including the county, the full amount of their respective claims, plus six per cent interest. The county demanded interest on the amount due it at the rate of twelve per cent, under C. S., 357, which provides that upon the wrongful detention of public funds by a public officer such officer should be liable for the sum due, plus interest thereon at twelve per cent. *Held:* C. S., 357, is not applicable, and the county is not entitled to the penalty, since the statute contemplates the payment of the penalty by a public officer wrongfully withholding public funds, whereas, under the facts of this case, the penalty would fall upon innocent stockholders whose stock assessments helped contribute, and since the withholding of the funds by the statutory receiver in the course of liquidation was not an unlawful detention as contemplated in the statute.

APPEAL by defendant Commissioner of Banks from judgment rendered by *Cranmer, J.*, at Spring Term, 1935, of PASQUOTANK. Modified and affirmed.

PASQUOTANK COUNTY *v.* HOOD, COMR. OF BANKS.

This was an action to recover certain county and school funds of Pasquotank County, and for damages for the unlawful detention thereof at the rate of 12 per cent per annum, from Gurney P. Hood, Commissioner of Banks, on the relation of Savings Bank and Trust Company of Elizabeth City, N. C. It was heard by the court below on agreed statement of facts.

It appears that from 1928 to 1 December, 1930, the Savings Bank and Trust Company (hereinafter called the bank), was the duly qualified and acting financial agent of Pasquotank County (Public-Local Laws 1915, ch. 61), and gave corporate surety bond for the faithful performance of its duties as such; that on 1 December, 1930, it applied for and was reëlected to the same position. No surety bond was given under the last appointment, and on 18 December, 1930, the president and cashier of the bank, pursuant to an agreement with the chairman of the board of county commissioners, entered into in good faith, segregated certain securities of the bank of the face value of $41,900, and turned same over to the county, and they were placed in a lock box in the bank, as security for the funds of the county and the board of education, which were held by and on deposit in said bank. The individual key to said lock box was delivered to the register of deeds of the county, *ex officio* secretary of the board of county commissioners.

That on 19 December, 1930, the bank closed its doors and ceased its operation as a bank, and thereupon the defendant Commissioner of Banks took charge of same for the purpose of liquidation under the statute, and appointed W. O. Crump and later R. C. Coppedge as liquidating agents in charge; that the securities so segregated were later turned over by the plaintiffs to the liquidating agents for collection; that collections thereon were faithfully made, other assets collected, including certain insurance funds, and stock assessments, and distribution made from time to time therefrom, until the Commissioner of Banks has now on hand funds sufficient to pay the balance in full to all depositors and creditors, including the plaintiffs, together with interest thereon at six per cent; that plaintiffs instituted this action on 7 March, 1934, to enforce its right to the pledged securities, and, in addition, to recover damages for the unlawful detention of its funds in the sum of 12 per cent thereof, under the provisions of C. S., 357.

Of plaintiffs' total debt of $39,212.40, the sum of $36,286.36 was paid from dividends and collections, and after the institution of this action the balance of $2,926.04 was offered in full of the amount due plaintiffs, and refused.

From judgment that plaintiffs were entitled to recover their entire claim, together with 12 per cent thereon as damages under the statute, the defendant Commissioner of Banks appealed.

McMullan & McMullan for plaintiffs.
M. B. Simpson and Thompson & Wilson for defendants.

DEVIN, J. It was admitted that the plaintiffs were entitled to the full amount claimed, together with interest thereon at 6 per cent, but defendant denied liability for any greater amount as damages under C. S., 357.

It was urged in the oral argument and by brief that the pledge of the securities on 18 December, 1930, was not authorized by the board of directors of the bank, nor accepted by the board of county commissioners. However, it would seem that this action of the president and cashier of the bank was acquiesced in and acted upon by the Commissioner of Banks, who succeeded to the assets and rights of the bank, that his dealings therewith were approved by orders of the court, that the county commissioners are asserting their rights under said pledge, and that the collections from these and other assets of the bank are sufficient to pay the claims of all creditors in full. Hence, it is no longer open to the defendants to question the validity of a pledge upon which both have so long acted.

Therefore, the only question to be determined is whether the plaintiffs are entitled to recover damages at the rate of 12 per cent per annum upon deferred payments on their claims. This depends on whether the statute invoked by plaintiffs applies to the facts of this case.

C. S., 357, must be considered in connection with the preceding section.

C. S., 356, is as follows (omitting unnecessary words): "When a sheriff, coroner, constable, clerk, county or town treasurer, or other officer, collects or receives any money by virtue or under color of his office, and on demand fails to pay the same to the person entitled to require the payment thereof, the person thereby aggrieved may recover judgment in the Superior Court, etc."

Sec. 357: "When money received as aforesaid is unlawfully detained by any of said officers, and the same is sued for in any mode whatever, the plaintiff is entitled to recover, besides the sum detained, damages at the rate of twelve per centum per annum from the time of detention until payment."

This statute, which is of ancient origin, prescribes a penalty in the form of damages at a fixed rate, upon defaulting public officers, or those public officers who unlawfully detain funds received by them by virtue of their office.

While a bank, which has been appointed county financial agent under the statute, performs the duties usually appertaining to the office of

county treasurer, there are material differences with respect to the manner in which public funds shall be held. It is provided in the statute that "such bank shall not charge nor receive any compensation for its services, other than such advantages and benefit as may accrue from the deposit of county funds in the regular course of banking." C. S., 1389.

Evidently sections 356 and 357 of the Consolidated Statutes are inapplicable to impose liability for damages in a case where the facts are as presented here. We are not dealing with a defaulting or delinquent public officer. Here the Commissioner of Banks, acting pursuant to the authority of the statutes enacted to expedite and safeguard, in the public interest, the liquidation of closed banks, took over the affairs of a bank which had been theretofore constituted the financial agent of the county and which had county funds on deposit and in its possession. The defendant's relationship to the bank is that of statutory receiver. He took possession of the assets and funds of the bank for the purpose of collecting, preserving, and distributing the same for the benefit of all the creditors. His holding a portion of the fund, subject to the orders of the court and for the purposes of liquidation, could not be said to constitute an "unlawful detention," nor should he in his representative capacity be liable in damages as a penalty for so doing. The punishment would not fall upon a defaulting or delinquent public officer, as intended by the statute, but would penalize funds held in trust for all the creditors and stockholders whose stock assessments have helped to contribute.

All the decided cases that have been called to our attention, where the statute 357 has been applied, are concerned with defaulting public officers. *Bond v. Cotton Mills,* 166 N. C., 20; *Hannah v. Hyatt,* 170 N. C., 634; *S. v. Martin,* 188 N. C., 119; *S. v. Gant,* 201 N. C., 211.

For these reasons the judgment below must be modified to allow the plaintiffs the full amount of their claim, with interest at the rate of six per cent per annum on deferred payments, calculated in the manner set out in the judgment, instead of at the rate of 12 per cent; and thereafter the funds will be distributed in accordance with the statutes and this opinion. *Hackney v. Hood, Comr.,* 203 N. C., 486.

Modified and affirmed.

WALTER F. BOYLES AND HIS WIFE, CATHERINE BOYLES, v. THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, AND SHELDON M. ROPER.

(Filed 26 February, 1936.)

1. Mortgages H b—Trustors may not recover sum voluntarily paid to have advertised sale of property called off.

It appeared from the facts alleged in the complaint that defendants required trustors to pay the cost of advertisement and commissions to the trustee before calling off an advertised sale of the property under the terms of the deed of trust, defendants being the *cestui* in the deed of trust and its agent, and that at the time of the advertisement of the property for sale, negotiations were pending, to the knowledge of all parties, for the refinancing of the deed of trust, which was in default. *Held:* Trustors are not entitled to recover the sum voluntarily paid by them to have the sale called off, the trustors having received the consideration agreed upon, and there being no facts alleged tending to show that the payment was induced by fraud on the part of defendants, or mistake on the part of plaintiffs.

2. Same—Where cestui has right to advertise property under terms of instrument, trustors may not recover damages resulting from advertisement.

Trustors in a deed of trust instituted negotiations for the refinancing of the debt, trustors being in default in payment, and the *cestui* submitted to the proposed lender the amount required by it to cancel its lien. Several months thereafter, the *cestui* had the property advertised for sale under the terms of the instrument. Prior to sale the trustors succeeded in borrowing the money to refinance the deed of trust, and paid the debt and the *cestui* canceled its deed of trust. Trustors instituted this action to recover damages resulting from loss of credit and standing caused by the advertisement of their land for sale. *Held:* The *cestui* had a right under the terms of the instrument to advertise the land for sale, and if such advertisement caused injury to trustors, such injury is *damnum absque injuria.*

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

APPEALS by both plaintiffs and defendants from *Sink, J.,* at July Term, 1935, of LINCOLN. Affirmed in plaintiffs' appeal; reversed in defendants' appeal.

The facts alleged in the complaint in this action are as follows:

1. On 11 May, 1927, the plaintiffs executed a deed of trust by which they conveyed to the Chickamauga Trust Company, as trustee, the lands described therein, to secure the payment of their note to the defendant, the Prudential Insurance Company of America, for $1,800. The consideration for said note was money loaned to the plaintiffs by the said defendant.

2. Some time during the year 1933, prior to 23 September, 1933, the plaintiffs had defaulted in the payment of their note, and, in order to secure an extension of said note, paid to the defendant Sheldon M. Roper, as attorney and agent of his codefendant, the sum of $32.23, which sum the said defendant agreed to repay to the plaintiffs if the defendant, the Prudential Insurance Company, declined to grant the extension which the plaintiffs had applied for. Thereafter, the plaintiffs were informed by the defendants that the extension would not be granted. The defendants have failed and refused to repay to the plaintiffs the sum of $32.23.

3. On 15 November, 1933, with the knowledge, approval, and consent of the defendants, the plaintiffs applied to the Federal Land Bank of Columbia, S. C., for a loan sufficient in amount to pay the amount due on plaintiffs' note to the defendant, the Prudential Insurance Company.

On 16 January, 1934, the defendant insurance company filed with the Federal Land Bank of Columbia a statement in writing showing the total amount due by plaintiffs to said insurance company, and agreed that upon the payment of said amount out of any loan made by the said land bank to the plaintiffs, it would cancel the deed of trust securing said amount.

4. On 16 April, 1934, plaintiffs' note to the defendant insurance company being still unpaid, and past due, the defendants caused the trustee in the deed of trust to advertise the land described therein for sale, under the power of sale contained in the deed of trust, at the courthouse door in Lincolnton, N. C., on 14 May, 1934. Although the land was duly advertised for sale in newspapers and elsewhere, the plaintiffs did not learn of the advertisement until 10 May, 1934. They at once protested to the defendants that their lands ought not to be sold in accordance with the advertisement, but notwithstanding said protest, the plaintiffs were informed that the land would be sold on 14 May, 1934, unless plaintiffs paid to defendants the sum of $125.35 to cover the costs and expenses incurred by the advertisement, including commissions to the trustee. The plaintiffs paid to the defendants the said sum of $125.35, and the sale was called off.

5. On 15 June, 1934, the plaintiffs secured from the Federal Land Bank of Columbia the loan for which they had applied, and out of the proceeds of said loan paid to the defendant insurance company, in full, the amount due on their note.

6. As a result of the advertisement of their land for sale by the defendants, the plaintiffs suffered humiliation and embarrassment, and loss of credit in the community in which they reside. They allege that they thereby sustained damages in the sum of $5,000.

In their answer, the defendants denied the allegations of the complaint on which the plaintiffs demanded judgment that they recover of the defendant the sum of $32.23.

By their demurrer, the defendants presented their contention that the facts stated in the complaint are not sufficient to constitute causes of action on which the plaintiffs are entitled to recover of the defendants the sum of $125.35, or damages for the advertisement by the defendants of their land for sale.

The action was heard on the demurrer. The court sustained the demurrer with respect to the cause of action on which plaintiffs demand judgment that they recover of the defendants the sum of $125.35, and overruled the demurrer with respect to the cause of action on which plaintiffs demand judgment that they recover of the defendants damages for the advertisement by the defendants of the lands of the plaintiffs for sale.

Both the plaintiffs and the defendants excepted to the judgment and appealed to the Supreme Court.

W. A. Self and L. E. Rudisill for plaintiffs.
A. L. Quickel for defendants.

CONNOR, J. With respect to the cause of action on which the plaintiffs demand judgment that they recover of the defendants the sum of $125.35, the plaintiffs allege "that on or about 10 May, 1934, the plaintiffs discovered that their lands were advertised for sale as aforesaid, and immediately communicated with the defendant Sheldon M. Roper, agent and attorney for Prudential Insurance Company, and protested against the exposure of their farm for sale; that the said Sheldon M. Roper, acting as attorney and agent for said defendant, informed the plaintiffs that the sale would be made at the time and place as advertised unless the plaintiffs paid to him the sum of $125.35, covering a commissioner's fee and the costs of advertisement; and that plaintiffs, not being advised of their rights, and relying upon the correctness and uprightness of the statements of the said Sheldon M. Roper, procured and caused to be paid over to him as attorney and agent of the Prudential Insurance Company the sum of $125.35, and that by reason of said payment of money wrongfully and fraudulently exacted as aforesaid from the plaintiffs by the said Sheldon M. Roper, attorney and agent for his codefendant, the said sale was abandoned."

It appears from this allegation that the sum of $125.35 was voluntarily paid by the plaintiffs to the defendants. No facts are alleged

tending to show that the payment was induced by fraud on the part of the defendants, or by any mistake on the part of the plaintiffs. Upon payment of the sum agreed upon by the parties, the sale was called off. It is manifest that plaintiffs are not now entitled to recover of the defendants the sum which they paid voluntarily, and for which they have received the consideration agreed upon.

With respect to the cause of action on which the plaintiffs demand judgment that they recover of the defendants damages in the sum of $5,000, the plaintiffs allege "that the defendants in causing the lands of the plaintiffs to be advertised for sale, as set forth in paragraph 5 of this complaint, were acting in a fraudulent, unlawful, and high-handed manner in their disregard of the rights of the plaintiffs and with intent to embarrass and humiliate the plaintiffs; that said unwarranted advertisement of plaintiffs' said lands was due, as plaintiffs believe and allege, to the determination and desire of the defendants to embarrass and harass the plaintiffs, and to improperly, unlawfully, and fraudulently exact and extort from plaintiffs the said sum of $125.35."

It appears from the allegations of the complaint that defendants had a right in law and in equity to cause the lands of the plaintiffs to be advertised for sale by the trustee in the deed of trust, which plaintiffs had executed to secure their note to the defendant, the Prudential Insurance Company. The note was long past due, and plaintiffs' application for a loan out of which the note was to be paid had been pending for several months, with no assurance to defendants that the application would be approved. If plaintiffs suffered loss by the advertisement of their lands, the defendants were not liable for any damages resulting from such loss. The principle of *damnum absque injuria* is applicable.

There was no error in the judgment sustaining the demurrer as to the "second cause of action" alleged in the complaint.

There was error in the judgment overruling the demurrer as to the "third cause of action" alleged in the complaint. It follows that the judgment is

Affirmed in plaintiffs' appeal.

Reversed in defendants' appeal.

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

NANTAHALA POWER AND LIGHT COMPANY v. WHITING MANUFACTURING COMPANY AND IRVING TRUST COMPANY, TRUSTEE.

(Filed 26 February, 1936.)

1. Trial D e—

In a civil action where no counterclaim is set up and no rights have accrued, plaintiff may take a voluntary nonsuit at any time before the rendition of a complete verdict sufficient to support a judgment.

2. Eminent Domain D e—Petitioners in condemnation proceedings may abandon proceedings after report but before confirmation.

Petitioners in condemnation proceedings may abandon the proceedings and take a voluntary nonsuit, upon payment of costs, even after the commissioners appointed by the court have made their appraisal and report and petitioners have filed exceptions thereto, provided petitioners abandon the proceedings before confirmation of the commissioners' report, since it is provided by C. S., 752, that special proceedings shall be governed as near as may be by the rules governing civil actions, and since the respondents have suffered no loss, the right to sell the land not being defeated by the institution of the proceedings, and petitioners not having entered into possession and having no right to do so until payment of the appraised value into court, C. S., 1723, and judgment that the proceedings be dismissed on motion of petitioners, and the cause retained for assessment of costs against petitioners, is upheld in this case.

APPEAL by defendants from *Warlick, J.,* at September Term, 1935, of GRAHAM. Affirmed.

This was a proceeding instituted by petitioners to condemn certain land of the respondents for hydroelectric development. The clerk of the Superior Court of Graham County appointed commissioners to view and appraise the value of the described land, and the named commissioners thereafter made their report appraising the value of said land at $165,000. To this report petitioners filed exceptions, and when the matter came on for hearing on said report before the clerk, and before it was heard, petitioners moved to be allowed to take a voluntary nonsuit. The clerk overruled the motion of petitioners for nonsuit, and subsequently, on the same day, on motion of respondents, confirmed the report of the commissioners, whereupon the whole matter was appealed to the Superior Court at term.

From judgment of Warlick, J., reversing the clerk, adjudging that petitioner had right to take a nonsuit, and directing judgment of nonsuit, respondents appealed to this Court.

Black & Whitaker and J. N. Moody for petitioners.

Jones & Ward, T. M. Jenkins, and R. L. Phillips for respondents.

DEVIN, J. The single question presented by this appeal is whether petitioners in a condemnation proceeding, after commissioners have made their appraisal and report, and exceptions are filed, but before confirmation, can submit to a voluntary nonsuit and abandon the proceeding.

In civil actions, the right of the plaintiff to submit to a voluntary nonsuit is unquestioned, where no counterclaim is set up in the answer and no rights have accrued.

At common law a voluntary nonsuit was an abandonment of the cause by a plaintiff who allowed judgment for costs to be entered against him by absenting himself or failing to answer when called upon to hear the verdict. 18 C. J., 1146; *McKesson v. Mendenhall,* 64 N. C., 502. It is a well settled rule of procedure in this jurisdiction that a nonsuit may be taken at any time before verdict. McIntosh Prac. and Proc., sec. 628. And this right continues even after the jury has attempted to render a verdict, with some, but not all, of the issues answered, where the verdict is not accepted by the court and the jury is sent back with instructions to respond to the unanswered issues. *Oil Co. v. Shore,* 171 N. C., 52; *Cahoon v. Brinkley,* 168 N. C., 257.

However, a proceeding to condemn land under statutory power is a special proceeding and is so denominated by the statute, C. S., 1715. But C. S., 752, requires that, "except as otherwise provided," special proceedings shall be governed by the same rules laid down for civil actions.

And in C. S., 1729, we find this language: "In all cases of appraisal under this chapter where the mode or manner of conducting all or any of the proceedings to the appraisal and the proceedings consequent thereon are not expressly provided for by the statute, the courts before whom such proceedings may be pending shall have the power to make all the necessary orders and give the proper directions to carry into effect the object and intent of this chapter, and the practice in such cases shall conform as near as may be to the ordinary practice in such courts."

The statutes regulating the practice and procedure for the condemnation of land make no specific reference to the question whether at any time the petitioner may abandon the proceeding and submit to nonsuit, but they do recognize the fact that the petitioner may elect not to complete the proceeding, and provision is made therefor. The procedure subsequent to the filing of report by the commissioners is set forth in C. S., 1723. In this last mentioned section it is provided that the petitioners may not enter into possession of the property sought to be condemned until the amount appraised has been paid in full, and that upon confirmation of appraisers' or commissioners' report and payment of the amount into court the title of the landowner shall be divested, and concludes with this language: "If the amount adjudged to be paid the

owner of any property condemned under this chapter shall not be paid within one year after final judgment in the proceeding, the right under the judgment to take the property or rights condemned shall *ipso facto* cease and determine, but the claimant under the judgment shall still remain liable for all amounts adjudged against him, except the consideration for the property."

In other words, after final judgment fixing petitioner's rights to condemn, and the value of the land, if the appraised value of the land be not paid within one year, the petitioner's right to take the property shall end, and the petitioner or claimant shall not be liable for the consideration (value of the land), but shall be liable for all costs adjudged against him.

Hence, it appears that the title of the landowner is not divested until final confirmation and the payment in full of the amount appraised. The right to convey the land is not affected by the mere filing of condemnation proceedings, nor by appraisement without confirmation and payment, as all rights would pass to the grantee. *Liverman v. R. R.*, 109 N. C., 52; *Beal v. R. R.*, 136 N. C., 298; C. S., 1730.

In the case at bar no rights had been acquired. There was no attempt to enter into possession of or exercise any authority over the property described in the petition, nor was there interference with the rights of respondents thereto, except to file the petition and present evidence before the appraisers.

As was held in *Pullman Car Co. v. Transportation Co.*, 171 U. S., 138: "There must be some plain legal prejudice to defendant to authorize a denial of the motion to discontinue; such prejudice must be other than the mere prospect of future litigation rendered possible by the discontinuance. If the defendants have acquired some rights which might be lost or rendered less efficient by the discontinuance, the court may deny the application."

In *R. R. v. R. R.*, 148 N. C., 59, plaintiff was not permitted to take a nonsuit in a condemnation proceeding where it had entered and begun work on the land, under court order giving it exclusive possession.

In *Goldsboro v. Holmes*, 183 N. C., 203, the question of the right to take a nonsuit in condemnation proceedings was debated, but the appeal was disposed of on another ground without deciding the question now presented.

But in *In re Baker*, 187 N. C., 257, the question seems to have been determined against the respondent. There the town of Ahoskie was permitted to enter nonsuit in the Superior Court in a proceeding to condemn land. The town had instituted proceedings to condemn land, appraisers had been appointed, and report filed fixing value of the property at $1,250. From the finding of the board and the valuation, Baker,

the landowner, appealed to the Superior Court. Subsequently, in that court, on motion of the town, judgment was entered dismissing the proceedings. In the opinion of the court, by *Clark, C. J.*, it is stated: "The court found as a fact, as set out in the record, that the town has never been in possession of the strip of land, and had never exercised any ownership or authority over it, and there is nothing in the record showing any judgment or confirmation by the commissioners of the town which conferred any interest or lien in the land or authority over it against the respondents. The respondent had appealed, it is true, but he had set up no counterclaim, and there was no equity involved. The town had a right to take a nonsuit in the proceeding upon payment of the costs."

In re Baker, supra, is cited in *Board of Education v. Forrest,* 193 N. C., 519.

The statute, C. S., 1723, contemplates that in the event, for any reason, the condemnation proceedings are not carried through, all the costs of the proceeding, except the appraised value of the land, shall be paid by the petitioners, and the judgment appealed from retains this case on the docket for the determination of the amount of costs adjudged against petitioner. We do not think the respondents are entitled to more.

Upon reason and authority, we conclude that the judgment of the court below must be

Affirmed.

FANNIE COBB SPEIGHT, WIDOW, v. BRANCH BANKING AND TRUST COMPANY, ADMINISTRATOR OF THE ESTATE OF JAMES E. SPEIGHT; JOHN H. SPEIGHT AND WIFE, LILLIE SPEIGHT; GROVER C. SPEIGHT AND WIFE, RUTH SPEIGHT; C. L. SPEIGHT AND WIFE, PAULINE SPEIGHT; MARY SPEIGHT CRAFT AND JOE CRAFT, HER HUSBAND; M. B. SPEIGHT AND WIFE, ANNIE SPEIGHT.

(Filed 26 February, 1936.)

1. Trusts A b—Plaintiff held entitled to land under constructive trust under facts of this case.

Plaintiff signed her husband's note as surety for the accommodation of her husband, and executed a mortgage, with joinder of her husband, on land belonging to her individually as security for the note. Upon default, the mortgage was foreclosed and the land purchased at the sale by the husband who paid off the debt with his own money and took title in himself. *Held:* The land was impressed with a constructive trust in the hands of the husband, since the husband owed the wife the duty to fully indemnify her for loss occasioned her as surety on his note, and upon the husband's death, she is entitled to recover the land as against the husband's estate.

2. Same—Nature of constructive trust in general.

Where a person obtains legal title to property by the violation of a fiduciary relationship or by the neglect to discharge some duty or obligation with respect to the property, or in any other unconscientious manner, equity will impress a constructive trust upon the property in favor of the one who is in good conscience entitled to it.

3. Equity B a—

Where it is agreed that the party entitled to equitable relief had no knowledge of the facts constituting the basis of her rights until shortly before suit, the question of laches cannot arise.

APPEAL by defendants from *Cranmer, J.*, at November Term, 1935, of EDGECOMBE. Affirmed.

This case was heard by the court below upon an agreed statement of facts substantially as follows:

Plaintiff is the widow of James E. Speight, who died intestate in 1934. The defendant bank is administrator of the estate of James E. Speight, and the other defendants are his brothers and sisters, and only heirs at law.

The plaintiff Fannie Cobb Speight, prior to 10 January, 1921, was owner of a certain tract of land containing 79 acres, and on said date James E. Speight, being indebted to John H. Speight in a sum in excess of $2,900, executed his promissory note, payable to John H. Speight, and this was signed by plaintiff as surety. And on the same date plaintiff with joinder of her said husband executed and delivered to said John H. Speight a mortgage on her said land for the accommodation of James E. Speight, and as security for the indebtedness evidenced by his said note.

Default having been made in payment of said note and mortgage, the land was advertised for sale by John H. Speight, mortgagee, under the power contained in the mortgage. After the sale, James E. Speight and the plaintiff instituted an action to restrain delivery of the deed to the purchaser. At September Term, 1926, judgment was rendered determining the balance due on the note and mortgage to be $2,969.63, and appointing commissioners to sell. Upon sale by the named commissioners, the land was first bid off by John H. Speight, mortgagee, and later, upon increased bid by James E. Speight, was conveyed to said James E. Speight for $2,625.

James E. Speight used his own money to raise the bid and paid with his own money the purchase price to the mortgagee, the commissioners reporting they had delivered deed to James E. Speight, "the said John H. Speight having acknowledged to the commissioners that James E. Speight had paid unto him the sum of $2,625 and fully satisfied the judgment rendered in the action of James E. Speight and wife, Fannie Cobb Speight, *v.* John H. Speight."

It is admitted that plaintiff had no information of the fact that the deed to her land had been made by the commissioners to James E. Speight until after his death in 1934.

This action was instituted 22 March, 1935, for the purpose of declaring the trust and having title to said land vested in her.

W. A. Lucas and Gilliam & Bond for plaintiff.
H. H. Philips for defendants.

DEVIN, J. Reduced to its last analysis, the question here presented is this: When the wife is surety on the note of her husband and executes a mortgage on her land as security for his debt, and the husband subsequently buys the land at a sale under the mortgage, pays off the debt with his own money, and takes title to the land to himself, will a court of equity impress on the legal title thus acquired a trust in favor of the wife?

We think this question must be answered in the affirmative.

It is admitted that the plaintiff signed the note as surety for her husband, James E. Speight, and that she executed the mortgage on her individual land as security for his debt. Thereupon, in consequence of the relationship of principal and surety thus brought about, James E. Speight owed a duty to his surety with reference to her property put up as security for his debt, and he could not, in good conscience, take advantage of the lien imposed on the land solely for his benefit, and of the position so created, to acquire title to the land and hold same in hostility to the right of the surety, to whom was due complete indemnification. Equity, which acts *in personam,* would regard him as holding the legal title to the property as trustee for the benefit of the surety. Thus, a trust would be created by the operation of law, and it would fall into the category denominated in equity jurisprudence as a constructive trust.

"Constructive trusts arise by pure implication of equity without regard to the intention of the parties, or, necessarily, the frustration of fraud." Bispham's Eq., sec. 91.

One of the most ordinary trusts of this kind is that which grows out of the rule of law forbidding one occupying a fiduciary or *quasi*-fiduciary position from gaining any personal advantage touching the property as to which the fiduciary position exists. Bispham's Eq., sec. 92; *Avery v. Stewart,* 136 N. C., 426.

We quote from Pomeroy on Equity Jurisprudence, sec. 1044, as follows: "Constructive trusts include all those instances in which a trust is raised by the doctrines of equity for the purpose of working out justice in the most efficient manner, where there is no intention of the parties to create such a relation, and in most cases contrary to the intention of the one holding the legal title, and where there is no express or implied, written or verbal, declaration of the trust. They arise when

the legal title to property is obtained by a person in violation, express or implied, of some duty owed to the one who is equitably entitled, and when the property thus obtained is held in hostility to his beneficial rights of ownership."

A constructive trust has been concisely defined as "one not created by any words, either expressly or impliedly evincing a direct intention to create a trust, but only by the construction and operation of equity in order to satisfy the demands of justice." 65 C. J., 223, 224.

It seems to be a well settled rule that if one person obtain legal title to property by the violation of a fiduciary relationship, or in any other unconscientious manner, equity will impress a constructive trust upon the property in favor of one who is in good conscience entitled to it. And this applies where such person owes some duty or obligation with respect to the property. 26 R. C. L., 1236, 1237.

Equity applies the principles of constructive trusts wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoer. Pomeroy Eq. Jur., sec. 1053; *Edwards v. Culberson,* 111 N. C., 342.

The principle is stated in Pomeroy's Equity Jurisprudence that while ordinarily constructive trusts, properly so called, may be referred to what equity denominates fraud, actual or constructive, many instances spring from the violation of some fiduciary obligation, and in them "there is, latent perhaps, but none the less real, the necessary element of that unconscientious conduct which equity calls constructive fraud." Pom. Eq. Jur., sec. 1044.

The equitable doctrine of constructive trusts is fully discussed in two well considered opinions from this Court, one by *Walker, J.,* in *Lefkowitz v. Silver,* 182 N. C., 348, and the other by *Adams, J.,* in *Bryant v. Bryant,* 193 N. C., 372.

It was held in *Jordan v. Simmons,* 169 N. C., 140, that a husband, who had the management and control of his wife's property, should not be allowed to buy her property at a tax sale without her knowledge or consent, and hold same adversely to her. *Ruark v. Harper,* 178 N. C., 249.

It is apparent that the equitable principles herein stated apply to the facts in the case before us.

There is no question here of laches, or of affirmance by acquiescence on the part of the plaintiff. These could only arise after knowledge, and here it is expressly agreed that the plaintiff had no knowledge or information that the deed to her land had been made to James E. Speight until shortly before this suit.

The judgment of the court below that the plaintiff is the equitable owner of the described land is

Affirmed.

ELMER W. DANIELS v. SWIFT & COMPANY.

(Filed 26 February, 1936.)

Food A a—Evidence held sufficient for jury on issue of negligence of manufacturer in preparation of food.

Plaintiff's evidence tended to show that he was injured by particles of glass eaten by him in sausage prepared by defendant manufacturer, and that a short time prior to his injury plaintiff had found grit in similar sausage prepared by defendant, and that the deleterious substances were found inside the casings in which the sausage was stuffed. *Held:* The evidence was sufficient to be submitted to the jury on the issue of defendant's negligence.

STACY, C. J., dissenting.

CONNOR, J., concurs in dissent.

APPEAL by the defendant from *Harris, J.*, at December Term, 1935, of BEAUFORT. No error.

E. A. Daniel and LeRoy Scott for plaintiff, appellee.
MacLean & Rodman for defendant, appellant.

SCHENCK, J. This is an action to recover damages for personal injury alleged to have been caused by the negligence of the defendant in allowing minute particles of glass to get into sausage sold by it for public food consumption.

From a judgment based upon the verdict the defendant appealed and assigned as error the action of the court in refusing to grant its motion for judgment as of nonsuit made upon the plaintiff's resting his evidence and renewed at the close of all the evidence. C. S., 567.

There was evidence tending to show that on or about 15 June, 1935, the plaintiff purchased from L. A. Trueblood & Company about one and one-half pounds of sausage which had been packed and sold for food consumption to Trueblood & Company by the defendant Swift & Company, and that after the sausage was eaten by the plaintiff it was found to have contained small particles of glass, some of which the plaintiff swallowed, resulting in his painful and serious damage. There was further evidence tending to show that within two or three weeks prior to this occasion the plaintiff had found "grit" in similar sausage purchased by him from the same source which had likewise been manufactured and sold for food consumption by the defendant. The evidence also tended to show that the sausage, when manufactured, was stuffed into "sheep casings," and that when purchased no grit was found on the outside thereof.

We think this evidence brings the case within the principle enunciated in *Hampton v. Bottling Co.*, 208 N. C., 331, and *Corum v. Tobacco Co.*, 205 N. C., 213, and cases there cited. In the *Hampton case, supra,* it was said: "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. . . . 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."

In the trial of the case in the Superior Court we find

No error.

STACY, C. J., dissenting: The record is devoid of any evidence of actionable negligence on the part of the defendant, according to our previous decisions. *Thomason v. Ballard & Ballard Co.*, 208 N. C., 1, 179 S. E., 30; *Blackwell v. Bottling Co.*, 208 N. C., 751; *Enloe v. Bottling Co.*, 208 N. C., 305, 180 S. E., 582.

"The facts present a case where it would be entirely unsafe to permit the application of the principle contended for (*res ipsa loquitur*), or to hold that the explosion of one single bottle of such an article (Coca-Cola), under such circumstances, should of itself rise to the dignity of legal evidence sufficient, without more, to carry the case to the jury"—*Hoke, J.*, in *Dail v. Taylor*, 151 N. C., 284, 66 S. E., 135.

Here we have only one instance of deleterious substance (glass) found in sausage, and another instance of "grit" found therein. By grit the witness may have meant no more than gristle or particles of bone. Nor does it appear whether this "grit" was in the original package. Indeed, it may be doubted whether the particles of glass were found in the original package, though the evidence may be sufficient to warrant the inference.

Having decided in *Thomason v. Ballard & Ballard Co., supra,* that plaintiff is not entitled to recover, *ex contractu,* as upon an implied warranty, the pertinent decisions in cases sounding in tort should be followed.

CONNOR, J., concurs in dissent.

MRS. MAUDE J. CHEEK, ADMINISTRATRIX OF W. E. CHEEK, DECEASED, v. BARNWELL WAREHOUSE AND BROKERAGE COMPANY, AND B. B. SHARPE.

(Filed 26 February, 1936.)

1. Evidence K a—Opinion testimony held properly excluded as invading the province of the jury.

Plaintiff's intestate was killed in a collision between his car and a truck driven by the individual defendant. The driver of the truck was the only surviving eye-witness of the accident, and did not testify at the trial. The liability of defendants was based mainly on plaintiff's contention that the truck was being driven on the wrong side of the highway. A witness who came upon the scene of the accident shortly after it occurred was allowed to described to the jury the position of the cars, the location of the glass and other physical facts at the scene of the collision. The court excluded his testimony, based upon the physical conditions at the scene, that at the time the cars collided the truck was a foot and a half over the center of its side of the highway. *Held:* The testimony was properly excluded as invading the province of the jury.

2. Automobiles C m: Negligence D c—Where plaintiff's evidence raises only conjecture of defendant's negligence, nonsuit is proper.

Where plaintiff's evidence leaves in speculation and conjecture the determinative fact of whether defendant's car was being driven on the wrong side of the highway at the time of the collision, defendant's motion to nonsuit is properly granted, the burden being on plaintiff to establish the negligence of defendant. C. S., 2621 (51).

APPEAL by the plaintiff from judgment of nonsuit entered by *Pless, J.*, at August Term, 1935, of GUILFORD. Affirmed.

A. C. Davis and Frazier & Frazier for plaintiff, appellant.

Cooper & Curlee and Brooks, McLendon & Holderness for defendants, appellees.

SCHENCK, J. This is an action for wrongful death of plaintiff's intestate resulting from a collision between a motor truck owned by the corporate defendant and driven by the individual defendant and a Chevrolet automobile driven by the intestate.

It is admitted that the collision took place on 10 December, 1934, on Highway No. 10, between Greensboro and Raleigh, while the truck was being driven east and the Chevrolet was being driven west, that the defendant Sharpe was driving the car of the Barnwell Warehouse and Brokerage Company in the scope of his employment as a chauffeur for the company, and that as a result of the collision the intestate was killed.

All allegations of negligence contained in the complaint are abandoned in the appellant's brief except those to the effect that the defendant's truck was being driven on the left half of the highway in violation of C. S., 2621 (51), and similar statutes, and that the driver of said truck failed to maintain a careful and proper lookout.

So far as the record discloses there were no eye-witnesses to the collision between the two cars other than the intestate, who is now dead, and the driver of the truck, who did not testify. The plaintiff rests her case upon the testimony of witnesses who reached the scene of the collision some time after it occurred, and from the testimony of these witnesses all that can be gleaned is that the two cars collided and that the intestate was killed as a result of the collision. There is no evidence to establish on which side of the center line of the road the collision took place, or to establish the failure by the defendant to keep a proper lookout.

The plaintiff offered the testimony of the witness Bayne to the effect that the collision took place on the intestate's side of the center line of the road, that is, the north side, to which the defendants in apt time objected. The following questions and answers were propounded to and made by the witness in the absence of the jury: "Question: I asked you where, with respect to the center line in the road, did the cars come in contact with each other? Answer: Eighteen inches on the right-hand side coming this way. That is the north side. Question: From what you saw there now, and from the location of the cars and other conditions there, do you know where the collision took place, on which side of the road? Answer: About eighteen inches on the north side of the road." We think that the court properly excluded this testimony from the jury, since it does not fall within the exception to the rule as to the admission of opinion evidence by a nonexpert witness upon a collective fact, for the reason that it is an expression by the witness of an opinion upon the very question which the jury was called upon to answer. *Trust Co. v. Store Co.*, 193 N. C., 122; *Pace v. McAden*, 191 N. C., 137.

The court allowed the witness to describe the position of the cars, the location of the glass and other physical facts which he found upon his arrival at the scene of the collision, and it was the province of the court to determine from those facts, and such other facts as the evidence disclosed, whether there was evidence sufficient to be submitted to the jury upon the determinative question in the case, namely, on which side of the center line of the road did the collision take place. His Honor held, and we think properly, that the evidence was not sufficient to take the case to the jury upon this question.

In *Grimes v. Coach Company*, 203 N. C., 605, *Brogden, J.*, writes: "The law imposes upon the plaintiff the burden of offering evidence tending to show that the injury was proximately caused by the negli-

gence of the defendant. In the present case, deductions, inferences, theories, and hypotheses rise and run with the shifting turns of interpretation, but proof of negligence must rest upon a more solid foundation than bare conjecture."

The judgment of the Superior Court is

Affirmed.

W. J. BUNDY ET AL. V. SARAH E. SUTTON ET AL.

(Filed 26 February, 1936.)

1. Mortgages H p—Evidence held sufficient for jury in this action to set aside foreclosure sale for fraud.

It appeared that certain of defendants' claims against the estate of the owner of land were disallowed, in whole or in part, as improper charges against the estate of the owner, the debts having been incurred by the guardian of the owner who had been adjudged an incompetent. Thereafter a deed of trust on the lands, executed by the guardian, was foreclosed and the bid placed by one of defendants was transferred to two other defendants to whom deed was made and who immediately thereafter executed deeds of trust to the creditors whose claims against the owner's estate had been disallowed in whole or in part. The owner's successor guardian brought this action to set aside the foreclosure. *Held:* The jury having found that the defendants to whom the trustee's deed had been made under the foreclosure proceedings had illegally and fraudulently colluded and connived together to suppress the bidding at the sale to the end that they might acquire the land at a grossly inadequate price, the evidence that certain other of the defendants participated in the plan to fraudulently deprive the owner of his land and to suppress the bidding at the sale was sufficient to sustain the jury's finding in plaintiff's favor.

2. Same: Judgments K f—

An independent action to vacate the order of confirmation is the proper remedy to attack a foreclosure sale for fraud and collusion, and defendants' contention that the remedy is by motion in the cause is untenable.

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

APPEAL by defendants from *Barnhill, J.*, at March Term, 1935, of PITT.

Civil action to set aside conveyances on ground of fraud and collusion, for accounting, and to recover plaintiff's lands.

The facts were fully stated on the prior appeal, reported 207 N. C., 422, 177 S. E., 420, to which reference may be had without repeating here.

On the second hearing, upon denial of liability and issues joined, the jury returned the following verdict:

"1. Did the defendants Joe Sutton and Guy Sutton illegally and fraudulently collude and connive together to suppress the bidding at the sale by W. H. Woolard, trustee, on 10 March, 1932, of the land in controversy to the end that they might acquire title thereto at a grossly inadequate price, as alleged? Answer: 'Yes.'

"2. If so, did said defendants, as a result of said unlawful agreement and their conduct in connection therewith, in fact acquire title to said property at a grossly inadequate price, as alleged? Answer: 'Yes.'

"3. Did the defendants Joe Sutton and Guy Sutton unlawfully agree and conspire together to procure the Greenville Banking and Trust Company to bid on the property at the sale held 10 March, 1932, and afterwards transfer its bid to them upon their assumption of the debt owing by the estate of J. W. Sutton to said bank, including $600 interest charged but disallowed, and secure the same by a lien upon the property, and if so, as the result thereof, did they in fact procure said bank to execute said agreement, as alleged? Answer: 'Yes.'

"4. If so, did the said Joe Sutton and Guy Sutton acquire title to said land under said agreement and at a grossly inadequate price? Answer: 'Yes.'

"5. Did the defendants Joe Sutton and Guy Sutton wrongfully collude and agree with the Greenville Banking and Trust Company, J. H. Waldrop, and W. H. Woolard, trustee, that said sale should be held and conducted, not in good faith, but for the mere purpose of effecting the transfer of the title to said land to the said Joe Sutton and Guy Sutton at a grossly inadequate price, as alleged? Answer: 'Yes.'

"6. Was the defendant H. L. Hodges wrongfully induced by the said Joe Sutton and Guy Sutton to refrain from bidding on said land, and was the bidding on said land thereby chilled or suppressed, as alleged? Answer: 'No.'

"7. Was the defendant Nora Patrick wrongfully induced by the said Joe Sutton and Guy Sutton to refrain from bidding on said land, and was the bidding on said land thereby chilled or suppressed, as alleged? Answer: 'Yes.'

"8. Was the defendant Virginia-Carolina Chemical Corporation wrongfully induced by the said Joe Sutton and Guy Sutton to refrain from bidding on said land, and was the bidding on said land thereby chilled or suppressed, as alleged? Answer: 'Yes.'" (The remaining issues deal with rents and the question of accounting.)

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

Gaylord & Hannah, Harrell & Bundy, and H. C. Carter for plaintiffs.
Albion Dunn, Thurman Kitchin, J. B. James, F. M. Wooten, and Blount & James for defendants.

STACY, C. J. The vital question presently presented is whether the evidence warrants the answers to the 3d, 5th, 7th, and 8th issues. A careful perusal of the record leaves us with the impression that it does.

In view of the avowed purpose of Joe and Guy Sutton to obtain possession of their father's lands, the case presented an issue for the jury to determine whether the other defendants, with knowledge of the facts, were also "present, consenting unto the wrong." While three of the claims, one in favor of the chemical corporation, another in favor of H. L. Hodges, and the third in favor of the trust company, were disallowed, in whole or in part, as proper charges against plaintiff's estate while under guardianship, nevertheless under the collusive scheme of the two Suttons, these were to be paid in full or compromised. This circumstance proved to be the undoing of the whole plan, and furnished the nucleus of the evidence upon which the case was properly submitted to the jury.

The plea of estoppel, or that plaintiff's remedy was by motion in the cause, rather than by independent action to vacate the order of confirmation, cannot avail in the face of the allegation and finding of fraud or collusion. *Hatley v. Hatley,* 202 N. C., 577, 163 S. E., 593; *McCoy v. Justice,* 196 N. C., 553, 146 S. E., 214; *Fowler v. Fowler,* 190 N. C., 536, 130 S. E., 315; *Craddock v. Brinkley,* 177 N. C., 125, 98 S. E., 280.

The remaining exceptions are not of sufficient moment to call for elaboration. They have all been examined. None can be sustained. The verdict and judgment will be upheld.

No error.

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

J. R. WHITE, ADMINISTRATOR OF SARAH ELIZABETH WHITE, DECEASED, v. THE CITY OF CHARLOTTE, AND CHARLOTTE PARK AND RECREATION COMMISSION.

(Filed 26 February, 1936.)

Municipal Corporations E a—Demurrer is properly overruled when complaint does not disclose that city was engaged solely in governmental function.

Plaintiff brought suit for the death of her intestate alleging that intestate was killed as she was swinging in a municipal park operated

by defendants, and that her death was caused by the negligence of defendant city and of defendant municipal park commission. Defendants demurred on the ground that it appeared from the complaint that they were engaged at the time in the performance of a governmental function. *Held:* The facts alleged in the complaint failing to show as a matter of law that defendants in maintaining the park and providing swings therein were engaged solely in a governmental function, the demurrer was properly overruled, leaving the facts relied on by defendants in support of their defense to be developed on the trial of the action on its merits.

APPEAL by defendants from *Alley, J.*, at October Term, 1936, of MECKLENBURG. Affirmed.

This is an action to recover of the defendants damages for the death of plaintiff's intestate.

It is alleged in the complaint that the death of plaintiff's intestate was caused by the negligence of the defendant, the city of Charlotte, a municipal corporation, and of the defendant Charlotte Park and Recreation Commission, an agency of said city, created by its governing body, under statutory authority.

The defendants demurred to the complaint on the ground that the facts stated therein are not sufficient to constitute a cause of action on which the defendants, or either of them, is liable to the plaintiff, for that it appears from the allegations of the complaint that the injuries which resulted in the death of plaintiff's intestate were received by her while she was using a swing in a public park in the city of Charlotte, which was maintained by the defendants in the performance of a governmental function.

The demurrer was overruled, and the defendants appealed to the Supreme Court, assigning as error the refusal of the court to sustain their demurrer.

John Newitt for plaintiff.
Scarborough & Boyd for defendants.

CONNOR, J. The facts alleged in the amended complaint in this action (see *White v. City of Charlotte,* 207 N. C., 721, 178 S. E., 219), are sufficient to constitute a cause of action on which the plaintiff is entitled to recover of the defendants, unless, as contended by the defendants, the injuries which resulted in the death of plaintiff's intestate were caused by the defendants while they were engaged in the performance of a governmental function. In that event, although the death of plaintiff's intestate was caused by the failure of the defendants to exercise reasonable care for her safety, the defendants are not liable to the

plaintiff for damages resulting from her death. See *Scales v. Winston-Salem,* 189 N. C., 469, 127 S. E., 543. On the other hand, if the fatal injuries were caused by the defendants while engaged in the performance of a mere corporate function, the defendants are liable, notwithstanding their status as municipal corporations. See *Parks-Belk Co. v. Concord,* 194 N. C., 134, 138 S. E., 599.

The facts alleged in the complaint in this action are not sufficient to determine as a matter of law whether or not the defendants, in maintaining a public park in the city of Charlotte, and providing in said park a swing for the use of children and others who used said park for purposes of recreation, were thereby engaged in the performance of a governmental function only. For that reason, there was no error in overruling the demurrer filed by the defendants. When the facts on which the defendants rely to support their contention that they are not liable to plaintiff in this action are developed on the trial of the action on its merits, the question debated on the argument and in the briefs on this appeal will be presented for decision.

Affirmed.

J. H. GROGG, JR., v. WILLIAM H. GRAYBEAL ET AL.

(Filed 26 February, 1936.)

Courts A c—Appeal from county court must be taken to next term of Superior Court commencing after adjournment of county court.

An appeal from judgment of a general county court must be taken to the term of the Superior Court commencing next after the adjournment of the term of the county court at which the judgment was entered, and where the record is not docketed in the Superior Court within the time prescribed, the appeal is properly dismissed, it being provided by statute that appeals from the general county court shall be governed by the rules governing appeals from the Superior Courts to the Supreme Court, 3 C. S., 1608 (cc), and dismissal in such circumstances being mandatory under Rule of Practice in the Supreme Court No. 5.

APPEAL by plaintiff from *Oglesby, J.,* at November Term, 1935, of BUNCOMBE.

Civil action to recover broker's commissions on sale of real estate, tried in the general county court of Buncombe County, September Term, 1935, nonsuited as to defendant W. H. Graybeal, and appeal dismissed in Buncombe Superior Court, November Term, 1935.

The facts are these:

1. Judgment was signed in the general county court, 6 September, 1935.

2. The September Term, general county court, adjourned by limitation, 4 October, 1935.

3. Plaintiff appellant docketed record proper in office clerk Superior Court, 28 October, 1935.

4. No case on appeal has been stated or served on appellee, and no certification of the judgment roll appears in the cause.

5. Appeal bond was filed 31 October, 1935.

6. The October and November Terms, 1935, Buncombe Superior Court, began 6 October and 4 November, respectively.

Upon the foregoing facts, the Superior Court being of opinion the appeal had not been prosecuted as required by law, dismissed the same upon motion of appellee.

Plaintiff appeals.

Weaver & Miller for plaintiff.

George O. Perkins and Sale, Pennell & Pennell for defendants.

STACY, C. J. The general county court of Buncombe County was established in 1929, pursuant to ch. 159, Pub. Laws 1929, which brought said county within the operation of the general statutes on the subject. *Jones v. Oil Co.*, 202 N. C., 328, 162 S. E., 741.

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," the time for docketing and perfecting appeals to be counted "from the end of the term of the general county court at which such trial is had." *Baker v. Clayton*, 202 N. C., 741, 164 S. E., 233.

Assuming, therefore, that the rules of the Supreme Court are applicable to appeals from the general county court to the Superior Court of the county—and the statute appears to be susceptible of no other interpretation—it would seem the motion to dismiss was properly allowed under Rule 5, Rules of Practice in the Supreme Court, 200 N. C., 816; *Pruitt v. Wood*, 199 N. C., 788, 156 S. E., 126; *Pentuff v. Park*, 195 N. C., 609, 143 S. E., 139.

It is true, the rules as thus adopted by statute, apparently are ill adapted to appeals from the general county court to the Superior Court of the county, but as they have been prescribed by the General Assembly, litigants who avail themselves of the machinery of the general county courts are under the necessity of conforming. *Baker v. Clayton, supra.*

Affirmed.

A. G. McCABE ET AL. v. MARYLAND CASUALTY COMPANY.

(Filed 26 February, 1936.)

1. Insurance R a—Provision in accident policy that person over stipulated age should not be covered thereby held provision limiting liability.

A provision in an accident policy that the policy should not cover any person under 18 years of age or over 65 years of age, and that any premium paid to the company for any period not covered by the policy would be returned on request, is a provision limiting liability and not a condition working forfeiture, and where such policy is issued to a person over the specified age, insured's recovery on the policy is limited to a return of premiums paid.

2. Insurance K a—Provision limiting liability may not be waived, provision working forfeiture may be waived.

Where a policy of accident insurance contains a provision limiting insurer's liability under the policy to a return of premiums paid if the person insured is over a stipulated age, knowledge of insurer's local agent that insured was over the stipulated age at the time the policy was issued will not effect a waiver of the provision, the provision being a limitation of liability which may not be waived, and not a condition working a forfeiture, which may be waived.

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

APPEAL by defendant from *Moore, Special Judge,* at October Term, 1934, of PASQUOTANK.

Civil action to recover on policy of insurance.

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

"1. Did the defendant issue to J. T. McCabe its original policy of insurance, No. MC-108253, as alleged in the complaint? A. 'Yes.'

"2. Did the defendant, through its agents or employees, know that Jos. T. McCabe was over 65 years of age, the name of his wife, and his lack of part of his left arm at the time said policy was issued? A. 'Yes.'

"3. Was the age and date of birth of Dr. J. Lev McCabe, the naming of the latter's wife as beneficiary, her designation as Jos. T. McCabe's wife, and a description of Jos. T. McCabe as in whole and sound condition physically inserted in the application of said policy through mutual mistake of the parties, or the mistake of the draftsman, as alleged in the complaint? A. 'Yes.'

"4. Did the plaintiff's intestate, Jos. T. McCabe, die as a result of bodily injuries effected directly and independently of all other causes through accidental means and sustained while operating and driving an automobile? A. 'Yes.'

"5. Has the defendant waived paragraph 20 of said policy, designated 'Age Limits of Policy,' and the errors appearing in the application, and is defendant estopped to set up said paragraph and said errors in denial of liability on said policy? A. 'Yes.'

"6. At the time of the issuance of the policy MC-108253, on 25 July, 1929, was J. T. McCabe, deceased, more than 65 years of age? A. 'Yes.'

"7. Is plaintiff's cause of action barred by the statute of limitations? A. 'No.'

"8. In what amount, if anything, is defendant indebted to plaintiff administrator? A. '$5,000, with interest (from) 15 November, 1934.'"

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

J. H. LeRoy, Jr., and M. B. Simpson for plaintiff.

John H. Hall and McMullan & McMullan for defendant.

STACY, C. J. Without going into the "mix-up," as indicated by the third issue, whereby the insured was confused with his 36-year-old son in the application, suffice it to say the policy in suit contains the following provision:

"20. Age Limits of Policy: The insurance under this policy shall not cover any person under the age of 18 years nor over the age of 65 years. Any premium paid to the company for any period not covered by this policy will be returned upon request."

With this provision in the face of the policy, plaintiff's recovery is limited to a return of the premiums paid while the insured was over the age of 65 years. *Reinhardt v. Ins. Co.*, 201 N. C., 785, 161 S. E., 528; *Gilmore v. Ins. Co.*, 199 N. C., 632, 155 S. E., 566.

The fifth issue undertakes to find that the defendant had waived paragraph 20 of its policy, but the suit is upon the policy as written. *Burton v. Ins. Co.*, 198 N. C., 498, 152 S. E., 396. The stipulation in question is not a condition working a forfeiture, which may be waived, *Mahler v. Ins. Co.*, 205 N. C., 692, 172 S. E., 204; *Horton v. Ins. Co.*, 122 N. C., 498, 29 S. E., 944, but a limitation upon liability. *Foscue v. Ins. Co.*, 196 N. C., 139, 144 S. E., 689; *Lexington v. Indemnity Co.*, 207 N. C., 774, 178 S. E., 547; *Spruill v. Ins. Co.*, 120 N. C., 141, 27 S. E., 39. Its purpose was to protect the defendant against the heedlessness of youth and the debility of age. *McCain v. Ins. Co.*, 190 N. C., 549, 130 S. E., 186; *Moore v. Cas. Co.*, 207 N. C., 433, 177 S. E., 406. Compare *Walls v. Assurance Corp.*, 206 N. C., 903, 173 S. E., 23; *Welch v. Ins. Co.*, 196 N. C., 546, 146 S. E., 216.

New trial.

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

STATE v. RAYMOND HARRIS.

(Filed 26 February, 1936.)

1. Criminal Law L e—

Where the culpable negligence of defendant is abundantly established by the evidence, error in a question asked one of the witnesses on this aspect of the case will not be held for reversible error.

2. Criminal Law I g—

A slight misstatement of the evidence in stating the State's contentions should be brought to the trial court's attention in apt time if deemed material.

3. Criminal Law L e—

A slight misstatement of the evidence in stating the State's contentions on a certain aspect of the case *is held* not to constitute reversible error, defendant not having been prejudiced thereby in view of the fact that there was plenary evidence on this aspect of the case correctly stated in the charge.

APPEAL by defendant from *Cranmer, J.*, at September Term, 1935, of EDGECOMBE.

Criminal prosecution, tried upon indictment charging the defendant with the unlawful and felonious slaying of C. C. Harris, Lena Harris, and Paul Alford, Jr.

The record discloses that the three persons named in the indictment were killed on Saturday night, 20 July, 1935, about a mile from Crisp, N. C., on Highway No. 12, as a result of a collision between a Chevrolet automobile driven by C. C. Harris, one of the persons killed, and a Ford pick-up truck driven by the defendant. The two vehicles were running in opposite directions. "The Chevrolet was hit on the right-hand front wheel." The scene of the accident was on a long curve, and it is in evidence that the defendant was driving on his left-hand side of the road. The officer, who arrived shortly after the wreck and arrested the defendant, said that he considered Raymond Harris drunk. "I say this from his actions, and you could smell it. He acted like a drunken man and was cursing and rearing and staggering."

The officer was asked the following question:

"Q. Could you tell whether it was a sidewise or head-on collision? Ans.: The truck hit the Chevrolet." Objection; overruled; exception.

The evidence for the defendant tended to show that he was driving in a prudent manner, on his right-hand side of the road, and that he was not under the influence of liquor. He contended the collision was the result of an accident, brought about by the carelessness of the driver of the Chevrolet car.

Paul Alford, a witness for the State, testified that the Chevrolet car pulled off the hard-surface to the right and hit a sign-post eight feet from the outer edge of the highway. He identified the sign-post and the car door with yellow paint on it, which were offered in evidence. On cross-examination, it appeared that his identification of the sign-post and car door was derived from hearsay, hence the exhibits were withdrawn on motion of defendant. However, there was other evidence of the sign-post and the condition of the Chevrolet car.

In charging the jury, the court stated the contention of the State that the driver of the Chevrolet pulled off the hard surface so far that it struck a road sign, "which has been introduced in evidence, . . . and as indication that it had been struck, yellow paint was found on the car door the next morning." Exception.

Verdict: Guilty of involuntary manslaughter.

Judgment: Imprisonment in the State's Prison for not less than 15 nor more than 20 years.

Defendant appeals, assigning errors.

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

George M. Fountain & Son for defendant.

STACY, C. J. It is conceded in the State's brief that the solicitor was perhaps infelicitous in the question he propounded to the officer as to how the collision occurred, whether sidewise or head-on, but as the culpable negligence of the defendant is abundantly established by the record, the error, if such it be, is not regarded as hurtful or reversible. *S. v. Jessup,* 183 N. C., 771, 111 S. E., 523; *S. v. Gray,* 180 N. C., 697, 104 S. E., 647.

Indeed, it would seem that the officer's testimony, if not a "short-hand statement of a collective fact," and admissible as such, *S. v. Skeen,* 182 N. C., 844, 109 S. E., 71, should be regarded as the statement of an ultimate fact, rather than the expression of an opinion. *S. v. Sterling,* 200 N. C., 18, 156 S. E., 96.

Nor can the court's misstatement that the sign-post "has been introduced in evidence," made in giving the State's contentions, be held for reversible error on the present record. The inaccuracy, if deemed material, should have been called to the court's attention at the time. *S. v. Lea,* 203 N. C., 13, 164 S. E., 737. In any event, the matter is too attenuate to work a new trial. There was ample evidence as to the sign-post without the exhibit being in evidence. The case of *S. v. Love,* 187 N. C., 32, 121 S. E., 20, is easily distinguishable.

The remaining exceptions call for no elaboration.

No error.

STATE v. ERNEST B. STAMEY AND CLYDE WOODS.

(Filed 26 February, 1936.)

1. **Criminal Law F a—**

Defendants failing to plead former jeopardy and to offer supporting evidence thereon, waive their rights to have the question of former jeopardy adjudicated.

2. **Criminal Law L g—Held: Petitioners failed to preserve their rights to have rights adjudicated and certiorari was improvidently granted.**

One of defendants appealed from conviction, and the judgment of the lower court was reversed, the Supreme Court holding that the defendant was entitled to a hearing upon his plea of former jeopardy. Thereupon a writ of *certiorari* in the nature of a writ of error was allowed as to the other defendants. Upon return of the writ it appeared that such other defendants failed to preserve their rights to have the question of former jeopardy adjudicated. *Held:* The petition for *certiorari* must be dismissed, it appearing that the writ was improvidently granted.

PETITION by Ernest B. Stamey and Clyde Woods for *certiorari,* filed originally in the Supreme Court, and granted at the Fall Term, 1935.

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

Marvin L. Ritch for defendants.

STACY, C. J. The petitioners were tried with Robert Bell at the April Term, 1933, Macon Superior Court, upon an indictment charging them, in one count, with conspiracy to murder George Dryman, and, in a second count, with the murder of the said George Dryman.

Robert Bell entered a plea of former jeopardy and offered to show that at the same term of court he had been tried and acquitted on a bill charging him and his codefendants, in one count, with conspiracy to burglarize the home of George Dryman, and, in a second count, with burglariously robbing said home. The court ruled that this plea was not good and declined to hear his evidence offered in support thereof. On appeal, the ruling of the trial court was held for error, as the charge of murder grew out of the burglary. *S. v. Bell,* 205 N. C., 225, 175 S. E., 50.

Following the decision in *Bell's case, supra,* the petitioners, who did not appeal from the judgments entered against them, were thought to be entitled to similar treatment. Hence, the application for *certiorari*

in the nature of a writ of error was allowed on authority of *S. v. Lawrence,* 81 N. C., 522, and *S. v. Green,* 85 N. C., 600.

However, it is shown by the record now before us that the petitioners, Stamey and Woods, did not properly enter pleas of former jeopardy, or offer evidence to support such pleas, or preserve their rights to have the question presented as their codefendant Bell did. *S. v. Ellsworth,* 131 N. C., 773, 42 S. E., 699; *S. v. King,* 195 N. C., 621, 143 S. E., 140. Unlike Bell, they were convicted on the burglary charge. Their defense, on the second trial, was an alibi, and they offered many witnesses to show that they were elsewhere at the time the murder is alleged to have been committed. *S. v. Steen,* 185 N. C., 768, 117 S. E., 793.

Thus, it appears from the return to the *certiorari* that the writ was improvidently granted. It will be dismissed.

Petition dismissed.

H. T. GRAY ET AL. v. W. C. WORTHINGTON ET AL.

(Filed 26 February, 1936.)

1. Evidence J b—

Plaintiffs claimed under a parol trust and under a later executed written contract to convey. *Held:* Evidence of the parol agreement in conflict with the later executed written contract is incompetent.

2. Vendor and Purchaser F a—

A purchaser under a contract to convey may not specifically enforce the contract as against grantees of the vendor for value who hold prior registered title.

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

APPEAL by plaintiffs from *Grady, J.,* at June Term, 1935, of LENOIR.

Civil action to engraft parol trust on title to real estate, and to enforce specific performance.

In 1931 the plaintiffs were seized and possessed of certain lands situate in Lenoir County, encumbered by deed of trust. Foreclosure was had 22 December, 1922, the defendant W. C. Worthington bidding in the lands at said sale. Plaintiffs allege that Worthington agreed to buy the lands for them at said foreclosure, and to reconvey upon terms stated, which he now declines to carry out. Worthington later executed a contract to convey said lands to the plaintiffs.

On the hearing, it was admitted that the defendant Worthington subsequently sold the lands to the defendants F. P. and W. B. Heath for a valuable consideration; whereupon, the action was dismissed as to the

defendants F. P. and W. B. Heath, the court being of opinion that as to them specific performance could not be had, and a mistrial was ordered as to the defendant Worthington, with privilege to plaintiffs to recast their pleadings and ask for damages, if so advised.

Plaintiffs appeal, assigning error in the nonsuit as to the Heaths.

Rouse & Rouse, Wallace & White, and Sutton & Greene for plaintiffs.
John G. Dawson for defendant Worthington.

STACY, C. J. The nonsuit is correct on two grounds: First, it appears that the alleged parol agreement is in conflict with the written contract to convey (*Ins. Co. v. Morehead, ante,* 174); and, second, the contract to convey is not enforceable as against purchasers for value who hold prior registered title. C. S., 3309; *Combes v. Adams,* 150 N. C., 64, 63 S. E., 186; *Hood, Comr., v. Macclesfield Co., ante,* 280.

This is the only question presented by the appeal.

Affirmed.

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

THE STATE OF NORTH CAROLINA, ON RELATION OF HAYWOOD COUNTY, v. J. C. WELCH AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

(Filed 26 February, 1936.)

1. Reference A b—A plea in bar requiring determination before reference must extend to the whole cause of action.

In this action on the bond of a public official involving a long account, defendant surety pleaded a settlement made by the public official with the county commissioners. Plaintiff county replied and alleged that any purported settlement was incomplete and was based upon fraudulent statements. *Held:* Plaintiff sought to surcharge and falsify the account and settlement, and the plea of the settlement is not such a plea in bar as to require determination before the court could order a compulsory reference, a mere denial of plaintiff's cause of action being insufficient to defeat a reference.

2. Reference A a—

Statutes relating to trials by referees should be liberally construed.

APPEAL by defendants from an order appointing referee to hear and determine the matters in controversy, entered by *Oglesby, J.,* at January Term, 1936, of HAYWOOD.

HAYWOOD COUNTY *v.* WELCH.

The county of Haywood instituted action against defendant J. C. Welch, former tax collection officer for the county, and the Fidelity and Deposit Company of Maryland, surety on his bond, to recover for alleged defalcations in 1930 and 1931, in the sum of $42,678.25, together with $2,500 penalty.

In its complaint plaintiff alleged that said Welch, in breach of his bond, had failed and neglected to collect taxes appearing on tax books; that he had collected large sums of money which he had failed and refused to account for and pay over, and which he had misappropriated, and that he had fraudulently represented he had sold certain properties for taxes and wrongfully claimed and received credit therefor in his settlement with the county. And the plaintiff set out as an exhibit to the complaint detailed statement of tax shortages, unsettled taxes, and false land-sale certificates, containing more than five hundred separate items. Defendants answering denied the alleged shortages, and further alleged that defendant Welch had made a full and complete settlement with the board of county commissioners for the taxes of 1930 and 1931, and that his settlement had been accepted and approved by said board.

Plaintiff replied that if any settlements were made they were incomplete and based on fraudulent statements and accounts of defendant Welch.

Upon motion of plaintiff, the court ordered a reference, finding that the action involved the taking of a long account.

Defendants excepted to the order of reference, and appealed to this Court.

J. G. Merrimon and A. S. Barnard for plaintiff.
Morgan, Stamey & Ward for defendant Welch.
Shepherd & Shepherd for Fidelity and Deposit Company.

PER CURIAM. Defendants contend that their answers set up a plea in bar which should have been disposed of before a compulsory reference was ordered. But upon consideration of the pleadings, we are of opinion that the order of reference was properly entered, and that defendants' answer does not preclude the court from making such order at this time. Manifestly, the case, which involves more than five hundred items, must be tried by referee, unless the facts pleaded in the answer be such as to defeat plaintiff's action absolutely and entirely in the outset before the necessity for an accounting be reached.

To constitute a plea in bar, there must be something more than a denial of plaintiff's cause of action. It must extend to the whole cause of action so as to defeat it absolutely and entirely. *Reynolds v. Morton,* 205 N. C., 491. In *Bank v. Evans,* 191 N. C., 535, *Brogden, J.,* defines

what is meant by a plea in bar, and states the rule for the application of the principle invoked to procedure in cases requiring trial by referee.

Here defendants allege settlement with county commissioners, but, as pointed out in *Commissioners v. White,* 123 N. C., 534, this will not prevent a compulsory reference when the complaint recognizes attempted settlements and alleges errors and fraud, and seeks to surcharge and falsify the account and settlement. *Jones v. Sugg,* 136 N. C., 143.

The statutes relating to trials by referees serve a useful purpose and should be liberally construed. *Jones v. Beaman,* 117 N. C., 259.

Judgment affirmed.

ELLIS C. JONES, ASSIGNEE OF CORPORATION COMMISSION OF NORTH CAROLINA, v. T. S. FRANKLIN ESTATE, JULIAN PRICE, AND JULIAN PRICE, TRUSTEE.

(Filed 26 February, 1936.)

1. Judgments P b—Assignee of judgment acquires only rights of judgment creditor in his capacity as such.

Plaintiff assignee of a judgment against an executor in his representative capacity for a stock assessment made on shares of stock of a bank in liquidation, sought by subsequent proceedings to charge the executor personally with liability upon allegations that the executor personally owned the bank stock, legally or equitably. *Held:* The mere assignment of the judgment, without more, transferred only the rights of the assignor of the judgment in his status of judgment creditor and not his personal rights not incident to such status, and plaintiff was not entitled to set up the personal liability of the executor.

2. Evidence E b—

The fact that an order making a person a party defendant is entered by consent is not an admission of liability of such person nor a waiver of his right to demur *ore tenus* to the complaint.

APPEAL by plaintiff from *Oglesby, J.,* at December Term, 1935, of BUNCOMBE. Affirmed.

Briefly stated, the facts are these: Upon failure of the Central Bank and Trust Company of Asheville, N. C., the North Carolina Corporation Commission, in accordance with the statutes then in force, levied a stock assessment on twenty shares of stock in said bank against T. S. Franklin Estate, of which defendant Julian Price is executor, and judgment thereon for two thousand dollars was docketed. Subsequently, on 16 November, 1931, said judgment was assigned to the plaintiff by the following words entered on the judgment docket: "For value received,

I hereby assign this judgment to Ellis C. Jones, Attorney. A. M. Burrus, Liquidating Agent, Central Bank & Trust Co."

Thereafter, 13 May, 1935, on motion of plaintiff, an order was entered by the Superior Court making defendant Julian Price, individually and as trustee, party to said cause, and subsequently plaintiff filed his complaint alleging that "the defendant Julian Price was the actual owner of said stock, hereinbefore specifically set out, legal or equitable, although the same stood on the books of the bank in the name of said defendant's codefendant, T. S. Franklin Estate," and asking that defendant Price be held chargeable with the payment of said judgment.

Defendant Price, individually and as trustee, demurred *ore tenus*, on the ground that the complaint did not state facts sufficient to constitute a cause of action.

The demurrer was sustained in the court below, and from judgment dismissing the action plaintiff appealed.

Zeb F. Curtis and Weaver & Miller for plaintiff.
Smith, Wharton & Hudgins for defendant Price.

PER CURIAM. Does the simple assignment of a judgment on the judgment docket entitle the assignee in a subsequent proceeding to bring in others, who were not parties to the original action, and subject them to liability for the payment of the judgment which had been rendered against the original debtor only? We think not.

The statute (C. S., 219-c) provides that executors and trustees shall not personally be subject to liability as stockholders for stock held by the estate.

The mere assignment of a judgment transfers to the assignee all the rights and remedies of the assignor with respect to the judgment and carries with it the right to enforce the judgment by a resort to every legal or equitable remedy available to the assignor, but unless expressly provided for, this does not confer upon the assignee the additional right thereafter to subject to liability on the judgment others who were not parties to the original action, though the assignor, the original plaintiff, might have had a cause of action against them but forebore to pursue it. Independent and personal rights of the assignor, not incident to his status as judgment creditor in the particular judgment assigned, do not pass by assignment unless expressly included therein. 2 Freeman on Judgments, 2209; *Redmond v. Staton,* 116 N. C., 140; *Timberlake v. Powell,* 99 N. C., 233; *Ward v. Haggard,* 75 Ind., 381; *Vicars v. Wampler,* 51 S. E. (Va.), 737; *Heyer v. Kaufenberg,* 53 A. L. R., 285.

The fact that the order making defendant Price a party was by consent could not be construed as an admission of liability to the plaintiff, nor as a waiver of his right to demur *ore tenus* to the complaint.

The judgment sustaining the demurrer and dismissing the action is Affirmed.

F. B. TURNER v. C. C. DISHER CHEVROLET COMPANY, INC.

(Filed 26 February, 1936.)

1. Principal and Agent C a—

Where there is plenary evidence that the principal ratified the contract of his agent, objection to the admission of evidence of the contract on the ground that the authority of the agent to make the contract had not been shown, is untenable.

2. Cancellation and Rescission of Instruments A e—Breach of condition held to go to substance of contract, entitling plaintiff to rescission.

Where it appears that defendant failed to procure a contract of indemnity insurance as agreed upon by the parties in their contract for the exchange of cars, the breach goes to the substance of the contract and entitles plaintiff to rescind and be placed in *statu quo ante* upon the substantial damage of the car in an accident.

3. Evidence E d—

A letter written by an agent is properly admitted against the principal when it is made to appear that the principal subsequently acted upon and ratified the letter.

4. Appeal and Error J e—

The admission of a letter in evidence without proper foundation for its admission will not be held reversible error when it appears that appellant was not prejudiced thereby.

APPEAL by defendant from *Sink, J.*, at January Term, 1934, of GUILFORD. No error.

Henderson & Henderson for plaintiff, appellee.
Frazier & Frazier for defendant, appellant.

PER CURIAM. The issues submitted and answers made thereto were as follows:

"1. Did the defendant enter into a contract with plaintiff whereby it agreed to procure a $50.00 deductible collision policy, as alleged in the complaint? Answer: 'Yes.'

"2. Did the defendant fail to comply with the terms thereof and breach said contract, as alleged in the complaint? Answer: 'Yes.'

"3. What damage, if any, is the plaintiff entitled to recover of the defendant? Answer: '$163.00.'

"4. Did the plaintiff, by reason of false representations, induce the defendant to enter into said contract? Answer: 'No.'

"5. What damage, if any, did the defendant sustain as a result of said false representations? Answer: ....."

The issues, to which there was no objection, arose upon the pleadings, and the verdict supported the judgment from which the defendant appealed.

The first group of assignments of error discussed in the appellant's brief are to the admission of the plaintiff's evidence as to the contract upon which he sues and alleges was made with him by W. C. Baker, as agent for the defendant, upon the ground that the authority of Baker to make such contract was not shown. However this may be, there is plenary evidence that the contract was subsequently acted upon and ratified by the president of the defendant company, C. C. Disher, which renders these assignments untenable.

The second group of assignments of error discussed in the appellant's brief are to the holding and charge of the court to the effect that the failure to procure the $50.00 deductible clause insurance on the automobile sold by the defendant to the plaintiff was such a breach of the contract between the parties as to entitle the plaintiff to rescind the contract and be placed in *statu quo ante*. "To permit an abandonment it is necessary that the failure of performance go to the substance of the contract, . . ." 13 C. J., p. 657, sec. 734. The failure to procure the insurance, for which the plaintiff was required to pay, in our opinion went to the substance of the contract in suit, and renders these assignments untenable.

The third assignment of error discussed in the appellant's brief is to the admission in evidence of a letter by W. C. Baker purporting to set forth the terms of the "trade" between the plaintiff and defendant of a "Chevrolet" for a "LaSalle." There is likewise plenary evidence that this letter was subsequently acted upon and thereby ratified by the president of the defendant company, and the assignment is therefore untenable.

The fourth assignment of error discussed in the appellant's brief is to the admission in evidence of a copy of a letter from the plaintiff to the defendant notifying the defendant that the LaSalle car had been wrecked and asking for an adjustment. Even if it be conceded that the proper foundation was not laid for the introduction of a copy, as argued by the appellant, the contents thereof are not such as could have prejudiced the defendant.

Having contented itself to try this case upon the plaintiff's evidence, without requesting any special instructions as to the law or the presentation of any special contentions, and the jury, under a fair and impartial charge, having answered the issues adversely to it, the defendant must abide the result.

No error.

WADE HOWELL v. SOUTHERN RAILWAY COMPANY AND W. T. CHAPMAN.

(Filed 26 February, 1936.)

Removal of Causes C b—

Where the complaint states a cause of action against the resident defendant, the nonresident defendant's motion to remove is correctly denied, although its petition for removal alleges facts sufficient, under some circumstances, to constitute a defense as to the resident defendant.

APPEAL by the corporate defendant from *Alley, J.*, at July Term, 1935, of SWAIN.

T. D. Bryson, Jr., and Edwards & Leatherwood for plaintiff, appellee.

R. C. Kelly and Jones & Ward for Southern Railway Company, appellant.

PER CURIAM. This action was instituted to recover $20,000 for personal injuries alleged to have been negligently inflicted. The defendant Southern Railway Company, a corporation chartered under the laws of the State of Virginia, filed motion for removal to the District Court of the United States for the Western District of North Carolina for the reason that, as it contends, the complaint fails to allege any cause of action against the defendant Chapman, a resident of North Carolina, and that the resident defendant was joined as a party defendant to defraud the United States Court of its jurisdiction. As stated in the brief of the appellant, Southern Railway Company, the sole question presented on this appeal is: "Does the complaint state a cause of action against the resident defendant, W. T. Chapman, engineer, thereby preventing removability of the case?"

The complaint alleges, in effect, that the plaintiff was employed by the corporate defendant, and that his duties "consisted of cleaning up the station yards at station houses of the said defendant Southern Railway Company," and that when he had cleaned up the station yard at Bryson

City he was ordered by his supervisor to board the "Murphy Local" to proceed to other stations for the purpose of cleaning them up, and that pursuant to orders he boarded said train at Bryson City, "and was seated in the place designated by his supervisor, W. C. Kilwell. That the train was being operated by the defendant W. T. Chapman. That the aforesaid train proceeded from the station at Bryson City in a westerly direction toward the city of Murphy and stopped at its 'Y' track about a mile distant from its station at Bryson City for the purpose of picking up additional freight cars. That the engine operated by the defendant W. T. Chapman was uncoupled from the car in which plaintiff was riding, leaving said car stationed upon the main track until it could be recoupled to the train as aforesaid. That the said W. T. Chapman, without notice or warning of his intention to recouple the train to the car in which plaintiff was riding, negligently, recklessly, and carelessly backed the engine and cars making up the train as aforesaid into the car in which plaintiff was seated at a great and excessive rate of speed, causing the plaintiff to be thrown from his seat in said car, striking his head against an iron hand rail, knocking and hurling plaintiff to the floor of said car and greatly injuring, bruising, and crushing the bones and flesh of plaintiff's head and face, and causing other great, severe, and permanent injuries to plaintiff, as will more fully hereinafter appear."

While the allegations contained in the affidavit to support the motion for removal to the effect that the resident defendant had no notice of the presence of the plaintiff in the car may, under some circumstances, constitute a defense to the alleged cause of action against the resident defendant, it does not appear from the face of the complaint that such defense exists.

We are of the opinion, and so hold, that the allegations of the complaint state a cause of action against the resident defendant Chapman, and that the judge of the Superior Court properly denied the motion of the nonresident defendant for removal to the United States Court.

For a full and comprehensive discussion of the subject of removal of cases from the state courts to the federal courts, see the recent opinion of *Clarkson, J.*, in *Bank & Trust Co. v. Ry. Co., ante,* 304.

Affirmed.

FLORA WILLIAMS v. CHARLES STORES COMPANY, INC., ASHEVILLE GAS COMPANY, AND E. C. HORTON.

(Filed 18 March, 1936.)

1. Negligence A c—Store proprietor is under duty to exercise ordinary care to keep premises in reasonably safe condition.

While the proprietor of a store is not an insurer of the safety of customers while on the premises, he owes them the duty to exercise ordinary care to keep the premises in a reasonably safe condition and to give warning of hidden perils or unsafe conditions known to him, or which he could have discovered by reasonable inspection and supervision.

2. Negligence B c—Intervening negligence must break sequence of events in order to insulate primary negligence.

In order for primary negligence to be insulated by intervening negligence, the intervening negligence must be such as to break the sequence of events, must be palpable and gross, and must begin to operate subsequent to the primary negligence and continue to operate until the instant of injury.

3. Negligence A c—Evidence of negligence and proximate cause held sufficient for jury as against store proprietor.

The evidence tended to show that plaintiff was injured while a customer in a store when a heavy glass globe on a gas lighting fixture fell and hit her, that the fixture belonged to the store, and that at the time of injury a wire basket, usually kept in place over the globe to prevent injury if the globe should break or fall, was not fastened over the globe. Defendant store offered evidence tending to show that a few days before the injury the gas company had repaired and cleaned the fixture and that the fixture had not been touched since. Defendant gas company offered evidence tending to show that it had left the fixture in a safe condition, that it could not have become unsafe unless tampered with. *Held:* Defendant store's motions to nonsuit on the ground of insufficiency of the evidence and for that the evidence showed that the injury was caused solely by the negligence of defendant gas company were properly overruled, the conflicting evidence of negligence being for the jury, and there being evidence of concurrent negligence and breach of duty on the part of both defendants with respect to the same instrumentality.

4. Master and Servant D a—Injured third person may hold independent contractor liable under doctrine of imminent danger.

Ordinarily, an independent contractor is not liable to a third person for an injury sustained after completion of the contract and the acceptance of the work, but he may be held liable in such circumstances when he turns the work over in such a defective condition that it is imminently dangerous to third persons.

5. Trial D a—

On motion to nonsuit, the evidence must be considered in the most favorable light to plaintiff.

6. Master and Servant D e—

A servant may be held liable by a third person for an injury sustained as a result of the servant's negligence in the performance of a duty owed to the public as well as to the master.

7. Negligence A c—Evidence held for jury on issue of liability of company repairing fixture for injury caused by fixture's fall.

The evidence tended to show that defendant gas company usually repaired and cleaned gas fixtures belonging to its customers in order to stimulate the use of gas, that the gas company was requested to repair and clean a gas fixture in its codefendant's store, that its employee worked on the fixture, and that a few days thereafter the heavy glass globe of the fixture fell and injured plaintiff, a customer in the store, as she was standing in the aisle of the store. There was evidence that a wire basket, usually kept in place over the glass globe to prevent injury in case the globe broke or fell, was not in place at the time of the injury. Defendant store offered evidence tending to show that the fixture had not been touched by its employees since defendant gas company worked on it, and defendant gas company offered evidence tending to show that its employee left the fixture in a safe condition, and that it could not have become unsafe unless tampered with. *Held:* The conflicting evidence was properly submitted to the jury on the question of the liability of defendant gas company, regardless of whether it was an employee or independent contractor, since there was evidence that it turned the fixture over in an imminently dangerous condition within the rule of liability of an independent contractor to third persons, and that it was negligent in the performance of a duty owed the store and the public within the rule of liability of a servant to third persons.

8. Evidence K a—

The testimony of medical experts as to the permanency of plaintiff's injuries and their nature and effect, based upon personal examination of plaintiff and deduced from their technical knowledge and experience, *is held* competent.

9. Appeal and Error J d: J e—

The burden is on appellants to show error and that the alleged error was prejudicial.

10. Evidence D f—

Testimony of a witness on redirect examination relating to matters elicited on cross-examination *held* competent, the testimony not containing statements of controverted fact.

11. Damages F a—Plaintiff may recover medical expenses upon showing that she had been attended by physicians and had been in hospital.

Where plaintiff shows that she had been attended by three physicians and had spent some time in the hospital as the result of her injuries, and that her condition was such as would require medical attention in the future, a charge to the jury that plaintiff might recover, as an element of damage, the actual expenses for nursing and medical attention paid by plaintiff, or for which she had become indebted, and such further expenses as the jury should find from the evidence plaintiff would be put to in the future, is without error, although plaintiff failed to introduce evidence

that she had actually paid for any medical services, since it must be presumed from the evidence introduced that plaintiff had incurred liability therefor.

12. Trial E f—

Errors in the statement of the contentions of the parties will not ordinarily be considered on appeal when not brought to the trial court's attention at the time.

13. *Appeal and Error J g*—

Where the answer of the jury to one of the issues makes unnecessary the answering of certain subsequent issues, exceptions to the charge relating to such subsequent issues need not be considered on appeal.

14. Trial E c—

An exception to the refusal of the court to give instructions requested will not be sustained when it appears that the requested instructions were substantially given, and that the court inserted therein or added thereto correct instructions of law or instructions which were not prejudicial when the charge is construed as a whole.

15. Negligence B g—

The burden on the issue of primary and secondary liability is upon the defendant claiming that its codefendant is primarily liable.

16. Trial E g—Where it appears that jury could not have been misled by charge, an exception thereto cannot be sustained.

Where it appears that the charge properly placing the burden of proof on one of the issues upon one of defendants could not have been understood by the jury as placing the burden of proof on any other issue upon such defendant, an exception to the charge upon the issue cannot be sustained.

17. Same—Charge will be construed contextually as a whole.

An exception to the charge for that it stated the jury would be "warranted" in answering an issue in the affirmative if they found the determinative facts by the greater weight of the evidence, will not be sustained when it appears that in the preceding paragraphs, in stating the same principle of law in almost identical language, the court correctly instructed the jury that it would be their "duty" to so answer the issue if they were satisfied of the existence of the determinative facts by the greater weight of the evidence.

18. Negligence B g—

The question of primary and secondary liability between defendants held properly submitted to the jury under the rule laid down in *Johnson v. Asheville*, 196 N. C., 550.

19. Evidence G a—

An exception to the production before the jury of a duplicate of the globe which struck plaintiff *is held* without merit, defendants having previously exhibited parts of the same instrumentality and having failed to request the court to restrict the testimony to the illustration of the witness' testimony.

WILLIAMS *v.* STORES CO., INC.

APPEAL from *Oglesby, J.*, at December Term, 1935, of BUNCOMBE.

Plaintiff instituted her action against Charles Stores Company, Inc. (hereinafter called Stores Company), and E. C. Horton, manager of said Stores Company, and the Asheville Gas Company (hereinafter called Gas Company), in the general county court of Buncombe County, to recover damages for a personal injury alleged to have been caused to her by the negligence of the defendants.

She alleged, substantially, that her injury was due to the falling of a heavy glass globe from a gas lighting fixture insecurely suspended ten or twelve feet above an aisle in the department store of defendant Stores Company in Asheville, N. C., said globe striking plaintiff on her head and causing partial paralysis; that she was a customer in the store at the time, and that defendants were negligent in respect to the inspection, supervision, maintenance, and repair of the lighting fixtures and devices for supporting such heavy object suspended over a walkway in a store much used by customers and the public.

Defendant Gas Company filed answer admitting it furnished gas for lighting, but that all the fixtures in the store were owned and controlled by its codefendant Stores Company, admitting that a globe maintained by the Stores Company did fall and strike the plaintiff, but denied all allegations of negligence on its part.

Defendants Stores Company and E. C. Horton filed answer admitting the operation of a general department store for sale of merchandise, and that in the store were gas pipes and equipment, and that gas lighting fixtures were suspended from the ceiling; admit that while plaintiff was a customer in the store a globe from said gas lighting fixture fell and struck the plaintiff, but denied that they were negligent in any respect, and alleged that whenever it became necessary for said lighting fixtures to be repaired the Stores Company contracted with and customarily employed the defendant Gas Company for that purpose, due to the technical knowledge and experience required; that pursuant to this practice, shortly before the occasion when plaintiff was struck, defendant Gas Company inspected said gas fixture, removed the globe for the purpose of repair, and in replacing same negligently failed to securely fasten same, and as a result the globe fell and struck plaintiff; that the insecurity of the globe was not discovered by defendant Stores Company until after it fell; and defendant Stores Company alleges if either of the defendants were negligent, its negligence was passive and inactive, while that of defendant Gas Company was positive and active, insulating the Stores Company's negligence, and that if negligent at all, its liability was secondary to that of defendant Gas Company.

Defendant Gas Company replied to the answer of its codefendants and admitted that it was engaged in furnishing and distributing gas for

lighting purposes, and that it customarily did certain repair work to gas lights when called upon; that pursuant to request of the Stores Company on the occasion alleged it did certain repair work to lights in the store, and removed the globe, but that it replaced the same in proper manner, and denied all allegations of negligence.

The cause came on for trial at the September Term, 1935, of the general county court for Buncombe County, and upon the pleadings and evidence offered by plaintiff and defendants, issues were submitted to the jury, who answered them as follows:

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

"2. Was the plaintiff injured by the negligence of the defendant Asheville Gas Company, as alleged in the answer of the Charles Store? Answer: .....

"3. Was the plaintiff injured by the negligence of the defendant Charles Stores Company, as alleged in the complaint? Answer: .....

"4. Was the plaintiff injured by the negligence of the defendant E. C. Horton, as alleged in the complaint? Answer: .....

"5. Is the liability of the defendant Asheville Gas Company primary, and that of the defendants Charles Stores Company and E. C. Horton secondary, as alleged in the answer of the defendants Charles Stores Company and E. C. Horton? Answer: 'No.'

"6. What damages, if any, is the plaintiff entitled to recover? Answer: '$17,500.'"

From judgment on the verdict, the defendants appealed to the Superior Court. Each defendant filed numerous assignments of error, based upon exceptions taken during the trial in the general county court. Defendant Stores Company noted 75 exceptions, embraced in 64 assignments of error, and defendant Gas Company 55 exceptions, embraced in 40 assignments of error.

Upon the hearing before the judge of the Superior Court he overruled all defendant Stores Company's assignments of error (other than formal ones), except two with reference to the charge of the trial judge, and overruled all of defendant Gas Company's assignments of error (other than formal ones), except those noted to the judge's charge, and, on account of assignments of error thus sustained, rendered judgment awarding a new trial.

From the judgment of the Superior Court granting a new trial, plaintiff appealed to this Court, and from so much of said judgment in the Superior Court as overruled its assignments of error and exceptions in the county court as to plaintiff and defendant Gas Company, defendant Stores Company appealed; and from so much of the judgment in the Superior Court as overruled its assignments of error and exceptions taken in the county court, defendant Gas Company appealed.

Weaver & Miller, William J. Cocke, Jr., and R. R. Williams for plaintiff.

Jones & Ward for defendant Asheville Gas Company.

Harkins, Van Winkle & Walton for defendants Charles Stores Company and E. C. Horton.

DEVIN, J. This case presents the unusual situation in which both the plaintiff and each defendant appear before this Court in the dual rôle of appellant and appellee, not only as between plaintiff and defendants, but also between the two defendants, and we are favored with three records and seven briefs.

On the trial in the general county court both the defendant Stores Company and the defendant Gas Company noted numerous exceptions, which they have preserved on their appeals to this Court, and the plaintiff in her appeal assigns as error the granting of a new trial by the judge of the Superior Court.

This case comes to us by appeal from a judgment rendered by the Superior Court, which here occupied the position of an intermediate appellate court, and we are called upon to review the rulings of the judge of the Superior Court upon the assignments of error set out in the appeal from the general county court as they were presented to him.

While the record is voluminous and there are many exceptions and assignments of error, a careful examination and analysis of these show that the determinative questions presented for decision are comparatively few.

1. Was there error in overruling the motions of the defendant for judgment as of nonsuit? We think not.

Stores Company contends that the falling of the globe and consequent injury to the plaintiff was due to the negligence of the Gas Company, and that the Gas Company's negligence was the sole proximate cause of the injury, or that the negligence of the Gas Company was active and positive and insulated any negligence on the part of the Stores Company.

It is well settled that while the proprietor of a store is not an insurer of the safety of a customer while on the premises, he does owe a duty to such person to exercise ordinary care to keep the premises in a reasonably safe condition and to give warning of hidden perils or unsafe conditions in so far as same can be ascertained by reasonable inspection and supervising. *Bowden v. Kress,* 198 N. C., 559; *Parker v. Tea Co.,* 201 N. C., 691; *King v. Thackers,* 207 N. C., 869.

The doctrine of insulated negligence set forth in *Ballinger v. Thomas,* 195 N. C., 517, is inapplicable. There was evidence of concurrent negligence and breach of duty with respect to the same instrumentality. In order to insulate the original or primary negligence, the new and

independent intervening cause must be such as to break the sequence of events, must be palpable and gross, and must begin to operate subsequent to the original act of negligence and continue to operate until the instant of injury. *Hinnant v. R. R.*, 202 N. C., 489; *Herman v. R. R.*, 197 N. C., 718.

The questions of negligence and proximate cause were properly left to the jury.

Defendant Gas Company contends it was an independent contractor and owed no duty to third parties, and that it had completed the work it was called upon to do, that same had been accepted and it had left the premises; that there being no privity of contract between it and an invitee on the premises, it owed her no duty.

While the general rule is that an independent contractor is not liable for injuries to a third person accruing after the contract is completed and the work accepted this rule does not apply where the finished work is turned over by the contractor in a manner so negligently defective as to be imminently dangerous to third persons. 14 R. C. L., 107; 45 C. J., 885; 241 Ill. A., 583.

This involves the question of what was the relationship of the Gas Company to the Stores Company, and to the work alleged to have been negligently performed.

Upon motion to nonsuit, the evidence must be taken in its most favorable light for the plaintiff. The evidence here tends to show that the gas fixtures in the store, including the globes and mantles, belonged to the Stores Company, and that the Gas Company was under no explicit contract to keep same in repair, but that incident to its business of furnishing gas it was directly interested in the continued and unobstructed flow of gas through its pipes and outlets, as this was its only source of profit; that for years the uniform custom and practice was, when there was complaint anywhere about a gas fixture being out of order, to send a man to make the repairs; that this work of repair, inspection, and cleaning up service was carried on outside of any written contract; that no charge to the consumer was made for the work, but it was done "to keep the gas burning" in the interest of the Gas Company; that on Saturday, 17 November, 1934, complaint was made by defendant Stores Company of low pressure, and a man was sent to them on that day or the following Monday or Tuesday to repair the trouble; that the gas lights in defendant's store were for use when electric lights failed, and a pilot light constantly burned; that around the light was a large heavy glass globe, held in place by a ring and lugs, and there was under and around the globe a wire net or basket fastened by screws to the fixture above, to prevent the globe falling in case it came off or was broken by the heat; that the Gas Company's employee knew the globe was over an

aisle in the department store where customers, employees, and others were continually passing and standing, and that he knew it would be dangerous to anyone walking there if the globe was not properly secured; that if the wire net or basket was not in place there was danger of the globe falling, because it might break or crack or fall out of its ordinary clip.

The manager of the Gas Company testified in part as follows:

"If there is anything about it that needs new material, we furnish it, if we have not, they furnish it for us. It would be the duty of my men when they put this wire basket back on to attach it properly. Of course, they know how to do that. And that is their business. When they get up to repair a light, the first thing they do, if there is a wire guard there, is to unscrew the screws and take them off, got to do that before they do anything else. When they get through, they put the globe back in, wire back, and fix it back securely. That has a tendency to keep the globe from falling in the event anything should happen to this clip above there."

It was in evidence that the Gas Company knew its customers in calling for service and repairs relied upon the knowledge, experience, and technical ability of its employees.

It was also in evidence that the Gas Company's employee, after doing some work on this and other lights in the store, left; that no one in the store touched or handled this globe or fixture; that it was against the rules of the store for any employee of the store to do so; that a few days thereafter, when the globe fell and struck the plaintiff, the wire netting or basket was off, or hanging down on one side; that when the man came to work, the wire basket was underneath the globe.

There was testimony to the contrary on the part of defendant Gas Company, tending to sustain its contentions that the work was properly done by its employee; that the globe was securely fastened when he left; that there was no wire netting under the globe when he went there to work; that the Stores Company had paper pennants strung on wires near the light; that when globe was securely fastened it would not be likely to fall unless it was tampered with or there was an unusual jar.

But it is apparent that under any view of the law applicable the evidence in the case at bar is sufficient to require its submission to the jury on the pertinent questions of negligence and proximate cause.

If it be considered that the evidence presents the phase that defendant Gas Company was employed by Stores Company to make the repairs to its lights, and thereby became the employee of its codefendant, it is held as a general rule that where a duty rests upon an employee to perform certain acts for the benefit of his employer and the public as well, negligence resulting in injury would impose liability on the employee. 18 R. C. L., 820.

And the same result is reached if we consider it under the doctrine of independent contractors, as contended by defendant.

In the case of *Trust Co., Admr., v. Electric Co.,* 253 U. S., 212, a contractor was employed to stretch a political banner across a street. This was done by attaching one end of a wire to a chimney. Five days later, during a storm, this caused a brick to be dislodged and fall and strike a passerby, injuring him. It was held the facts warranted a verdict for the plaintiff and did not relieve the defendant of a duty with respect to the plaintiff and other travelers in the street with whom it had no contract.

The Court further said: "An act of this kind that reasonable care would have shown to endanger life might have made the actor guilty of manslaughter. . . . The same considerations apply to civil liability for personal injuries from similar causes that would have been avoided by reasonable care (*Gray v. Boston Gas Light Co.,* 114 Mass., 149). A man is not free to introduce a danger into public places even if he be under no contract with the person subjected to the risk." And it was held that where a danger had been called into existence by the defendant, it could not escape liability for the results of conditions that it knew and had created by stepping out of control a few days before the event.

In *Overstreet v. Security Storage Co.,* 138 S. E., 552 (Va.), it is held (quoting from *Lisle v. Anderson,* 61 Okl., 68): "Whenever the circumstances attending the situation are such that an ordinarily prudent person could reasonably apprehend that, as a natural and probable consequence of his act, another person, rightfully there, will be in danger of receiving an injury, a duty to exercise ordinary care to prevent such injury arises, and if such care is not exercised by the party on whom the duty rests and injury to another person results therefrom, liability on the part of the negligent party to the person injured will generally exist, in the absence of any other controlling element or fact, and this, too, without regard to the legal relationship of the parties."

And in the *Overstreet case, supra,* the following is quoted from *Wittenberg v. Seitz,* 8 App. Div., 439, 40 N. Y. S., 899: "There was no contractual relation existing between these parties, and therefore the liability of the defendant for the injuries received by the plaintiff, if any exists, results from his failure to observe the obligation which the law imposes upon a party engaged in the prosecution of any work, of performing the same in such a manner as not to endanger the lives or persons or other parties. This is a very well settled principle, and it is applicable to all cases where a person is engaged in the performance of work which, without the exercise of a reasonable degree of care and prevision, may be attended with risk and danger to others."

If the plaintiff has offered evidence tending, in any aspect, to show that the defendant Gas Company negligently omitted to fasten the safety device beneath the globe which was suspended over an aisle in a department store constantly used by many persons as customers and employees, that would produce a situation potentially dangerous by reason of the liability of the globe to fall, and would bring this case within the rule laid down in *Trust Co. v. Electric Co., supra,* and in the case of *Devlin v. Smith,* 89 N. Y., 470, and in *McPherson v. Buick Motor Co.,* 217 N. Y., 382.

In the leading case of *Devlin v. Smith, supra,* the plaintiff was injured by the breaking of a scaffold which had been furnished by a contractor. Recovery was resisted on the ground that there was no privity of contract between the contractor and the plaintiff, even if, through the contractor's negligence, the scaffold was defective. But it was held that liability would rest not upon any contract between the contractor and the party injured, but upon the duty which the law imposes on everyone to avoid acts in their nature dangerous to the lives of others, and that the erection of a defective scaffold was imminently dangerous. *O'Brien v. Am. Bridge Co.,* 110 Minn., 364, 136 Am. St. Rep., 503.

In the case of *McPherson v. Buick Motor Co., supra,* the cases on this subject are analyzed by *Mr. Justice Cardozo,* and the doctrine of things "imminently dangerous" as affecting the liability of contractors held to include those instrumentalities which are not inherently destructive, but become so if imperfectly constructed or negligently used. "If the nature of the thing is such that it is reasonably certain to place life and limb in peril when negligently made or used, it is a thing of danger. In such circumstances the presence of known danger attendant upon a known use makes vigilance a duty."

"The general rule is that the contractor, after an acceptance of the work by the owner, is not liable to third parties who have no concurrent relationships with him for damages subsequently sustained by reason of his negligence in the performance of his contract duties." *Casey v. Bridge Co.,* 114 Mo. App., 47. But this rule is subject to the qualification that an action on the ground of negligence may be maintained by a stranger to a contract for the execution of a specific piece of work if the product of the stipulated work be imminently dangerous to third parties or to the public.

In 41 A. L. R., beginning on page 8, will be found a comprehensive monograph, with annotations of the leading cases, on the subject of the liability of independent contractors for injuries to third persons by defects in completed work.

2. Was there error in the rulings of the trial court upon the exceptions to certain testimony of the plaintiff's witnesses, Drs. J. C. Rich, J. F. Brownsberger, and Forest E. Bliss?

These witnesses were admitted to be medical experts, and each of them had treated the plaintiff and testified as to her condition, and from personal knowledge gave their opinions as to the permanency of her injuries and their nature and effect. The defendants admitted in their pleadings that the plaintiff had been struck on the head by the falling of the globe. The manner in which she received her injuries was not controverted. These physicians were examined and cross-examined by both defendants at length, and their opinions both as the result of personal examination and deduced from their technical knowledge and experience were competent, and the rulings of the court on objections to this testimony cannot be held for reversible error. The burden was imposed upon the defendants not only to show that there was error in the admission of testimony, but that the error affected the result. One of the questions asked was similar to that held improper in *Plummer v. R. R.*, 176 N. C., 279, but here it was asked on redirect examination in response to matters elicited on cross-examination. Nor did the answers contain statements of controverted facts, as in *Mule Co. v. R. R.*, 160 N. C., 252.

3. Was there error in the charge of the trial court on the issue of damages with respect to medical expenses?

The judge of the county court charged the jury on this question as follows:

"Damages for personal injuries, such as those complained of in this action, include actual expenses for nursing, medical services, loss of time and earning capacity, mental and physical pain and suffering.

"By actual expenses for nursing and medical expenses is meant such sum as the plaintiff has expended therefor in the past, or for which she has become indebted, and such further expenses for nursing and medical services as she will, in your best judgment, based upon the evidence in this case and by the greater weight thereof, be put to in the future, which flow directly and naturally from any injury she may be found by you to have sustained on account of the negligence of the defendants, complained of in this action."

There was no exception noted by the defendant Stores Company, but the defendant Gas Company noted an exception to the last paragraph hereinbefore quoted. It is apparent that the portion excepted to by the defendant Gas Company merely defines and explains what was stated in the preceding paragraph to which no exception was taken, and refers to prospective liability therefor in the future. The defendant Gas Company contends, however, that there is error in this portion of the charge under the rule laid down in *Wallace v. R. R.*, 104 N. C., 442.

An examination of the *Wallace case, supra,* shows that after the judge in that case had correctly laid down the rule for the admeasurement of damages for personal injuries (quoting from 3 Sutherland on Damages,

261), it was at the request of counsel for the plaintiff that the jury should not consider nursing or medical attendance in making up their verdict, that the court added: "There is no evidence, however, offered that anything was paid for actual nursing or any amount was paid for medical attendance." This case of *Wallace v. R. R., supra,* seems to have been considered by this Court three times, 98 N. C., 494; 101 N. C., 454. In none of the reports of this case does it appear that any evidence of nursing or medical attendance was offered, and the other cases cited by the defendant Gas Company are based on what was said in the *Wallace case, supra.* In the instant case it was in evidence that the plaintiff had been attended by three physicians and had spent some time in a hospital, and presumably had incurred liability for nursing and medical services. Without showing that she had actually paid for them, liability therefor would have been an element of damage proper to be considered, and the evidence tended to show that her condition was such as would require medical services in the future. So that she was entitled to have the jury consider what these services had been, and would prospectively be, reasonably worth, under all the circumstances.

Therefore, we cannot hold for error the expressions used in the charge on this subject.

4. Was there error in the charge of the court in the other respects as to which exceptions were noted?

Twenty-nine exceptions were noted to the judge's charge, but many of these were to statements of the contentions of the parties, and any errors contained in statement of contentions not called to the attention of the judge at the time will not ordinarily be considered. *S. v. Baldwin,* 184 N. C., 791.

The definitions of negligence and proximate cause and of the duty devolving upon the defendants were properly stated.

The first issue, "Was the plaintiff injured by the joint and concurring negligence of defendants, as alleged in the complaint?" was answered by the jury in favor of the plaintiff, and the jury was instructed if they answered the first issue "Yes," they would not answer the second, third, and fourth issues, but if they answered the first issue "No," they would consider the second, third, and fourth issues. Most of the exceptions noted by the defendants were to the instructions of the court upon the second, third, and fourth issues, but these issues not having been answered by the jury, the exceptions to the charge on these issues become moot and need not be considered. As was said by *Mr. Justice Clarkson,* speaking for the Court in *Reid v. Reid,* 206 N. C., 1: "This Court will not consider exceptions and assignments of error arising upon the trial of other issues when one issue decisive of appellant's right to recover has been found against him." *Ginsberg v. Leach,* 111 N. C., 15.

The defendant Stores Company excepted to the refusal of the court to give two instructions prayed for by it upon the question of primary and secondary liability, but upon examination of the charge it appears that both of these requests were substantially stated in the general charge. These requests were addressed to the fifth issue. Upon that issue the burden of proof was properly placed upon the defendant Stores Company, as against its codefendant, the Gas Company (*Stein v. Levins,* 205 N. C., 302), and in charging the jury the trial judge inserted, parenthetically, in the requested instruction the words, "the burden being upon the Charles Stores to so satisfy you." That the words were used in this sense is clearly apparent, and could not have been understood by the jury to place the burden of proof upon the Stores Company in any other respect.

The other prayer of defendant Stores Company was given verbatim, except at the close the court uses this language: "The court charges you that you would be authorized and warranted in answering the issue 'Yes,' but if you are not so satisfied, you would answer it 'No.'" The defendant Stores Company contends that the judge should have used the phrase, "it would be your duty" instead of saying "you would be authorized and warranted."

The use of the words "authorized and warranted" in this connection was improper, as the words used would ordinarily be understood to convey an implication of permission or discretion, rather than necessarily an imperative and mandatory direction. *Jones v. Commissioners,* 135 N. C., 218; *S. c.,* 137 N. C., 579. This might be held for error but for the fact that in the preceding paragraphs, in stating the same principle of law, in almost identical language, the court properly instructed the jury if they found the same facts which were incorporated in the requested instruction to be true, it would be their duty to answer the issue in favor of Stores Company.

The question of primary and secondary liability as between the defendants, raised by the pleadings, was properly submitted to the jury in accordance with the rule laid down by this Court in *Johnson v. Asheville,* 196 N. C., 550, and *Taylor v. Construction Co.,* 195 N. C., 30, and was decided against the defendant Stores Company by the verdict of the jury.

5. The exception to the production before the jury of a duplicate of the globe which struck the plaintiff is without merit. The defendants had previously exhibited parts of the same instrumentality. Nor was request made to the court to restrict the testimony to the illustration of the witness' testimony. *Barber v. R. R.,* 193 N. C., 691; *Ledford v. Lumber Co.,* 183 N. C., 614; *Beck v. Tanning Co.,* 179 N. C., 123; *Hill v. Bean,* 150 N. C., 436.

There were other exceptions noted in the long trial before the jury, but after examining them we find no reversible error, or need for detailed comment.

The case seems to have been fairly tried. The issues of fact raised by the pleadings were properly submitted to the jury. Full opportunity was given all parties to present evidence in support of their contentions, and the jury, the triers of the facts, who heard the testimony as it fell from the lips of the witnesses, have rendered their decision, and we find no sufficient ground to disturb the result thus reached.

The briefs filed by counsel in this case, as well as the oral argument, showed diligent investigation of the decided cases and a careful study of the law relating to the questions here presented, as well as an able marshaling of the legal learning applicable to the litigated facts, as contended by the plaintiff and defendants.

We reach the conclusion that the rulings of the judge of the Superior Court upon the defendants' exceptions from which they have appealed to this Court must be sustained, and that upon the plaintiff's exception to the granting of a new trial the judgment must be reversed.

Upon plaintiff's appeal, judgment reversed and case remanded to the Superior Court of Buncombe County for judgment in accordance with this opinion.

Upon appeal of defendant Charles Stores Company, judgment affirmed.

Upon appeal of defendant Asheville Gas Company, judgment affirmed.

STATE v. CHARLES PERRY.

(Filed 18 March, 1936.)

1. Homicide H c—Where evidence warrants a verdict of murder in the second degree, the question must be submitted to the jury.

It is only when all the evidence tends to show that the homicide was committed by means of poison, lying in wait, imprisonment, starving, torture, or in the perpetration or attempt to perpetrate a felony, that the court may instruct the jury to return a verdict of guilty of murder in the first degree or not guilty, and where the evidence tends to show that defendant killed deceased with a deadly weapon and no evidence that the homicide was committed by lying in wait or in the perpetration or attempt to perpetrate a felony, the court must submit the question of murder in the second degree to the jury, although there is ample evidence of premeditation and deliberation, the evidence of premeditation and deliberation being for the jury upon the question of whether the crime was murder in the first or second degree.

STATE *v.* PERRY.

2. Homicide G b—Killing with deadly weapon raises presumption of second degree murder only.

A killing with a deadly weapon raises the presumption that the homicide was murder in the second degree, and if the State seeks a conviction of murder in the first degree it has the burden of proving beyond a reasonable doubt that the homicide was committed with deliberation and premeditation.

CLARKSON, J., dissenting.

APPEAL from *Sinclair, J.*, at October Term, 1935, of HERTFORD. New trial.

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

C. W. Jones and J. H. Matthews for defendant, appellant.

SCHENCK, J. This is a criminal action wherein the defendant appeals from sentence of death based upon a verdict of guilty of murder in the first degree. Under the view we take of the case, it becomes necessary for us to consider only one group of the defendant's assignments of error, namely, those relating to the failure of the court to submit to the jury the issue of murder in the second degree.

The State offered evidence to the effect that the defendant made a confession in which he stated that he was with Joseph Terry late at night, and that Joseph Terry went into his house, out of sight of the defendant, and fired the fatal shot that killed the deceased. The State also offered in evidence the testimony of Joseph Terry to the effect that he and the defendant were out together at night and that the defendant told him (witness) that he (defendant) had shot and killed the deceased during an interval when they were separated. No eye-witness to the homicide was introduced. The evidence as to how the actual killing was accomplished is entirely circumstantial. While there was evidence of threats and of motive and of other facts and circumstances amply sufficient to take the case to the jury upon the issue of murder in the first degree, there was no evidence that the crime was committed by any of the means specifically mentioned in the statute defining the two degrees of murder or in the perpetration or attempt to perpetrate a felony, as delineated in C. S., 4200.

The defendant offered no evidence.

The court charge the jury to return a verdict of guilty of murder in the first degree or not guilty.

It is only in cases where all of the evidence tends to show that the homicide was committed by means of poison, lying in wait, imprisonment, starving, torture, or in the perpetration or attempt to perpetrate

a felony, that the trial judge can instruct the jury that they must return a verdict of murder in the first degree or not guilty. In those cases where the evidence establishes that the killing was with a deadly weapon the presumption goes no further than that the homicide was murder in the second degree, and if the State seeks a conviction of murder in the first degree it has the burden of proving beyond a reasonable doubt that the homicide was committed with deliberation and premeditation. Under such circumstances it is error for the trial judge to fail to submit to the jury the theory of murder in the second degree, since it is the province of the jury to determine if the homicide be murder in the first or in the second degree, that is, whether they, the jury, are satisfied beyond a reasonable doubt, from the evidence, that the homicide was committed with deliberation and premeditation. Whenever there is any evidence or when any inference can be fairly deduced therefrom tending to show a lower grade of murder, it is the duty of the trial judge, under appropriate instructions, to submit that view to the jury. The defendant is entitled to have the jury instructed to the effect that if they should find beyond a reasonable doubt that he committed the murder, and should fail to find beyond a reasonable doubt that such murder was committed with deliberation and premeditation, they should return a verdict of guilty of murder in the second degree. *S. v. Spivey,* 151 N. C., 676; *S. v. Newsome,* 195 N. C., 552.

Under the authorities cited, we hold that the failure to submit to the jury the theory of murder in the second degree entitles the defendant to a new trial, and it is so ordered.

New trial.

CLARKSON, J., dissenting: The defendant was indicted and tried for the homicide of Skidmore Nichols, on the night of 14 September, 1933, and convicted of murder in the first degree.

The defendant Charles Perry paid the rent for the house that Skidmore Nichols' wife and family lived in and he was there two or three times a week. In January, 1933, Skidmore Nichols and his wife separated. Joseph Terry, the brother of Skidmore Nichols' wife, had a house some 5 or 6 miles away. The defendant Charles Perry, Joseph Terry, and Thomas Nichols were at the house rented by defendant on Sunday morning, 15 September. Thomas Nichols, a son of Skidmore Nichols, was there and was going to Billy Terry's, and was requested by Joseph Terry to go to his home and feed his dog. When Thomas Nichols entered the house of Joseph Terry, about 12:45, he went into the house through the back door. He sat down to write a letter and smelled something peculiar. He opened the window blind in the room, the shade was down, and when he opened the blind he saw a man's foot,

and when he opened the door he saw his father—dead. Blood and brains were up and down the ceiling overhead and blood dripping on the floor. That evening Skidmore Nichols' wife and defendant Charles Perry were at Perry's own house. Perry was on the bed, Skidmore Nichols' wife was lying across the bed, and Joseph Terry was on the floor.

Thomas Nichols testified in part: "Joseph Terry asked me, in the presence of Perry, to get Joe Ben Godwin to swear he stayed at his house on Saturday night, he and Perry."

Dr. L. K. Walker, an expert, testified in part: "The body was the body of Skidmore Nichols. The body was found on the floor in the middle of the room just out from the bed. The man was lying on his back and Sheriff Parker and myself turned him over and the whole top of his skull was blown off and his brains were blown on the floor and scattered around the room and house. Pieces of his skull were found in an adjoining room. The door was open between the two rooms. The feet of the dead man were six or eight feet from the adjoining room. In the examination of the room I found blood and pieces of flesh on the ceiling and the brains and part of the hair were blown up in the ceiling of the room. I found the man lying on the floor, his brains shot out. His skull blown all to pieces, his brain tissue scattered about the ceiling and floor, his skull bones partly in an adjoining room, scattered shot all around on the bed near where the man was lying and on the floor. One thing peculiar was I didn't find any scars on the man anywhere except where the load carried his skull clean off. He was shot with a gun. I have an opinion satisfactory to myself where the load of shot entered the head. It entered in the back and took the whole top of it off clean. He was shot from a lower angle than from where he was sitting. I think he was shot with number four shot."

Sheriff C. W. Parker testified in part: "From the appearance of the wound in the head, it looked like he was shot from a lower angle from where he was sitting or standing. I examined a window there and saw the pane was out. It was just a glass of one part of the pane, I would say, about six inches pieces out of the glass. From where that pane was out and the position of the body in the house I would think the shot went through the pane from the outside of the house. He was lying on his back when I first saw him with his head towards the broken out window pane. . . . When we arrived at the house of Charles Perry we walked in the house and went in the room on the left side and found on the bed Charles Perry and Mrs. Nichols and over in the corner of the same room I found Joseph Terry. . . . Q. Now, before you said anything to anyone at that place, what, if anything, was said by anyone in the presence of Perry in respect to Mr. Nichols? Ans.: I guess it was the middle-size boy of Mrs. Nichols as I walked out of the door

with Perry and Sergeant Welch, this boy ran up behind me and asked if his daddy was dead sure enough. . . . I found blood on Perry's clothes. His clothes were dirty, sweaty, and looked like they had been wet. That is the shirt he had on. I found blood on that shirt. Several places on the front. They were cut off. He had on a hat. There was blood on it. He had on an apron to the overalls. At that time bits of flesh and pieces of hair were on the apron of the overalls. . . . The ceiling had bits of brain, hair, and flesh on it. The blood had dripped down by the window on the floor. A lot of shot were on the floor on the back side and also the gun wadding. . . . I did not see any other sign or mark of violence on the body of the deceased besides the shot in the head. . . . I found the gun in a rack over the door leading to the back porch and to the kitchen. There was no empty shell in the gun. This is the gun you hand me. It was hanging on two hooks over the door leading to the back porch from the other room in which he was killed, the room nearer Winton. He was killed in the room nearer Union. I found this loaded shell in the same room I found the gun in. The number of the shot is on the shell. They are number four shot. . . . Q. Sheriff, was any threat made towards Mr. Perry? Ans.: None whatsoever. Q. Was any inducement made to him? Ans.: No, sir, I told Mr. Perry I was not offering to do anything for him and he could not hope for any reward and he made that statement. The conversation made to me by the defendant was made yesterday in jail. *He sent for me* and said he wanted to talk with me. Q. What statement did he make then relative to where he spent the night, and what, if anything, he did that night? Ans.: He said on Saturday afternoon he met Joseph Terry in Winton and he and Joseph Terry went out to Mrs. Nichols' and had supper and sat around there for a while and then came back to Winton. He said they drank some whiskey while out at Mrs. Nichols' home and said they came back to Winton and drank some more whiskey, and then Joseph Terry told him he was going out and kill Skidmore Nichols. He said they left Reid's Filling Station and walked to the dirt road leading to Union, and they got about 30 or 40 yards down the road and stopped and had a conversation, and he said Terry told him he was going to kill old man Skidmore Nichols and that they went on; that he got in front of the house and they stopped in front of the house and Terry went around the house and in a few minutes he heard a gun fire and in a few more minutes he saw Terry come out and Terry said, 'Old man Skidmore Nichols is out of the way.' "

Jeffrey Brown testified in part: "Q. Why did he say he was on the farm? Ans.: He said the sheriff caught him in the bed with Mr. Nichols' wife. Q. What did he say in respect to what he was going to do after

he left the farm? Ans.: He said he was going to kill Skidmore Nichols for causing all that trouble."

Odelia Terry testified in part: "I was at the home of Malissa Nichols, wife of Skidmore Nichols. . . . It was about six weeks before Mr. Nichols was killed. I stayed there two days and two nights. Charles Perry came there while I was there. He had his gun and some fish. That was the night he came. He came that evening about 3 o'clock. While he was there Mr. Skidmore Nichols came near there. I don't know how near. He came by there and went on by the house towards Winton. He came from towards Murfreesboro and passed there coming towards Winton. Mr. Perry saw him when he passed. Q. What, if anything, did Perry say? Ans.: He said he was going to kill him. I sure did hear him make that statement. . . . Q. At the time he said he was going to kill Mr. Nichols, what else did he say? Ans.: He said a damn rascal or scoundrel. Q. He was going to kill him? Ans.: Yes, sir."

J. E. Brady testified in part: "Q. Did you see him (defendant) on the day or within a few days after he came from the county farm? Ans.: I saw him the day he came from the county farm, in front of my store, sitting on a box. He got out of a car and came across there. He had been there something like a half-hour or an hour when Mr. Nichols came up on some car and got out of it and went across the street. Q. What did Charles Perry say in your presence in respect to Skidmore Nichols? Ans.: The only thing I heard him say or ever heard him say was, he didn't feel he would ever die satisfied if he couldn't run his arm down Skidmore Nichols' throat and pull his heart out of him. That is the only thing I ever heard him say."

Charles Terry testified in part: "I never saw the defendant Charles Perry before he was tried here and sent to the roads. I saw him then. Q. What statement, if any, did you hear him make on the day he was tried here in respect to Skidmore Nichols? Ans.: I heard him say that he was going to kill the s—— of a b—— if he ever got free. He was referring to Skidmore Nichols and was talking to Mrs. Nichols. Q. He was talking to Mrs. Nichols, wife of Skidmore Nichols, after being tried and convicted for what? Ans.: For being with Mrs. Nichols."

Joe Ben Godwin testified in part: "On Sunday morning, 15 September, Charles R. Perry came to my house around 4:30 o'clock or 5:00 o'clock in the morning, Sunday, 15 September. It was dark at that time. He asked me to take him home. I told him I could not take him. He wanted to know the reason I could not take him and I told him I did not have enough gas in my car to go there and back. He did not spend the night at my home. . . . The fellow who was with him said: 'Come on, let's go. I have got to go to bed.' He said, 'You

are going to fall down if you don't watch out;' and he said, 'I have already fallen down.' That is what Charles Perry said, I didn't see him."

Edgar Perry testified in part: "Charles Perry is my uncle. My father and he are brothers. I live on the highway between Cofield and Harrellsville. On Sunday morning, 15 September, I came through Cofield and found Charles Perry there when I got there. . . . I got there about 7 o'clock. Charles Perry said, 'If you are going to Winton, I want to ride with you.' . . . We took him down the road a quarter of a mile past Parker's Ferry Road. I know where Mrs. Nichols lives. I judge where we stopped was one mile this side of her home."

W. J. Manly testified in part: "I heard Charles Perry at my door Sunday morning about 5 o'clock. It was not dark. . . . I did not see any other man out there with him, but I heard Mr. Perry talking to some other person."

Brandon Smith testified in part: "I saw Charles R. Perry Sunday, 15 September. He was at my house and asked me to take him home. It was after midnight and before day. . . . Another man was out there with him. I could hear them talking to each other."

Joseph Terry testified in part: "Charles Perry dodged me at Cofield and was gone one hour and a half or two hours. I didn't do anything while he was gone. He did not make any statement to me as to where he was going or why he was going. He got back to Cofield about midnight. He came back alone. Only my dog was with him. When I saw my dog with him I asked him where he had been. He didn't say anything at first. I saw the dog. He said, 'I have been to your house.' I said, 'I would not like to go in anybody's house when no one was there.' I asked him what reason he had to go to my house. He said, *'I will tell you something, but if you tell anybody I will get you before the sheriff gets me.'* He said, 'I expect Skidmore Nichols is at your house dead, but if you tell it I will get you before the sheriff gets me.' I could not do anything. He said to stay with him. I went on with him. We went to Mr. Godwin's and hailed. I had never been to Mr. Godwin's before. Some young man came to the door and Mr. Perry asked about carrying us home. He said he didn't have enough gas to get us there and back and finally he said his car was out of shape. . . . He told me he killed Skidmore Nichols. He said, 'Old man Nichols threw up his hands and said, 'Mr. Perry, please don't kill me, please don't.' "

L. B. Rhodes, an expert witness, testified in part: "I found some splotches on this hat. Q. Did you make an examination of those splotches to determine whether or not they were blood? Ans.: Yes, sir, the splotches on the hat of Mr. Charles Perry were identified as blood.

I didn't make an examination for the determination of human blood. I found a stain on the brim and another stain on the band of the hat. Those I identified as blood. . . . Q. Did you examine the shirt I hand you, represented to be the shirt of Charles Perry? Ans.: Yes. There were splotches on the shirt on the back of the collar here on the collar at the back and some on the front. Some blood stains were on the front. They were the ones cut out. There was blood both on the back and on the front. Q. Did you examine the splotches found on the overalls? Ans.: I also found blood stains on the overalls."

James H. Mitchell, deputy sheriff, testified in part: "I am a deputy sheriff and went to the home of Joseph Terry where the body of Skidmore Nichols was found. I found several pieces of skull on the floor. I have a piece of the skull. Yes, sir, that is a piece of the skull of Mr. Nichols I found there. It was lying about 3 feet from his body on the side next to the road from where he was lying. I saw a number of shot inside or at the top of the room in which Mr. Nichols' body lay, on the opposite side of the house from the dirt road. The room don't face on the dirt road. It faces on a little porch. It was from that door to the back side of the house on the opposite side of that. . . . Shot ranged upwards and struck the ceiling. There were several shot in the ceiling."

J. W. Hampton testified in part: "On Saturday night, 14 September, I left Winton to go home around 20 minutes to 11 o'clock. . . . When I got in about 300 or 400 yards of this side of my home I met Mr. Perry and Mr. Terry walking along the road towards Union. They did not have a dog with them at that time. I got home around 11 o'clock, in 3 or 4 minutes after I left them. . . . When I met these men on the road coming to Winton they did not have a gun with them. If they had had a gun I could have easily seen it. The moon was shining and I was riding along slow. I know both of them when I see them."

Annie Wiggins testified in part: "I and my husband live in the house on the right just after you leave the highway going towards the house in which Mr. Nichols was found dead. It is in sight and in hollering distance. On the Saturday night of 14 September, I passed by the house in which Mr. Nichols' body was found the next day. My husband was with me. It was 20 minutes past 12 o'clock. . . . After we got home I saw some men pass our house going towards the house in which Mr. Nichols' body was found. . . . Just about the time it took the men to walk from up there down to Mr. Terry's house I heard a gun fire. Just as soon as the gun fired a hollering took place. . . . I got out of the window, cracked the door and stood there about an hour. They came towards Winton. They came down the dirt road and went

up towards the highway. Yes, I know where Cofield is. They were going towards Cofield. Mr. Skidmore Nichols came to our house Saturday afternoon. When he left our house he went back towards Mr. Terry's house, where he was found dead. There were two of the men." There was other evidence on the part of the State.

In the main opinion is the following: "Whenever there is any evidence or when any inference can be fairly deduced therefrom tending to show a lower grade of murder, it is the duty of the trial judge, under appropriate instructions, to submit that view to the jury."

The defendant did not testify, but his plea was "Not guilty." The evidence, I think, on the part of the State showed that whoever did the killing, did it with premeditation and deliberation, and there was no evidence tending to show a lower degree.

N. C. Code, 1935 (Michie), sec. 4200, is as follows: "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary, or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State prison."

Under the statute, the murder to be in the first degree must be a willful, deliberate, and premeditated killing, and this must be shown by the State beyond a reasonable doubt before it is justified in asking a verdict of guilty of murder in the first degree.

All the authorities are to the effect: Premeditation means "thought of beforehand," for some length of time, however short. Deliberation means a preconceived intent to kill, executed in cold blood, in furtherance of a fixed design to gratify a feeling of revenge or to accomplish some unlawful purpose, and not under the influence of a violent passion suddenly aroused by some lawful or just cause or legal provocation. And before conviction for murder in the first degree can be had, the State must show that the prisoner has formed, prior to the killing, with deliberations and premeditations, a purpose to kill deceased. Where a conspiracy is formed and murder is committed by one of the conspirators in the attempt to perpetrate the crime, each conspirator is guilty of murder in the first degree. Murder in the second degree is the unlawful killing of a human being with malice, but without elements of premeditation and deliberation.

In *S. v. Spivey,* 151 N. C., 676 (686), is the following: "It becomes the duty of the trial judge to determine, in the first instance, if there is any evidence or if any inference can be fairly deduced therefrom tend-

ing to prove one of the lower grades of murder. This does not mean any fanciful inference tending to prove one of the lower grades of murder; but, considering the evidence 'in the best light' for the prisoner, can the inference of murder in the second degree or manslaughter be fairly deduced therefrom." *S. v. Newsome,* 195 N. C., 552, is to the same effect.

I have set forth the evidence copiously, as I can see no evidence and cannot see any inference that can be fairly deduced therefrom tending to prove a lower grade of murder.

(1) *How was the deceased shot?* With a shotgun. There were no scars on the dead man, Skidmore Nichols, "except where the load carried his skull clean off." The load "entered in the back and took the whole top of it off clean. . . . He was shot from a lower angle, . . . blood and pieces of flesh, brains and part of the hair were blown up in the ceiling of the room." "The back part of his head was shot off." No "sign or marks of violence on the body of the deceased, besides the shot in the head." James H. Mitchell testified: "Shots ranged upwards and struck the ceiling."

(2) *Who did the shooting?* Defendant told the sheriff that "Joseph Terry told him he was going out and kill Skidmore Nichols. He went with him and Terry again told him, "He was going to kill old man Skidmore Nichols." They stopped in front of the house. "Terry went around the house and in a few minutes he heard a gun fire and in a few more minutes he saw Terry come out and Terry said, 'Old man Skidmore Nichols is out of the way.' " Joseph Terry said that defendant told him, "I expect Skidmore Nichols is at your house dead, but if you tell it I will get you before the sheriff gets me." "He told me he killed Skidmore Nichols. He said, 'Old man Nichols threw up his hands and said, "Mr. Perry, please don't kill me, please don't." ' "

(3) *Threats made:* 1. He (defendant) told Jeffrey Brown when he was on the county farm that the sheriff had caught him in bed with Nichols' wife and after he left the farm "he was going to kill Skidmore for causing all this trouble." 2. Odelia Terry testified that as Skidmore Nichols passed by the house of Malissa Nichols, wife of Skidmore Nichols, defendant was there and said "he was going to kill him," called him a "damn rascal or scoundrel." 3. J. E. Brady testified that defendant said "he didn't feel he would ever die satisfied if he couldn't run his arm down Skidmore Nichols' throat and pull his heart out of him." 4. Charles Terry testified before defendant was tried and sent to the roads he said that "he was going to kill the s—— of a b—— if he ever got free."

In the *Newsome case, supra* (p. 559), the defendant told Dr. Linville: "I asked him what caused him to do this, and he said, 'I don't know.'

I asked him if he cut the girl immediately after he came up with her. He said he did not; that he seized her around the waist, and she fought him off and ran from him. He said that he cut her after he caught up with her; that he cut her because she said she was going to tell her father." As I understand the main opinion in that case, this was some evidence on the question of murder in the second degree. In that case the Court said (p. 564): "Deliberation and premeditation, if relied upon by the State, as constituting the homicide murder in the first degree, under the statute, must always be proved by the evidence, beyond a reasonable doubt. In such case, under the statute as construed by this Court, it is for the jury and not the judge to find the fact of deliberation and premeditation, from the evidence, and beyond a reasonable doubt. Premeditation and deliberation are always matters of fact to be determined by the jury, and not matters of law to be determined by the judge."

In the present case, if the defendant did the killing or aided and abetted or conspired with Joseph Terry to do the killing, in either aspect he would be guilty on the evidence in this case of murder in the first degree. The jury found that defendant did the killing with premeditation and deliberation. The court below charged the jury clearly and correctly on the law applicable to the facts. On the evidence, if defendant killed or aided or conspired in the killing, it was murder in the first degree. The evidence was not circumstantial, but direct, that the deceased was shot in the back of the head and his skull shot off. He was shot from a lower angle and blood, flesh, brains, and parts of his hair were blown to the ceiling of the room, and the cry went up from the dead man, when he threw up his hands: "Mr. Perry, please don't kill me, please don't."

The record discloses a horrible crime, for which the jury has convicted defendant of murder in the first degree, and I can see no error in the record. Defendant took deceased's wife and was convicted and imprisoned for the crime. He made threat after threat that he was going to kill deceased, and did kill him—shooting him from behind—taking the top of his head off; or conspired with or aided and abetted Joseph Terry in killing him in the manner before described. He was found the day after the night of the killing lying on his bed in his home in his bloody clothes, bits of flesh and pieces of hair on the apron of his overalls—his paramour, deceased's wife, was with him on the bed.

The evidence is to the effect that he filled up on whiskey before the foul deed was done.

J. W. TESENEER AND WIFE, M. J. TESENEER, v. HENRIETTA MILLS COMPANY.

(Filed 18 March, 1936.)

1. Trial D a—Upon motion to nonsuit, all the evidence must be considered in light most favorable to plaintiff.

Upon a motion as of nonsuit, all the evidence which makes for plaintiff's claim or tends to support his cause of action is to be considered in its most favorable light for plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom, and only the evidence favorable to plaintiff will be considered. C. S., 567.

2. Limitation of Actions A c—Action for trespass based on damage to land from ponded water held not barred by three-year statute.

The evidence favorable to plaintiffs tended to show that defendant's dam had been erected for over twenty years, that defendant had periodically opened the flood gates and cleaned the pond, that for several years prior to the institution of the action defendant had not so cleaned the pond, and that the bed of the stream had gradually built up, and that after heavy rains the water was ponded on plaintiffs' land and deposited sand thereon until at the time of institution of the action the sand was over two feet in depth, rendering it unfit for cultivation, but that the land had not been substantially damaged or rendered unfit for cultivation except during the two years prior to the institution of the action. *Held:* Whether the action was barred by the three-year statute of limitations was properly submitted to the jury upon the evidence under instructions that if all the damage was caused by a wrongful act committed more than three years before the institution of the action, the action was barred, and that recovery of all damage inflicted more than three years prior to the institution of the action was barred, and the jury's finding from the evidence that the action was not barred is upheld. C. S., 441 (3).

3. Waters and Water Courses C b—Evidence held for jury on question of damage to land from defendant's wrongful operation of dam.

Plaintiffs' evidence tended to show that defendant had periodically opened the flood gates of its dam and cleaned the pond for many years prior to the institution of the action, and that plaintiffs' land during this time had not been substantially damaged, but that for several years prior to the institution of the action defendant had not cleaned the pond because of the scarcity of water, that the bed of the stream had gradually filled up so that any heavy rain caused the water to overflow plaintiffs' land and deposit sand thereon, rendering the land incapable of cultivation, and that the sand was deposited by reason of the ponding of still water thereon, and the failure to clean out the sand from the stream bed above the dam. *Held:* The evidence was sufficient to be submitted to the jury on the issue of defendant's negligent operation of the dam and damage resulting therefrom.

4. Damages H b—Admission of evidence of value of land prior to period for which damages are sought held not error under the facts.

Plaintiffs instituted this action to recover damages to their land for the three years prior to the institution of the suit, the injury to the land result-

ing from defendant's wrongful act causing sand to be deposited thereon by ponded water. Plaintiffs were allowed to introduce evidence of the value of the land prior to the three years in controversy. *Held:* The admission of the testimony cannot be held for reversible error, since a certain latitude must be allowed in the introduction of evidence bearing on the question of damage, and since it appears that defendant introduced testimony of the value of the land prior to the three-year period in conflict with plaintiff's evidence.

5. Evidence K b—Admission of opinion testimony that defendant's dam caused stream to deposit sand on plaintiffs' land held not error.

The male plaintiff was allowed to testify to the effect that defendant's dam caused large quantities of sand to be deposited on plaintiffs' land by ponding water thereon. Plaintiffs' expert witness testified to the same effect without objection, as did other nonexpert witnesses for plaintiffs. *Held:* An exception to the admission of plaintiff's testimony cannot be sustained, the testimony being of a common condition not capable of being made palpable to the jury and being based upon plaintiff's observations made at the time.

6. Appeal and Error J e—

Ordinarily, an exception to the admission of incompetent evidence cannot be sustained when it appears that testimony of like import was theretofore and thereafter admitted without objection.

7. Trial F d—

Where defendant does not object to issues tendered by plaintiff or tender other issues, his exception to the issues ordinarily will not be considered on appeal.

8. Trial E g—

The court's charge to the jury will be construed contextually as a whole.

9. Easements A e—Where permanent damage is awarded for injury to land, defendant is entitled to an easement therein.

Where permanent damages are allowed for damage resulting to plaintiffs' land from defendant's ponding of water thereon, the judgment should grant defendant, its successors and assigns, an easement to pond water on the land in controversy.

APPEAL by defendant from *Harding, J.*, and a jury, at Regular September Term, 1935, of RUTHERFORD. No error.

This was a civil action, instituted by plaintiffs against the defendant, to recover damages to land alleged to be the result of the negligent construction and operation of the power dam below the land owned by plaintiffs.

The plaintiffs allege, in part:

"That the construction of the said dam has caused the bed of the said river to gradually fill up over a period of several years with silt and sand and debris several feet deep, and has caused the bed of the said stream for several miles above the said dam to be several feet higher than it was originally; that included in the plaintiffs' tract of land herein-

above described are about 20 acres of river bottom land lying on the west side of said river and on both sides of said creek or branch; and that up until the last few years the said bottom land was in a high state of cultivation and was extremely fertile bottom land for the production of corn and other crops, had level surface and rich soil, and was free from deposit of silt and sand. . . .

"That during the past few years the defendant, on account of the unusual and abnormal dry summers, has failed and refused to operate the said dam properly in that the defendant has not opened the gates of the said dam and has not drawn therefrom the water, silt, and sand as frequently as formerly and as necessary, but has allowed the gates to be closed for months at a time in order to preserve water power.

"That solely by reason of the construction of said dam and the addition thereto in height as aforesaid mentioned and the negligent and careless operation of said dam in not having the pond properly and frequently 'drawned,' which said operation has continued until present time, the bed of the said river and branch has filled with dead sand and silt and other debris, and has caused the bed to rise several feet higher than originally, and as a result thereof the said river and branch have practically no banks whatever, and that whenever any little rain or freshet occurs the river and branch spread its water, silt, and sand all over the bottom land of the plaintiffs; and further, that the said lands during the past two and three years have been visited and covered and filled with water and sand to such an extent that the said lands are now entirely useless and worthless for cultivation, and that by reason of the accumulation of sand several feet thereon said lands are also unfit for pasture, or any purpose. . . .

"That the aforesaid acts of negligence and wrongful conduct on part of defendant have gradually increased the damages to said bottom land so that for the past two years or more the plaintiffs' bottom lands have not been fit to cultivate, or even use for pasture; that prior to commencement of injury to plaintiffs' lands 40 to 50 bushels of corn could be easily and profitably produced; that plaintiffs have not only lost use and yields from bottom lands during the past few years, but that said lands are permanently unfit for either cultivation or pasture, and that since the bed of said river and stream is gradually rising and thus increasing the deposit of water, sand, and silt, the damages to plaintiffs' farm and bottom land are becoming more and worse and greater each year, and have been getting worse each year for past few years."

The defendant denied the material allegations of the complaint, and as a further defense says: "That the dam referred to in plaintiffs' complaint was constructed more than thirty-five (35) years ago, and has been operated since that time by the defendant corporation. That the

operation of said dam has been proper, and the same has been operated in such a manner as not to cause any damage to the plaintiffs' property or any other property. That if any damage has been occasioned by the construction and operation of said dam, that the said damage accrued many years ago; and this defendant pleads the twenty-year statute, the ten-year statute, the seven-year statute, and the three-year statute of limitations as a complete bar of plaintiffs' right to recover in this action."

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

"1. Are the plaintiffs the owners of the land described in the complaint, as alleged? Ans.: 'Yes.' (By consent.)

"2. Has the defendant, in the operation and control of its dam, wrongfully flooded the lands of the plaintiffs, as alleged in the complaint? Ans.: 'Yes.'

"3. Is the plaintiffs' cause of action barred by the statute of limitations, as alleged in the answer? Ans.: 'No.'

"4. What damage, if any, are plaintiffs entitled to recover? Ans.: 'One thousand dollars ($1,000).'"

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

Wade B. Matheny for plaintiff.

Stover P. Dunagan, Robt. G. McRorie, and Clyde R. Hoey for defendant.

CLARKSON, J. The *first* question: Should plaintiffs be nonsuited? We think not.

At the close of plaintiffs' evidence and at the close of all the evidence the defendant in the court below made motions for judgment as of nonsuit. C. S., 567. The court below overruled these motions, and in this we can see no error.

Upon a motion as of nonsuit all the evidence which makes for plaintiff's claim or tends to support his cause of action is to be considered in its most favorable light for plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom.

The competent evidence on the part of plaintiffs sustained the allegations of the complaint, that about 20 acres of plaintiffs' land was damaged by the negligent construction and operation of defendant's power dam—about one mile and a quarter below plaintiffs' land. The defend-

ant, having pleaded certain statutes of limitations, the court below limited the question of wrong to three years. The suit having been commenced on 15 December, 1934, the wrong was limited to three years from 15 December, 1931. We think from the facts and circumstances of this case that the court below was correct.

The defendant's evidence was contrary to that of plaintiffs, but under the rule in this jurisdiction we can only consider plaintiffs' evidence.

About 1895 the defendant built a dam across Second French Broad River, at Caroleen. In 1918, the plaintiffs purchased 57.48 acres of land about one and one-fourth miles above the defendant's dam, paying therefor $50.00 an acre. Plaintiff J. W. Teseneer testified in part: "When I moved there in 1918 the banks on the river were about 6 feet deep, and now the banks around the bottom land are something like two feet deep, or a little more. The bottom land is in two tracts, and is about a quarter of a mile from the lower tract to the upper tract. When the dam is full the pond water would stand on the bottom land. . . . The river did not throw out any sand to do any damage up to about six years ago. . . . I did not plant anything on the bottom land this year, as I made nothing last year. At the present time the land is wet, the part that does not have dead sand on it. About four or five feet of dead sand on it now. It is all level land. Some of it in places is deeper than others. It is so deep that it would not make anything. I am satisfied the average depth on the lower bottom is two feet and six feet on upper bottom." . . .

For seven consecutive years after plaintiff purchased the tract of land in controversy he raised 40 to 50 bushels of corn to the acre. He testified further: "The land is not fit for cultivation now. I never planted anything this year. I let the cows run over it for pasture. Planted about two acres in wire grass about four years ago, but it won't grow. Neither corn nor any other kind of crop will grow in the sand now."

There was other evidence on the part of plaintiffs corroborating his testimony. The plaintiffs' expert witness, H. H. Stribling, an engineer and surveyer, testified, in part: "Assuming 100 to be the height of the flash board on the dam (in order to keep all other measures applicable to 100), the back water with no spilling extends to Teseneer's lower tract, which is absolute dead water—no spilling at one and quarter miles. There is a fall of about two feet from the upper to the lower tract. . . . I examined the surface of the bottom land in question. It is irregular, cut up with sluices; varies in height from one to six feet. At the peak it is ten feet above the spillway, that is all sand. . . . *The bank is practically as high as ever, but it is sand and not soil. I would say the sand is 4 feet deep, most of the way, caused by water and flood—*

stilling the flood water—stilling of the flood water due to the level of the flash board on the dam. The level from that point and each succeeding point is still in comparison with the middle of the stream, and it is held there long enough to deposit sand. In a country which is not all cleared it would take quite a long time after the completion of the dam for the sand to be backed up. I have known sometimes it takes ten to fifteen years for a dam to back water on owner's field. The sand is in suspension, carried like a vehicle, and has got to be dropped. Whenever it is still it will be dropped, if it can't run off. It does that in case of a pond and the river itself as far up as the back water—as the flash board affects the gradient—back water on top of that—it is still beyond what nature intended. Nature would carry it to a flat place, where it would be deposited. *If the dam had never been up there and the water got out over the bottom land, the water would run off, carrying this suspended sand, as fast as nature allows.*"

J. A. Peeler, a witness for plaintiffs, testified, in part: "I could not say when most of the sand was put there. It has been getting on there for several years. *I would say some five or six years ago before any real damage.* There is a portion of it covered with sand. The land I worked I stuck a stick in it, and said is deep, that was just before last court. It would be hard to tell what the average depth of the sand is unless a man measured it. *I would say anywhere from two to two and a half feet. Some places as deep as a man's hip.* Q. Do you know what put that sand there? Ans.: Caused from slow water of Caroleen dam, I would say. . . . I am a farmer. I would not want to plant a crop on it for myself."

B. A. Stalnaker, a witness for plaintiffs, testified, in part: "I went to Caroleen to work in 1917, as chief engineer and electrician. *There were no flash boards on the dam when I went there 1 February, 1917. I put them on, I think, about April, 1917, with the superintendent's permission, in order to make the water last longer.* The height of the boards did not run even, but were between two and three feet. . . . At that time there were four flood gates in operation, and one over near the west bank that had been out of commission a long time and was not operated. *The flood gates are three feet by five, and the purpose is to draw open the pond and keep it clean.* I worked there eight years. . . . I drew the pond pretty often, usually after I got the gates fixed. I drew it every other Saturday in order to clean the pond and get out mud that would bank up around there, and to make it hold more water. There was plenty of sand there when I first drew the pond. Right in the channel there was about 20 feet of mud in some places. I cut out about 20 feet. The pond got more shallow as it went to the land. . . . In the summer time I usually opened the flood gates every two weeks,

every other Saturday. We had an ice plant and did not want to cripple it every week, just every other week."

We think the evidence, direct and circumstantial, as to the damage for the three years, from 15 December, 1931, sufficient to be submitted to the jury.

The court below charged the jury, to which there was no exception, as follows: "The plaintiffs are not asking for any permanent damage created to that property prior to three years before 15 December, 1931. This action was brought and the date of the summons issued is 15 December, 1934. Three years prior from that date, by mathematical calculation, is 15 December, 1931. The statute of limitation would bar the plaintiffs' right of action if you shall find that the wrongful maintenance of the dam, which caused the damage, was done prior to 15 December, 1931. If you shall find that the wrongful maintenance and operation of the dam caused the damage to plaintiffs' land, you will answer this issue 'Yes.' But the court charges you, that if that wrongful act was done prior to 15 December, 1931, which caused or has produced all of the damage and injury to the plaintiff, then his cause of action is barred by the statute of limitation."

This matter has been so recently considered in *Lightner v. Raleigh,* 206 N. C., 496, that we do not think it necessary again to consider the aspect on the question of the statute of limitations in cases as to damages resulting from acts continuing, recurring, or intermittent. N. C. Code, 1935 (Michie), sec. 441 (3). The defendant's evidence was in sharp conflict to that of plaintiffs, but the matter was for the jury to determine.

The defendant in its *second* question asks: "Did the lower court err in permitting plaintiffs to offer evidence relating to damages sustained to plaintiffs' property and the value of the same prior to 15 December, 1931?" We think not, from the facts and circumstances of this case.

In *Myers v. Charlotte,* 146 N. C., 245 (248), it is said: "The value of land is largely a matter of opinion, derived from a variety of circumstances, and, when it is agricultural land, one of the most important is the yield of crops therefrom. That is a matter upon which farmers acquainted with the land, or who have examined it, can express an opinion more or less accurately. This opinion is subject to the test of cross-examination, and the weight to be given it is a matter for the jury. This matter has been recently fully discussed. *Creighton v. Water Commissioners,* 143 N. C., 171; *Brown v. Power Co.,* 140 N. C., 341." *Powell v. R. R.,* 178 N. C., 243 (248).

In *Rouse v. Kinston,* 188 N. C., 1 (13), we find: "The evidence bearing on the question of compensation naturally takes a wide range—the surrounding circumstances and facts. From the record both sides were allowed latitude."

The court below allowed defendant latitude—Coffey Hollifield, witness for defendant, testified, in part: "I have been on this bottom various times during the past twenty-five years. I don't think this land has been damaged in the last eight or ten years. In my opinion, the island was worth $50.00 an acre eight or ten years ago. In my opinion, the value now is $50.00 an acre. . . . I am somewhat familiar with the other streams, have had experience farming on Puzzle Creek. There is no dam on that stream. Puzzle Creek has been filling up with sand. It has three or four feet now where formerly didn't have any. I know the conditions of other streams about filling up. In my estimation there is not a stream in Rutherford County but what has filled up in the last few years." There was other evidence to like effect on the part of defendant.

The defendant cites 27 R. C. L., p. 1103, which is as follows: "The rule is well settled that the owner of a dam must use reasonable care and skill in so constructing and maintaining it that it will not be the means of injuring another, either above or below, by throwing the water back, or being incapable of resisting it in times of usual, ordinary, and expected floods, but his liability extends no further, and he is not held responsible for inevitable accidents, or for injuries occasioned by extraordinary freshets, which could not be anticipated or guarded against." We think, under the above principle of the law, there was sufficient evidence in this case to be submitted to a jury.

The *third* question: "Did the lower court err in permitting plaintiffs' witnesses to testify as to the cause of damage alleged to have been sustained to plaintiffs' property?" If error, it was waived.

Plaintiff testified, in part: "Q. Mr. Teseneer, what caused that water to be ponded up on your bottom land? Ans.: That dam was the cause of the water being backed up on the bottom. There is no other dam or construction between the Caroleen dam and the bottom land. Q. Go ahead and tell the court and jury what it was that put the sand out on the bottom land, if you know. Ans.: The dam was the cause on account of backing the water so the water would not drain out." To the above questions defendant excepted and assigned error. They cannot be sustained.

It is true the general rule is that the opinion of witnesses is not competent evidence, but, as stated in *Britt v. R. R.*, 148 N. C., 37 (41) (quoting 5 Encyc. Ev., 654), there is well recognized exception to the rule, and "It includes the evidence of common observers testifying the results of their observations made at the time in regard to common appearances, facts, and conditions which cannot be reproduced and made palpable to a jury." The testimony did not invade the province of the jury. *Marshall v. Tel. Co.*, 181 N. C., 294; *Hicks v. Love*, 201 N. C., 773; *Morris v. Lambeth*, 203 N. C., 695.

The plaintiffs' expert witness, Stribling, testified, unobjected to, substantially what plaintiff testified to as above set forth. Many of plaintiffs' witnesses testified to the same effect, unobjected to by defendant. For example, E. T. Randall testified: "Caroleen dam has caused the water to be ponded up to the lower tract. The water has thrown sand out of the river and deposited it on that bottom land." Vance Price testified: "The dam causes the water to pond up. There is nothing between the dam and this lower tract to obstruct the river."

In *Shelton v. R. R.*, 193 N. C., 670 (674), it is said: "It is thoroughly established in this State that if incompetent evidence is admitted over objection, but the same evidence has theretofore or thereafter been given in other parts of the examination without objection, the benefit of the exception is ordinarily lost." *Ingle v. Green,* 202 N. C., 116 (121).

The *fourth* question: "Did the lower court properly charge the jury and submit proper issues in the case?" We think so. The issues tendered were not objected to by defendant, nor did defendant submit other issues.

In the case of *Greene v. Bechtel,* 193 N. C., 94 (99), this Court said: "If the defendant did not consider the issues submitted by the court proper or relevant, it was his duty to tender other issues, and, having failed to do so, he cannot now complain."

We have examined the charge of the court below carefully—it contains 20 pages. Taking same as a whole, and not disconnectedly, we think the able and learned judge in the court below charged the law applicable to the facts and gave fairly the contentions of both litigants.

The record discloses that the defendant, by its attorney, made its motion that the court allow and permit the jury to view and visit the said bottom land and the defendant's dam before arriving at a decision. Plaintiffs' attorney did not object to the motion, but consented thereto. Thus, it was agreed by plaintiffs and defendant that at the conclusion of the judge's charge to the jury, that the jury should go out and view the location of the Teseneer land and the Caroleen dam. This was done by the jury before they rendered their verdict.

The *fifth* question is not material and has already been considered under other questions. We see no prejudicial or reversible error in the exceptions and assignments of error made by defendant.

The *sixth* question: "Is the judgment in proper form to settle the controversy between the parties?" We think not. The judgment must be modified.

The case was tried on the theory of permanent damage and the court below charged, unobjected to: "Now, the court charges you that if you find that this defendant has committed a wrongful act in that it has failed to exercise due care in the maintenance and operation of its dam,

and that such failure is the proximate cause of flooding plaintiffs' land, and that that failure took place on 15 December, 1931, or any time since then, the plaintiffs would be entitled to recover the difference between the reasonable market value at the time of the injury—time the injury took place—and the reasonable market value at this time. Q. (By juror): Are we to consider permanent damage, if any we find, after this date? The court: Of course, gentlemen, this is a permanent damage, but you have got to measure it by something, and the measurement is the difference between the reasonable market value at this time and the market value on 15 December, 1931. Or, put it another way: The difference between the reasonable market value of the land if the water was not on it 15 December, 1931. You ascertain what that value was at that time, and then the difference between the value of it at that time and the value of it at this time. That is the damage, and that measure of damage will include all damages." The judgment must be modified so as to give and grant the defendant, its successors and assigns, an easement to back water on the 20 acres of plaintiffs' land damaged by defendant, as found by the jury.

For the reasons given, the judgment is modified. There is no error in the trial.

No error.

STATE OF NORTH CAROLINA, EX REL. A. A. F. SEAWELL, ATTORNEY-GENERAL OF THE STATE OF NORTH CAROLINA, EX REL. ZEB V. NETTLES AS SOLICITOR OF THE NINETEENTH JUDICIAL DISTRICT, V. CAROLINA MOTOR CLUB, INC., AND AMERICAN AUTOMOBILE ASSOCIATION.

(Filed 18 March, 1936.)

1. Attorney and Client A b—C. S., 199 (a), prohibiting the practice of law except by members of the bar, is constitutional and valid.

C. S., 199 (a), providing that only those admitted and licensed to practice as attorneys at law may appear as attorney in any action, except appearance by a party *in propria persona*, give legal advice for a fee or any compensation, or prepare legal documents, or hold themselves out as competent to give legal advice or furnish legal services, is constitutional and valid, the right to practice law being subject to legislative regulation within constitutional restrictions and limitations, and the statute not being in contravention of any provision of the State or Federal Constitutions.

2. Attorney and Client A a—

The right to practice law is personal and may not be exercised by a corporation either directly or indirectly by employing lawyers to practice for it.

3. Same—Nature and scope of practice of law in general.

The practice of law is not limited to the conduct of cases in court, but embraces, in its general sense, legal advice and counsel and the preparation of legal documents and contracts by which legal rights are secured, although such matter may or may not be pending in court.

4. Attorney and Client A b—Decree enjoining defendant corporation from continuing practice of law held correct upon facts found.

The trial court found, upon supporting evidence, that defendant corporations, as a part of their services to their members rendered in consideration of the payment of annual dues, were engaged in giving legal advice, in employing attorneys for members in certain instances to collect damages out of court, in allowing lay members of the incorporated club to write letters on club stationery to persons involved in accidents with members of the club advising, at least indirectly, that such persons were liable in damages in law for negligence in causing such accidents, and in drawing up receipts stating that a certain sum was received as settlement of such damages when collections were made as a result of such letters. *Held:* The findings support the conclusion of law that defendants were engaged in the practice of law in violation of C. S., 199 (a), and judgment upon the findings that defendants be perpetually enjoined from performing such acts is affirmed on appeal.

5. Appeal and Error J c—

Findings of fact by the court under agreement of the parties are conclusive on appeal when based upon competent evidence.

APPEAL by defendants from *Oglesby, J.*, at September Term, 1935, of BUNCOMBE. Affirmed.

This was an action, instituted by Zeb V. Nettles, solicitor of the Nineteenth Judicial District, to restrain defendants from doing certain acts in violation of C. S., sec. 199 (a), brought upon application of certain members of the bar and of the Junior Bar Association of Buncombe County, under authority of section 199 (d). Later, on motion, the State *ex rel.* A. A. F. Seawell, Attorney-General, was made party plaintiff.

The allegations in the complaint are substantially these:

That the defendant Carolina Motor Club, Inc., is a North Carolina corporation, with branch office in Asheville, N. C., and defendant American Automobile Association is a corporation authorized to do business in North Carolina, with branch offices operated through its codefendant, Carolina Motor Club, Inc.; that the defendants, by word, sign, letter, or other advertising, hold themselves out as competent to give legal advice, to prepare legal documents and, in consideration of a payment of regular annual dues, are engaged in advising or counselling in law, acting as attorneys or counsellors at law, and in furnishing the services of lawyers without license so to do; that defendants in their advertisements hold themselves out and are engaged in furnishing the

services of lawyers to assist persons in the collection of damages out of court, furnishing legal advice with respect to the ownership, operation, or registration of motor vehicles, the furnishing of attorneys for private prosecution of criminal actions, furnishing counsel and attorneys at law to defend persons charged with criminal offenses; that defendants circulate and distribute maps on which are printed advertisements by which defendants hold themselves out as furnishing services of attorneys; that by advertisement through the Carolina Motor News defendants hold themselves out as furnishing attorneys retained by them to represent persons in need of legal advice and court action; that defendants advertise to have collected $71,780.42 through its legal department in civil damages; that defendants are and have been engaged in advising and counselling in law and furnishing the services of lawyers, and are so advertising.

The plaintiff offered the following exhibits:

Exhibit A: "The Club, through its Legal Department will give advice to members with respect to the ownership, the operation, or registration of members' cars. In addition, the Club will assist members in the collection of damages out of court. The Club does not, however, furnish legal service in civil matters which involve litigation. If, in order to collect damages, court action is necessary, the member must pay for such services to the attorney of his or her choice.

"In criminal cases involving members' cars in those courts where there is no regular prosecuting attorney, the Club will furnish an attorney to prosecute such cases. The Club will also furnish counsel to defendant members charged with criminal offenses, provided said offenses do not grow out of illegal transportation of whiskey or the operation of a car while under the influence of intoxicating beverages."

"Direct Benefits and General Services:

"Legal advice regarding registration, ownership, and operation of automobiles and defense when member is being unjustly prosecuted."

Exhibit B: "Legal Advice and Assistance." (Said words constituting a caption to a picture of a judge on the bench, with attorney, pleading case for client.)

"Legal Advice—Attorney Services assures members of advice in any case involving an automobile and defense in criminal actions accruing from operation of an automobile.

"Carolina A. A. A. Motor Club. Claim Service Department Endeavors to collect Damage for Members out of Court. Claim Service—$71,780.42 in Damage Claims Collected for Members. Carolina A. A. A. Motor Club. 6,150 Members Given Legal Advice by Club Attorneys. Legal Advice."

Exhibit C: "A. A. A. Motor Club Attorneys in the Carolinas.

"Herewith is a partial list of corresponding attorneys retained to represent Carolina Motor Club and A. A. A. Members in emergency cases. Members should bear in mind that these local attorneys should be consulted only in case of emergency. A full report of any case demanding legal advice should be filed promptly to club headquarters. It will then be handled by the Claim and Adjustment Department of the club, which may, in its discretion, turn the case over to the proper corresponding attorney."

(Follows list of approximately one hundred [100] North Carolina attorneys, with addresses.)

Defendants in their answer deny the material allegations of the complaint charging them with violating the statute, and deny they are engaged in the practice of law in any respect. Defendants allege further that these defendants, though incorporated, consist of groups of motorists banded together for their protection and for the advancement of the interest of motorists generally, both as to security and convenience, and for the enactment of wise motor vehicle laws for the safety of the public; that as incident to the service it renders, in return for the annual dues paid by its members, it uses its good offices to facilitate the amicable adjustment of small claims growing out of operation of automobiles; that in a few instances the club has employed counsel to attempt to settle property damage claims for its members, and has employed counsel to represent its members when unjustly prosecuted.

Affidavits of Coleman W. Roberts, president; J. H. Monte, secretary; and Frank D. Miller were offered by defendants and those of W. C. Maness and A. O. Mooneyham by plaintiffs.

Upon the hearing it was stipulated and agreed by all parties that jury trial in this action be waived; that the court should find the facts from the affidavits and pleadings, and render final judgment thereon. The findings of fact, conclusions of law, and judgment of the court below are as follows:

"2. That the defendant American Automobile Association is a foreign corporation or organization, but is represented in this State by its co-defendant, the said Carolina Motor Club, Inc., its duly authorized agent, and that the defendant Carolina Motor Club, Inc., is a corporation organized and existing under and by virtue of the laws and statutes of this State.

"3. That the defendants are in the business of rendering certain services to motorists who become members of said organization in consideration of the payment of certain membership fees and annual dues.

"4. That among the services so rendered in consideration of the payment of said annual dues and fees, the defendant Carolina Motor Club,

Inc., and the defendant American Automobile Association, through its agent, Carolina Motor Club, Inc., maintain and have maintained what is known as a legal department and claim and adjustment department of said club or clubs.

"5. That the foregoing legal service is partially explained by an advertisement appearing in the Carolina Motor Club News for February-March, 1935, a newspaper published by Carolina Motor Club, Inc., pages 1, 2, 3, and 4 thereof, being attached to the complaint of the plaintiff, and exhibited, filed, and placed in evidence in this cause, and that said advertisement is in part as follows:

"'Herewith is a partial list of corresponding attorneys retained to represent Carolina Motor Club, Inc., and American Automobile Association members in emergency cases. Members should bear in mind that these local attorneys should be consulted only in cases of emergency. A full report of any case demanding local legal advice should be filed promptly at headquarters. It will then be handled by the claim and adjustment department of the club, which may in its discretion turn the case over to the proper attorneys.'

"(Follows long list of attorneys located in various towns in North and South Carolina.)

"6. That said services are further explained by reference to advertisements published on maps issued by the defendants prior to April, 1935, one of which maps is attached to the complaint, and filed in evidence in this cause, which said advertisements state that attorneys' services assure members of advice in any case involving an automobile and defense in criminal actions accruing from operation of an automobile; that the claim service department endeavors to collect damages for members out of court, and that $71,780.42 has been collected by this department for members, and that 6,150 members have been given legal advice by club attorneys.

"7. That since April, 1935, said defendants have discontinued the advertising of legal services, but did not discontinue the rendering of said service until the issuance of the temporary restraining order in this cause.

"8. That defendants' services to members in criminal law consist, and has consisted, of employing counsel for private prosecution where the member desired a criminal action to be vigorously pushed against a nonmember motorist with whom he had had a collision, and in employing counsel to defend said members where, in the opinion of the agent of the club, the member was being 'unjustly prosecuted' or was not admittedly guilty of driving under the influence of intoxicating liquor, and that these services were rendered to the members by attorneys employed, retained, and paid directly by the defendants, and that said members

were entitled to said service by virtue of the payment of dues and membership fees to the defendants.

"9. That the services rendered in connection with the civil practice of the law by the defendants consists of giving legal advice, and the collection of damages out of court resulting from collision of motor vehicles; that in part this service was rendered by lay employees and agents of the club, and in part by attorneys employed, retained, and paid by the defendants, the method being in the discretion of the agents and officers of the defendants.

"10. That the defendant Carolina Motor Club, Inc., admits in open court, through the affidavit filed in this cause by its secretary, J. H. Monte, that lay members of the club have written letters on the stationery of the club to the other party involved in a collision, stating in substance that the member of the motor club was of the opinion that the property damage in question resulted from the negligent operation of the automobile by the other party involved to whom the letter was addressed, and requesting that such party mail a check in a certain amount to cover the damage occasioned, and that if necessary the defendant would write follow-up letters; and the court further finds as a fact that, in this connection, Mr. Frank D. Miller, manager of the Asheville office of the Carolina Motor Club, Inc., stated in open court that if these letters were successful and a check was received it was the practice to draw up a receipt stating merely that a certain sum had been received as settlement of the damages caused to the car of the club member; and the court further finds as a fact that, in the writing of said letters in the manner hereinabove set out, the defendants were expressing and giving an opinion, at least indirectly, by adopting or confirming the opinion of the club member as to negligence as a matter of law on the part of the claimee, and as to the proper amount of damages involved in a case of tort liability.

"11. The court further finds that both the defendants admit in paragraph 5 of their further answer and defense filed in this cause that at least in a few instances the defendants have employed attorneys to perform this 'claim and adjustment service.'

"12. That for all of the services hereinabove specifically set out the defendants receive valuable consideration in the form of dues and membership fees, and that the giving of said services by the defendants constitutes a substantial inducement to the motoring public to become members of said organization and pay the required fees and dues therefor.

"13. It further appears to the court that the State of North Carolina does not insist upon and agrees to waive its cause of action with respect to the revocation of defendant Carolina Motor Club's charter.

"Now, therefore, it is hereby ordered and adjudged that the defendants, and each of them, be and they are hereby forever and perpetually restrained and enjoined from in any way advertising or holding themselves out as competent to practice law as defined by the statutes and laws of this State; to prepare legal documents, engage in advising or counsel in law or equity or acting as attorneys and counsellors at law or in furnishing the services of a lawyer or lawyers in legal matters, civil or criminal, as a consideration for the payment of membership dues; directly or indirectly to furnish the service of a lawyer or lawyers in any civil or criminal litigation in consideration for the payment of fee for membership; from collecting, or attempting to collect, damages in or out of court as part of legal service, or settling, or attempting to settle disputes, by giving legal advice in or out of court, sounding in tort arising from collision of motor vehicles, or other vehicles, on behalf of its members or other parties, and from so settling controversies as to tort liabilities, and from in anywise engaging in the practice of law, or holding themselves out as practicing law in violation of the statutes of this State."

The defendants excepted to paragraphs 9 and 10 of the foregoing findings and judgment, and appealed to the Supreme Court.

Zeb V. Nettles, solicitor of the Nineteenth Judicial District.

Weaver & Miller, appearing as amici curiæ on behalf of Junior Bar Association for Buncombe County, N. C.

C. C. Collins, H. E. Fisher, and Thomas S. Rollins, Jr., for defendants.

DEVIN, J. The question presented to this Court for decision is whether the particular acts and methods of business of the defendants, as charged in the complaint and found by the court below, constitute a violation of the statute prohibiting the practice of law by unauthorized persons, and particularly by corporations and associations; and are such as to entitle the plaintiff to injunctive relief.

By chapter 157, Acts 1931 (C. S., 199-a) it is made unlawful for any corporation, person, or association, except members of the bar of North Carolina, admitted and licensed to practice as attorneys at law, "to appear as attorney or counsellor at law in any action or proceeding in any court; to maintain, conduct, or defend the same, except in his own behalf as a party thereto; or, by word, sign, letter, or advertisement, to hold out himself, or themselves, as competent or qualified to give legal advice or counsel, or to prepare legal documents, or as being engaged in advising or counselling in law or acting as attorney or counsellor at law, or in furnishing the services of a lawyer or lawyers." It

is made unlawful "for any person or association of persons, except members of the bar, for a fee or any consideration, to give legal advice or counsel, perform for, or furnish to another legal service."

And the statute further authorizes the solicitor, upon application of any member of the bar or any bar association, to bring action in the name of the State to enjoin such person, corporation, or association from violating the provisions of this act. C. S., 199 (a). *Fitchette v. Taylor,* 254 N. W., 910.

The right to practice law is not a natural one. Subject to constitutional restrictions and limitations, the Legislature has the power to prescribe the qualifications and establish the rules and regulations under which citizens may enter upon and continue in the professional practice of the law. *In re Applicants for License,* 143 N. C., 1.

The statute in question offends neither the State nor Federal Constitution. *Berk v. State,* 225 Ala., 324.

A corporation cannot lawfully practice law. It is a personal right of the individual, obtained by diligent study and good conduct, cannot be delegated or assigned and dies with him.

Since a corporation cannot practice law directly, it cannot do so indirectly by employing lawyers to practice for it. *Re Co-operative Law Co.,* 198 N. Y., 479, 32 L. R. A. (N. S.), 55; *State ex rel. Lundin v. Merchants Pro. Corp.,* 105 Wash., 12; *Photo Eng. Co. v. Schonert,* 95 N. J. Eq., 12; *Re George H. Otterness,* 181 Minn., 254; *People v. Cal. Pro. Corp.,* 76 Cal. App., 354; *People v. Merchants Pro. Corp.,* 189 Cal., 531; *Re Eastern Idaho Loan & Tr. Co.,* 49 Idaho, 280, 73 A. L. R., 1323, and note.

In recent years the courts have been frequently called upon to determine what constitutes practicing law. Probably the definition more often quoted with approval is found in *In re Duncan,* 83 S. C., 186, as follows: "According to the generally understood definition of the practice of law in this country, it embraces the preparation of pleadings and other papers incident to actions and special proceedings, and the management of such actions and proceedings on behalf of clients before judges and courts, and, in addition, conveyancing, the preparation of legal instruments of all kinds, and, in general, all advice to clients, and all action taken for them in matters connected with the law." *In re Duncan,* 83 S. C., 186; *In re Pace,* 170 N. Y. App. Div., 818, 156 N. Y. S., 641; *Barr v. Caldwell,* 173 Iowa, 18; *Ferris v. Snively,* 172 Wash., 167; *Fitchette v. Taylor,* 254 N. W., 910, 94 A. L. R., 356; *S. v. Bryan,* 98 N. C., 644.

The practice of law is not limited to the conduct of cases in court. *S. v. Richardson,* 125 La., 644. In a larger sense it includes legal advice and counsel and the preparation of legal instruments and con-

tracts by which legal rights are secured, although such matter may or may not be pending in court. *Boykin v. Hopkins,* 162 S. E., 796 (Ga.).

But the defendants in the case at bar contend they are not practicing law. They do not object to any of the prohibitions contained in the judgment except as their "claim and adjustment" department may be affected. They excepted only to paragraphs 9 and 10 of the findings and judgment of the court below.

The question whether the maintenance of a collection agency comes within the definition of practicing law has been considered by the courts in other jurisdictions, and it has been generally held that while a collection agency might lawfully, for its members and others, engage in the collection of their claims, the maintenance of a law department and through it giving free legal advice to members and the performance of the services of an attorney in collecting the claims would constitute practicing law, and that where the corporations employed attorneys to dispense legal advice and services of the sort usually furnished by lawyers to their clients, and undertook to perform various legal services through licensed attorneys paid by them, it would be regarded as an evasion of the law. *Creditors National Clearing House v. Bannwart,* 227 Mass., 579; *Midland Credit Adjustment Co. v. Donnelly,* 219 Ill., 271; *Grocers & Merchants Bureau v. Gray,* 6 Tenn., C. C. A., 87, cited in 84 A. L. R., 753; *State v. Retail Credit Men's Association,* 163 Tenn., 451; *Berk v. State,* 225 Ala., 324 (distinguishing *Kendrick v. State,* 218 Ala., 277); *Boykin v. Hopkins,* 162 S. E., 796 (distinguishing *Trust Co. v. Boykin,* 172 Ga., 437).

In the recent case (1935) of *Rhode Island Bar Association v. Automobile Service Association,* 179 Atl., 139, where the facts were very much like those in the case at bar, the questions here involved were fully discussed with citation of authorities, and a similar result reached.

The defendants in the case at bar, doubtless, perform useful services for the convenience of their members, and in the public interest with respect to the safety of motor vehicular travel and the promulgation of automobile laws and regulations, but in so far as any of their activities, methods, and conduct contravene the express provisions of the statute, they must, upon proper application, be enjoined.

The complaint in the case at bar alleges violations of law in the very terms of the statute. The findings of fact and conclusions of law determine that in certain respects the identical matters and things forbidden by the statute have been and are being done by the defendants, and the judgment enjoins them from continuing such unauthorized practices.

The findings of fact based on evidence are conclusive on appeal, and the conclusions of law of the court below necessarily follow, and must be sustained.

Judgment affirmed.

MRS. MAUDE V. SHACKELFORD v. THE SOVEREIGN CAMP OF THE WOODMEN OF THE WORLD.

(Filed 18 March, 1936.)

1. Insurance K b—Evidence held for jury on question of insurer's waiver of prompt payment of premiums.

Plaintiff's evidence tended to show that for a period of fifteen years it had been the custom of defendant mutual benefit association's collecting agents, N. C. Code, 6393 (a), to collect dues from members after the due date but within thirty days thereof, that defendant's home office knew of this custom, or should have known of it in the exercise of due care, and that insured made payment of the dues for the preceding month within thirty days of the due date and died prior to the customary time for the collection of dues for the following month. *Held:* The evidence was sufficient to be submitted to the jury on the question of defendant's waiver of the provisions of its certificate and by-laws, requiring certificate of good health before reinstating a policy upon payment of premium after the due date, and upon the verdict of the jury in her favor, plaintiff, who was named beneficiary in the certificate, is entitled to judgment for the amount of the policy, less the dues for the month not paid because of the death of insured prior to the customary time for collecting same. The distinction is made between waiver by local agents of defendant, prohibited by N. C. Code, 6503, and a custom of dealing established over a period of years to the knowledge of the home office.

2. Appeal and Error J e—

Ordinarily, an exception to the admission of certain testimony will not be considered on appeal when it appears that appellant elicited testimony of the same import upon cross-examination of the witness.

3. Insurance P b—

An exception to the admission of the testimony of the former collecting agent for defendant mutual benefit association, tending to establish a custom of defendant in accepting dues within thirty days after due date, *is held* untenable.

STACY, C. J., and CONNOR, J., dissent.

APPEAL by defendant from *Harris, J.*, and a jury, at December Term, 1935, of BEAUFORT. No error.

This is an action, brought by plaintiff against the defendant, to recover $1,000 on a certain certificate of insurance issued to plaintiff's husband, Rufus R. Shackelford, plaintiff being the beneficiary therein. The certificate No. TE-718755 being a 10-year term insurance certificate, issued 30 December, 1927. The plaintiff alleges: "That said policy of insurance was in full force and effect at the time of his death. That said policy obligated and bound the defendant to pay the beneficiary therein named, to wit: This plaintiff, the sum of $1,000, upon proof of death of the said insured, which obligation has been breached by failure and

refusal of the defendant to make payment as demanded. That more than 90 days has passed since receipt by the defendant of proof of death, and less than one year since said death has passed at the beginning of this action, and under the terms and conditions of said policy defendant is indebted to her as beneficiary therein named in the sum of $1,000, with interest from 90 days after the death of said insured. Wherefore, she prays judgment against the defendant for the sum of $1,000, with interest and costs, and for general relief."

In the record is the following: "It is admitted that plaintiff submitted to the defendant proof of the death of Rufus R. Shackelford, and that this proof was submitted more than 90 days prior to the institution of this action."

The answer of defendant denies the breach, and alleges that the certificate "was issued and accepted subject to the provisions of the constitution, laws, and by-laws of defendant. It is further expressly provided in said certificate that if the payments required by the constitution, laws, and by-laws of defendant are not paid by the member, the certificate should be null and void, and that should the certificate become null and void for any cause, acceptance of any payment from or for the member or any other act of any camp officer or member of the society thereafter should not operate as an estoppel or as a waiver of the terms of the contract. . . . That Rufus R. Shackelford failed to pay the installment due for the month of December within the time and in the manner prescribed in said constitution, laws, and by-laws, and that by reason of said failure the certificate became void as provided in said constitution, laws, and by-laws and particularly section 63 thereof. On or about 10 January, 1935, he paid the installment due during the month of December, 1934, which payment was made subject to and in accordance with the terms and provisions of section 65 of the constitution, laws, and by-laws of defendant. . . . The payment made by Rufus R. Shackelford on or about 10 January, 1935, by which he sought to be reinstated as provided by section 65 of the constitution, laws, and by-laws, was refunded by defendant's check B-25149, said check being in the sum of $2.89." The plaintiff refused to accept this check.

In reply the plaintiff alleges: "That the application referred to in the answer and the statements made in the same has been in possession of defendant at all times since the application was signed and no copy was kept by the insured and the adoption of the by-laws referred to in the answer as comprising a part of the said application was not known and understood and not read by the insured, and the by-laws referred to was never left with the insured and the insured had no knowledge of it, and in signing the application and making the said by-laws a part of it, the said insured followed the solicitation and direction of the agent of the

defendant, and that thereafter, through the entire period of the pendency of the contract, and as to each and all premium payments made, the agents of the defendant, knowing the provisions of the application from their custom of keeping them in their possession, and knowing that the said insured did not know and understand the provisions of forfeiture and of reinstatement and the condition of good health on the part of the insured at the time of his subsequent payment of that due date of such premium, consistently and in almost every instance caused and consented to the deferring of the payment beyond the due date and on to the following month as in the payment of the last premium, to wit: The one referred to in the answer, and the defendant, at its home office, knew of the long fixed and established custom of collecting the premium and never demanded nor required proof or notice of good health conditions on acceptance of such premium payments, but in every instance accepted the same as an approval of the date of their collection, and by the course of practice so long pursued caused the insured to recognize the payment as being the fixed policy of the defendant as to the time of payment by him and such custom and practice and withholding of actual knowledge was calculated to deceive and did deceive the said insured and mislead him to his prejudice, and the by-laws, providing that a delayed payment would not continue the policy in effect unless accompanied by a certificate of good health and an actual condition of good health, being at all times withheld from the insured and never brought to his attention, was a trick and device calculated and intended to deceive and did deceive the said insured, a fraud upon his rights and is null and void, and the custom and policy hereinabove stated constitutes a waiver on the part of the defendant of any right to plead the said deferred payment unaccompanied by proof of good health as a forfeiture of the contract of insurance. It is denied that the insured was in fact not in good health at the time of the payment of the premium referred to in the answer, and the state and condition of his health was known to the defendant at the time the insured made the payment."

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

"1. Did the defendant company issue to Rufus R. Shackelford, with the plaintiff as beneficiary therein, the policy as set out in the pleadings? Ans.: 'Yes.'

"2. Did the defendant waive the matters and things set up in its pleadings and in the said policy as a defense in this action? Ans.: 'Yes.'

"3. Was the said policy in force at the death of the insured? Ans.: 'Yes.'"

The judgment is as follows: "This cause coming on for trial at this term before the judge and the jury, and the jury having answered the

issues as appears in the record, it is, on motion of J. A. Mayo and Ward & Grimes, counsel for plaintiff: Ordered, adjudged, and decreed that the plaintiff recover of defendant $1,000, the face of the policy, less $3.14, representing the dues for January, 1935, on the policy, together with the cost, to be taxed by the clerk. Bond to stay execution fixed at $1,200. W. C. Harris, Judge presiding."

To the foregoing judgment defendant excepted, assigned error, and made numerous other exceptions and assignments of error and appealed to the Supreme Court. The material ones and necessary facts will be set forth in the opinion.

John A. Mayo and H. S. Ward for plaintiff.
MacLean & Rodman for defendant.

CLARKSON, J. The main question involved in this controversy is whether or not the provisions in the policy were waived by defendant. We think the uncontradicted evidence shows a waiver.

"In *Murphy v. Ins. Co.*, 167 N. C., at p. 336, it is written: 'It is also held by well considered cases on the subject here and elsewhere that this provision as to forfeiture, being inserted for the benefit of the company, may be waived by it, and such a waiver will be considered established and a forfeiture prevented whenever it is shown, as indicated, that there has been a valid agreement to postpone payment, or that the company has so far recognized an agreement to that effect or otherwise acted in reference to the matter as to induce the policyholder, in the exercise of reasonable business prudence, to believe that prompt payment is not expected and that the forfeiture on that account will not be insisted on (citing numerous authorities).' The principle in the above case is cited and approved in *Paul v. Ins. Co.*, 183 N. C., 159, and at p. 162 it is said: 'A course of action on the part of the insurance company which leads the party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity, on his part, will estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract' (citing numerous authorities)." *Hill v. Ins. Co.*, 200 N. C., 115, at pp 121-2. The above has been for long years the well settled law in this jurisdiction.

W. H. Congleton, a witness for plaintiff, testified, in part: "The Woodmen of the World had a local camp in Washington, N. C., in 1928, and continued to have one through 1935. The Woodmen of the World is a fraternal organization. The local camp has a consul commander, vice-consul, sentry, and vice-sentry. I was consul commander in 1928. For the past three years I have been financial secretary. My duties as financial secretary were to collect dues and remit to the home

office. I collected the dues from Mr. Rufus R. Shackelford. I have been collecting for the past three years. Mr. Singleton was clerk or financial secretary before I held the office. This is the fourth year that I have been secretary. Q. Tell us whether there was any custom during that time of collecting dues which, under the contract, were due at a certain time thereafter and within the grace of 30 days? Ans.: Yes, sir, there was. It was customary. Mr. Singleton had the book, the former clerk ahead of me, and like he died 1 February, we would only be starting to collect the January dues. Q. How long had that been the custom of the lodge? Ans.: Over 15 years. Q. When you collected from him, when would you remit? Ans.: About the 12th of the month. Court: The dues for December you would remit 12 January? Ans.: Yes, sir, so as to reach the home office by the 15th. I would send them in by money order. The monthly report which I sent would show the months for which payment was made. I send these monthly reports every month. I have copies of the reports which I made. The home office sends me a statement of the dues which I am to remit. I get this somewhere around the 10th of the month. Q. Would you get it before you sent in your 10 January collection? Ans.: No, sir, 10 January goes in and then they bill me back the next month. Q. I mean on the December dues. When do they bill you for that collection? Ans.: January 1st to 5th. Q. Can you say, either from the fact of the report or your independent recollection, that this had been going on for any considerable period of time—if so, how long? Ans.: Been going on for over 15 years. When I collected from Mr. Shackelford I would give him a receipt for his dues. You hand me what purports to be two receipts. I signed both of them. Receipt No. 12 is for the December dues paid on 10 January. The other receipt is for installment No. 11. That is for the November dues. All of my receipts were in the same form. (The receipts exhibited to the witness show the date, the amount received, the month for which paid, and the amount paid. Receipt No. 12 was dated 10 January for December dues.) Q. Was any other information given to him than the receipt itself? Ans.: No. (Plaintiff offered in evidence the two receipts which had been exhibited to the witness, one dated 17 December, 1934, being receipt for $3.14 for November dues, the other dated 10 January, 1935, $3.14 for December dues.) I recall making the collection on 10 January. Payment was made to me by Mr. Shackelford in his store. Q. What appeared to be the condition of his health from your observation of him at that time he made the payment? Ans.: Good so far as I know. . . . Ans.: I can clear that up why he didn't pay. Court: This witness says he can clear up something. If there is any explanation you wish to make, do so. Ans.: In regard to the January installment, it had been the custom to collect back month—when I billed for the January collection I would not start

collecting until 1 February for the month of January, and he died 1 February and I could not collect a dead man's dues when I was sending in a death claim; that's the reason the January dues were not collected, because I mailed the death claim ahead of the report."

The record states: "The reports or remittance sheets to which the witness referred as being received between the 1st and 5th of the month, and which he used with his remittances to the home office, were in form as follows (setting same forth)."

The questions above were excepted to by defendant and assignments of error duly made. We do not think they can be sustained.

On cross-examination, the witness Congleton testified: "I have in my hands a book of bound sheets. They are sheets sent to me monthly by the Grand Lodge showing the names of the members, their certificates, and the amounts to collect on the certificates. You call my attention to the sheet showing the dues payable in December; that was received by me some time between the 1st and 5th of January. In regard to January installments, it had been the custom to collect back month. (Redirect): Q. Would the report show that it was for the then past month? Ans.: Yes, sir, that was an understood fact. Q. How was it understood? Ans.: Because it had been the custom and they had never changed it whatsoever." The evidence elicited on cross-examination is practically that objected to on the direct examination. The witness was the financial secretary of the local camp. The receipt given Rufus R. Shackelford for December was signed by Congleton, the local financial secretary, on 10 January, 1934. Shackelford was then in good health. The defendant for the December collection sent a bill to Congleton, the local financial secretary, between January 1st to 5th. The dues for December would be remitted 12 January, so as to reach the home office by the 15th. Rufus R. Shackelford died 1 February, 1934, having been given a receipt prior to his death by the financial secretary, Congleton, of the local camp, which course of dealing had been customary for more than 15 years.

A. L. Singleton, witness for plaintiff, testified, in part: "I held the position of financial secretary for the local camp of the Woodmen of the World before Mr. Congleton. I am familiar with the custom of collecting the monthly assessments when I was financial secretary. Q. Tell the court and jury when the assessments were collected with respect to when they were due. Ans.: Always waited until the month had 30 days grace and started collecting dues anywhere from the 1st to the 15th of the following month. I made out reports to the home office somewhat similar to the reports which Mr. Congleton has referred to. I would send my remittance to the home office anywhere from the 5th to the 15th." The question above was objected to and assignment of error made, which we do not think can be sustained.

From the entire evidence, the course of dealing extending over 15 years, it is beyond question that the home office knew, or in the use of due care ought to have known, of the custom. It acquiesced in the custom, and sent out forms indicating its knowledge of the custom, the home office sending bills for December dues from the 1st to the 5th of January. This is knowledge of the home office and fifteen years unbroken custom was sufficient to establish a "course of dealing" and an unmistakable information to Shackelford that when he paid his dues as the local camp required, his policy continued in force.

We do not think that the deposition of the sole witness for defendant, who resided in Omaha, Neb., and secretary of defendant company, raises any sufficient controverting evidence. He mainly states the constitution, laws, and by-laws of defendant. In fact, he says, speaking of defendant: "Its objects are to combine white persons of sound bodily health, exemplary habits, and good moral character, between the ages of 16 and 60 years, into a secret, fraternal beneficiary and benevolent association; provide funds for their relief; comfort the sick and cheer the unfortunate by attentive ministrations in times of sorrow and distress; promote fraternal love and unity; and to create funds from which, on reasonable and satisfactory proof of death of a beneficiary member who has complied with all the requirements of the association, there shall be paid the sum provided for by the terms of the contract to the beneficiary or beneficiaries under his beneficiary certificate."

Under the facts and circumstances of this case, the above fundamental ideals should be applicable to the plaintiff widow in this case. It is a matter of common knowledge that defendant is a splendid, reputable organization. The local financial secretary and former secretary were witnesses for plaintiff, indicating that under a course of dealing, for over 15 years acquiesced in by the home office and relied on by Rufus R. Shackelford, who had his receipt for the December dues, that on a technicality $1,000 should not be forfeited to the company.

The defendant cites N. C. Code, 1935 (Michie), sec. 6503, as follows: "The constitution and laws of a society may provide that no subordinate body, nor any of its subordinate officers or members, shall have the power or authority to waive any of the provisions of the laws and constitution of the society, and the same shall be binding on the society and each and every member thereof, and on all beneficiaries of members."

A similar provision is in the South Carolina law. The defendant cites the case of *Perry v. Sovereign Camp, W. O. W.* (S. C.), 174 S. E. Rep., 397. The decision was written by the able and learned *Associate Justice M. L. Bonham,* but is clearly distinguishable from the present case. In that case the member was suspended for nonpayment of installments, and the payment was made after the member was dead. In fact, the learned Justice lays down the rule relied upon by plaintiff (p. 399):

"Concede, if you please, that the Sovereign Camp had power to waive this nonwaiver provision of the statute and the nonwaiver provisions of its by-laws and constitution, unless it can be shown by competent evidence that it had knowledge of the facts upon which the claim of waiver, and consequent estoppel, is founded, no waiver or estoppel follows."

The above section was enacted by the General Assembly of North Carolina in 1913—ch. 89, sec. 17, N. C. Code, *supra*, sec. 6493 (a) (was enacted in 1921, ch. 139), and is as follows: "Assessments and dues referred to in the two preceding sections may be collected, receipted, and remitted by a member or officer of any local or subordinate lodge of any fraternal order or society when so appointed or designated by any grand, district, or subordinate lodge or officer, deputy, or representative of the same, there being no regular licensed agent or deputy of said grand lodge charged with said duties; but any person so collecting said dues or assessments shall be the agent or representative of such fraternal order or society, or any department thereof, and shall bind them by their acts in collecting and remitting said amount so collected. Under no circumstances, regardless of any agreement, by-laws, contract, or notice shall said officer or collector be the agent or representative of the individual member from whom any such collection is made; nor shall said member be responsible for the failure of such officer or collector to safely keep, handle, or remit said dues or assessments so collected, in accordance with the rules, regulations, or by-laws of said society; nor shall said member, regardless of any rules, regulations, or by-laws to the contrary, forfeit any rights under his certificate of membership in said fraternal benefit society by reason of any default or misconduct of any said officer or member so acting."

On the entire record, we see no prejudicial or reversible error.

No error.

STACY, C. J., and CONNOR, J., dissent.

C. M. BUCKNER v. UNITED STATES FIRE INSURANCE COMPANY AND THE FEDERAL LAND BANK OF COLUMBIA, COLUMBIA, S. C.

(Filed 18 March, 1936.)

1. Insurance O a—Insurer paying mortgagee under provisions of mortgage clause held not entitled to subrogation against mortgagor.

Defendant insurer denied liability to the owner mortgagor of the property because of alleged breach of the arbitration clause of the policy, but paid a sum agreed upon to the mortgagee in discharge of its lia-

bility to the mortgagee under the standard mortgage clause. Under provisions of the policy, insurer took from the mortgagee an agreement subrogating insurer for the amount paid, and assigning to insurer a proportionate part of the mortgage debt. The mortgagor brought this action to have the amount paid to the mortgagee applied on the debt and to have the subrogation agreement between the mortgagee and insurer canceled. *Held:* Agreements in the policy contrary to statutory provisions are void, and the only statutory provision relating to subrogation, N. C. Code, 6437, does not provide that insurer should be subrogated to rights of the mortgagee against mortgagor, and under the facts of this case insurer is not entitled to the subrogation claimed upon any equitable principle, and insurer's subrogation receipt from the mortgagee is not valid or binding as against the owner mortgagor.

2. Insurance P c—Provision of policy providing time within which action should be brought held not applicable to this action.

Insurer denied liability to the owner mortgagor, but paid a sum agreed to the mortgagee in discharge of its liability under the standard mortgage clause of the policy, and took from mortgagee a subrogation receipt as against the owner mortgagor. The owner mortgagor brought this action to have the sum paid applied to the mortgage debt and to have the subrogation agreement canceled. *Held:* The provision of the policy prescribing the time within which action on the policy must be brought has no application, plaintiff's action being an independent action to have the proceeds of the policy applied upon the debt under the provision of the policy giving him the right to direct such application of the proceeds.

3. Insurance O a—

Upon paying the loss by fire, insurer is entitled to subrogation to the rights of insured against the third person tort-feasor causing the loss, to the extent of the amount paid, both by provision of statute, N. C. Code, 6437, and under equitable principles.

APPEAL by defendant U. S. Fire Insurance Company from *Oglesby, J.*, and a jury, at Regular December Term, 1935, of BUNCOMBE. No error.

This was a civil action, tried before his Honor, John M. Oglesby, judge presiding, and a jury, at the Regular December, 1935, Term for the trial of civil cases in the Superior Court for the county of Buncombe, State of North Carolina. The plaintiff commenced this action against the defendant United States Fire Insurance Company and the Federal Land Bank to have credited $2,292.45 on notes executed by the plaintiff to the Federal Land Bank of Columbia, secured by deeds of trust, which amount of said notes the defendant United States Fire Insurance Company claimed had been assigned to it by way of subrogation.

The United States Fire Insurance Company will hereafter be abbreviated "Insurance Company," and the Federal Land Bank of Columbia, S. C., abbreviated "Land Bank."

C. M. Buckner was the owner and seized in fee simple of 40.57 acres of land in Black Mountain, Buncombe County, N. C. Situated on the

land was a big house—two and a half story building. Plaintiff made two notes, secured by deeds of trust on said property for the benefit of the defendant Land Bank—one 31 December, 1926, for the sum of $2,500, and one on 29 September, 1928, for the sum of $900.00. There is due on same, including principal, interest, and advances as of 1 April, 1935, $3,972.33.

Terms of the deeds of trust were: "It is covenanted by and between the said parties of the first part, their heirs, executors, or administrators, to insure and to keep insured to the satisfaction of the Federal Land Bank of Columbia all the buildings and improvements now on said premises, the value of which was a factor in determining the amount of the loan secured hereby, against loss or damage by fire or windstorm in such sum or sums as may be required by the Federal Land Bank of Columbia, and in such company or companies as may be approved by the Federal Land Bank of Columbia, its successors or assigns, the loss, if any, to be payable to Federal Land Bank of Columbia as its interest may appear at the time of the loss, and will deliver said policy or policies of insurance to the Federal Land Bank of Columbia, and will promptly pay when due all premiums for such insurance. In case any insured buildings or improvements on said premises are destroyed or damaged by fire or windstorm, *the sum or sums collected from said insurance may, at the option of the said parties of the first part, be applied either to the payment of the note secured by this mortgage,* or, subject to the regulations of the Farm Loan Board, and under the direction of the Federal Land Bank of Columbia, to the reconstruction of the buildings or improvements so destroyed or damaged. . . . (3) And it is further covenanted that if the said parties of the first part, their heirs, executors, administrators, or assigns, *shall fail to procure and maintain said insurance, or if after procuring the same shall fail to pay the premium charged therefor, or shall fail to pay said taxes, liens, judgments, or assessments as herein agreed, then the Federal Land Bank of Columbia, its successors or assigns, may effect said insurance and pay the premium thereon,* as well as any unpaid premiums for an insurance policy procured and deposited by the party of the first part with the party of the second part under the provisions of section 1 hereof, and may also pay said taxes, liens, judgments, or assessments, and the money so advanced for the payment of such insurance premiums, taxes, liens, judgments, or assessments, *shall be added to the mortgage debt and become a part thereof and the repayment of the same, with simple interest at the rate of 6% per annum, from the date of actual payment, and until paid, shall be secured by this mortgage.*" (Italics ours.)

The Land Bank, in compliance with the deeds of trust, took out insurance with defendant Insurance Company in the sum of $2,700, on

26 January, 1931, and paid the premium and tacked same to the deed of trust as was provided in same. When the insurance was in full force and effect, on 1 January, 1933, the "big house" was burned to the ground, salvage being only perhaps $100.00.

Plaintiff alleges that he "furnished the proof of the total loss of said dwelling house, insured as aforesaid, to the defendant U. S. Fire Insurance Company and the defendant Federal Land Bank of Columbia, under the terms and conditions of the policy of said fire insurance company, and in the manner and time required for the furnishing of said proof under said policy." This was admitted by defendant Land Bank, and defendant Insurance Company said: "It is true that the plaintiff delivered to the defendant a certain paper writing purporting to be a proof of loss on a dwelling house located in Black Mountain Township, Buncombe County, State of North Carolina."

There was a disagreement between plaintiff and the Insurance Company as to the appraisers, at the same time the plaintiff claiming the full amount of the policy—$2,700. At the instance of the Land Bank the plaintiff selected as an appraiser C. C. Daugherty and the defendant Insurance Company selected Dion A. Roberts. The Insurance Company knew that Daugherty was the appraiser selected by plaintiff. On 28 November, 1933, the appraisers found the "Total sound value $3,675.88," that is the actual cash value of the property when burned and the actual loss and damage by the fire. The defendant Insurance Company paid the defendant Land Bank $2,292.45 and required and took from the Land Bank a "subrogation receipt," in part: "By making payment to the bank as mortgagee, under the terms of the memorandum, after denial of liability to the owner, the company has acquired an interest by subrogation in the note and mortgage, but junior in priority and subject in effect to the right of the bank to be first paid the full amount of its mortgage debt, including all advances permitted and authorized to be made by the terms of the mortgage. Unless otherwise ordered and adjudged by a court of competent jurisdiction or disposed of by an agreement and adjustment between the owner and the company, the bank will assign without recourse the note and mortgage to the company when the amount due it has been paid in full, provided that in the meantime the owner has not contested the denial of liability and been sustained therein by the court, in which event the funds will be credited on the remaining unpaid principal of the indebtedness."

The following is in the policy of the defendant Insurance Company: "It is hereby further understood and agreed that the undersigned company, whenever it shall claim that as to any mortgagor or owner whose property is insured under this policy no liability for any loss exists, or

though admitting its liability therefor, it shall dispute the amount thereof as claimed by any mortgagor or owner, will pay to the bank the amount of the loss, the same not to exceed the amount covered by its schedule policy, and thereafter the company will at once be legally subrogated to all the rights of the bank and to all the securities held as collateral to the mortgage debt to the extent of such payment, or at the company's option it may pay to the bank the whole principal due or to grow due on the mortgage debt, with interest, and shall thereupon receive a full assignment and transfer of the note and mortgage and all other securities held as collateral to the mortgage debt, but no such subrogation shall impair the right of the bank to recover the full amount of its mortgage debt."

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

"1. Were the premises of the plaintiff C. M. Buckner insured by the defendant United States Fire Insurance Company, for the benefit of the said Buckner and the Federal Land Bank of Columbia, Columbia, S. C., as their separate interests might appear, as alleged in the complaint, and, if so, was said dwelling described in the complaint destroyed by fire, as alleged? Ans.: 'Yes.'

"2. If so, was there an appraisal and award between the Federal Land Bank of Columbia and the defendant United States Fire Insurance Company made in accordance with the terms and provisions of said policy? Ans.: 'Yes.'

"3. What sum, if any, is plaintiff C. M. Buckner entitled to recover of United States Fire Insurance Company and defendant The Federal Land Bank of Columbia? Ans.: '$2,292.45.'"

The court below rendered judgment on the verdict. The defendant Land Bank did not appeal. The defendant Insurance Company made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones and necessary facts will be set forth in the opinion.

W. E. McLean, Max E. Ramsey, and J. W. Haynes for plaintiff.
R. R. Williams for United States Fire Insurance Company.

CLARKSON, J. The question involved: Is the plaintiff mortgagor, in an independent action, under mortgagee loss clause, entitled to have the sum of $2,292.45 fire loss paid by defendant Insurance Company to defendant Land Bank, under the policy of insurance in defendant Insurance Company, credited upon his indebtedness of $3,972.33, due as of 1 April, 1935, to defendant Land Bank? We think so, under the facts and circumstances of this case.

The prayer of plaintiff is as follows: "(1) That the defendant U. S. Fire Insurance Company be required to cancel and deliver any agreement it may have entered into by it and its codefendant Federal Land Bank of Columbia, attempting to assign any interest of the plaintiff in his notes and his farm given as security for the same; (2) that the Federal Land Bank of Columbia be required to credit the principal sum of the note of the plaintiff described in the deed of trust in the amount of $2,292.45, as of the date of 28 November, 1933; (3) for such other and further relief as the plaintiff may be entitled herein."

In *Bank v. Insurance Co.*, 187 N. C., 97 (102), citing a wealth of authorities, it is said: "With respect to the rights of the mortgagee under the standard mortgage clause, it is the generally accepted position that this clause operates as a separate and distinct insurance of the mortgagee's interest, to the extent, at least, of not being invalidated by any act or omission on the part of the owner or mortgagor, unknown to the mortgagee; and, according to the clear weight of authority, this affords protection against previous acts as well as subsequent acts of the assured." *S. c.*, 188 N. C., 747 (751); *Bank v. Insurance Assn. (Hager case)*, 203 N. C., 669; *Mahler v. Ins. Co.*, 205 N. C., 692; *Stockton v. Ins. Co.*, 207 N. C., 43.

This is an independent civil action, instituted in the Superior Court of Buncombe County, 8 September, 1934, wherein the plaintiff mortgagor seeks to have the fire loss under the policy of insurance paid by the defendant Insurance Company to its codefendant, the Land Bank, credited upon his notes given to the defendant Land Bank.

In the policy issued by defendant Insurance Company is the following: "Does insure the Federal Land Bank of Columbia and legal representatives, to the extent of the actual cash value (ascertained with proper deductions for depreciation) of the property at the time of loss or damage, but not exceeding the amount which it would cost to repair or replace the same with material of like kind and quality within a reasonable time after such loss or damage," etc.

Under the contract plaintiff elected that the $2,292.45 be credited on his deeds of trust to the Land Bank, and brought this action for that purpose. The property burned was considered by plaintiff to be worth far above the appraisal. The total sound value by the appraisers was fixed at $3,675.58. The premium paid was $48.60 a year for amount of insurance. From the record we are unable to understand by what legerdemain the Insurance Company paid the Land Bank only $2,292.45 under the insurance contract—which was for $2,700 in case of loss. We will pass over the questions of waiver and breach of contract on the part of defendant Insurance Company. It may be noted that plaintiff accepted the reduced amount and elected to sue and have the amount

credited on his deeds of trust. We will consider the right on the part of the Insurance Company to set up the subrogated receipt. There is one thing fatal to the Insurance Company's defense—it relies on the form of Standard Policy, N. C. Code, 1935 (Michie), sec. 6437.

In *Johnson v. Ins. Co.*, 201 N. C., 362 (363-4), it is said: "These stipulations and provisions are included in the policies by virtue of statutory requirements, and are valid in all respects. *Midkiff v. Ins. Co.*, 197 N. C., 139, 147 S. E., 812; *Greene v. Ins. Co.*, 196 N. C., 335, 145 S. E., 616; *Bank v. Ins. Co.*, 187 N. C., 97, 121 S. E., 37; *Black v. Ins. Co.*, 148 N. C., 169, 61 S. E., 672. In the last cited case, referring to the stipulations and provisions included in a policy of fire insurance, as required by C. S., 6437, it is said: 'They are inserted in the policy, not by the company or by the plaintiff, but by the statute. To fail to give them force and effect is to nullify the statute.' These stipulations and provisions are included in the policies, and unless waived as provided therein, must and will be enforced."

A provision in the policy of defendant Insurance Company is as follows: "It is understood and agreed where the printed conditions of this policy are in conflict with the conditions of the standard fire and lightning policy of any State or territory where this contract is to be performed, then and in that event the standard policy of such State or territory shall control and govern the construction of the printed portion of this policy," etc.

The only subrogation clause we can find in the Form of Standard Policy, in section 6437, *supra*, is the following: "Subrogation—This company may require from the insured an assignment of all right of recovery against any party for loss or damage to the extent that payment therefor is made by this company." This has been held to be an equitable right independent of the statute. *Cunningham v. R. R.*, 139 N. C., 427 (434).

The defendant Insurance Company has put in the policy a new right, contrary to the standard policy. We do not think under the terms of its policy or on any equitable principle that its subrogation receipt is valid or binding on plaintiff on the facts and circumstances of this case.

The policy period contended by defendant Insurance Company for bringing this action does not apply on this record. This is an independent action, brought by plaintiff against the Land Bank to have the amount of insurance paid it by the Insurance Company credited on its deeds of trust, in accordance with his contract with the Land Bank. This action was brought immediately when plaintiff found that this had not been done.

On this record the exclusion of evidence on the part of the Insurance Company by the court below is not material.

The plaintiff, by the amount being tacked on to his debt, under his contract with the Land Bank, paid the insurance policy. The plaintiff had no notice of this new right of subrogation put in the policy by the Insurance Company—contrary to the statute—as the policy was left with the Land Bank. The Land Bank's interest in the policy, under its contract with plaintiff, is the "loss, if any, to be payable to Federal Land Bank of Columbia, as its interest may appear at the time of the loss."

In Richards on the Law of Insurance (4th Ed.), p. 75, part sec. 52, is the following: "A corollary incident to the doctrine of indemnity is the right of subrogation. Upon paying the loss under a fire or marine policy, the insurer becomes subrogated *pro tanto* to such rights and remedies as the insured may have against third persons who are primarily liable to him for his damage sustained. The person who has caused the loss is said to (be) the one primarily liable."

This is the right given the Insurance Company under section 6437, *supra*—"Subrogation." An insurer, on paying a loss, is subrogated to the insured's claim against the wrongdoer causing the loss. *Cunningham & Hinshaw v. S. A. L. Ry. Co., supra; Fidelity Ins. Co. v. A. C. L. R. Co.,* 165 N. C., 136; *Powell & Powell v. Wake Water Co.,* 171 N. C., 290; *Lumbermen's Mut. Ins. Co. v. Sou. Ry. Co.,* 179 N. C., 255.

N. C. Code, 1935 (Michie), sec. 446, provides that all actions must be prosecuted in the name of the real party in interest. "But this section does not authorize the assignment of a thing in action not arising out of contract." Held, that if the exception in the section operated to prevent a fire insurance company, on paying a loss, from suing the one whose negligence caused the loss, it was repealed by Laws 1899, ch. 54, sec. 43, which provides that the insurance company should be subrogated, to the extent of the payment by it, to all right of recovery by assured. *Hamburg-Bremen Fire Ins. Co. v. A. C. L. R. Co.,* 132 N. C., 75. See subrogation clause now in the Standard Policy, sec. 6437, *supra.*

"But where the mortgagor has any interest in the policy, either by payment of premiums or by agreement with the mortgagee, then there will be no subrogation in favor of the insurers, for the latter takes only such rights as the assured can give." Richards, *supra,* p. 80, part sec. 53.

Fire insurer paying insurance to mortgagee under mortgage clause held not entitled to be subrogated *pro tanto* to right of mortgagee against insured mortgagors. *Atlantic Joint Stock Land Bank of Raleigh v. Farmers Mut. Fire Ins. Assn. of N. C.,* 203 N. C., 669 (*Hager case*).

We see no error in the charge. On the entire record we see no prejudicial or reversible error.

No error.

CLARE O. REED v. THE STATE HIGHWAY AND PUBLIC WORKS COMMISSION OF THE STATE OF NORTH CAROLINA.

(Filed 18 March, 1936.)

1. Eminent Domain A a—Private property may not be taken but for public use.

Private property may not be taken, even upon payment of just compensation, except for a public use or purpose, and although what is a "public purpose" must first be passed upon by administrative bodies, the Legislature cannot deprive the courts of their power and duty to determine the question when properly presented, nor may the courts be precluded by the declarations of administrative bodies as to whether the use is public or private.

2. Same—Pleadings held insufficient to raise issue of fact as to whether taking was for private or public purpose.

Under the provisions of ch. 145. Public Laws of 1931, the county commissioners petitioned the State Highway Commission that certain roads in the county be taken over as a part of the county system. Plaintiff, owner of part of the land involved, obtained a temporary injunction prohibiting the taking over of the road, claiming the taking was for a private and not a public purpose. Upon the return of the temporary order, the court found that the taking was for a public purpose, and dismissed the action, it appearing from the pleadings considered as affidavits that the proposed road would give four families access to the county seat and that the road would constitute a part of a through scenic highway. *Held:* The judgment dismissing the action is affirmed, there being no evidence upon the record showing that the taking over of the road was for a private purpose sufficient to raise an issue of fact, and plaintiff being remitted to his rights under N. C. Code, 3846 (bb), 1716, for the recovery of just compensation.

3. Same—

In taking over a road as a part of the highway system, the scenic value of such road and its necessity as a part of the system of scenic highways for the public may be considered in determining whether taking over the road is for a public or private purpose.

4. Constitutional Law B c—

The courts must declare the law as written, the wisdom of the enactments being a question for the Legislature.

APPEAL by plaintiff from *Harding, J.*, 9 November, 1935, at Chambers. From POLK. Affirmed.

This is an injunctive proceeding brought by plaintiff against the defendant to restrain it from taking over plaintiff's road and making it a part of the State system of highways. Plaintiff alleged that the taking was for a private, not a public purpose. The prayer is as fol-

lows: "That the defendant and its officers, representatives, agents, and servants be permanently enjoined from taking over the private roadway of the plaintiff hereinbefore described as a part of the State Highway System of the State of North Carolina, and that a temporary injunction be issued and continued until the hearing of the matter on its merits; and for such other and further relief as is just and equitable, and that the plaintiff recover against the defendant the costs of this action."

The defendant, in answer, denied the material allegations of the complaint, and alleged: "That the defendant's action in this matter has been in accordance with its honest judgment and what it deemed to be for the best of the public interest and within the scope of the discretion vested by law in the said Commission."

As a further defense, the defendant alleges: "(1) That this action is brought by the plaintiff in an effort to restrain the defendant in the exercise of the discretion vested in it by law and in direct violation of the provisions of section 7 of chapter 46 of the Public Laws of 1927, and cannot therefore be maintained in the courts of this State. (2) That this action is in effect an allegation that the defendant has appropriated certain property rights of the plaintiff, and that the General Assembly has, by section 3846 (bb) of the Consolidated Statutes, provided the only and exclusive remedy by which questions of that nature may be tried in the courts of this State. This action, therefore, not being in accordance with the provisions of law and being against an agency of the sovereign State and without legislative authority, cannot be maintained in the courts of this State. Wherefore, the defendant, having fully answered the complaint of the plaintiff, prays that this action be dismissed and that it go hence without day."

The defendant sets forth, as "Exhibit A," a Road and Bridge Report, showing, among other things, that the road proposed to be taken over will "furnish a public outlet for five homes from the top of the mountain to the county seat at Columbus." Also petition, "Exhibit B," as follows:

"PETITION.

"NORTH CAROLINA—POLK COUNTY.

"In the matter of the Reed Road, Columbus and White Oak Townships.

"Whereas, the Board of Commissioners of Polk County, at their regular monthly meeting at the courthouse in Columbus, N. C., on 6 May, 1935, duly enacted a resolution and ordinance in words and figures following, to wit:

" 'Whereas, in the opinion of this Board the best interests of the people of Polk County and of the particular communities which include

the towns of Tryon and Columbus, and that portion of White Oak Township situated upon the upper levels of White Oak and Tryon Mountains and the broad plateau which crowns said mountains, and the connecting ridges, will be subserved by the addition to the county road system of Polk County heretofore established and defined by the State Highway Commission conformably to the provisions of chapter 145 of the Public Laws of 1931, of another and new road, namely, to be composed of the following separate but connecting roads, to wit:

" 'That certain road commonly known as the Reed Road, from its intersection near the town of Columbus, with the public road known as the Houston Road, and continuing thence to the top of the ridge and passing near the ruins that mark the site of the former Log Cabin Inn, and also passing the entrance to the Slick Rock Estate, and traversing the said plateau area to the point known as Sunset Rock, and continuing thence in a westerly direction with the existing roadway to its intersection with Skyuka Road, and continuing thence with the road known as Skyuka Road, and passing Skyuka Hotel, to the intersection of said road with North Carolina State Highway No. 181 (which is also Federal Highway No. 176), near the town of Lynn, North Carolina; said new road to conform to the existing locations of said connecting roads, as above defined, except for such relocations and realignments as said State Highway Commission may deem requisite:

" 'Now, therefore, Be It Resolved: That this, the Board of County Commissioners, conformably to the provisions of the aforementioned statute, and section 13 thereof, to add the above defined new road to the Polk County Road System aforementioned, as provided by law; said petition to be signed for and in the name of this board by its chairman and secretary, and duly authenticated as required by law, and said petition to recite and exhibit this resolution: *Provided, however,* that such right of way and easement costs, if any, and all other costs and expenses that may be incurred in the execution of said project, shall be the obligations of the State Highway Commission and not of the county of Polk.'

"Now, therefore, the said Board of Commissioners of Polk County, acting in this behalf in conformity with the said resolution and the statute (P. L. 1931, ch. 145, and particularly section 13 thereof), does hereby petition the State Highway Commission of North Carolina to add to the County Road System of Polk County, heretofore established conformably to the provisions of said statute, that other and new road mentioned and described in said resolution; but subject, however, to the condition therein prescribed.

"In witness whereof, the said Board of Commissioners has caused this petition to be signed in the name of said Board by its Chairman and duly attested by its Secretary and by the corporate seal of the said Board hereto affixed.

BOARD OF COMMISSIONERS OF POLK COUNTY,
By (Signed) G. C. FEAGAN,
Chairman.

"Attest:
(Signed) C. W. BALLENGER, *Secy.* (Seal.)"

The judgment of the court below is as follows: "This cause, coming on to be heard before his Honor, W. F. Harding, holding the courts of the 18th Judicial District, upon the return of the temporary restraining order in Hendersonville on 15 October, 1935, and being heard upon the complaint and answer treated as affidavits; and after the argument of counsel; and the court being of opinion, and so finding, that the defendant is an agency of the State of North Carolina, and that as such agency is not subject to suit, except in accordance with special matters particularly authorized by the General Assembly; and that this complaint is an effort to make the said Commission answerable before this court for the exercise of a discretionary power that has been vested in the said Commission with respect to taking over and incorporating into the public road system of the State additional roads; and that the said Commissioner, in the exercise of the discretion vested in it by law and in response to the request of the Board of Commissioners of Polk County, has caused an investigation to be made of the particular road in question, and based upon such investigation has found and determined that the incorporation of the said road into the public road system of the State is in furtherance of the public interest, and that there has been no abuse of the discretion on the part of the said Commission, and that there has been no sufficient evidence produced before this court to satisfy it that there has been any abuse on the part of the said Commission of the discretion vested in said Commission, and that questions of pecuniary damage are not properly presented in this cause for determination by the Court. Now, therefore, it is considered and adjudged that the defendant's demurrer *ore tenus* be and the same is hereby sustained, and this action is dismissed at the cost of the plaintiff. The matter having been taken under advisement by the court, all parties having agreed that the court can sign judgment at such time and place as might suit its convenience, this judgment is signed at Rutherfordton on 28 November, 1935. W. F. Harding, Judge holding the courts of the 18th Judicial District."

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

Massenburg, McCown & Arledge and Paul Boucher for plaintiff.
Charles Ross for defendant.

CLARKSON, J. It is well settled that public funds cannot be taken for private purposes, and private property can only be taken for public purposes upon the payment of "just compensation" to the owner.

In *Stratford v. Greensboro,* 124 N. C., 127 (132-133), we find: "In cases where the municipal authorities are empowered by the general law, or by their charters, as in this case, to open up, grade, and pave streets, the *expediency* or *necessity* of doing so, and the power of exercising the right of eminent domain, condemning the private property of the citizen for that purpose, are entirely within the determination of the corporate body, and their action is conclusively against judicial interference, since such a question is not judicial; it is political. 2 Dillon Mun. Corp., sec. 600. When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. Lewis on Em. Domain, sec. 238; *Boom v. Patterson,* 98 U. S., 403; *Broadnax v. Groom,* 64 N. C., 244; *Vaughan v. Commissioners,* 117 N. C., 434. It is also true that municipal authority, when lawfully exercising the power of condemning private lands for the public use, do and must determine, in the first instance, that the use to which they intend the land is *public use.* But that decision is not conclusive. But whether the use of the property which the delegated legislative authority has declared to be a public use be such a use as would sustain the authorities in taking, against the will of the owner, his property, is a judicial question. If the taking be in fact for the purposes of private use, if the basis of condemnation be the benefit of an individual and not the public interest and convenience, the courts cannot be concluded by the action of legislative authority from exercising jurisdiction in determining whether the use is a *public* use or one for *private* gain and advantage. 2 Dillon, *supra,* sec. 600; *Call v. Wilkesboro,* 115 N. C., 337. All the courts, we believe, concur in holding that whether a particular use is public or not, within the meaning of the Constitution, is a question for the judiciary. Lewis, *supra,* sec. 158; Cooley on Taxation, 110, 120; *Clark v. Sanders,* 74 Mich., 692. . . . (Pp. 134-5.) In the case before us, the main question raised by the pleadings was whether the use, to which the new street and improvements were to be devoted, was a public use. It was not necessary on the part of the plaintiff to allege or prove actual fraud in the transaction. If the substantial benefit was for the defendant Cone as an individual, and the benefit to the city only incidental and purely prospective, then the proceedings of the board were *ultra vires* and void. An issue should therefore have been submitted as to whether the action of the board, in making the

orders and carrying them out, was for the public benefit, and whether the lands condemned were for the public use; and upon that issue the court should have instructed the jury in the law as to what constitutes a public use." *Cobb v. R. R.*, 172 N. C., 58.

In *Hartsfield v. New Bern*, 186 N. C., 136 (142-3), we find: "The plaintiffs rely upon *Stratford v. Greensboro*, 124 N. C., 127, but as to that case it was said by *Hoke, J.*, in *Edwards v. Comrs.*, 170 N. C., 451, cited in *Allen v. Reidsville*, 178 N. C., 532: 'In that case there was specific allegation, with evidence tending to show that the action of the city authorities was in pursuance to a contract admittedly entered into with the individual defendant and making it according to plaintiff's evidence, not at all improbable that the measure complained of was in promotion of a personal and private scheme in favor of the individual defendant, and not in furtherance of the public interest.' In *Lee v. Waynesville*, 184 N. C., 565 (568), *Hoke, J.*, speaking for a unanimous court, and citing numerous cases expressly in point says: 'It is the accepted principle, declared and upheld in numerous decisions with us, that courts may not interfere in a given case with the exercise of discretionary powers, conferred on these local administrative boards for the public welfare, unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of their discretion.'" *Yarborough v. Park Com.*, 196 N. C., 284 (292).

In Public Laws of 1931, ch. 145, sec. 13, is the following: "The board of county commissioners of any county may, when in the opinion of said board the best interests of the people of said county or of any particular community thereof will be subserved thereby, petition the State Highway Commission to change or abandon any road in the county road system or *to add thereto any new road.* Said petition shall be filed with the chairman of the State Highway Commission, who shall personally or by his duly constituted deputy, after conference with the board of county commissioners of said county, make diligent inquiry into and study of the proposed change, abandonment, or addition, and if in his opinion the public interest demands the same, such change, abandonment, or addition shall be made." In the construction of the section above, see limitations set out in *Davis v. Alexander*, 202 N. C., 130. *In re Petition of Edwards*, 206 N. C., 549 (551); *Grady et al. v. Grady, post*, 749.

The question as to what is a public purpose is not always clear or well defined. On the present record we see no sufficient evidence to base an issue of fact that the present road taken over is for private purposes. The road in controversy, known as the "Reed Road," will furnish a public outlet for five homes from the top of the mountain to the county seat of Columbus; then again, it will be a part of a through scenic high-

way. In the petition of the Board of Commissioners of Polk County is the following: "In the opinion of this board the best interests of the people of Polk County and of the particular communities which include the towns of Tryon and Columbus, and that portion of White Oak Township situated upon the upper levels of White Oak and Tryon Mountains and the broad plateau which crowns said mountains, and the connecting ridges, will be subserved by the addition to the County Road System of Polk County heretofore established and defined by the State Highway Commission conformably to the provisions of chapter 145 of the Public Laws of 1931, of another and new road, namely, to be composed of the following separate but connecting roads, to wit: That certain road commonly known as the Reed Road," etc.

It is a matter of common knowledge, shall we term it, "the tourist industry" is now in the mountain sections of this State one of its most valuable assets to the people of that section. These scenic roads do much to encourage tourists to come into this "land of the sky," locate and spend the summer, and put into circulation money which is of great benefit to the people. In taking over a road to be a part of the highway system, this purpose can be considered on the aspect of the road being taken over for a public and not a private purpose. These beautiful mountain views ought not to be shut off from the public by selfish persons or interests. It goes without saying that private property cannot be taken for public purposes without just compensation.

In *Shute v. Monroe,* 187 N. C., 676 (683), is the following: "The Anglo-Saxon holds no material thing dearer than the ownership of land; his home is termed his 'castle.' Although there is nothing in the Constitution of North Carolina that expressly prohibits the taking of private property for public use without compensation (the clause in the United States Constitution to that effect applies only to act by the United States and not to government of the State), yet the principle is so grounded in natural equity and justice that it is a part of the fundamental law of this State that private property cannot be taken for public use without just compensation. *Johnston v. Rankin,* 70 N. C., 555." *MacRae v. Fayetteville,* 198 N. C., 51 (54).

N. C. Code, 1935 (Michie), sec. 3846 (bb), provides a remedy for plaintiff against defendant for damages, "just compensation," for taking plaintiff's land: *"Provided,* that all actions for damages for rights of way or other causes shall be commenced within six months from the completion of each particular project."

In *McKinney v. N. C. Highway Com.,* 192 N. C., 670 (671), we find: "In *Latham v. Highway Commission,* 191 N. C., 141, speaking to the question, it was said that 'where a State agency, like the State Highway Commission, is created for certain designated purposes, and a statutory

method of procedure provided for adjusting or litigating claims against such agency, the remedy set out in the statute is exclusive and may alone be pursued,' citing a number of authorities for the position. The only remedy afforded the plaintiff, and others similarly situated, by express provisions of the statute (3 C. S., 3846 [bb], and C. S., 1716) is a special proceeding in condemnation under chapter 33 of the Consolidated Statutes. This remedy is equally available to the owner of the land and the State Highway Commission."

N. C. Code, 1935 (Michie), sec. 1715, proceedings when parties cannot agree. Section 1716, in part: "For the purpose of acquiring such title the corporation, or *the owner,* of the land sought to be condemned, may present a petition to the clerk of the Superior Court of the county in which the real estate described in the petition is situated, praying for the appointment of commissioners of appraisal," etc. *Long v. City of Randleman,* 199 N. C., 344.

Wisdom or impolicy of legislation is not judicial question, *Sidney Spitzer & Co. v. Comrs. of Franklin County,* 188 N. C., 30. Policy of legislation for the people, not courts. *Bond v. Town of Tarboro,* 193 N. C., 248. Courts do not say what law ought to be, but only declare what it is. *S. v. Revis,* 193 N. C., 192.

In the judgment of the court below is the following: "That the incorporation of the said road into the public road system of the State is in furtherance of the public interest, and that there has been no abuse of the discretion on the part of the said Commission."

On the record, we think the above finding of the court below correct. For the reasons given, the judgment of the court below is

Affirmed.

CITY OF GREENSBORO v. GUILFORD COUNTY, BOARD OF COMMISSIONERS OF GUILFORD COUNTY, AND BOARD OF EDUCATION OF GUILFORD COUNTY,

and

GREATER GREENSBORO SCHOOL DISTRICT ET AL. v. GUILFORD COUNTY, BOARD OF COMMISSIONERS OF GUILFORD COUNTY, AND BOARD OF EDUCATION OF GUILFORD COUNTY.

(Filed 18 March, 1936.)

1. Counties E b: Schools and School Districts B b—County may not be forced to assume liability for special charter school district bonds not necessary to maintenance of constitutional school term.

Where a special charter school district and a city operating schools within a special charter school district coterminous with its corporate

limits, issue bonds, respectively, for school sites, buildings, and maintenance of schools in order to provide better schools within the districts than those provided by the General Assembly for the county generally, in accordance with intent of the General Assembly in creating such special charter districts, but at the time such bonds are issued they are not reasonably essential and necessary for the operation of schools in the districts for the minimum constitutional term of six months, Art. IX, sec. 2, the city and special charter school district are not entitled to *mandamus* to force the county to assume such bonds upon the taking over by the county of the buildings as a part of the general system of public schools. Liability for the bonds may not be imposed upon the county without the approval of a majority of the qualified voters of the county, Art. VII, sec. 7.

2. Appeal and Error F a—

Assignments of error must be supported by exceptions taken during the trial in order to be considered on appeal.

3. Appeal and Error J g—

Where the rights of the parties are determined by the answers to certain issues, regardless of the answer to a subsequent issue, matters relating to such subsequent issue need not be considered on appeal.

APPEAL by plaintiffs from *Alley, J.*, at December Term, 1934, of GUILFORD. No error.

Each of the above entitled actions was begun by a summons which was returnable before the judge of the Superior Court of Guilford County, at his chambers, in the city of Greensboro, on 31 August, 1934.

On the facts alleged in the complaint in each action, the plaintiff therein prayed that a writ of *mandamus* be issued by the court, commanding the defendants therein to assume the payment of certain bonds described in the complaint, and to provide for the payment of said bonds, as the same shall become due, by levying taxes on all the property, both real and personal, subject to taxation, in Guilford County, for that purpose.

The defendants in each action filed an answer to the complaint therein, and prayed that the action be dismissed.

On the return of the summons in each action, it was ordered by the judge, on motion of the defendants and without objection by the plaintiff, that the action be transferred to the civil issue docket of the Superior Court of Guilford County, for the trial, at term time, by a jury of the issues of fact raised by the answer therein. Both actions were accordingly transferred to the civil issue docket of said court.

When the actions came on for trial at the December Term, 1934, of the Superior Court of Guilford County, by consent of counsel for the plaintiff and the defendants in each action, it was ordered by the court that the two actions be consolidated for trial. The two actions were accordingly consolidated and tried together.

At the trial, issues arising upon the pleadings were submitted to the jury and answered as follows:

"1. Did the plaintiff, the city of Greensboro, issue and sell $1,125,000 of bonds for the purpose of providing sites, buildings, and equipment for the schools conducted and operated within its district, as alleged in the complaint? Answer: 'Yes.'

"2. Were the proceeds of said bonds used by the plaintiff, the city of Greensboro, for the purpose of providing sites, buildings, and equipment for the schools conducted and operated within its district, as alleged in the complaint? Answer: 'Yes.'

"3. What amount of the bonds and interest so issued and used by the said plaintiff is still outstanding and unpaid? Answer: 'Principal, $869,000; interest, $11,978.'

"4. Did the plaintiff, the Greater Greensboro School District, issue and sell $2,300,000 of bonds for the purpose of providing sites, buildings, and equipment for the schools conducted and operated within its district, as alleged in the complaint? Answer: 'Yes.'

"5. Were the proceeds of said bonds used by said plaintiff for the purpose of providing sites, buildings, and equipment for the schools conducted and operated within its district, as alleged in the complaint? Answer: 'Yes.'

"6. What amount of the bonds and interest so issued and used by said plaintiff is still outstanding and unpaid? Answer: 'Principal, $2,125,000; interest, ...'

"7. Were the sites, buildings, and equipment acquired, constructed, and used by the plaintiff, the city of Greensboro, reasonably essential and necessary for the conduct and operation of the six months school term contemplated by Article IX, section 3, of the North Carolina Constitution and statutes enacted pursuant thereto, as alleged in the complaint? Answer: 'No.'

"8. Were the sites, buildings, and equipment acquired, constructed, and used by the plaintiff Greater Greensboro School District, reasonably essential and necessary for the conduct and operation of the six months school term contemplated by Article IX, section 3, of the North Carolina Constitution, and statutes enacted pursuant thereto, as alleged in the complaint? Answer: 'No.'

"9. Did the defendants, in the year 1922 or thereafter, assume the payment of the bonds and interest issued and sold by Rural Special Tax Districts in Guilford County, as alleged in the complaint? Answer: 'No.'

"10. Have the defendants failed and refused to assume the payment of the bonds and interest issued and sold by the plaintiffs herein, as alleged in the complaint? Answer: .....

"11. Is the plaintiff, the city of Greensboro, estopped by its conduct from asserting its claim and demand that the defendants assume the payment of its bonded indebtedness, as alleged in the complaint? Answer: ....:....

"12. Did the plaintiff Greater Greensboro School District waive its right to demand that the defendants assume the payment of its bonded indebtedness, as alleged in the complaint? Answer: ....."

The 1st, 2d, 3d, 4th, 5th, and 6th issues were answered by consent. There are no exceptions in the case on appeal with respect to either of these issues.

The court instructed the jury that if they should answer the 7th, 8th, and 9th issues "No," they would not answer the 10th, 11th, or 12th issues. The exceptions in the case on appeal are directed, chiefly, to the trial of the 7th, 8th, and 9th issues.

From judgment denying the prayer of the plaintiffs that a writ of *mandamus* be issued by the court in each action, and dismissing both actions, the plaintiffs appealed to the Supreme Court, assigning numerous errors in the trial, and in the judgment.

Andrew Joyner, Jr., Hoyle & Hoyle, and Hines & Boren for plaintiffs.

B. L. Fentress, Brooks, McLendon & Holderness, Frazier & Frazier, and King & King for defendants.

CONNOR, J. The bonds aggregating in amount the sum of $2,125,000, which were issued and sold by the city of Greensboro, prior to 1926, when the Greater Greensboro School District was created by the Board of Education of Guilford County, were valid obligations of the city of Greensboro, a municipal corporation of this State. The issuance and sale of said bonds were authorized by statute and were first approved by a majority of the qualified voters of the city of Greensboro. The proceeds of the said bonds were used by the city of Greensboro to provide sites, buildings, and equipment for schools which were established, maintained, and operated by the city of Greensboro, under valid provisions of its charter, in a special charter school district, which was coterminous with the corporate limits of the city of Greensboro, as such corporate limits existed prior to 15 March, 1923, when said corporate limits were extended. These schools were not established, maintained, or operated by the Board of Commissioners or by the Board of Education of Guilford County. The special charter school district, which was coterminous with the corporate limits of the city of Greensboro, was created by the General Assembly of this State, in order that the city of Greensboro might provide better schools in said district than those which the General Assembly at that time provided in obedience to the constitutional man-

date that "the General Assembly at its first session under this Constitution, *i.e.* (the Constitution of North Carolina adopted in 1868), shall provide by taxation and otherwise for a general and uniform system of public schools, wherein tuition shall be free of charge to all children of the State between the ages of six and twenty-one years." Sec. 2, Art. IX, Const. of N. C. It was manifestly contemplated by the General Assembly, when it created the special charter school district which was coterminous with the corporate limits of the city of Greensboro, and imposed upon the city of Greensboro the duty of establishing, maintaining, and operating schools in said district, that the school facilities in said district would be better in all respects than those provided by the General Assembly for districts in which schools were maintained and operated for only the minimum term required by the Constitution of this State.

The bonds aggregating in amount the sum of $2,300,000, which were issued and sold by the Board of Education of the Greater Greensboro School District, after the said district had been created by the General Assembly a special charter school district, were valid obligations of said district. The issuance and sale of said bonds were authorized by statute and were first approved by a majority of the qualified voters of said district. The proceeds of said bonds were used by the Board of Education of the Greater Greensboro School District to provide sites, buildings, and equipment for schools which were established, maintained, and operated in said district by said Board of Education, under statutory authority. These schools were not established, maintained, or operated, after the issuance and sale of said bonds, by the Board of Commissioners or by the Board of Education of Guilford County. The Greater Greensboro School District, which was first established by the Board of Education of Guilford County, as a school district, in 1926, was created by the General Assembly in 1927, a special charter school district. See chapter 77, Private Laws of North Carolina, 1927. It is provided therein that "the $2,300,000 bonds voted for and in behalf of said district may be issued and sold by the Board of Education of the Greater Greensboro School District, in the name of the district." All the provisions of chapter 77, Private Laws of North Carolina, 1927, show that it was contemplated by the General Assembly, when it created the Greater Greensboro School District a special charter school district, and imposed upon the Board of Education of said district the duty to establish, maintain, and operate schools in said district, that the school facilities of said district would be better in all respects than those which the General Assembly had then provided for districts in the several counties of the State, in which schools were main-

tained and operated for only the minimum term required by the Constitution of the State.

The facts as found by the jury at the trial of these actions that the sites, buildings, and equipment acquired, constructed, and used by the plaintiffs for schools in their respective districts, were not reasonably essential and necessary for the operation in said districts of schools for the minimum term required by constitutional mandate, do not support the suggestion that the jury, in answer to issues submitted by the court, found that the governing authorities of the plaintiffs had acquired sites, constructed buildings, and purchased equipment, with the proceeds of said bonds, which were not reasonably required by the needs of their respective special charter school districts. On the contrary, all the evidence at the trial shows that the sites acquired, the buildings constructed, and the equipment purchased, were all required for the operation of schools in their respective districts, as contemplated and authorized by the General Assembly of this State. These facts are, however, material to a proper determination of the questions involved in these actions, to wit: Whether, under the law of this State, it has become and is now the duty of the defendants to assume the payment of the amounts now due and unpaid on the bonds which were issued and sold by the plaintiffs as obligations of their respective districts, and thereby make said bonds the obligations of Guilford County.

In support of their contention that the questions involved in these actions should be answered in the affirmative, the plaintiffs cite and rely upon the decision of this Court in *City of Hickory v. Catawba County and Newton Graded School District v. Catawba County,* 206 N. C., 165, 173 S. E., 56. These cases were consolidated and tried together in the Superior Court of Catawba County. On defendants' appeal to this Court, the judgment of the Superior Court, on the facts found by said court, commanding the defendants to assume the payment of bonds issued by the plaintiffs, and to levy taxes on all the taxable property in Catawba County for that purpose, was affirmed. In that case it was found as a fact by the Superior Court that the proceeds of the bonds issued and sold by the plaintiffs had been used by them in the construction of buildings which were necessary for the operation in their respective districts of schools for the minimum constitutional term of six months in each and every year. In his opinion in that case, writing for the Court, *Justice Adams* says: "This is not a problem to be solved by the defendants in the exercise of their discretion, or one in the solution of which the courts are shorn of jurisdiction. The exercise of jurisdiction implies the right to hear evidence on the question whether buildings and equipment of certain types are essential to the operation of the schools." The clear implication is that when it is found as a fact, as in

the instant case, that the buildings constructed by the governing authorities of a special charter school district and paid for out of the proceeds of bonds which were obligations of the said district, at the time the said bonds were issued and sold, were not reasonably essential and necessary for the operation in said district of schools for the minimum constitutional term of six months, there is no duty imposed by law upon the county in which said district is located, or upon its Board of Commissioners or Board of Education, which can be enforced by a writ of *mandamus,* to assume the payment of said bonds, where the General Assembly has authorized and directed the county and its governing authorities to take over said buildings and use them in operating public schools as part of the general and uniform system of public schools, required by the Constitution of this State. In such case, liability for the bonds cannot be imposed upon the county without the approval of a majority of the qualified voters of the county. Art. VII, sec. 7, Const. of N. C.

We have considered the numerous contentions of the plaintiffs on this appeal. Many of them are not supported by assignments of error based on exceptions taken during the trial. For this reason they do not require discussion. Contentions which are so supported are without substantial merit. They are not sustained. The answers to the 7th and 8th issues are sufficient to support the judgment, without regard to the answer to the 9th issue. In view of the answers to the 7th and 8th issues, it is immaterial whether or not the defendants have assumed the payment of bonds issued by the rural districts of Guilford County. The proceeds of these bonds were used in the construction of buildings in said districts, which were required for the operation of schools in said district for the constitutional term of six months.

The situation in Guilford County with respect to the bonded indebtedness of said county for schools, as disclosed by the record on this appeal, is the result of a belated recognition by the General Assembly of its constitutional duty to provide a general and uniform system of public schools, which shall be as the Constitution contemplates, a State system. The problems presented by this situation are legislative and not judicial. Relief must be sought from the General Assembly and not from the courts.

We find no error in the trial of these actions. The judgment is affirmed.

No error.

J. C. THOMSON v. HARNETT COUNTY, A BODY POLITIC AND CORPORATE, AND J. B. ENNIS, J. S. BARKER, G. R. NOEL, AND E. L. COOK, AND A. A. CAMERON, AS THE BOARD OF COMMISSIONERS OF HARNETT COUNTY.

(Filed 18 March, 1936.)

1. Taxation A c—Issuance of county bonds held not to violate constitutional mandate that property may not be taken but by law of the land.

Under the provisions of ch. 342, Public-Local Laws of 1935, defendant county proposed to issue county bonds bearing 4% interest to refinance township road bonds issued by the townships of the county, the township bonds to remain valid and to be acquired by the county and held in a sinking fund, and the county bonds to be paid by a tax equal to 6% of the bonds issued by each township to be levied in the respective townships. *Held:* The proposed county bond issue is merely to refinance the township unit bonds, and the possibility of a deficit requiring payment by the county as a whole is remote, and plaintiff taxpayer's contention that the statute violates Art. I, sec. 17, of the State Constitution, prohibiting the taking of property but by the law of the land, is untenable.

2. Counties E b—County bond issue to refinance county township road bonds held for county purpose.

Under the provisions of ch. 342, Public-Local Laws of 1935, defendant county proposed to issue county bonds to refinance bonds issued by the townships of the county. The proceeds of the township bonds were used in the construction of highways constituting a part of the general highway system of the county, which highways were later taken over by the county, ch. 293, Public-Local Laws of 1925, and thereafter taken over for maintenance and improvement by the State. *Held:* The proposed county bond issue is for a county purpose within the meaning of Art. V, sec. 6 of the Constitution of North Carolina.

3. Taxation A a—Bond issue to refinance township bonds issued for county highways held for necessary county expense.

Defendant county proposed to issue bonds to refinance bonds issued by its townships, the proceeds of the township bonds having been used to build highways thereafter taken over by the county as a part of the county highway system. *Held:* The township bonds were for a necessary county expense, and the approval of the majority of the qualified voters of the county is not a prerequisite to the issuance of the refunding bonds, N. C. Constitution, Art. VII, sec. 7.

4. Taxation A e: Counties A c—Under facts of this case proposed county bond issue held not a tax on one community for benefit of another.

Under the provisions of ch. 342, Public-Local Laws of 1935, defendant county proposed to issue county bonds bearing 4% interest to refinance township road bonds issued by the townships of the county, the township bonds to remain valid and outstanding and to be acquired by the county and held in a sinking fund, and the county bonds to be paid by a tax equal to 6% of the bonds issued by each township to be levied in the respective townships. The proceeds of the township bonds were used in the construction of highways later taken over by the county as a part of

the county highway system. *Held:* Since the proceeds of the township bonds were used for a necessary county expense and the entire county received the benefit of the expenditure by the townships, and since N. C. Constitution, Art. VII, sec. 2, imposes the duty on the county commissioners to supervise roads, the levying of taxes and finances of the county, objection to the proposed county bond issue on the ground that the statute authorizing the bond issue violates N. C. Constitution, Art. VII, sec. 9, by granting the power to tax one community or local tax district for the exclusive benefit of another, is untenable.

5. Constitutional Law A a—

Our Constitution is not static, but must be liberally construed to meet changing conditions.

6. Counties A a—

A county is but an agency of the State, and is subject to almost unlimited legislative control in the exercise of ordinary governmental functions.

APPEAL by plaintiff from *Sinclair, J.*, at Chambers, 17 February, 1936, in Lillington, N. C. From HARNETT. Affirmed.

This is an injunctive proceeding, brought by plaintiff against defendants, to restrain them from issuing $427,000 of county bonds.

The judgment in the court below was as follows:

"This cause coming on to be heard before the undersigned judge holding the courts of the Fourth Judicial District, at chambers in Lillington, North Carolina, on 17 February, 1936, upon the complaint, treated as an affidavit, and the demurrer of the defendants, the court concludes:

"1. That the bond issues of the several townships of Harnett County described in the complaint, now outstanding and unprovided for, totaling $427,000, were issued lawfully, and the proceeds thereof expended for the improvement of the public roads constituting the public road system of Harnett County.

"2. That said bonds are and will remain valid obligations against the taxable properties of the several townships issuing them until paid, and the continued levying and collecting of a tax to pay at least the interest thereon by the commissioners of Harnett County is a valid exercise of the taxing power.

"3. That the county of Harnett as a whole received a direct benefit from the expenditure of the money represented by said indebtedness, and the proposed underwriting of said indebtedness by the issuance of county bonds is in accordance with law and for a county purpose.

"4. That the carrying out of the proposed arrangements, as outlined in the complaint, will violate no constitutional right of the plaintiff, or any other taxpayer, but will inure to the benefit of the plaintiff and all other taxpayers of the county as a whole.

"Therefore, the motion of the plaintiff for an injunction is denied, the proposed issuance of bonds is declared to be a valid and lawful exercise

of the authority vested by law and in said board of commissioners, and the action is therefore dismissed. N. A. Sinclair, Judge."

The plaintiff excepted and assigned error to the judgment as signed, and appealed to the Supreme Court. The exception and assignment of error and necessary facts will be set forth in the opinion.

Jernigan, Godwin & Strickland for plaintiff.

I. R. Williams, county attorney, and Ross & Ross, special attorneys, for the defendants.

CLARKSON, J. *The facts:* Under and by virtue of the provisions of chapter 427 of the Public-Local Laws of 1913, each and every one of the townships of Harnett County from time to time issued township road bonds by vote of the people, and expended the proceeds of the said road bonds upon the improvement and development of the public roads of the county lying within the respective townships, the said bonds being in the total sum of $430,000. None of the principal of the said bonds has been paid, except $3,000 of the bonds of Buckhorn Township, and the remainder of the said principal remains due and unpaid, and no provision has been made by the respective townships for the payment of the said principal sum.

Section 17 of the act provides that the township road commissions to be set up in the event of a favorable vote in each township shall "succeed to and have all of the rights, powers, and duties, not inconsistent with the provisions of this act, now conferred by law upon the township board of supervisors." The act does not deprive the board of county commissioners of their general right to aid in the improvement of the public roads of the county.

Chapter 293 of the Public-Local Laws of 1925, substituted for the existing several agencies of township road commissions, one commission for the entire county, and vested in this county highway commission the control of the roads then being maintained and improved by the several townships, and that act, in section 13, expressly declared, with reference to the outstanding township bonds: "The proceeds of said bonds are hereby declared and found to have been expended for the necessary improvement of the public roads of Harnett County." The county commissioners were, in that act, authorized, in their discretion (section 13), "to purchase or assume the payment of any and all of the road bonds of the several townships heretofore issued and outstanding." This discretion, however, was never exercised.

By chapter 342 of the Public-Local Laws of 1935, after reciting in detail the outstanding township road bond issues, it was declared: "The proceeds of the said bonds were used for the purpose of the neces-

sary improvement of public roads constituting a part of the general road system of the county, and the entire county received direct benefit from the said expenditures, and the county as a whole was relieved of an expenditure which otherwise would have fallen upon the whole county."

The several townships of Harnett County issued road bonds between 1 October, 1914, and 1 July, 1921. These bonds constitute obligations of the respective townships. The proceeds thereof were spent in the respective townships for improving roads therein which the General Assembly has declared constitute "a part of the general road system of the county." Some of these township road bonds are now in default.

Chapter 342, Public-Local Laws 1935, *supra*—"An act to authorize refunding bonds for the county of Harnett for the retirement of township road bonds in said county," provides that the township bonds are in all respects validated; that Harnett County is authorized to issue full faith and credit bonds of the county bearing interest not exceeding 4% per annum and maturing serially over not to exceed thirty years, and to levy and collect annually upon the entire taxable property of the county such tax as may be necessary, in addition to other sources of revenue provided in the act to pay interest and principal on the county bonds as the same may become due. The act declares that the county bonds and tax are for meeting a necessary expense of the county, and provides that with the consent of the Local Government Commission as to each transaction, the Board of Commissioners may exchange the bonds authorized by the act for township bonds, or, after their sale at not less than par, may use the proceeds for the exclusive purpose of purchasing township bonds of the issues described in the preambles, all upon such terms as may be agreed upon with the holders of township bonds, but not more than par for par; that the township bonds so "acquired" shall remain valid obligations of the respective townships, and shall be deposited in the sinking fund for the county bonds and held for the purpose of paying the county bonds; that the board shall be required to levy and collect annually in each township a tax sufficient to pay at least 6% interest annually on the township bonds now outstanding and unpaid; that proportion of the collections from this tax which represents the proportion of the total outstanding township bonds which are held in the sinking fund, shall be paid to the sinking fund; and that such tax and payments are to continue in each township until collections from such township are sufficient to retire an amount of the county bonds equal to the amount of bonds of such township acquired by the sinking fund.

Under the authority of the above act, the board of commissioners for the county of Harnett has adopted a resolution providing for the issuance of $427,000 Harnett County Township Road Refunding Bonds.

This resolution describes the township bonds to be acquired by purchase or exchange for the county bonds authorized. The county accountant is directed to negotiate and enter into agreements with the holders of the township bonds, subject to the approval of the board of commissioners of Harnett County, on the most advantageous terms available to the county, for the acquisition of such bonds.

The act is challenged by the plaintiff upon the grounds: First, that it is the taking of the plaintiff taxpayer's property other than by the the law of the land; second, that it is an authorization of a county tax for other than a county purpose; third, that it is not for a necessary expense; and fourth, that it violates Article VII, sec. 9, of the Constitution, by levying a tax on the community or taxing district for the exclusive benefit of another.

Plaintiff says the questions present are: "(1) Does chapter 342, Public-Local Laws of North Carolina, 1935, violate Article I, sec. 17, of the North Carolina Constitution, which prohibits the taking of plaintiff's property other than by law of the land? (2) Does the act violate Article V, sec. 6, of the North Carolina Constitution, which prohibits the levy of a county tax for other than a county purpose? (3) Does the act violate Article VII, sec. 7, of the North Carolina Constitution, which prohibits a county from contracting a debt and levying a tax for other than a necessary expense of the county without a vote of the majority of the qualified voters therein? (4) Does the act violate Article VII, sec. 9, of the North Carolina Constitution, by granting the power to tax one community or district for the exclusive benefit of another?" We do not think the contentions of plaintiff can be sustained.

The *first* question: The township units are pledged now to pay the principal and 6% interest on its present bonds. The county issue under the act in controversy is in the aggregate sum of $427,000, and is for the amount of all the township units, and the issue is restricted to be sold or exchanged at 4% to aid these units. We cannot see how there can be any possibility of a deficit under the new issuance of bonds of 4% when the township units are pledged to pay 6%. It is an easy method of financing the township unit bonds and does not deprive plaintiff of his property. It does not impinge the Constitution "but by the law of the land."

The *second* question: Under Article V, sec. 6, in *Brooks v. Avery County,* 206 N. C., 840, it is held: "A county has authority to issue funding and refunding bonds with the approval of the Local Government Commission to take up valid, outstanding indebtedness of the county which was incurred for necessary county expenses. Article V, sec. 6."

We think, under the facts and circumstances of this case, the bonds are for a county purpose. It may be noted that the county roads were taken over by the State for maintenance and improvement, and are now maintained and improved by the State. Public Laws 1931, ch. 145.

In *Hill v. Comrs.*, 190 N. C., 123, it is held: "A public-local law authorizing the commissioners of a county to take over a specified highway within the county, constituting one of the principal highways within the county, connecting two important State highways, transferring to the said commissioners the bridges of the various townships for their care and supervision, is not violative of Article II, sec. 29, of our Constitution against direct legislation by local, private, or special act, nor the taking of property without the due process of law, Article I, sec. 17; nor the pledging of the county's faith or credit without the approval of the voters, etc., Article VII, sec. 7; nor against the uniformity rule, Art. VII, sec. 9."

The *third* question: It has been held by this Court that roads are necessary expenses. Citing a wealth of authorities, it is said in *Barbour v. Wake County,* 197 N. C., 314 (317): "It has been held in this jurisdiction that the construction and repair of bridges and roads are necessary expenses. To contract a debt for such purposes, a vote of the majority of the qualified voters of a county is not a prerequisite."

The *fourth* question: The plaintiff contends that "The act violates Article VII, sec. 9, of the North Carolina Constitution, by granting the power to tax one community or local taxing district for the exclusive benefit of another." *Commissioners v. Lacy,* 174 N. C., 141; *Ellis v. Greene,* 191 N. C., 761 (766).

Constitution of North Carolina, Article VII, sec. 2, is as follows: "It shall be the duty of the commissioners to exercise a general supervision and control of the penal and charitable institutions, schools, roads, bridges, levying of taxes and finances of the county, as may be prescribed by law. The register of deeds shall be, *ex officio,* clerk of the board of commissioners." The General Assembly can, "as may be prescribed by law," give almost unlimited power to the counties to carry out this provision of the Constitution.

The act in controversy does not in any way impair the obligation of the township bonds. These bonds are valid obligations of the townships. Under Article VII, sec. 2, of the Constitution, above quoted, the commissioners of a county have the duty to exercise a general supervision and control of the roads and levying of taxes as prescribed by law in reference to roads. By legislative authority all these roads were taken over by the county and the act of 1935 declared that the entire county received direct benefit from the expenditures in the townships, and the county as a whole was relieved of an expenditure which otherwise would have fallen upon the whole county.

In *Reeves v. Buncombe County,* 204 N. C., 45 (47), *Brogden, J.,* writing the opinion for the Court, distinguishes *Commissioners v. Lacy, supra,* and *Ellis v. Greene, supra,* and says: "The record discloses that the proceeds of both bond issues were spent upon roads and bridges in Black Mountain Township, 'which said roads and bridges were later taken over by the county of Buncombe as a part of the highway system of said county, and later taken over by the State Highway Commission, and are now under the control of same.' Manifestly, the facts so established disclose that the project was not one of local or township benefit, supervision, and control, but such expenditure was made (quoting from *Comrs. v. Lacy, supra*) 'for the public benefit or a part of the State or county system.' Hence, the law impresses upon the bond issues the character and quality of a county-wide obligation."

Our Constitution is not static—it is elastic to meet changing conditions. It must be liberally construed, as was done in the *Reeves case, supra.* The act in controversy cannot injure plaintiff, but is an aid to the townships to meet changed conditions. A county is subject to almost unlimited legislative control in the exercise of ordinary governmental functions, it being but an agency of the State. *Day v. Commissioners,* 191 N. C., 780.

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

Affirmed.

STATE OF NORTH CAROLINA EX REL. BANK OF SPRUCE PINE v. J. H. MCKINNEY AND UNITED STATES FIDELITY AND GUARANTY COMPANY.

(Filed 18 March, 1936.)

1. Register of Deeds B b—Failure of register of deeds to properly register instruments is breach of bond for which person injured may sue.

The register of deeds of a county is required by statute to register written instruments properly presented to him for registration, and to properly index and cross-index such instruments as an essential part of their registration, C. S., 3553, and the failure of the register of deeds to register such instruments or his failure to properly index and cross-index them is a breach of his statutory bond, C. S., 3545, for which he and the surety on his bond are liable to the person injured by such breach, C. S., 3555.

2. Limitation of Actions B a—Action against register's bond for failure to register instrument accrues at time of failure and not its discovery.

This action to recover against the statutory bond of defendant register of deeds was brought under the provisions of C. S., 354, to recover damages sustained by reason of the failure of the register of deeds to properly index and cross-index relator's mortgage, resulting in loss of priority of

the instrument to subsequently registered mortgages and subsequently docketed judgments. Relator's evidence tended to show that the failure of the clerk to index and cross-index its mortgage was not discovered until about two years before institution of the action, but it appeared that the clerk was required by the statute to index and cross-index the instrument more than six years before the institution of the action. *Held:* The cause of action accrued at the time of the neglect of the register of deeds to index and cross-index the instrument as required by the statute, and the action should have been dismissed by judgment as of nonsuit upon defendants' plea of the six-year statute of limitations, C. S., 439.

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

APPEAL by defendants from *Harding, J.*, at March-April Term, 1935, of MITCHELL. Reversed.

This is an action to recover damages resulting from the breach of an official bond filed by the defendant J. H. McKinney, register of deeds of Mitchell County, with the board of commissioners of said county, on 22 December, 1924. The action was begun on 25 October, 1933.

The defendants in their answer deny the breach of the bond as alleged in the complaint, and among other defenses set up in their answer, pleaded in bar of plaintiff's recovery in this action certain statutes of limitation.

The evidence offered at the trial by the plaintiff showed the following facts:

At the general election held in Mitchell County, on . November, 1934, the defendant J. H. McKinney was duly elected register of deeds of said county for a term of two years, beginning on the first Monday in December, 1924, and ending on the first Monday in December, 1926. After the said election, the defendant filed with the board of commissioners of Mitchell County a bond in the sum of $5,000, payable to the State of North Carolina, and in form as required by statute. This bond was duly executed by the defendant United States Fidelity and Guaranty Company as surety, and was duly approved and accepted by the board of commissioners of Mitchell County. After he had filed said bond, and had otherwise qualified as register of deeds of Mitchell County, for a term of two years as aforesaid, the defendant J. H. McKinney entered upon the performance of the duties of his office. The defendant has been from time to time reëlected as register of deeds of Mitchell County for successive terms of two years each, and is now and has been at all times since 15 January, 1925, the duly elected and duly qualified register of deeds of Mitchell County.

On 15 January, 1925, the relator Bank of Spruce Pine filed with the defendant, for registration, a mortgage deed by which the mortgagors named therein, to wit: C. F. Arrowood and his wife and D. P. Hyatt

and his wife, conveyed to the Bank of Spruce Pine certain real estate described therein and located in Mitchell County, to secure the payment of their bond in the sum of $4,500, payable to the Bank of Spruce Pine. The said bond was dated 6 January, 1925, and was due four months after its date. Prior to the time the said mortgage deed was filed with the defendant for registration its execution by the mortgagors had been duly probated by the clerk of the Superior Court of Mitchell County. The said mortgage deed was recorded by the defendant on 15 January, 1925, at page 266, in Book No. 47, in his office. The defendant, however, failed and neglected to index and cross-index the registration of the said mortgage deed, as required by statute, during his term of office, which expired on the first Monday in December, 1926. During a subsequent term of office as register of deeds of Mitchell County, to which he had been elected, to wit: On 25 June, 1931, at the request of the relator Bank of Spruce Pine, the defendant properly indexed and cross-indexed the registration of said mortgage deed. A short time before 25 June, 1931, the relator discovered, for the first time, that its mortgage deed was not properly indexed and cross-indexed, and immediately requested the defendant to index and cross-index the same in accordance with statutory requirements.

During the period of time which elapsed from 15 January, 1925, to 25 June, 1931, certain mortgage deeds executed by C. F. Arrowood and his wife and D. P. Hyatt and his wife were duly registered in the office of the register of deeds of Mitchell County, and certain judgments recovered against the said D. F. Arrowood and his wife and against D. P. Hyatt and his wife were docketed in the office of the clerk of the Superior Court of Mitchell County. As the result of the failure and neglect of the defendant J. H. McKinney, register of deeds, to index and cross-index its mortgage deed, on 15 January, 1925, or thereafter during his term of office, which expired on the first Monday in December, 1926, the relator did not acquire priority over the mortgages subsequently executed by C. F. Arrowood and his wife and D. P. Hyatt and his wife, and subsequently registered in the office of the register of deeds of Mitchell County, and over the judgments subsequently recovered against the said C. F. Arrowood and wife and the said D. P. Hyatt and wife, and subsequently docketed in the office of the clerk of the Superior Court of said county, with respect to the real estate described in its mortgage deed from C. F. Arrowood and his wife and D. P. Hyatt and his wife. The said real estate was sold under foreclosure proceedings instituted subsequent to 25 June, 1931. The proceeds of the sale of said real estate have been applied to the satisfaction of the mortgage deeds executed by C. F. Arrowood and his wife and D. P. Hyatt and his wife, and of the judgments recovered against them, in the order of their priority. The

amount now due to the Bank of Spruce Pine, the relator in this action, on the note executed by C. F. Arrowood and his wife and D. P. Hyatt and his wife, and secured in the mortgage deed executed by them to the Bank of Spruce Pine, is $468.37, with interest from 14 January, 1933.

At the close of the evidence for the plaintiff, the defendants moved for judgment as of nonsuit. The motion was denied, and the defendants duly excepted.

No evidence was offered by the defendants.

The issues submitted to the jury were answered as follows:

"1. Is the plaintiff's cause of action barred by the statute of limitations, as alleged in the answer? Answer: 'No.'

"2. Did the defendant J. H. McKinney, register of deeds of Mitchell County, fail to properly index and cross-index the mortgage deed referred to in the complaint, as alleged in the complaint? Answer: 'Yes.'

"3. What damages, if any, is the plaintiff entitled to recover of the defendant J. H. McKinney, and the surety on his bond, United States Fidelity and Guaranty Company? Answer: '$400.00.'"

From judgment that plaintiff recover of the defendants J. H. McKinney and the United States Fidelity and Guaranty Company, and each of them, the sum of $400.00, with interest on same from 30 October, 1933, and the costs of the action, the defendants appealed to the Supreme Court, assigning errors in the trial.

McBee & McBee and Burke & Burke for plaintiff.
Huskins & Wilson for defendants.

CONNOR, J. This action was instituted under the provisions of C. S., 354, wherein it is provided, among other things, that every person injured by the neglect of the register of deeds of any county in this State to perform an official duty may institute an action in the name of the State against such register of deeds, and the surety or sureties on his official bond. Every person who has been duly elected register of deeds of any county in this State, before he is inducted into his office, is required by statute to give bond with sufficient surety, to be approved by the board of commissioners of the county, in a sum not exceeding ten thousand dollars, payable to the State of North Carolina, and conditioned for the safe keeping of the books and records, and for the faithful discharge of the duties of his office. He is required to renew his bond annually on the first Monday in December. C. S., 3545.

It is provided by statute that "the register of deeds shall register all instruments in writing delivered to him for registration forthwith. He shall endorse on each instrument in writing the day and hour on which it is presented to him for registration, and such endorsement shall be

entered on his books and form a part of the registration, and he shall, immediately upon making the endorsement herein required upon each instrument in writing, index and cross-index the same in the order of time in which such instruments are presented to him: *Provided,* that the register of deeds may, if in his opinion it is proper to do so, prepare and use in lieu of his permanent index a temporary index until the instrument is actually recorded, upon which all instruments shall be indexed immediately upon receipt of same in his office, and until said instruments shall have been recorded, the temporary index shall operate in all respects as the permanent index. In the event the register of deeds shall use a temporary index, however, all instruments shall be recorded and cross-indexed on the permanent index within thirty (30) days from date of receipt of same." C. S., 3553.

The neglect of a register of deeds to register a deed or other instrument presented to him for registration, as required by statute, is a breach of his official bond, and for such breach he and the surety or sureties on his official bonds are liable to any person injured by such breach. C. S., 3555.

The indexing and cross-indexing of deeds or other instruments in writing filed with a register of deeds for registration, as required by statute, is essential to their proper registration (*Woodley v. Gregory,* 205 N. C., 280, 171 S. E., 65), and the failure of a register of deeds to index and cross-index such deed or instrument is a breach of his official bond, for which he is liable on his official bond to the person injured by such breach. (*Watkins v. Simonds,* 202 N. C., 746, 164 S. E., 363.)

The evidence at the trial of the action showed that the defendant J. H. McKinney, register of deeds of Mitchell County, breached his official bond by his neglect to index and cross-index, as required by statute, the mortgage deed which was delivered to the said defendant for registration by the relator Bank of Spruce Pine on 15 January, 1925. The relator is entitled to recover in this action such damages as resulted from said breach, unless, as contended by the defendants, the action is barred by the statute of limitations.

It is provided by statute in this State that an action to recover on the official bond of a public officer must be begun within six years from the date at which the cause of action accrued. C. S., 439. Otherwise, the action is barred, and the plaintiff cannot recover.

This action was begun on 25 October, 1933.

The cause of action on which the plaintiffs seek to recover in this action accrued at the date of the neglect of the defendant J. H. McKinney, register of deeds of Mitchell County, to index and cross-index the mortgage deed delivered to him by the Bank of Spruce Pine for registration, as required by statute, which was 15 January, 1925. The action

was not begun within six years from the date on which the cause of action accrued. For that reason, the action is barred and the plaintiffs cannot recover. See *Daniel v. Grizzard,* 117 N. C., 106, 23 S. E., 93.

There was error in the refusal of the trial court to allow defendants' motion for judgment as of nonsuit. See *Washington v. Trust Co.,* 205 N. C., 382, 171 S. E., 438.

The judgment is reversed, and the action remanded to the Superior Court of Mitchell County that judgment may there be entered in accordance with this opinion.

Reversed.

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

ANDREW WILLIFORD LANCASTER v. CATHERINE DELLA LANCASTER, LUCY LANCASTER DRAUGHN AND HUSBAND, CHARLES DRAUGHN, EMILY P. LANCASTER, JOSEPH L. LANCASTER, PIERPONT MORGAN LANCASTER, DAVID W. ISEAR, GUARDIAN AD LITEM.

(Filed 18 March, 1936.)

1. Wills E d—Held: Under terms of this will, if contingent limitation over should be defeated, property would not revert to testatrix' estate, but would go to brothers and sisters of life tenant.

Testatrix' will provided that a certain sum should be used by her executor in the purchase of a home for each of the children of a specified person, who was no kin to testatrix, that each of the named beneficiaries should have a life estate in the property purchased for him or her, with remainder over to the child or children surviving such beneficiary. Testatrix later executed a codicil directing that if any one of the named beneficiaries should die before testatrix' death, "and the payment to him or her by my executor of his or her devise after my death," the share of such beneficiary should be used for the other beneficiaries of the class, share and share alike. *Held:* Upon the death of any one of the named beneficiaries without issue him or her surviving, real estate purchased for such beneficiary under the provisions of the will would not revert to the estate of testatrix and descend to her heirs at law, but would go to the brothers and sisters of such beneficiary as members of the class.

2. Life Estates and Remainders C a—Heirs at law of testatrix held not necessary parties for sale of contingent remainder for reinvestment.

Under the terms of the will in this case certain beneficiaries, who were brothers and sisters but no kin to testatrix, were given, respectively, a life estate in certain property, with contingent limitation over to the child or children him or her surviving, with further provision that if any beneficiary should die without child or children him or her surviving, the property should vest in the brothers and sisters of such beneficiary. *Held:*

LANCASTER *v.* LANCASTER.

In a proceeding under N. C. Code, 1744, for the sale of the property of one of the named beneficiaries for reinvestment, the heirs at law of testatrix are not necessary parties, since if the contingent limitation over to the child or children of such beneficiary should be defeated, the property would not revert to the testatrix' estate, but would go to the brothers and sisters of the beneficiary dying without issue.

APPEAL by respondent J. T. McCraw from *Harris, J.*, at February Term, 1935, of WILSON. Affirmed.

The clerk of the Superior Court of Wilson County, N. C., rendered the following judgment:

"In the above entitled action or special proceeding pending in this court, a rule was duly issued to J. T. McCraw, commanding him to appear and show cause, if any he had, why he should not accept the deed tendered to him, and to pay the purchase price for the real estate agreed by him to be purchased as set forth in the petition and former judgment herein; in obedience to said rule the said respondent J. T. McCraw now appears in court by his attorneys, F. L. Carr, Jr., and Connor & Connor, and files answer to said rule, stating that:

" '1. That the land described in the petition in this cause was conveyed unto Andrew W. Lancaster by the deed of W. E. Smith, a copy of which is attached to the petition. That as will be seen by reference had to the petition herein and the deed attached thereto, the said land was conveyed to Andrew W. Lancaster to be held under the terms of the will of Catherine Fryar, a copy of which is attached to the petition herein. Reference is hereby made to the said deed and said will.

" '2. That the plaintiff and the defendants named in this action are not related by blood or marriage to Catherine Fryar, and that the heirs at law of Catherine Fryar have not been joined as defendants in this action, and that should the remainder over upon the death of Andrew W. Lancaster without issue descend to the heirs at law of Catherine Fryar, or any other person or class of persons not named in this action, then the respondent is advised, informed, and so believes that this action would be null and void as to such persons or class of persons, and his title to the said tract of land would thereby be rendered defective.

" '3. Respondent has been advised that it is a doubtful question of law as to whether deed therefor offered to him by Andrew W. Lancaster and S. G. Mewborn, commissioner, conveys unto him a good and indefeasible title in fee to said property.'

"The court, upon due consideration of the answer filed herein by said respondent, orders, decrees, and adjudges:

"1. That all parties necessary to this action and its determination have been made parties defendant thereto, and that the heirs at law of the said Catherine Fryar have and can have no interest whatever in said real estate, as the respondent admits, that the plaintiff and the named

defendants are not related by blood or marriage, nor were so related to said Catherine Fryar, deceased.

"2. That the deed made and executed under the order of this court by said Andrew W. Lancaster and S. G. Mewborn, commissioner, does convey unto the said respondent J. T. McCraw a good and indefeasible title thereto in fee:

"3. That the said respondent J. T. McCraw accept said deed so tendered to him and that he pay said agreed purchase price therefor, as hereinbefore adjudged, and that in default thereof that said real estate be sold at public auction for cash at the courthouse door in the town of Wilson by said commissioner after due advertisement thereof, for and at the risk of said respondent J. T. McCraw.

"That this cause of action be and the same is retained for such other and further orders as the court may adjudge proper in the premises. This 7 February, 1936. M. D. Owens, C. S. C., Wilson County."

The court below rendered the following judgment: "This cause coming on to be heard at this term of the Superior Court of Wilson County upon the appeal of the respondent J. T. McCraw from a judgment of the clerk of the Superior Court for Wilson County, rendered in this action, and being heard by his Honor, W. C. Harris, judge presiding, the court adopts the findings of fact and the conclusions of law as rendered by the clerk in his judgment herein and affirms said judgment in all respects, and this cause is remanded to the clerk for such other orders as he may deem proper in the premises. W. C. Harris, Judge presiding."

J. T. McCraw, respondent, excepted and assigned error to the foregoing judgment and appealed to the Supreme Court.

S. G. Mewborn for plaintiff.

Fred L. Carr, Jr., and Connor & Connor for J. T. McCraw, respondent.

CLARKSON, J. The only question presented on this appeal is: Were the heirs at law of Catherine Fryar, deceased, necessary parties to be joined as defendants in this action? We think not.

Catherine Fryar, who was no relation to the parties to this controversy, made a will on 17 July, 1926, which was duly probated. Item 2, in part, is as follows: "To Andrew Williford Lancaster $4,000. . . . The herein mentioned bequests and devises to Andrew Williford Lancaster, Catherine Della Lancaster, Lucy Williford Lancaster, and Emily Peninah Lancaster is not to be paid directly to them by my said executor, but is to be used by him and for them in the purchase and acquisition of a home or in real estate for them and each of them, title thereto being

taken to them and each of them for their lifetime, remainder to their children or issue in such manner that each of said devisees shall have only a lifetime right or title therein, the remainder to vest in such child or children as the said devisee may have surviving them, him, or her at his or her death. The selection of the home or real estate to be made by such devisee and the payment therefor to be made by my executor out of or from the bequest and devise hereinbefore provided."

This provision of the will was carried out, and W. E. Smith and wife deeded to plaintiff certain lots of land—the provision in the deed is as follows (substantially the words of the will): "To Have and to Hold, unto him the said Andrew W. Lancaster, to him for his lifetime, remainder to his child, children or issue, in such manner that the said Andrew W. Lancaster shall have only a lifetime right or title therein, remainder to vest in such child or children as he may leave surviving him at his death, as set out and provided for in the last will and testament of Catherine Fryar, deceased, which last will and testament is fully recorded in the office of the clerk of the Superior Court of Wilson County, to which reference is here made."

Catherine Fryar, on 23 March, 1928, made a codicil to her will, which was duly probated. In Item 3 of the codicil the testatrix provided: "In the event of the death of any one of the children of Rosa Rebecca Lancaster (she was the mother of the plaintiff and the named defendants) before my death and the payment to him or her by my executor of his or her devise after my death, then and in such event the other brothers and sisters of the one so dying shall have and take and receive his or her devise, sharing equally among them therein; provided, such child shall leave no child or children surviving him or her, if child or children is left such one so dying, then same to be paid to such child or children or to their guardian."

Andrew W. Lancaster holds a life estate in these lots, and, under the long established decisions of this Court, any child or children which Andrew W. Lancaster may leave surviving him are the owners of a contingent remainder in fee of the property in question. *Starnes v. Hill,* 112 N. C., 1.

The respondent contends: "If a contingent remainder becomes impossible of vesting because of the determination of the life estate before the contingency upon which the remainder was limited has happened—*i.e.,* if the contingent remainder has perished it is the same as if it never existed. And where there is a remainder over and no remainderman to take, it will go back to the estate and descend to the heirs of the testator." 23 R. C. L., pp. 517-18, part sec. 54.

The above principle is ordinarily true, but not applicable here. The plaintiff contends that Catherine Fryar did not die intestate as to the property in controversy.

In *Case v. Biberstein,* 207 N. C., 514 (515), is the following: "The law presumes that when a person who is capable of doing so undertakes to make a will, he does not intend to die intestate as to any part of his property. *Gordon v. Ehringhaus,* 190 N. C., 147, 129 S. E., 187. This presumption against partial intestacy has been applied in a number of cases," citing authorities.

Plaintiff contends: "That, as set forth in Item 3 of the codicil, these brothers and sisters should succeed in title the interest of anyone dying without child, children, or issue surviving him, she, or them." We think this contention correct according to the codicil of the will.

The executor, under Item 2 of the will and in compliance with the same, had the property in controversy deeded to plaintiff by W. E. Smith and with the contingent remainder as to his leaving surviving him a child or children. Nothing else appearing, there being a remainder over and no remainderman to take, ordinarily it would go back to the estate and descend to the heirs of the testator. But it seems that the codicil above quoted especially provides for two contingencies as to the vesting of the remainder: (1) Contingency upon the death of any one of the children of Rosa Rebecca Lancaster in the testatrix lifetime, and (2) after death of the testatrix these contingent remainders (the payment was made by the executor and the land in controversy purchased for plaintiff) are devised as follows: "Then and in such event the other brothers and sisters of the one so dying shall have and take and receive his or her devise, sharing equally among them therein; provided, such child shall leave no child or children surviving him or her, if child or children is left such one so dying, then same to be paid to such child or children or to their guardian." In other words, if plaintiff died without child or children, the remainder would go to his brothers and sisters.

This proceeding is brought under N. C. Code, 1935 (Michie), sec. 1744—"Remainder to uncertain persons; procedure for sale; proceeds secured."

In *Poole v. Thompson,* 183 N. C., 588 (599), it is said: "C. S., 1744, providing for the sale of land affected with certain contingent interests does not in its terms or purpose profess or undertake to destroy the interests of the contingent remaindermen in the property, but only contemplates and provides for a change of investment, subject to the use of a reasonable portion of the amount for the improvement of the remainder, properly safeguarded, with reasonable provision for protecting the interest of the unascertained or more remote remaindermen by guardian *ad litem,* etc., and is constitutional and valid."

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

Affirmed.

WILLIAM NELSON THOMPSON v. MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION.

(Filed 18 March, 1936.)

1. Insurance K a—Knowledge of local agent at inception of policy is imputed to insurer when agent does not participate in fraud.

Where an applicant for life or health insurance discloses to insurer's local soliciting agent all material facts and circumstances relative to the risk, knowledge of the local agent is imputed to insurer, and constitutes a waiver by insurer of the right to declare the policy void for fraud in the failure of the application to state material matters relative to the health of applicant at the time of the inception of the policy, when the agent does not participate in the alleged fraud.

2. Insurance P b—Conflicting evidence as to knowledge of local agent held to raise issue of fact for determination by jury.

Where applicant testifies that he made disclosure to insurer's soliciting agent of all matters relating to health called for in the application, and the soliciting agent testifies that applicant did not make such disclosure, the conflicting testimony raises an issue of fact for the jury, and insurer's motion to nonsuit upon the evidence is correctly denied.

3. Insurance E b—

Subordinate conditions and provisos limiting and restricting the primary object of the policy to afford protection upon the happening of certain contingencies, should be strictly construed against insurer.

4. Insurance R a—Evidence held for jury upon question of degree of disability suffered by insured.

The policy in question provided two schedules of benefits for illness causing total temporary disability and loss of time, and necessitating regular visits by a physician, the larger benefits to be paid for such illness which continuously confined insured within doors, and the smaller schedule for such illness which did not continuously confine insured indoors. Plaintiff's evidence tended to show illness causing total temporary disability and necessitating regular attendance by a physician, but that on orders of his physician he took infrequent walks of not more than two blocks from his home. *Held:* The provision relating to continuous confinement within doors was to describe the character and extent of illness rather than to prescribe limitations upon insured's conduct, and the evidence was properly submitted to the jury under correct instructions by the court on the question of whether insured's illness and disability came within the provision for the greater or lesser benefits.

APPEAL by defendant from *Moore, Special Judge,* at September Special Term, 1935, of MECKLENBURG. No error.

This is an action wherein the plaintiff seeks to recover illness indemnity benefits for "confining illness" under a health insurance policy issued to him by the defendant on 17 November, 1931, and wherein the

defendant seeks, first, to avoid all liability upon the ground that the issuance of said policy was procured by fraud, and, second, to limit the recovery of the plaintiff to the benefits allowed for "nonconfining illness."

There was evidence tending to establish the plaintiff's allegation of total disability and total loss of time from 1 August, 1934, to 14 November, 1934, and that his illness confined him within doors and required the regular attention of a physician. On the other hand, there was evidence tending to establish the defendant's allegations that the policy was procured by fraud, and that the plaintiff's illness did not confine him within doors and therein require the regular attention of a physician.

The case was submitted to the jury under appropriate issues, and from a judgment based on an adverse verdict the defendant appealed, assigning errors.

Ralph V. Kidd and John M. Robinson for plaintiff, appellee.
J. Laurence Jones and J. L. DeLaney for defendant, appellant.

SCHENCK, J. The assignments of error are treated in the briefs in two groups, and we will consider them as grouped.

The first group of assignments relates to the motions for judgment as of nonsuit. It is conceded in the brief of the appellant that it "would not be entitled to a judgment of nonsuit unless the court finds that the policy was void as a matter of law under the evidence."

The fraud alleged, upon which appellant seeks to have the policy declared void, is in effect that the insured concealed from the insurer that he had been ill over a long period for which he had collected health insurance, and that a railway employee benefit association had refused to renew a health policy he formerly carried with it, and that he had suffered from and collected insurance for attacks of influenza, neuritis, and neurasthenia, and that the insured had represented that he was "sound physically and mentally" at the time he made application for the policy when in truth and in fact he knew he was suffering from nervous exhaustion, "special weakness in right arm" (telegrapher's cramp), and an irregular heart and sub-acute endocarditis, and, further, that within the last five years he had been treated by only one physician and by him only for pyrogenic poisoning from his teeth, whereas he had been treated by a number of other physicians for various maladies.

The plaintiff, in his reply to the answer of the defendant, denied the allegations of fraud by either concealment or misrepresentations, and averred that at the time his application for insurance was solicited and obtained he made a full and complete disclosure to the agent of the

insurer of the facts relative to his former illnesses, collection of health insurance benefits, the reason for the refusal of the railway employees benefit association to rewrite the policy formerly held by him, and had concealed no facts from such agent and had made no misrepresentation of facts to such agent.

The court, without objection, submitted the following issue: "Was the policy of insurance, plaintiff's 'Exhibit A,' obtained from the defendant insurance company by means of false representations or concealments, as alleged in the answer?" There was evidence to sustain the allegations both of the defendant and of the plaintiff, and the jury answered the issue in favor of the plaintiff. There are no assignments of error either to the evidence or to the charge as they relate to this issue, the defendant having contented itself to rely upon its motions for judgment as of nonsuit.

The motions for judgment as of nonsuit cannot be sustained. It has been repeatedly held by this Court, and courts of other jurisdictions, that if an agent of an insurance company, while acting within the scope of his authority in soliciting and taking applications for insurance, is advised of the facts constituting any alleged fraud, and did not himself participate in such fraud, the knowledge of the agent will be imputed to the insurer. This principle applies to conditions existing at the time of the inception of the policy and not after the policy has been issued. The doctrine of waiver is applied upon well settled principles of equity. *Smith v. Insurance Co.*, 208 N. C., 99; *Colson v. Assurance Co.*, 207 N. C., 581.

In the case at bar there is no suggestion that the agent was not acting within the scope of his authority or that he participated in the alleged fraud. The defendant offered the agent as witness in its behalf and he testified that when he solicited and obtained the application for the policy he was not informed of the plaintiff's illnesses or of his former policies, and was generally ignorant of the facts which the defendant set up as constituting the fraud. The evidence was sharply in conflict and presented a question for the jury, not the court.

The second group of assignments relates to the question as to whether the plaintiff's claim for illness indemnity, under the evidence, falls under Part J or Part K of the policy, relative to "confining illness" and "non-confining illness," respectively. The plaintiff contends the claim falls under the former and the defendant under the latter. The portions of the policy involved are as follows:

"Part J. The association will pay, for one day or more, at the rate of seventy-five ($75.00) dollars per month for the first fifteen days and at the rate of one hundred fifty ($150.00) dollars per month thereafter

for disability resulting from disease, the cause of which originates more than thirty days after the date of this policy, and which confines the insured continuously within doors and requires regular visits therein by legally qualified physician; provided, said disease necessitates total disability and total loss of time."

"Part K. The association will pay, for one day or more, at the rate of seventy-five ($75.00) dollars per month, but not exceeding one month, for disability resulting from disease, the cause of which originates more than thirty days after the date of this policy, and which does not confine the insured continuously within doors, but requires regular medical attention; provided, said disease necessitates total disability and total loss of time."

There is no controversy as to the plaintiff having had a disability resulting from disease, the cause of which originated thirty days after the date of the policy, that required regular medical attention, and that such disease necessitated total disability and total loss of time. The controversy is over the court's submitting to the jury, under the evidence in the case, the issue as to whether the plaintiff's disability was such as to confine the insured continuously within doors and to require regular visits therein by legally qualified physician.

The evidence is to the effect that the plaintiff's disability due to disease during the time alleged, from 1 August, 1934, to 14 November, 1934, confined the plaintiff to his home and required regular visits of a legally qualified physician there, except that he sometimes went to his doctor's office a half-block from where he lived for treatment, and occasionally went to the A. & P. Store and library, both within a half-block of his home, and had walked to the barber shop and shoe shop within a block and a half of his home, but that during all of this time he was totally disabled and was suffering a total loss of time, and had been able to do but little except to sit in a chair, and that the doctor advised him to get out and walk some in order to regain the use of his legs, and that such walking as he did was not for pleasure or profit, but in obedience to the doctor's advice.

The question presented is whether the fact that the plaintiff occasionally walked from his home when he was suffering total disability and total loss of time took his protection from Part J and placed it in Part K. The purpose of the provision relative to the insured's being continuously confined within doors was to describe the character and extent of his illness, rather than to prescribe a limitation upon his conduct. The insured took out the policy as an indemnity against loss in case of total disability to pursue his usual vocation. This indemnity was the principal object of the contract and the protection for which the

insured paid the premiums. The subordinate conditions and provisos of the policy should be strictly construed against the insurer, since they limit the scope and purpose of the principal object for which the policy was taken out. We are of the opinion that the interruption or break in the strict continuity of the confinement of the insured within doors is not such a departure from the contract, or in such violation of its provisions, as to take the insured's protection from Part J to Part K. To give the provision relative to confinement within doors such a construction would be to so magnify the letter as to practically nullify the principal object of the policy. *Wade v. Mutual Benefit Health & Accident Association,* 177 S. E., 611 (W. Va.); *Mutual Benefit Health & Accident Association v. McDonald,* 215 P., 135 (Col.). "Not of the letter, but of the spirit: for the letter killeth but the spirit giveth life." 2 Corinthians 3:6.

The fourth issue was: "If so, has said total disability confined the plaintiff continuously within doors since said date during the period set out in the complaint, requiring regular visits therein by a legally qualified physician?" and we hold that his Honor properly charged the jury thereupon as follows: "I charge you, gentlemen of the jury, upon the fourth issue, that if you find as facts from the evidence, and by its greater weight, that on 1 August, 1934, the plaintiff became totally disabled from a cause originating more than thirty days after the date of the policy; that thereafter, from 1 August, 1934, until 14 November, 1934, the plaintiff was totally disabled; that during this entire period his physical condition was of such seriousness as to necessitate him being indoors; that he got out of the house infrequently and only because of his doctor's instructions to do so as much as possible; that he spent practically all of his time indoors; that he got out of doors for only short periods of time and only went short distances of not over two blocks, and that these infrequent departures from the house were not of such a character as to imply any lessening of the gravity of his illness; that during the entire period in question his condition was such as to require regular visits and attention of a physician, and that during said entire period he was, in fact, under the constant care and attention of a physician, I charge you, if you find all those facts by the greater weight of the evidence, you should answer the fourth issue 'Yes.'"

In the trial of the Superior Court we find

No error.

C. E. BLEVINS AND WIFE, ETHEL BLEVINS, v. NORTHWEST CAROLINA UTILITIES, INC.

(Filed 18 March, 1936.)

1. Constitutional Law I b—Statute held unconstitutional for failure to give reasonable time for institution of action before bar.

Section 2 of ch. 433, Public-Local Laws of 1923, providing that no action for compensation or damages for rights of way used by domestic electric companies for transmission lines should be maintained against such companies unless brought within six months after the passage of the act when such transmission lines were in use for two years prior to the enactment of the statute, *is held* unconstitutional and void for failure to give a reasonable time, under the circumstances, for the institution of an action before the bar of the statute takes effect, in contravention of the Fourteenth Amendment of the Federal Constitution, the limitation in effect prior to the statute being twenty years.

2. Same—Law changing limitation of actions must allow reasonable time within which action may be brought before bar takes effect.

The Legislature may prescribe a limitation for the bringing of suits where none previously existed, or shorten the time for bringing suits on existing causes of action, provided a reasonable time is allowed by the new law for the bringing of suits before the bar takes effect, and what is a reasonable time must be determined by the facts and circumstances of each particular case.

3. Same—Statute held constitutional as providing reasonable time for institution of action before limitation takes effect.

Section 1 of ch. 433, Public-Local Laws of 1923, providing that C. S., 440, applicable to railroad companies, should also apply to all electric companies operating in certain counties of this State so that actions against them for damages for use of land for transmission lines should be barred unless commenced within five years after the accrual of the cause of action, *is held* constitutional and valid as giving a reasonable time for the institution of actions before the bar of the statute becomes effective.

4. Limitation of Actions E c—Conflicting evidence on question of bar of statute of limitations should be submitted to the jury.

Where there is conflict in the evidence as to whether defendant's increased use of its easement for a transmission line by the addition of new wires and a substation on plaintiffs' land resulted in adding to the burden of the easement theretofore acquired by defendant by adverse user, and it appears that plaintiffs' action to recover the alleged additional damage was instituted within the time allowed by the applicable statute of limitations pleaded by defendant, the conflicting evidence on the question of additional damage inflicted since the bar of the statute should be submitted to the jury, and an instruction directing that plaintiffs' action was not barred is reversible error.

CLARKSON, J., concurring in part and dissenting in part.

APPEAL by defendant from *Phillips, J.*, at September Term, 1935, of MITCHELL. New trial.

Action for permanent damages to land caused by the erection and maintenance of structures for transmission of electric power. Defendant admitted occupancy of plaintiffs' land for the purpose of placing two of its poles carrying its lines, but alleged adverse user of the easement for fourteen years, and pleaded the statutes of limitation, specifically ch. 433, Public-Local Laws of 1923, in bar of plaintiffs' action.

There was evidence that at the time plaintiffs purchased the land in 1925 there were two poles with wires on each side of them in front of plaintiffs' lots on the highway, with one transformer, and that within less than two years before the commencement of this action (1934) defendant had removed its old poles and equipment and built a new line, with new transformers, and erected a substation on plaintiffs' land two hundred feet from plaintiffs' house, with power lines extending over plaintiffs' garden and pasture, and voltage increased from 2,100 to 6,600.

The defendant offered evidence tending to show that the line was originally constructed in 1920 substantially as it now stands, consisting of power line from Toecane to Bakersville, with three power wires and a telephone wire, and that it has been in continuous use since; that there are now five wires; that there were formerly two poles and a tower on plaintiffs' land; that the transformers were placed on it in 1931 or 1932, when the substation was erected; that the substation consisted of two forty-foot poles, five or six feet apart, with steel platform and a couple of transformers; that there were two poles originally, and two poles now; that the poles were moved four feet further into plaintiffs' land and away from the road and guy wires put up, guy wires extending 12 feet from the base of poles.

Plaintiffs offered evidence as to the difference in the market value of the property prior to and since the erection of the substation. Defendant offered evidence that the market value of the land was not affected by any change in the structures.

The judge below charged the jury that a public service corporation could acquire land by purchase, by condemnation, or "by going in and taking possession thereof and using same openly, notoriously, and adversely for the period of twenty years." He further charged the jury, if they found the facts to be as testified by the witnesses and as the evidence tended to show, to answer the issue as to the statute of limitations that plaintiffs' cause of action was not barred.

There was a verdict for plaintiffs on issues submitted, and from judgment thereon defendant appealed.

M. L. Wilson and Charles Hutchins for plaintiffs.
Watson & Fouts, Walter Berry, and Miles & O'Brien for defendant.

DEVIN, J. The determinative question presented here is the application of the statutes of limitation.

The learned judge who tried the case below charged the jury that the only statute available to the defendant was the twenty-year statute, and that in the absence of title by grant or condemnation, it could only acquire the easement to impose the servitude complained of on the land of plaintiffs by twenty years adverse user. And he further charged the jury, if they found the facts to be as shown by all the evidence, to answer the issue as to the statute of limitations against the defendant.

The defendant sets up in its answer and contends upon the evidence that plaintiffs' cause of action is barred by the provisions of ch. 433, Public-Local Laws of 1923. This act is as follows:

"Sec. 1. That section four hundred and forty (440) of the Consolidated Statutes of North Carolina shall apply and be in full force and effect, and shall regulate all suits, actions, or proceedings brought or maintained against corporations under the laws of the State of North Carolina, whose business is the generation and transmission of electric power as a public service corporation.

"Sec. 2. That no action shall be brought against any electric company chartered under the laws of this State and which has maintained its transmission lines for a term of two years prior to the enactment of this statute, for damages or compensation for rights of way or use and occupancy of any land by the company for use of its transmission lines unless the action or proceeding is commenced within six months after the passage of this act: *Provided,* that this act shall apply only to the counties of Yancey, Mitchell, and Haywood."

This act was ratified 2 March, 1923.

The second section of C. S., 440, referred to in the above quoted act, is as follows:

"No suit, action, or proceeding shall be brought or maintained against a railroad company for damages caused by the construction of the road, or the repairs thereto, unless such suit, action, or proceeding is commenced within five years after the cause of action accrues, and the jury shall assess the entire amount of damages which the party aggrieved is entitled to recover by reason of the trespass on his property."

There was competent evidence of injury to plaintiffs' land by reason of the construction and maintenance of a substation and power lines, and that action therefor was brought within five years after their cause of action accrued. But defendant contends that section 2 of the act of

1923 applies and that plaintiffs are thereby barred. The plaintiffs, on the other hand, argue that this section of the act attempts to impose an unreasonable burden on those whose property has been taken by public service corporations, and that it is unconstitutional and void.

An examination of the second section of the act referred to, in the light of the facts as shown by the record before us, leads us to the conclusion that plaintiffs' position on that point is correct.

This section purports to extend the benefit of the limitation to "any electric company chartered under the laws of this State," thus giving privileges to a North Carolina corporation not permitted to others. *Gulf, Col. R. Co. v. Ellis,* 165 U. S., 154. However, it does not appear that the defendant is a North Carolina corporation. But we think the attempt to prescribe a statute of limitations limiting a landowner to six months after the passage of the act as the only period within which he could bring an action for compensation for wrongful use and occupancy of his land is in violation of the Fourteenth Amendment to the Constitution of the United States.

Under this provision of the Federal Constitution it is well settled that the Legislature may prescribe a limitation for the bringing of suits where none previously existed, as well as shorten the time within which suit to enforce existing causes of action may be commenced, provided, in each case a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of suit before the bar takes effect. *Wheeler v. Jackson,* 137 U. S., 255; *Turner v. New York,* 168 U. S., 94; *Saranac Land Co. v. Comptroller,* 177 U. S., 318.

"Statutes of limitations affecting existing rights are not unconstitutional if a reasonable time is given for the commencement of an action before the bar takes effect." In such cases the question is whether under all the circumstances the time allowed by the statute is reasonable. What is a reasonable time in a particular case depends upon its particular facts. *Terry v. Anderson,* 95 U. S., 628; *Hozisek v. Brigham,* 49 A. L. R., 1260, and note; *Nichols v. R. R.,* 120 N. C., 495; *Culbreth v. Downing,* 121 N. C., 205.

In the present case, prior to the act of 1923, the only statute of limitation applicable was the twenty-year statute. That is, the plaintiffs had twenty years within which to bring their action for damages to their land caused by the structures erected by the defendant. And when the Legislature attempted to reduce that to six months and to prescribe that no action should be brought against an electric company for damages for occupancy of land unless the action should be commenced "within six months after the passage of this act," that act must be held to be unreasonable, violative of the rights guaranteed by the Constitution of the United States, and therefore void.

But the first section of the act (ch. 433, Public-Local Laws of 1923), which, in general terms, prescribes the same statute of limitations for public service corporations engaged in the business of generation and transmission of electric power as that which has prevailed since 1893 as to railroads, would not seem to be unreasonable under the rule set forth in the authorities cited, and is therefore within the legislative power and valid. C. S., 440.

It follows, therefore, that the plaintiffs' right to bring their action for compensation for damages caused by the construction of defendant's power lines, or the repairs thereto, and the erection of the substation and structures complained of, is limited to the period of five years next after the cause of action accrued.

The evidence as shown by the record in the case before us is conflicting and would not warrant the peremptory instructions given by the court below on the question of the statute of limitations, and requires the awarding of a new trial.

This disposition of the case renders unnecessary the consideration of the other assignments of error. Nor is it necessary to decide the other questions presented on the argument and by brief by plaintiffs and defendant, as there must be a

New trial.

CLARKSON, J., concurring in part and dissenting in part: I think that the main opinion is correct, provided the statute, ch. 433, Public-Local Laws 1923, is constitutional, but the proviso in section 2 is as follows: "*Provided,* that this act shall apply only to the counties of Yancey, Mitchell, and Haywood." This is contrary to the Constitution of North Carolina, Art. I, sec. 7: "No man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." *Simonton v. Lanier,* 71 N. C., 498; *S. v. Fowler,* 193 N. C., 290 (292); *Pott v. Ferguson,* 202 N. C., 446; *Hendrix v. R. R.,* 202 N. C., 579; *Edgerton v. Hood, Comr.,* 205 N. C., 816.

There is a general statute of this State giving telegraph, telephone, electric power or lighting companies a right to condemn land "upon making just compensation therefor." N. C. Code, 1935 (Michie), sec. 1698.

The right of easement may be acquired by adverse and continuous user for the period of 20 years. *Teeter v. Postal Tel. Co.,* 172 N. C., 783. In the present case I think the court below correct in applying the twenty-year statute, and there is no error in the judgment of the court below.

S. V. TOMLINSON v. H. A. CRANOR, TRUSTEE, AND MRS. BESSIE CRANOR McELWEE.

(Filed 18 March, 1936.)

1. Appeal and Error E g—

The record imports verity, and an appeal will be determined on, and limited by, the record, and matters discussed in briefs outside the record will not be considered.

2. Injunctions D b—It is error to dissolve temporary order when issues of fact are raised determinable by jury.

Plaintiff alleged that the trustee in a prior deed of trust released a part of the land from the lien at the instance of the *cestui que trust*, by making a marginal entry upon the record, and that plaintiff loaned money to the mortgagor on the strength of the release and took a first mortgage on the land released from the prior deed of trust, and that the trustee in the prior deed of trust was advertising the whole tract for sale under the instrument. and prayed that the sale of the part released be enjoined. Defendant *cestui* demurred to the complaint for failure to state a cause of action, but thereafter filed an affidavit denying the material facts alleged in the complaint, and prayed that the trustee in plaintiff's deed of trust be made a party, and that sale under plaintiff's deed of trust be enjoined. Temporary restraining orders were issued, respectively, on the prayer of the complaint and on the prayer of the affidavit. Upon the return of the temporary orders, the court entered judgment dissolving the restraining order issued in plaintiff's favor and making permanent the restraining order issued in defendants' favor. *Held:* The temporary orders should have been continued to the hearing for the determination by a jury of the issue of fact raised by the pleadings as to the authorization of her trustee by defendant *cestui* to release the part of the land from her deed of trust, and the judgment of the court dissolving plaintiff's restraining order was error upon the record. The record also disclosed that neither defendants' demurrer nor their motion to make plaintiff's trustee a party was passed on by the court.

APPEAL by plaintiff from *Phillips, J.*, at September-October Term, 1935, of WILKES. Reversed.

This is an injunctive proceeding, brought by plaintiff against defendants, to restrain them from selling a certain piece of land on which plaintiff claimed a first lien. This was denied by defendants, who claimed a first lien.

The plaintiff in his complaint alleges that on 4 January, 1930, T. B. Finley and wife, C. L. Finley, made and executed a deed of trust to Julius A. Rousseau, trustee for plaintiff, to secure the sum of $10,000, said deed of trust was duly recorded. The lot set forth in said deed of trust was in the town of North Wilkesboro and fully described.

The plaintiff further alleges: "That on .... February, 1925, the said T. B. Finley and wife executed to H. A. Cranor, trustee, for the benefit

of Mrs. Bessie C. McElwee, a deed of trust, which deed of trust is recorded in Book 131, page 293, in the office of the register of deeds of Wilkes County, conveying, among other property, the same property as above described, and being the second tract in said deed of trust. That on 7 January, 1930, the said H. A. Cranor, trustee, for value received, made a marginal entry on said deed of trust, which is as follows: 'For value received, the second tract in this deed of trust is fully released from this deed of trust and canceled. Signed, H. A. Cranor, Trustee. Witness: T. H. Settle, Register of Deeds.' That this plaintiff loaned to T. B. Finley and wife, C. L. Finley, the sum of $10,000, in good faith, and paid over the money after the said H. A. Cranor, trustee, had released and canceled from the operation of the deed of trust executed by T. B. Finley and wife to him, as trustee. . . . That the said defendants now have said tract of land advertised for sale on 21 September, 1935, at 12 o'clock noon, at the courthouse door in Wilkes County, and will sell said property unless they are enjoined and restrained from so doing, and if said property is sold that this plaintiff will suffer great damage and irreparable wrong. Plaintiff further alleges in that the defendant, Mrs. Bessie Cranor McElwee, caused her trustee, H. A. Cranor, to release and cancel from the operation of her deed of trust the lot located on the west side of Tenth Street, in the town of North Wilkesboro, as hereinbefore described from the operation of said deed of trust, that she is now estopped, and that the trustee is now estopped, they having no title to same from selling said lot, and that plaintiff has had his trustee, Julius A. Rousseau, to advertise said property for sale on 23 September, 1935, at 12 o'clock noon, at the courthouse door in the county of Wilkes, and that unless the defendants are restrained from foreclosing or attempting to foreclose, this plaintiff will suffer great damage and irreparable wrong. That there is now due upon said deed of trust held by this plaintiff the sum of $10,000, with interest from date, in order to satisfy said deed of trust it is necessary that this plaintiff sell said lot hereinbefore described free and clear from encumbrances. When plaintiff made said loan he relied on the release and cancellation of said deed of trust by H. A. Cranor, trustee, who, as this plaintiff is advised, informed, and believes, has represented the *cestui que trust,* Mrs. Bessie C. McElwee, for a number of years, he being a brother to her, and had full authority and power to release and cancel said deed of trust, and they are now estopped from claiming any interest in the lot hereinbefore described, and that the attempt of the defendants now to foreclose said property casts a cloud upon the title to said property and, unless they are enjoined and restrained from selling or attempting to sell, this plaintiff will suffer great damage and irreparable wrong."

On 20 September, 1935, Judge Wilson Warlick issued a restraining order, as follows: "It is therefore ordered, considered, decreed, and

adjudged that the defendants, and each of them, their attorneys and representatives be and they are hereby enjoined and restrained from selling the lands described in the complaint on 21 September, 1935, and they are further required to appear before his Honor, F. Donald Phillips, Judge holding courts in the 17th Judicial District, on Wednesday, 2 October, 1935, at Wilkesboro N. C., at 10 o'clock a.m., and show cause, if any cause they have, why this order should not be made permanent or continued until the final hearing. This order does not affect any property advertised by the defendants, except the lot described in the petition."

The defendant, Mrs. Bessie Cranor McElwee, demurs to the complaint of the plaintiff upon the following grounds:

"1. That the complaint does not state facts sufficient to constitute a cause of action; in that the plaintiff's complaint, upon its face, shows that on 4 January, 1930, the plaintiff took a deed of trust from T. B. Finley and wife, C. L. Finley, to secure $10,000, as shown by paragraph 2 of the complaint. Paragraph 3 of the complaint shows that the deed of trust of this defendant, upon 4 January, 1930, was the first mortgage on the tract of land described in paragraph 2, and that the mortgage of the plaintiff was a second mortgage, and does not allege that the purported release placed on the defendant's deed of trust by H. A. Cranor, trustee, was placed there at the instance of the plaintiff or that any value proceeded from him. That said complaint does not show any authority from this defendant to H. A. Cranor, trustee, to make the purported entry now found on her deed of trust, or that this defendant ever received anything of value therefor; and further, as a matter of law, shows that said purported entry is not such entry as a trustee is authorized to make, and was not made until three days after the plaintiff's deed of trust, if made at all.

"2. That the court has no jurisdiction of the action, the same being brought before the clerk of the Superior Court of Wilkes County, and the complaint directed to said clerk.

"This 23 September, 1935. W. H. McElwee, Attorney for Defendant, Mrs. Bessie Cranor McElwee."

Thereupon defendant, Mrs. Bessie Cranor McElwee, filed an affidavit and petition: "That said deed of trust was issued to this affiant with H. A. Cranor as trustee therein, to whom no power was delegated, except the powers set forth in the deed of trust, and no authority was granted him any time thereafter to release the lands described in paragraph 2 of the answer from the lien of said deed of trust. That your affiant was no party to said purported release, and has received no money therefor. That your affiant commanded H. A. Cranor, trustee, to sell under said deed of trust, and the said trustee did advertise said property,

including the lot set out in paragraph 2 of the complaint in this action, and the sale was set for 12 o'clock on 21 September, 1935, at which time the plaintiff served a restraining order upon one of your affiant's attorneys, W. H. McElwee, and on H. A. Cranor, trustee, restraining said sale. That said sale was held as to all other property described in your affiant's deed of trust, which property only brought the sum of $2,000, and the balance due on her said deed of trust after applying the proceeds of said sale will be more than $13,000. That your affiant has filed a demurrer to said complaint, as shown by the files in said action. That the plaintiff, as your affiant is informed and believes, has caused said restraining order to be served upon herself, and her trustee, for the purpose of enabling the plaintiff to get priority of sale of the said lot of land and thereby defeat her deed of trust as to said lot, and unless the plaintiff is also restrained from selling said lot (which sale he has set for Monday, 23 September, 1935, at 12 o'clock noon), your affiant will suffer great and irreparable damages in the sum of the balance due on her said deed of trust, which will be more than $13,000. Wherefore, your affiant prays the court that J. A. Rousseau, trustee, be made a party to this action, and that he and the plaintiff be enjoined and restrained from selling said lot of land under his said mortgage prior to the sale of said lot under her deed of trust."

On 23 September, 1935, Judge Wilson Warlick issued a restraining order as follows: "It is, therefore, ordered that the plaintiff S. V. Tomlinson, and J. A. Rousseau, trustee, their attorneys and agents, be and they are hereby enjoined from selling the lands described in the complaint and in this affidavit on 23 September, 1935, or at any other time until further orders from the court, and they are further required to appear before his Honor, F. Donald Phillips, on Wednesday, 2 October, 1935, in Wilkesboro, North Carolina, at 10 o'clock a.m., and show cause, if any they have, why this order should not be made permanent or continued to the final hearing of the action upon its merits."

The restraining orders came on for hearing before Judge Phillips, who found certain facts and made the following order: "It is therefore ordered that the temporary restraining order, in favor of the plaintiff, is dismissed and dissolved, and that the temporary restraining order issued in favor of defendants is sustained and made permanent, except the plaintiff is entitled to his sale as a second lien." The plaintiff excepted and assigned errors to the findings of fact set forth in the judgment—that J. A. Rousseau, trustee, was not made a party and to the judgment as signed, and appealed to the Supreme Court.

Bowie & Bowie and J. H. Whicker for plaintiff.
Chas. G. Gilreath and W. H. McElwee for defendants.

CLARKSON, J. It is well settled in this jurisdiction that the record imports verity. The case in this Court is determined on the record.

In the present case the defendants filed no answer denying the allegations of the complaint, but demurred to same. From the record this demurrer has not been passed on.

The brief of defendants deals with matters *de hors* the record, and some of the material matters therein debated are not now before us. The court below made the following order: "That the temporary restraining order, in favor of the plaintiff, is dismissed and dissolved, and that the temporary restraining order issued in favor of the defendants is sustained and made permanent, except the plaintiff is entitled to his sale as a second lien." The temporary restraining orders were obtained by both plaintiff and defendants from Judge Warlick, and set for hearing, and were heard before Judge Phillips, at the same time and place.

In *Bost v. Lassiter,* 105 N. C., 490 (498), we find: "They cannot suffer serious injury by delaying the sale of the property until the action can be determined upon its merits. In such a case, the injunction will be continued until the hearing. *Whitaker v. Hill,* 96 N. C., 2, and cases there cited."

In *Sutton v. Sutton,* 183 N. C., p. 128, it was held: "Upon the hearing by the judge upon the question of continuing a restraining order to the hearing, the judge, upon proper findings, may dissolve the temporary order, but in doing so it is error for him to also determine an issue of fact, material to the rights of the parties, and which should be reserved for the jury to pass upon at the trial." *Grantham v. Nunn,* 188 N. C., 239 (242); McIntosh, N. C. Prac. and Proc. in Civil Cases, sec. 876, p. 994.

In *Galloway v. Stone,* 208 N. C., 739 (740), *Devin, J.,* says: "A permanent or perpetual injunction issues as a final judgment which settles the right of the parties, after the determination of all issues raised. McIntosh N. C. Prac. and Proc., secs. 848, 849."

The court below dismissed and dissolved the temporary restraining order theretofore issued in favor of plaintiff. This was error on the facts of this record. The issue of fact material to the rights of plaintiff should have been continued to the final hearing. The record also discloses that the demurrer of defendants to plaintiff's complaint was not passed on, nor was the question of making J. A. Rousseau, trustee, a party passed on. We may state that the record is not clear, and is somewhat ambiguous.

The cause was ably argued in this Court by T. C. Bowie, Jr., one of the attorneys for plaintiff.

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

Reversed.

IN RE DISBARMENT OF JAMES D. PARKER.

(Filed 18 March, 1936.)

1. Appeal and Error A e—

Where an appeal can be decided on either of two grounds, one involving a constitutional question, and the other a question of lesser moment, the latter alone will be decided.

2. Appeal and Error E h—

Matters not determined in the Superior Court or continued therein without prejudice are not presented for determination upon appeal and will not be discussed or considered.

3. Appeal and Error B b—

An appeal *ex necessitate* follows the theory of the trial.

4. Attorney and Client E c—Judgment of disbarment in proceedings under statutory method held erroneous upon the record in this case.

The statutory disbarment proceedings in this case were prosecuted on the theory of professional misconduct as an attorney on the part of the respondent, and were based upon a civil action in which judgment was recovered against respondent, in his capacity as executor, and against the surety on his bond, for matters transpiring prior to the enactment of ch. 210, Public Laws of 1933, under which the proceedings were instituted. *Held:* The verdict and findings that respondent was guilty of misappropriation of funds coming into his hands as an attorney are not supported by the record tending to establish such misappropriation in his capacity as executor, and respondent's motion for a directed verdict should have been allowed and his exception to the refusal of the Council of the Bar to grant his motion to nonsuit should have been sustained.

DEVIN, J., concurs in the result.

APPEAL by respondent, James D. Parker, from *Small, J.*, at April Term, 1935, of JOHNSTON.

Disbarment proceeding instituted 2 July, 1934, by The North Carolina State Bar, under authority of ch. 210, Public Laws 1933, on allegations substantially as follows:

1. That complaint against respondent has been filed with the Grievance Committee of the State Bar, and report thereon recommending investigation and hearing.

2. That the charges are based upon the case of "State *ex rel.* W. Lester Langdon, Administrator *c. t. a., v.* James D. Parker and Ezra Parker, Executors and Trustees Under the Will of Willis Calvin Lassiter," which action was tried at the March Term, 1933, Johnston Superior Court, resulting in verdict "that the respondent, while acting as executor, did fail to faithfully execute the trust reposed in him as executor," etc., to

the damage of said estate in the sum of $10,633.52. Judgment was thereupon entered against the defendants and their surety, Massachusetts Bonding and Insurance Company, for said amount and costs.

3. That upon said information and belief, it is averred, respondent, while acting as one of the executors and trustees of said estate, wrongfully converted said sum to his own use and benefit, and has failed properly to account therefor.

4. That it is further alleged, upon such information and belief, respondent not only acted as one of the executors and trustees of said estate, but also represented said estate in the capacity of attorney, and has been guilty of unprofessional conduct in connection therewith.

Whereupon, a trial committee was appointed to hear the evidence, find the facts, and report its conclusions thereon.

At the opening of the hearing before the trial committee, the respondent demurred (1) to the jurisdiction of the committee, and (2) to the applicability of ch. 210, Public Laws 1933, to acts committed prior to 1 July, 1933, its effective date. Demurrer overruled; exception.

The Trial Committee found (one member dissenting) that the misconduct of the respondent was that of an executor, and not as attorney for the estate, and recommended the proceeding be dismissed.

On appeal to the Council of The North Carolina State Bar, the findings and conclusions of the Trial Committee were reversed, contrary findings made, and disbarment ordered.

Respondent filed exceptions to said findings and judgment, and gave notice of appeal to the Superior Court of Johnston County.

The complainant then amended its complaint and charged the respondent with the wrongful conversion of funds, in the amount above mentioned, belonging to the estate of W. C. Lassiter, deceased.

Before the judge of the Superior Court, the respondent demanded a jury trial, which was denied as a matter of right, but allowed as a matter of grace.

The jury returned the following directed verdict:

"Did the respondent collect as an attorney moneys of the estate of W. C. Lassiter and retain the same without *bona fide* claim thereto, as alleged in the rule to show cause? A. 'Yes.' "

Respondent challenged the sufficiency of the evidence by motion for directed verdict in his favor. Overruled; exception.

The respondent renewed his demurrer before the judge of the Superior Court, which was overruled; his exceptions were likewise overruled; the findings and conclusions of the Council adopted and approved, and the motion to disbar by virtue of the court's inherent power was continued without prejudice.

From the judgment of disbarment entered upon the findings and conclusions of the Council, adopted and approved by the judge of the Superior Court, and the jury's verdict, the respondent appeals, assigning errors.

F. Ertel Carlyle, Varser, McIntyre & Henry for North Carolina State Bar.

G. A. Martin, James A. Wellons, and J. Ira Lee for respondent.

STACY, C. J. The plea to the jurisdiction brings in question the power and authority of the Council of the North Carolina State Bar to disbar the respondent, and to take from him his license and right to practice law in this State.

The basis of respondent's challenge is fourfold:

1. It is pointed out that by the express terms of the statute, ch. 210, Public Laws 1933, The North Carolina State Bar is created "an agency of the State of North Carolina," with its government vested in a "Council" of 20 members, one from each judicial district, yet "neither a councillor nor any officer of the Council, or of The North Carolina State Bar, shall be deemed as such to be a public officer as that phrase is used in the Constitution and laws of the State of North Carolina." This last limitation, it is contended, deprives the "Council" of any judicial or *quasi*-judicial powers. *Ex parte Schenck,* 65 N. C., 353; *S. v. Johnson,* 171 N. C., 799, 88 S. E., 437; *S. v. Kiker,* 261 Pac. (N. Mex.), 816.

2. It is also advanced by the respondent that the act contains an unwarranted delegation of legislative powers over the subject of discipline, disbarment, and restoration of attorneys practicing law in the State. *Provision Co. v. Daves,* 190 N. C., 7, 128 S. E., 593.

3. It is next suggested that the right of trial by jury, vouchsafed in the Bill of Rights, sec. 19, is denied in disbarment proceedings. *Ex parte Thompson,* 152 So. (Ala.), 229. True, an appeal may be taken from any judgment of suspension or disbarment "to the Superior Court judge regularly holding the courts of the county . . . on the record made before the Council," and "upon appeal to the judge of the Superior Court, the accused shall have the right to have his cause heard by a jury," but it is further provided that in hearings before the Council (or Committee), "and in all appeals the procedure shall conform as near as may be to the procedure now provided by law for hearings upon the report of referees in references by consent."

It is well settled that, in consent references, the parties waive the right to have any of the issues of fact passed upon by a jury. C. S., 572; *Carr v. Askew,* 94 N. C., 194; *Green v. Castlebury,* 70 N. C., 20.

Compare 3 C. S., 6618; *Board of Medical Examiners v. Gardner,* 201 N. C., 123, 159 S. E., 8; *S. v. Carroll,* 194 N. C., 37, 138 S. E., 339.

4. Finally, the respondent says his right of appeal to the Supreme Court is left in doubt by the statute: "From the decision of the Superior Court judge hearing the appeal, or the jury, the Council (or Committee) and the accused attorney shall each have the right of appeal to the Supreme Court of North Carolina." Appeals to the Supreme Court are taken only from the Superior Court. *Rhyne v. Lipscombe,* 122 N. C., 650, 29 S. E., 57.

It must be conceded that the plea to the jurisdiction presents a grave and serious constitutional question. However, it is not after the manner of appellate courts to pass upon constitutional questions, even when properly presented, if there is also present some other ground upon which the case may be made to turn. *Newman v. Comrs.,* 208 N. C., 675; *Wood v. Braswell,* 192 N. C., 588, 135 S. E., 529. "It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case"—*Mr. Justice Peckham* in *Burton v. U. S.,* 196 U. S., 283. The rule is, that if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of lesser moment, the latter alone will be decided. *Siler v. L. & N. R. R.,* 213 U. S., 175; *Light v. U. S.,* 220 U. S., 523.

An avenue of escape from the constitutional question is afforded by the theory upon which the case was predicated and tried. The proceeding rests upon the record in "Langdon, Admr., *v.* Parker," heard at the March Term, 1933, Johnston Superior Court, which resulted in verdict and judgment against the respondent, and his surety, in his capacity as executor. Indeed, in no other capacity would his surety have been liable.

In the present proceeding, upon the same record, it is sought to hold the respondent liable for breach of trust in his capacity as an attorney. The two verdicts are not alike. Not only is this so, but it also appears that all the matters and things complained of took place before the enactment of ch. 210, Public Laws 1933, which *eo nomine* repeals the prior subsisting statutes on the subject. For history of prior legislation, see *S. v. Johnson, supra.* The verdict and findings in the instant proceeding are not supported by the record. Respondent's motion for a directed verdict should have been allowed, and his exception to the refusal of the "Council" to grant his motion for judgment as of nonsuit should have been sustained.

The other matters, sought to be raised before the judge of the Superior Court were either not determined or continued without prejudice. *In re Stiers,* 204 N. C., 48, 167 S. E., 382; *Bar Association v. Strickland,* 200 N. C., 630, 156 S. E., 110. They are not now before us. Nor are we presently called upon to express any opinion upon their merits. *In re*

Shattuck, 279 Pac. (Cal.), 998. On the hearing, the case was limited to a narrow compass. An appeal *ex necessitate* follows the theory of the trial. *Coral Gables v. Ayres,* 208 N. C., 426; *Weil v. Herring,* 207 N. C., 6, 175 S. E., 836; *Hargett v. Lee,* 206 N. C., 536, 174 S. E., 498; *Holland v. Dulin,* 206 N. C., 211, 173 S. E., 310.

The case then comes to a single question: Shall the respondent be disbarred by the statutory method? The answer is: Not on this record.

Reversed.

DEVIN, J., concurs in the result on the ground that the respondent could not be convicted and caused to suffer disbarment under chapter 210, Public Laws of 1933, for the offenses committed prior to the passage of the act.

JOHN BANNER v. CAROLINA BUTTON CORPORATION.

(Filed 18 March, 1936.)

1. Process B c—Facts found held to support judgment denying motion to vacate service by attachment and publication.

Plaintiff instituted suit against defendant, a domestic corporation, and, upon return of summons not served, attached a judgment owing defendant and obtained an order restraining defendant from issuing execution on the judgment. Defendant entered a special appearance and moved to vacate the proceedings. The court found summons had been issued in the county in which the action was instituted and in the county to which defendant had moved, and that both of them had been returned "Defendant not to be found," that plaintiff had filed affidavit that defendant had removed its property from the State with intent to hinder, delay, and defraud creditors, that so far as appeared from the evidence, defendant had no other property out of which plaintiff's claim might be satisfied, in whole or in part, defendant having removed all other property from the State, and that plaintiff has a *bona fide* claim against defendant as provided by C. S., 798. *Held:* The findings support the court's judgment denying the motion to vacate the proceedings, and continuing the order restraining execution on the judgment by defendant to the hearing.

2. Appeal and Error J f—Judgment continuing restraining order will ordinarily be affirmed when sustained by findings supported by evidence.

Where the findings of fact in injunctive proceedings are sufficient to sustain the judgment and are supported by evidence, the judgment will ordinarily be affirmed, although the Supreme Court has the power to review the evidence, and the evidence on the determinative facts is conflicting.

3. Injunctions D b—

Ordinarily, a restraining order will be continued to the final hearing where no harm can come to the defendant by such continuance and where injury might result to plaintiff from a dissolution thereof.

BANNER *v.* BUTTON CORPORATION.

APPEAL by the defendant from *Rousseau, J.*, at October Term, 1935, of SURRY. Affirmed.

Folger & Folger for plaintiff, appellee.
Walter G. Green, Jr., for defendant, appellant.

SCHENCK, J. This is an action instituted by the plaintiff to recover damages in the sum of $550.00 for the wrongful conversion of personal property and for injury to real and personal property in consequence of the wrongful detachment and removal by the defendant of lighting fixtures and wiring, plumbing and toilet fixtures, locks, and other property from the building of the plaintiff in Mount Airy, North Carolina, to the State of Virginia, and wherein the plaintiff alleges that the defendant is a domestic corporation and "has removed all of its property from the State of North Carolina with the intent to hinder, delay, and defraud the creditors of the defendant." The relief prayed is for the recovery of $550.00, and "that a warrant of attachment issue against the property of the defendant if any should be found within the State of North Carolina." Upon the summons having been returned endorsed "after diligent search and inquiry, Carolina Button Corporation not to be found in my county," the clerk of the Superior Court of Surry County issued a warrant to the sheriff of said county commanding him to forthwith attach and safely keep all the property of the defendant found in his county. Subsequently, plaintiff filed a supplemental affidavit to the effect that the defendant had within the State of North Carolina a judgment against the Mount Airy Knitting Company in the sum of $228.85, duly recorded in the office of the clerk of the Superior Court of Surry County, whereupon the clerk of the Superior Court issued summons in garnishment to the Mount Airy Knitting Company to be at his office and answer on oath what it owed to the defendant, the Carolina Button Corporation, and pursuant to said summons the said knitting company filed answer and admitted it was indebted to the button corporation in the sum of $228.85 as appears by judgment duly docketed in Surry County.

By virtue of the warrant of attachment issued to him the sheriff of Surry County levied upon the judgment docketed in the office of the clerk of the Superior Court in favor of the Carolina Button Corporation against Mount Airy Knitting Company.

Two days after the levy upon the aforesaid judgment by virtue of the warrant of attachment the plaintiff made application to the judge regularly holding the courts of the Eleventh District for an order restraining and enjoining the Carolina Button Corporation and the sheriff of Surry County from proceeding with the levy and sale of any of the prop-

erty of the Mount Airy Knitting Company under the judgment of the Carolina Button Company, and filed affidavit to the effect that the Carolina Button Company had removed from the State all of its property, except this judgment, and had had execution on this judgment placed in the hands of the sheriff, and that if the said Carolina Button Company was permitted to collect this judgment through execution the plaintiff's attachment against said judgment would fail and become ineffective, and the plaintiff would not be able to realize upon any judgment that he may secure against the Carolina Button Company. Upon this application and affidavit, the judge of the Superior Court issued a temporary restraining order and notice to the Carolina Button Company to show cause why the same should not be continued till the hearing.

Upon affidavit of the plaintiff to the effect that the summons had been returned endorsed diligent search and inquiry made and defendant not to be found in Surry County, and that the defendant after due diligence could not be found in the State, and that personal service could not be made thereupon, the clerk of the Superior Court ordered that service of summons be made by publication in the *Mount Airy News* as by law provided.

After several continuances, the case came on to be heard before Judge Rousseau, holding the courts of the Eleventh District, upon a supplemental and cumulative affidavit by the plaintiff and upon an affidavit by Walter G. Green, J., filed by the defendant under a special appearance. The defendant, still under special appearance, moved to vacate and set aside the attachment and the proceedings in this cause. The affidavit of Green is to the effect that he, Green, was a director of the Carolina Button Corporation, which is a domestic corporation, and formerly had its principal office in Mount Airy, North Carolina, and subsequently moved said office to Winston-Salem, N. C., and now has its office in the latter city; and that the defendant has not attempted to hinder, delay, or defraud its creditors, but, on the contrary, has tried to discharge its obligations; and that the property which the plaintiff had attached was subject to liens in favor of the United States for taxes amounting to approximately $1,300; and that this action, in affiant's opinion, was commenced at the connivance of the stockholders of the Mount Airy Knitting Company to thwart the defendant in collecting its judgment against said knitting company. Judge Rousseau entered the following judgment:

"This cause coming on to be heard before his Honor, J. A. Rousseau, judge holding the courts of the 11th Judicial District, and being heard at Dobson, N. C., the county-seat of Surry County, the court finds as a fact:

"1. That this action was duly begun in the Superior Court of Surry County, summons issued and returned; that the defendant is not to be

found in Surry County; that affidavit was duly made that the defendant cannot after due diligence be found in the State of North Carolina.

"2. That the plaintiff has made affidavit that the defendant Carolina Button Corporation has removed its property from the State of North Carolina, and that said property was removed and was removed with the intent to hinder, delay, and defraud the creditors of the said defendant.

"3. That process was issued to the sheriff of Forsyth County and returned unserved with the notation made by the sheriff of Forsyth County that no officer of the said corporation was to be found upon whom process could be served; and that no certificate of the corporation or the Secretary of State was filed in the clerk's office setting forth that Winston-Salem was the principal office of said corporation.

"4. That said defendant has no property within the State of North Carolina, having removed all other property therefrom so far as evidence appears to the court, out of which the plaintiff's claim may be satisfied in whole or in part, and that all other property has been removed from the State.

"5. That the plaintiff has a *bona fide* claim against the defendant as provided in section 798 of the North Carolina Code for $550.00, as set forth in the plaintiff's complaint.

"It is now therefore ordered and adjudged that the motion to vacate and set aside the attachment and the proceedings in this cause made by the defendant be and the same are denied and this cause is retained to be heard upon its merits in the Superior Court of Surry County. The defendant is allowed 45 days from this date to file answer to the complaint of the plaintiff if it be so advised. That the restraining order be continued to be heard upon its merits."

Although it was conflicting, there was sufficient evidence to support all the findings of fact by the court, and the findings of fact sustain the judgment. Under these circumstances, and in view of the fact that the plaintiff has given a sufficient bond to save the defendant harmless, the judgment will not be disturbed, notwithstanding this Court may have the power to review the findings of fact in injunctive proceedings. *Wentz v. Land Co.*, 193 N. C., 32; *Cahoon v. Comrs. of Hyde*, 207 N. C., 48. It is the general practice in this jurisdiction to continue a temporary restraining order to the final hearing where no harm can come to the defendant by such a continuance and where injury might result to the plaintiff from a dissolution thereof. *Boushiar v. Willis*, 207 N. C., 511, and cases there cited.

Affirmed.

W. H. STEPHENSON v. N. A. HONEYCUTT.

(Filed 18 March, 1936.)

1. Appeal and Error G c—

Exceptions not discussed in briefs are deemed abandoned. Rule 28.

2. Evidence I b—Witness held competent to identify account, and his testimony relative thereto was competent.

Plaintiff, suing upon an open account, offered the testimony of the manager of the store in charge of the books, to the effect that the owner of the store made certain entries on the books before the witness was hired, and that he had charge of the books thereafter, that he had discussed the account with the debtor, who did not deny its correctness, and that the account was in the sum claimed by plaintiff. *Held:* The witness was competent to identify the account, and an exception to his testimony is untenable.

3. Account Stated A c—

Where the debtor accepts an account rendered, either by assenting to its correctness or by failing to object thereto within a reasonable time, he will be regarded as admitting its correctness, and the account becomes an account stated.

4. Payment A c—

The plea of payment is an affirmative one, and the burden of proof is upon the party asserting payment.

5. Payment C d—Delivery of intoxicating liquor cannot operate as payment.

Defendant contended that he made payment on his account by delivering intoxicating liquor to the creditor. *Held:* The law recognizes no property right in or growing out of intoxicating liquor sold or transferred in violation of the law, and the delivery of the intoxicating liquor does not support the plea of payment.

6. Trial D a: Appeal and Error B d—

Where defendant does not renew his motion to nonsuit at the close of all the evidence he waives his right to have the sufficiency of the evidence considered on appeal. C. S., 567.

7. Appeal and Error J a: Trial G c—

A motion to set aside the verdict as being contrary to the weight of the evidence is addressed to the discretion of the trial court, and the court's determination of the motion is not ordinarily reviewable.

APPEAL by defendant from *Williams, J.*, and a jury, at October Term, 1935, of HARNETT. No error.

This was a civil action, instituted in the recorder's court of Harnett County by the plaintiff, to recover judgment against the defendant in the sum of $257.30, claimed by the plaintiff on an open account, pur-

chased by plaintiff at an administrator's sale of the estate of L. G. Young. The action was heard and determined before his Honor, F. H. Taylor, judge of the recorder's court of Harnett County, and from a judgment in favor of the plaintiff, and against the defendant, the defendant appealed to the Superior Court of Harnett County. The cause came on for hearing at the October Term, 1935, Harnett Superior Court.

The issue submitted to the jury and their answer thereto was as follows: "1. What amount, if any, is the defendant indebted to the plaintiff? Ans.: 'Full amount of debt as of book record, $257.30. We recommend that no interest be charged.'"

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

Dupree & Strickland for plaintiff.
J. R. Hood for defendant.

CLARKSON, J. The defendant in his brief only relies on three exceptions and assignments of error. The others will be taken as abandoned by him. N. C. Code, 1935 (Michie), p. 2674; Supreme Court Rule 28.

Defendant's *first* contention: "That the witness W. J. Crawford was not a competent witness to identify the account, and that his Honor erred in permitting the testimony of the witness Crawford to go to the jury."

Under the facts and circumstances of this case, defendant's contention cannot be sustained.

W. J. Crawford, prior to September, 1933, was manager of Young Bros. Drug Co. L. G. Young, through whom plaintiff claims the account by assignment, was the sole owner. As manager it was said Crawford's duty to keep the books. He testified, in part: "I had an account against the defendant N. A. Honeycutt. This is N. A. Honeycutt's account; this is the old drug ledger; some of this here was done by L. G. Young before I was employed by him; it indicates a balance due by Mr. N. A. Honeycutt. Q. Will you tell the jury what that balance is? Ans.: I discussed that balance with Mr. Honeycutt; especially since Mr. Stephenson bought the account; Mr. Honeycutt did not deny the account at that time; it has never been denied. He claimed that Mr. Young owed him; he said that he owed him for a little stuff. . . . I did not make all of those records there. By the court: What is the balance there you discussed with Mr. Honeycutt? Ans.: It looks like $257.30. By Mr. Dupree: Is that the amount less his credits? Ans.: Yes, sir. The account was $278.45. . . . He never denied he got

the stuff charged." The defendant's exception and assignment of error to the above questions must be denied.

In Black's Law Dictionary (3d Ed.), p. 27, citing numerous authorities, "account stated" is defined: "An account rendered by the creditor, and by the debtor assented to as correct, either expressly or by implication of law from the failure to object."

In *Supply Co. v. Plumbing Co.,* 195 N. C., 629 (633), it is said: "When an account is rendered, a failure to object to it within a reasonable time will be regarded as an admission of its correctness by the party. *Davis v. Stephenson,* 149 N. C., 113."

W. H. Stephenson testified, in part: "My name is W. H. Stephenson. I have Mr. Honeycutt sued on an account of $257.30. I purchased this account from the administrators of L. G. Young estate at Angier; at public sale. I made demand on Mr. Honeycutt for the account. He never denied the correctness of the account, but said Mr. Young owed him for some liquor. . . . He did not assign any reason for not paying it. I told him that I could not allow him credit for the whiskey. . . . He did not claim that Mr. Young owed him for anything except the whiskey."

The defendant testified, in part: "I don't think I owe him anything on that account. He owed me $280.00 and I owed him $245.00, somewhere along there; $280.00 in money and whiskey, too; I paid him brandy and all that I owed him. . . . There never was any dispute between me and him as to the account."

The evidence was practically but one way. In fact, the defendant in his brief says: "The defendant by his answer admits that he had an account with the deceased, but claimed that the said account was paid, and at the time of the death he was not indebted to the plaintiff."

The plea of payment is an affirmative one. In *Furst v. Taylor,* 204 N. C., 603 (605), it is said: "It is well settled that the plea of payment is an affirmative one, and the burden of showing payment is on the one who relies on the same. The burden of proof is a substantial right. *Collins v. Vandiford,* 196 N. C., 237." *Davis v. Dockery, ante,* 272 (274).

The defense of defendant was to the effect that the account was paid practically in liquor—"blind-tiger" whiskey and brandy.

Walker, J., in *Liquor Co. v. Johnson,* 161 N. C., 74 (75-6), said: "The defense was that the checks were given for the sale of liquor, contrary to our statute prohibiting the sale of liquor in the State, and upon the principle that where a contract is entered into by the parties for the purpose of doing something that is prohibited by law, it is not enforceable, as the law will not lend its support to a claim founded upon a violation of itself (citing numerous authorities). In *Holman*

v. Johnson, Cowp., 341, Lord Mansfield said: 'The principle of public policy is this: *ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating or otherwise the cause of action appear to arise *ex turpi causa,* or the transgression of a positive law of this country, then the Court says he has no right to be assisted. It is upon that ground the Court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.' "

On this aspect the able, painstaking, and learned judge in the court below charged the jury correctly as follows: "It is admitted in evidence here, gentlemen of the jury, that he claimed to have paid the account through the delivery of whiskey to Mr. L. G. Young. The delivery of whiskey from one person to another is an unlawful transaction, a transaction in violation of the laws of North Carolina, and from an unlawful transaction no valid obligation to pay money or anything else can be created or can arise. The law recognizes no property right in and no property right growing out of whiskey or intoxicating liquors. A man that sells another intoxicating liquor on credit does not have any right to come into court for the collection of an obligation which is founded on that unlawful transaction."

The defendant's *second* contention: "That his Honor erred in denying the motion for judgment as of nonsuit at the close of the plaintiff's testimony."

We cannot so hold on this record. The defendant, after the close of plaintiff's evidence in the court below, made a motion, under C. S., 567, for judgment as in case of nonsuit. This motion was overruled. The defendant then introduced evidence and at the close of all the evidence did not renew his motion in the court below for judgment as in case of nonsuit, C. S., 567. By not making this motion, he waived the benefit of the statute.

In *Nowell v. Basnight,* 185 N. C., 142 (148), citing numerous authorities, it is said: "If the first motion is overruled, the defendant may except and go to the jury; or except, introduce evidence, and renew motion after all the evidence. . . . Exception is waived if motion is not renewed." *Ferrell v. Ins. Co.,* 208 N. C., 420 (421).

The defendant's *third* contention: "For that his Honor erred in not setting aside the verdict of the jury, and in signing the judgment as appears of record." This matter was within the discretion of the court below.

In McIntosh, N. C. Prac. and Proc. in Civil Cases, p. 670, we find: "The verdict is the solemn act of the jury, and it should not be set aside without mature consideration, but the power of the court to set aside a verdict as a matter of discretion has always been inherent, and

is necessary to the proper administration of justice. It is not an arbitrary discretion, to be exercised capriciously and at the mere inclination of the judge, but by a sound and enlightened judgment, to prevent what may seem to be an inequitable result. The judge is in a position to know all the circumstances and their probable effect, and in this respect his discretion is practically unlimited, since his action will not be reviewed, unless it clearly appears that the discretion was abused."

On the whole record and in the charge we see no prejudicial or reversible error.

No error.

S. A. SPARKS v. C. H. HOLLAND

and

J. W. PARDUE v. C. H. HOLLAND.

(Filed 18 March, 1936.)

1. Appeal and Error G c—

Exceptions not discussed in briefs are deemed abandoned. Rule 28.

2. Jury A d—Court may allow counsel to ask prospective jurors if they are connected with insurance company when inquiry is in good faith.

The court has discretionary power, upon its finding that the inquiry is in good faith, to allow plaintiff's counsel to ask prospective jurors if they have any business connections with a certain insurance company, it having been made to appear to the court that defendant's car, involved in the collision in suit, was insured by such company, and an exception to the court's allowing such inquiry is untenable.

3. Damages H a—Allegation held sufficient to support evidence of hospital expenses.

The complaint alleged that as the proximate result of defendant's negligence in driving his automobile, plaintiff suffered damages in a large sum. *Held:* The allegation was sufficiently broad to permit plaintiff to introduce in evidence, as an element of damage, the amount of the hospital bills paid by plaintiff, defendant's remedy, if the complaint failed to sufficiently disclose the nature of plaintiff's injuries, being by motion to make the complaint more definite and certain, C. S., 537, or by motion for a bill of particulars, C. S., 534.

4. Trial E f—

A misstatement of the contentions of a party must be brought to the court's attention in time to afford opportunity for correction in order for an exception based thereon to be considered on appeal.

5. Negligence D d—Charge held to sufficiently instruct the jury on question of proximate cause.

Defendant excepted to an excerpt from the charge instructing the jury that if they found from the greater weight of the evidence that plaintiff

was injured by the negligence of defendant they should answer the issue in the affirmative, defendant contending that the excerpt was erroneous for failing to make reference to proximate cause. It appeared that in the preceding portion of the charge the court defined proximate cause and correctly stated the burden of proof. *Held:* Defendant's exception is untenable, the charge being construed as a whole, and the excerpt complained of not being in conflict with the preceding portions of the charge.

6. Trial E g—

The court's charge to the jury will be construed contextually as a whole.

APPEAL by the defendant from *Phillips, J.*, at November Term, 1935, of WILKES. No error.

These are civil actions, consolidated by consent for the purpose of trial, wherein it is alleged by the respective plaintiffs that they were gratuitous guests in an automobile owned and driven by the defendant, and that they were injured when said automobile collided with another automobile driven by one Sherman Anderson. It is further alleged that at the time of the collision the defendant was unlawfully and negligently driving his automobile on his left side of the road, and that the injury to the plaintiffs was proximately caused by such negligence. The allegations of negligence were denied by the defendant. Evidence tending to establish the contentions of both parties was offered. The jury found that the plaintiffs had been injured by the negligence of the defendant, as alleged in the complaint, and assessed damages.

From judgments based upon the verdict, the defendant appealed to the Supreme Court, assigning errors.

J. M. Brown and Bowie & Bowie for plaintiffs, appellees.
T. E. Bingham and Trivette & Holshouser for defendant, appellant.

SCHENCK, J. We will consider the several assignments of error brought forward in the appellant's brief in the order in which they are there presented. The other assignments in the record which are not mentioned in the brief are deemed to be waived. Rule No. 28 of Rules of Practice in the Supreme Court, 200 N. C., 811 (831).

The first assignment of error is to the court's permitting counsel for the plaintiff to inquire of the jurors being selected if they had any business connection with the American Casualty Company. The following appears in the record:

"The court, not in the presence of the jury, and at the insistence and request of the plaintiffs' counsel, inquired of the defendant's counsel if the defendant was insured by the American Casualty Company, whereupon the defendant's counsel declined to answer, and plaintiffs' counsel stated to the court, in the presence of the defendant's counsel, that the

plaintiffs' counsel had been in several conferences with the defendant's counsel and a representative of the American Casualty Company with reference to the suit, which statement was not denied by the defendant's counsel; whereupon, the court found as a fact that the plaintiffs' inquiry was in good faith, and permitted the plaintiffs' counsel in the exercise of the discretion of the court to question the jury as to whether any of the jurors had an interest as agent or otherwise in the American Casualty Company, which finding of fact and inquiry addressed to the defendant's counsel were not made in the hearing of the jury."

The court having found as a fact that the plaintiffs' inquiry was in good faith, and having permitting the questions as to whether the jurors being selected had any interest as agent or otherwise in the American Casualty Company in its sound discretion, this assignment of error is untenable. *Walters v. Lumber Co.,* 165 N. C., 388, and cases there cited. "As to whether the question (relative to any connection the prospective jurors might have to an indemnity company) is asked in good faith, or as to whether the adverse party has been prejudiced by the inquiry addressed to the jurors, before the jury is impaneled, must be left to the trial judge to determine in his discretion." *Fulcher v. Lumber Co.,* 191 N. C., 408.

The third assignment of error is to the court's permitting the plaintiff Pardue to testify as to the amount of the hospital bills paid by him when there was no specific allegation in the complaint as to such bills. The complaint alleges "that by reason of the carelessness and negligence of the defendant, which was the proximate and sole cause of the plaintiffs' injury, . . . the plaintiff has been damaged in the sum of $3,500." A liberal interpretation of this allegation would permit the proof of hospital bills paid in connection with the injuries complained of, since "in this class of cases the plaintiff is entitled to recover as damages one compensation for injuries, past and prospective, in consequence of the defendant's wrongful or negligent acts. These are understood to embrace indemnity for actual nursing and medical expenses and loss of time, or loss from inability to perform ordinary labor, or capacity to earn money." *Wallace v. Western Railroad Company,* 104 N. C., 442. If the precise nature of the plaintiffs' injury and damage was not apparent it was open to the defendant to have moved the court to make the complaint more definite and certain, C. S., 537, or, if the defendant so desired, to have asked for a bill of particulars, C. S., 534. It would further seem that the maxim *"de minimis non curat lex"* is here applicable, since the judgment was for $1,500, and the plaintiff's testimony relative to his hospital bill was, "It wasn't so much. I would say ten or fifteen dollars, somewhere along there."

The eighteenth assignment of error is to a portion of the charge, as follows: "The plaintiff further contends, gentlemen of the jury, that when you answer the first issue 'Yes,' that there being no dispute about the fact that the defendant was operating his automobile in violation of the law and that the automobile being so operated was the proximate cause of the injury and damage to the plaintiff, that your answer to the second issue in each case should be a large amount."

The defendant says in his brief: "We do not think from a perusal of the record it will be found anywhere that the defendant admitted that he was driving in violation of the law, his contention being that this was a country road with only one track traveled by all cars during the season of the year in which the accident occurred." The court was stating the contentions and "we have so often said that the statement of contentions must, if deemed objectionable, be excepted to promptly, or in due and proper time, so that, if erroneously stated, they may be corrected by the court. If this is not done, any objection in that respect will be considered as waived." *S. v. Sinodis,* 189 N. C., 565, and cases there cited. The defendant failed to except to the statement of the contentions or to call the court's attention to any error therein, and thereby waived any objections thereto.

The thirteenth assignment of error is to a portion of the charge, as follows: "Now, gentlemen of the jury, if you find from the evidence and by its greater weight in this case that the plaintiff in each of these cases was injured by the negligence of the defendant, in each case you would answer the first issue 'Yes,' that is, in the 'Sparks case' and also in the 'Pardue case,' you would answer the issue 'Yes.'"

The defendant argues that the foregoing instruction is erroneous for that it fails to make any reference to proximate cause. However, when the excerpt is read in connection with the portion of the charge immediately preceding it, wherein the court in defining actionable negligence to the jury said: "It must appear that such negligent breach of duty was the proximate cause of the injury—a proximate cause is a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts and circumstances as they existed," it is manifest that the jury were clearly instructed as to the burden of the plaintiff to establish that the defendant's negligence was the proximate cause of his injury. The instruction complained of is not in conflict with the instructions that preceded it, even if not as elaborate. The charge must be considered contextually as a whole and not disjointedly. *Marriner v. Mizzelle,* 207 N. C., 34.

No error.

LOIS LETTERMAN, BY HER NEXT FRIEND, C. R. LETTERMAN, v. FLOYD MILLER AND S. H. MILLER, TRADING AS ASHEVILLE-CANTON AND WAYNESVILLE MOTOR EXPRESS.

(Filed 18 March, 1936.)

Automobiles C c—Evidence held for jury on issues of negligence and proximate cause in this action to recover for injuries to child struck by truck as she crossed highway to enter automobile.

The evidence tended to show that plaintiff, a child nine years old, and her brother and two sisters, neither of whom was over fourteen years old, were walking to school along the highway, that a neighbor, riding his child to the same school, slowed down and stopped his car on the opposite side of the highway to give plaintiff and her brother and sisters a ride to school in his car, that the driver of defendants' truck, driving behind the car and going in the same direction, slowed down when the car slowed down and stopped behind it, and that plaintiff, assuming the truck had stopped so she could cross the highway, started across the highway to enter the car, and was struck when the truck driver started forward without warning for the purpose of going around the automobile. *Held:* The evidence was sufficient to be submitted to the jury on the question of negligence in the operation of the truck and proximate cause, notwithstanding defendants' evidence to the contrary.

STACY, C. J., dissenting.

APPEAL by both plaintiff and defendants from *Oglesby, J.*, at December Term, 1935, of BUNCOMBE.

Reversed in plaintiff's appeal; defendants' appeal dismissed.

This is an action to recover damages for personal injuries suffered by the plaintiff, a child nine years of age, when she was struck and knocked down as she started to cross a State highway in Buncombe County, to enter an automobile parked on the opposite side of the highway, by a truck owned by the defendants and negligently operated on said highway by the driver, an employee of the defendants.

The defendants denied that the driver of the truck was negligent in its operation at the time the plaintiff was injured, or if he was negligent, that such negligence was the proximate cause of plaintiff's injuries.

The action was begun and tried in the general county court of Buncombe County.

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? Answer: '$3,000.'"

From judgment that plaintiff recover of the defendants the sum of $3,000, and the costs of the action, the defendants appealed to the Supe-

rior Court of Buncombe County, assigning errors in the trial in the general county court.

At the hearings of defendants' appeal, pursuant to the rulings of the judge of the Superior Court on their assignments of error, it was ordered and adjudged by the court that the defendants are entitled to a new trial, and accordingly the action was remanded to the general county court for a new trial.

From the judgment of the Superior Court both the plaintiff and the defendants appealed to the Supreme Court, each assigning errors in the rulings of the judge on defendants' assignments of error on their appeal from the judgments of the general county court.

Geo. O. Perkins and J. W. Pless for plaintiff.
Smathers, Martin & McCoy for defendants.

CONNOR, J. An examination of the record in this appeal discloses no error in the rulings of the judge of the Superior Court by which certain of defendants' assignments of error on their appeal from the judgment of the general county court were overruled. There is error, however, in the rulings of the judge by which other assignments of error were sustained, resulting in the order for a new trial. For this reason there is error in the judgment of the Superior Court awarding the defendants a new trial. The judgment of the Superior Court is reversed on plaintiff's appeal to this Court. The appeal of the defendants is dismissed. The judgment of the general county court should be affirmed.

The only ruling of the judge of the Superior Court at the hearing of defendants' appeal from the judgment of the general county court which seems to require discussion by this Court is the ruling by which defendants' contention that there was error in the refusal of the trial court to allow their motion for judgment as of nonsuit, at the close of all the evidence, was not sustained. There was no error in this ruling.

There was evidence at the trial in the general county court tending to show that plaintiff, a child nine years of age, with her brother and two sisters, neither of whom was over fourteen years of age, was walking along the edge of the highway, on her way to school. A neighbor passed in his automobile, taking his child to the same school which the plaintiff and her brother and sisters attended. He indicated to plaintiff that he would take her and her brother and sisters to school in his automobile, and at once began to slow down. He stopped his automobile about thirty feet from the plaintiff, on the opposite side of the highway. At this time, defendants' truck was approaching, going in the same direction as the automobile. When the driver of the truck saw that the auto-

mobile was slowing down, he slowed down, and when the automobile stopped, he stopped, a short distance in the rear of the automobile. The plaintiff, assuming that the truck had stopped so that she could cross the highway and enter the automobile in safety, took a step in the direction of the parked automobile. At this moment, without warning, the driver of the truck started up and turned toward the plaintiff for the purpose of going around the automobile. In this situation the plaintiff was struck and knocked down by the truck, and thereby suffered serious injuries which are probably permanent.

This evidence was properly submitted to the jury as tending to show, notwithstanding the evidence for the defendants to the contrary, that the driver of the truck was negligent, and that his negligence was the proximate cause of plaintiff's injuries. See *Smith v. Miller, ante,* 170.

The action is remanded to the Superior Court of Buncombe County that judgment may be entered in said court affirming the judgment of the general county court of Buncombe County.

Reversed in plaintiff's appeal.

Defendants' appeal dismissed.

STACY, C. J., dissenting: Unfortunate and distressing as the accident in this case was, a careful perusal of the record leaves me with the conviction that no actionable negligence on the part of the defendants has been shown.

The little girl ran into the side of the truck, as witness the following from her own evidence: "The truck hit her on top of the head. . . . The front corner of the bed hit her. . . . She stepped one step, just a side step. She was struck straight in the back of the head. . . . If she had stood still she would not have been hit. . . . Q. What part of the truck hit her? A. The corner of the front of the bed. After she fell forward, the hind wheel of the truck ran over her leg." This means the bumper, the fender, the front wheel, and the cab of the truck had safely passed where the children were standing before the plaintiff took her "one step, just a side step," and was struck by the corner of the bed of the slowly moving truck. It was the rear wheel, and not the front wheel, that crushed her leg. Her companions were not hurt. These physical facts permit no inference of negligence on the part of the driver of the truck. He did not know the children were waiting to cross the road, as was the case in *Smith v. Miller, ante,* 170. Reasonable prevision or foresight, and not the gift of prophecy or clairvoyance, is all the law required of him. *Osborne v. Coal Co.,* 207 N. C., 545, 177 S. E., 796. "The law does not require omniscience"—*Brogden, J.,* in *Gant v. Gant,* 197 N. C., 164, 148 S. E., 34.

When the plaintiff fell, she was "4 or 4½ feet inside the curbing." This would indicate that she necessarily took more than "one little step" before coming in contact with the truck, but this is not the determining factor.

Under the law as heretofore written, the plaintiff is not entitled to recover. The case is no stronger than *Fox v. Barlow,* 206 N. C., 66, 173 S. E., 43, where a nonsuit was ordered.

MARY E. BAILEY, EVELYN PETERSON SCOTT, PAULINE PETERSON HALTEMAN, AND NEWLAND C. PETERSON v. JESSE HOWELL AND WIFE, TIE HOWELL, AND J. W. HOWELL AND WIFE, LUCRETIA HOWELL.

(Filed 18 March, 1936.)

1. Taxation H c—

The statute, C. S., 441 (10), barring an action to set aside a tax deed after three years from the execution of the deed by the sheriff does not apply where the owner remains in possession.

2. Adverse Possession A f—

Possession of one tenant in common is the possession of all, and is not adverse to them, until there has been an ouster and adverse holding.

3. Tenants in Common A c—

The acquisition of an outstanding adverse title by one tenant in common in possession, including titles based upon tax deeds, inures to the benefit of all the cotenants.

4. Same—

The mortgaging of the entire tract by one tenant in common, who remains in possession, does not destroy the tenancy in common, nor does the subsequent foreclosure of the mortgage destroy the interest of the cotenants.

5. Same: Taxation H e—Tenant in common may not acquire tax title so as to defeat the interests of her cotenants.

One tenant in common listed the entire tract for taxation in her name. Thereafter the land was sold for taxes and deed made to a stranger, who transferred title back to the tenant a few days thereafter, taking a mortgage in himself, the tenant remaining in possession throughout. *Held:* The reconveyance of the tax title to the tenant in common inured to the benefit of her cotenants, and the tenant's mortgaging of the property did not convey the interest of her cotenants nor destroy the tenancy in common.

6. Adverse Possession A h—

A mortgage executed on the entire tract by one tenant in common in possession is not color of title as against the cotenants.

BAILEY *v.* HOWELL.

7. Adverse Possession A f—Possession of tenant in common under whom plaintiff claims held not adverse to cotenants.

One tenant in common listed the land for taxes in her name and thereafter the land was sold for taxes and deed executed by the sheriff to defendant, but the sheriff's deed was void as being without authority of law. A few days after execution of the sheriff's deed, defendant reconveyed the land to the tenant in common and took a mortgage back in himself. Thereafter the mortgage was foreclosed and the property bid in by defendant, who transferred the land to a stranger, who reconveyed it back to him. The tenant listing the land for taxes remained in possession of the land throughout. The cotenants instituted partition proceedings and defendant claimed sole seizin, basing his claim of title upon seven years adverse possession under color of title. *Held:* Although a void sheriff's deed constitutes color of title, the tenant in possession subsequently acquired such title, which inured to the benefit of her cotenants, and defendant may not claim adverse possession thereunder, nor may defendant claim the benefit of the tenant's possession by virtue of her mortgage to him and the subsequent foreclosure and acquisition of title by him, since the mortgage did not convey the cotenants' rights or destroy the tenancy in common or render the tenant's possession adverse to her cotenants, and he acquired upon foreclosure only her interest as a tenant in common.

8. Taxation H b—

The title of tenants in common who are not made parties is not affected by a tax foreclosure suit and commissioner's deed executed in pursuance thereof.

APPEAL by plaintiffs from *Harding, J.*, at October-November Term, 1935, of YANCEY. Reversed.

Originally begun as a special proceeding for the partition of land, upon defendants' plea of sole seizin, the cause was transferred to the civil issue docket for the determination of the issue of title to the land.

The uncontroverted facts were these:

In 1919, by deed, the described land was conveyed to Sarah Peterson and her daughter, Lydia, wife of W. S. Renfro, as tenants in common. Sarah Peterson died in 1925, and her one-half interest in the land descended one-third to her daughter, the plaintiff Mary E. Bailey, one-third to the other plaintiffs, the children of her deceased son, Charles Peterson, and one-third thereof to the said Lydia Renfro. So that thereupon the plaintiff Mary E. Bailey owned one-sixth of the whole, the named children of Charles Peterson one-sixth of the whole, and Lydia Renfro the remaining two-thirds of the whole (one-half under the deed of 1919 and one-sixth by descent from Sarah Peterson). Lydia Renfro has been in possession of said land since the death of Sarah Peterson in 1925.

The land, which was listed in the name of Lydia Renfro, was sold by the sheriff for the nonpayment of taxes 1 September, 1926. The plain-

tiffs were at that time nonresidents, and it is alleged in the petitioners' reply that three of them were under the age of twenty-one years. On 24 August, 1927, within less than one year from the date of tax sale, the sheriff executed a deed for the land to the defendant J. W. Howell. The affidavit required by the statute, C. S., 8029, was not attached to the sheriff's deed.

Defendant J. W. Howell, 9 September, 1927, reconveyed the land to the said Lydia Renfro, and took a mortgage from her back to himself. Subsequently, by deed dated 18 July, 1931, J. W. Howell, mortgagee, executed deed to Jesse Howell for the land, and by deed dated 4 August, 1931, registered 6 March, 1935, Jesse Howell and wife reconveyed to J. W. Howell.

Evidence was offered as to the relationship of the parties, and that Lydia Renfro and her husband had lived on and been in possession of said land since the death of Sarah Peterson in 1925.

This action was begun 27 February, 1935.

At the conclusion of plaintiffs' evidence, defendants' motion for nonsuit was allowed, and from judgment dismissing the action plaintiffs appealed.

Huskins & Wilson for plaintiffs, appellants.
Charles Hutchins and Anglin & Randolph for defendants, appellees.

DEVIN, J. The defendants seek to sustain the nonsuit on the ground that the plaintiffs are barred by the three-years statute of limitations, C. S., 441 (10), or by seven years adverse possession under color of title.

It is admitted that the sheriff's deed was void. It was not made in conformity with the statutory provisions in effect prior to the Act of 1927. The Act of 1927, ch. 221, which went into effect 9 March, 1927, changed the law as to tax deeds, repealed secs. 8028 to 8037, inclusive, of the Consolidated Statutes, and substituted the remedy by suit for foreclosure of the certificate of tax sale. The sheriff's deed was executed without authority of law.

But even if it be conceded that the statute of limitations is broad enough to bar any proceeding with respect to real property unless instituted within three years next after the execution of the sheriff's deed, the defendants are not in position to invoke its protection under the facts shown by the record in this case. The statute does not apply when the owner continues in possession. *McNair v. Boyd,* 163 N. C., 478; *Jordan v. Simmons,* 169 N. C., 140; *Price v. Slagle,* 189 N. C., 757.

The plaintiffs and Lydia Renfro were admittedly tenants in common up to the time of the execution of sheriff's deed in August, 1927, and the possession of one tenant in common is in law the possession of all (*Purvis v. Wilson,* 50 N. C., 22), until there has been an ouster and adverse holding for twenty years. *Crews v. Crews,* 192 N. C., 679; *Hicks v. Bullock,* 96 N. C., 164.

And the conveyance by the sheriff to Howell and by Howell within a few days back to Lydia Renfro, together with the subsequent passing back and forth of the title, could not change the effect of the continued possession of the land by Lydia Renfro at all times and up to the trial, nor destroy her tenancy in common with plaintiffs. *Smith v. Smith,* 150 N. C., 81. She held in trust for all the tenants in common.

Tenants in common are placed in confidential relations to each other by operation of law as to the joint property. "These relations of trust and confidence bind all to put forth their best exertions, to protect and secure the common interest, and forbid the assumption of a hostile attitude." Freeman on Cotenancy, sec. 151.

"It is a well settled rule that a person under any legal or moral obligation to pay the taxes cannot by neglecting to pay the same, and allowing the land to be sold in consequence of such neglect, add to or strengthen his title by purchasing at the sale himself, or by subsequently buying from a stranger who purchased at the sale; otherwise, he would be allowed to gain an advantage from his own fraud or negligence in failing to pay the taxes." *Smith v. Smith, supra.*

The acquisition of an outstanding adverse title by one of the tenants in common, who is in possession, inures to the benefit of all. And this rule applies to tax sales. Tiffany Real Prop., sec. 201. *Goralski v. Kostuski,* 179 Ill., 177, 20 Am. St. Rep., 98.

The law will not permit Lydia Renfro, one of the tenants in common, as result of a sale of the land for taxes listed by her, to take title to the whole tract to the exclusion of the other tenants in common. As the tenant who was in possession, she occupied a trust relationship with respect to the land for her cotenants.

While an invalid sheriff's deed will ordinarily constitute color of title, the possession of Lydia Renfro was not adverse to the plaintiffs, and the deed to her of an outstanding adverse title inured to the benefit of her cotenants. Nor could defendant J. W. Howell claim the benefit of her possession under her mortgage to him and subsequent foreclosure and deed, for her deed would not convey the interest of the plaintiffs, nor constitute color of title as against them. As was held in *Lumber Co. v. Cedar Works,* 165 N. C., 83: "A deed by one tenant in common of the entire estate is not sufficient to sever the unity of possession by which they are bound together, and does not constitute color of title, as

the grantee of one tenant takes only his share and steps into his shoes. In such case twenty years adverse possession, under claim of sole ownership, is required to bar the entry of the other tenants." *Crews v. Crews, supra.*

Hence, it follows that the plaintiffs' title to an interest in the land has not been divested by seven years adverse possession under color of title, nor has their action been barred by the statute of limitations.

The deed to the defendant J. W. Howell from D. R. Fonts, commissioner, in a tax foreclosure suit by the county commissioner, in October, 1932, could not affect plaintiffs' title, since they were not parties to that action.

It is stipulated in the record that plaintiffs admit that the taxes claimed by the defendants to be due are due, and that they will pay them.

We conclude that defendants were not entitled to have the action dismissed, and that the judgment of nonsuit must be

Reversed.

STATE v. J. B. EDMUNDSON.

(Filed 18 March, 1936.)

1. **Homicide H b—Evidence held sufficient to be submitted to jury on question of defendant's guilt of second degree murder or manslaughter.**

The State's evidence tended to show that while defendant's brother and another were engaged in a fight, defendant ran past them and cut the throat of his brother's assailant with a knife, causing his death. Defendant's evidence was to the effect that deceased had the knife in his hand as they were fighting and that defendant's brother got possession of the knife and inflicted the mortal wound. *Held:* The evidence, though conflicting, was sufficient to be submitted to the jury on the question of defendant's guilt of murder in the second degree or manslaughter, there being no evidence that defendant, if he did inflict the mortal wound, did so in defense of himself or the necessary defense of his brother.

2. **Criminal Law L e—**

Where a new trial must be awarded for error in the instructions to the jury, exceptions to the admission of evidence need not be considered.

3. **Homicide H c—Instruction held erroneous as failing to instruct jury on question of manslaughter.**

The State's evidence tended to show that while defendant's brother and another were engaged in a fight, defendant ran past them and cut the throat of his brother's assailant with a knife. The evidence disclosed that defendant's brother had previously shot his assailant and that either wound was sufficient to cause death, and that each wound was a contribut-

ing factor in causing death. Defendant contended that he did not cut deceased, but that deceased had the knife in his hand as they were fighting and that defendant's brother got possession of the knife and inflicted the wound. The court instructed the jury that if they should find from the evidence beyond a reasonable doubt that defendant cut the deceased, as contended by the State, and that such wound caused death or was a contributing cause of death, they should return a verdict of guilty of second degree murder. *Held:* The instruction is erroneous for failing to charge the jury upon the facts that if they should fail to find that the act of the defendant was malicious they should return a verdict of guilty of manslaughter, there being evidence from which the jury might find that if defendant cut the deceased as contended by the State, he did so, not from malice, but from sudden passion aroused by the assault which deceased was then making upon his brother.

APPEAL by defendant from *Sinclair, J.*, at November Term, 1935, of WAYNE. New trial.

The defendant J. B. Edmundson was tried at the November Term, 1935, of the Superior Court of Wayne County on an indictment in which he was charged with the murder of Pinkey Smith, on or about 1 April, 1933, in Wayne County, North Carolina.

On his arraignment, the defendant entered a plea of not guilty.

The solicitor announced in open court that the State would not contend at the trial that the defendant is guilty of murder in the first degree, but would contend that defendant is guilty of murder in the second degree or of manslaughter, as the jury shall find the facts to be from all the evidence.

At the trial, the evidence for the State tended to show that on the night of 6 April, 1933, a number of people had assembled at Spring Branch schoolhouse in Wayne County to participate in or witness an entertainment; that among others present were the defendant J. B. Edmundson, at that time about 15 years of age, his older brother, H. Weil Edmundson, and the deceased, Pinkey Smith; that before the entertainment began, while H. Weil Edmundson was engaged in conversation with two or three girls, Pinkey Smith walked up to him and cursed him; that H. Weil Edmundson resented the language used by Pinkey Smith, who thereupon repeated the language; that H. Weil Edmundson then drew a pistol and shot Pinkey Smith, thereby inflicting upon him a wound in his abdomen; that Pinkey Smith then grappled with H. Weil Edmundson, catching him by the arm, which he held up; that the pistol then fired a second time, the shot lodging in the roof of the schoolhouse; H. Weil Edmundson and Pinkey Smith then fell to the floor, with Smith on top of Edmundson; and that in this situation the defendant J. B. Edmundson ran by his brother and Pinkey Smith, as they were struggling on the floor in the schoolhouse, and cut Pinkey

Smith with his knife, thereby inflicting a wound on his neck. The defendant ran out of the schoolhouse and left the premises.

After he had been cut by the defendant, Pinkey Smith arose and went out of the schoolhouse. At his request, he was taken immediately to a hospital in the city of Goldsboro, where he received surgical and medical treatment. The surgeon who attended him testified that in his opinion either the pistol wound in his abdomen or the knife wound in his neck was sufficient to cause death. He said: "I cannot tell from which wound he died. I think that each wound was a contributing factor to the death of the deceased. I think either wound was sufficient to cause his death." Pinkey Smith died two days after he was taken to the hospital on the night of 6 April, 1933.

The evidence for the defendant tended to show that he took no part in the quarrel between his brother, H. Weil Edmundson, and the deceased, Pinkey Smith; that at the time the quarrel began the deceased had a knife in his hand, and that in the tussle between him and H. Weil Edmundson the knife fell from his hand to the floor, and that after they were on the floor, and while they were struggling with each other, H. Weil Edmundson got the knife and cut Pinkey Smith on the neck. The testimony of the defendant that he did not take part in the quarrel between his brother and the deceased, and did not cut the deceased, was corroborated by the testimony of other witnesses. At a former term of the court, H. Weil Edmundson was tried on an indictment in which he was charged with the murder of Pinkey Smith. He was convicted of murder in the second degree, and is now confined in the State's Prison, under a judgment upon such conviction.

The evidence for both the State and the defendant was submitted to the jury. The defendant was convicted of murder in the second degree.

From judgment that he be confined in the State's Prison for a term of not less than ten or more than fifteen years, the defendant appealed to the Supreme Court, assigning numerous errors in the trial.

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

N. W. Outlaw and Berkeley & Colton for defendant.

CONNOR, J. The assignment of error on this appeal based on defendant's exceptions to the refusal of the trial court to allow defendant's motion, at the close of all the evidence, that the action be dismissed, on the ground that there was no evidence tending to show that defendant is guilty of either murder in the second degree or of manslaughter, cannot be sustained. The evidence, although conflicting, was properly submitted to the jury.

As the defendant is entitled to a new trial for error in an instruction of the court to the jury, it is needless to discuss or to decide questions presented by assignments of error based on defendant's exceptions to the refusal of the trial court to sustain defendant's objections to the admission of evidence offered by the State. Conceding, without deciding, that there were errors in the admission of testimony as evidence for the State, over objections by the defendant, such errors were not prejudicial to the defendant. The evidence admitted by the court had little, if any, probative force on the questions involved in this action.

The court instructed the jury as follows:

"I charge you, gentlemen of the jury, that if you find from all the evidence, beyond a reasonable doubt, that the defendant cut the throat of the deceased, as contended by the State, and that the wound caused his death, or that the wound was one of the contributing causes that brought about the death of the deceased, it would be your duty to return a verdict of guilty of murder in the second degree."

The defendant excepted to this instruction and on his appeal to this Court assigns the same as error. This assignment of error is sustained on the authority of *S. v. Robinson,* 188 N. C., 784, 125 S. E., 617, and of cases cited in the opinion in that case.

There was no evidence at the trial of the instant case tending to show that the defendant, if he did cut the deceased, did so in self-defense, or in the necessary defense of his brother, H. Weil Edmundson. There is evidence, however, from which the jury could find that if the defendant cut the deceased as contended by the State, he did so, not from malice, but from sudden passion aroused by the assault which the deceased was then making upon his brother. In that case, the defendant is guilty of manslaughter and not of murder in the second degree. It was error to instruct the jury that if they should find that the defendant cut the deceased as contended by the State, they should return a verdict of guilty of murder in the second degree. The jury should have been instructed by the court that if they should find beyond a reasonable doubt that the defendant cut the deceased as contended by the State, and that the wound thereby inflicted upon the deceased caused his death, or was one of the contributing causes of his death, but should fail to find that the act of the defendant was malicious, they should return a verdict of guilty of manslaughter.

For this error, the defendant is entitled to a new trial. It is so ordered.

New trial.

MISS ELVA BRYAN v. ACME MANUFACTURING COMPANY.

(Filed 18 March, 1936.)

Pleadings C b—Matter alleged in reply held within limitations upon scope of reply imposed by statute.

Plaintiff brought action to cancel certain notes for failure of consideration, alleging that the notes were executed for tobacco fertilizer and that defendant furnished corn or cotton fertilizer, which was worthless to plaintiff, and that plaintiff did not discover that cotton fertilizer had been furnished until after she had attempted to use it. Defendant alleged in its answer that plaintiff had ordered through her agent cotton fertilizer as furnished, and offered in evidence the purported order signed by plaintiff's agent. Plaintiff filed a reply, as permitted by the court under a general order, in which she alleged that the signature of her agent to the order was procured by fraud, and that if the fertilizer furnished was cotton fertilizer, as alleged in defendant's answer, the fertilizer was tagged tobacco fertilizer, and was thus misbranded in contemplation of law. *Held:* The attack of the contract set up in the answer as a defense, on the ground of fraud, and the allegations that the fertilizer was misbranded contrary to law are not inconsistent with the complaint, but tend to constitute a defense to the new matter alleged in the answer and to amplify the original theory of the complaint that cotton fertilizer was furnished when plaintiff had ordered tobacco fertilizer, and the allegations of the reply were erroneously stricken out on defendant's motion, the allegations being within the limitations upon the scope of a reply imposed by statute, C. S., 525.

APPEAL by plaintiff from judgment sustaining a demurrer to certain allegations in plaintiff's reply entered by *Sinclair, J.*, at October Term, 1935, of LEE. Reversed.

This was a civil action, brought to cancel two notes aggregating $832.90, given by the plaintiff to the defendant, upon the ground that said notes were void for lack of consideration. It is alleged in the complaint that the notes were given for tobacco fertilizer, and that when the fertilizer furnished the plaintiff by the defendant was attempted to be used on a tobacco crop the discovery was made that it was corn and cotton fertilizer and unfit for use in growing tobacco, and was of no use and of no value to the plaintiff; and that the defendant well knew when the fertilizer was shipped that it was ordered for the purpose of being used on a tobacco crop, and that tobacco fertilizer and no other was ordered; and further, that it was not discovered by the plaintiff that she had been furnished by the defendant corn and cotton fertilizer instead of tobacco fertilizer until after the notes had been given and the attempt to use the fertilizer as aforesaid had been made.

Defendant filed answer and denied the lack of consideration for the aforesaid notes, and denied that plaintiff had ordered tobacco fertilizer at all, and alleged that a cotton fertilizer had been ordered by plaintiff

and was the subject of the sale. The defendant further filed a counterclaim for the amount of the notes mentioned in the complaint, and to rebut the allegation of lack of consideration therefor and to establish that a cotton fertilizer had actually been ordered, pleaded and set out what purported to be a copy of the written order and sales contract entered into between it and plaintiff's agent for the identical cotton fertilizer furnished, and of the kind and quality actually furnished.

The plaintiff, by leave of court, filed a reply wherein she denied that she or her agent had ever executed, or that her agent was ever authorized to execute, any order or contract for cotton fertilizer, or for the fertilizer actually furnished, and alleged that if the defendant held such an order or contract as it alleged, the same had been procured by fraudulently filling out as an order or contract for cotton fertilizer a form signed by her agent to be used for ordering tobacco fertilizer; and the plaintiff further alleged in her reply that the fertilizer which the defendant delivered to her was actually tagged as tobacco fertilizer and not as cotton fertilizer at all, and that the same was thereby misbranded in contemplation of law if it was cotton fertilizer as alleged in the answer.

Defendant filed demurrer to that portion of the reply alleging fraud in the procurement of the written order or contract for cotton fertilizer, and to that portion thereof alleging that the fertilizer furnished was tagged as tobacco fertilizer, and misbranded if the same was cotton fertilizer as alleged in the answer.

His Honor entered judgment sustaining the demurrer, and the plaintiff excepted and appealed, assigning as error the signing of this judgment.

K. R. Hoyle for plaintiff, appellant.
C. D. Hogue for defendant, appellee.

SCHENCK, J. The allegation in the reply that the purported order or contract for cotton fertilizer was procured by fraud was not demurrable upon the ground that it was inconsistent with the complaint or a departure from the original cause of action alleged. In *Houser v. Bonsal,* 149 N. C., 51, wherein the defense was set up that a judgment had been entered and paid and the reply of the plaintiff assailed the procurement of the judgment and the settlement thereof upon the ground of fraud, *Hoke, J.,* at page 57, says: ". . . Under our present system, where courts are empowered to administer full relief in one and the same action, when all the parties to be affected by the decree are before the court, and a judgment is set up in bar and directly assailed in the proceeding for fraud, this is a direct and proper proceeding to determine its validity." If a judgment set up in an answer as a defense may be

assailed for fraud when all the parties affected thereby are before the court, by the same token, an order or contract so set up, when all the parties thereto are in court, may be so assailed.

The allegation in the reply that the fertilizer furnished the plaintiff by the defendant was tagged tobacco fertilizer, when it was in truth cotton fertilizer, is "not inconsistent with the complaint," and tends to constitute "a defense to the new matter in the answer," and amplifies the original theory of the complaint, namely, that cotton fertilizer, a commodity valueless to the plaintiff, was furnished when tobacco fertilizer was ordered, and known by the defendant to have been ordered. McIntosh's N. C. Prac. and Proc., par. 479, pp. 510-11.

Winstead v. Acme Manufacturing Co., 207 N. C., 110, is differentiated from the instant case in that in the former case the court in its discretion denied the motion of the plaintiff to amend his complaint so as to allege that the order or contract was fraudulently filled in, whereas in the latter case the plaintiff filed a reply in which such fraud is definitely alleged as "a defense to the new matter in the answer." The order permitting its filing was general and placed no limitations upon the scope of the reply except those imposed by the statute, C. S., 525, and the reply is within the provisions of the statute.

The judgment sustaining the demurrer is

Reversed.

STATE v. ARTHUR THOMAS AND DIXIE BONDING COMPANY.

(Filed 18 March, 1936.)

1. Bail B e—The State is bound by the terms of a bail bond accepted by it.

In this action on an appearance bond it appeared that the bond stipulated that it should create a liability against a certain trust fund held by the trustees under a recorded declaration of trust, and that the bond should create no personal liability on the part of the trustees or any *cestui que trust*, and that the recorded trust agreement contained like stipulations against personal liability. Upon breach of the bond and execution against the trust fund being returned unsatisfied, the solicitor moved that the trustee signing the bond be made a party, alleging that the trust in fact created a partnership between the trustees, and that the trustee signing the bond was personally liable. *Held:* The State having accepted the bond, and having notice, both actual and constructive, of the provision against personal liability, is bound by the terms of the bond and may not hold the trustee signing the bond personally liable.

2. Same: Estoppel C d—

The State, claiming under an appearance bond, may not be heard to attack its validity.

3. Same—If appearance bond is void as being contrary to public policy, the bond is a nullity and no recovery may be had thereunder.

The appearance bond in this case stipulated that it should create liability against a certain trust fund, but that the trustees and *cestuis que trustent* should not be personally liable. The State contended that its provisions were void as being against public policy. *Held:* If the bond is void, as contended by the State, no recovery may be had thereunder, since in such event the bond is a nullity.

APPEAL by respondent C. C. Willis from *Harding, J.*, at October Term, 1935, of YANCEY. Reversed.

On 4 February, 1932, the defendant Arthur Thomas executed a bond in the sum of one thousand dollars, payable to the State of North Carolina, with the Dixie Bonding Company as his surety, conditioned for his appearance at the March Term, 1932, of the Superior Court of Yancey County, to answer the criminal charge made against him on this action. The bond was executed in the name of the Dixie Bonding Company by J. W. Bennett, trustee or agent, and contains a paragraph as follows:

"This bond, when signed by Dixie Bonding Company, by C. C. Willis or W. F. Rogers, or their duly authorized agent, shall create a liability against all of the trust fund held by the said trustees under a declaration of trust dated 14 August, A.D. 1923, and recorded in the office of the register of deeds for Buncombe County, North Carolina, Book of Deeds 273, at page 381, and shall not be a personal liability on the part of the trustees or any of the *cestuis que trustent.*"

Upon the failure of the defendant Arthur Thomas to make his appearance at the March Term, 1932, of the Superior Court of Yancey in accordance with the conditions of said bond, judgment was duly rendered in this action against the said defendant and the Dixie Bonding Company in favor of the State of North Carolina for the penal amount of said bond, to wit: One thousand dollars. Execution duly issued on said judgment has been returned wholly unsatisfied.

On 14 September, 1935, the solicitor for the State filed a petition in this action in which he alleged that the Dixie Bonding Company is a partnership, composed of C. C. Willis and others. He moved that the said C. C. Willis be made a party to the action, and that judgment be rendered against him personally on the bond executed and filed in this action by the defendant Arthur Thomas as principal and the Dixie Bonding Company as surety.

In response to notice served on him, the respondent C. C. Willis filed an answer to the petition, in which he denied that the Dixie Bonding Company is a partnership. He alleged that on .... August, 1923, Scott Dillingham, W. F. Rogers, and C. C. Willis, by an instrument in writing, signed by them and duly recorded in the office of the register of deeds of Buncombe County, created a trust under the name and style

of the Dixie Bonding Company; that he is one of the trustees named in said instrument, and that it is expressly provided therein that "neither the trustees nor the *cestuis que trustent* shall ever be personally liable hereunder as partners or otherwise, but that for all debts the trustees shall be liable as such to the extent of the trust fund only."

The court was of opinion that the trust agreement set up in respondent's answer, and offered in evidence by the plaintiff, is a partnership agreement, by which Scott Dillingham, W. F. Rogers, and C. C. Willis are engaged in business as partners, and accordingly ordered and adjudged that the plaintiff recover of the respondent C. C. Willis the sum of one thousand dollars, and the costs of the action.

The respondent excepted to the judgment and appealed to the Supreme Court, assigning error in the judgment.

Anglin & Randolph for plaintiff.
O. K. Bennett for respondent.

CONNOR, J. The State of North Carolina, having accepted the bond filed in this action by the defendant Arthur Thomas, is bound by its terms.

It is expressly stipulated in the bond that no personal liability is created by its execution as against the trustees named in the declaration of trust by which the Dixie Bonding Company was established, and by which it was authorized to execute civil or criminal bonds. Reference is made in the bond to the declaration of trust, as recorded in the office of the register of deeds of Buncombe County. It is expressly provided in the declaration of trust that "neither the trustees nor the *cestuis que trustent* shall ever be personally liable hereunder, as partners or otherwise, but that for all the debts the trustees shall be liable as such to the extent of the trust, only."

The State of North Carolina, at the time it accepted the bond, as obligee named therein, had notice, both actual and constructive, that the trustees named in the declaration of trust had not assumed personal liability under the bond. For this reason there is error in the judgment that the State of North Carolina recover of the respondent C. C. Willis, personally, the penal amount of the bond. See *Roberts v. Syndicate,* 198 N. C., 381, 151 S. E., 865.

The State claims under the bond. It cannot be heard to challenge its validity in this action. If the bond is void as against public policy, as contended in the argument and brief filed in this appeal on behalf of the State, the State cannot recover on the bond, which in that event is a nullity.

The judgment is

Reversed.

STATE v. JOHN HORNE.

(Filed 18 March, 1936.)

1. **Homicide G d: Criminal Law G i—Nonexpert may testify from observation as to sanity or insanity of defendant.**

Nonexpert witnesses are competent to testify from their observation of defendant that defendant was sound mentally, and where defendant in a homicide prosecution contends that he was mentally incapable of premeditation and deliberation, such testimony is properly admitted for the consideration of the jury upon the question.

2. **Homicide G d—Evidence of previous threats made by defendant held competent on question of premeditation and deliberation.**

The State's evidence tended to show that defendant and his wife had become separated because of defendant's mistreatment of her, that defendant was greatly upset by the separation, and sought to get his wife to return to him, and that after her refusal to return to him, he went to the place where she was working, made an unprovoked attack upon her, cutting her throat and causing her death. *Held:* Evidence that some four weeks before the homicide, and prior to their separation, defendant ran after his wife and threatened to cut her with a knife, is competent as tending to show a circumstance which the jury could properly consider on the question of premeditation and deliberation.

3. **Constitutional Law F a—**

The court's remarks to the jury in instructing them that defendant was within his rights in not testifying, and that his failure to testify should not be considered against him, are held without error upon defendant's exception. C. S., 1799.

APPEAL by defendant from *Harris, J.*, at September Term, 1935, of CHOWAN. No error.

The defendant John Horne was tried at the September Term, 1935, of the Superior Court of Chowan County on his plea of not guilty to an indictment charging him with the murder, on 14 August, 1935, in Chowan County, of his wife Nellie Horne. He was convicted of murder in the first degree.

From judgment that he suffer death by means of asphyxiation as prescribed by statute (chapter 294, Public Laws of North Carolina, 1935), the defendant appealed to the Supreme Court, assigning errors in the trial.

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

W. D. Pruden for defendant.

CONNOR, J. On his appeal to this Court, the defendant contends that there were errors in the trial of this action in the Superior Court which

entitle him to a new trial. He contends that there was error in the admission of evidence offered by the State, and in instructions of the court to the jury. These contentions cannot be sustained.

For some time prior to 14 August, 1935, the defendant and his wife were living separate and apart from each other. She was living with her parents at Edenton, N. C. His efforts to induce her to return to his home had been futile. Evidence offered by the State tended to show that the separation was caused by defendant's mistreatment of his wife. He insisted that her refusal to return to his home, and to resume marital relations with him, was the result of the influence of her parents upon her. From time to time he expressed his resentment of this situation.

Some time between 7 and 8 o'clock on the morning of 14 August, 1935, the defendant went into Edenton Cotton Mill, where he knew his wife was at work as an employee of the mill. After talking to her for a few minutes, without provocation he assaulted and killed her by cutting her throat with a razor. She died almost immediately after receiving the fatal wounds. After cutting his wife's throat, the defendant inflicted wounds on his own person, with suicidal intent. Evidence offered by the State tended to show that the homicide was murder in the first degree, the murder having been committed by the defendant, after premeditation and deliberation. See C. S., 4200. The defendant offered no evidence. He relied upon his contention that at the time of the homicide, he was incapable of premeditation and deliberation because of his mental condition, and that at most he was guilty of murder in the second degree only.

The evidence offered by the State, and admitted by the court over objections by the defendant and subject to his exceptions, tending to show that at the time of the homicide the defendant was of sound mind, and fully capable of premeditation and deliberation, was competent for that purpose. It is well settled as the law of this State that "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." *S. v. Keaton,* 205 N. C., 607, 170 S. E., 27.

The evidence offered by the State, and admitted by the court over objections by the defendant and subject to his exceptions, tending to show that about four weeks before the homicide, and before she had left his home, the defendant on one occasion ran after his wife and threat-

ened to cut her with a knife, was competent as tending to show a circumstance which the jury could properly consider as tending to show that the homicide was committed by the defendant after premeditation and deliberation, as contended by the State. *S. v. Foster,* 130 N. C., 666, 41 S. E., 284.

In his charge, the judge instructed the jury as follows:

"Now, gentlemen of the jury, the defendant did not see fit to offer any evidence. I charge you that he was within his rights in so doing. The law does not require the defendant to go on the stand as a witness. He has a right to sit mute and say nothing.

"Some people on the street say that if a defendant is not guilty, he will prove it, and will go on the stand for that purpose, but the law does not say so, and I charge you that you are not to consider the fact that the defendant did not go on the stand as a witness as any evidence of his guilt. The law says that he cannot be forced to go on the stand, and I so charge you."

We find no error in this instruction of which the defendant can complain. C. S., 1799.

As the trial of the action in the Superior Court is free from error prejudicial to the defendant, the judgment must be and is affirmed.

No error.

STATE v. PARKER HUSKINS, ROY WELDS, AND HARRY BURLESON.

(Filed 18 March, 1936.)

1. Criminal Law G c—

Defendant in a criminal prosecution may put his character in issue as substantive evidence of innocence, and this he may do without testifying in his own behalf, and even by cross-examination of a State's witness.

2. Criminal Law G r—

The cross-examination of a witness is not limited to matters elicited on his examination-in-chief, but may extend to and include any matter relevant to the inquiry.

3. Criminal Law L e—

The rule that an exception to the exclusion of testimony will not be considered where the record does not show what the answer of the witness would have been had he been permitted to testify, does not apply when the question is asked an adversary witness on cross-examination.

DEVIN, J., concurs in the result.

APPEAL by defendant Huskins from *Phillips, J.,* at September Term, 1935, of MITCHELL. New trial.

STATE *v.* HUSKINS.

This was a criminal action wherein the appellant and two others were tried upon a three-count bill of indictment charging (1) the felonious breaking and entering a storehouse where personal property was kept for the purpose of committing a felony, (2) larceny, and (3) feloniously receiving stolen goods knowing them to have been stolen. The codefendants of the appellant were convicted on the first count and did not appeal. The appellant, Parker Huskins, was convicted on the second count, larceny, and from judgment pronounced appealed to the Supreme Court, assigning errors.

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

Charles Hutchins and W. C. Berry for defendant, appellant.

SCHENCK, J. The State's witness, J. E. Guy, a member of the partnership whose goods were alleged to have been stolen, on cross-examination stated: "I have known Parker Huskins about four years." Whereupon, counsel for the defendant propounded the following question: "Do you know his general reputation?" To this question the State objected, and the court sustained the objection and refused to allow the witness to make answer. The defendant makes this ruling of the court the basis for exceptive assignment of error.

"It is the rule with us that the cross-examination of an adversary's witness is not necessarily confined to matters about which the witness has testified on his examination-in-chief, but may extend to and include any matter relevant to the inquiry. . . . The evidence then must be considered and dealt with as if it had come from plaintiff's witness, and this though it was in no way responsive to the testimony given in chief, and may tend only to support an affirmative defense." *Smith v. R. R.*, 147 N. C., 603.

"In all cases a person accused of a crime of any grade, whether a felony or a misdemeanor, has a right to offer in his defense testimony of his good character. . . . This right is not dependent upon the defendant having been examined as a witness in his own behalf, and was recognized long before defendants were made competent to testify." *S. v. Hice,* 117 N. C., 782. "In all criminal prosecutions, certainly those involving moral turpitude, the defendant may elect to put his character in issue, and thus produce evidence of his good reputation and standing in the community." *S. v. Colson,* 193 N. C., 236.

But it is contended by the State that although it may be competent for the defendant to put his character in issue without going upon the stand as a witness in his own behalf, and to show such character by cross-examination of a State's witness, and to have the evidence thus elicited

considered as substantive evidence upon the issue of his innocence or guilt, since the record does not disclose what the answer of the witness, had he been permitted to make answer, would have been to the question, "Do you know his (defendant's) general reputation?" the exception of the defendant can avail him nothing. While ordinarily the rule is that to afford the appellant any relief by reason of the court's refusal to allow answer to a question the record must disclose what the answer would have been, this rule does not apply when the question is asked upon cross-examination of a witness called by his adversary. This is so for the very sufficient reason that counsel for appellant cannot be charged with knowledge of what the answer of an adversary witness would be, and could not be expected to be able to state to the court what answer such witness would make. *Etheridge v. R. R., ante,* 326. However, lack of knowledge of what the witness might say does not deprive the defendant of his right under the law to put his character in issue and to show his general reputation as substantive evidence of his innocence, and to do this even by cross-examination of a State's witness if he is willing to take the hazard of an adverse answer.

The error in the court's refusal to allow the State's witness to make answer to the question as to whether he knew the defendant's general reputation entitles the defendant to a new trial, and renders it unnecessary for us to consider the other exceptions to the rulings upon the evidence and the charge.

New trial.

DEVIN, J., concurs in the result, but is of opinion that there was not sufficient competent evidence to go to the jury on the question of the guilt of defendant Huskins on the charge of larceny.

WALTON W. SMITH v. HENRY A. JOHNSON.

(Filed 18 March, 1936.)

Boundaries B b—Equitable matters may be set up by defendant in proceeding to establish boundary.

In a proceeding to establish a disputed boundary, C. S., 361, defendant filed answer denying the allegations of the petition, and alleging as a further answer and defense that the common grantor represented when the deeds were simultaneously executed that the boundary was as contended by defendant, and that if the deeds called for the boundary claimed by plaintiff, such boundary was inserted in the deeds by mutual mistake of the parties, and prayed that the common grantor be made a party

defendant and the deeds reformed, or that defendant recover from the common grantor damages suffered by reason of its representation of the boundary otherwise than as contained in the deeds. *Held:* The common grantor should have been made a party and the cause transferred to the civil issue docket for trial of the issues of fact raised by the answer, and judgment sustaining plaintiff's demurrer *ore tenus* to the further answer and defense and remanding the cause to the clerk for further proceedings, is erroneous. C. S., 363 (4), 758, 457.

APPEAL by the defendant from judgment sustaining demurrer *ore tenus* to further answer and defense and remanding the cause to the clerk, entered by *Sinclair, J.*, at September Term, 1935, of JOHNSTON. Reversed.

This proceeding was instituted under chapter 9 of the Consolidated Statutes, sections 361, *et seq.*, to establish the boundary line between the lands of the plaintiff and defendant, wherein the plaintiff alleges that he is the owner and entitled to the possession of certain lands contiguous to the lands of the defendant, and that the defendant is encroaching upon his lands and cultivating a part thereof, to his damage, and that the true boundary line between their lands is as set out in the complaint.

The defendant filed answer wherein he denies the allegations of the complaint, and sets up as a further answer and defense that there was a mutual mistake in the drafting of the deeds from the Home Insurance and Realty Company to the plaintiff and to the defendant, respectively, for the lands involved in this controversy, that the said deeds were simultaneously drawn and delivered to the plaintiff and defendant by said Home Insurance and Realty Company, the immediate predecessor in title of both the plaintiff and the defendant, and that said Home Insurance and Realty Company, through its properly constituted agents, represented to the plaintiff and to the defendant that the dividing line between the lands involved was located as alleged by the defendant, and that both the plaintiff and the defendant acted upon said representation in purchasing said lands, and if the dividing line contained in the deeds is located otherwise than as so represented, such location was inserted in the deeds by the mutual mistake of the Home Insurance and Realty Company and of both the plaintiff and the defendant. The defendant asked that the Home Insurance and Realty Company be made a party defendant, and that the true dividing line be adjudged to be as alleged in the further answer, or, in the event that it be not so adjudged that the defendant recover damages of said insurance and realty company suffered by reason of its representation that the boundary line was otherwise than contained in its deeds.

Subsequent to the filing of the answer and further defense, the clerk, upon motion of the defendant, found that there was involved in the

proceeding an issue of fact as to whether there had been a mutual mistake in the execution of the deeds by the Home Insurance and Realty Company to the plaintiff and to the defendant, respectively, and transferred the cause to the civil issue docket, and ordered that the Home Insurance and Realty Company be made a party defendant and that summons issue accordingly.

To the further answer and defense the plaintiff demurred *ore tenus*, and moved the court to remand the cause to the clerk for determination as provided by statute in processioning proceedings. The court sustained the demurrer and allowed the motion. From the ruling of the court the defendant appealed, assigning error.

E. J. Wellons for plaintiff, appellee.
Parker & Lee for defendant, appellant.

SCHENCK, J. C. S., 361, provides that when boundary lines are in dispute that they may be established by a special proceeding in the Superior Court of the county in which the land, or any part thereof, is situated. C. S., 363 (4), provides that the procedure in processioning proceedings shall be the same as in special proceedings. C. S., 758, provides that in special proceedings a defendant or other party thereto may plead any equitable or other defense, or ask any equitable or other relief in the pleadings which it would be competent to ask in a civil action, and that when such pleas are filed the clerk shall transfer the cause to the civil issue docket for trial during term upon all the issues raised by the pleadings. C. S., 457, provides that all persons may be made defendants who are necessary parties to the complete determination or settlement of the question involved.

It therefore appears that the plaintiff properly commenced this proceeding, C. S., 361, and that the procedure was that of special proceedings, C. S., 363 (4), and that it was competent for the defendant to plead the equitable relief of mutual mistake, and when this plea was filed the clerk properly transferred the cause to the civil issue docket, C. S., 758, and that the court was authorized to make the Home Insurance and Realty Company a party defendant, C. S., 457.

The allegation of mutual mistake of the Home Insurance and Realty Company, the common grantor of the plaintiff and defendant, and of the plaintiff and defendant as grantees in the deeds simultaneously executed and delivered to them by said insurance and realty company, raised an issue which the defendant was entitled to have submitted to the jury, and rendered erroneous the judgment sustaining the demurrer *ore tenus* to the further answer and defense and remanding the cause to the clerk.

Reversed.

ISABEL G. WRIGHT v. LYDIA J. PETTUS.

(Filed 18 March, 1936.)

1. States A c—

An action instituted in the courts of this State, involving an automobile accident occurring in another state, is governed by the laws of such other state.

2. Automobiles C j—

The liability of a driver to a gratuitous guest for injuries sustained in an accident occurring in the State of Virginia must be determined in accordance with the laws of the State of Virginia, which deny liability except in case of wanton or culpable negligence.

3. Negligence E a—

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.

4. Automobiles C j—Evidence held insufficient to establish wanton or culpable negligence of driver of car.

The evidence disclosed that defendant, the owner and driver of an automobile in which plaintiff was riding as a gratuitous passenger, attempted to pass two trucks going in the same direction upon the highway, that after the defendant had passed the first truck she saw a horse-drawn wagon approaching from the opposite direction, and that in the emergency, there being only thirty feet between the trucks, she attempted to pass the second truck before meeting the wagon by increasing her speed, that she passed the second truck without accident and swerved back to the right of the highway, but that the car then swerved back to the left and ran off the highway, resulting in the injuries in suit. *Held:* The evidence showed that defendant exercised her best judgment in the situation suddenly confronting her not only for the safety of plaintiff but for her own safety, and the accident having occurred in the State of Virginia and plaintiff's action being governed by the laws of that state denying recovery by a gratuitous passenger in the absence of wanton or culpable negligence, defendant's motion to nonsuit should have been allowed.

CLARKSON, J., dissents.

APPEAL by defendant from *Oglesby, J.*, at August Term, 1935, of BUNCOMBE. Reversed.

This is an action to recover damages for personal injuries suffered by the plaintiff when an automobile in which she was riding, and which was owned and driven by the defendant, left the highway and collided with a tree which was off the highway. The collision occurred in the State of Virginia.

In her complaint the plaintiff alleges that the collision and her resulting injuries were caused by the wanton or culpable negligence of the defendant in undertaking to pass a truck which was traveling on the

highway in the same direction as the automobile. This allegation is denied in the answer of the defendant. She alleges that the collision was the result of an accident which she could not have foreseen or prevented.

The issues submitted to the jury were answered as follows:

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

"2. If so, what damages, if any, is the plaintiff entitled to recover of the defendant? Answer: '$8,000.'"

From judgment that plaintiff recover of the defendant the sum of $8,000, and the costs of the action, the defendant appealed to the Supreme Court, assigning as error the refusal of the trial court to allow her motion for judgment as of nonsuit at the close of the evidence.

Zeb V. Curtis, P. C. Cocke, Sr., and P. C. Cocke, Jr., for plaintiff.

Smathers, Martin & McCoy for defendant.

CONNOR, J. At the trial the evidence for the plaintiff tended to show the following facts:

On 21 November, 1934, the plaintiff and the defendant left the home of the defendant in the city of Asheville, N. C., where the plaintiff had been for some time the guest of the defendant, in defendant's automobile, intending to drive to New York City, where both plaintiff and defendant hoped to secure employment. They were and had been for several years close and intimate friends. They had lived and worked together in New York City, where the plaintiff resided, and had taken trips together frequently in defendant's automobile. On these trips the automobile was driven sometimes by the plaintiff and sometimes by the defendant. Both plaintiff and defendant were competent drivers of an automobile.

At about 1:30 p.m., on 22 November, 1934, as they were traveling in defendant's automobile on a highway in the State of Virginia, they overtook two trucks which were traveling on the highway in the same direction as the automobile. The defendant, who was driving the automobile, turned to her left, and passed the first truck in safety. As they were passing the first truck, and before they had overtaken the second truck, they observed a wagon drawn by a pair of horses, approaching them from the opposite direction. At this time the wagon was at least 100 feet ahead of them. The distance between the two trucks was about 30 feet. In this situation the plaintiff said to the defendant: "You cannot make it." The defendant replied: "Yes, I can," and "stepped on the gas," thus causing the automobile to leave the paved surface of the highway and run a short distance on the shoulder. The defendant

turned the automobile to her right, drove across the highway and passed the second truck in safety. As the automobile passed from the left to the right of the highway, to avoid meeting the oncoming wagon and horses, it swerved from right to left, and ran off the highway and collided with a tree which was standing about 20 feet from the right edge of the highway. As the result of the collision, the plaintiff was thrown from the automobile, and thereby suffered serious and permanent personal injuries, on account of which she has sustained damages.

By her assignment of error on her appeal to this Court, the defendant presents her contention that there was no evidence at the trial of this action tending to show that the plaintiff's injuries, as shown by the evidence, were caused by the wanton or culpable negligence of the defendant as alleged in the complaint, and that for this reason there was error in the refusal of the trial court to allow her motion for judgment as of nonsuit at the close of the evidence for the plaintiff, no evidence having been offered by the defendant.

The cause of action on which the plaintiff seeks to recover in this action arose in the State of Virginia. It is admitted that at the time she was injured the plaintiff was riding in defendant's automobile as her gratuitous guest. The defendant's liability to the plaintiff in this action must be determined by the law of the State of Virginia, and not by the law of this State. *Wise v. Hollowell,* 205 N. C., 286, 171 S. E., 82. It is conceded that under the law of the State of Virginia the plaintiff is not entitled to recover of the defendant, unless her injuries were caused by the wanton or culpable negligence of the defendant. Culpable negligence has been defined by this Court as such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences, or a heedless indifference to the safety and rights of others. *S. v. Cope,* 204 N. C., 28, 167 S. E., 456.

In the instant case there was no evidence tending to show that defendant, at any time immediately before the plaintiff was injured, was heedless of plaintiff's safety or indifferent to her rights. On the contrary, all the evidence shows that in the situation which suddenly confronted her she exercised her best judgment as to the course she should pursue for the safety not only of the plaintiff but of herself. We are of opinion that there was error in the refusal of the trial court to allow defendant's motion for judgment as of nonsuit. For this reason, the judgment is

Reversed.

CLARKSON, J., dissents.

AVERY MILLER v. W. A. BUMGARNER, C. H. COLVARD, AND C. C. FAW.

(Filed 18 March, 1936.)

Limitation of Actions C a—Payment on note by maker without agreement for extension to definite time does not prevent bar as to endorsers.

Payment of interest and part payment of principal by the maker of a note, without agreement for extension of time for payment of the principal of the note for a definite period or to a date certain, does not prevent the running of the statute of limitations in favor of the endorsers, even though the note provides on its face for waiver by all parties to the note of extension of time for payment.

APPEAL by defendants Colvard and Faw from *Phillips, J.*, at October Term, 1935, of WILKES.

J. H. Whicker, John R. Jones, and J. M. Brown for plaintiff.
Trivette & Holshouser for defendants, appellants.

DEVIN, J. This was an action on a note for $350.00, due 25 August, 1926, executed by defendant Bumgarner, and endorsed by defendants Colvard and Faw.

Defendant Bumgarner filed no answer, but the endorsers set up the defense of release by extension of the time for payment, and pleaded the statute of limitations.

The note contained these words: "Protest, presentment, notice of dishonor, extension of time of payment waived by all parties to this note." On the back of the note appear the signatures of the appealing defendants and the following credits: "May 25, 1927, int. paid, $15.00; Nov. 29, 1927, received on principal, $125.00; Jan. 7, 1928, $50.00; May 20, 1930, on interest, $2.00."

Suit was instituted 21 May, 1932.

On the trial below there was a verdict and judgment for plaintiff.

Construing similar extension agreements in negotiable instruments, in *Wrenn v. Cotton Mills,* 198 N. C., 89, this Court said: "By the terms of this contract defendants waived such notice (notice of dishonor); also they waived defenses based upon an extension of time of payment. The latter waiver, however, imports a legal extension of time which would be effective against the defendants. Granting that time of payment may be extended, . . . we are confronted by the general rule that such an agreement must fix a definite time when payment is to be made. The time thus agreed on should be as definite as that which is required when the note is originally executed."

And in *Corporation Commission v. Wilkinson,* 201 N. C., 344, it is said: "In order to bind the endorsers two things are essential to such an

agreement: (1) Waiver of the defense that the time of payment has been extended; (2) mutual assent to a definite time when payment is to be made."

In the recent case of *Bank v. Hessee,* 207 N. C., 71, *Brogden, J.,* thus clearly states the law: "Ordinarily payments made by a principal will not deprive an endorser of the benefit of the defense of the bar of the statute of limitations. *Houser v. Fayssoux,* 168 N. C., 1; *Franklin v. Franks,* 205 N. C., 96. This principle, however, does not apply when the endorser has consented in the body of the instrument itself to such extensions; provided, of course, that such extensions are for definite periods of time. *Revell v. Thrash,* 132 N. C., 803."

In the case at bar the only competent evidence of agreements for extensions of time for payment is that implied by the credits on the note. While these credits would prevent the bar of the statute as to the principal, they are not for definite periods of time, nor do they fix a definite time when payment is to be made, so as to bring this case within the rule laid down in the cited cases.

It follows that the action as to the appealing defendants, who were accommodation endorsers, is barred by the statute of limitations, and that they were entitled to have their motion for nonsuit allowed.

Reversed.

NEW AMSTERDAM CASUALTY COMPANY v. E. R. DUNN AND WIFE, LOUIE E. DUNN.

(Filed 18 March, 1936.)

Homestead D b—Homestead right held not forfeited by failure to assert same until after judgment decreeing sale of land.

Defendant allowed judgment by default to be taken against him in an action to set aside his deed as being fraudulent as to creditors, the deed embracing practically all property of defendant, real or personal. Judgment was entered that the deed be set aside and a commissioner was appointed to sell the land, and the cause retained. Prior to sale, defendant prayed that his homestead be allotted in the land. *Held:* The right to the homestead exemption guaranteed by the Constitution, Art. X, sec. 2, is not forfeited by a fraudulent conveyance, and the judgment was properly modified by order directing that defendant be allotted his homestead in the land which should be exempt from sale by the commissioner.

APPEAL by plaintiff from *Hill, Special Judge,* at November Term, 1935, of JOHNSTON. Affirmed.

Plaintiff creditor brought its action to set aside as fraudulent a conveyance by defendant E. R. Dunn to his wife. The land so conveyed

constituted practically all the property, real or personal, then owned by defendant E. R. Dunn. Defendants are residents of Johnston County. No answer was filed.

On the trial at April Term, 1935, before Small, J., there was a verdict for plaintiff and judgment thereon that the conveyance was fraudulent, and that the land was held in trust for creditors, and a commissioner was appointed with directions to sell the land and to report his proceedings to a subsequent term of court. It was further decreed that the case be retained upon the docket for further orders.

Prior to the advertised date of sale defendants filed a motion in the cause asking the court to set aside the judgment on the ground of excusable neglect, and "that in event the judgment is not set aside the defendant E. R. Dunn be allotted his homestead exemption in said land."

Upon examination of the judgment roll, together with defendants' affidavit and motion, it was held by the court below that the effect of the former judgment was to set aside the deed as being in fraud of creditors, and that defendant E. R. Dunn was entitled to have his homestead allotted in said land, and ordered that the former judgment be modified so that homestead be allotted said E. R. Dunn in accordance with the provisions of the Constitution and statutes relative to homestead, and that the commissioner be permitted to sell only such part of said land as should not be allotted to defendant as his homestead exemption.

The plaintiff excepted to the judgment and appealed to this Court.

Parker & Lee for plaintiff, appellant.
L. L. Levinson for defendants, appellees.

DEVIN, J. The only question presented here is whether the judgment decreeing a sale of the debtor's land may be modified so as to permit the allotment of a homestead therein.

The Constitution of North Carolina (Art. X, sec. 2) provides that "Every homestead . . . owned and occupied by any resident of this State and not exceeding the value of one thousand dollars, shall be exempt from sale under execution or other final process obtained on any debt," and this homestead "to be selected by the owner thereof."

The right to the homestead exemption is guaranteed to every resident of North Carolina by the Constitution, and this right is not forfeited by a fraudulent conveyance. *Grocery Co. v. Bails,* 177 N. C., 298; *Rose v. Bryan,* 157 N. C., 173. Nor by a fraudulent assignment. *Whitmore v. Hyatt,* 175 N. C., 117.

The authorities cited by plaintiff (*Cooper v. McKinnon,* 122 N. C., 450, and *Powell v. Lumber Co.,* 153 N. C., 59) construed sections 967,

et seq., of the Revisal of 1905, which were not brought forward in the Consolidated Statutes.

The allowance of defendant's motion for the allotment of his homestead in the land described and the modification of the decree of sale protecting that constitutional right cannot be held for error.

Affirmed.

S. A. STEVENS v. CORNELIA VANDERBILT CECIL.

(Filed 18 March, 1936.)

1. Principal and Agent C a—General manager of principal's dairy held without implied authority to make contract to employ plaintiff for life.

Plaintiff declared on an alleged contract of employment for life made on defendant's behalf by her agent. *Held:* In the absence of evidence tending to show the authority of the agent to make the alleged contract or ratification of same by defendant, defendant's motion to nonsuit should have been allowed.

2. Appeal and Error J g—

Where it is determined on plaintiff's appeal that defendant's motion to nonsuit should have been allowed, defendant's appeal from the ruling of the court on her exceptions taken in the county court need not be considered.

APPEAL by both plaintiff and defendant from *Oglesby, J.*, at December Term, 1935, of BUNCOMBE. Affirmed in plaintiff's appeal; defendant's appeal dismissed.

This is an action to recover damages for the breach of a contract by which the defendant, for a valuable consideration, agreed to employ plaintiff for his life, and to pay him the sum of $4.00 per day so long as he shall live.

The plaintiff alleges in his complaint that the contract alleged therein was made with him, on behalf of the defendant, by Frank Daly, superintendent and manager of the Biltmore Dairy, which was owned and operated by the defendant at the time the alleged contract was made. This allegation is denied by the defendant. She expressly denies in her answer that Frank Daly, as superintendnt and manager of the Biltmore Dairy, was authorized by her to make the contract alleged in the complaint on her behalf. She pleads in bar of plaintiff's recovery in this action the three-year statute of limitations.

The action was begun and tried in the general county court of Buncombe County.

Issues submitted to the jury were answered as follows:

"1. Is the plaintiff's cause of action barred by the statute of limitations? Answer: 'No.'

"2. Did the defendant Cornelia Vanderbilt Cecil agree and contract with the plaintiff to employ the plaintiff for his life, as alleged in the complaint? Answer: 'Yes.'

"3. If so, did the defendant Cornelia Vanderbilt Cecil breach such contract and agreement? Answer: 'Yes.'

"4. What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: '$10,000.' "

From judgment that plaintiff recover of the defendant the sum of $10,000, and the costs of the action, the defendant appealed to the Superior Court of Buncombe County, assigning numerous errors in the trial.

At the hearing of defendant's appeal, the judge of the Superior Court sustained defendant's assignment of error based upon her exception to the refusal of the trial court to dismiss the action by judgment as of nonsuit, and overruled assignments of error based upon other exceptions taken during the trial.

From judgment reversing the judgment of the general county court, and dismissing the action, both the plaintiff and the defendant appealed to the Supreme Court, each assigning errors in the rulings of the judge of the Superior Court at the hearing of defendant's appeal from the judgment of the general county court.

Don C. Young and Jones & Ward for plaintiff.
Adams & Adams for defendant.

CONNOR, J. An examination of all the evidence at the trial of this action in the general county court fails to disclose any evidence tending to show that Frank Daly, superintendent and manager of the Biltmore Dairy, which was owned and operated by the defendant, at the time the contract alleged in the complaint was made by him with the plaintiff, as testified by the plaintiff, was authorized by the defendant to make said contract. There was no evidence at the trial tending to show that the defendant had ratified said contract, and thereby become bound to perform the same. For this reason, there was no error in the ruling of the judge of the Superior Court sustaining defendant's assignment of error based on her exception to the refusal of the trial court to allow her motion, at the close of all the evidence, for judgment dismissing the action as of nonsuit. See *Stephens v. Lumber Co.*, 160 N. C., 107, 75 S. E. 933. The judgment of the Superior Court, which is in accord with this ruling, is affirmed.

As the judgment dismissing the action is affirmed, the defendant's appeal need not be considered. It is dismissed. *Beard v. Sovereign Lodge,* 184 N. C., 154, 113 S. E., 661.

Affirmed in plaintiff's appeal.

Defendant's appeal dismissed.

GURNEY P. HOOD, COMMISSIONER OF BANKS, EX REL. NORTH CAROLINA BANK AND TRUST COMPANY, v. R. T. PITTMAN AND HIS WIFE.

(Filed 18 March, 1936.)

Banks and Banking H d—Defendant may set up counterclaim in action by Commissioner of Banks without showing that notice of claim was given.

While, in an action against the Commissioner of Banks on a claim against a bank in course of liquidation, it is necessary that plaintiff allege and prove demand on defendant for the payment of the claim, in an action instituted by the Commissioner of Banks on a note executed to the bank by defendants, defendants may set up breach of contract by the bank resulting in unliquidation damages as an offset against the note sued on without showing that notice of the claim was given, prior to the institution of the action, to the bank or the liquidating agent.

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

APPEAL by plaintiffs from *Moore, Special Judge,* at April Term, 1935, of EDGECOMBE. No error.

This is an action to recover on a note executed by the defendants and payable to the order of the North Carolina Bank and Trust Company.

The defendants admitted the execution of the note sued on and pleaded as a counterclaim to said note damages which they had sustained, as the result of the breach of a contract by which the North Carolina Bank and Trust Company had agreed to advance to the defendant R. T. Pittman the sum of $1,000, to enable the said defendant to cultivate a farm in Edgecombe County during the year 1933.

The issues submitted to the jury were answered as follows:

"1. In what amount are the defendants indebted to the plaintiffs on account of the note sued on? Answer: '$1,468, with interest from 28 February, 1933.'

"2. Did the plaintiff North Carolina Bank and Trust Company breach its contract with the defendant R. T. Pittman? Answer: 'Yes.'

"3. If so, what damages has the defendant R. T. Pittman sustained by reason of said breach? Answer: '$775.00.' "

From judgment that plaintiffs recover of the defendants the sum of $820.09, and the costs of the action, the plaintiffs appealed to the Supreme Court, assigning as errors the overruling of their demurrer to the answer, and the refusal of the trial court to allow their motion for judgment as of nonsuit on defendants' counterclaim.

Gilliam & Bond for plaintiffs.
H. D. Hardison and H. H. Philips for defendants.

CONNOR, J. Neither of the assignments of error on this appeal can be sustained.

The demurrer was properly overruled. There was no error in the refusal of the trial court to allow plaintiffs' motion for judgment as of nonsuit on defendants' counterclaim.

Neither *Buncombe County v. Hood, Comr.*, 202 N. C., 792, 164 S. E., 370, nor *Child v. Hood, Comr.*, 203 N. C., 648, 166 S. E., 809, is applicable to the instant case. In each of those cases the plaintiff had failed to allege in his complaint that he had made demand on the defendant for the payment or allowance of his claim before the commencement of the action. On demurrer to the complaint, it was held that such failure was fatal. The instant case was begun by the Commissioner of Banks. The defendants were not required to allege in their answer or to show at the trial that they had given notice to the plaintiffs of their claim for unliquidated damages, resulting from breach of contract, which included the execution of the note sued on, prior to the commencement of the action. See *Sugg v. Greenville*, 169 N. C., 606, 86 S. E., 695.

The judgment is affirmed.

No error.

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

ELIZABETH M. HARRELL v. CARL GOERCH AND "THE STATE."

(Filed 18 March, 1936.)

1. Libel and Slander D d—Evidence held sufficient to overrule motion to nonsuit in this action for libel.

Plaintiff instituted this suit for libel against a magazine and the publisher thereof, and introduced evidence that an article published in the magazine tended to hold her up to ridicule and contempt by charging she kept a number of dogs in her house under conditions which would make her place insanitary and her manner of living indecent. Defendants did

not plead privilege, justification, or mitigating circumstances, C. S., 542. *Held:* The granting of defendants' motion to nonsuit was error, since plaintiff has showed the article to be libelous, and since, on the state of the pleadings, it is immaterial whether the article was libelous *per se* or only *per quod*.

2. Limitation of Actions E c—

Where, in an action for libel, defendants admit that the article was published in defendant magazine on a certain date, and plaintiff shows that the action was instituted one day less than a year thereafter, defendant is not entitled to nonsuit upon his plea of the one-year statute of limitations, C. S., 443 (3).

3. Trial D a—

On motion to nonsuit, the evidence is to be taken in its most favorable light for the plaintiff.

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

APPEAL by plaintiff from *Moore, Special Judge,* at October Term, 1935, of HALIFAX.

Civil action for libel.

There was allegation and evidence on the part of the plaintiff tending to show that on 14 October, 1933, the defendant published in "The State," a journal or magazine published by Carl Goerch, a libelous and defamatory article, in that it is therein asserted the plaintiff kept a large number of dogs in the house in which she lived, under such conditions as to make her place insanitary and her manner of living indecent, thus holding her up to the ridicule and contempt of the community; that more than five days before the institution of this action the plaintiff served notice in writing on the defendant as required by C. S., 2429, specifying the article and statements therein which she alleged to be false and defamatory; and that she has suffered damages by reason of said publication. The action was commenced by the issuance of summons on 13 October, 1934.

The defendants admit in their answer that the article complained of "appeared in the issue of the aforesaid magazine on 14 October, 1933." They further allege that the publication was in good faith and without any intent to injure or in any way to ridicule the plaintiff. They also pleaded the one-year statute of limitations.

From a judgment of nonsuit, entered at the close of all the evidence, plaintiff appeals, assigning error.

Gulley & Gulley for plaintiff.
Bunn & Arendell for defendants.

STACY, C. J. As the article was shown to be libelous, *Brown v. Lumber Co.,* 167 N. C., 9, 82 S. E., 961, and the defendants have not pleaded

privilege, justification, or mitigating circumstances, C. S., 542, it was error to withhold the case from the jury. *Alley v. Long, ante,* 245; *Hartsfield v. Hines,* 200 N. C., 356, 157 S. E., 16; *Gudger v. Penland,* 108 N. C., 593, 13 S. E., 168; *Broadway v. Cope,* 208 N. C., 85; McIntosh, Practice and Procedure, 365; 17 R. C. L., 401.

Nor can the nonsuit be sustained on the theory the action was not brought within the statutory period of one year. C. S., 443 (3). It is admitted in the answer that the publication appeared in the issue of the defendant magazine "on 14 October, 1933." This action was commenced by the issuance of summons on 13 October, 1934. *Morrison v. Lewis,* 197 N. C., 79, 147 S. E., 729; McIntosh, *supra,* 293, *et seq.*

Whether the article should be regarded as libelous *per se* or only *per quod* is not material on the motion to nonsuit, as the evidence was sufficient to carry the case to the jury in either view, considering the state of the pleadings. *Oates v. Trust Co.,* 205 N. C., 14, 169 S. E., 869; *Pentuff v. Park,* 194 N. C., 146, 138 S. E., 616.

On motion to nonsuit, the evidence is to be taken in its most favorable light for the plaintiff. *Nash v. Royster,* 189 N. C., 408, 127 S. E., 356.

Reversed.

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

RACHEL E. BLACK, ADMINISTRATRIX, v. RUTH TREMBLY.

(Filed 18 March, 1936.)

Wills E b—Judgment that legatee of life estate in personalty might use part of corpus held without error on remainderman's appeal.

Judgment that a bequest of personalty to testator's wife, "to be used as she sees fit," and at her death to go to testator's daughter if living, and if not, to testator's brother and sisters, gave the wife the right to use not only the income, but also so much of the principal thereof as should be necessary for her comfort and support, *is held* without error upon the appeal of the daughter. As to whether a limitation over after a life estate may be created in personalty by executory devise, *quære?*

APPEAL by defendant from *Harding, J.,* at November Term, 1935, of HENDERSON.

Civil action, brought by administratrix *c. t. a.* of the estate of E. R. Black, to obtain a construction of the testator's will and for guidance in the discharge of her duties.

The only clause in the will submitted for construction is as follows:

"That I will all of my personal and real estate to my wife, Rachel E. Black, to be used as she sees fit, and at the expiration of her life to go to my daughter Ruth, if she is living, if she is not living, to go to my sisters and brother."

The defendant is the daughter of the testator mentioned in the will.

The testator also left him surviving one brother and three sisters.

The estate is not large; it consists of personal property; the major portion of which is common stocks of various corporations. There is no real estate.

The trial court being of opinion "the testator intended by the said will that his widow should have the right to hold the said personal property and to use, not only the income, but also so much of the principal or *corpus* thereof as might be necessary for her comfort and support," entered judgment accordingly, from which the defendant appeals, assigning error.

Thomas H. Franks for plaintiff.

Charles French Toms, Sr., for defendant.

STACY, C. J. It would seem that under the decision in *Jordan v. Sigmon,* 194 N. C., 707, 140 S. E., 620, the defendant is in no position to complain at the judgment entered below. Compare *Speight v. Speight,* 208 N. C., 132, 179 S. E., 461.

The cases cited by appellant, *Dixon v. Hooker,* 199 N. C., 673, 155 S. E., 567, and *Allen v. Smith,* 183 N. C., 222, 111 S. E., 11, were given due weight by the trial court. They are not controlling on the facts presently presented.

Affirmed.

J. W. ALLEN ET AL. v. EULA ALLEN ET AL.

(Filed 18 March, 1936.)

Deeds B a—

Deeds of gift executed and delivered by the grantors in escrow and therefore not registered by the grantees within two years thereafter, are void under the terms of the statute, C. S., 3315.

APPEAL by plaintiffs from *Phillips, J.,* at December Term, 1935, of YADKIN.

Civil action to remove cloud from title, *i.e.,* to declare deeds of gift void, and to have plaintiffs and defendants declared tenants in common of certain lands.

The facts are these:

1. On 20 April, 1928, T. W. Allen and wife decided to divide their lands among their children.

2. Plaintiffs were given a deed for the "Martin Place," which their mother owned, and they went into immediate possession.

3. Deeds for other lands (here in controversy) were duly executed to the defendants and delivered to J. N. Davis, son-in-law of grantors, "to be by him held in escrow until after the death of the grantors and then to be delivered to the grantees."

4. T. W. Allen died 11 January, 1935, his wife having predeceased him, and on 14 January, 1935, J. N. Davis delivered the deeds in question to defendants, grantees therein, who caused them to be registered.

From judgment upholding validity of deeds to defendants, the plaintiffs appeal, assigning errors.

C. F. Burns, Hastings & Booe, Peyton B. Abbott, and Richmond Rucker for plaintiffs.

Avalon E. Hall for defendants.

STACY, C. J. It is provided by C. S., 3315, that deeds of gift "shall within two years after the making thereof be proved in due form and registered, or otherwise shall be void." It is conceded that if the delivery in escrow completed the "making" of said deeds, they were not registered within two years thereafter. The defendants say delivery was not complete, and registration by them not possible, until said deeds actually came into their possession. This position prevailed below.

The position of the defendants, however appealing, overlooks the effect of a delivery in escrow and the terms of the statute. 18 C. J., 208. "Where a deed is deposited as an escrow to take effect upon the death of the grantor, the general rule is that the deed is immediately operative as against the grantor." 21 C. J., 889; *Fortune v. Hunt,* 149 N. C., 358, 63 S. E., 82; *Buchanan v. Clark,* 164 N. C., 56, 80 S. E., 424.

The deeds of the defendants being deeds of gift, and admittedly not registered "within two years after the making thereof," are void under the terms of the statute, C. S., 3315. *Booth v. Hairston,* 193 N. C., 278, 136 S. E., 879 (on rehearing, 195 N. C., 8, 141 S. E., 480); *Reeves v. Miller, ante,* 362.

The question of advancements, mentioned on the argument, is not presented by the appeal. *Paschal v. Paschal,* 197 N. C., 40, 147 S. E., 680; *Lunsford v. Yarborough,* 189 N. C., 476, 127 S. E., 426; *Thompson v. Smith,* 160 N. C., 256, 75 S. E., 1010; *Nobles v. Davenport,* 183 N. C., 207; 1 Am. Jur., 715.

New trial.

C. A. HARDY, ADMINISTRATOR OF PAUL G. HARDY, v. DR. OLIVER DAHL.

(Filed 18 March, 1936.)

Pleadings I a—

The trial court may refuse to strike out certain paragraphs of the complaint on motion when the matter may be better determined by rulings upon the competency of evidence, if and when offered.

APPEAL by the defendant from an order entered by *Harding, J.*, at November Term, 1935, of HENDERSON, allowing in part and disallowing in part defendant's motion to strike from the complaint various and sundry allegations therein contained. Affirmed.

R. L. Whitmire and O. B. Crowell for plaintiff, appellee.
Redden & Redden for defendant, appellant.

PER CURIAM. This is an action to recover damages for the death of the plaintiff's intestate, alleged to have been caused by the wrongful and negligent acts of the defendant in purporting to treat said intestate while ill with diphtheria. The complaint is rather long and elaborate and the judge of the Superior Court held that some of the allegations of the complaint assailed by the motion should be stricken therefrom. To this portion of the order there was no exception. The judge, however, was evidently of the opinion that the other allegations of the complaint assailed by the motion to strike could better be determined by rulings upon the competency of the evidence, if and when offered, than by undertaking to chart the course of the trial by passing upon allegations as yet undenied, and for this reason disallowed the motion in part. In this we see no error. *Pemberton v. Greensboro,* 205 N. C., 599. The order appealed from is accordingly

Affirmed.

SHERMAN ANDERSON v. C. H. HOLLAND.

(Filed 18 March, 1936.)

Appeal and Error J a—

The discretionary order of the trial court entered at the term of the trial setting aside the verdict as being contrary to the weight of the evidence is not reviewable, and an appeal therefrom will be dismissed in the absence of abuse of discretion. C. S., 591.

LANGE *v.* EVANS.

APPEAL from *Phillips, J.*, at October Term, 1935, of WILKES. Dismissed.

J. M. Brown and Bowie & Bowie for plaintiff, appellee.
T. E. Bingham and Trivette & Holshouser for defendant, appellant.

PER CURIAM. Civil action wherein plaintiff alleged that he was injured by the negligence of the defendant in causing a collision of his automobile with the automobile of the defendant, and the defendant alleged the contributory negligence of the plaintiff. The jury answered the first issue as to negligence in favor of the plaintiff and the second issue as to contributory negligence in favor of the defendant. The defendant presented judgment to the effect that the plaintiff recover nothing, which the court declined to sign, and made the following entry: "The plaintiff requests the court in its discretion to set aside the verdict as being contrary to the greater weight of the evidence. The court in its discretion sets aside the verdict and orders new trial. When the court exercises its discretion in setting aside the verdict as being contrary to the weight of the evidence the defendant objects and excepts, and in open court gives notice of appeal to the Supreme Court."

The defendant makes as his only assignment of error the action of the court in declining to sign the judgment presented and in ordering the verdict set aside.

Where the trial judge, at the same term at which the trial is had, sets aside a verdict in his discretion as being contrary to the weight of the evidence his action is not subject to review on appeal, and, in the absence of abuse of discretion, an appeal therefrom will be dismissed. C. S., 591. *Goodman v. Goodman*, 201 N. C., 808, and cases there cited.

Appeal dismissed.

ANNIE E. LANGE v. W. L. EVANS.

(Filed 18 March, 1936.)

Landlord and Tenant D b—

Where the lessee forfeits and surrenders all rights under his lease, the lessor may recover the premises from a sublessee of the lessee, even though the sublease has not terminated under its terms.

APPEAL by defendant from *Oglesby, J.*, at September Term, 1935, of BUNCOMBE. No error.

VANNOY *v.* STAFFORD.

This is a summary action in ejectment, tried in the Superior Court of Buncombe County on plaintiff's appeal from a judgment of the justice of the peace of said county before whom the action was originally tried.

The issues submitted to the jury were answered as follows:

"1. Is the plaintiff entitled to the possession of the premises, as alleged in the affidavit? Answer: 'Yes.'

"2. What amount of rent, if any, is the plaintiff entitled to recover of the defendant? Answer: 'The amount due and unpaid, $64.00, on the basis of $16.00 per month up to the date of the Superior Court trial, but we think that defendant should be credited on rent with reasonable payment covering cost of improvements which he placed in building.'"

In the exercise of his discretion, the judge presiding set aside the answer to the second issue and ordered a new trial of said issue.

From judgment that plaintiff recover of the defendant possession of the premises described in the affidavit, the defendant appealed to the Supreme Court, assigning errors in the trial.

Weaver & Miller, Ford, Coxe & Carter and James S. Howell for plaintiff.

Sale, Pennell & Pennell and George C. Franklin for defendant.

PER CURIAM. The plaintiff is the owner in fee of the premises described in the affidavit filed in this action. The defendant is in possession of said premises, claiming as a sublessee of the lessee of the plaintiff. At the date of the commencement of the action the sublease had not expired. However, prior to said date, the lessee of the plaintiff, under whom the defendant claims, had forfeited and surrendered all his rights under the original lease.

On these facts shown by all the evidence, there was no error in the trial. The judgment is

Affirmed.

R. G. VANNOY v. MRS. E. F. STAFFORD, ADMINISTRATRIX OF ESTATE OF E. F. STAFFORD, DECEASED.

(Filed 18 March, 1936.)

1. Bills and Notes G f—

An extension of time for payment of a note will not discharge an endorser when the note provides on its face that extension of time for payment is waived by all parties to the note, the endorser being a "party" to the note, C. S., 3092.

2. Evidence D b—

An attorney formerly holding a note for collection is not an interested party in an action on the note within the meaning of C. S., 1795, prohibiting testimony by interested parties as to transactions with or declarations of a decedent.

APPEAL by defendant from *Phillips, J.*, at October Term, 1935, of WILKES. No error.

John R. Jones and J. M. Brown for plaintiff, appellee.
Trivette & Holshouser and J. H. Whicker for defendant, appellant.

PER CURIAM. This was an action against the endorser of a note and was resisted on the ground of release by an extension of the time for payment. On the face of the note appears the following: "Protest, presentment, notice of dishonor, and extension of time of payment waived by all parties to this note."

These words constituted a waiver by defendant's intestate, who was a "party" to the note as an endorser. C. S., 3092; *Bank v. Hessee,* 207 N. C., 71; *Corp. Com. v. Wilkinson,* 201 N. C., 344.

Defendant also excepted to the testimony of an attorney, who had formerly held the note for collection, as to declarations of defendant's intestate to him, but C. S., 1795, disqualifies "only such as have a direct and substantial, or a direct legal or pecuniary interest in the result" (*Jones v. Emory,* 115 N. C., 158), and does not apply to an attorney. *Propst v. Fisher,* 104 N. C., 214; *Hall v. Holloman,* 136 N. C., 34.

No error.

L. GRADY AND J. W. OUTLAW, SR., ON BEHALF OF THEMSELVES AND ALL OTHER INTERESTED PERSONS WHO MAY COME IN AND MAKE THEMSELVES PARTIES, v. HENRY F. GRADY.

(Filed 18 March, 1936.)

Highways E a—

Persons living along a highway which had been taken over by the State Highway Commission, and subsequently abandoned by it, are "interested citizens" within the meaning of ch. 302, Public Laws of 1933, and may maintain a proceeding to have the road established as a "neighborhood public road."

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

GRADY *v.* GRADY.

APPEAL by defendant from *Devin, J.,* at October Term, 1935, of WAYNE. Affirmed.

This is a special proceeding, begun before the clerk of the Superior Court of Wayne County on 1 March, 1935, and heard at October Term, 1935, of said court, on defendant's appeal from an order of said clerk overruling a demurrer to the petition filed by the defendant.

From judgment affirming the order of the clerk, and remanding the proceeding for further proceedings according to law, the defendant appealed to the Supreme Court.

Dickinson & Bland for petitioners.

J. Faison Thomson for defendant.

PER CURIAM. On the facts alleged in the petition in this proceeding, the road leading from the town of Mount Olive to Outlaw's School, in Wayne County, is a "neighborhood public road," as defined by statute, chapter 302, Public Laws of North Carolina, 1933.

The petitioners are residents of Wayne County, living on said road, and are therefore "interested citizens," within the meaning of the statute. They are therefore entitled to maintain this proceeding.

The purpose of the proceeding is to have the old Mount Olive Road, in Wayne County, which was taken over by the State Highway Commission, under the provisions of chapter 145, Public Laws of North Carolina, 1931, and subsequently abandoned for purposes of maintenance by said Commission under the provisions of chapter 448, Public Laws of North Carolina, 1931, as amended by chapter 302, Public Laws of North Carolina, 1933, established by the clerk of the Superior Court of Wayne County, as a "neighborhood public road," as provided by statute.

The judgment affirming the order of the clerk overruling the demurrer to the petition is affirmed. See *In re Petition of Edwards,* 206 N. C., 549, 174 S. E., 505, and *Davis v. Alexander,* 202 N. C., 130, 162 S. E., 372.

Affirmed.

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

TOWN OF BENSON, A MUNICIPAL CORPORATION, v. COUNTY OF JOHNSTON.

(Filed 8 April, 1936.)

1. Taxation B d—Property acquired by municipality by tax foreclosure and rented by it held not exempt from county taxation.

Plaintiff municipality acquired certain property within its corporate limits by tax foreclosure. After acquisition of the property the municipality rented same, and received the rents therefrom. The county levied *ad valorem* taxes against the property, and the municipality contended that the property was exempt from taxation from the date the municipality acquired title. *Held:* The property is liable for the county taxes, since it is not used by the city for a governmental purpose, and therefore does not come within the constitutional provision for the exemption of property from taxation, N. C. Constitution, Art. V, sec. 5, or within the scope of the statutes enacted pursuant thereto. N. C. Code, 7880 (2), (177).

2. Same—

Exemptions of property from taxation are to be strictly construed.

DEVIN, J., dissenting.

APPEAL from *Daniels, Emergency Judge,* at February Term, 1936, of JOHNSTON. Affirmed.

This is a controversy without action, N. C. Code, 1935 (Michie), sec. 626. The agreed statement of facts is as follows:

"1. The town of Benson, North Carolina, is a municipal corporation, created by an act of the General Assembly of North Carolina, chapter 63, Private Laws of 1915, and is vested with all the rights conferred by its charter and by the statutory law of North Carolina pertaining to municipal corporations. The county of Johnston is a body politic under the statutes of North Carolina.

"2. That the town of Benson duly instituted an action in the Superior Court of Johnston County, entitled 'Town of Benson *v.* J. C. Warren and Wife, Mrs. J. C. Warren,' for the purpose of foreclosing tax certificate on account of the nonpayment of taxes levied and assessed against the property hereinafter described, and said property was acquired by the town of Benson from the commissioner appointed in said action, on 6 January, 1934, and is now the lawful owner in fee simple of said property, the deed conveying the same to the town being of record in Book No. 306, page 494, registry of Johnston County, and said property is described as follows: Lot No. 1, in Block No. 21, according to map of the town of Benson, made by Riddick, Mann and Hales in 1914, said map being of record in the office of the register of deeds for Johnston County. The property herein described being situate on Parrish Drive (formerly Mill Street), in the town of Benson, North Carolina.

"3. The county of Johnston instituted foreclosure proceedings on account of the nonpayment of taxes due said county by the Benson Creamery Corporation, and prosecuted said action to judgment, wherein C. C. Canaday was appointed commissioner to sell and convey, and thereafter, on 10 May, 1932, the town of Benson having become the purchaser at said foreclosure sale, the said C. C. Canaday, commissioner, executed and delivered to the town of Benson a deed of conveyance, stipulating a consideration of $1,174.76, and described and conveyed the following property:

"One lot fronting Wall Street, same being Highway No. 22, and is Lot No. 1, in Block No. 45, according to the map of the town of Benson prepared by W. J. Lambert, surveyor, and is Lot No. 17, in Block No. 33, according to the map of the Alonzo Parrish property, and is bounded on the north by the land of D. J. Hill; on the east by Wall Street, or State Highway No. 22; on the south by the land of C. T. Johnson; and on the west by a lot of land formerly owned by Alonzo Parrish, said lot fronting Highway No. 22—60 feet and running back 50 feet, being a lot 60 by 50 feet.

"This conveyance is made as of 8 February, 1932, and the property herein conveyed shall not be chargeable with 1932 and 1933 county *ad valorem* taxes.

"That the deed bears date of 10 May, 1932, and was filed for registration on 7 February, 1934, and registered in Book No. 306, page No. 494, office of the register of deeds for Johnston County. The said commissioner paid the receipts of the sale to the county of Johnston, and said receipts were sufficient to pay all taxes to the county of Johnston up to and including 1931. The town of Benson has been in possession of said property since such sale and is the owner of same in fee simple.

"4. There is a dwelling house upon the first parcel of land hereinbefore described, and a small building upon the other parcel now used as a hatchery. The town of Benson has, since obtaining title to said two parcels of property, received a small monthly rental, which has gone into the treasury of the town for general municipal purposes.

"5. The town of Benson is now endeavoring to refund its bonded indebtedness and has prepared and promulgated a refunding plan, bearing date of 1 December, 1934. That said refunding plan contains the following provision:

" 'Moneys derived from the sale or from the redemption of the twenty-two parcels of property heretofore taken over for delinquent taxes and assessments, as well as the net income, if any, derived from the operation of said properties, will be paid into the sinking fund for the funding bonds.'

"That the two parcels of land hereinbefore described constitute a part of the twenty-two parcels referred to in the above quoted provision.

"6. The town of Benson offered the two parcels of property referred to for sale, and has received *bona fide* bids to purchase said property at an agreed price from the firm of Blackman and Massengill and Wade F. Johnson, who require the title to be in fee simple, free and clear of all liens, encumbrances, and taxes. There are no liens or encumbrances upon said property, excepting that the county of Johnston claims taxes against the first parcel of land herein described (J. C. Warren property), for the years *1929 to 1935,* both years inclusive, and upon the second parcel of property referred to (Creamery property), for the years *1932 to 1935,* both years inclusive, the town of Benson admits that the Warren property is subject to county taxes for the years 1929 to 1933, inclusive, being prior to the time the town took title to said property, but denies that the county is entitled to any taxes upon said property since the town of Benson took title thereto; the town further denies that the county is entitled to assess taxes as a lien against the Creamery property since the town acquired title thereto, and during the period title to said property, as well as the other parcel referred to, is vested in said town of Benson.

"7. Under the duly constituted authority, the board of county commissioners of Johnston County have assessed said property for taxation during the period the title to same has been vested in the town of Benson, and have levied a tax against same, which plaintiff refuses to pay; and the tax collector 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 remains unsettled against said property. The plaintiff denies that the county of Johnston is permitted to tax said property during the period it remains vested in the plaintiff municipal corporation, and therefore refuses to pay the same.

"Wherefore, the parties hereto have agreed upon the foregoing facts, and respectfully urge a speedy determination of the matter of law involved in this controversy. The matter in controversy being whether or not such tax may be assessed as a lien against said property for and during the period title to same is vested in said town of Benson.

"This 14 February, 1936.

L. L. LEVINSON,
Atty. for Plaintiff.
W. J. HOOKS,
Atty. for Defendant.

"Jurat."

The judgment of the court below is as follows: "This cause coming on to be heard, and being heard by his Honor, F. A. Daniels, judge presiding, at the February Term, 1936, of the Superior Court of Johnston County, by consent, upon an agreed statement of facts submitted

in a controversy without action: It is therefore considered, ordered, and adjudged that the tax levied and assessed by the defendant against the property of the plaintiff, during the periods that the title to said property was vested in the plaintiff, is valid and collectible. Let the plaintiff pay the cost of this action. F. A. Daniels, Judge Superior Court holding the February Term, 1936."

The only exception and assignment of error is to the judgment as signed.

L. L. Levinson for plaintiff.
W. J. Hooks for defendant.

CLARKSON, J. The question involved in this controversy is whether or not a county may levy and collect *ad valorem* taxes against real estate owned by a municipality within that county, after title to such real property has been acquired by tax foreclosure and is being used by the municipality for rental purposes? We think so, when the property is not devoted to governmental uses or purposes.

The plaintiff claims the parcels of property (1) acquired by the town of Benson at a foreclosure sale of the tax certificate held by the town of Benson for the nonpayment of tax on the J. C. Warren property. (2) Acquired by the town of Benson at a foreclosure sale of the tax certificate held by the county of Johnston for the nonpayment of the tax on the Benson Creamery Corporation property.

The plaintiff contends that it is exempted, under the Constitution of North Carolina, Art. V, sec. 5. We cannot so hold under the facts of this controversy. The provisions of the Constitution are 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."

In *Atlantic & N. C. R. R. Co. v. Board of Commissioners of Carteret County,* 75 N. C., 474 (476), it is said: "But where the State steps down from her sovereignty and embarks with individuals in business enterprises, the same considerations do not prevail. . . . 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."

The General Assembly has passed the following act, N. C. Code, 1935 (Michie), sec. 7880 (2): "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.

We think that the question involved in this controversy was settled in *Board of Financial Control v. Henderson Co.,* 208 N. C., 569 (571-2), where it is said: "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."

In the above case we distinguished the case of *Andrews v. Clay Co.,* 200 N. C., 280, and said at p. 574: "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."

While there is no doubt as to the general principle in this State, the specific question here involved has not been directly decided, but the case of *Village of Watkins Glen v. Hager,* 252 N. Y. S., 146, is directly in point. In that case a tract of land was deeded to the municipality without reservation "to use the same, or the avails therefrom for municipal purposes, and for the use, benefit, and enjoyment of the people of the said village and its successors." . . . The power of the municipality to acquire the land was amply sustained by statutory provision. At the time of the decision in this case, all real property in the State of New York was subject to taxation except as the same was exempted from taxation under the terms of the tax law as follows: "Property of a municipal corporation of the State held for a public use, . . . except the portion of municipal property not within the corporation." It will be noted that the terms of the exemption statute were not as broad as the constitutional exemption in North Carolina, but this Court held in *Atlantic & N. C. R. R. Co. v. Comrs. of Carteret County, supra,* that this was intended to apply only to property devoted to a public use, or to some purpose or function of government. In applying the tax law exemption, the New York Supreme Court relied as one of its authorities upon the North Carolina decision. The county of Schuyler sought to sell the land, and an action was brought to cancel the assessment and levy. The plaintiff contended that the property, having been acquired by the village of Watkins Glen for municipal purposes, was held by it for a public use, and that the same was not subject to taxation. The

defendants contended that the property so held by the plaintiff was not held for a public use or devoted to a public use, and therefore was subject to taxation.

"It is manifest there are two classes of property of municipal corporations exempt from taxation," said the New York Supreme Court. "First is that class of property held for a public use, in that it is used in connection with the operation of the functions of government, such as municipal buildings; second, that class of property held for a public use, in that it is for the benefit of the people for their free use and enjoyment, such as parks, playgrounds, athletic fields, art museums, and public uses of a similar nature.

"When the municipal corporation, however, acquires and holds property without devoting the same to either class of purpose, it is simply held without use. The fact that it is to a certain extent used for the purpose of producing income, when there is no definite plan evolved for its use by or for the public, cannot reasonably be said to constitute holding for a public use. If property is held for a public use, it must be used for the public benefit, devoted to some public purpose, and operated and maintained in the interest of the public health, education, amusement, or other specified statutory purposes. When it is held in practically a private capacity, when no use is made of it for the benefit of the people, when the sole acts of the public authorities in relation to it are to rent small parcels and exclude the public by locked gates, such property is not held for a public use within either the letter or the spirit of the statute exempting the same from taxation."

N. C. Code of 1935 (Michie), sec. 7880 (177), is as follows: "Whenever in any law or act of incorporation, granted either under the general law or by special act, there is any limitation or exemption of taxation, the same is hereby repealed, and all the property and effects of all such corporations, other than the bonds of this State and the United States Government, shall be liable to taxation, except property belonging to the United States and to municipal corporations, and property held for the benefit of churches, religious societies, charitable, educational, literary, or benevolent institutions or orders, and also cemeteries: *Provided,* that no property whatever, held or used for investment, speculation, or rent shall be exempt, other than bonds of the State and the United States Government, unless said rent or the investment in or income from such investment shall be used exclusively for religious, charitable, educational, or benevolent purposes, or the interest upon the bonded indebtedness of said religious, charitable, or benevolent institutions." This section is based on Art. V, sec. 5, of the State Constitution. In fact, portions of the section are verbatim enactments of the provisions of the constitutional article before mentioned. No exemption is per-

mitted except in the specified instances and where such property is *exclusively* devoted to those purposes. *United Brethren v. Comrs.*, 115 N. C., 489; *Davis v. Salisbury*, 161 N. C., 56; *Southern Assembly v. Palmer*, 166 N. C., 75; *Trustees v. Avery County*, 184 N. C., 469; *Salisbury Hospital v. Rowan County*, 205 N. C., 8. See N. C. Code, 1935 (Michie), sec. 7971 (17).

Taxation is the rule and exemption the exception. The rule has repeatedly been laid down by this Court, the exemptions from taxation are to be strictly construed. *United Brethren v. Comrs., supra*, 490; *Salisbury Hosp. v. Rowan County, supra; Rich v. Doughton*, 192 N. C., 604; *Latta v. Jenkins*, 200 N. C., 255; *Stedman v. City of Winston-Salem*, 204 N. C., 203.

It has been specifically held that property acquired by the State through delinquent tax sales is held by the State in its proprietary capacity, and not for governmental purposes, and lands so held are subject to general assessments and other burdens not imposed upon property impressed with a public purpose. *Conley v. Hawley* (Cal.), 39 P. (2d), 408.

Property acquired by a municipal corporation through foreclosure of local improvement assessments and held in trust for holders of improvement bonds has been held not exempt from taxation. *Spokane County v. City of Spokane* (Wash.), 13 P. (2d), 1084.

Even if it be conceded that a liberal construction should be given to tax exemption laws as applied to municipal corporations, it is nevertheless true that property of municipal corporations not intended to be used for corporate purposes is not exempted from taxation. *City of Eugene v. Kenny* (Ore.), 293 P., 924.

There is no evidence in the record of this case indicating that the town of Benson ever had any intention of devoting the lands purchased under tax foreclosure proceedings for a public purpose. The lands were rented, and the town received the rental income. They were held for sale, and the present action was brought because of bidders for the property. The only suggestion of a public purpose or public use is that the purchase of the tracts was necessary to protect the town's tax liens. Having done that, the town held the lands as would any other purchaser, renting the property as a private individual would have done, and now it proposes to sell the lands, as any private individual purchaser might have done. The income from the rents has been applied or could have been applied to paying the taxes due on the lands. To permit the town to buy the lands, and thus exempt them from county taxes, would result in manifest discrimination against the county.

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

Affirmed.

DEVIN, J., dissenting: The Constitution of North Carolina, Art. V, sec. 5, contains these words:

"Property belonging to the State or to municipal corporations shall be exempt from taxation."

Neither the General Assembly nor this Court has power to amend or qualify the clear and unmistakable mandate of the organic law of the State.

The positive language of the constitutional exemption admits of no interpretative distinction contrary to the written words.

STATE v. G. T. EUBANKS.

(Filed 8 April, 1936.)

1. Criminal Law I j—

Upon motion to nonsuit, the evidence is to be taken in the light most favorable to the State, and it is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom.

2. Same—

Upon motion to nonsuit, only the evidence favorable to the State will be considered.

3. Same—

The competency, admissibility, and sufficiency of evidence is for the court to determine, the weight, effect, and credibility is for the jury.

4. Criminal Law L d—

Where the charge of the court is not in the record, it will be presumed correct on appeal.

5. Homicide H b—Evidence held sufficient to overrule nonsuit in this prosecution of constable for manslaughter.

The evidence favorable to the State tended to show that deceased was attacked by a person with an axe handle, that deceased took the axe handle away from his assailant, and that thereupon his assailant called upon defendant, a constable, to arrest deceased for assault, that defendant went up and took hold of deceased, that deceased backed away across the highway and both shoulders of the road to his son's filling station, that several persons called to defendant not to shoot, but that defendant followed him, and then shot him four times, causing his death, that prior to the homicide defendant had made threats against deceased, and that after the shooting defendant cursed deceased. *Held:* The evidence was sufficient to be submitted to the jury on the question of defendant's guilt of manslaughter, either upon the theory that defendant shot the deceased for revenge, or used unnecessary and excessive force in attempting to arrest deceased.

STATE *v.* EUBANKS.

6. Arrest B a—

An officer of the law may use only reasonable and necessary force in making an arrest, and whether the force used in any particular case is reasonable and necessary or excessive and unnecessary is ordinarily a question for the jury.

APPEAL by defendant from *Cowper, Special Judge,* and a jury, at December Special Term, 1935, of JONES. No error.

The defendant was tried upon a bill of indictment charging him with murder in the first degree in connection with the killing of William Oxley. Upon the calling of the case for trial, the solicitor announced in open court that he would not ask for a verdict of murder in the first degree, but would ask for a verdict of murder in the second degree or manslaughter, as the court and jury might find the facts to be. Upon the conclusion of all the evidence, the solicitor announced that upon suggestion by the court he would not ask for more than manslaughter, and the case proceeded to argument with the defendant being tried for manslaughter in connection with the death of the said William Oxley. The defendant was convicted of manslaughter and sentenced to not less than four nor more than eight years in the State Prison.

Mrs. Ethel Oxley Quinn, a witness for the State, testified in part: "Mr. William Oxley, the deceased, was my father, and Mr. Dan Oxley is my brother. At the time my father was killed I was standing in the door of my brother's, Dan Oxley's, store. I was working there at the time. Some time before my father was killed I saw the defendant, Guy Eubanks, in Dan's store. It was about 3 or 3:30 o'clock in the afternoon. At that time my father was asleep in his room in the building. I heard a conversation between my brother Dan and defendant Eubanks. The reason why I think the defendant was drinking was because I had never seen him before but what he showed all manner of respect for everybody, and I judged by the way he talked in our station. The defendant went out of the store, was gone about 30 or 45 minutes, and then came back again, but I don't know where he went. From the statements and the way he acted and talked he was mad. He said he came there to settle the matter of corn. The second time he came back was about 4 or 4:15 o'clock, and he stayed only a few minutes. Dan was in the filling station and my father was still asleep. The next time I saw him after he left that time he was standing across the road at Mr. Lon Hawkins' filling station. . . . When papa came out he did not come to the store, and when I saw him I was standing in front of the store a few minutes before the shooting occurred. . . . He (deceased) started across the road where Mr. Dail was, and after he got over there I heard he and Mr. G. T. Eubanks, the defendant, in an argument. I could not understand what they were saying. They were across the

road from me, and was standing between Mr. Lon Hawkins' station and the log cabin. After they stood there and argued a while, papa came around in front of Mr. Hawkins' store, from the side where he had been, which is directly across the road from where I was. He and Mr. Eubanks seemed to have stopped. Then I saw Mr. Hawkins come out. I did not hear Mr. Hawkins tell papa to leave his premises, but I heard papa say he would leave, and then Mr. Hawkins went back in the store and got an axe handle and came out and hit papa with it. He tried to hit him on the head but papa threw his hands up and he hit him on the left arm two or three times. Then papa took the axe handle away from Mr. Hawkins and acted as if to hit Mr. Hawkins, and Mr. Hawkins went back in the store, and then Mr. Eubanks, the defendant, went up to papa. He went up and took hold of papa, but turned him loose, and papa started backing away towards Dan's station where I was, and still held the axe handle in his hand. I think he had the axe handle in his right hand and held it up and he kept backing back and Mr. Eubanks was following him. I did not see the pistol until they were at the center of the highway, and then I could see Mr. Eubanks had the pistol in his hand and papa still kept backing, and at that time I heard Mr. Will Dail holler and say, 'Guy, don't shoot!' Papa kept on backing until he got practically even with our gas tanks. He had backed all the way from Hawkins' station across the highway, which was about twice the width of the road, I think. He backed from one station clear to the other, which includes the highway and both shoulders to the road. Then it was that Guy Eubanks started to shooting. My father did not strike at him at any time, but he shot papa four times. Then papa walked in the store and lay down on the floor. . . . Four bullets took effect in my father's body and he is now dead. He was shot around 6 o'clock and died at 8:15 that same night in the Parrott's Hospital in Kinston. I asked Mr. Eubanks over a half-dozen times not to shoot papa. At that time papa was backing from the window of the highway to where he was shot. Papa was 60 years old, and he was not as large as Guy Eubanks, the defendant. I also heard Mr. Will Dail holler to him not to shoot papa a half-dozen times or more. . . . Papa knew Mr. Eubanks and had known him for a number of years and knew he was a constable, and I knew he was a constable."

Richard Casper testified, in part: "On the day of the shooting I was in Trenton. I saw Mr. Guy Eubanks about 2 o'clock that same day, and I heard him make a statement at that time. I heard Guy say that he would get even with Will Oxley, 'a d—— s. o. b., before night.'"

Wesley Smith testified, in part: "I live with Dan Oxley, and I help haul the corn away from the barn. Mr. Will Oxley went with us when we hauled the corn; it was hauled from George Metts' on the Guy

Eubanks' land. George Metts was farming for Guy Eubanks, and George Metts had an account with Mr. Oxley. Mr. Will Oxley hauled the corn, and I helped him, and this was done a week before the shooting."

Earl Smith testified, in part: "Mr. Eubanks was on the outside talking to somebody, don't know who. It was about dusk. Then Mr. Will Oxley went over to where Mr. Will Dail was. . . . Heard Guy Eubanks call Dan Oxley a 'd—— s. o. b.' and Mr. Will said, 'Don't you call my son a d—— s. o. b.,' and then Guy and Mr. Oxley got to arguing."

J. P. Taylor testified, in part: "From the way he (defendant) looked I judged he was drinking."

Will Dail testified, in part: "Eubanks shot Will Oxley four or five times. After he shot him Guy Eubanks said, 'G—— d—— you, I reckon you will stop now.' . . . I was about two-thirds the length of this building from Guy, and I hollered at Guy three or four times and said, 'Guy, I certainly would not shoot that man,' and my wife also hollered at him. . . . He did mention to me something about their having some trouble over the corn."

J. K. Dixon, who acted as coroner at the inquest, testified in part: "I think one ball looked like it went in a little bit to the left side, not right in front, left side of the abdomen. It came out over on the opposite side. There was another one that went in about the same side, but a little lower down, and came out lower down in practically the same position. Then there was one in the left leg, I think, and one in the arm, four different places. Two of them went through the body and through the intestines."

There was other evidence corroborating the State's evidence, and several witnesses testified that defendant was drinking.

The defendant gave a different version of what took place from that of the State—that the deceased was the aggressor and had had trouble with Hawkins, who ran the filling station, called the "Little Chicago," and who asked defendant as an officer to arrest the deceased for assault on him. Also that deceased had an axe handle which he had taken from Hawkins in an altercation, and defendant, at the request of Hawkins to arrest deceased for assault on him, had told deceased to consider himself under arrest; that the killing took place in an attempt to arrest deceased, and that deceased had a knife out. This was denied by the State's witnesses.

Defendant testified, in part: " 'I have asked you to drop the axe helve and consider yourself under arrest on good terms,' and just as I said that he hauled off and hit me a glancing lick on my arm and hit my head, and I ducked my head and almost fell down. Then when he hit me with the axe helve I shot under his feet, as I thought. At the time he drew

back again—the shooting did not take any effect at all—the first shot. Then he come back with another lick, glancing on my right side, and as I shot, his glancing lick hit my thumb of the hand I had the pistol in and the last report went off during the meantime; at the time he hit me the last time the glancing lick on my arm, then the pistol went off again. At the time I was doing my own aiming was under his feet, but the time he hit my hand with the axe helve I did not have any control with the gun as it went off the last two shots; the shots were in pretty rapid succession. I did not have any purpose other than to shoot him in the legs and make him quiet and drop his axe handle. . . . I was trying to protect myself and arrest him. I carry a pistol as an officer in performance of my duty. I think I shot four times."

In regard to previous troubles he had, he testified: (1) "It was kind of a race riot, you might say, trouble between white and colored boys, and I shot a Negro boy. The judge ruled it was done in self-defense. The Negro died. I was acquitted. I paid the funeral bill, but that was between the father of the dead boy and myself. I paid them $250.00, I and the father of the Negro boy settled that between ourselves." (2) "I also had a scrape with a fellow. The judge tried us and found us both guilty and spread the cost between us. That has been sixteen years ago." (3) "I cut John Gardner with a knife and he was sewed up by a doctor, but I don't know how many times I cut him. I don't know how many stitches the doctor took. He cut me, too. He was out in two or three days after I cut him." (4) "I had a little fuss with Wilbur Burnette at Polloksville. We had a little friendly fuss. He did not black my eyes, just scratched them a little, while he had me on the floor. That was while I was an officer. I don't say whether we were drinking or not, but I guess we had had a drink and got in a little fuss. . . . I don't think I was drinking the Saturday night before I killed Mr. Oxley, but I drank a bottle of beer in the pool room there. I had not taken anything besides beer more than usual that day. I don't usually get drunk every day, or pretty full. I was not drunk when I jumped on Mr. Larkins, just drinking a bottle of beer." (5) "On October 1st, I was indicted for driving an automobile while under the influence of whiskey; I was indicted, but I was not driving drunk. That case is on the docket but has not been proven." (6) "I also had a wreck with a colored fellow; he ran into me. I had drunk a bottle of beer and had eaten a sandwich. That case is still pending."

Defendant testified further: "I stopped there between 2 and 3 o'clock. I went in and just asked Dan Oxley what he wanted to do about it. He had my corn locked up and he had made threats that he was going to get it and I wanted to know what he wanted to do about it. I did not invite him out then; he invited me out. I had my pistol in my belt

then. I carried my gun when I left that morning. I had it when I left there at 4 o'clock; I had it all day. . . . I did take a drink with Rom McDaniels, a colored fellow, that day. I don't know who drank out of the bottle first. Another fellow had it. We all were drinking out of the same bottle. . . . I left him alone after I had fired four shots into his body. I told him plainly he had cursed me several times, and I told him not to hit me any more; I said, 'Don't you hit me any more; if you hit me any more I am going to shoot you;' he hit me again and I shot, and the next time he hit at me, he hit my arm and the next shots were not under my control. I shot four times."

The defendant introduced evidence corroborating his testimony as to what took place. He also introduced evidence that his general reputation was good. The jury returned a verdict of guilty of manslaughter. There was judgment on the verdict. The defendant made several exceptions and assignments of error, and appealed to the Supreme Court.

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

J. A. Jones for defendant.

CLARKSON, J. The defendant, at the close of the State's evidence and at the close of all the evidence, moved to dismiss the action or for judgment of nonsuit. C. S., 4643. The court below denied the motions. This constitutes defendant's sole exceptions and assignments of error. The only question involved in this appeal: Was there sufficient evidence of defendant's guilt to be submitted to the jury? We think so.

On motion to dismiss or judgment of nonsuit, the evidence is to be taken in the light most favorable to the State, and it is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom. "An exception to a motion to dismiss in a criminal action taken after the close of the State's evidence, and renewed by defendant after the introduction of his own evidence, does not confine the appeal to the State's evidence alone, and a conviction will be sustained under the second exception if there is any evidence on the whole record of the defendant's guilt." *S. v. Earp,* 196 N. C., 164 (166). See *S. v. Carlson,* 171 N. C., 818; *S. v. Sigmon,* 190 N. C., 684. The evidence favorable alone to the State is considered—defendant's evidence is discarded. *S. v. Utley,* 126 N. C., 997. The competency, admissibility, and sufficiency of evidence is for the court to determine, the weight, effect, and credibility is for the jury. *S. v. Utley, supra; S. v. Blackwelder,* 182 N. C., 899; *S. v. Lawrence,* 196 N. C., 562 (564).

The charge of the court below is not in the record, and the presumption is that the court below charged the law applicable to the facts.

The defendant was mad with the deceased because he hauled some corn from defendant's tenant's farm to pay a bill which the tenant owed to the Oxleys. About 2 o'clock of the day of the killing defendant told Richard Casper "that he would get even with Will Oxley, a d—— s. o. b., before night." He went to deceased's son's (Dan's) store about 3:30 o'clock that afternoon and came back about 4:15 o'clock. He said that he came there to settle the matter of corn. The deceased was sleeping at the time defendant came and when deceased awoke he went across the road to Hawkins' filling station. There was a quarrel between Hawkins and the deceased—the deceased took an axe handle away from Hawkins. The defendant went up and took hold of the deceased. The deceased, with the axe handle, kept backing across the road to his son's filling station, the defendant following him. He had backed from one station, across the highway and both shoulders of the road, until he got even with the gas tanks—then it was that defendant shot him four times, all the shots taking effect. The deceased was an old man and the defendant was comparatively a young man. The defendant was larger than the old man. The deceased did not strike at defendant at any time. Several witnesses hollered to defendant, in substance, "Guy, I certainly would not shoot that man." After defendant had shot the deceased, he said, "G—— d—— you, I reckon you will stop now."

In *S. v. Bland,* 97 N. C., 438 (443), speaking to the subject, it is said: "The law does not clothe an officer with the authority to judge arbitrarily of the necessity of killing a prisoner to secure him, or of killing a person to prevent a rescue of a prisoner. He cannot kill unless there is a necessity for it, and the jury must determine, from the testimony, the existence or absence of the necessity. They must judge of the reasonableness of the grounds upon which the officer acted."

In *S. v. Pugh,* 101 N. C., 737 (740), as to the rights of an officer to make an arrest, it is said: "A grossly unnecessary, excessive, and wanton exercise of force would be evidence—strong evidence—of a willful and malicious purpose, but the jury ought not to weigh the conduct of the officer as against him in 'gold scales'; the presumption is he acted in good faith. This is the rule applicable in such cases as the present one, as settled in *S. v. Stalcup,* 24 N. C., 50; *S. v. McNinch,* 90 N. C., 695, and the cases there cited. So, also, *S. v. Bland,* 97 N. C., 438." *S. v. Dunning,* 177 N. C., 559 (562-3); *Holloway v. Moser,* 193 N. C., 185; *S. v. Jenkins,* 195 N. C., 747.

In *S. v. Orr,* 175 N. C., 773 (775), we find: "If Grant, instead of acting as an officer of the law in arresting Birchfield, engaged in an

affray with him and afterwards assisted Orr in causing his death, he is at least guilty of manslaughter, of which he was convicted."

On this record it is presumed that the court below charged the jury on the law, as above stated, and applied the law applicable to the facts.

On two aspects the evidence was sufficient to be submitted to the jury: (1) The defendant was, in the language of the witness, "mad" at deceased and had made threats against him, and the defendant shot deceased for revenge. (2) If he was acting in good faith, as an officer, attempting to arrest deceased, it was for the jury to determine whether he used unnecessary and excessive force. Without any danger to himself, he shot deceased, while backing away from him, four times in the body, and at the time the evidence is that witnesses appealed to him not to shoot.

The defendant is a constable, and his first duty is to "preserve the public peace." It is in evidence that he was a frequent violator of the law, and there was at the time of the trial an indictment pending against him "for driving an automobile while under the influence of whiskey."

The defendant's counsel ably argued the case in this Court, and no doubt before the jury, but we think the court below correct in submitting the matter to the jury.

In the record we see

No error.

J. F. WILLIAMS, LUVENIA KENNEDY, I. D. JOHNSON, S. E. JOHNSON, F. L. JOHNSON, J. B. JOHNSON, IRA JOHNSON, WILLIAMS JOHNSON, CLAUDIA M. JOHNSON, ROSA L. JOHNSON, JANIE B. JOHNSON, EFFIE MURRAY, MARY CARR, AND ALBERTA WARD v. GREENSBORO FIRE INSURANCE COMPANY.

(Filed 8 April, 1936.)

1. Insurance E c—Insurance policy may be reformed for mutual mistake or mistake induced by fraud.

A policy of insurance, like other written instruments, may be reformed for mutual mistake or for mistake induced by fraud or inequitable conduct of the adverse party, and parol evidence is competent to establish the right to such equitable relief, but the proof must be clear, strong, and convincing.

2. Same—Evidence held sufficient for jury on issue of plaintiff's right to relief of reformation of policy as to name of insured.

Plaintiffs' evidence tended to show that defendant's local agent issuing the fire insurance policy in suit was a tenant in one of the stores insured, and paid rent to plaintiffs, who owned the property as heirs at law. The application was made in the name of plaintiffs' ancestor, and the policy issued in his name. *Held:* The question of whether the policy was issued

in the name of the ancestor, who was dead at the time of application therefor, instead of the names of plaintiffs owning the property as heirs at law, through the mutual mistake of the parties was properly submitted to the jury, the knowledge of the local agent of insurer at the inception of the policy being imputed to insurer.

3. Limitation of Actions A a—Action held for construction of policy as to property covered and not for reformation.

Defendant insurer contended that the policy in question covered only one store, comprising a compartment in plaintiffs' building. Plaintiffs filed a reply, alleging that the policy was intended to cover and did cover the whole building, which contained three compartments or stores. Defendant, in its rejoinder, set up the defense of the three-year statute of limitations, claiming that plaintiffs' right to reformation of the policy as to the property covered was barred, since more than three years had elapsed since the issuance of the policy and the damage to the property by fire. *Held:* Plaintiffs' right to relief is based upon a construction of the policy and not upon reformation thereof as to the property covered, and under the pleadings and facts the statute of limitations is not applicable.

4. Insurance E b—Evidence held for jury on question of property insured.

Plaintiffs' property consisted of one building, divided into stores or compartments, two facing on one street and one facing on another street. The evidence tended to show that the amount of the policy was greatly in excess of the value of one store, and amounted to a little more than the value of the whole building, and that the policy described the building, and provided that the insurance should be effective only while the property was occupied by "tenants" as "stores," but designated the property by number and block of one of the stores. The building caught on fire and each of the stores was damaged thereby. Defendant insurer contended that the policy covered only one store, and not the whole building. *Held:* The policy was ambiguous as to the property covered thereby, and the question was properly submitted to the jury as to whether the entire building was covered by the policy.

5. Same—

An insurance policy will be construed strictly against insurer.

6. Same—In construing policy as to amount of property covered, it will not be presumed that insurer charged larger premium than allowed by law.

Plaintiffs' property consisted of one building containing three compartments or stores. Insurer contended that the policy issued covered only one of the stores and not the entire building. It appeared that the amount of the policy was greatly in excess of the value of the one store, but was about the value of the entire building, and that insured paid the premium based upon the amount for which the policy was issued. *Held:* In construing the policy as to whether it covered the one store or the entire building, it will not be presumed that insurer charged a premium based upon a valuation greatly in excess of the value of the property insured in violation of law, N. C. Code, 6418, 6435, but that the policy covered the entire building, the value of which would justify the amount of the policy and the charge of the premium paid.

7. Insurance M e—

Where insurer denies liability, insured is not required to furnish proof of loss as stipulated in the policy, the denial of liability constituting a waiver of proof.

APPEAL by defendant from *Grady, J.*, and a jury, at January Term, 1936, of DUPLIN. No error.

This is an action by plaintiffs against defendant to recover on a fire insurance policy. The defendant denied liability. The issues indicate and show the controversy between the parties.

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

"1. Were plaintiffs, as heirs at law of J. C. Williams, the owners of the property in question at the time of the issuance of the policy of insurance sued upon, and at the time of the fire referred to in the complaint? Ans.: 'Yes.'

"2. At the time of the application for and the issuance and delivery of said policy to J. F. Williams, did the defendant know that J. C. Williams was dead, and that J. F. Williams was acting for himself and the other heirs at law of J. C. Williams in securing said insurance? Ans.: 'Yes.'

"3. At the time of the issuance and delivery of said policy (to) J. P. Williams, was it understood and agreed between him and C. M. Miller, agent of the defendant, that said policy was intended to cover all of the brick building situate on the north side of East Church Street in Rose Hill, composed of three separate compartments, as alleged by the plaintiffs? Ans.: 'Yes.'

"4. If so, were the agreements and understandings referred to in the second and third issues left out of the policy as issued by the mutual mistake of the said J. F. Williams and the defendant? Ans.: 'Yes.'

"5. What was the total damage to said building by reason of the fire of 14 November, 1931? Ans.: '$4,800.'

"6. What was the total damage to the part of said building designated on the defendant's map as No. 107 Church Street? Ans.: '$500.00.'

"7. Is the plaintiffs' claim barred by reason of their failure to file proof of loss within sixty days from date of fire, under the conditions named in said policy? Ans.: 'No.'

"8. Is plaintiffs' cause of action for reformation of said policy barred by the three-year statute of limitations? Ans.: 'No.'

"9. What damages, if anything, are the plaintiffs entitled to recover of the defendant? Ans.: '$3,600.' "

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.

Beasley & Stevens for plaintiffs.

R. D. Johnson, J. T. Gresham, Jr., and Smith, Wharton & Hudgins for defendant.

CLARKSON, J. At the close of plaintiffs' evidence and at the close of all the evidence defendant made motions in the court below for judgment as in case of nonsuit. N. C. Code, 1935 (Michie), sec. 567. The court below overruled these motions, and in this we can see no error.

J. C. Williams owned, in fee simple, title to certain property in the town of Rose Hill, Duplin County, N. C., on which was situated a one-story brick building, metal roof. There were three compartments but all one building, built at the same time, and a wall all the way around the compartments. The contractor testified, in part: "I begun on the inside walls on Church Street and run back and cut off what we called the drug store; and then I joined the drug store wall with a brick wall and run west to Railroad Street, and joined the wall with a center wall, making three compartments. Two fronted on Railroad Street and one fronted on Church Street."

(1) The drug store, or compartment, on Church Street, was rented by C. M. Miller; (2) Scott Bros., who ran a general store, rented the corner store, or compartment, on Railroad Street; (3) W. M. Rochelle, who ran a dry goods store, rented the other store, or compartment, on Railroad Street. The plaintiffs' evidence was to the effect: (1) That the fair market value of the store, or compartment, rented by Miller on 20 November, 1930, the date of the issuance of the policy of fire insurance, was $1,500. Defendant was immediately notified of the fire damage, and on 27 May, 1932, plaintiffs gave formal notice, itemizing same. The totals are below given. The fire damage to the drug store was $135.50. (2) The fair market value of the corner store, or compartment, was $3,500, the fire damage was $3,172.80. (3) The fair market value of the other store, or compartment, was $2,500, the fire damage was $2,344.75—total, $5,653.05. In the policy was a three-fourths value clause, and plaintiffs claimed $4,239.79.

The defendant contended that the policy was void, as J. C. Williams, in whose name the policy was issued, was dead. That the policy was issued on 20 November, 1930, for one year. That J. C. Williams died on 26 April, 1930, and the fire was on 14 November, 1931. On the other hand, plaintiffs contend that C. M. Miller was the local agent of defendant, rented the drug store and had full knowledge of the whole matter. That J. C. Williams was dead and his heirs at law were J. F. Williams and the other plaintiffs herein. That J. F. Williams took out the policy through the agent Miller, paid the premium to him, and "the plaintiffs aver that the names of the plaintiffs as the owners of said buildings and

the beneficiaries of said policy were omitted from the same, and the name of J. C. Williams inserted therein by the mutual mistake of the plaintiffs and the defendant, and the inadvertence of the said C. M. Miller, agent of the defendant, who effected said insurance, and wrote up or had written up said policy of insurance."

It is well settled that in equity a written instrument, including insurance policies, can be reformed by parol evidence, for mutual mistake, inadvertence, or the mistake of one superinduced by the fraud of the other or inequitable conduct of the other. The evidence must be clear, strong, and convincing; or clear, convincing, and satisfactory; or clear, cogent, and convincing. *Lee v. Brotherhood,* 191 N. C., 359; *Lloyd v. Speight,* 195 N. C., 179.

In *Sykes v. Ins. Co.,* 148 N. C., 13 (21), we find: "The principle, as we have seen, applies to policies of insurance. 'The power of reformation extends to practically every kind of written instrument. Thus, there may be a reformation of a conveyance, a mortgage or deed of trust, a bond, an insurance policy, a promissory note, lease, power of attorney, contract of sale, or any character of contract in writing.' 24 Am. and Eng. Enc. (2d Ed.), p. 652." *Burton v. Ins. Co.,* 198 N. C., 498.

C. M. Miller was the local agent of defendant company, with whom J. F. Williams took out the insurance. There was evidence that it was known by Miller that J. C. Williams was dead and the insurance was for J. F. Williams and the other heirs at law of J. C. Williams, who then owned the real estate and received rent for same, including himself as tenant. Miller delivered the policy for $5,000 (it was reduced from $6,000 to $5,000) to J. F. Williams for the heirs at law, and J. F. Williams paid him the premium of $114.50. This is not a case where the knowledge of the agent is after the policy has become effective. The matter here is at the inception of the contract. *Midkiff v. Ins. Co.,* 197 N. C., 139 (142).

In *Horton v. Insurance Co.,* 122 N. C., 498 (503-4), is the following: "It is well settled in this State that the knowledge of the local agent of an insurance company is, in law, the knowledge of the principal; that the conditions in a policy working a forfeiture are matters of contract and not of limitation, and may be waived by the insurer, and that such waiver may be presumed from the acts of the agent," citing numerous authorities. *Ins. Co. v. Lumber Co.,* 186 N. C., 269; *Aldridge v. Greensboro Fire Ins. Co.,* 194 N. C., 683; *Houck v. Insurance Co.,* 198 N. C., 303; *Mahler v. Insurance Co.,* 205 N. C., 692 (698-9); *Belk's Dept. Store v. Insurance Co.,* 208 N. C., 267 (277).

In *Colson v. Assurance Co.,* 207 N. C., 581 (583-4), is the following: "In *Laughinghouse v. Ins. Co.,* 200 N. C., 434 (436), speaking to the subject, we find: 'It is held 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 a stipulation to the contrary. *Short v. LaFayette Ins. Co.*, 194 N. C., 649; *Insurance Co. v. Grady*, 185 N. C., 348.'"

In the policy is the following: "Mercantile Building (Three-Fourths Value Clause) $5,000.00 on the one-story brick building with metal roof, only while occupied by tenants as stores and for no other purpose situated number 107, on the North side of East Church Street, Block No. ..... in Rose Hill, N. C."

The plaintiffs' complaint, in part, is as follows: "The defendant executed and caused to be delivered through its said local agent to the plaintiff J. F. Williams, for himself and the other plaintiffs herein, in consideration of the sum of $114.50, to said defendant paid by said J. F. Williams through its said local agent, as premium therefor, a policy or contract of insurance in the sum of $5,000, which said contract or policy of insurance was to be in force from 20 November, 1930, to 20 November, 1931, insuring against loss or damage by fire the brick store building then situated on the lot described in paragraph 4 of this complaint, and then owned by the plaintiffs." The plaintiffs prayed for "general relief." This action was instituted 24 October, 1932.

In the defendant's further answer is the following: "That the said policy of insurance covered only 107 East Church Street, Rose Hill, North Carolina, and no other property, and did not cover the other store buildings alleged to be covered in the complaint."

In plaintiffs' reply, filed 9 January, 1935, is the following: "It is alleged in connection therewith that said insurance policy was intended to cover and did cover all of said stores set out and described in the complaint, and formerly belonging to J. C. Williams in the town of Rose Hill, N. C., bounded on the south by Church Street, and on the west by the east boundary lines of Atlantic Coast Line Railroad Company, known as Railroad Street; that said policy was at the time that it was issued intended to cover and did cover all three of said store buildings under one roof, to the east edge of the right of way of said Atlantic Coast Line Railroad in the town of Rose Hill, two of said stores fronting on said right of way, and if the description in said policy failed to cover all three of said stores, then the same was omitted from the said policy by the mutual mistake of the parties and the inadvertence of the draftsman, and the plaintiffs ask that said policy be reformed to that extent."

In defendant's rejoinder is the following: "That the said policy in question was issued on or about 20 November, 1930, and that if the plaintiffs ever had any cause of action to reform said policy, all of which the defendant denies, the said cause of action is barred by the three-year

statute of limitations, it having been more than three years since said policy was issued, and likewise having been more than three years since the date of the fire, all of which is specifically pleaded in bar of plaintiffs' right of recovery."

We do not think that the statute of limitations is applicable on the pleadings and facts and circumstances of this case. The case cited by defendant, *Moore v. Casualty Co.*, 207 N. C., 433, is not applicable.

The language in the policy is ambiguous and parol evidence admissible outside of the allegation for reformation. 107 East Church Street was a private number of the N. C. Inspection and Rating Bureau. They fixed the property by blocks, lots, etc. The case of *Floars v. Ins. Co.*, 144 N. C., 232, is also not applicable to the facts on this record. If contract is ambiguous, effect is for jury. *Montgomery v. Ring,* 186 N. C., 403; *Porter & Peck v. West Const. Co.,* 195 N. C., 328. If writing leaves it doubtful or uncertain as to what the agreement was, parol evidence is competent to show and make certain what was the real agreement, which is for the jury. *Hite v. Aydlett,* 192 N. C., 166.

In *Fayetteville Light Infantry v. Dry Cleaners, ante,* 14 (16), we find: "In determining the meaning of an indefinite or ambiguous contract, the construction placed upon it by the parties themselves is to be considered by the court. *Lewis v. Nunn,* 180 N. C., 159; *Lumpkin v. Investment Co.,* 204 N. C., 563."

The policy says "$5,000 on the one-story brick building, metal roof." The three compartments came within this description. Then it says: "Only while occupied by *tenants* as *stores* and for no other purpose." There were three stores and three tenants. Then comes a limited description, taken from the Inspection and Rating Bureau's private numbers, "Number 107 on the North side of East Church Street, Block No. ....., Rose Hill, N. C." What construction did defendant, to sell the insurance, put on this language? No. 107 was valued at some $1,500. It seems that the intention of the parties was that the insurance policy should cover the three compartments. It is presumed that defendant would not violate the law. N. C. Code, 1935 (Michie), sec. 6418, says that no insurance company shall issue a policy for more than a "fair valuation of the property." Section 6433, provides a penalty for so doing. Section 6435, in part, is as follows: "Every agent of a fire insurance company shall, before issuing a policy of insurance on property situated in a city or town, inspect the same, informing as to its value and insurable condition." Defendant issued a $5,000 policy and received the premium $114.50, and now has same. The three compartments were *stores* and had *tenants:* One, the drug store, valued at $1,500; the next at $3,500; and the third at $2,500. Total value, $7,500. And prior to this it was insured for $6,000. Of course, defendant, a

reputable company, would not violate the law and issue a $5,000 policy on the $1,500 drug store and pocket $114.50—price of a $5,000 policy. This aspect was left to the jury, and they answered the issue in favor of plaintiffs. In fact, this evidence almost required a directed verdict for plaintiffs on the third issue—sufficient to sustain a judgment on this aspect of the controversy. It is well settled that an insurance policy will be construed strictly against the insurer and in favor of the insured.

The defendant further contends that proof was not furnished within 60 days, as required by the policy. But defendant denied liability and now denies liability. The law does not require one to do a vain thing.

In *Misskelley v. Ins. Co.*, 205 N. C., 496 (505), speaking to the subject, it is said: "In *Gerringer v. Ins. Co.*, 133 N. C., 407 (415), we find: 'The weight of authority is in favor of the rule that a distinct denial of liability and refusal to pay, on the ground that there is no contract or that there is no liability, is a waiver of the condition requiring proof of loss or death. It is equivalent to a declaration that they will not pay, though the proof be furnished,' " citing a wealth of authorities. *Guy v. Ins. Co.*, 207 N. C., 278 (279); *Gossett v. Ins. Co.*, 208 N. C., 152 (158).

The defendant's prayers for instruction were properly refused by the court below. We think the issues submitted were proper under the pleading—material and determinable of the controversy. We see no error in the charge, taken as a whole and not disconnectedly. The *quantum* of proof required of plaintiffs was given "clear, strong, and convincing." There was ample competent evidence to sustain the issues submitted to the jury. The assignments of error made by the defendant cannot be sustained.

We have read the record with care and can see no prejudicial or reversible error.

No error.

STATE v. GARVEY RAY ET AL.

(Filed 8 April, 1936.)

1. Indictment C d—Defendant must aptly enter plea in abatement to present contention that crime was committed in another county.

Defendant moved to quash the indictment in this prosecution for receiving stolen goods knowing them to have been stolen, on the ground that the evidence showed that the property, if stolen, was stolen in another county, and, if received by defendant, was received by him in a third county. *Held:* The motion to quash was correctly denied, even without taking into consideration the provisions of C. S., 4250, since, under the provisions of

C. S., 4606, the crime is presumed to have been committed in the county laid in the bill of indictment unless defendant aptly enters a plea in abatement.

2. Criminal Law G b—Evidence of guilt of other crimes is competent when tending to establish scienter constituting element of the crime charged.

While ordinarily evidence of guilt of crimes other than that charged in the bill of indictment is not competent, the rule is subject to the exception that when guilty knowledge is an essential element of the crime charged, evidence of guilt of other crimes is competent when such evidence tends to establish guilty knowledge or *scienter*, and in this prosecution for receiving stolen goods knowing them to have been stolen, evidence tending to show that defendant had in his possession stolen goods bearing no consignee marks, or which had had the consignee marks removed, on three separate occasions other than the occasion charged in the indictment, the collateral occasions having occurred, respectively, two weeks prior to the date charged in the indictment, and three and ten days thereafter, *is held* competent as tending to show defendant's knowledge at the time of receiving the goods as charged in the indictment that same had been stolen.

3. Criminal Law G t—Best and secondary evidence rule held not applicable to facts of this case.

The contents of a specified box car was a material fact involved in this prosecution for receiving stolen goods knowing them to have been stolen. The State introduced witnesses who testified from their own knowledge as to the contents of the car. Defendant objected to the testimony on the ground that the records of the railroad company were the best evidence as to the contents of the car. *Held:* The best and secondary evidence rule applies in proving the contents of a written instrument but is inapplicable in proving the contents of the box car, and defendant's objection is untenable.

4. Criminal Law I g—Instruction in this case held to sufficiently charge jury on question of burden of proof.

The charge of the court in this case, when construed contextually as a whole, *is held* to sufficiently instruct the jury that they were required to find defendant guilty of each of the essential elements of the crime beyond a reasonable doubt before they could convict him, and defendant's objection to the charge on the ground that the court failed to instruct the jury that the burden of proof was on the State, and failed to define the term, is untenable.

APPEAL by defendant Ray from *Small, J.*, at August Term, 1935, of PITT. No error.

Allen J. Honeycutt, Garvey Ray, Emanuel Crump, John Dunbar, and James Hinton were placed upon trial upon a three-count bill of indictment charging that they, on or about 5 April, 1935, in the county of Pitt, (1) feloniously broke and entered freight car No. 20635 of the Norfolk Southern Railroad Company with the intent to commit a felony

therein, (2) committed larceny of several cases of cigarettes consigned to Sea Stores Warehouse No. 2, District of Maryland, and (3) feloniously received several cases of cigarettes of the value of $500.00, which had been in the custody of the Norfolk Southern Railroad Company for the purpose of transportation, then and there well knowing that said cigarettes had been stolen. A verdict of not guilty was entered as to the defendants Honeycutt and Ray upon the first and second counts, and as to them the jury returned a verdict of guilty upon the third count. The other defendants, in the course of the trial, entered a general plea of guilty, and were used as State's witnesses. From judgment pronounced, the defendant Garvey Ray alone perfected appeal to the Supreme Court.

The evidence introduced by the State, as it relates to the appellant Ray, tended to show that 20 cases of Lucky Strike cigarettes were loaded on Norfolk Southern freight car No. 20635, at Durham, on 4 April, 1935, and that these cigarettes were consigned to "Sea Stores," since they were not for consumption in this country, but for use on the water, and contained no government revenue stamps; that said car was routed to Berkeley, Va., and on 5 April, 1935, at Greenville, one Boston McNeill and the codefendants Dunbar, Hinton, and Crump, broke and entered the car and threw out some of the cigarettes, near Greenville, in Pitt County, and some of them at Marsden, in Beaufort County; that Dunbar, Hinton, and Crump came to Wake County and told Honeycutt that they had the cigarettes, whereupon Honeycutt took them to the home of the appellant Ray, his son-in-law, and there Ray made arrangements for his truck, driven by his brother, to take them back to Greenville and Marsden to get the cigarettes; that they got the cigarettes at Marsden, but were unable to find those near Greenville; that they brought the cigarettes in the truck of the appellant Ray to his filling station in Wake County, and the appellant then and there took charge of the truck and of the cigarettes therein; and that on the following day at the "regular meeting place" and "regular pay-off place" on Peace Street, in the city of Raleigh, the defendant Honeycutt, in the presence of the appellant Ray, paid them $48.00 for five cases of Lucky Strike cigarettes, and stated, also in the presence of the appellant, that he could not pay more because the cigarettes had gotten soiled and wet, and that on the next trip he wanted some Camels.

There was further evidence by the State, admitted over the objection of the appellant, which tended to show that in March, 1935, the appellant Ray went with one Boston McNeill and some of the codefendants to Youngsville, in Franklin County, and there loaded on his truck and hauled to his place of business in Wake County 26 cases of Chesterfield cigarettes, which said McNeill and others had thrown out of a car of the Seaboard Air Line Railway Company; and also, tending to prove that

on 8 and 15 April, 1935, there were obtained from the place of business of the appellant Ray on the Wake Forest Road, in Wake County, four cases of Camels and Chesterfield cigarettes, upon which there were no consignee marks, and from some of which it appeared consignee marks had been removed.

The evidence introduced by the appellant tended to show that he was in Florida on 5 and 6 April, 1935; that he left his home in Wake County in an automobile on 29 March, 1935, for Arcadia, Florida, to drive some friends to attend a funeral of a kinsman who had died the preceding day; that he left Arcadia, Florida, on 7 April, and arrived at Raleigh about 2:00 o'clock p.m. on 9 April. The appellant also introduced evidence tending to show that his wife had purchased Camel and Chesterfield cigarettes from a man in a truck.

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

Ellis Nassif and Douglass & Douglass for defendant, appellant.

SCHENCK, J. Upon the close of the evidence the appellant moved the court to "quash the indictment" for the reason that he could not be tried in Pitt County, since all of the evidence tended to show that the property involved, if stolen, was stolen in Beaufort County, and if received by him, was received by him in Wake County. The motion was denied by the court, and such denial is made the basis of exceptive assignments of error. The assignments cannot be sustained.

In order to sustain a conviction it is not necessary for the State to prove that the crime occurred in the county where the indictment is drawn, as, since the Act of 1844, "in the prosecution of all offenses it shall be deemed and taken as true that the offense was committed in the county in which by the indictment it is alleged to have taken place, unless the defendant shall deny the same by plea in abatement." C. S., 4606. *S. v. Outerbridge,* 82 N. C., 618. "Indeed, the offense, if proven, 'shall be deemed and taken' as having been committed in the county laid in the charge, unless the defendant, by plea in abatement, under oath, shall allege the transaction took place in another county, whereupon the case may be removed thither for trial." *S. v. Allen,* 107 N. C., 805. An offense is deemed to have been committed in the county in which it is laid in the indictment unless the defendant shall deny the same by plea in abatement, which ordinarily must be filed not later than the arraignment. *S. v. Oliver,* 186 N. C., 329, and cases there cited. "If the offense had not been committed in that county the defendant waived the objection by not pleading in abatement." *S. v. Lemons,* 182 N. C.,

828. There was no plea in abatement in the case at bar before arraignment, or at any time.

In the absence of a plea in abatement, it was not necessary for the State in this case to invoke the provisions of C. S., 4250, to the effect that one charged with receiving stolen property knowing it to have been stolen may be tried in any county in which he shall have had such property in his possession or in any county in which the thief may be tried.

There was evidence tending to show that within less than a month preceding the date of the commission of the crime for which the appellant was being tried, namely, 5 April, 1935, there had been other offenses of a similar nature committed by the appellant, and some of the other parties named in the bill of indictment, and that shortly after said date other stolen cigarettes were obtained from the appellant. This evidence was introduced by the State and admitted by the court over objection by the appellant, and is made the basis for exceptive assignments of error. There was no error in the admission of this evidence, since it comes within a well recognized exception to the general rule that a particular crime may not be proved by evidence of distinct substantive offenses. The exception is that when it becomes necessary to prove the guilty knowledge of the accused, evidence of similar independent offenses committed by him is competent to show such knowledge, or *scienter*. In *S. v. Twitty*, 9 N. C., 248, wherein the defendant was charged with uttering forged money knowing it to be forged, the court cited various authorities and said: "These authorities seem to go the length of proving that where an offense consists in a knowledge of the thing done to be unlawful, evidence may be given to bring home that knowledge to the prisoner, although a disclosure of other facts and transactions for which the defendant is not then on trial may be the consequence. . . . The *quo animo* with which he passed the note is to be collected from the concomitant circumstances." See, also, *S. v. Walton*, 114 N. C., 783; *S. v. Pannil*, 182 N. C., 838; *S. v. Ferrell*, 205 N. C., 640; Lockhart's N. C. Evidence, par. 213. Guilty knowledge is an essential element of the crime with which the appellant was charged, the words of the statute creating it being, "such person knowing the same to have been feloniously stolen or taken, . . ." C. S., 4250.

This exception to the general rule applies not only to prior transactions of the accused but also to his recent subsequent transactions of a similar nature. In *S. v. Murphy*, 84 N. C., 742, *Ashe, J.*, cites *Rex v. Davis*, 6 Car. & P., 117, where, on a trial for knowingly receiving stolen goods, for the purpose of showing guilty knowledge of the defendant, evidence was admitted that other stolen goods were found at the same time in his possession, although they were the subject of an indictment then pending, and writes: "So, on a charge for sending a threatening

letter, prior and subsequent letters from the defendant to the person threatened have been received in evidence explanatory of the meaning and intent of the particular letter upon which the indictment is found." The following from *S. v. Jeffries,* 117 N. C., 727, is cited and quoted in the brief of the appellant: "If such testimony be admissible to prove such intent, the 'collateral offense' sought to be proved must be confined to a time before or just about the time the offense charged against the defendant is alleged to have been committed."

The evidence of prior collateral offenses which the State introduced tended to prove that 26 cases of stolen Chesterfield cigarettes were hidden at Youngsville, in Franklin County, and that the appellant, in March, about two weeks before the date alleged in the bill of indictment as the date the defendant knowingly received stolen property, went with some of his codefendants and hauled them "to a little place back of his house" in Wake County. The evidence of subsequent collateral offenses which the State introduced tended to prove that on 8 April and 15 April, three and ten days, respectively, after 5 April, 1935, the date alleged in the bill of indictment, four cases of Chesterfield and Camel cigarettes (two cases on each date), with no consignee marks on them, were obtained from the appellant in Wake County. All of this evidence as to both prior and subsequent collateral offenses was sufficiently connected and contemporaneous with the crime charged to render it competent as tending to prove that the appellant knew that the cigarettes named in the bill of indictment were stolen at the time he received them.

As to all the evidence relative to similar collateral offenses, the court was careful upon its admission in each instance to instruct the jury that it was admitted only to show, if it did show, the knowledge on the part of the appellant that he was receiving stolen property when he received Lucky Strike cigarettes from his codefendants on or about 5 April, 1935. This instruction was also repeated in the charge.

The appellant directs a number of exceptions to the court's permitting the State to introduce, over his objection, parol evidence to establish the contents of Norfolk Southern freight car No. 20635, when there was evidence to the effect that the records of the railroad company showed such contents, upon the theory that such records were the best evidence of the fact sought to be proved. While it is generally agreed that writings themselves furnish the best evidence of their contents, the "best evidence rule" has no application here, since the fact sought to be proved was whether certain cigarettes had been put in a certain car, and had no relation whatsoever to the contents of any writing or record. No problem of primary and secondary evidence was presented. The making of a record did not prohibit a witness, who loaded the car and saw what went into it, from testifying as to its contents.

The appellant assigns as error that "the trial court did not at any time instruct the jury that the burden of proof was upon the State, nor did it explain to the jury the meaning of burden of proof." In the light of the charge as a whole, this assignment is untenable. At the outset of the charge his Honor correctly defined the offense of feloniously receiving stolen property knowing it to have been stolen, and told the jury that the defendant was presumed to be innocent until proved guilty beyond a reasonable doubt, and carefully explained the meaning of the words "reasonable doubt," and, later on in the charge, instructed the jury as follows: "Now, gentlemen, right there, if you convict Garvey Ray, you would have to be satisfied beyond a reasonable doubt, first, that he received the cigarettes at his filling station; and secondly, you would have to be satisfied beyond a reasonable doubt that at the time he received them he knew they were stolen goods. If you have a reasonable doubt about either one of these essentials, you would return a verdict of not guilty as to Garvey Ray." This instruction, when read contextually with the rest of the charge, fully meets the only exception to the charge brought forward in the appellant's brief.

In the trial in the Superior Court we find no error.

The motion in arrest of judgment lodged in this Court is denied.

No error.

ROBERT E. COX v. THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

(Filed 8 April, 1936.)

1. Appeal and Error B b—

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

2. Insurance P b—Conflicting evidence on question of insured's disclosure of facts to insurer's agents held to raise issue for jury.

Insured offered evidence, principally his own testimony, to the effect that he disclosed previous illnesses and the names of physicians who had treated him to insurer's soliciting agent and to insurer's medical examiner, that insurer's medical examiner tested him in regard to his previous ailments and pronounced him all right, and stated he would not put all the information down because it was immaterial. Insurer offered evidence that insured's application failed to disclose material facts, and offered testimony, principally that of its medical examiner, to the effect that insured did not disclose such information either to the soliciting agent or to the medical examiner, and that no test as to the prior ailments was made. *Held:* The conflicting evidence raised an issue of fact for the determination of the jury.

3. Insurance K a—Knowledge of local agent is imputed to insurer when agent does not participate in fraud, and constitutes waiver or estoppel.

The jury found from conflicting evidence that insured disclosed all facts material to the risk to insurer's soliciting agent and to insurer's medical examiner. There was no suggestion that insurer's agents participated in the alleged fraud, or that the information was not received by them in the scope of their duties. *Held:* The knowledge of insurer's local agents at the inception of the policy is imputed to insurer, even though the policy contains a stipulation to the contrary, and insurer will not be allowed to avoid the policy for the very facts so disclosed to its local agents, such imputed knowledge constituting either a waiver or an estoppel.

APPEAL by the defendant from *Cowper, Special Judge,* at March Term, 1935, of WAYNE. No error.

This is a civil action, wherein the plaintiff alleged that the defendant, on 14 March, 1929, issued to him two life insurance policies providing for suspension of payment of premiums and certain monthly cash benefits to the insured in the event of his total and permanent disability; and that the premiums were paid and the policies were in full force and effect on 1 December, 1931, when the plaintiff became totally and permanently disabled within the meaning of the policies.

The defendant made answer and admitted the issuance of the policies with total and permanent disability provisions, but denied the plaintiff was disabled as alleged, and for a further defense averred that the total and permanent disability provisions in said policies were void for the reason that the plaintiff's application therefor contained false representations and concealments, (1) as to the receipt by him of insurance benefits for injury or illness, (2) as to other illnesses or injuries suffered by him, and (3) as to the physicians by whom he had been treated during the preceding five years.

The plaintiff filed reply in which he alleged that if the application for disability insurance signed by him failed to contain a full and correct statement of his former illnesses and injuries, and of the physicians who had treated him, such failure was due to the omission of the medical examiner of the defendant to record all the information given him, since at the time said application was prepared by said examiner the plaintiff made to said examiner a full and correct statement of all illnesses and injuries suffered by him and of the physicians who had treated him during the preceding five years, and that such omissions as were made in the applications were known to the defendant at the time the policies were delivered.

The issues submitted to and the answers made by the jury were as follows:

"1. Did the plaintiff, on or about 1 December, 1931, become totally and permanently disabled, as defined in the policy? Answer: 'Yes.'

"2. Has such disability continued and existed continuously to the present time? Answer: 'Yes.'

"3. Did the plaintiff Robert E. Cox untruthfully represent in his application for the insurance policies sued on that he had never received any insurance benefit or indemnity for any injury or illness? Answer: 'No.'

"4. Did the plaintiff untruthfully represent in his application for the insurance policies that he had had no other illness or injury except the following: Treatment of the right leg 1923, tonsilectomy 1927, influenza 1928, and bronchitis 1928? Answer: 'No.'

"5. Did the plaintiff untruthfully represent in his application for the insurance policies that he had consulted or been treated by no physician or practitioner during the preceding five years except Dr. D. J. Rose? Answer: 'No.'"

There appears in the record the following agreement: "It was agreed between the parties that if the jury shall answer the issues in such manner that the plaintiff will be entitled to any sum, that the court or judge may find from the evidence the amount so due the plaintiff for disability and return of premiums."

The court entered judgment to the effect that "the plaintiff recover of the defendant the sum of eighteen hundred eighty-two and 50/100 ($1,882.50) dollars, with interest on $382.50 thereof from the first day of October, 1932, and interest on $1,400.00 thereof from the first day of August, 1932, together with the costs of this action, to be taxed by the clerk," . . . and that "the contract of insurance issued by the defendant to the plaintiff and being Policy No. 7638016, and the contract of insurance issued by the defendant to the plaintiff and being Policy No. 7638017, are valid and binding obligations on the part of said defendant and are now in full force and effect." From this judgment the defendant appealed, assigning errors.

Dickinson & Bland, Julian T. Gaskill, Kenneth C. Royall, and Joe C. Eagles, Jr., for plaintiff, appellee.

Langston, Allen & Taylor and S. Brown Shepherd for defendant, appellant.

SCHENCK, J. The exceptions relating to the first and second issues do not seem to be very strongly urged in the appellant's brief, and we find no reversible error presented by them. The third issue was answered by consent. The controversy centers upon the fourth and fifth issues.

Under its exceptions to the court's refusal to grant its motions for judgment as of nonsuit, and to the court's refusal to give requested peremptory instructions as to the fourth and fifth issues, the defendant

takes the position that under all of the evidence it was entitled to a judgment canceling the total and permanent disability clause of the policies in suit.

From the issues submitted, the evidence offered by the defendant, and the charge of the court, it clearly appears that the case was tried in the Superior Court upon the theory that the disability clause in the policies in suit was void for reason that the plaintiff, the insured, made false representations and concealments in his application to the defendant, the insurer, for such policies. Having been tried upon this theory in the Superior Court, and no objection having been made by either party to the issues submitted, the case must be interpreted by us in the light of such theory. *Edgerton v. Perkins,* 200 N. C., 650.

Upon the fourth issue the defendant offered evidence tending to prove that the plaintiff had other illnesses and injuries than those mentioned, namely: "Treatment of the right leg 1923, tonsilectomy 1927, influenza 1928, and bronchitis 1928," and the plaintiff did not controvert that he had had some other illnesses and injuries. However, the plaintiff offered evidence, his own testimony principally, that he had made known to both the soliciting agent and to the medical examiner of the defendant, who filled out the application, all of the illnesses and injuries that he had suffered, and had told such examiner that he had had trouble while in the army with a sprained ankle and afterwards had an attack of "sciatica nerve trouble," and had recently been to the Veterans' Bureau in Charlotte and had it checked; that at the time of the examination the examiner had him to hop to the back of the office on his right foot and back on his left foot, and the examiner remarked: "I think that is all right"; that during the examination he was stripped and the fact that one of his legs was smaller than the other was apparent; and that he remembered very distinctly that the medical examiner, when the various illnesses and injuries the plaintiff had suffered were being related to him, said: "There ain't no need putting all that junk down, because it is immaterial." The defendant offered evidence, the testimony of the the medical examiner principally, that the plaintiff did not inform him of any illnesses or injuries not written in the application, and did not tell him of any trouble he had had in the army or of any visit to the Veterans' Bureau, and that the plaintiff was not stripped for the examination and was not required to hop across the office, and did not make known or exhibit the fact that one of his legs was smaller than the other; and that the medical examiner had no information as to the plaintiff's past health record except that given to him by the plaintiff. This sharply conflicting evidence raised a clear issue of fact for the jury and the jury found for the plaintiff.

A similar issue of fact was presented under the fifth issue. The plaintiff's evidence tended to prove that he gave to the medical examiner of the defendant the names of all other physicians than Dr. R. J. Rose, who had treated him during the preceding five years, and that the medical examiner of the defendant failed to write such names in the application. The defendant's evidence tended to show that while other physicians had treated the plaintiff for other maladies in the preceding five years, no other physicians or maladies than those mentioned in the application and issues were given to its medical examiner by the plaintiff. The issue of fact raised by this conflicting evidence was likewise found for the plaintiff.

The answers to the issues, when taken with the agreement in the record, constitute a verdict that, under the decisions of this Court, support the judgment entered.

It is a well settled principle in this jurisdiction that an insurance company cannot avoid liability on a policy issued by it by reason of any facts which were known to it at the time the policy was delivered, and that any knowledge of an agent or representative, while acting in the scope of the powers entrusted to him, will, in the absence of fraud or collusion between the insured and the agent or representative, be imputed to the company, though the policy contains a stipulation to the contrary. *Follette v. Accident Asso.*, 110 N. C., 377; *Fishblate v. Fidelity Co.*, 140 N. C., 589; *Short v. Life Insurance Co.*, 194 N. C., 649; *Laughinghouse v. Insurance Co.*, 200 N. C., 434; *Colson v. Assurance Co.*, 207 N. C., 581; *Barnes v. Assurance Society*, 204 N. C., 800, and cases there cited.

There is no suggestion in this case that there was any collusion between the insured and the medical examiner, or that the medical examiner was not acting in the scope of his employment in making the examination and in writing the answers to the interrogatories contained in the application, since said examiner was introduced as a witness for the defendant and his testimony is its principal reliance. There is also no evidence or suggestion in the record of any collusion between the insured and the soliciting agent. The only evidence relative to the information possessed by the latter was the testimony of the former. The soliciting agent was not called as a witness.

What is said in *Follette v. Accident Association, supra,* is applicable to this case and renders unnecessary any discussion by us of the questions relative to waiver and estoppel raised in the briefs. In that case *Judge Avery* writes: "It is not material whether we say that the conduct of the local agent amounts to a waiver or works an estoppel on the insurer, as the authorities are in conflict upon the point. . . . Certain it is that in such cases the knowledge of the agent is imputed to the principal, and to deliver a policy with a full knowledge of facts upon which its

validity may be disputed, and then insist upon those facts as a ground of avoidance, is to attempt a fraud."

We have examined the exceptive assignments of error which relate to the admission and exclusion of evidence and to the charge of the court and find no reversible error.

No error.

F. L. CASE AND WIFE, MAGGIE CASE, v. FRANK FITZSIMONS.

(Filed 8 April, 1936.)

Dower B a—Where deed of trust is executed in substitution for purchase money lien without discharging original debt, dower does not attach.

By agreement between the grantor and grantee, the debt secured by a duly executed purchase money deed of trust was divided, and two deeds of trust securing same were executed and substituted for the original purchase money deed of trust, which was canceled, the substitution of the two deeds of trust, constituting a first and second lien, for the original purchase money deed of trust being made for the convenience of the grantee in making payment. The wife of the grantee did not join in executing any of the deeds of trust. The trial court found, upon submission of controversy, that the substituted deeds of trust constituted a continuation of the original debt. *Held:* The wife of the grantee acquired no dower right in the land, the original debt for the purchase money not having been extinguished. N. C. Code, secs. 1003, 4101.

APPEAL by defendant from *Pless, J.*, at March Term, 1936, of HENDERSON. Affirmed.

This is a controversy without action. N. C. Code, 1935 (Michie), sec. 626. The agreed statement of facts is as follows:

"1. That on 7 September, 1935, the plaintiffs were the owners and in possession of the following described tract of land in said county, to wit: (describing same by metes and bounds).

"2. That as such owners the plaintiffs sold and conveyed, by proper deed, all said lands to one George B. Pettit, which said deed is duly recorded in the office of the register of deeds for Henderson County; that upon delivery of said deed said George B. Pettit paid part of the purchase price in cash, and simultaneously with the execution and delivery of said deed, and to secure the balance of the purchase price, executed a deed of trust to McD. Ray, trustee, for the plaintiff F. L. Case, conveying said property to said trustee, for the purpose of securing the said balance of the purchase price; that said deed of trust was in all respects regular and constituted a first and valid lien, and was a purchase money deed of trust against said property, said deed of trust being recorded in

the office of the register of deeds for Henderson County, in Book ....., page ....., of the Records of Mortgages and Deeds of Trust.

"3. That at the time of the execution and delivery of said deed of trust the purchaser, George B. Pettit, was married and living with his wife; that the said wife still lives and is residing with her said husband, but was not a party to said purchase money deed of trust.

"4. That on 7 September, 1926, after said purchase money deed of trust was recorded, and while the same was in full force and effect, and before any payment had been made thereon, the said George B. Pettit requested of the plaintiff, F. L. Case, the then owner and holder of the notes securing said purchase money and deed of trust, to grant an extension of the payments maturing under the terms of said purchase money deed of trust, and to divide the total sum so that it would mature on dates other than the maturity dates mentioned in the purchase money deed of trust; whereupon, the plaintiff F. L. Case caused to be properly canceled the said purchase money deed of trust, and simultaneously therewith the said George B. Pettit executed and delivered to the said F. L. Case one note in the sum of $3,500, due 7 September, 1927, and to secure the payment thereof, executed and delivered at said time a deed of trust to M. M. Redden, trustee, for F. L. Case, which, in all respects, is regular and is duly recorded in Book 99, page 168, of the Henderson County Mortgage Records, and conveys the property aforementioned, for the purpose of securing said debt; that it is recited in said deed of trust, 'This deed of trust is given to secure a part of the purchase price on the above described land, and is a first mortgage on same.' That said note and deed of trust represented a part of the money owing for the purchase of said land as secured by the original deed of trust first above mentioned, and was a continuation of said debt.

"5. That the balance of the purchase money, as represented by the original deed of trust first above mentioned, was evidenced by the execution and delivery on the part of George B. Pettit, of one note, in the sum of $570.00, and one note, in the sum of $4,000, maturing 20 February, 1927, and 7 September, 1927, respectively, which were executed and delivered simultaneously with the cancellation of the first deed of trust aforementioned and said notes were secured by the execution and delivery on the part of George B. Pettit to M. M. Redden, trustee, for F. L. Case, a deed of trust, in proper form, conveying the property aforementioned, for the purpose of securing said debt as evidenced by said notes, and there is written in said deed of trust the following: 'This deed of trust is given to secure a part of the purchase price and is a second lien on same.' Said deed of trust is duly recorded in Book 99, page 167, of the Henderson County Mortgage Records; that said notes and deed of trust represent that part of the original purchase money deed of trust

not secured by the deed of trust described in paragraph 4 above. That both said last deeds of trust were executed and delivered to M. M. Redden, trustee, for F. L. Case, to secure the obligation as evidenced by the original purchase money deed of trust, and was a continuation of the debt evidencing the purchase price of said land; that the wife of George B. Pettit did not join in either of said deeds of trust.

"6. That the trustee, in accordance with the terms of sale provided in the last two deeds of trust aforementioned, on account of default in the payment thereof, advertised said lands and exposed the same to public sale, in strict compliance with the provisions of said deeds of trust; that plaintiff F. L. Case became the purchaser of said lands, and the trustee executed and delivered to said F. L. Case a deed conveying said lands to said F. L. Case, who is now the owner of an indefeasible, fee simple, unencumbered title to said lands, unless the wife of George B. Pettit, because of her failure to sign said deeds of trust, has an inchoate right of dower therein.

"7. That the plaintiffs and defendant entered into a contract, in writing, by the terms of which the plaintiffs agreed to sell, and the defendant agreed to purchase, said property, for an agreed consideration, provided the plaintiffs could deliver a good title to said property; that said plaintiffs being husband and wife at all times herein mentioned, have executed a deed in proper form, by the terms of which the property aforementioned is conveyed to the defendant, and the defendant is able, ready, and willing to comply with the terms of his agreement and pay the purchase price and accept deed therefor, but contends that, on account of the matters and things herein set forth the wife of George B. Pettit is the owner of an inchoate right of dower in said land, and for that reason has declined to accept said deed and pay said purchase price.

"8. That the defendant contends that when the plaintiffs caused to be canceled the original purchase money deed of trust first above mentioned, the wife of George B. Pettit immediately became vested with a dower interest in said property, and that the execution and delivery of the last two deeds of trust above mentioned did not defeat said interest.

"9. The plaintiffs contend that since the purchase money deed of trust first above mentioned was in all respects regular and proper, and the debt secured thereby was the balance of the purchase price, that the execution and delivery of the last two deeds of trust constituted simply a continuation of the debt and did not vest the wife of George B. Pettit with any interest in said property until the debt was paid, which has not been done, and that the deed offered by the plaintiffs to the defendant conveys said land in fee simple, free from any claim of dower on the part of the wife of George B. Pettit.

"10. That plaintiffs have been at all times since the sale of said lands to George B. Pettit, and are now, in possession thereof; that said sale was consummated in the 'boom days' of Western North Carolina real estate; that the wife of George B. Pettit has never claimed any interest in said property, and her whereabouts at present are unknown.

"Wherefore, the parties hereto respectfully pray the court:

"That the differences between them be adjudged and determined to the end that their rights may be declared. This 6 March, 1936.

REDDEN & REDDEN,
Attys. for Plaintiffs.
L. B. PRINCE,
Atty. for Defendant."

The judgment of the court below is as follows: "The above entitled cause coming on to be heard before his Honor, J. Will Pless, Jr., judge presiding, at the aforesaid term of court, and being heard, and after consideration of the facts agreed upon, and after hearing the argument of counsel of plaintiffs and defendant, the court being of the opinion that upon the facts in this case the execution of the deeds of trust in question was a continuation of the original purchase money deed of trust securing the purchase price, and that to hold otherwise would render the property unsalable by the owner, resulting in injustice to him, thereupon holds that the wife of George B. Pettit has no dower interest or other claim in or to the property described in paragraph 1 of this controversy, and that the deed tendered by plaintiffs to the defendant is sufficient to convey an absolute title: It is therefore, on motion of Redden & Redden, attorneys for plaintiffs, ordered, adjudged, and decreed that the plaintiffs are declared the owners in fee simple of the lands described in this controvrsy, free from any claim of dower or otherwise on the part of the wife of George B. Pettit in said lands, and the defendant is ordered and directed to pay the purchase price agreed upon to the plaintiffs upon further tender of a deed to said property, as set forth in said controversy. It is further ordered that defendant pay the cost of this action as taxed by the clerk. This 6 March, 1936. J. Will Pless, Jr., Judge presiding."

The only exception and assignment of error is to the judgment as signed.

Redden & Redden for plaintiffs.
L. B. Prince for defendant.

CLARKSON, J. The question involved in this controversy: When a purchase money deed of trust, in proper form, has been canceled at the

request of the maker and a substituted deed of trust given therefor between the same original parties and to secure the same debt so as to more conveniently suit the ability of the maker to pay the debt, does the substituted deed of trust lose its status as a purchase money lien, thereby vesting the maker's wife with an inchoate right of dower in the property? We think not, under the facts and circumstances of this case.

N. C. Code, 1935 (Michie), sec. 1003, is as follows: "The purchaser of real estate who does not pay the whole of the purchase money at the time when he takes a deed for title may make a mortgage or deed of trust for securing the payment of such purchase money, or such part thereof as may remain unpaid, which shall be good and effectual against his wife as well as himself, without requiring her to join in the execution of such mortgage or deed of trust."

Section 4101 is as follows: "No alienation of the husband alone, with or without covenant of warranty, shall have any other or further effect than to pass his interest in such estate, subject to the dower right of his wife: *Provided,* that a mortgage or trust deed by the husband to secure the purchase money, or any part thereof, of land bought by him, shall, without the wife executing the deed, be effectual to pass the whole interest according to the provisions of the said deed."

From the agreed statement of facts, the court below in the judgment found "That upon the facts in this case the execution of the deed of trust in question was a continuation of the original purchase money deed of trust securing the purchase price."

In *Grace v. Strickland,* 188 N. C., 369 (372), speaking to the subject, it is said: "In 8 C. J., p. 443, sec. 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." *Kidder v. McIlhenny,* 81 N. C., 123 (133); *Terry v. Robbins,* 128 N. C., 140; *Dawson v. Thigpen,* 137 N. C., 462 (470-1); *Bank v. Howard,* 188 N. C., 543 (547). The case of *Chemical Co. v. Walston,* 187 N. C., 817 (825), cited by defendant, we do not think is contrary to the position here taken.

We think from the facts and circumstances of this case the wife of George B. Pettit has no dower rights in the lands in controversy.

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

Affirmed.

W. O. CARTER ET AL. v. JESSE SMITH ET AL.

(Filed 8 April, 1936.)

1. **Parties A c—Where subject matter is in custody of the court, the court may allow person having an interest therein to intervene.**

Where final judgment adjudicating the rights of the parties has been rendered, but the subject matter of the action is still in the custody of the court, the court has the discretionary power to allow a person having an interest in the subject matter of the action, but who was not made a party thereto, to intervene and assert his rights, since the intervener, not being a party to the action, is not bound by the provisions of the judgment.

2. **Appeal and Error J a—**

The determination of a motion that a party be allowed to intervene in an action, upon a proper showing, is not reviewable, the motion being addressed to the discretion of the court.

3. **Descent and Distribution B c—Representatives of brothers of mother of illegitimate child held not entitled to inherit from him.**

The provisions of ch. 256, Public Laws of 1935, do not affect the distribution of an estate of a person dying prior to the enactment of the statute, the provision of the statute that it should apply to estates of such persons whose estates had not then been distributed being inoperative, and an illegitimate person dying prior to the enactment of the statute leaving only the brothers of his mother, or their legal representatives, him surviving, leaves no person him surviving entitled to inherit from him, and his property, both real and personal, vests immediately in the University of North Carolina under the Constitution and laws of this State.

4. **Consitutional Law E a—**

A statute enacted subsequent to intestate's death may not change the law of descent so as to divest property rights which had vested in accordance with the law in effect at the time of the death of the intestate.

APPEAL by all parties, both plaintiffs and defendants, except the University of North Carolina, intervener, from *Rousseau, J.*, at September Term, 1935, of FORSYTH. Affirmed.

This is a special proceeding, instituted before the clerk of the Superior Court of Forsyth County, on 12 December, 1932, for the purpose of having determined by the court which of the plaintiffs and defendants are heirs at law and next of kin of Ed L. Carter, deceased, and for the partition among his heirs at law of lands of which the said Ed L. Carter died seized and possessed, and for the distribution among his next of kin of the personal property which was owned by the said Ed L. Carter at his death.

After pleadings had been filed, to wit: On 20 February, 1933, on the facts set out therein, an order was made in the proceeding by the clerk of the Superior Court that the lands described in the petition be sold by

a commissioner appointed by the court for that purpose; and pursuant to said order the said lands were sold by the commissioner and the proceeds of the sales, to wit: The sum of $7,291.40, are now in the office of the clerk of the Suprior Court of Forsyth County, awaiting final judgment in the proceeding. In addition to this sum, there is now in the hands of the defendant administrator of Ed L. Carter, deceased, subject to the orders of the court, the sum of $9,000, which constitutes the personal estate of Ed L. Carter, deceased.

Pursuant to an order of the clerk of the Superior Court of Forsyth County made on 20 February, 1933, the proceeding was transferred by said clerk to the civil issue docket of the Superior Court of Forsyth County for the trial by a jury of the issues of fact raised by the pleadings. At March Term, 1933, of said court, issues involving the conflicting contentions of the plaintiffs and defendants, as to which of the said parties to the proceeding are heirs at law and next of kin of Ed L. Carter, deceased, were submitted to and answered by the jury. Judgment was rendered at said March Term, 1933, of the court, in accordance with the verdict, determining that certain of the plaintiffs and certain of the defendants are heirs at law and next of kin of Ed L. Carter, deceased, and as such are entitled to share in the division of the proceeds of the sales of the lands owned by the said Ed L. Carter, at his death, and in the distribution of the personal property owned by the said Ed L. Carter at his death.

After the judgment in this proceeding was rendered at March Term, 1933, of the Superior Court of Forsyth County, and before the proceeds of the sales of the lands owned by Ed L. Carter at his death had been divided, or the personal property owned by the said Ed L. Carter, at his death, had been distributed in accordance with said judgment, to wit: On 29 April, 1933, the University of North Carolina filed a motion in writing in the proceeding, praying that it be allowed to intervene in the proceeding, for the purpose of setting up its claims, under the Constitution and laws of this State, to the property, both real and personal, owned by Ed L. Carter, at his death. This motion was heard and allowed by the court at its October Term, 1933.

The University of North Carolina thereupon intervened in the proceeding and filed its petition. On the facts alleged in its petition, it prayed that the judgment rendered at March Term, 1933, of the court be set aside and vacated, and that it be adjudged by the court that the University of North Carolina is the owner of all the property, real and personal, which was owned by Ed L. Carter at the date of his death, subject only to the payment of his debts, if any, and the costs and expenses incurred in administering his estate. Answers to the petition were duly filed by both plaintiffs and defendants, who prayed that on the facts alleged in said answers the petition be dismissed.

The proceeding was heard on the petition of the University of North Carolina, as intervener, and the answers of the plaintiffs and defendants, at September Term, 1935, of the Superior Court of Forsyth County. At this hearing a statement in writing of facts agreed by the parties was filed with the court. The facts agreed by the parties are substantially as follows:

1. Ed L. Carter died in Forsyth County, North Carolina, intestate, on 20 August, 1932.

The plaintiff R. L. Hastings has been duly appointed and has duly qualified as administrator of Ed L. Carter, deceased.

At his death the said Ed L. Carter was seized in fee and in possession of the lands described in the petition. These lands have been sold pursuant to an order made in this proceeding by the clerk of the Superior Court of Forsyth County. The proceeds of the sale of said lands, to wit: The sum of $7,291.40, are now in the office of the clerk of the Superior Court of Forsyth County, and are subject to the final judgment in this proceeding.

At his death the said Ed L. Carter was the owner of considerable personal property, which has been sold by his administrator. The proceeds of the sale of said personal property, together with the amount of a deposit in the Wachovia Bank and Trust Company of Winston-Salem, N. C., which has been paid to the said administrator, amount to the sum of $9,000. This sum is now held by the administrator of Ed L. Carter, deceased, and is subject to the final judgment in this proceeding.

The deposit in the Wachovia Bank and Trust Company, amounting to the sum of $2,835.07, was to the credit of "Ed Carter or Bettie Carter." Bettie Carter was the mother of Ed Carter. She died intestate before his death. No administrator has been appointed for Bettie Carter. The deposits were made during the joint lives of Bettie Carter and Ed Carter, and were made up by money earned by their joint labors.

2. Ed L. Carter was the only child of Bettie Carter, who died in Forsyth County, North Carolina, intestate, about seventeen years before his death. He was the illegitimate son of Bettie Carter. He never married.

Bettie Carter, mother of Ed L. Carter, had two brothers, William Carter and Frank Carter, both of whom died prior to her death. Each of the brothers of the said Bettie Carter left surviving him children or grandchildren. The plaintiffs and the defendants are children or grandchildren or descendants of William Carter or of Frank Carter. Each of the defendants has been duly served with summons in this proceeding.

This proceeding was instituted on 12 December, 1932. At March Term, 1933, of the Superior Court of Forsyth County, judgment was rendered in the proceeding that certain named plaintiffs and defendants

are the heirs at law and next of kin of Ed L. Carter, deceased. The University of North Carolina was not a party to the proceeding at the time said judgment was rendered. After the said judgment was rendered, the University of North Carolina, on its motion, was allowed to intervene in the proceeding, and to file its petition praying that on the facts alleged therein, the judgment at March Term, 1933, of the Superior Court of Forsyth County be set aside and vacated, and that it be adjudged by the court that the University of North Carolina, under the Constitution and laws of this State, is the owner of all the property, real and personal, which was owned by Ed. L. Carter at his death, subject only to the payment of his debts, if any, and the costs and expenses incurred in administering his estate.

On the facts agreed, it was ordered, considered, and adjudged by the court that the University of North Carolina is entitled to all the funds now in the hands of the administrator of Ed L. Carter, deceased, and to all the funds now in the custody of the clerk of the Superior Court of Forsyth County, as proceeds of the sale of lands owned by the said Ed L. Carter at his death.

It was further ordered by the court "that R. L. Hastings, administrator as aforesaid, shall, immediately after paying the costs and expenses of administration and all debts and expenses of the estate of Ed L. Carter, deceased, pay the remainder of said funds to the University of North Carolina, and that the clerk of the Superior Court of Forsyth County shall likewise pay to the University of North Carolina the funds held by him."

All the parties to the proceeding, except the University of North Carolina, excepted to the judgment and appealed to the Supreme Court of North Carolina, assigning errors in the judgment.

Elledge & Wells, Gold, McAnally & Gold, and Hastings & Booe for appellants.

Parrish & Deal for University of North Carolina.

CONNOR, J. There was no error in the order made in this proceeding by the judge of the Superior Court of Forsyth County at October Term, 1933, of said court, allowing the University of North Carolina to intervene in the proceeding in accordance with its motion made after the judgment had been rendered in the proceeding at March Term, 1933, of said court. The intervener was not a party to the proceeding at the time the judgment was rendered, and therefore was not bound by its provisions. On the facts alleged in its motion, which was in writing, the intervener had an interest not only in the controversy which was involved in the proceeding, but also in its subject matter. The contro-

versy between the plaintiff and defendants had been determined by the judgment, but the subject matter of the controversy was in the custody of the court, or subject to its control, at the time the motion was made. Whether or not, on these facts, the University of North Carolina should be allowed to intervene in the proceeding in accordance with its motion was a matter resting in the sound discretion of the court, and its order allowing the motion is for that reason not subject to review by this Court. *Bank v. Lewis,* 203 N. C., 644, 166 S. E., 800. We think, however, that in the instant case the court properly exercised its discretion when it allowed the University of North Carolina to intervene in the proceeding, and to assert therein its claim, under the Constitution and laws of this State, to the property, real and personal, which was owned by Ed L. Carter at his death.

At his death on 20 August, 1932, Ed L. Carter left surviving him no person who was entitled to his property, real or personal, as his heir at law or as his next of kin. He died intestate. He had never married. He was the only child of Bettie Carter, who had predeceased him. He was her illegitimate son. Under the Constitution and laws of this State, in force at the death of Ed L. Carter, his property, both real and personal, subject only to the claims of his creditors, if any, vested immediately in the University of North Carolina (see *In re Neal,* 182 N. C., 405, 109 S. E., 70), and could not be divested by a statute enacted by the General Assembly subsequent to his death. Chapter 256, Public Laws of North Carolina, 1935, which was ratified on 29 April, 1935, is not applicable to the instant case, notwithstanding the provisions of section 3 of the statute.

There is no error in the judgment of which the plaintiffs or the defendants can complain. On the facts agreed, neither the plaintiffs nor the defendants have any right, title, or interest in the property, real or personal, which was owned by Ed L. Carter at his death. The judgment must be and is

Affirmed.

RUTHERFORD COLLEGE, INCORPORATED, v. T. D. PAYNE.

(Filed 8 April, 1936.)

1. Courts A f—Matter determined by order of one Superior Court judge may not be presented for decision to another Superior Court judge.

The findings of fact and order of the clerk refusing a motion to remove the cause to another county, on the ground of the residence of the parties, were approved and affirmed on appeal by the judge of the Superior Court at term. Upon trial of the cause at a subsequent term, movant excepted to the refusal of the trial court to remove the cause. *Held:* Movant's

rights were determined by the confirmation of the clerk's order, and his exception to the trial court's refusal to order the cause removed cannot be sustained, since no appeal will lie from a determinative order of one judge of the Superior Court to another.

2. Bills and Notes H b—Where evidence is conflicting on defense relied on by maker, nonsuit is properly denied.

Defendant admitted executing the note sued on, which was introduced in evidence by plaintiff, but defendant alleged certain matters in defense. The evidence was conflicting upon the defense relied on by defendant. *Held:* Defendant's motion to nonsuit was properly denied, the burden being upon defendant to prove the defense, and plaintiff's evidence being sufficient to take the case to the jury.

3. Bills and Notes H c—Answer held to allege defense to recovery on note, and evidence thereon should have been submitted to jury.

The note in suit stipulated that the consideration therefor was to provide, with other contributors, an endowment fund for the denominational educational institution named as payee. In an action on the note, defendant maker admitted its execution, but alleged and offered evidence to the effect that the institution named as payee was insolvent and was in process of liquidation, and that its assets had been assigned to another educational institution controlled by the same religious organization, and that the purpose of establishing an endowment fund for the institution named as payee could not be accomplished. *Held:* Although there was sufficient consideration for the note at the time of its execution, the matters alleged, if existing at the time of institution of action, constituted a defense, and the conflicting evidence upon the defense should have been submitted to the jury.

APPEAL by defendant from *Warlick, J.*, at January Term, 1936, of CATAWBA. New trial.

This is an action to recover on a note which is in words and figures as follows:

"RUTHERFORD COLLEGE, N. C.,
October 26, 1927.

"$300.00.

"Five years after date, for value received, I promise to pay to the order of Rutherford College (Incorporated) the sum of three hundred dollars, with interest from date at the rate of 6 per cent, payable annually.

"The consideration of the foregoing obligation is together with other subscribers and contributors mutually to provide, create, and establish an endowment fund for the said Rutherford College, an institution dedicated to Christian Education, said fund and endowment to be held by the said Rutherford College and used in the cause of Christian Education; and it is provided that in the event of my death before the maturity of this bond and obligation, that the total sum herein pledged, both principal and interest, shall become at once due and payable.

T. D. PAYNE (Seal)."

It is alleged in the complaint and admitted in the answer that the interest accrued on said note from its date to 26 October, 1932, has been paid by the defendant.

In his answer the defendant admits the execution of the note sued on. He does not allege that he has paid the said note, or any part of its principal.

In defense of plaintiff's recovery on the note described in the complaint, the defendant alleges in his answer, among other things:

"(c) That on account of the mismanagement of Rutherford College by its trustees, it became insolvent, and has been unable to run as an institution of learning; and that the defendant is informed and believes, and so alleges, that the trustees of Rutherford College and others connected with its operation, including G. F. Ivey, who now claims to be treasurer of Rutherford College, used the assets of said institution, including money that had been contributed to its endowment fund, for the purpose of paying debts which they themselves created, and for which they are personally responsible.

"(d) That on account of the mismanagement of Rutherford College by its trustees and those in charge of it, the institution has been utterly discontinued as an institution of learning, and the corporation is now in process of liquidation and dissolution.

"(e) That on account of the mismanagement of Rutherford College, as hereinbefore alleged, the very purpose for which this defendant promised to contribute has been destroyed, and it is not now and never can be again an institution of learning, and there is not now and never can be again any endowment fund created for the said Rutherford College.

"(f) That the purpose of the plaintiff in this action instituted by G. F. Ivey, who claims to be treasurer of Rutherford College, is to attempt to collect money on the note or obligation which this defendant executed for the purpose hereinbefore alleged, and to use such proceeds as may be collected on said note for the payment of debts and obligations of said institution which were made and contracted without any authority from this defendant, but on which indebtedness, as this defendant is informed and believes, and so alleges, the said G. F. Ivey and others are liable as endorsers or otherwise, and not for the purpose of creating an endowment fund for Rutherford College.

"(g) That this defendant is informed and believes, and so alleges, that the said G. F. Ivey, claiming to be treasurer of Rutherford College, has no authority nor direction given by any one to institute suit against the defendant for any cause whatsoever, and particularly has been given no power or authority to represent Rutherford College in bringing this action against this defendant.

"(h) That the defendant is informed and believes that by action of the Western North Carolina Conference of the Methodist Episcopal Church, South, which Conference was the owner and operator of Rutherford College, while it was in existence, had previously to the filing of this action by the plaintiff transferred and assigned all of the assets of Rutherford College to Brevard College, Incorporated; and that Brevard College, Incorporated, is an educational institution, owned and operated by the Western North Carolina Conference of the Methodist Episcopal Church, South, and that the plaintiff has no right to bring an action against this defendant, nor against any other person, for or on behalf of Rutherford College, Incorporated, inasmuch as Rutherford College, Incorporated, does not now own any assets or choses in action, and therefore cannot become a proper party to any suit on any obligations which have been assigned by the Western North Carolina Conference of the Methodist Episcopal Church, South, to Brevard College, Incorporated."

At the trial, after offering in evidence the note described in the complaint, together with the defendant's admission in his answer that he executed the note as alleged in the complaint, the plaintiff rested.

The evidence offered by the defendant tended to support the allegations in his answer to the effect that Rutherford College has been discontinued as an institution under the control of the Western North Carolina Conference of the Methodist Episcopal Church, South, dedicated to the cause of Christian education, and that the plaintiff corporation is now in process of liquidation because of its insolvency, for the purpose of its ultimate dissolution.

As a witness in his own behalf, the defendant testified as follows:

"I am a member of the Methodist Church. I signed the note described in the complaint. At the time I signed the note, it was my understanding that Rutherford College was owned and operated by the Western North Carolina Conference of the Methodist Episcopal Church, South, as a Methodist school. After I signed the note, I paid the interest a number of times—until 26 October, 1932. Rutherford College is not operated now as a Methodist School, as it was when I signed the note. I signed the note for the purpose of making a contribution to the endowment fund of Rutherford College. I was raised in Hickory, N. C. Although I did not attend Rutherford College, as a student, I felt very kindly to the college. When I was solicited to make a contribution to its endowment fund, it was a Methodist School, dedicated to the cause of Christian education. When I learned that the college had been discontinued as a Methodist school, I stopped paying interest on the note, and have since refused to pay the principal. Rutherford College is no longer a Methodist school, and cannot now use an endowment fund to promote the cause of Christian education under the control of the Methodist church."

The only issue submitted to the jury was as follows:

"What amount, if any, is the plaintiff entitled to recover of the defendant?"

The court instructed the jury as follows:

"If you find the facts to be as the evidence tends to show, and by its greater weight, you will answer the issue, $349.50, with interest at 6 per cent from 26 July, 1935. I am giving you this as a peremptory instruction; you may simply signify your answer to the issue by holding up your right hands."

The defendant excepted to the instruction of the court to the jury. The jury answered the issue in accordance with the instruction.

From judgment that plaintiff recover of the defendant the sum of $349.50, with interest on said sum from 26 July, 1935, and the costs of the action, the defendant appealed to the Supreme Court, assigning errors in the trial.

Thos. P. Pruitt for plaintiff.
Jake F. Newell for defendant.

CONNOR, J. Defendant's assignments of error based on his exceptions to the refusal of the trial judge to order the removal of this action from Catawba County, where it was begun, to Mecklenburg County, where the defendant resides, and also to his refusal to allow defendant's motion, at the close of all the evidence, for judgment as of nonsuit, manifestly cannot be sustained.

The motion for the removal of the action on the ground that the principal office of the plaintiff corporation is not in Catawba County was first made before the clerk of the Superior Court of Catawba County. The clerk's findings of fact, and his order denying the motion, on defendant's appeal, were approved and affirmed by the judge of the Superior Court at November Term, 1935. This was conclusive of defendant's right to a removal of the action for trial on the facts alleged by him. See *Broadhurst v. Drainage Comrs.*, 195 N. C., 439, 142 S. E., 477. In that case it is said: "It is well settled by numerous decisions of this Court that no appeal lies from an order of one judge of the Superior Court to another. It has been held that this principle does not apply where the order is merely interlocutory, and not determinative of the rights of the parties. *Bland v. Faulkner*, 194 N. C., 427, 139 S. E., 835. When, however, the order is final with respect to the matter involved, as in this case, the principle must be given full force, for otherwise we could not have an orderly administration of the law by the courts. *Dockery v. Fairbanks-Morse Co.*, 172 N. C., 529, 90 S. E., 501; *Cobb v. Rhea*, 137 N. C., 295, 49 S. E., 161; *Cowles v. Cowles*, 121

N. C., 276, 28 S. E., 476; *Henry v. Hilliard,* 120 N. C., 479, 27 S. E., 130; *Alexander v. Alexander,* 120 N. C., 472, 27 S. E., 171; *May v. Lumber Co.,* 119 N. C., 96, 25 S. E., 721."

The admission by the defendant in his answer that he executed the note described in the complaint, was offered in evidence by the plaintiff. This was sufficient to take the case to the jury. The burden was on the defendant to sustain by evidence the defense on which he relies in this action. The defendant offered evidence which tended to support the allegations of his answer. This evidence, however, was contradicted by evidence offered by the plaintiff. For this reason, there was no error in the refusal of the court to allow defendant's motion, at the close of all the evidence, for judgment as of nonsuit.

There was error, however, in the peremptory instruction of the court to the jury. This instruction can be upheld only upon the contention that the facts alleged in the answer and shown by evidence offered by the defendant at the trial are not sufficient to constitute a defense to plaintiff's recovery in this action. This contention cannot be sustained.

There was sufficient consideration for the note sued on in this action when it was signed and delivered by the defendant to the plaintiff. See *James v. Dry Cleaning Co.,* 208 N. C., 412, 181 S. E., 341; *Rousseau v. Call,* 169 N. C., 173, 85 S. E., 414; *University v. Borden,* 132 N. C., 476, 44 S. E., 47.

The jury should have been instructed by the court that if they found from the evidence, the burden being upon the defendant, that at the commencement of this action the plaintiff was insolvent, and was in process of liquidation for the purpose of its ultimate dissolution, that Rutherford College had been discontinued as a school owned and operated by the Western North Carolina Conference of the Methodist Episcopal Church, South, for the promotion of Christian education, and that the plaintiff, by reason of its insolvency and of the discontinuance of Rutherford College as a school owned and operated by the Western North Carolina Conference of the Methodist Episcopal Church, South, for the promotion of Christian education, is now unable to hold and use an endowment fund for the promotion of Christian education, they should answer the issue, "Nothing."

For the error in the instruction of the court to the jury, the defendant is entitled to a new trial. It is so ordered.

New trial.

T. M. STANBACK, ADMINISTRATOR OF THE ESTATE OF T. C. INGRAM, DECEASED, v. ANNIE HAYWOOD, WIDOW OF W. F. HAYWOOD, C. T. HAYWOOD AND HIS WIFE, MYRTLE HAYWOOD, D. C. HAYWOOD AND HIS WIFE, ADNA HAYWOOD, ET AL.

(Filed 8 April, 1936.)

Trial F a—New trial will be awarded where issues submitted by court are insufficient to present all material questions raised by pleadings.

In this action to foreclose a mortgage, and recover any deficiency after sale, defendants alleged that contemporaneously with the execution of the notes and mortgage, the mortgagee agreed with defendants by parol not to foreclose the mortgage, but to accept a reconveyance of the land and cancel the notes if defendants were unable to pay same. Issues as to the execution of the notes and mortgage, the existence of the parol agreement, and indebtedness, were submitted to the jury. *Held:* A new trial must be awarded on plaintiff's exceptions to the issues and to the judgment rendered thereon, since the issues submitted are insufficient to support the judgment, in that the issues did not require defendants to prove, or afforded plaintiff opportunity to disprove, that defendants were unable to pay the balance due on the notes, which, under the pleadings and evidence, was a condition precedent to defendants' right to have the notes canceled upon a reconveyance of the land, C. S., 584.

STACY, C. J., and CLARKSON, J., concur.

APPEAL by the plaintiff from *Clement, J.*, at September Term, 1935, of MONTGOMERY. New trial.

Armstrong & Armstrong for plaintiff, appellant.

R. T. Poole, M. C. Lisk, Lee Smith, and R. L. Smith & Sons for defendants, appellees.

SCHENCK, J. This was a suit to foreclose a mortgage for $16,000, given to the plaintiff's intestate by the defendants to secure eight notes for $2,000 each, four of which have been paid, and to collect any deficiency after application to the debt of the amount received from the foreclosure sale.

The defendants in their answer admitted the execution of the notes and mortgage referred to in plaintiff's complaint, and in their further defense alleged that contemporaneously with the execution of said notes and mortgage a parol agreement was entered into between them and the plaintiff's intestate to the effect that in the event the defendants were unable to pay the balance due on said notes, said intestate would not foreclose said mortgage, but would accept in full satisfaction of any such balance due a reconveyance to him of the land described in the mortgage securing the notes, which were given for the purchase price of said land.

The court submitted the following issues:

"1. Did the defendants execute the notes and mortgage set out in the complaint?

"2. Did T. C. Ingram, the original plaintiff, agree at the time of the consummation of the trade with the defendants that he would, in the event defendants were unable to pay the notes given for said land, accept the land in payment of said notes, as alleged in the answer?

"3. What amount, if any, are the defendants indebted to the plaintiff?"

To the submission of the foregoing issues the plaintiff reserved exception.

The jury answered the first issue "Yes," the second issue "Yes," and the third issue, "None, except the land," whereupon the court entered judgment to the effect that the heirs at law of the plaintiff's intestate were the owners and entitled to the possession of the land described in the complaint, and directing the defendants to make conveyance accordingly, and that the defendants were entitled to have the notes secured by the mortgage canceled and directing the plaintiff to surrender the same. To the signing of this judgment the plaintiff reserved exception.

The exception to the issues submitted should have been sustained for the reason that, under the issues submitted, no requirement was made of the defendants to prove, and no opportunity afforded the plaintiff to disprove, that the defendants were unable to pay the balance due on the notes. This was a vital issue between the defendants and the plaintiff, concerning which there were no admissions in the pleadings or record.

"Section 395 of The Code (C. S., 584) is mandatory, and binding equally upon the court and counsel, and it is the duty of the trial judge, either of his own motion or at the suggestion of counsel, to submit such issues as are necessary to settle the material controversies arising on the pleadings. In the absence of such issues, or equivalent admissions of record sufficient to reasonably justify a judgment rendered thereon, this Court will order a new trial." 1 Syllabus of *Tucker v. Satterthwaite,* 120 N. C., 118.

"It is within the sound discretion of the trial judge to determine what issues shall be submitted, and to frame them subject to the restrictions, first, that only issues of fact raised by the pleadings are submitted; secondly, that the verdict constitutes a sufficient basis for a judgment; and thirdly, that it does not appear that a party was debarred for want of an additional issue or issues of the opportunity to present to the jury some view of the law arising out of the evidence." *Redmond v. Chandley,* 119 N. C., 575. See, also, *Bank v. Broom Co.,* 188 N. C., 508.

The exception to the judgment should have been sustained, since the verdict, in the absence of any finding by the jury that the defendants

were unable to pay the balance due on the notes, was not sufficient to support the judgment.

"The insufficiency of the verdict, 'the facts found,' to support the judgment is a defect upon the face of the record proper which is presented for review, since the appeal is of itself an exception to the judgment. The omission of a vital issue is not cured by the charge of the court, for there is no finding by the jury." *Strauss v. Wilmington,* 129 N. C., 99.

The issues submitted to the jury were insufficient to support the judgment for the reason that they were only partially determinative of the controversy between the parties. The essential fact of the defendants' inability to pay the balance due on the notes is still undetermined. For this reason a new trial must be awarded. *Chapman-Hunt Company v. Board of Education,* 198 N. C., 111, and cases there cited.

If it should be thought that the allegations of the further answer are not sufficient to make the inability of the defendants to pay the balance due on the notes a condition precedent to their right to recover the land and have the notes canceled, and for that reason an issue as to such inability did not arise on the pleadings, it would seem that the further answer would be subject to dismissal, since all of the evidence relative to the alleged contemporaneous oral agreement tended to show that such inability was an essential condition of such agreement. Any doubt as to the sufficiency of the allegations of the further answer, relative to the inability of the defendants to pay any balance due on the notes, may be removed by appropriate amendment.

The view we take of the two exceptions discussed renders it unnecessary for us to consider the other exceptions in the record.

New trial.

STACY, C. J., concurs on the ground the contemporaneous oral agreement, as alleged in the answer, runs counter to the terms of the written instruments (*Coral Gables v. Ayres,* 208 N. C., 426, 181 S. E., 263), and, further, the evidence offered in support of said alleged contemporaneous oral agreement is not sufficient to carry the issue to the jury. *Brown v. Kinsey,* 81 N. C., 245.

CLARKSON, J., concurs on the ground that the evidence was admissible to show an agreed mode of payment and discharge other than specified in the bond, and the evidence was sufficient to be submitted to the jury.

In *Evans v. Freeman,* 142 N. C., 61 (62-3), the evidence was that, "It was a part of the agreement at the time the note was given that it should be paid out of the proceeds of the sale of the stock-feeder." At p. 64, *Walker, J.,* says: "But this rule applies 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."

In *Bank v. Winslow,* 193 N. C., 470 (*Brogden, J.*), the note was to be paid from the sale of peanuts. In *Justice v. Coxe,* 198 N. C., 263 (266), (*Connor, J.*): "The contract, which defendant alleged in his answer was entered into by and between him and the plaintiff contemporaneously with the execution of the notes, was, in effect, that defendant should be discharged of liability upon his conveyance of the land to George W. Knight, Edward Higgins, and Samuel Puleston, and upon their assumption of the notes." *Stockton v. Lenoir Co.,* 201 N. C., 88; *Stack v. Stack,* 203 N. C., 498. *Wilson v. Allsbrook,* 203 N. C., 498 (*Stacy, C. J.*), the note "was to be paid from rents collected by the defendant." In *Kindler v. Trust Co.,* 204 N. C., 198 (201), citing numerous authorities, *Adams, J.,* says: "In proper cases it may be shown by parol evidence that an obligation was to be assumed only upon a certain contingency, or that payment should be made out of a particular fund or otherwise discharged in a certain way, or that specified credits should be allowed."

In *Trust Co. v. Wilder,* 206 N. C., 124 (125), we find: "Liberally construed, the defendants allege that they executed the notes as trustees for the plaintiff, receiving no consideration, and with the agreement that the notes were to be paid out of the proceeds of the sale of land. These allegations invoke the principles applied in *Evans v. Freeman, supra, et al.*" *Galloway v. Thrash,* 207 N. C., 165; *Bank v. Rosenstein,* 207 N. C., 529.

MRS. JOHN S. E. YOUNG ET AL. v. GURNEY P. HOOD, COMMISSIONER, ET AL.

(Filed 8 April, 1936.)

1. Banks and Banking H a—Estate held not entitled to vacate stock assessment for failure of successive trustees to sell the stock.

Testator created a trust estate, part of which consisted of bank stock, which testator provided should not be sold without the consent of the majority of certain of the income beneficiaries of the estate and the consent of the president of the bank during his lifetime, and suggested the stock should not be sold unless the further holding of the stock would be detrimental to the best interests of the trust estate in the opinion of the trustee, testator being interested in the estate's retaining the stock because of long business association and for the interest of his son, who was an officer of the bank. The number of shares of bank stock held by the

estate was increased by a stock dividend and by the trustee's exercise of stock subscription rights. After the death of the president of the bank the bank was merged with other banks and the trustee exchanged the bank stock for stock in the new bank. Thereafter, the new bank took over the management of the trust estate upon its merger with the trustee bank. The new bank became insolvent and a stock assessment was levied against the estate. It did not appear that the successive trustees were of the opinion that the further holding of the bank stock would be detrimental to the estate, or that the requisite consent to the sale of the stock could have been obtained at any time. *Held:* The estate was not entitled to vacate the stock assessment on the ground that the original trustee acted in bad faith in exercising the stock subscription right and in exchanging the stock for stock of the new bank, or on the ground that the new bank, upon becoming trustee, should have sold the stock.

2. Trusts E d—Restrictions placed upon sale of assets by trustor should be considered in passing upon trustee's management of estate.

In an action to recover for alleged mismanagement of the trust estate by the trustee in failing to sell certain assets for reinvestment, the trustor's expressed desire that such assets should not be sold, and his imposition of restrictions upon their sale without the consent of certain interested persons, and whether the requisite consent could have been obtained, and the good faith of the trustee in retaining the assets, are all germane and properly to be considered, and the exclusion of evidence relating thereto is erroneous.

3. Banks and Banking H e—

An estate may not claim a preference against the assets of an insolvent bank for alleged mismanagement of the estate by the bank while acting as trustee, resulting in loss to the estate.

4. Appeal and Error J c—

An exception to a finding of fact by the court must be sustained when the record does not support such finding.

APPEAL by defendants from *Cowper, Special Judge,* at April Term, 1935, of WAKE.

Civil actions to restrain execution of stock assessment levy, to recover of trustee for faithless management of trust estate, and to establish preference or priority of claim to funds in hands of liquidating agent of insolvent bank.

The cases were consolidated for trial and heard, without the intervention of a jury, upon uncontroverted facts or those found by the court.

In the first case, for brevity, called the "Young Case," the plaintiffs, who are grandchildren of A. B. Andrews, Sr., deceased, seek to restrain execution of judgment for stock assessment against the trust estate of their grandfather in the sum of $160,000, to require an accounting, and to secure the appointment of a competent trustee to manage said estate.

In the second action, for short called the "Cheshire Case," the newly appointed trustee seeks to repudiate the holding and purchase of stock

in the North Carolina Bank and Trust Company by the former trustee, to recover for the faithlessness of the said trustee or trustees, and to establish a preference or prior claim upon the assets in the hands of the liquidating agent of the North Carolina Bank and Trust Company.

On 17 April, 1915, A. B. Andrews, Sr., died a resident of Wake County, leaving a last will and testament by the terms of which he created a trust estate for the benefit of his children and grandchildren, and appointed the Raleigh Savings Bank and Trust Company trustee of his estate.

Item Three of the will empowers the trustee to change investments in the trust estate by sale and purchase, provided it first obtain the consent, in writing, of a majority of testator's children living and having issue, but that in case of the sale of the 800 shares of stock in the Citizens National Bank, held by the testator at the time of his death, the consent of Joseph G. Brown, president of the bank, shall also be secured in addition to the consent of a majority of the children living and having issue.

This item concludes as follows:

"Having been one of the organizers of said Citizens National Bank of Raleigh, N. C., and having been a director in that institution ever since its organization, over forty years ago, and being anxious to hold my stock in said bank for the benefit of my family, and especially of my grandchildren, *I suggest that said trustee do not sell any of said bank stock* unless the further holding of said stock would, in the opinion of said trustee, be detrimental to the best interests of said trust estate, and it would be gratifying to me for Mr. Joseph G. Brown to remain president of said bank as long as he lives and for the trustee holding said stock in trust to vote for him as such president; and in case of his death it would be pleasing to me for the said bank to make my son, Graham H. Andrews (who is now in said bank and expects to make it his life work), president or some other prominent officer of said bank; but these statements as to the holding and sale of said stock and as to officers of said bank are mere expressions of my personal preferences and are not to be taken as obligatory or as binding or enforceable in a court of law."

Item Twelve of the will provides that in the event of the death of any person whose consent is required to effect any change or sale of investments, the will shall be construed as though such consent were not required. Joseph G. Brown died in January, 1927.

The income from the trust estate was to be paid to the trustor's children so long as they should live, and the corpus of the estate was then payable to their children (grandchildren of trustor) *per stirpes.*

The holding of stock in the Citizens National Bank, which amounted to 800 shares at the time of trustor's death, was increased to 2,000 shares

in 1927, (1) by reason of a stock dividend of 400 shares, and (2) by the exercise of stock subscription rights, amounting to 800 shares.

In 1929 the Citizens National Bank of Raleigh combined with other banks of the State to form the North Carolina Bank and Trust Company, and the trustee exchanged the 2,000 shares of Citizens National Bank Stock, which it then held, for 16,000 shares (par value $10.00) of the stock of the North Carolina Bank and Trust Company.

This bank stock was held by the Raleigh Savings Bank and Trust Company, as trustee, until 1932, when it was merged with the North Carolina Bank and Trust Company, and thereafter the North Carolina Bank and Trust Company took over the management of the trust estate under authority of chapter 207, Public Laws 1931, and continued to act as such trustee, paying the income to the income beneficiaries, until its insolvency in March, 1933.

A stock assessment was levied against the bank stock, held for the benefit of the trust estate, which the plaintiffs in the "Young Case" seek to restrain and vacate.

The court found that the former trustee, or trustees, "did not exercise a sound discretion and act in good faith and to the best interest of the trust estate in the attempted purchase of the 800 shares of stock of the Citizens National Bank with trust assets in August, 1927, nor in the exchange of the stock of the Citizens National Bank for the stock of the North Carolina Bank and Trust Company in October, 1929, nor in the retention of the stock of the Citizens National Bank after August, 1927, nor in the retention of the stock of the North Carolina Bank and Trust Company after October, 1929." Exception No. 119.

Judgment was entered, and preferential claim decreed, against the assets in the hands of the defendants in the sum of $284,616.37, less dividends previously paid on said bank stock, agreeably to the prayer in the "Cheshire Case"; and the stock assessment levy was declared null and void as asked in the "Young Case."

The defendants appeal, assigning errors.

Paul F. Smith, James S. Manning, and Murray Allen for plaintiffs.

Kenneth C. Royall and Brooks, McLendon & Holderness for defendants.

STACY, C. J. A reversal of the present judgment was adumbrated or foreshadowed by the decisions in *Hood, Comr., v. Trust Co. and Brand, ante,* 367, and *Parker v. Hood, Comr., ante,* 494.

The *Brand case, supra,* is a direct authority against the position taken in the "Young Case," and the decision in *Parker v. Hood, Comr., supra,* is contrary to the preferential part of the judgment rendered in the "Cheshire Case."

It should be observed that here the trustor himself placed several restrictions upon the trustee. Investments were not to be changed without the written consent of certain of the income beneficiaries, and in case of a sale of the bank stock, the consent of the president of the bank, if living, was also to be obtained. These restrictions ought to be considered in passing upon the management of the estate. *Hester v. Hester,* 16 N. C., 328; *Crayton v. Fowler,* 140 S. C., 517, 130 S. E., 161; Bogart on Trusts, sec. 681, *et seq.;* 26 R. C. L., 1307, *et seq.* A trustor is privileged to impose terms and conditions upon the administration of his estate, as well as to select the agencies for the distribution of his bounty. *Crabb v. Young,* 92 N. Y., 56.

In the instant case, the trustee is held to have breached his trust in exchanging the Citizens National Bank stock for stock in the North Carolina Bank and Trust Company "without first procuring the consent of the children of A. B. Andrews as required by the will," which seems to be at variance with the written proxy authorization appearing of record; and again the trustee is charged with a breach of trust for holding the bank stock when there is no evidence that the requisite consent to sell could have been secured at any time, or that the trustee deemed "the further holding of said stock detrimental to the best interest of said trust estate." *Stroud v. Stroud,* 206 N. C., 668, 175 S. E., 131. Indeed, the proffered testimony of the defendants that the trustee was of a contrary opinion and that the requisite consent to sell would not have been forthcoming, had it been requested, was excluded. Likewise, the defendants' evidence tending to establish the *bona fides* of the trustee's management of the estate was excluded. This was error. *Fisher v. Fisher,* 170 N. C., 378, 87 S. E., 113; *Carter v. Young,* 193 N. C., 678, 137 S. E., 875; *Sheets v. Tob. Co.,* 195 N. C., 149, 141 S. E., 355; 26 R. C. L., 1310.

It appears somewhat inconsistent to hold the investment in the bank stock valid as to the income beneficiaries and invalid as to their children in the "Young Case," and then void as to both in the "Cheshire Case," yet this is the effect of the judgment entered below. It would seem, therefore, that, in result, the income beneficiaries win both ways and on opposite theories. *Lannin v. Buckley,* 256 Mass., 78, 152 N. E., 71; *International Trust Co. v. Preston,* 24 Wyo., 163, 156 Pac., 1128; Bogart, *supra,* sec. 689. They "keep their cake and eat it too." *Whitmire v. Ins. Co.,* 205 N. C., 101, 170 S. E., 118. The record discloses they were close advisers and consultants of the trustee. At least one of them was director or officer of the trustee bank as well as of the Citizens National Bank.

The case turns on the alleged *mala fides* of the former trustee, or trustees, in the management of the estate. It is conceded the defend-

ants' 119th exception, above set out, goes to the heart of the case. This exception must be sustained, as it is not supported by the record. *Sheets v. Tob. Co., supra; Carter v. Young, supra.* The trustor had a peculiar interest in retaining the bank investment, not only because of his long association with the business, but also on account of the hope he cherished for the promotion of one of his sons in the same enterprise. The situation partakes of the unusual, which equity regards. *McNinch v. Trust Co.*, 183 N. C., 33, 110 S. E., 663.

It would serve no useful purpose to consider the remaining exceptions *seriatim*, as the trial court apparently was misled by the application of inapposite principles. The judgment will be stricken out and the causes remanded for judgment accordant herewith.

Error.

NORTH CAROLINA BANK AND TRUST COMPANY AND GURNEY P. HOOD, COMMISSIONER OF BANKS, EX REL. NORTH CAROLINA BANK AND TRUST COMPANY, AND EX REL. BANK OF DUPLIN, v. J. F. WILLIAMS, ADMINISTRATOR OF J. C. WILLIAMS, DECEASED, CHAS. TEACHEY, MAURY WARD, D. W. FUSSELL, HENRY FUSSELL, D. B. HERRING, AND G. W. BONEY, AND M. G. STARLING, ADMINISTRATOR OF MAURY WARD, DECEASED, AND MRS. LULA HERRING, ADMINISTRATRIX OF D. B. HERRING, DECEASED.

(Filed 8 April, 1936.)

1. Limitation of Actions A c—

The ten-year statute of limitations applies to principals in an indemnity bond under seal, but not to sureties therein. C. S., 437.

2. Limitation of Actions B a—

Ordinarily, a cause of action does not accrue on an indemnity bond until loss or damage is sustained, or where the bond provides payment of loss upon demand by those indemnified, at the time of such demand.

3. Limitation of Actions B g—Substitution of statutory receiver for insolvent bank plaintiff held not to constitute new action.

Where action is instituted by a bank as holder of an indemnity bond, and thereafter, upon insolvency of the holder, the statutory receiver is made a party or allowed to intervene as the equitable owner or pledgor, the cause of action is not changed, but is a continuation of the original action, and the period of limitation will be computed as of the date of the institution of the original action. C. S., 547.

4. Limitation of Actions C b—New promise held made for benefit of plaintiff and was supported by sufficient consideration.

A bank assigned its assets to another bank for liquidation, and certain officers and stockholders of the assignor bank executed as sureties a bond of the assignor bank indemnifying the assignee bank from loss in such

liquidation. Thereafter, in order to have the assets of the assignor bank transferred from the assignee bank to the statutory receiver for liquidation, the officers and stockholders executed a resolution addressed to the statutory receiver, agreeing to remain bound on the indemnity bond until the assignee bank had been reimbursed for moneys advanced in the liquidation of the assets of the assignor bank. *Held:* The resolution, although directed to the statutory receiver, was executed for the benefit of the assignee bank, and was supported by sufficient consideration, and constituted a new promise from which the statute of limitations began to run.

APPEAL by defendants from *Grady, J.*, at August Term, 1935, of DUPLIN. Affirmed.

Action on indemnity bond executed by defendants, directors, and stockholders of Bank of Rose Hill to the Bank of Duplin, under an agreement by which the Bank of Duplin took over the assets of the Bank of Rose Hill and guaranteed payment of its depositors.

This bond was dated 15 July, 1926, and was conditioned as follows:

"The condition of the above obligation is such that if the above bounden, the Bank of Rose Hill, and its sureties, shall well and truly have, keep, bear harmless, and indemnify the Bank of Duplin against all loss and damage that it may sustain in taking over the Bank of Rose Hill by reason of shortage, bad paper, overdrafts, expense, bank guarantees, attorney fees, court costs, and all other damages and losses whatsoever incident to taking over and liquidating the said Bank of Rose Hill in an amount not exceeding $30,000, the penal amount of this bond. (And the said Bank of Rose Hill and its sureties shall make good any loss or damage covered by this bond within 30 days after demand by the said Bank of Duplin.) Then this obligation to be null and void; otherwise, to remain in full force and virtue."

On 27 September, 1928, the Bank of Rose Hill adopted a resolution which was signed by each of the defendants. In this resolution request was made by the Bank of Rose Hill and the said signers of the indemnity bond that the Corporation Commission take over and liquidate the Bank of Rose Hill under the existing banking laws. It was set forth in the resolution, among other things, that "the fact that the North Carolina Corporation Commission enters into possession of the Bank of Rose Hill and its assets, and proceeds to liquidate same under banking law shall be without prejudice to the rights of the Bank of Duplin to collect from the Bank of Rose Hill and its sureties on the indemnity bond made by the said Bank of Rose Hill to the Bank of Duplin, 15 July, 1926, and the said defendants (naming them), sureties on said indemnity bond, . . . hereby agree to remain bound and liable on said indemnity bond until the Bank of Duplin shall have been reimbursed for the money advanced by it during the course of liquidating, taxes, and necessary expenses, including attorney fees incurred in connection therewith."

On 20 March, 1929, demand was made by the Bank of Duplin on all the signers of said bond for the payment of losses occasioned by taking over the Bank of Rose Hill.

On 16 January, 1930, the bond signed by defendants was assigned to the North Carolina Bank and Trust Company as collateral security for the indebtedness due it by the Bank of Duplin. On 4 December, 1930, Bank of Duplin closed its doors and was taken over for liquidation by the State Banking Department.

On 21 April, 1931, this action was instituted by North Carolina Bank and Trust Company, assignee, against the defendants, signers of said bond.

On 10 January, 1934, order was made making Hood, Commissioner of Banks *ex rel.* Bank of Duplin, party plaintiff to the action, as of 25 May, 1932, the date of his petition therefor, and some time after the institution of the action order was made substituting Hood, Commissioner of Banks *ex rel.* North Carolina Bank and Trust Company, party plaintiff for the said Bank and Trust Company, said Bank and Trust Company being then in liquidation.

This cause was heard by Grady, J., on agreed statement of facts on the question of the statute of limitations set up by defendants.

From judgment that the plaintiffs' action was not barred, and continuing the cause for determination of other issues, defendants appealed.

C. I. Taylor, E. K. Bryan, and Geo. R. Ward for plaintiffs.

R. D. Johnson, Oscar B. Turner, Beasley & Stevens, and Butler & Butler for defendants.

DEVIN, J. This case was before this Court at Fall Term, 1931, on appeal by defendants from a judgment overruling their demurrer, and is reported in 201 N. C., 464.

The case again came before this Court at Spring Term, 1935, on appeal by defendants from a judgment on directed verdict for the plaintiffs that the action was not barred by the statute of limitations. New trial was awarded for error in the peremptory instructions as to one or more of defendants. This is reported in 208 N. C., 243.

It was stated in the last report of the case (opinion by *Stacy, C. J.*): "The defendant Maury Ward did not sign the resolution; nor does J. C. Williams appear to have signed it individually."

However, from the record before us now, it appears that the resolution of 27 September, 1928, was signed by both these defendants.

The only question presented by this appeal is the correctness of the ruling of the court below on agreed facts that plaintiffs' cause of action was not barred by the statute of limitations.

While the indemnity bond sued on appears to have been under seal, and there is some ground for plaintiffs' contention that it was in effect an original obligation on the part of the signers, yet their relationship to the transaction here has been treated throughout as that of sureties, and the ten-year statute, C. S., 437, applies only to principals. *Barnes v. Crawford,* 201 N. C., 434; *Welfare v. Thompson,* 83 N. C., 276.

This being an action on an indemnity bond, the general rule is that the cause of action would not accrue until loss or damage was sustained. 37 C. J., 838. The language of the bond is that the defendant "shall make good any loss or damage within 30 days after demand." Demand was made 20 March, 1929.

This action on the bond was begun 21 April, 1931, by the North Carolina Bank and Trust Company, the holder of the bond as collateral security for the indebtedness of the Bank of Duplin, and plaintiff, Commissioner of Banks *ex rel.* Bank of Duplin, the equitable owner or pledgor of the bond, was by order made party plaintiff, or was permitted to intervene, as of 25 March, 1932. This, it seems, was a continuation of the same suit. The cause of action was not changed. The statute, C. S., 547, expressly confers power to amend pleadings and process by adding names of parties when the claim is not thereby substantially changed. The court has power to make additional parties when the amendment does not change the cause of action. *Mills v. Callahan,* 126 N. C., 756; *Martin v. Young,* 85 N. C., 156; *Cheatham v. Crews,* 81 N. C., 343; *Bullard v. Johnson,* 65 N. C., 436.

"A suit brought before the bar is complete will inure to the benefit of one intervening after the time when but for the commencement of the suit the claim would be barred," when there is privity of estate or community of interest between the parties. 37 C. J., 1064.

The name of one beneficially interested may be added by amendment after the statute of limitations has run. *Gentile v. Philadelphia,* 274 Pa., 335.

But the defendants have by their own act extended the period of obligation by signing and sealing the resolution of 27 September, 1928, in which they use this language: "The said J. C. Williams, Charles Teachey, Maury Ward, D. W. Fussell, Henry Fussell, D. B. Herring, and G. W. Boney, sureties on the said indemnity bond from the Bank of Rose Hill to the Bank of Duplin, as aforesaid, hereby agree to remain bound and liable on said bond until the Bank of Duplin shall have been reimbursed for money advanced, etc." There was no evidence that the Bank of Duplin has been reimbursed.

While this resolution, so signed, was addressed to the Corporation Commission, which under the law at that time had charge of the liquidation of banks, it was passed for the purpose of taking the assets and

property of the Bank of Rose Hill from the Bank of Duplin and putting same into the hands of the Corporation Commission for liquidation, which the court finds was done 6 October, 1928. The agreement to remain bound was for the purpose of indemnifying the Bank of Duplin on account of the removal of the assets of the Bank of Rose Hill and to renew and continue the obligation "until the Bank of Duplin shall have been reimbursed for money advanced." *Statesville v. Jenkins,* 199 N. C., 159; *Barnes v. McCullers,* 108 N. C., 47. The renewed indemnity obligation was clearly intended for the benefit of the Bank of Duplin, and its rights thereunder cannot be defeated by the contention that the promise to remain bound was made to another, since it was expressly stipulated it was intended for the protection of the Bank of Duplin. *Glass v. Fidelity Co.,* 193 N. C., 769; *Rector v. Lyda,* 180 N. C., 577; *Withers v. Poe,* 167 N. C., 372.

Nor was it without consideration. *Institute v. Mebane,* 165 N. C., 644; *Cherokee County v. Meroney,* 173 N. C., 653; *Exum v. Lynch,* 188 N. C., 392; *R. R. v. Zeigler,* 200 N. C., 396.

We conclude that there was no error in the rulings of the able and careful judge who heard the case below, and that his findings and judgment must be

Affirmed.

GURNEY P. HOOD, COMMISSIONER OF BANKS, EX REL. MORRIS PLAN BANK, GREENSBORO, NORTH CAROLINA, v. W. A. HEWITT.

(Filed 8 April, 1936.)

1. Banks and Banking H a—Stockholders of industrial bank are liable for assessment to pay debts contracted by bank after effective date of N. C. Code, 225 (o).

Under the provisions of N. C. Code, 225 (o), stockholders of an industrial bank are liable for a statutory stock assessment, upon the insolvency of the bank, when necessary for the payment of debts contracted by the bank subsequent to the effective date of the statute, although as between the stockholders and the bank the stock is fully paid up and nonassessable, the provisions of the statute for the stock assessment being for the benefit of the depositors and creditors of the bank and not for the benefit of the bank.

2. Constitutional Law E a—Statute imposing liability upon stockholders of industrial bank held not to impair obligations of contract.

N. C. Code, 225 (o), imposing a statutory liability upon holders of stock in industrial banks is constitutional and valid even in regard to stock sold by industrial banks prior to the enactment of the statute which, as between the bank and stockholders is fully paid up and nonassessable, since such liability is imposed by the statute only for debts contracted

by industrial banks after the effective date of the statute, and since the contract between the stockholders and the banks providing that the stock is fully paid up and nonassessable, is not affected, the liability imposed by the statute not being for the benefit of the banks but for the benefit of their depositors and creditors upon insolvency, and the statute being within the constitutional power of the General Assembly to alter the law under which the industrial banks were organized, N. C. Const., Art. VIII, sec. 1.

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

APPEAL by defendant from *McElroy, J.*, at March Term, 1935, of GUILFORD. Affirmed.

This was an appeal from an assessment made by the Commissioner of Banks of North Carolina against the defendant as the owner of 44 shares of the capital stock of the Morris Plan Bank of Greensboro, North Carolina, an insolvent banking corporation, organized under and prior to its insolvency, doing business by virtue of the laws of North Carolina.

The assessment was made under and by authority of section 13, Public Laws of North Carolina, 1927, as amended. N. C. Code of 1935, sec. 218 (c), subsec. 13. It was filed and docketed in the office of the clerk of the Superior Court of Guilford County on 2 March, 1934. The defendant appealed from the assessment to the Superior Court of Guilford County, as authorized by the statute.

At the hearing of the appeal, the parties filed with the court an agreed statement of facts, which is as follows:

"The parties hereto expressly waive trial by jury and agree upon the following facts, and further agree that the judge presiding at the trial of this cause may try the same, without a jury, upon said agreed statement of facts, and render judgment, subject to the rights of the parties, or either of them, to appeal to the Supreme Court, or otherwise seek a review of such decision; the facts agreed upon being as follows:

"1. On 2 December, 1916, Greensboro Morris Plan Company was created, organized, and came into existence as a corporation; a copy of its certificate of incorporation is hereto annexed, marked 'Exhibit A,' and made a part hereof. On 21 April, 1920, the certificate of said corporation was amended so as to authorize an increase of capital stock; a copy of the amendment then made is hereto annexed, marked 'Exhibit B,' and made a part hereof. On 19 October, 1921, the certificate of incorporation of said corporation was again amended so as to change the name to 'The Morris Plan Industrial Bank of Greensboro'; a copy of the amendment then made is hereto annexed, marked 'Exhibit C,' and made a part hereof. On 3 July, 1930, the certificate of incorporation of said corporation was again amended, and the name changed to 'The

Morris Plan Bank'; a copy of the amendment then made is hereto annexed, marked 'Exhibit D,' and made a part hereof. The defendant W. A. Hewitt consented to and signed the original of the last amendment to the certificate of incorporation, secured on 3 July, 1930.

"2. Shortly after the enactment of chapter 225 of the Public Laws of 1919, relating to Industrial Banks, and before 1 January, 1920, the president and secretary of said corporation filed with the Corporation Commission and the Secretary of State the notice required by said act to be recognized as an Industrial Bank and to come within the provisions of the said chapter of the Public Laws of 1919, and received from the Corporation Commission a license to do an industrial banking business; but it does not appear from the minutes of said corporation that the act of the president and secretary was or was not approved by the directors or stockholders of said corporation. After filing said notice and receiving said license the said corporation engaged in the business of an Industrial Bank until the banking holiday declared by the President in March, 1933. From time to time during said period of operation the said corporation published or caused to be published in newspapers published in the city of Greensboro advertisements by which it held itself out as doing an industrial banking business. Two typical copies of the advertisements published subsequent to 1 July, 1930, are attached hereto, marked 'Exhibit E,' and made a part hereof.

"3. On 1 September, 1921, defendant W. A. Hewitt purchased eight (8) shares of stock in said corporation and paid therefor the sum of $800.00 to said corporation, whereupon a certain stock certificate, duly signed and executed, was issued and delivered to him; a copy of said stock certificate is hereto annexed, marked 'Exhibit F,' and made a part hereof. On 2 January, 1924, the defendant W. A. Hewitt received two (2) shares of stock in said corporation as a 25 per cent stock dividend, whereupon a certain stock certificate, duly signed and executed, was issued and delivered to him, a copy of said certificate being hereto annexed, marked 'Exhibit G,' and made a part hereof. On 15 January, 1925, the defendant W. A. Hewitt purchased eight (8) shares of stock in said corporation and had the same transferred to him on the books of said corporation, whereupon a certain stock certificate, duly signed and executed, was issued and delivered to him; a copy of said certificate, except as to number and number of shares, is hereto annexed, marked 'Exhibit G.' On 24 January, 1924, the defendant W. A. Hewitt purchased fifteen (15) shares of stock in said corporation and had the same transferred to him on the books of said corporation, whereupon a certain stock certificate, duly signed and executed, was issued and delivered to him; a copy of said certificate, except as to number and number of shares, is hereto annexed, marked 'Exhibit G.' On 20 February, 1924,

the defendant W. A. Hewitt purchased five (5) shares of stock in said corporation and had the same transferred to him on the books of said corporation, whereupon a certain stock certificate, duly signed and executed, was issued and delivered to him; a copy of said stock certificate, except as to number and number of shares, is hereto annexed, marked 'Exhibit G.' On the date said corporation closed and the Commissioner of Banks took possession of it, as hereinafter set forth, defendant W. A. Hewitt was the owner of all of said shares of stock, totaling thirty-eight (38) shares, in said corporation, having continuously owned said shares of stock since his purchase of them as aforesaid.

"On 21 April, 1926, defendant W. A. Hewitt purchased three (3) shares of stock in said corporation from a stockholder to whom said shares had been issued by the corporation on or before 2 January, 1924, and had said shares transferred to him on the stock books of the corporation on or about 21 April, 1926, whereupon a certain stock certificate, duly signed and executed, was issued and delivered to him; a copy of said stock certificate, except as to number and number of shares, is hereto annexed, marked 'Exhibit G,' and made a part hereof. On 15 March, 1928, defendant W. A. Hewitt purchased three (3) shares of stock in said corporation from a stockholder to whom said shares had been issued by the corporation on or before 2 January, 1924, and had said shares transferred to him on the stock books of the corporation on or about 15 March, 1928, whereupon a certain stock certificate, duly signed and executed, was issued and delivered to him; a copy of said stock certificate, except as to number and number of shares, is hereto annexed, marked 'Exhibit G,' and made a part hereof. On the date said corporation closed and the Commissioner of Banks took possession of it, as hereinafter set forth, defendant W. A. Hewitt was the owner of both of said certificates of stock for a total of six (6) shares in said corporation, having continuously owned said shares of stock since his acquisition of them as aforesaid. That the par value of each share of stock is $100.00.

"4. Said corporation paid and defendant W. A. Hewitt received yearly dividends on each share of stock owned by him, from the date of its acquisition, as aforesaid, through the year 1932.

"5. When the national banking holiday was declared by the President in March, 1933, said corporation ceased to do an unrestricted business, and thereafter its business activities were restricted and curtailed.

"6. On 30 December, 1933, the directors of said corporation met and adopted a resolution, a copy of which is hereto annexed, marked 'Exhibit H,' and made a part hereof, and immediately notified the Commissioner of Banks of the adoption of said resolution. On 1 January, 1934, the Commissioner of Banks of North Carolina caused to be filed in the office of the clerk of the Superior Court of Guilford County a notice of posses-

sion of the assets of said corporation, a copy of which notice is attached hereto, marked 'Exhibit I,' and made a part hereof.

"7. At the time the Commissioner of Banks filed notice of possession of the assets of said corporation, as aforesaid, said corporation was insolvent, and all of the amount for which the stockholders of said corporation are liable on account of any statutory liability, if any such liability exists, is needed to pay the obligations and liabilities of said corporation.

"8. On or about 2 March, 1934, the Commissioner of Banks caused an order levying a stock assessment against defendant W. A. Hewitt and all the other stockholders of said corporation to be filed and docketed in the office of the clerk of the Superior Court of Guilford County, in Judgment Docket Book 21, at page 39, *et seq.*, a copy of the pertinent portions of said assessment order being hereto attached, marked 'Exhibit J,' and made a part hereof.

"9. To the foregoing assessment the said defendant W. A. Hewitt excepted and appealed, notice of appeal being given as set out in the record.

"10. That the liabilities of the Morris Plan Bank of Greensboro on 1 January, 1934, the date on which the Commissioner of Banks took charge, were $247,705.21; that $59.29 of the said liabilities were contracted by the bank prior to 4 March, 1925; that $247,645.92 of said liabilities were contracted by the bank after 4 March, 1925.

"It is agreed that if upon the foregoing facts the court is of the opinion that the defendant appellant, W. A. Hewitt, is liable for said assessment, or any part thereof, the court may enter judgment therefor, and for the costs of this appeal; and if the court is of the opinion that he is not liable for said assessment, the court may enter judgment so declaring, and taxing the respondent with the costs; subject to the rights of either party to appeal to the Supreme Court."

On the foregoing agreed statement of facts, it was considered, ordered, and adjudged by the court that the plaintiff recover of the defendant the sum of $4,400.00, with interest from 2 March, 1934, and the costs of the action.

It was further considered, ordered, and decreed by the court that no part of the sum or sums recovered by the plaintiff of the defendant on account of said judgment shall be applied by the plaintiff to the payment of the indebtedness of the Morris Plan Bank of Greensboro, due on 1 January, 1934, which was contracted by said bank prior to 4 March, 1925.

From said judgment the defendant appealed to the Supreme Court, assigning errors in the judgment.

York & Boyd for plaintiff.
Hobgood & Ward for defendant.

CONNOR, J. There is no error in the judgment in this action. The judgment is supported by the facts agreed, and by a proper construction of the statute applicable to these facts.

Under the provisions of section 1, chapter 121, Public Laws of North Carolina, 1925 (section 225 [o], N. C. Code of 1935), which became effective on 4 March, 1925, the defendant, as a stockholder of the Morris Plan Bank of Greensboro, N. C., owning 44 shares of its capital stock, of the par value of $4,400, is liable, individually, to the extent of the par value of the shares of stock owned by him at the date of the insolvency of said bank, for every contract entered into, for every debt incurred, and for every engagement made by said bank, since 4 March, 1925.

This statute was enacted by the General Assembly of this State in the valid exercise of its power to alter, by a general law or by a special act, the law under which the corporation was created in 1916. Const. of N. C., Art. VIII, sec. 1. The statute is applicable to the defendant in this action, notwithstanding the shares of stock owned by him are fully paid and nonassessable by the corporation. The statute does not affect, or purport to affect, the contract between the corporation and its stockholders with respect to the shares of its stock owned by its stockholder. The liability imposed by the statute upon the stockholders of an industrial banking corporation, organized and doing business under the laws of this State, is for the benefit of creditors of the corporation, and not for the benefit of the corporation itself. The effect of the statute is to impose upon every stockholder of an industrial banking corporation, organized and doing business under the laws of this State, a statutory liability to all persons who shall become creditors of the corporation, after its enactment. The validity of the statute as thus construed is sustained by the decision of this Court in *Smathers v. Bank*, 135 N. C., 410, 47 S. E., 493. In that case, speaking of chapter 298, Public Laws of North Carolina, 1897 (now section 219 [a], N. C. Code of 1935), the Court said: "We hold that the statute should not be so construed as to fix liability upon stockholders for debts contracted or made prior to the amendment of the charter or the statute. The subscription of stockholders constitutes the contract, and the extent of the liability as to debts already incurred is fixed by the terms of the charter as they then exist. Any change in the charter in this respect must be construed to operate prospectively, only. It is well settled that such liability as the stockholder assumes is contractual. Thus construed, we find no constitutional objection to the Act of 1897."

In this case, from 1921, when the corporation, by amendment to its certificate of incorporation, changed its name to "The Morris Plan Industrial Bank of Greensboro," to 1933, when the corporation, by action of its board of directors, placed all its assets in the hands of the Commissioner of Banks for liquidation, as authorized by statute, the defendant was a stockholder of said corporation. During this time the corporation was engaged in the business of operating an industrial bank, under the laws of this State. The defendant, by the judgment in this action, is required to discharge his statutory obligation to creditors whose debts were contracted after 4 March, 1925, and who relied, as they had a right to do, upon the provisions of the statute for protection in the event the corporation became insolvent. The judgment is supported by the statute, and is, we think, in accord with good morals.

Affirmed.

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

GURNEY P. HOOD, COMMISSIONER OF BANKS, EX REL. MORRIS PLAN BANK, GREENSBORO, NORTH CAROLINA, v. C. S. WILLIAMS.

(Filed 8 April, 1936.)

APPEAL by defendant from *McElroy, J.*, at March Term, 1935, of GUILFORD. Affirmed.

This was an appeal from an assessment made by the Commissioner of Banks against the defendant as the owner of five shares of the capital stock of the Morris Plan Bank of Greensboro, North Carolina, an insolvent banking corporation, organized under, and prior to its insolvency doing business by virtue of, the laws of North Carolina.

On an agreed statement of facts filed with the court it was considered, ordered, and adjudged by the court that the plaintiff recover of the defendant the sum of $500.00, with interest from 2 March, 1934, and the costs of the action.

It was further considered, ordered, and decreed by the court that no part of the sum or sums recovered by the plaintiff of the defendant on account of said judgment shall be applied by the plaintiff to the payment of the indebtedness of the Morris Plan Bank of Greensboro, due on 1 January, 1934, which was contracted by said bank prior to 4 March, 1925.

From said judgment the defendant appealed to the Supreme Court, assigning errors in the judgment.

York & Boyd for plaintiff.
Hobgood & Ward for defendant.

CONNOR, J. There is no error in the judgment in this action. The judgment is affirmed on the authority of *Hood, Comr., v. Hewitt, ante,* 810.

Affirmed.

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

FEDERAL LIFE INSURANCE COMPANY v. JOHN W. NICHOLS.

(Filed 8 April, 1936.)

1. Insurance I b—Evidence held not to disclose fraud in insured's application for policy of accident insurance.

Insured's application for a policy of accident insurance stated that insured's occupation was a lumber buyer and salesman on the yards of his employer, not handling lumber. Insurer's evidence tended to show that insured inspected and checked lumber bought and sold, and supervised the loading and unloading of lumber by other employees. *Held:* Insurer's evidence does not establish fraud in the application, the acts established by the evidence being ordinarily incidental to the occupation of a buyer and seller of lumber as stated in the application.

2. Insurance R a—Evidence held not to establish that insured was engaged in more hazardous duties at time of accident.

The policy in suit insured defendant for accidental injuries sustained in his occupation of buyer and seller of lumber on the yards of his employer, and provided for a smaller rate of compensation if accidental injury occurred while insured was engaged in a more hazardous duty. The evidence disclosed that insured was injured while directing other employees in moving a car loaded with lumber when the car accidentally ran over his foot. *Held:* The evidence discloses that insured was injured while engaged in a duty incidental to his occupation as a buyer and seller of lumber, and not one requiring the handling of lumber, and insured's recovery is not governed by the schedule for injuries sustained in more hazardous duties.

APPEAL by plaintiff from *Phillips, J.,* at October Term, 1935, of WILKES. No error.

Two causes of action are alleged in the complaint in this action.

On the allegations which constitute the first cause of action, the plaintiff prays judgment declaring that the policy of insurance described in the complaint, which was issued to the defendant by the plaintiff on

15 May, 1931, is void, and ordering that the same be canceled on the ground that its issuance was procured by false and fraudulent representations made by the defendant in his application for said policy, with respect to his occupation and the duties incident thereto.

On the allegations which constitute the second cause of action, the plaintiff prays judgment that the defendant be reclassified with respect to his occupation in accordance with the provisions of the policy, for the purpose of determining the amount for which the plaintiff is liable to the defendant, if any, under the policy, for the loss of a foot on 6 June, 1931.

In his answer the defendant denies the allegations of the complaint which constitutes the two causes of action alleged therein, respectively, and prays judgment that plaintiff recover nothing on either of the causes of action alleged in the complaint.

On the allegations of his answer, which constitute the cause of action set up therein in his cross action against the plaintiff, the defendant prays judgment that he recover of the plaintiff the sum of $2,500.00, and the costs of the action.

The evidence at the trial shows the following facts:

On 4 May, 1931, at the solicitation of an agent of the plaintiff, the defendant signed an application to the plaintiff for a policy of insurance. In the application the defendant represented that he was at that time a "lumber buyer and salesman—not handling lumber (in yards or woods)," and that he was then employed by "C. D. Coffey, wholesale lumberman, at North Wilkesboro, N. C." The application was signed by the defendant at his office. At the time he signed the application the defendant disclosed to plaintiff's agent all the facts relative to his occupation and employment, and it was agreed by and between the defendant and the agent that the defendant was entitled to classification, with respect to his occupation, as a lumber buyer and salesman—not handling lumber.

Pursuant to the application signed by the defendant on 15 May, 1931, the plaintiff issued to the defendant the policy of insurance described in the complaint, which contains the following provision:

"The policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance, except as it may be modified by the company's classification of risks and premium rates in the event that the insured is injured after having changed his occupation to one classified by the company as more hazardous than that stated in the policy, or while he is doing any act or thing pertaining to any occupation so classified, except ordinary duties about his residence or while engaged in recreation, in which event the company will pay only such portion of the indemnities provided in the policy as the premium paid

would have purchased at the rate, but within the limit so fixed by the company for such more hazardous occupation."

After the issuance of the policy, and while same was in force, to wit: On 6 June, 1931, the defendant suffered the loss of a foot by an accident which occurred in the lumber yard of his employer, C. D. Coffey, at North Wilkesboro, N. C. At the time of the accident the defendant was engaged in the performance of duties incident to his occupation and employment, as stated in the application and in the policy. Under the provisions of the policy the defendant was entitled to an indemnity of $2,500 for the loss of his foot. His claim for such indemnity was duly made and denied by the plaintiff.

As incident to his employment by C. D. Coffey as a buyer and salesman of lumber on his lumber yard at North Wilkesboro, the defendant was required, from time to time, to inspect and check lumber bought and sold by him and to supervise the loading and unloading of said lumber by other employees of C. D. Coffey, and in that respect to act as foreman of the yard. He was not required to handle lumber, and was not handling lumber at the time of the accident which resulted in the loss of his foot.

At the close of the evidence the defendant moved for judgment as of nonsuit on both causes of action alleged in the complaint. The motion was allowed, and the plaintiff duly excepted.

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

"1. Did the plaintiff issue to the defendant the insurance policy described in the pleadings? Answer: 'Yes.'

"2. What amount, if any, is the defendant entitled to recover of the plaintiff? Answer: '$2,500.' "

From judgment that the defendant recover of the plaintiff the sum of $2,500, and the costs of the action, the plaintiff appealed to the Supreme Court, assigning as errors in the trial the dismissal of plaintiff's action against the defendant, and the peremptory instructions to the jury on the issues submitted by the trial court.

Bowie & Bowie, John R. Jones, and J. M. Brown for plaintiff.
Burke & Burke and Trivette & Holshouser for defendant.

CONNOR, J. On the admissions in the pleadings, which were introduced as evidence by the plaintiff at the trial of this action, the defendant is entitled to recover of the plaintiff the sum of $2,500, under the terms and provisions of the policy of insurance described in the pleadings, unless, as alleged in the complaint, the issuance of said policy was procured by false and fraudulent representations with respect to his

occupation at the date of the application, made by the defendant in his application, or unless, as further alleged in the complaint, after the issuance of the policy, the defendant changed his occupation to one more hazardous than that stated in the application and in the policy, or unless at the time he suffered the loss of his foot by accident he was engaged in the performance of an act pertaining to the more hazardous occupation.

At the close of the evidence for the plaintiff, the trial court was of opinion that the plaintiff had failed to offer any evidence tending to support the allegations of its complaint, and accordingly, on motion of the defendant (C. S., 567), dismissed plaintiff's action. In this there was no error.

There was no evidence tending to show that the representations made by the defendant in his application for the policy, with respect to his occupation and the duties incident thereto, were false or fraudulent. The defendant's occupation, as stated in the application and in the policy, to wit: "Lumber buyer and salesman—not handling lumber in yards or woods)," ordinarily includes as its incidents the inspection and checking of lumber bought and sold. The defendant's employment, as stated in the application, to wit: As buyer and salesman of lumber on the yards of his employer, ordinarily includes the supervision of the unloading of lumber bought by him and the loading of lumber sold by him. These duties are incidental to the occupation of a buyer and salesman of lumber, employed by a wholesale lumberman, and do not require of him the handling of lumber. The performance of these incidental duties do not increase the hazards of the occupation of buying and selling lumber.

At the time the defendant was injured by an accident which resulted in the loss of his foot, he was at work on the lumber yard of his employer. He had directed other employees of his employer to move a car loaded with lumber. The car accidentally ran over and knocked him down on the track. The injury to his foot necessitated its amputation. He was not engaged at the time of the accident in the performance of an act which was incident to an occupation more hazardous than that stated in his application or in the policy. For that reason the plaintiff was not entitled to a reclassification of the defendant with respect to his occupation, with the result that it would be liable to the defendant, under the policy, for a smaller sum than $2,500.

In support of the dismissal by the trial court of plaintiff's action against the defendant, see *Womack v. Ins. Co.*, 206 N. C., 445, 174 S. E., 314; *Smith v. Ins. Co.*, 179 N. C., 489, 103 S. E., 887, and *Hoffman v. Ins. Co.*, 127 N. C., 337, 37 S. E., 466.

The judgment in this action is affirmed.

No error.

R. C. COLLINS v. LUMBERTON COCA-COLA BOTTLING COMPANY.

(Filed 8 April, 1936.)

Food A a: Evidence D h—Evidence must show time when product was bottled for evidence of deleterious substances therein to be competent.

Plaintiff instituted action to recover damage alleged to have resulted from drinking bottled Coca-Cola containing a deleterious substance, which plaintiff had purchased from a retailer and which had been bottled by defendant. Evidence was admitted, over defendant's objection, tending to show that deleterious substances had been found in other Coca-Cola bottled by defendant, but the evidence failed to show when such other bottles had been sold by defendant to the retailers from which they were purchased. *Held:* The evidence was erroneously admitted, since the required proximity of time was not established to render such other instances competent on the question of negligence.

CLARKSON, J., dissents.

APPEAL by the defendant from *Grady, J.*, at May Term, 1935, of ROBESON. New trial.

This was a civil action by a consumer to recover of a bottler damages resulting from drinking bottled beverage containing foreign and deleterious substance. Negligence is alleged against the bottler and the action is to recover in tort.

The plaintiff alleged, and offered evidence tending to prove, that on 30 June, 1934, he purchased from one Hamp Mercer at his place of business on Main Street in Lumberton a bottle of Coca-Cola which had been bottled and placed on the market by the defendant; that when he was drinking from the bottle the partially decayed body of a spider came with the fluid into his mouth, which he "blowed back into the bottle"; and that he became ill from drinking a portion of the contents of the bottle.

The plaintiff was allowed to offer evidence, over the objection of the defendant, tending to show that on six other occasions Coca-Cola bottled and sold by the defendant to retail dealers was found to contain foreign substances. These occasions, as gathered from a construction of the evidence most favorable to the plaintiff, were as follows:

1. About the same time the sale was made to the plaintiff by Mercer, Paul Britt bought a bottled Coca-Cola from Mercer containing a substance that "looked like ground-up meat," which Mercer had bought from the defendant "two or three weeks, or a month" before the sale to Collins (the plaintiff).

2. Earl Thompson bought from J. F. Rozier a bottled Coca-Cola "in June, 1934," which had an "odor of kerosene." While the evidence

tends to show that Rozier, the retail dealer, or "middleman," purchased this Coca-Cola from the defendant, there is no evidence as to the time he purchased it, or how long he had had it before he sold it to Thompson.

3. W. N. Ivey bought from Willie Davis a bottled Coca-Cola on 15 June, 1934, which had "three flies of some kind in it." As on the preceding occasion, the evidence tends to show that Davis, the retail dealer, bought the Coca-Cola from the defendant, but is silent as to when he bought it, or how long he had it in stock before selling it to Ivey.

4. Marvin Autrey bought from James Stanley a bottled Coca-Cola in November, 1934, which contained something that "looked like a bug." On this occasion, likewise, while tending to show the Coca-Cola was purchased from the defendant, there is no evidence as to when it was so purchased.

5. Rester Ivey bought from Fundy Fry a bottled Coca-Cola "some time last summer" which had a "housefly in it." As on the other occasions, the evidence tends to show that the Coca-Cola was purchased by the retailer from the defendant, the bottler, but fails to indicate when such purchase was made.

6. James Allen bought from J. F. Rozier a bottled Coca-Cola on 2 June, 1934, which contained something that "looked like a crushed bug." While there is evidence that the Coca-Cola was bottled and sold by the defendant, the record is silent as to when the sale was made by the defendant, the bottler, to Rozier, the retail dealer, or "middleman."

The issues of negligence and damage were answered in favor of the plaintiff, and from judgment in accord with the verdict the defendant appealed, assigning errors.

Lee & Lee, McNeill & McKinnon, and F. Ertel Carlyle for plaintiff, appellee.

Varser, McIntyre & Henry for defendant, appellant.

SCHENCK, J. Since there was a total absence of any evidence as to the time when the bottles of Coca-Cola containing foreign and deleterious substances were sold by the defendant, the bottler, to the various retail dealers, the middlemen, the foundation laid was insufficient to support the introduction of evidence tending to show the occasions on which such substances were found in bottles of Coca-Cola placed on the market by the defendant.

Brogden, J., clearly stated the question of law involved in this class of cases as follows: "Upon the trial of an action for damages for personal injury caused by shivered glass in a bottle of Coca-Cola, is it competent upon the question of negligence to show that foreign substances were

found in other bottles of beverage bottled and sold by the defendant 'at about the same time' plaintiff was injured?" *Perry v. Bottling Co.*, 196 N. C., 175. The question is answered in the affirmative.

In plotting again the decisions in this jurisdiction respecting the liability of one who prepares in bottles beverages and places them on the market, for injuries sustained by the ultimate consumer who purchases such goods from a dealer, or middleman, and not from the bottler, the present *Chief Justice,* in the recent case of *Enloe v. Bottling Company,* 208 N. C., 305, writes: "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."

On all of the occasions set forth above, with the possible exception of the first, there is a total absence of any evidence as to the time when the bottles of Coca-Cola involved were sold by the defendant to the various retail dealers, and for this reason we hold that the evidence as to such occasions (except the first) was erroneously admitted and that a new trial must be awarded.

New trial.

CLARKSON, J., dissents.

JACK SLADE, DECEASED, AND MRS. JACK SLADE v. WILLIS HOSIERY MILLS ET AL.

(Filed 8 April, 1936.)

1. Master and Servant F b—

In order for a death to be compensable under the Workmen's Compensation Act, it is necessary that the death result from an injury by accident, which is an injury produced by a fortuitous cause. C. S., 8081 (i), prior to the amendment of ch. 123, Public Laws of 1935.

2. Same—Evidence held insufficient to show that death of employee was caused by accidental injury.

The evidence tended to show that the employee was required to wash certain machines and remove ashes from the furnaces, that the day in question was hot, but not excessively so, that the employee got wet in washing the machines, although furnished with special clothes, including rubber boots, and that in removing the ashes he got in the sunshine and open air, and that the sudden change in temperature in going from the hot room into the open air caused him to contract pneumonia, from which

he died. *Held:* The evidence does not disclose any accidental injury, there being nothing unusual or unexpected in the employee getting wet in washing the machines or in getting into the sunshine and open air in removing the ashes, and compensation should have been denied.

3. Master and Servant F c—

A proceeding under the Workmen's Compensation Act to determine liability of defendants to the next of kin of a deceased employee should not be brought in the name of the deceased employee.

APPEAL by plaintiff from *Clement, J.*, at August Term, 1935, of CABARRUS.

Proceeding under Workmen's Compensation Act to determine liability of defendants to next of kin of Jack Slade, deceased, employee.

The deceased was employed by Willis Hosiery Mills as general handy man around the mill. On 13 June, 1934, he was cleaning and scouring the dye machines with broom and hose, also the ditch under the machines. For this work he had special clothes, including rubber shoes. The machines were not in operation and the boilers were cold. The ditch under the machines is two feet deep, five or six feet wide, and 25 or 30 feet long. The machines stand four or five feet above the ditch. The six windows and three doors in the dye house were open. The weather was not excessively hot, but "it was during the hot spell in June, and down behind these machines it is almost impossible for anyone to get to you. It was an unusually hot day." Slade had been removing ashes from the furnaces and carrying them to a pile about two feet from the mill. He had to get in the sunshine to take the ashes out. He was doing his usual work, it was not heavy, though he had not washed the machines in this way in about eighteen months. It was hotter under the machines than anywhere else. The water was cold and Slade was wet.

The deceased was well when he went to work on the morning of the 13th. That night "he was deathly sick all night."

The doctor testified that he was called to see Slade on the morning of the 14th. "He was in bed and acutely sick. He had consolidated pneumonia. He died on the 20th. The pneumonia was due to sudden change of temperature, going from the hot room out into the open air. It produced a congestive chill."

The Industrial Commission awarded compensation. This was reversed on appeal to the Superior Court. From the latter ruling, plaintiff appeals, assigning error.

Waller D. Brown for plaintiff.
R. M. Robinson for defendants.

STACY, C. J. Did Jack Slade's death result from an injury by accident arising out of and in the course of his employment? We agree with the judge of the Superior Court the evidence is not such as to permit an affirmative inference.

By the terms of the Workmen's Compensation Act, "death" means only death resulting from an injury, and "injury" means only "injury by accident" arising out of and in the course of the employment, and does not include a disease in any form, except where it results naturally and unavoidably from the accident. C. S., 8081 (i). "Accident" as here used has been defined "as an unlooked for and untoward event which is not expected or designed by the person who suffers the injury." *Conrad v. Foundry Co.,* 198 N. C., 723, 153 S. E., 266. And it was said in *McNeely v. Asbestos Co.,* 206 N. C., 568, 174 S. E., 509, that "injury by accident" has reference to "an injury produced without the design or expectation of the workman." See, also, *Thomas v. Lawrence,* 189 N. C., 521, 127 S. E., 585; and 28 R. C. L., 787.

Death from injury by accident implies a result produced by a fortuitous cause. *Scott v. Ins. Co.,* 208 N. C., 160, 179 S. E., 434. A compensable death, then, is one which results to an employee from an injury by accident arising out of and in the course of the employment. There must be an accident followed by an injury by such accident which results in harm to the employee before it is compensable under our statute. *Cabe v. Parker-Graham-Sexton,* 202 N. C., 176, 162 S. E., 223; *Specialty Co. v. Francks,* 147 Md., 368, 44 A. L. R., 363. It was said in *Johnson v. Southern Dairies,* 207 N. C., 544, 177 S. E., 632, that an injury resulting from the employer's negligence may be tantamount to an injury by accident. See, also, *Pilley v. Cotton Mills,* 201 N. C., 426, 160 S. E., 479. The act was intended to cover all accidental injuries arising out of and in the course of the employment which result in harm to the employee. *McNeely v. Asbestos Co., supra.*

In the present case there is no evidence of any accidental injury arising out of and in the course of the employment which resulted in the death of the deceased employee. For this reason the judgment of the Superior Court is correct.

The hearing Commissioner put his finding upon "the unusual conditions" under which the deceased worked, and because he "was subjected to a greater degree of heat and exposure . . . than that common to the general public." This was affirmed by the Full Commission, one member dissenting.

It is in evidence, however, that the conditions were not unusual, and to subject a workman to a greater degree of heat and exposure "than that common to the general public" is the rule rather than the exception in industries where men toil and engage in manual labor. The deceased

was doing his work in the usual and customary way. It was not heavy. The employer had provided him with special clothes, including rubber shoes. That he should get in the sunshine, in carrying the ashes out of the mill, was obviously necessary. Nor was it unusual or unexpected that he should get wet in washing the machines. He was pursuing the general routine of his employment. Nothing unusual or unexpected took place at the mill. The weather was hot, but not excessively so. The case is free from "injury by accident," as this phrase is used in the Workmen's Compensation Act. *Ferris' case,* 123 Me., 193; *Hoag v. Independent Laundry,* 113 Kan., 513, 215 Pac., 295; *Chop v. Swift & Co.,* 118 Kan., 35, 223 Pac., 800; *Lerner v. Rump Bros.,* 241 N. Y., 153, 149 N. E., 334, 41 A. L. R., 1122, and note.

It should be observed the amendment of 1935, ch. 123, Public Laws 1935, providing for payment of compensation in certain cases of disablement or death of an employee resulting from an occupational disease is not involved in the present proceeding.

Nor is "Jack Slade, deceased," a proper party to the proceeding. *Hunt v. State,* 201 N. C., 37, 158 S. E., 703.

Affirmed.

FLORENCE M. SUTTON v. FRANKLIN FIRE INSURANCE COMPANY ET AL.

(Filed 8 April, 1936.)

1. Insurance O d—Insurer suffering judgment held entitled to joinder of another insurer upon allegations entitling it to contribution.

Judgment was awarded against insurer on a policy of automobile accident insurance, and insurer asked that another insurer be joined, and that it have judgment against such other insurer for one-half plaintiff's judgment, alleging that such other insurer had also issued a policy of accident insurance on the same car. The other insurer demurred, contending that its policy was invalid. *Held:* The demurrer should have been overruled, the invalidity of the policy not being raised by demurrer.

2. Pleadings D e—

A demurrer admits facts well pleaded.

3. Appearance A a—

By demurring to the merits, a defendant puts itself in court.

APPEAL by defendant Franklin Fire Insurance Company from *Spears, J.,* at January Term, 1936, of CRAVEN.

Civil action to recover on policy of insurance covering Chrysler automobile.

Upon denial of liability and issues joined, the plaintiff was awarded judgment against the Franklin Fire Insurance Company upon the policy issued by it, which was paid; whereupon, said defendant asked that the St. Paul Fire and Marine Insurance Company, which had also issued a policy on said automobile, be brought in as a party defendant, and that the "Franklin" have and recover of "St. Paul" one-half of said judgment.

Demurrer interposed to said cross action upon the ground that the facts alleged are not sufficient to constitute a cause of action. Demurrer sustained; exception. Appeal.

L. J. Eubanks for appellee.
Ward & Ward for appellant.

STACY, C. J. The principal matter debated on brief, to wit, the alleged invalidity of defendant appellee's policy, *Johnson v. Ins. Co.*, 201 N. C., 362, 160 S. E., 454, is not presented by the record. It may be raised by answer.

The demurrer admits facts well pleaded, *Oliver v. Hood, Comr., ante,* 291; *Phifer v. Berry,* 202 N. C., 388, 163 S. E., 119, and it would seem that upon the facts alleged, nothing else appearing, the demurrer should have been overruled. *Ramsey v. Furniture Co., ante,* 165.

By demurring to the merits, the "St. Paul" put itself in court. *Motor Co. v. Reaves,* 184 N. C., 260, 114 S. E., 175.

Reversed.

STATE v. ROBY SPENCER.

(Filed 8 April, 1936.)

1. Automobiles C c—

Driving an automobile in excess of 45 miles per hour in the country on a public highway is *prima facie* evidence that the speed is unlawful, ch. 311, sec. 2, Public Laws 1935, but an instruction that the law prohibits a speed in excess of 45 miles per hour is erroneous.

2. Automobiles F b—

In this prosecution for manslaughter, resulting from an automobile accident, defendant *is held* entitled to a new trial for error in the charge applying the test of civil liability rather than of criminal responsibility.

APPEAL by defendant from *Clement, J.,* at September Term, 1935, of RANDOLPH.

Criminal prosecution, tried upon indictment charging the defendant and another with manslaughter.

There is evidence tending to show that on the night of 19 May, 1935, the defendant, while intoxicated, was driving an automobile on Highway No. 70, at an excessive rate of speed, on the wrong side of the road, when he collided with another car, driven by Amos Kearns, and in which Aileen Luther was riding. Shortly after the collision Aileen Luther was found dead in the Kearns car.

There is also evidence from which the jury could infer that the deceased met her death as a result of the collision. There is other evidence tending to show that she was dead before the collision occurred.

The judge charged the jury "the law provides that one shall not drive an automobile at a greater rate of speed than 45 miles an hour out in the country on the public highway." Exception.

Verdict: Guilty as charged in bill of indictment.

Judgment: Imprisonment in State's Prison for not less than eight nor more than twelve years.

Defendant appeals, assigning errors.

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

J. V. Wilson and H. M. Robins for defendant.

STACY, C. J. It is conceded in the State's brief the trial court was inattentive to ch. 311, sec. 2, Public Laws 1935, which provides that driving faster than 45 miles per hour, under conditions here described, "shall be *prima facie* evidence that the speed is not reasonable or prudent, and that it is unlawful."

It also appears from a careful perusal of the charge as a whole that the test of civil liability, rather than that of criminal responsibility, was applied in determining the defendant's guilt. *S. v. Cope,* 204 N. C., 28, 167 S. E., 456.

This necessarily works a new trial. It is so ordered.

New trial.

IN RE WILL OF W. M. EVANS.

(Filed 8 April, 1936.)

Limitation of Actions B d—

Where, at the time of the accrual of the cause of action, the person entitled to bring action is not under disability, the statute of limitations will not cease to run because thereafter the right passes to an infant.

STANLEY *v.* POWER CO.

APPEAL by caveator from *Harris, J.,* at September Term, 1935, of PITT.

Caveat proceeding.

The facts are these:

1. In September, 1911, W. M. Evans died leaving a last will and testament in which he named his son, Zeno T. Evans, executor.

2. On 29 September, 1911, the executor duly probated said will in common form.

3. On 8 August, 1912, Zeno T. Evans died leaving him surviving a son, Elbert Evans, then about nine months of age.

4. On 12 January, 1935, Elbert Evans filed caveat to his grandfather's will.

The trial court held that the caveator's right to file said caveat was barred by the seven-year statute of limitations, C. S., 4158, and so instructed the jury. Exception.

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

Julius Brown for caveator.

Harding & Lee and Albion Dunn for respondent.

PER CURIAM. Affirmed on authority of *Chancey v. Powell,* 103 N. C., 159, 9 S. E., 298. "In the statute of limitations, there is an express exception in favor of the rights of those who may be infants, etc., at the time the right accrues, but if, at that time, there is no disability, although the right may, on the next day, pass to an infant, etc., it is not within the proviso, so that it has grown into a legal adage, 'When the statute begins to run it continues to run.'" *Mebane v. Patrick,* 46 N. C., 23.

Affirmed.

J. FRANK STANLEY, ADMINISTRATOR, v. TIDEWATER POWER COMPANY.

(Filed 8 April, 1936.)

Electricity A a—Defendant held not liable for intestate's death caused by contact with wire which intestate had knocked down in auto accident.

Evidence that plaintiff's intestate drove his car off the highway, hit defendant's pole, causing an electric transmission wire supported thereby to sag, that intestate left the car where it stopped against a tree, but was killed when he returned and came in contact with the sagging wire which had caught on the car, is insufficient to resist defendant's motion to nonsuit, the evidence failing to establish negligence of defendant and disclosing contributory negligence on the part of plaintiff's intestate.

CARTER *v.* BOST.

APPEAL by plaintiff from *Barnhill, J.*, at November Term, 1935, of LENOIR.

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.

On the night of 9 November, 1934, plaintiff's intestate drove his automobile off Highway No. 11, across a drain ditch, struck a pole which supported defendant's electric transmission wire, and came to a stop when his car ran into a tree. The wire sagged down and caught on the car. Plaintiff's intestate and his companions left the automobile in safety and returned to the highway. Later plaintiff's intestate started back to his car when he came in contact with the transmission wire and was killed. It is in evidence that the parties had all been drinking.

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

John G. Dawson and Allen & Allen for plaintiff.
Poisson & Campbell and Rouse & Rouse for defendant.

PER CURIAM. The judgment of nonsuit is correct, whether viewed from want of evidence to establish actionable negligence on the part of the defendant, or from the standpoint of contributory negligence on the part of plaintiff's intestate.

Affirmed.

JULIA ANN CARTER v. D. W. BOST, L. T. HARTSELL, TRUSTEE, AND GEORGE I. CARTER.

(Filed 8 April, 1936.)

Limitation of Actions A d—Right to foreclose deed of trust given as additional security by person not liable on note held governed by ten-year statute and not three-year statute.

Plaintiff executed a deed of trust on her land as additional security for the principal's debt, the principal having executed the note and a deed of trust on his lands. Plaintiff did not sign the note, and brought this action to have the deed of trust on her lands canceled as a cloud upon title, alleging that her liability on the note as surety was barred by the three-year statute of limitations, C. S., 441 (1). *Held:* Plaintiff was not liable in any capacity on the note, and the right of action *in rem* for foreclosure of the deed of trust upon her land upon default of the principal is not barred until the expiration of ten years after the power of sale becomes absolute, or after ten years from the last payment on the note. C. S., 436, 437 (3).

CARTER *v.* BOST.

APPEAL from judgment sustaining demurrer entered by *Clement, J.*, at September Term, 1935, of ROWAN. Affirmed.

This is an action to remove cloud from plaintiff's title, instituted on 23 January, 1935. The complaint is substantially to the effect that on 23 May, 1923, the defendant George I. Carter purchased from Ellen M. Bost a tract of land containing 128 acres, and borrowed from the defendant D. W. Bost the sum of $3,600 with which to pay therefor; that on said date a deed of trust was executed by George I. Carter and his wife (now deceased) and by the plaintiff and her husband (now deceased) upon the said 128 acres, as well as upon a tract of 114 acres belonging to the plaintiff, to L. T. Hartsell, trustee, to secure a note for $3,600, payable to D. W. Bost, and representing the amount borrowed from him by George I. Carter; that the plaintiff signed the deed of trust with the understanding, and to the knowledge of all parties concerned, that she was signing only as surety, and that her land included in said deed of trust should be bound only as surety; that the deed of trust was due and payable on 23 May, 1924, but was not paid at that time, and without the knowledge or consent of the plaintiff, and at the request of the defendant George I. Carter, the defendants Hartsell, trustee, and D. W. Bost, *cestui que trust,* granted to George I. Carter extensions from time to time for payment of interest and principal on said note; and that inasmuch as more than three years have elapsed since such extensions were granted, her land is released from the operation of the deed of trust, but that said deed of trust constitutes a cloud upon her title.

After filing answer, the defendants demurred *ore tenus* upon the ground that the complaint failed to state facts sufficient to constitute a cause of action.

The court entered judgment sustaining the demurrer, from which plaintiff appealed to the Supreme Court.

R. Lee Wright for plaintiff, appellant.
Hartsell & Hartsell for defendants, appellees.

PER CURIAM. According to the admissions made on the argument, the plaintiff did not sign the note. This being true, the plaintiff was never bound by the note, either as principal or surety, and, therefore, the authorities cited by the plaintiff to the effect that actions against sureties on sealed instruments, not included in specific statutes, are ordinarily barred within three years by virtue of C. S., 441 (1), have no application to this case.

The plaintiff having executed only the deed of trust on her land as additional security for the debt, the only cause of action created by her, in the event of default in payment, was one to foreclose the deed of trust

against her land and not one for judgment against her personally—an action *in rem*, not *in personam*.

The period prescribed for the commencement of the foreclosure of a deed of trust under power of sale is "within ten years after the . . . power of sale became absolute, or within ten years after the last payment on the same." C. S., 436, 437 (3). There was no contention that the rights to foreclose the deed of trust on the plaintiff's land is barred by the ten-year limitation, presumably for the reason that it appears that many payments on the debt were made within the ten-year period next preceding the commencement of this action.

Affirmed.

W. M. ELKES AND WIFE, ANNIE L. ELKES, v. INTERSTATE TRUSTEE CORPORATION, NORTH CAROLINA JOINT STOCK LAND BANK OF DURHAM, AND LUCINDA EDWARDS.

(Filed 8 April, 1936.)

1. Mortgages H h: H p—

The burden is on the trustor attacking foreclosure for failure of due advertisement to prove such failure, since the execution of the power of sale contained in the instrument is presumed regular.

2. Mortgages H p—

Mere inadequacy of purchase price is not sufficient, standing alone, to upset a foreclosure sale.

3. Mortgages H j: H p—Trustee may announce bid made for property by cestui que trust at the foreclosure sale.

The *cestui que trust* advised the trustee by telephone that it would bid a certain amount for the property. The trustee announced the bid at the sale, and there being no other bid, the bid was reported, confirmed, and deed made accordingly. *Held:* The sale is not voidable on the ground that the trustee could not buy in at his own sale, since it appears that the bid was entered by the *cestui*, who is entitled to bid in the property at the trustee's sale.

APPEAL by plaintiffs from *Small, J.*, at October Term, 1935, of PITT. Affirmed.

Gaylord & Hannah and David M. Williford for plaintiffs.
J. B. James for defendants.

PER CURIAM. The facts are these: The plaintiffs in 1923 executed deed of trust on 60 acres of land to secure a loan of $2,900 made by the North Carolina Joint Stock Land Bank of Durham, N. C. Upon de-

fault in the payment of the debt the substituted trustee, the defendant Interstate Trustee Corporation, sold the land under the power, and the holder of the evidence of the debt, North Carolina Joint Stock Land Bank, became the purchaser at the price of $1,500. No advance bid having been placed thereon within the statutory period, on 22 February, 1933, said trustee executed deed to the land bank, and on 16 March, 1933, the land bank, for value, conveyed to the defendant Lucinda Edwards.

It was admitted that there was as much as $3,000 due on the debts on the land at the time of the sale. Plaintiffs attack the validity of the foreclosure sale on the ground that it was not properly advertised, and that the attorney for the trustee making the sale also made the bid for the land bank upon which the purchase was made and deed executed.

Plaintiffs further contend that the land was worth more than enough to satisfy all liens, and ask to recover from defendants, trustee and land bank, as damages, the difference between the value of the land and the debts and taxes, conceding defendant Edwards has acquired a good title. There was no evidence that the sale was not properly advertised. Plaintiffs offered the evidence of the attorney for the trustee, which showed that on the morning of the sale he was advised by telephone that the land bank wished to put on a bid of $1,500, subject to taxes for four years. At the sale at the courthouse door in Greenville, N. C., the bid of the land bank was announced. There was no other bid and sale to the land bank was reported and later confirmed. Plaintiffs also offered evidence that the land is now worth $4,000 or $6,000, though in February, 1933, only $2,000 or $2,500.

This action was instituted 1 January, 1935.

Plaintiffs seek to recover from the land bank and the trustee on the ground that the foreclosure as between them and the plaintiffs was void because not properly advertised and because the land was offered, bid off, and sold by the same person.

But the evidence fails to support either contention. There was no evidence that the sale was not properly advertised, and it is presumed to have been regular. *Jenkins v. Griffin,* 175 N. C., 184; *Phipps v. Wyatt,* 199 N. C., 727; *Cawfield v. Owens,* 129 N. C., 286.

Nor did the fact that the land bank was creditor prevent it from becoming purchaser at the sale by the trustee. *Simpson v. Fry,* 194 N. C., 623; *Bunn v. Holliday, ante,* 351.

Mere inadequacy of price is not sufficient to upset a duly advertised sale. *Roberson v. Matthews,* 200 N. C., 241.

Plaintiffs invoke the rule that when a mortgagee or trustee buys at his own sale the relationship of mortgagor and mortgagee will continue (*Owens v. Mfg. Co.,* 168 N. C., 397), and rely on *Gibson v. Barbour,*

100 N. C., 192, and *Lockridge v. Smith,* 206 N. C., 174. In the *Gibson case, supra,* the sale was made by the agent of the mortgagees, who bid off the land as agent of the purchaser (p. 196); and in the *Lockridge case, supra,* the agent and attorney of the trustee conducted the sale and bid it off for himself, and had deed made to himself.

The facts here were different. The agent and attorney of the corporate trustee making the sale received a bid from the land bank, announced it, and that being the last and highest bid, sale was reported, confirmed, and deed made accordingly.

The motion for nonsuit at the close of plaintiffs' evidence was properly allowed.

Judgment affirmed.

THE FIRST NATIONAL BANK AND TRUST COMPANY IN MACON v. N. D. LEVY ET AL.

(Filed 8 April, 1936.)

1. Evidence B d—

The burden is on defendant to prove an offset claimed by him.

2. Trial D b—

The court may direct a verdict on an issue against the party having the burden of proof on the issue when such party fails to introduce evidence on the issue or when the evidence offered and taken to be true fails to make out a case.

APPEAL by defendants from *Barnhill, J.,* at November Term, 1935, of LENOIR. No error.

This is an action to recover on a note executed by the defendants and payable to the plaintiff.

The defendants admit the execution of the note described in the complaint, and in their answer plead an offset or counterclaim.

The issues submitted to the jury were answered as follows:

"1. Did the defendants execute and deliver the note sued on? Answer: 'Yes.'

"2. What amount is now due and unpaid thereon? Answer: '$650.00 and interest.'

"3. What offset, if any, are the defendants entitled to by reason of the matters and things set out and alleged in the answers? Answer: 'None.' "

From judgment that plaintiff recover of the defendants the sum of $650.00, with interest from 15 November, 1932, and the costs of the action, the defendants appealed to the Supreme Court, assigning as error the instructions of the court to the jury with respect to the third issue.

Wallace & White for plaintiff.

James R. Patton, Jr., A. R. Wilson, and Robert D. Holleman for defendants.

PER CURIAM. There was no evidence at the trial of this action tending to support an affirmative answer to the third issue. The burden in this issue was on the defendants, and for that reason there is no error in the instruction of the court to the jury that they should answer the third issue, "None."

Defendants' assignment of error cannot be sustained.

The court may always direct a verdict against the party who has the burden of proof, if there is no evidence in his favor, as where he fails to introduce any evidence, or if the evidence offered and taken to be true fails to make out a case. McIntosh, N. C. Prac. and Proc., p. 632.

No error.

J. A. WARREN v. U. M. WARD.

(Filed 22 January, 1936.)

APPEAL by plaintiff from *Barnhill, J.*, at August Term, 1935, of ORANGE. Affirmed.

The following judgment was rendered in the court below:

"The above entitled cause coming on for trial before the undersigned judge and a jury and being consolidated and tried together by consent; and it being agreed by counsel that if the case of 'Warren *v.* Ward' is decided in favor of the defendant that in the case of 'Ward *v.* Warren' the plaintiff is to have judgment for the possession of the property described in the pleadings; and the plaintiff J. A. Warren having voluntarily amended his pleadings and alleged that the contract relied upon by him was an oral contract, the court being of opinion that since the complaint shows upon its face that the contract relied upon is a contract for the purchase and sale of real property and was not reduced to writing or signed by the defendant, and that the defendant denies the contract and pleads the statute of frauds, the plaintiff cannot recover; upon a demurrer *ore tenus* and a motion for judgment by the defendant the court renders judgment in favor of the defendant. The plaintiff Warren demurs to the cross action and counterclaim of the defendant Ward for damages in tort, which the court sustains. The defendant Ward takes a voluntary nonsuit upon his counterclaim for rent.

"It is further adjudged in the case of 'Ward *v.* Warren' that the plaintiff is entitled to the immediate possession of the lands described in the pleadings. It is agreed that execution on this judgment will not issue until the first of January, 1936, upon the payment of rent for 1935.

M. V. BARNHILL,
Judge Presiding."

The plaintiff excepted and assigned as error the action of his Honor, Judge Barnhill, in sustaining the demurrer *ore tenus* of the defendant, which is the only question involved in this appeal.

John J. Henderson for plaintiff.
S. M. Gattis, Jr., for defendant.

PER CURIAM. We see no error in the judgment of the court below. The allegations of plaintiff's complaint and his prayer for relief we think are so general and indefinite that under our most liberal practice plaintiff is not entitled to an issue as to the question of valuable improvements. The principle invoked by plaintiff is well settled in *Pass v. Brooks,* 125 N. C., 129; *S. c.,* 127 N. C., 119, and the more recent case of *Insurance Co. v. Cordon,* 208 N. C., 723. The pleadings of plaintiff and the theory upon which the case was heard in the court below does not now permit plaintiff to invoke the well settled principle in the above cited cases.

The judgment of the court below is
Affirmed.

STATE v. W. J. SWAN.

(Filed 22 January, 1936.)

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.

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

APPEAL by defendant from *Frizzelle, J.,* at November Term, 1935, of PAMLICO. Affirmed.

The defendant was convicted on four counts contained in two bills of indictment charging him, while an officer of a bank, with receiving deposits, or permitting deposits to be received, when he knew the bank was insolvent, and with making and publishing certain false reports as to the financial condition of the bank. From judgment pronounced upon the verdict, the defendant appealed.

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

W. B. Rodman, Z. V. Rawls, T. D. Warren, and L. I. Moore for defendant, appellant.

PER CURIAM. This case was argued at the Fall Term, 1934, and, after being considered in conference, was assigned to *Justice Brogden* for detailed investigation and report. *Justice Brogden* was taken ill soon thereafter and after several months died without submitting an opinion. Since his death the remaining members of the Court who heard the argument find themselves evenly divided upon the question of awarding the defendant a new trial.

In accord with the established practice, the Court being evenly divided in opinion, *Justice Devin* not sitting, the judgment of the Superior Court is affirmed and stands as the decision in this case without becoming a precedent. *Nebel v. Nebel,* 201 N. C., 840, and cases there cited.

Affirmed.

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

ALVIS RICHARDSON v. J. M. EDMUNDS COMPANY.

(Filed 22 January, 1936.)

APPEAL by defendant from *Hill, Special Judge,* at June Term, 1935, of ROCKINGHAM.

Civil action for damages arising out of collision between two automobile trucks.

The usual issues of negligence, contributory negligence, and damages were submitted to the jury and answered in favor of the plaintiff.

Defendant appeals, assigning errors.

P. W. Glidewell and Allen H. Gwyn for plaintiff.

R. T. Pickens and Dalton, Turner & Dickson for defendant.

PER CURIAM. The only exceptions brought forward in appellant's brief are those relating to the charge in which it is contended the court failed to "state in a plain and correct manner the evidence given in the case," and likewise failed to "declare and explain the law arising thereon," as required by C. S., 564. The exceptions are not of sufficient merit to call for elaboration or to warrant a new trial. Hence, the verdict and judgment will be upheld.

No error.

F. M. MISENHEIMER v. TOWN OF TROY.

(Filed 22 January, 1936.)

APPEAL by plaintiff from *Sink, J.*, at April Term, 1935, of MONTGOMERY. Affirmed.

This is an action for actionable negligence brought by plaintiff against defendant alleging damage.

R. L. Smith & Sons, W. L. Mann, and M. C. Lisk for plaintiff.
F. T. Poole 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 granted the motion, and in this we can see no error.

The plaintiff's evidence was to the effect that he and his brother were engaged in hauling crossties and went to Troy in a truck, on 22 April, 1933, and stopped in the main section of the town—on west side of street. In going to Johnson's store, on the east side, he passed across the street and stepped on the curbing and slipped and fell on a barrel in front of Johnson's store. That the curbing was painted white with fresh paint. Plaintiff testified, in part: "I went across the street and the little six-inch curbing was painted white and I stepped on it with my right foot and it slipped out to the left and threw me over on the barrel—the right side. It was an apple barrel, with no hoop on the top, an empty barrel."

The plaintiff was seriously injured. It was in the morning, about 10 or 11 o'clock.

Johnson, a witness for plaintiff, testified: "Curb was painted half-way in front of store. All way round the end. Run off in front of filling station. Had never seen this curb painted before. Don't know why it was there and don't know why or who put it there."

If it was negligence for the defendant to paint the curbing, there is no evidence that it was done by the defendant town, or that the officers of defendant knew, or by the exercise of due care ought to have known, of the situation complained of. It is questionable, under the facts and circumstances of this case, if the painting of the curbing was done by defendant and the barrel was as indicated in the evidence, that it was such a situation that injury to travelers might be reasonably anticipated or foreseen.

We think the judgment of the court below must be

Affirmed.

WILLIAM LAMONT v. HIGHSMITH HOSPITAL ET AL.

(Filed 22 January, 1936.)

APPEAL by defendants from *Frizzelle, J.*, at August Term, 1935, of HOKE.

Civil action to recover damages for alleged negligent injury, resulting in verdict and judgment for plaintiff.

Defendants appeal, assigning errors.

R. A. Collier and Varser, McIntyre & Henry for plaintiff.

Sapp & Sapp, Oates & Herring, and Spruill & Spruill for defendants.

PER CURIAM. This is the same case that was before us at the Spring Term, 1934, opinion filed 28 February, 1934, reported in 206 N. C., 111, 173 S. E., 46, to which reference may be had for fuller statement of the facts.

The record is quite voluminous and numerous exceptions have been assigned as error, but a careful perusal of the case leaves us with the impression that no new or novel question of law is presented by the appeal. The learned judge evidently had before him, during the trial, what was said on the former appeal and the case of *Nash v. Royster*, 189 N. C., 408, 127 S. E., 356. The whole ground was covered in these two opinions and it would serve no useful purpose to go over it again.

No reversible error has been made to appear; hence, the verdict and judgment must be upheld.

No error.

WORTH KELLY v. THE GREAT ATLANTIC & PACIFIC TEA COMPANY ET AL.

(Filed 22 January, 1936.)

Appeal and Error J d—

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

APPEAL by plaintiff from *Cowper, Special Judge*, at Special June Term, 1935, of MECKLENBURG.

Civil action to recover damages for an alleged negligent injury due to the failure of the corporate defendant, in the exercise of ordinary care, to furnish plaintiff, an employee, a reasonably safe place to work, brought against The Great Atlantic & Pacific Tea Company, a corpo-

ration chartered under the laws of the State of Arizona, and L. I. Smith, Clyde Culp, and J. M. Butler, citizens and residents of Mecklenburg County, North Carolina.

Motion of nonresident corporate defendant to remove cause to the District Court of the United States for the Western District of North Carolina for trial.

Motion allowed, and plaintiff appeals.

John M. Robinson, Ralph V. Kidd, and Hunter M. Jones for plaintiff.
Guthrie, Pierce & Blakeney for defendant A. & P. Tea Co.

PER CURIAM. The petition for removal, besides showing the presence of the requisite jurisdictional amount, asserts rights of removal on the grounds of diverse citizenship and (1) fraudulent joinder of resident defendants, and (2) separable controversies.

The trial court held that as the allegations of the complaint all point to the failure of the corporate defendant to discharge its nondelegable duty to furnish plaintiff, an employee, a reasonably safe place to work, the case was controlled by the line of decisions of which *Cox v. Lbr. Co.*, 193 N. C., 28, 136 S. E., 254; *Johnson v. Lbr. Co.*, 189 N. C., 81, 126 S. E., 165; and *Rea v. Mirror Co.*, 158 N. C., 24, 73 S. E., 116, may be cited as fairly illustrative; while the plaintiff contends the principles announced in *Givens v. Mfg. Co.*, 196 N. C., 377, 145 S. E., 681; *Crisp v. Fibre Co.*, 193 N. C., 77, 136 S. E., 238; and *Hollifield v. Tel. Co.*, 172 N. C., 714, 90 S. E., 996, are more nearly applicable.

Under the trial court's interpretation of the complaint, which is a permissible one, it would seem the plaintiff has not overcome the presumption against error. *LaNeve v. Tea Co.*, 207 N. C., 281, 176 S. E., 560. To prevail on appeal, he who alleges error must make it appear clearly, as the presumption is against him. *Poindexter v. R. R.*, 201 N. C., 833, 160 S. E., 767; *Jackson v. Bell*, 201 N. C., 336, 159 S. E., 926.

Affirmed.

W. L. BOWLES, ADMINISTRATOR OF MARY VIRGINIA WOODWARD, DECEASED, AND NEXT FRIEND OF EDITH MOZELLE WOODWARD, AN INFANT, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 22 January, 1936.)

APPEAL by defendant from *Devin, J.*, at March Term, 1935, of HALIFAX. No error.

Two actions, one by W. L. Bowles, administrator of Mary Virginia Woodward, deceased, and the other by W. L. Bowles, next friend of Edith Mozelle Woodward, both against the Atlantic Coast Line Railroad Company, to recover damages for the death of Mary Virginia Woodward, and for personal injuries suffered by Edith Mozelle Woodward, pending in the Superior Court of Halifax County, were, by consent, consolidated for trial, and tried together.

Issues arising in the pleadings were submitted to the jury and answered as shown by the record.

The jury found that Mary Virginia Woodward was killed, and Edith Mozelle Woodward was injured by the negligence of the defendant as the proximate cause of a collision between the automobile in which they were riding as guests of the owner and driver of the automobile and a locomotive engine of the defendant; that neither the said Mary Virginia Woodward nor the said Edith Mozelle Woodward, by her negligence, contributed to her respective death and injuries; and that the negligence, if any, of the driver of the automobile in which they were riding at the time of the collision did not insulate the negligence of the defendant. The jury assessed the damages which the plaintiff is entitled to recover for the death of Mary Virginia Woodward at $5,000, and for the injuries suffered by Edith Mozelle Woodward at $15,000.

From judgment that plaintiff, as administrator of Mary Virginia Woodward, recover of the defendant the sum of $5,000, and as next friend of Edith Mozelle Woodward recover of the defendant the sum of $15,000, and that the costs be taxed against the defendant, the defendant appealed to the Supreme Court, 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 to give certain instructions to the jury as requested by the defendant.

George C. Green and B. S. Royster, Jr., for plaintiffs.

Spruill & Spruill, Dunn & Johnson, and Thos. W. Davis for defendant.

PER CURIAM. On its appeal to this Court, the defendant contends that on facts shown by all the evidence, it is not liable to the plaintiffs in these actions, and that for that reason there was error in the refusal of the trial court to allow its motion at the close of all the evidence for judgment as of nonsuit, or to give the peremptory instruction requested by the defendant in apt time, and in writing.

After a careful examination of the record, we are of opinion that defendant's contention cannot be sustained. Its assignments of error are overruled, and the judgment is affirmed.

Both actions arise out of a collision at a grade crossing in the town of Enfield, N. C. Every fact involved in the issues submitted to the jury to determine the liability of the defendant was in dispute. The evidence was conflicting, and for that reason was properly submitted to the jury. The principles of law applicable to the facts as the jury might find them from the evidence are well settled and were correctly applied by the court in its rulings during the trial, and in its charge to the jury. The record discloses no error of law in the trial.

No error.

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

GURNEY P. HOOD, COMMISSIONER OF BANKS, EX REL. THE UNITED BANK AND TRUST COMPANY, v. A. J. TILLEY, TRADING AS TILLEY'S WAREHOUSE, A. J. TILLEY, PERSONALLY, J. W. HANCOCK, GEORGE T. HANCOCK, B. H. JONES, D. L. HANCOCK, L. C. SLOAN, O. M. McDANIEL, AND O. P. MAKEPEACE.

(Filed 22 January, 1936.)

APPEAL by plaintiff from *Devin, J.*, at January Term, 1935, of LEE. No error.

This is an action to recover on a note which was executed on 22 September, 1931, by A. J. Tilley, trading as Tilley's Warehouse, as maker, and by his codefendants as endorsers. The note was due on demand, and is payable to the order of United Bank and Trust Company. The amount due on the note at the commencement of the action was $2,910.84.

The plaintiff owns the note sued on as an asset of The United Bank and Trust Company, an insolvent banking corporation in his hands for liquidation; he is not a holder in due course of said note. The title to the note was acquired by The United Bank and Trust Company from the payee, United Bank and Trust Company, by purchase, after its maturity.

In defense of plaintiff's recovery in this action, the endorsers, as defendants, alleged in their answers breaches by the payee of certain agreements with them with respect to the application of the proceeds of the note, and with respect to certain securities held by the payee for the protection of the endorsers.

These defenses were sustained by the jury. The verdict as to the defendants A. J. Tilley and O. P. Makepeace was set aside by the trial judge in the exercise of his discretion.

From judgment that he recover nothing from the defendants J. W. Hancock, D. L. Hancock, George T. Hancock, L. C. Sloan, B. H. Jones, and O. M. McDaniel, on the cause of action alleged in the complaint, the plaintiff appealed to the Supreme Court, assigning errors in the trial.

J. C. Pittman and Smith, Wharton & Hudgins for plaintiff.
K. R. Hoyle and B. F. Brittain for defendants.

PER CURIAM. A careful examination of the assignments of error on this appeal fails to disclose any prejudicial error for which the plaintiff is entitled to a new trial. There was evidence tending to show agreements by the payee of the note sued on as alleged in the answers, and breaches of these agreements resulting in damages to the endorsers in excess of the amount due on the note.

The judgment is affirmed.

No error.

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

MILTON HESTER, ADMINISTRATOR OF JAMES W. HESTER, DECEASED, *v.* NORTH CAROLINA RAILROAD COMPANY AND SOUTHERN RAILWAY COMPANY.

(Filed 22 January, 1936.)

APPEAL by plaintiff from judgment of nonsuit entered by *Harris, J.*, at the May Term, 1935, of DURHAM. Affirmed.

Bennett & McDonald for plaintiff, appellant.
Hedrick & Hall for defendants, appellees.

PER CURIAM. This action was instituted by the plaintiff to recover damages for the alleged wrongful death of his intestate. It was alleged and evidence was offered tending to prove that on 18 November, 1934, the intestate, James W. Hester, was struck, run over, and killed by a passenger train of the defendants within the corporate limits of the city of Durham, and that the defendants were negligent in that the train which struck the intestate was running at a rate of speed in violation of

an ordinance of the city of Durham, and that the engineer failed to blow his whistle or give other signal of the approach of the train. However, there is no evidence as to what position the intestate was in just prior to and at the time he was struck, the evidence being that he was last seen, some few minutes before the train passed, in the public road about 800 feet from the place on the railroad track where his mangled body was subsequently found. In the absence of any evidence as to the intestate's position upon the track when struck the motion for judgment as of nonsuit was properly entered. *Norwood v. R. R.*, 111 N. C., 236, and cases there cited.

Affirmed.

SALLIE D. HOLDERFIELD v. GEORGE ROSS POU, P. A. HODGES, AND K. B. JONES.

(Filed 22 January, 1936.)

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.

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

NONSUIT as to the defendant Pou and no appeal. Appeal by defendants Hodges and Jones from judgment based upon adverse verdict before *Daniels, Emergency Judge,* at March Term, 1935, of WAKE. Affirmed.

This is a civil action for damages alleged to have been caused by trespass upon the family burying ground of the plaintiff's deceased father.

Albert Doub and J. W. Templeton for plaintiff, appellee.
Charles Ross and E. A. Adams for defendants, appellants.

PER CURIAM. The Court being evenly divided in opinion, one of its members, *Justice Devin,* not sitting, the judgment of the Superior Court is affirmed and stands as the decision in this action without becoming a precedent. *Nebel v. Nebel,* 201 N. C., 840, and cases there cited.

Affirmed.

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

ELIZA WILLIAMS AND HUSBAND, L. W. WILLIAMS, v. BLUE RIDGE BUILDING & LOAN ASSOCIATION AND A. W. BURNS, JR., LIQUIDATING AGENT FOR THE CENTRAL BANK AND TRUST COMPANY.

(Filed 26 February, 1936.)

APPEAL by the plaintiffs from *Oglesby, J.*, at August Term, 1935, of BUNCOMBE. Modified and affirmed.

This was a civil action, instituted by the plaintiffs, to restrain a sale under a certain recorded deed of trust, signed and purporting to be duly acknowledged before a notary public by the plaintiffs, to the Central Bank and Trust Company, as trustee, to secure an indebtedness of $7,000, and interest, to the Blue Ridge Building and Loan Association. Edwin Ray, receiver of the Blue Ridge Building and Loan Association, by consent, was made a party defendant in this Court. This case was here on a former appeal, 207 N. C., 362.

It is alleged in the complaint that, while the *feme* plaintiff signed the deed of trust, she never appeared before the notary public whose name is affixed to the certificate, and never, separately and apart from her husband, assented thereto. This allegation is denied in the answer. The case was submitted to the jury upon the following issue:

"1. Did the notary public, Fenton H. Harris, take the private examination of Eliza Williams touching her voluntary execution of the deed of trust dated 11 December, 1929, securing the sum of $7,000 recorded in Deed of Trust Book 305, page 292?" Upon the issue being answered in the affirmative, judgment was entered for the defendants, and the plaintiffs appealed, assigning errors.

Pritchard & James for plaintiffs, appellants.

R. M. Wells and Smathers, Martin & McCoy for defendants, appellees.

PER CURIAM. We have examined the exceptive assignments of error, both to the rulings upon the evidence and to the charge, and find no reversible error therein. The charge is in compliance with the opinion in this case when before this Court on former appeal.

However, in paragraph 6 of the judgment it is ordered that the defendants recover of the plaintiffs "the sum of $400.00, to be discharged by the payment to said defendants of a sum equal to $25.00 per month, calculated from 12 October, 1933, until paid, and the same to be calculated to the day of payment." It is conceded in the brief of the appellees that this provision of the judgment has no basis in either allegation

or proof. Such provision was erroneously inserted and must be stricken from the judgment.

Paragraph 6 of the judgment should be stricken therefrom and the remaining provisions affirmed, and to that end the case is remanded to the Superior Court that judgment may be modified accordingly.

Modified and affirmed.

STATE v. MAJOR LOWE.

(Filed 26 February, 1936.)

APPEAL from *Oglesby, J.*, and a jury, at November Term, 1935, of MADISON. No error.

The defendant was tried upon an indictment containing four counts: (1) Did unlawfully and willfully barter, sell, give away, furnish, deliver, exchange, and otherwise dispose of intoxicating liquors. (2) Did unlawfully and willfully transport, export, import, purchase, receive, possess, and have on hand intoxicating liquors. (3) Unlawfully and willfully did have and keep on hand intoxicating liquor for the purpose of being sold and otherwise disposed of in violation of law. (4) Did unlawfully and willfully solicit and receive, and knowingly permit his employees and agents to solicit and receive an order for liquor, and did give information of how liquor might be obtained in violation of the law. The defendant pleaded not guilty.

Harrison Treadway, a deputy sheriff, testified, in part: "I know Major Lowe. I found a half-gallon of whiskey five steps from the door of his house. It was in a gallon fruit jar. There were several empty jars around there that smelled like liquor. The defendant operates a filling station. The liquor was in the yard and you could not see any tracks. It was under a bushel bean basket in the yard. I went there about three o'clock in the afternoon and the defendant was at home. The other jars I found around the house had had liquor in them. There were also some 'bat-wing' bottles, about seven or eight or a dozen, there. There were also some jars, and I think a five-gallon can, all of which had the odor of whiskey in them. That was about five or six months ago, some time last spring. The whiskey I found was in a jar under a bean basket, five steps from the defendant's house. . . . The whiskey was near Marshall on the highway in the county of Madison."

The defendant did not go on the stand, but a witness for defendant, Betty Stewart, denied the material allegations of the State as to defendant's ownership of the liquor.

The State only asked for a verdict on one count, "possessing liquor for the purpose of sale." There was a verdict of guilty, and the court rendered judgment on the verdict. Defendant excepted, assigned error, and appealed to the Supreme Court.

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

Ramsey & McLean for defendant.

PER CURIAM. The witness, Betty Stewart, for defendant testified, in part: "I have seen Major Lowe take a drink when people came there and gave him one; that was in the filling station owned by him and in the yard, near the road. The last time I saw Major take a drink, I believe, was just before I went to jail in Asheville, about three months ago. I just saw him take a drink in a glass. I saw him pour the liquor into the glass in the yard of the filling station and in the filling station, too. The yard of the filling station is right on the edge of the road." The court in its charge fully and correctly laid down the law applicable to the facts. The record discloses:

"(The State further says and contends that you should be satisfied from the evidence offered by the defendant that the defendant on certain occasions was given drinks out on the highway near his home, and that he drank it. The court instructs you that if the defendant was on the highway and someone gave him liquor and he took it and took a drink, then he would be guilty of possession.)" To the foregoing charge of the court in parentheses the defendant excepted. "But the bill charges the defendant with possession for the purpose of sale, and whether the defendant was guilty of possession of the liquor for the purpose of sale is a matter for you to determine from all the evidence."

Taking the charge as a whole, the exception and assignment of error of the defendant cannot be sustained. It is well settled that the charge must be taken as a whole and not disconnectedly. The court below said: "But the bill charges the defendant with possession for the purpose of sale," etc. The court below confined the question of the guilt or innocence of defendant to the possession for the purpose of sale. The court below charged the jury fully the law as to possession and constructive possession. All the evidence showed that defendant had a filling station and he made this his home.

In *S. v. Hardy, ante,* 83, it was held (headnote): "The provision of N. C. Code, 3411 (j), that a person may legally possess intoxicating liquor in his dwelling for his personal consumption and the consumption of his family and *bona fide* guests is limited by the terms of the statute to a private dwelling occupied and used exclusively as a dwelling, and

a person may not lawfully possess intoxicating liquor in a building or structure used and operated by such person as a filling station and dwelling combined when the parts of the structure used for the respective purposes are connected."

The defendant, under the above holding, having his home as part of the filling station, would be guilty if he had the intoxicating liquor in his possession, irrespective as to having it for sale. The charge of the court below was more liberal for defendant than he was entitled to and did not impinge C. S., 564.

In the judgment there is

No error.

C. H. MORROW ET AL. v. BURLINGTON HOTEL CORPORATION ET AL.

(Filed 26 February, 1936.)

APPEAL from *Devin, J.*, at Chambers in Oxford, 10 July, 1935. From ALAMANCE.

L. D. Meador and Walter G. Green, Jr., for plaintiffs, appellants.

Louis C. Allen and Smith, Wharton & Hudgins for defendants, appellees.

PER CURIAM. This is an action, instituted by a minority stockholder in the defendant corporation, to enjoin the confirmation of foreclosure sale under deed of trust and the appointment of a receiver to wind up the affairs of the corporation.

The learned and painstaking judge who heard this case *in extenso* finds (1) that the plaintiff was given ample opportunity to raise or to have raised the bid made at the foreclosure sale, and that no raise was forthcoming, (2) that the sale was for the best interest of the creditors and stockholders of the corporation, and (3) that the interest of all concerned would be best conserved by the appointment of a receiver to wind up the affairs of the corporation, and upon these findings of fact confirmed the sale and appointed a receiver. From this judgment the plaintiffs appealed, assigning errors.

There was an abundance of evidence to support the findings of fact, and they amply sustained the judgment.

The record presents no new question of law for discussion.

The judgment of the Superior Court is

Affirmed.

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

PRESTON ROGERS ET AL. v. W. L. BAILEY ET AL.

(Filed 26 February, 1936.)

APPEAL by plaintiffs from *Cranmer, J.*, at September Term, 1935, of MARTIN.

Civil action to redeem, for an accounting and damages.

Plaintiffs allege that defendants took possession of their lands in 1929, under an agreement to hold the same until the mortgaged indebtedness thereon of $300, then held by defendants, could be paid; that thereafter, in breach of said agreement, attempted foreclosure of tax sales certificate was had and purchase made for defendants; that, in addition, defendants wrongfully attempted foreclosure of their said mortgage; wherefore plaintiffs ask to redeem, for an accounting, and for damages.

The defendants deny the allegations of the complaint and plead the three-year statute of limitations.

The judgment recites that "after hearing the pleadings read and arguments of counsel, upon motion of the defendants to dismiss the action as of nonsuit," the court being of opinion that plaintiffs could not recover, "ordered that the plaintiffs be nonsuited."

Plaintiffs appeal, assigning errors.

B. A. Critcher and J. A. Liverman for plaintiffs.

Jos. W. Bailey and Hugh G. Horton for defendants.

PER CURIAM. Reversed on authority of *Dix-Downing v. White*, 206 N. C., 567, 174 S. E., 451.

Reversed.

STATE v. LEE MURCHISON.

(Filed 18 March, 1936.)

APPEAL by defendant from *Sinclair, J.*, at November Term, 1935, of HARNETT.

Criminal prosecution, tried upon warrant charging the defendant with operating a motor vehicle "on the public highways of North Carolina in a careless and reckless manner, while drunk," etc.

Verdict: Guilty.

Judgment: That defendant pay a fine of $10.00 and costs.

Defendant appeals, assigning errors.

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

Neill McK. Salmon for defendant.

PER CURIAM. While strongly controverted, there was some evidence of reckless driving as defined in the statute, section 3, ch. 148, Public Laws 1927; hence, the demurrer to the evidence, or motion to nonsuit, was properly overruled. *S. v. Cope,* 204 N. C., 28, 167 S. E., 456.

The other exceptions are without substantial merit.

No error.

W. A. WEAVER v. PILOT LIFE INSURANCE COMPANY OF GREENSBORO, N. C.

(Filed 18 March, 1936.)

APPEAL by plaintiff from *Devin, J.,* at October Term, 1935, of WAYNE. Affirmed.

This is an action, brought by plaintiff against defendant, on a policy of insurance, containing a provision for total and permanent disability. The policy defined total and permanent disability as follows: "For the purposes of this policy contract, disability shall be deemed to be total when it is of such nature that the insured is prevented thereby from engaging in any occupation or performing any work for compensation or profit, and such total disability shall be deemed to be permanent when it is present and shall have continued uninterruptedly for a period of at least three months; but the entire and irrecoverable loss of the sight of both eyes, or the severance of both hands at or above the wrist, or both feet at or above the ankle, or of one entire hand and one entire foot will of itself be considered as total and permanent disability, without reference to the duration of the disability."

J. Faison Thomson for plaintiff.

Langston, Allen & Taylor for defendant.

PER CURIAM. At the close of plaintiff's evidence the defendant in the court below made a motion 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 plaintiff alleged in his complaint: "That on or about ..... December, 1932, while the contract or policy of insurance was still in force,

the existing contract between the plaintiff and defendant, and while all premiums then due by the plaintiff to the defendant had been paid, the plaintiff became totally and permanently disabled, having been and still being prevented from performing any work or from conducting any business for compensation or profit." This was denied by defendant.

After reading carefully the evidence on the part of plaintiff, we do not think, taking it in the light most favorable to plaintiff, that it sustained the allegations of his complaint. *Thigpen v. Ins. Co.*, 204 N. C., 551.

The judgment is

Affirmed.

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

STATE v. OTHEL SHOAF AND SLIM BARNHARDT.

(Filed 18 March, 1936.)

APPEAL by defendants from *Phillips, J.*, at August Term, 1935, of DAVIE.

Criminal prosecution, tried upon indictment charging the defendants with assault with deadly weapon, resulting in serious injury. C. S., 4215.

Verdict: Guilty in manner and form as charged in bill of indictment.

Judgment: Eighteen months on the roads.

Defendants appeal, assigning errors.

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

B. C. Brock and Walter H. Woodson for defendants.

PER CURIAM. The record is not altogether free from difficulty. The evidence tending to impeach the prosecuting witness' identity of the defendants as his assailants was competent, but its exclusion will not be held for reversible error, as the impeachment was otherwise before the jury without objection.

The question of jurisdiction, raised by the defendants, was decided against them in *S. v. Everhardt*, 203 N. C., 610, 166 S. E., 738.

No error.

BELLE G. OWENS v. NEW YORK LIFE INSURANCE COMPANY.

(Filed 8 April, 1936.)

APPEAL by defendant from *Clement, J.*, at October Term, 1935, of CABARRUS.

Civil action to recover on policy of life insurance.

Execution and delivery of policy admitted. Recovery resisted on the ground of alleged material false representations by insured at time of application for policy. Defense not sustained.

From judgment for plaintiff on the policy, defendant appeals, assigning errors.

Bridges & Orr for plaintiff.
Cansler & Cansler for defendant.

PER CURIAM. The case presents no new question of law or one not heretofore settled by a number of decisions. No reversible error has been made to appear.

The verdict and judgment will be upheld.

No error.

SPRUILL SPAIN, ADMINISTRATOR OF THE ESTATE OF DRURY S. SETTLE, DECEASED, v. ROBERT EXUM, AND M. S. HAWKINS AND L. H. WINDHOLZ, RECEIVERS OF NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 8 April, 1936.)

APPEAL by plaintiff from judgment sustaining demurrer entered by *Harris, J.*, at September Term, 1935, of PITT. Affirmed.

This was a civil action for wrongful death, heard upon complaint and demurrer. The complaint alleges that plaintiff's intestate was riding in "an automobile owned and entirely controlled by the defendant Robert Exum" when it collided with a train operated by the defendant receivers at a grade crossing in Marsden at an intersection of the railroad tracks and the Greenville-Washington Highway, and that as a result of said collision said intestate was killed. The complaint further alleges that said "intestate came to his death directly and proximately as a result of the joint and concurrent negligence . . . upon the part of the defendants. . . ." The negligence of the defendant Exum alleged is

that when he reached the grade crossing he "was driving said automobile in a highly reckless and unlawful manner, and at an unlawful rate of speed, and drove said automobile to and upon said crossing, and there collided with a train operated by said defendants, receivers, which was then standing upon or moving over said crossing"; and the negligence of the defendant receivers alleged is that they failed to provide proper signal devices or watchman to warn persons approaching the crossing of "trains standing upon or moving over same," and permitted their trains to block the highway, and that their engineer failed to blow the whistle or ring the bell attached to said train.

The defendant receivers filed demurrer to the complaint upon the ground that it failed to state facts sufficient to constitute a cause of action against them, and the court sustained the demurrer and entered judgment accordingly, from which plaintiff appealed.

Gaylord & Hannah and J. H. Harrell for plaintiff, appellant.
J. B. James for defendants, appellees.

PER CURIAM. The opinion of *Brogden, J.,* in *George v. Railroad,* 207 N. C., 457, is apposite to this case. It is as follows:

"The narrative of facts contained in the complaint and the picture painted therein classify this case within all the essential principles heretofore announced and applied in *Ballinger v. Thomas and Southern Railway,* 195 N. C., 517, 142 S. E., 761. Of course, there are slight variations of fact between the *Ballinger case, supra,* and the case at bar, which might form the basis of nice legal distinctions and metaphysical reasoning; nevertheless, in all practical aspects the *Ballinger case, supra,* is decisive."

Affirmed.

GLAIN SCOTT, DECEASED EMPLOYEE, AND J. O. SCOTT AND WIFE, PARENTS, PLAINTIFFS, V. FRANK AUMAN, EMPLOYER, AND LUMBERMEN'S MUTUAL CASUALTY COMPANY, CARRIER, DEFENDANTS.

(Filed 8 April, 1936.)

APPEAL by defendants from *Clement, J.,* at December Term, 1935, of RANDOLPH.

This cause was heard in the court below upon appeal from an award by the North Carolina Industrial Commission to the plaintiffs, who are the parents and next of kin of the deceased employee, Glain Scott.

From a judgment affirming the award, defendants appealed to this Court.

A. I. Ferree for plaintiffs.
Henderson & Henderson for defendants.

PER CURIAM. The only question involved is whether the ruling of the court below that the deceased employee left no one dependent is sustained by the evidence heard by the Industrial Commission.

It was not controverted that plaintiffs were entitled to an award, but the defendants contended there was evidence that plaintiffs were partially dependent on the employee, and that the amount of the award should be reduced for that reason in accordance with the provisions of the statutes. C. S., 8081 (tt), 8081 (vv).

The Industrial Commission found the following facts:

"The deceased was living in the home of his father while working in the employ of the defendant Frank Auman. The deceased, from time to time, made some contribution from his earnings towards the purchase of food and other items in the household of his father and mother. The deceased was living in said house and no board was being charged him for living there. From all the evidence it might be fairly concluded that the contributions made by the deceased to the living expenses of the family were no more than his just proportion of said expenses as compensation for his board in said house. While the deceased was away from home he made no contribution whatever to the family. The father of the deceased owned the farm on which he resided and neither the father nor the mother were dependent in any sense upon the deceased, as both were in good health and living on their own land."

There being evidence to support these findings, they are conclusive on appeal. *Tomlinson v. Norwood,* 208 N. C., 716; *Rowe v. Rowe-Coward Co.,* 208 N. C., 484; *Byrd v. Lumber Co.,* 207 N. C., 253.

Judgment affirmed.

DISPOSITION OF APPEALS FROM THE SUPREME COURT OF NORTH CAROLINA TO THE SUPREME COURT OF THE UNITED STATES

Norfolk & Western Railroad Co. v. Maxwell, Comr. of Revenue, 208 N. C., 397, affirmed.

State v. Carden, 209 N. C., 404, petition for *certiorari* denied.

Attorney-General v. Gorson, 209 N. C., 320, petition for *certiorari* denied.

INDEX.

Abatement and Revival.

B Pending Action.

b Same Subject of Action

1. Where an action is pending between the parties, plaintiff may not maintain another action involving the same subject matter, although in the first suit he demands damages and in the second injunctive relief. *Vinson v. O'Berry*, 289.

2. In this action to recover damages for defendant *cestui's* breach of contract to buy in the property embraced in the deed of trust at the foreclosure sale and to convey a certain part thereof to plaintiff's son, it appeared that the *cestui* bought in the property at the sale and conveyed the entire tract to a stranger, and that in a prior action instituted by a third person involving the part of the tract not agreed to be reconveyed to plaintiff's son, plaintiff had intervened. Defendant filed a plea in abatement on the ground that there was a prior action pending between the same parties involving the same subject matter. *Held:* The plea in bar should have been overruled, since the actions involve separate tracts of land and the two actions are not identical for the purpose of the plea under the recognized tests. *Bowling v. Bank*, 463.

Account Stated.

A Nature and Requisites.

c Acceptance of Account Rendered

Where the debtor accepts an account rendered, either by assenting to its correctness or by failing to object thereto within a reasonable time, he will be regarded as admitting its correctness, and the account becomes an account stated. *Stephenson v. Honeycutt*, 701.

Actions.

A Nature and Essentials of Rights of Action in General.

c Right to Maintain Civil Action Arising Out of Unlawful Act

Plaintiff alleged that defendant bank, in consideration of plaintiff's turning over certain collateral, agreed to pay plaintiff's check in a certain amount, although plaintiff's deposit was insufficient to cover same, that the bank breached the contract by failing to pay same, and that plaintiff suffered damage by reason of the breach by being prosecuted and convicted of issuing a worthless check. Plaintiff took no appeal from the conviction for issuing the worthless check. *Held:* Plaintiff was not entitled to maintain the action, since it was based upon a violation of the criminal law of the State by the plaintiff, the conviction being deemed in accordance with law in the absence of an appeal therefrom. *Wheeler v. Bank*, 258.

B Forms of Actions.

g Declaratory Judgment Act

While the Declaratory Judgment Act does not authorize the bringing of an action not founded upon a legal controversy, and does not authorize the courts to give advisory opinions upon moot or abstract questions, the act specifically authorizes parties whose rights, status, or other legal relations are affected by a statute, ordinance,

Actions B g—*continued.*

contract, etc., to obtain a declaration of rights, status, or other legal relations thereunder, and the act *is held* to afford a means of testing the validity of a statute requiring persons presenting themselves for registration to prove to the satisfaction of the registrar their ability to read or write any section of the Constitution, plaintiffs and all the people of the State being vitally affected by the statute in controversy. N. C. Code, 628 (b) (h). *Allison v. Sharp*, 477.

Adoption.

A Requisites and Procedure for Adoption.

a Parties and Notice

Where a mother has voluntarily relinquished control of her child and agreed in writing that it might thereafter be adopted by some suitable person approved by the superintendent of public welfare of the county, the mother thereby waives her right to notice of any proceeding thereafter instituted for the adoption of the child. *In re Foster*, 489.

d Right to Final Judgment of Adoption

Where a mother has voluntarily relinquished custody of her minor illegitimate child, and agreed that it might thereafter be adopted by some suitable person approved by the superintendent of public welfare of the county, and thereafter proceedings for adoption of the child are instituted by suitable persons, who are given custody of the child by the court pending final judgment, and who assume obligations for the care and support of the child, the mother, upon her later marriage, is not entitled to have the adoption proceedings dismissed upon petition filed in the proceedings by herself and husband, and the original petitioners in the proceedings, who are found by the court to be suitable persons and able to care for the minor, and who relied upon the mother's voluntary relinquishment of the child and incurred obligations upon the strength thereof, are entitled to judgment decreeing final adoption of the child. *In re Foster*, 489.

Adverse Possession.

A Nature and Requisites of Title by Adverse Possession.

f Hostile or Permissive Possession

Possession of one tenant in common is the possession of all, and is not adverse to them, until there has been an ouster and adverse holding, and plaintiff *held* not entitled to attack possession of the tenant in common in possession from whom he acquired title by foreclosure of a mortgage executed by the tenant on the entire tract. *Bailey v. Howell*, 712.

h Color of Title

A mortgage executed on the entire tract by one tenant in common in possession is not color of title as against the cotenants. *Bailey v. Howell*, 712.

Appeal and Error.

A Nature and Grounds of Appellate Jurisdiction of Supreme Court. (Original jurisdiction see State E b; appellate jurisdiction in criminal cases see Criminal Law L.)

Appeal and Error A—*continued.*

d Judgments Appealable (Matters reviewable see hereunder J a.)

1. The denial of a motion to dismiss on the ground that the complaint fails to state a cause of action is not appealable. *Oliver v. Hood, Comr.*, 291.

2. The overruling of a demurrer on the ground that the complaint fails to state a cause of action is appealable. *Ibid.*

3. At the close of the evidence the trial court intimated he would instruct the jury that plainitff would be entitled to recover only nominal damages, whereupon plaintiff submitted to a voluntary nonsuit, and appealed. *Held:* The ruling of the trial court did not go to the heart of the matter or take the case from the jury, and the appeal is dismissed. *Hill v. Clark*, 358.

f Parties Who May Prosecute Appeal

Where it is made to appear that a party has died pending appeal, the petition of the personal representative that he be substituted as a party will be allowed. Rules of Practice in the Supreme Court, No. 37. *Hanna v. Howard*, 161.

B Presentation and Preservation in Lower Court of Grounds of Review.

b Theory of Trial

An appeal will be determined in accordance with the theory of trial in the lower court. *Queen v. DeHart*, 414; *McGraw v. R. R.*, 432; *In re Parker*, 693; *Cox v. Assurance Society*, 778.

d Motions

Where defendant does not renew his motion to nonsuit at the close of all the evidence he waives his right to have the sufficiency of the evidence considered on appeal. C. S., 567. *Stephenson v. Honeycutt*, 701.

E Record.

c Form and Requisites of Transcript

Record need not show what testimony would have been when question is asked adversary witness on cross-examination. *Etheridge v. R. R.*, 326.

g Conclusiveness and Effect of Record

The record imports verity, and an appeal will be determined on, and limited by, the record, and matters discussed in briefs outside the record will not be considered. *Tomlinson v. Cranor*, 688.

h Question Presented for Review on Record

Matters not determined in the Superior Court or continued therein without prejudice are not presented for determination upon appeal, and will not be discussed or considered. *In re Parker*, 693.

F Exceptions and Assignments of Error.

b Necessity for, Form and Sufficiency.

1. In the absence of exceptions to the findings of fact by the court under agreement of the parties, his findings are conclusive. N. C. Constitution, Art. IV, sec. 13. *Odom v. Palmer*, 93.

2. When it appears from the face of the record that errors in the trial were committed which renders the judgment void, the judgment cannot be affirmed on appeal, even though such errors are not

Appeal and Error F b—*continued.*

assigned on appeal as grounds for reversal of the judgment. C. S., 1412. *In re Will of Roediger*, 470.

3. An assignment of error to the remarks of the court to the jury must be supported by an exception appearing of record, and may not be presented by an exceptive assignment of error appearing for the first time in appellant's brief, although an exception to the remarks need not be entered in the record until after verdict. *Winborne v. Lloyd*, 483.

4. Where appellant, in apt time, excepts and assigns error to the charge, a formal objection to the charge is not needed in order for the exception to be considered on appeal. N. C. Code, 590 (2). *Rice v. Hotel Co.*, 519.

5. Assignments of error must be supported by exceptions taken during the trial in order to be considered on appeal. *Greensboro v. Guilford County*, 655.

G Briefs.

c Abandonment of Exceptions by Failing to Discuss.

Exceptions not discussed in briefs are deemed abandoned. Rule 28. *Stephenson v. Honeycutt*, 701; *Sparks v. Holland*, 705.

J Review.

a Matters Reviewable

1. In proceedings to establish the boundary line between the parties, judgment was entered in accordance with defendant's contentions, and the court surveyor ordered to run the line in accordance therewith. Upon the coming in of the surveyor's report, defendant moved to set aside the judgment and resisted confirmation of the surveyor's report on the ground that he had been misinformed by the surveyor at the time of the trial as to where the line would run. *Held:* The motion was addressed to the discretion of the court, and its ruling thereon is not reviewable. *Gaskins v. Lancaster*, 301.

2. Whether the court should allow plaintiff to amend after sustaining a demurrer to the complaint is a matter in its sound discretion, and its ruling thereon is not reviewable. C. S., 515. *Hood, Comr., v. Motor Co.*, 303.

3. A motion to set aside the verdict as being contrary to the weight of the evidence is addressed to the discretion of the trial court, and the court's determination of the motion is not ordinarily reviewable. *Stephenson v. Honeycutt*, 701; *Anderson v. Holland*, 746.

4. The determination of a motion that a party be allowed to intervene in an action, upon a proper showing, is not reviewable, the motion being addressed to the discretion of the court. *Carter v. Smith*, 788.

c Of Findings of Fact (Sufficiency of exceptions to findings see hereunder F; review of findings in injunctive proceedings see hereunder J f.)

1. On a motion to dismiss an action, instituted after nonsuit of a prior action between the parties, on the ground of *res judicata*, the finding by the court, after considering the evidence in both actions,

Appeal and Error J c—*continued.*

that the evidence offered by plaintiff was substantially the same as that offered on the trial of the cause of action nonsuited, ordinarily will not be reviewed on appeal. *Batson v. Laundry Co.*, 223.

2. Findings of fact by the trial court are conclusive on appeal when supported by any competent evidence. *Meares v. Williamson*, 448; *Seawell, Attorney-General, v. Motor Club*, 624.

3. Findings of fact by a referee, approved by the trial court and supported by competent evidence, are ordinarily conclusive on appeal. *Parker v. Hood, Comr.*, 494.

4. An exception to a finding of fact by the court must be sustained when the record does not support such finding. *Young v. Hood, Comr.*, 801.

d Presumptions and Burden of Showing Error

1. The burden is on appellants to show error, and that the alleged error was prejudicial. *Williams v. Stores Co.*, 591.

2. The burden is on appellant to show error, as the presumption is against him. *Kelly v. Tea Co.*, 839.

3. 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. *S. v. Swan*, 836; *Holderfield v. Pou*, 844.

e Harmless and Prejudicial Error

1. The erroneous placing of the burden of proof is prejudicial error, the burden of proof being a substantial right. *Davis v. Dockery*, 272.

2. An exception to the exclusion of testimony cannot be sustained when the record fails to show what the testimony of the witness would have been had he been allowed to testify. *Winborne v. Lloyd*, 483.

3. The general rule that the record must show what the answer or testimony of a witness would have been in order for an exception to the exclusion of the testimony to be considered on appeal, does not apply where the question is asked on cross-examination of an adversary and hostile witness. *Etheridge v. R. R.*, 327; *S. v. Huskins*, 727.

4. Ordinarily, an exception to the admission of certain testimony will not be considered on appeal when it appears that appellant elicited testimony of the same import upon cross-examination of the witness. *Shackelford v. Woodmen of the World*, 633.

5. An exception to the admission of testimony cannot be sustained when the party excepting to its admission introduces testimony during the trial of the same import as that excepted to. *Queen v. DeHart*, 414.

6. Ordinarily, an exception to the admission of incompetent evidence cannot be sustained when it appears that testimony of like import was theretofore and thereafter admitted without objection. *Teseneer v. Mills Co.*, 615.

7. Where it appears from the facts and attendant circumstances appearing of record that the court's remarks to the jury during the trial could not have prejudiced appellant, such remarks cannot be held for reversible error. *Winborne v. Lloyd*, 483.

Appeal and Error J e—*continued.*

8. The admission of a letter in evidence without proper foundation for its admission will not be held reversible error when it appears that appellant was not prejudiced thereby. *Turner v. Chevrolet Co.*, 587.

9. Where it appears that the charge properly placing the burden of proof on one of the issues upon one of defendants could not have been understood by the jury as placing the burden of proof on any other issue upon such defendant, an exception to the charge upon the issue cannot be sustained. *Williams v. Stores Co.*, 591.

f Review of Injunctive Proceedings

Where the findings of fact in injunctive proceedings are sufficient to sustain the judgment and are supported by evidence, the judgment will ordinarily be affirmed, although the Supreme Court has the power to review the evidence, and the evidence on the determinative facts is conflicting. *Banner v. Button Corp.*, 697.

g Questions Necessary to Determination of Cause

1. Where the answer of the jury to one of the issues determines the rights of the parties, assignments of error relating to another issue need not be considered on appeal. *Winborne v. Lloyd*, 483.

2. Where it is determined on plaintiff's appeal that defendant's motion to nonsuit should have been allowed, defendant's appeal from the ruling of the court on her exceptions taken in the county court need not be considered. *Stevens v. Cecil*, 738.

3. Where the answer of the jury to one of the issues makes unnecessary the answering of certain subsequent issues, exceptions to the charge relating to such subsequent issues need not be considered on appeal. *Williams v. Stores Co.*, 591.

4. Where the rights of the parties are determined by the answers to certain issues, regardless of the answer to a subsequent issue, matters relating to such subsequent issue need not be considered on appeal. *Greensboro v. Guilford County*, 655.

5. Where an appeal can be decided on either of two grounds, one involving a constitutional question, and the other a question of lesser moment, the latter alone will be decided. *In re Parker*, 693.

K Determination and Disposition of Cause.

b Remand

When it appears from the face of the record that errors in the trial were committed which renders the judgment void, the judgment cannot be affirmed on appeal, even though such errors are not assigned on appeal as grounds for reversal of the judgment. C. S., 1412. *In re Will of Roediger*, 470.

L. Proceedings After Remand.

a Matters and Questions Open for Further Adjudication

The decision of the Supreme Court on a former appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal. *Dixson v. Realty Co.*, 354; *McGraw v. R. R.*, 432.

Appearance.
B Effect of Appearance.
a Waiver of Process
By demurring to the merits, a defendant puts itself in court. *Sutton v. Ins. Co.*, 826.

Arrest. (Arrest and Bail see Bail.)
B On Criminal Charges.
a Force Permissible in Making Arrest
An officer of the law may use only reasonable and necessary force in making an arrest, and whether the force used in any particular case is reasonable and necessary or excessive and unnecessary is ordinarily a question for the jury. *S. v. Eubanks*, 758.

Assault.
A Civil Actions.
c Defenses
Question of whether defendants used excessive force in protecting their property *held for* jury upon conflicting evidence. *Bailey v. Ferguson*, 264.

Attachment. (Service by publication and attachment see Process B c.)

Attorney and Client.
A Office of Attorney.
a In General
1. The right to practice law is personal and may not be exercised by a corporation either directly or indirectly by employing lawyers to practice for it. *Seawell, Attorney-General, v. Motor Club*, 624.

2. The practice of law is not limited to the conduct of cases in court, but embraces, in its general sense, legal advice and counsel and the preparation of legal documents and contracts by which legal rights are secured, although such matter may or may not be pending in court. *Ibid.*

b Admission to Bar and Regulation of Right to Practice
1. C. S., 199 (a), providing that only those admitted and licensed to practice as attorneys at law may appear as attorney in any action, except appearance by a party *in propria persona*, give legal advice for a fee or any compensation, or prepare legal documents, or hold themselves out as competent to give legal advice or furnish legal services, is constitutional and valid, the right to practice law being subject to legislative regulation within constitutional restrictions and limitations, and the statute not being in contravention of any provision of the State or Federal Constitutions. *Seawell, Attorney-General, v. Motor Club*, 624.

2. The trial court found, upon supporting evidence, that defendant corporations, as a part of their services to their members rendered in consideration of the payment of annual dues, were engaged in giving legal advice, in employing attorneys for members in certain instances to collect damages out of court, in allowing lay members of the incorporated club to write letters on club stationery to persons involved in accidents with members of the club advising, at

Attorney and Client A b—*continued.*

least indirectly, that such persons were liable in damages in law for negligence in causing such accidents, and in drawing up receipts stating that a certain sum was received as settlement of such damages when collections were made as a result of such letters. *Held:* The findings support the conclusion of law that defendants were engaged in the practice of law in violation of C. S., 199 (a), and judgment upon the findings that defendants be perpetually enjoined from performing such acts is affirmed on appeal. *Ibid.*

B The Relation.

b Scope of Attorney's Authority

Ordinarily an attorney has implied authority to control and manage the suit in matters of procedure and to make agreements affecting the remedy during the progress of the trial, but an attorney has no implied authority, after the termination or final disposition of the case in which he is employed, to enter an agreement materially affecting the rights of the client. *Dietz v. Bolch*, 202.

E Disbarment.

a Grounds for Disbarment

The record in this proceeding disclosed that respondent, at the time of application for license to practice law, concealed from the Supreme Court giving the examination the fact that respondent had been disbarred by the courts of another state for unprofessional conduct, and that he falsely represented to the Supreme Court that he had studied law in this State for a period of two years and had thereby qualified himself to take the examination. *Held:* The fraudulent concealment of the fact of prior disbarment and the false and fraudulent misrepresentations of a fact material to the issuance of the license are sufficient grounds for the revocation of the license by the Supreme Court. *Attorney-General v. Gorson*, 320.

b Jurisdiction and Procedure

The Supreme Court has the power to revoke a license, issued by it, entitling the licensee to practice law in this State, on the ground that its issuance was procured by fraudulent concealment or by a false representation of a fact material to its issuance. *Attorney-General v. Gorson*, 320.

c Proceedings and Judgment

The statutory disbarment proceedings in this case were prosecuted on the theory of professional misconduct as an attorney on the part of the respondent, and were based upon a civil action in which judgment was recovered against respondent, in his capacity as executor, and against the surety on his bond, for matters transpiring prior to the enactment of ch. 210, Public Laws of 1933, under which the proceedings were instituted. *Held:* The verdict and findings that respondent was guilty of misappropriation of funds coming into his hands as an attorney are not supported by the record tending to establish such misappropriation in his capacity as executor, and respondent's motion for a directed verdict should have been allowed and his exception to the refusal of the Council of the Bar to grant his motion to nonsuit should have been sustained. *In re Parker*, 693.

Automobiles. (Liability of city for injury caused by unsafe streets see Municipal Corporations E c; right of city to require liability insurance of drivers of vehicles for hire see Municipal Corporations H d.)

C Operation and Law of the Road.

c Speed

Driving an automobile in excess of 45 miles per hour in the country on a public highway is *prima facie* evidence that the speed is unlawful, ch. 311, sec. 2, Public Laws 1935, but an instruction that the law prohibits a speed in excess of 45 miles per hour is erroneous. *S. v. Spencer*, 827.

d Stopping, Starting, or Turning

Evidence that the driver of a car gave timely warning before turning his car from the highway into a side road is sufficient to sustain the jury's finding that he was not negligent in so turning, and in the driver's cross action to recover damages sustained in a collision with a car driven by his codefendant, set up in his answer in an action against both drivers instituted by a guest in his codefendant's car, the codefendant's motion to nonsuit the cross action on the ground of contributory negligence is properly denied. *Pittman v. Downing*, 219.

f Ordinary Care in Driving

1. Driver of a car going forty to forty-five miles an hour failed to slacken speed or give any warning as he approached a group of children standing on the highway, some on one side and some on the other, waiting for a school bus driven in front of the car and going in the same direction, *held* negligent. *Smith v. Miller*, 170.

2. Evidence *held* for jury on issues of negligence and proximate cause in this action to recover for injuries to child struck by truck as she crossed highway to enter automobile. *Letterman v. Miller*, 709.

l Evidence of Negligent Operation

After the collision in question the speedometer on defendant's car registered 70 miles per hour, the speedometer having stuck and ceased to function as a result of the collision. *Held:* Whether the needle on the speedometer fell or rose after the collision is a matter of speculation and conjecture, and its position after the collision is no evidence that defendant was driving 70 miles per hour at the time of the collision. *S. v. Benton*, 27.

m Sufficiency of Evidence and Nonsuit

1. Evidence that the driver of a car going forty to forty-five miles an hour failed to slacken his speed or give any warning as he approached a group of children standing on the highway, some on one side and some on the other, waiting for a school bus driven in front of the car and going in the same direction, that the driver saw, or could have seen in the exercise of reasonable care, this situation, and that he struck and injured one of the children as she ran across the highway to enter the school bus as it stopped, *is held* sufficient to sustain the allegations of negligence and proximate cause as a matter of law, and defendants' motions for judgment as of nonsuit were properly denied. C. S., 2621 (45). *Smith v. Miller*, 170.

Automobiles C m—*continued.*

2. Evidence *held* for jury on issues of negligence and proximate cause in this action to recover for injuries to child struck by truck as she crossed highway to enter automobile. *Letterman v. Miller*, 709.

3. Where plaintiff's evidence leaves in speculation and conjecture the determinative fact of whether defendant's car was being driven on the wrong side of the highway at the time of the collision, defendant's motion to nonsuit is properly granted, the burden being on plaintiff to establish the negligence of defendant. C. S., 2621 (51). *Check v. Brokerage Co.*, 569.

D Guests and Passengers.

d Actions

1. In an action by a guest against the driver of a car to recover damages sustained in a collision caused by the driver's negligence, the driver's motion to nonsuit on the ground of joint enterprise, contributory negligence, C. S., 523, and assumption of risk is properly refused when there is conflict of evidence as to whether the guest had the right or did control the driving of the car, and as to the issue of contributory negligence and assumption of risk, since a defendant is entitled to nonsuit plaintiff on defenses raised in his answer only when all the evidence, considered in the light most favorable to plaintiff, sustains such defenses. *Pittman v. Downing*, 219.

2. The liability of a driver to a gratuitous guest for injuries sustained in an accident occurring in the State of Virginia must be determined in accordance with the laws of the State of Virginia, which deny liability except in case of wanton or culpable negligence. *Wright v. Pettus*, 732.

3. Evidence *held* insufficient to establish wanton or culpable negligence of driver of car. *Ibid.*

E Liability of Owner for Driver's Negligence.

b Agents and Employees

1. Where, in an action against the driver of a car inflicting negligent injury and the owner of the car, the owner admits the fact of agency but denies that his agent at the time was acting within the scope of his employment and in furtherance of the principal's business, testimony of declarations of the agent immediately after the accident that at the time he was going after a newspaper for his employer is competent for the purpose of showing that at the time the agent was acting within the scope of his employment. *Smith v. Miller*, 170.

2. Evidence that a house servant was permitted to use the employer's car in doing errands for the employer, and that the employer often allowed the employee to drive the car to the employee's house for articles of clothing for himself, and that on the occasion in question the employer sent the employee to get a suit of clothing from a cleaning establishment for the employer and take same to the employer's apartment, that the employee, after getting the clothes from the cleaners, stopped at his home on the way to the employer's apartment in order to give instructions about his own clothes, that the house was about one thousand feet from the employer's

Automobiles E b—*continued.*

apartment, and that the injury was inflicted as the employee was driving from his house to the employer's apartment, *is held* sufficient to make out a *prima facie* case that at the time of the injury the employee was acting within the scope of his employment, the deviation from the direct route being minor in its nature. *Jackson v. Scheiber*, 441.

3. The competent evidence on the issue of defendant owner's liability tended to show that animosity existed between defendant's driver and the plaintiff, that the driver had threatened the plaintiff, and that at the time of the injury the driver backed his car past plaintiff, started the car forward, and deliberately struck plaintiff, while he was sitting several feet off the unobstructed road. *Held:* Defendant owner's motion to nonsuit was properly allowed, since the evidence, even though sufficient to show that the driver was about his master's business at the time, showed that the driver stepped aside from the course of his employment and inflicted the injury willfully to carry out his threat, and that he was motivated by spite and hatred personal to himself. *Ibid.*

G Criminal Responsibility of Owner or Driver.

b Culpable Negligence in Driving

1. The evidence on behalf of the State tended to show that defendant, while intoxicated, drove his car at a speed of 55 to 60 miles per hour into a city street intersection and struck the rear of another car which had passed the center of the intersection as it traveled along the intersecting street from defendant's right, that defendant at the time was talking with a passenger in his car and did not see the intersection or the other car, and that the passenger in defendant's car died as a result of injuries sustained in the collision. *Held:* The evidence was sufficient to overrule defendant's motion to nonsuit in a prosecution upon an indictment charging defendant with the unlawful and felonious slaying of the deceased. *S. v. Landin*, 20.

2. Evidence that defendant drove his car into a city street intersection at 35 or 40 miles per hour, but that he blew his horn before entering the intersection, and thereafter slackened his speed, and kept his car on the right side of the street, and that after he had passed the center of the intersection the rear of his car was struck by another car entering the intersection at 55 to 60 miles per hour from defendant's left, *is held* insufficient to be submitted to the jury in a prosecution of defendant on a charge of manslaughter for the death of a passenger in the other car resulting from the collision, since the negligence of defendant in entering the intersection at an excessive rate of speed had spent itself and would have been harmless but for the intervening negligence of the driver of the other car. *Ibid.*

3. In this prosecution for homicide for the death of deceased, killed in an automobile collision, defendant's motion to nonsuit should have been allowed, there being no evidence that the collision was caused by the culpable negligence of defendant. *S. v. Benton*, 27.

4. Speed in excess of 45 miles per hour is *prima facie* negligence, but not negligence *per se*. *S. v. Spencer*, 827.

Automobiles G b—*continued.*

5. In this prosecution for manslaughter, resulting from an automobile accident, defendant *is held* entitled to a new trial for error in the charge applying the test of civil liability rather than of criminal responsibility. *Ibid.*

Bail.

B In Criminal Prosecutions.

e Liabilities on Bonds

1. In this action on an appearance bond it appeared that the bond stipulated that it should create a liability against a certain trust fund held by the trustees under a recorded declaration of trust, and that the bond should create no personal liability on the part of the trustees or any *cestui que trust*, and that the recorded trust agreement contained like stipulations against personal liability. Upon breach of the bond and the execution against the trust fund being returned unsatisfied, the solicitor moved that the trustee signing the bond be made a party, alleging that the trust in fact created a partnership between the trustees, and that the trustee signing the bond was personally liable. *Held:* The State having accepted the bond, and having notice, both actual and constructive, of the provision against personal liability, is bound by the terms of the bond and may not hold the trustee signing the bond personally liable. *S. v. Thomas*, 722.

2. The appearance bond in this case stipulated that it should create liability against a certain trust fund, but that the trustees and *cestuis que trustent* should not be personally liable. The State contended that its provisions were void as being against public policy. *Held:* If the bond is void, as contended by the State, no recovery may be had thereunder, since in such event the bond is a nullity. *Ibid.*

Banks and Banking.

C Functions and Dealings.

e Payment of Checks

Drawer of worthless check may not maintain action against bank for breach of contract to pay same. *Wheeler v. Bank*, 258.

H Insolvency and Receivership.

a Statutory Liability of Stockholders

1. Although no time is fixed by C. S., 218 (c), within which a stockholder of an insolvent bank must give notice of appeal from the assessment levied against him by the Commissioner of Banks, the statute provides that when the assessment is docketed it shall have the force and effect of a judgment, C. S., 641, and therefore notice of appeal from such assessment must be given within ten days after the docketing of the assessment, with the right of the stockholder, in proper instances, to apply for a writ of *certiorari*, and when notice of appeal is not given within the time required and no application for *certiorari* made, the stockholder loses his right to appeal and the assessment is final and conclusive. *In re Bank*, 216.

Banks and Banking H a—*continued.*

2. An action to vacate a stock assessment made under C. S., 218 (c), and to restrain execution thereon is a direct attack upon the summary judgment of assessment. *Oliver v. Hood, Comr.*, 291.

3. In an action to vacate a stock assessment made against plaintiff by the Commissioner of Banks under C. S., 218 (c), and to restrain execution upon the summary judgment of assessment, a complaint failing to allege that plaintiff was not a stockholder of the bank at the time of its closing fails to state a cause of action for the relief sought, and an allegation that there was no certificate of stock standing in plaintiff's name upon the books of the bank at the time is insufficient, since plaintiff may be an equitable owner of stock and liable to assessment notwithstanding such fact. C. S., 219 (a). *Ibid.*

4. The statutory liability imposed upon stockholders of an insolvent bank is created, not for the benefit of the bank, but for the benefit of depositors and other creditors, and constitutes a fund in the nature of a trust fund in the sense that it should be maintained intact and be available upon insolvency for equitable distribution among all creditors. *Hood, Comr., v. Trust Co.*, 367.

5. By provision of C. S., 219 (c), an administrator, executor, guardian, or trustee is not personally liable for the statutory liability on bank stock held in their representative capacities, but such liability attaches to the estate or funds in their hands. *Ibid.*

6. Failure of bank as trustee of estate to sell bank stock belonging to the estate for reinvestment *held* not to relieve estate of statutory liability on the stock upon the bank's later insolvency and liquidation. *Ibid.*

7. The principle that a corporation cannot relieve a stockholder of liability for the balance due on unpaid stock to the prejudice of creditors of the corporation applies to the statutory liability of bank stockholders. *Ibid.*

8. Under the provisions of C. S., 219 (c), the trust estate is liable for the statutory assessment on bank stock owned by it, regardless of the method by which the trust is established, and where shares of bank stock appear on the books of the bank in the name of "executors," the statutory liability thereon of the estate may not be defeated by showing that the stock was held by the executors as executors and trustees under the will for the benefit of minor ulterior beneficiaries, the beneficiaries of the income from the trust estate being of age, and there being nothing on the books of the bank to disclose the trusteeship. *Ibid.*

9. The failure of a bank trustee to sell for reinvestment shares of the bank stock belonging to the trust estate does not relieve the estate of the statutory liability upon the insolvency of the bank. *In re Trust Co.*, 389; *Young v. Hood, Comr.*, 801.

10. The liability of a bank trustee to the trust estate for its negligent failure to sell for reinvestment shares of stock of the bank belonging to the trust estate cannot be set up as a counterclaim or set-off against the statutory liability of the estate upon the insolvency of the bank. *In re Trust Co.*, 389.

Banks and Banking H a—*continued.*

11. Under the provisions of N. C. Code, 225 (o), stockholders of an industrial bank are liable for a statutory stock assessment, upon the insolvency of the bank, when necessary for the payment of debts contracted by the bank subsequent to the effective date of the statute, although as between the stockholders and the bank and the stock is fully paid up and nonassessable, the provisions of the statute for the stock assessment being for the benefit of the depositors and creditors of the bank and not for the benefit of the bank. *Hood, Comr., v. Hewitt,* 810; *Hood, Comr., v. Williams,* 810.

c Management and Control of Assets

The Commissioner of Banks acts in a capacity equivalent to a receiver in taking over the assets of an insolvent bank, C. S., 218 (c), and in such capacity represents the depositors and other creditors in the collection and distribution of the assets of the bank. *Hood, Comr., v. Trust Co.,* 367.

d Collection of Notes, Offsets, and Counterclaims

1. Action on note *held* properly instituted in county of residence of liquidating agent of insolvent payee bank. *Hood, Comr., v. Progressive Stores,* 36.

2. In an action by the statutory receiver on a note executed to the bank, defendant maker set up a counterclaim for the penalty for usury in a sum in excess of the note, and alleged demand for its payment and refusal by the receiver. *Held:* The receiver's demurrer to the counterclaim was properly overruled. *Hood, Comr., v. Motor Co.,* 303.

3. While, in an action against the Commissioner of Banks on a claim against a bank in course of liquidation, it is necessary that plaintiff allege and prove demand on defendant for the payment of the claim, in an action instituted by the Commissioner of Banks on a note executed to the bank by defendants, defendants may set up breach of contract by the bank resulting in unliquidation damages as an offset against the note sued on without showing that notice of the claim was given, prior to the institution of the action, to the bank or the liquidating agent. *Hood, Comr., v. Pittman,* 740.

e Claims and Priorities

1. A depositor deposited with a bank as collecting agent checks drawn on banks in other states. The checks were collected in due course from the drawee banks and final credit given the bank of deposit the day before it restricted withdrawals to 5 per cent of deposits under an emergency statute. *Held:* The relation of debtor and creditor existed between the bank of deposit and the depositor on the day the bank went on a 5 per cent restricted basis, and upon the bank's subsequent liquidation, the depositor is not entitled to a preference in its assets. *Weeks v. Hood, Comr.,* 281.

2. A bank, acting as trustee under a will, received the assets of the estate and commingled moneys belonging to the estate with its general assets and exchanged securities of the estate for other securities. Upon its insolvency, a successor trustee was appointed, to whom was turned over the securities belonging to the estate

Banks and Banking H e—*continued.*

which were held by the bank at the time of its insolvency in the account of the estate, and the successor trustee brought action claiming a preference in the assets of the bank for the moneys commingled and the amount by which the securities of the estate were depreciated by exchange of such securities by the bank. *Held:* As to the funds of the estate commingled with the general deposits of the bank the relation of debtor and creditor existed, and the exchange of securities by the bank brought in no new money to the bank, and plaintiff trustee is not entitled to a preference in the assets of the bank. *Parker v. Hood, Comr.*, 494.

3. The cashier and president of a bank pledged certain securities to secure county funds which the bank had on deposit in its official capacity of county treasurer. Upon the insolvency of the bank, the county and the statutory receiver treated the securities, in the course of liquidation, as having been validly pledged to the county. *Held:* The receiver is estopped by his conduct from denying the validity of the pledge on the ground that the pledge of the securities had never been authorized by the board of directors of the bank nor accepted by the board of county commissioners. *Pasquotank County v. Hood, Comr.*, 552.

4. Penalty provided by C. S., 357, *held* inapplicable to demand against bank receiver for county funds held by the bank in capacity of county treasurer. *Ibid.*

5. An estate may not claim a preference against the assets of an insolvent bank for alleged mismanagement of the estate by the bank while acting as trustee, resulting in loss to the estate. *Young v. Hood, Comr.*, 801.

6. Where plaintiff is not entitled to a preference in his suit against the receiver of an insolvent bank on a debt due by the bank, judgment should be entered for plaintiff for the amount of the debt as a general claim, and judgment that plaintiff recover nothing is error. *Parker v. Hood, Comr.*, 494.

Bastards. (Right to inherit from see Descent B c.)

B Custody and Support.

c Criminal Liability for Failure to Support

A parent may be prosecuted under N. C. Code, 276 (a), for willful failure to support his illegitimate child begotten and born before the effective date of the statute, the offense being the willful failure to support an illegitimate child, and it being sufficient if such willful failure occur after the effective date of the statute. *S. v. Parker*, 32.

Bill of Discovery.

A Nature and Extent of Remedy.

a In General

The old equitable bill of discovery has been abolished by statute and examination of the adverse party substituted therefor, and the statute is remedial and should be liberally construed. N. C. Code, 899, *et seq. McGraw v. R. R.*, 432.

Bill of Discovery—*continued.*

D Introduction of Examination Upon Trial.

a Right to Introduce Examination

By the terms of the statute, N. C. Code, 902, evidence elicited from a witness upon examination prior to trial under the provisions of N. C. Code, 900, may be read at the trial. *McGraw v. R. R.*, 432.

b Attack and Impeachment of Examination by Adverse Party

Where the examination of witnesses prior to trial is had under the provisions of N. C. Code, 900, *et seq.*, and the testimony elicited from the witnesses read at the trial, the party against whom such evidence is introduced is not entitled as a matter of right to cross-examine such witnesses, although they are present at the trial, the right to object to the competency of the evidence and cross-examine the witnesses being available to the party only at the time the examination of the witnesses is had. *McGraw v. R. R.*, 432.

Bills and Notes.

G Payment and Discharge.

f Extension of Time for Payment (As affecting bar of statute see Limitation of Actions C a.)

An extension of time for payment of a note will not discharge an endorser when the note provides on its face that extension of time for payment is waived by all parties to the note, the endorser being a "party" to the note, C. S., 3092. *Vannoy v. Stafford*, 748.

H Actions. (Action against bank for breach of contract to pay worthless check see Banks and Banking C e.)

a Pleadings and Parties

1. In an action on a note executed to a bank, the liquidating agent of the payee bank and the Reconstruction Finance Corporation, to which the note had been pledged as collateral security, may jointly sue the makers of the note. *Hood, Comr., v. Progressive Stores*, 36.

2. A payee of a note who pledges same to a third party as collateral security for a debt owed by the payee to such third party does not part with legal title to the note, and has a substantial interest in the note sufficient to enable her, as the real party in interest, to maintain suit thereon against the makers, and judgment on the note is properly entered against the makers offering no defense against recovery when the payee obtains possession of the note during trial and before judgment so that the note may be canceled for the protection of the makers when the judgment is rendered. *White v. Winslow*, 207.

b Evidence and Burden of Proof

Defendant admitted executing the note sued on, which was introduced in evidence by plaintiff, but defendant alleged certain matters in defense. The evidence was conflicting upon the defense relied on by defendant. *Held:* Defendant's motion to nonsuit was properly denied, the burden being upon defendant to prove the defense, and plaintiff's evidence being sufficient to take the case to the jury. *Rutherford College v. Payne*, 792.

c Sufficiency of Evidence and Nonsuit

The note in suit stipulated that the consideration therefor was to provide, with other contributors, an endowment fund for the denomi-

Bills and Notes H c—*continued.*

national educational institution named as payee. In an action on the note, defendant maker admitted its execution, but alleged and offered evidence to the effect that the institution named as payee was insolvent and was in process of liquidation, and that its assets had been assigned to another educational institution controlled by the same religious organization, and that the purpose of establishing an endowment fund for the institution named as payee could not be accomplished. *Held:* Although there was sufficient consideration for the note at the time of its execution, the matters alleged, if existing at the time of institution of action, constituted a defense, and the conflicting evidence upon the defense should have been submitted to the jury. *Rutherford College v. Payne*, 792.

Boundaries.

B Proceedings to Establish.

b Defenses

Equitable matters may be set up by defendant in proceeding to establish boundary. *Smith v. Johnson*, 729.

Burglary.

C Prosecution and Punishment.

c Competency of Evidence

Where it is established by evidence that a store building was broken into and the vault therein blown open with nitro-glycerine, it is competent for the State to show, in connection with evidence tending to establish defendant's presence at the scene of the crime when it was committed, that defendant had in his possession dynamite caps and nitro-glycerine when he was arrested some ten months after the commission of the crime, since such possession tended to show that, if defendant were present, he committed or participated in the commission of the crime, the probative value of the evidence being for the jury. *S. v. Huffman*, 10.

d Sufficiency of Evidence

Evidence tending to show that a store building had been broken into by breaking the lock and prizing the rear door open, that defendant's fresh finger prints were found the following morning about the vault, which had been blown open with nitro-glycerine, and about other places in the building, and that at the time of his arrest some ten months after the commission of the crime, defendant had in his possession dynamite caps and nitro-glycerine, *is held* sufficient to be submitted to the jury on the issue of defendant's guilt of feloniously breaking and entering, the evidence being sufficient to warrant the inference that defendant was present and committed or participated in the commission of the crime, and the weight and credibility of the evidence being for the jury. *S. v. Huffman*, 10.

g Verdict and Sentence

A sentence of not less than twenty-five nor more than thirty years in the State's Prison, upon a plea of guilty of possession of weapons and implements for house breaking, in violation of C. S., 4236, is within the discretion of the court conferred by the statute, and is not objectionable as a cruel and unusual punishment within the meaning of Art. I, sec. 14, of the Constitution of North Carolina. *S. v. Cain*, 275.

Cancellation and Rescission of Instruments.

A Right of Action and Defenses.

a In General

The grantor may not rescind a deed executed in consideration of the marriage of the grantee to him, since the grantor cannot restore the consideration received for the deed. *Whitley v. Whitley*, 25.

b For Fraud

Plaintiff brought suit to recover rents for a filling station subleased to defendant oil company. The oil company set up in its answer a supplemental agreement between the parties, which provided that defendant should not be liable for any further rents until a certain amount of gasoline had been sold at the station, and it was admitted that the stipulated amount of gasoline had not been sold. Plaintiff alleged that his signature to the supplemental agreement was procured by the false and fraudulent representation by defendant that the agreement was not intended as a waiver of plaintiff's right to collect rents from defendant as they accrued, that the representation was made with knowledge and intent that plaintiff should rely thereon, that plaintiff did rely thereon to his damage. *Held:* Plaintiff sufficiently alleged fraud in the procurement of the supplemental agreement, entitling him to the relief of rescission if he can establish the allegations by evidence. *Breece v. Oil Co.*, 527.

e For Breach of Condition

1. A promise by the grantee to take care of the grantor so long as they both should live is a condition subsequent, and the breach of the condition does not affect the validity of the deed. *Whitley v. Whitley*, 25.

2. A contract may be rescinded for breach of condition precedent constituting an integral part of the consideration of an entire and indivisible contract. *Jenkins v. Myers*, 312.

3. A contract may not be rescinded for breach of a condition precedent unless the breach is material or substantial. *Ibid.*

4. Evidence *held* to show substantial performance of condition precedent, and plaintiff was not entitled to rescission. *Ibid.*

5. Where it appears that defendant failed to procure a contract of indemnity insurance as agreed upon by the parties in their contract for the exchange of cars, the breach goes to the substance of the contract and entitles plaintiff to rescind and be placed in *statu quo ante* upon the substantial damage of the car in an accident. *Turner v. Chevrolet Co.*, 587.

Cloud on Title see Quieting Title.

Conflict of Laws see State A.

Consolidated Statutes and Michie's Code Construed. (For convenience in annotating. Rules for construction of statutes see Statutes.)

SEC.

74. Funds in heirs' hands from sale of land claimed by them by descent may be attached to pay debts of estate. *Odom v. Palmer*, 93.

93. Estate of life tenant is liable for taxes assessed prior to his death as preferred claim, but assessments for public improvements and

Consolidated Statutes—*continued.*

SEC.

charges for water and gas connections do not constitute preferred claim. *Rigsbee v. Brogden*, 510.

130, 131. Executrix may not bind estate on note for debt incurred wholly after testator's death. *Hood, Comr., v. Stewart*, 424.

131, 132, 166. Ordinarily, judgment against representative is not lien on lands of estate. *Tucker v. Almond*, 333.

135. Action to recover for personal services rendered testator's wife, involving construction of the will and an accounting, *held* properly brought in Superior Court. *Meares v. Williamson*, 448.

199(a). Statute *held* constitutional, and facts found *held* to warrant order restraining defendant corporation from further practice. *Seawell, Attorney-General, v. Motor Club*, 624.

218(c). Stockholder must give notice of appeal from stock assessment within ten days from docketing of assessment. *In re Bank*, 216. Commissioner of Banks acts as receiver in taking over assets of insolvent bank, and as such represents depositors and creditors. *Hood, Comr., v. Trust Co.*, 367. Action to vacate stock assessment and to restrain execution thereon *held* direct attack on summary judgment of assessment. *Oliver v. Hood, Comr.*, 291. Complaint alleging that no stock certificate was standing in plaintiff's name on books of bank at time of its closing fails to state cause of action to vacate assessment, since plaintiff may be equitable owner of stock, C. S., 219(a). *Ibid.*

219(c). An administrator, executor, guardian, or trustee is not personally liable for statutory stock assessment, but liability attaches to the estate or funds in their hands. *Hood, Comr., v. Trust Co.*, 367. Under provisions of this section trust estate *held* liable for stock assessment although bank, acting as trustee, failed to sell the bank stock for reinvestment. *Hood, Comr., v. Trust Co.*, 367; *In re Trust Co.*, 389; *Young v. Hood, Comr.*, 801.

225(o). Stockholders of industrial bank are liable for assessment to pay debts contracted by bank after effective date of statute. *Hood, Comr., v. Hewitt*, 810.

276(a). Parent may be prosecuted under this section although child was begotten before effective date of the statute, it being sufficient if the offense of willful failure to support transpire after its effective date. *S. v. Parker*, 32.

354, 439. Action against register's bond for failure to properly register instrument accrues at time of such failure and not time of discovery. *Bank v. McKinney*, 668.

357. Penalty provided for in this section *held* inapplicable to demand upon bank receiver for county funds held by the bank in capacity of county treasurer. *Pasquotank County v. Hood, Comr.*, 552.

361. Equitable matters may be set up by defendant in proceeding to establish boundary. *Smith v. Johnson*, 729.

416. In order for partial payment to prevent bar, circumstances must show debtor's recognition of debt as then existing. *Bryant v. Kellum*, 112.

Consolidated Statutes—*continued.*

SEC.

437. Ten-year statute applies to principals in indemnity bond under seal but not to sureties therein. *Trust Co. v. Williams*, 806.

440. Statute providing that this section should apply to electric power lines in certain counties *held* constitutional. (Sec. 1, ch. 433, Public Laws of 1923.) *Blevins v. Utilities*, 683.

441(1), 436, 437(3). Right to foreclose deed of trust given as additional security by person not liable on principal note *held* governed by ten-year and not three-year statute. *Carter v. Bost*, 830.

441(3). Action for trespass based on damage to land from ponded water *held* not barred by three-year statute. *Teseneer v. Mills Co.*, 615.

441(10). Does not apply where owner remains in possession after tax foreclosure sale. *Bailey v. Howell*, 712.

442. Action to recover penalty for usury is barred after two years from payment of usurious charge. *Woody v. Ins. Co.*, 364.

446. 469, 218(c) (7). Action on note *held* properly instituted in county of residence of liquidating agent of insolvent bank. *Hood, Comr., v. Progressive Stores*, 36.

450. Corporation may not be appointed next friend of infant. *In re Will of Roediger*, 470.

464. Upon dismissal of action as to defendant town, action was properly remanded to county in which defendant administrator qualified and in which plaintiff resides. *Banks v. Joyner*, 261.

515. Whether Superior Court should allow plaintiff to amend after sustaining demurrer is in court's sound discretion. *Hood, Comr., v. Motor Co.*, 303. Where judgment overruling defendant's demurrer is reversed on appeal, plaintiff may ask to be allowed to amend if so advised. *Oliver v. Hood, Comr.*, 291.

523. Where driver's negligence is established, his motion to nonsuit on defense of contributory negligence is properly refused when the evidence is conflicting on the issue. *Pittman v. Downing*, 220. Ordinarily, contributory negligence cannot be taken advantage of by demurrer. *Ramsey v. Furniture Co.*, 165.

525. Matter alleged in reply *held* within limitations upon scope of reply imposed by statute. *Bryan v. Mfg. Co.*, 720.

535. Demurrer admits facts properly alleged, and cannot be sustained unless complaint is wholly insufficient to state cause of action. *Ramsey v. Furniture Co.*, 165; *Bowling v. Bank*, 463.

537. Remedy where complaint is indefinite but sufficient to state cause of action is by motion to have the allegations made definite and certain, which motion must be made before demurrer. *Bowling v. Bank*, 463; *Sparks v. Holland*, 705.

542. In absence of plea of privilege, justification, or mitigating circumstances, evidence *held* sufficient to overrule corporate defendant's motion to nonsuit in action for slander. *Alley v. Long*, 245. Evidence *held* sufficient for jury in this action for libel, defendant not having pleaded privilege, justification, or mitigating circumstances. *Harrell v. Goerch*, 741.

Consolidated Statutes—*continued.*

SEC.

547. Substitution of statutory receiver for insolvent plaintiff *held* not to constitute new action. *Trust Co. v. Williams*, 806.

564. Defendant's objection to the charge on the ground that it unduly stressed contentions of the State is not sustained, it appearing that charge was without error when construed as whole. *S. v. Hester*, 99. Instruction in this case *held* erroneous as containing expression of opinion by the court. *S. v. Rhinehart*, 150.

567. On motion to nonsuit evidence must be considered in light most favorable to plaintiff. *Williams v. Stores Co.*, 591; *Teseneer v. Mills Co.*, 615, and only evidence favorable to plaintiff will be considered. *Ford v. R. R.*, 108. Where defendant does not renew motion to nonsuit at close of all evidence, benefit of first motion is waived. *Stephenson v. Honeycutt*, 701.

584. New trial will be awarded where issues submitted by court are insufficient to present all material matters raised by pleadings. *Stanback v. Haywood*, 798.

590(2). Formal objection to charge is not necessary in order for exception thereto to be considered on appeal. *Rice v. Hotel Co.*, 519.

591. Discretionary order setting aside verdict as being contrary to weight of evidence is not reviewable. *Anderson v. Holland*, 746.

600. Has no application to action to set aside judgment as being irregular. *Hood, Comr., v. Stewart*, 424.

618. Does not apply to liability of insurance carriers of tort-feasors. *Gaffney v. Casualty Co.*, 515.

624, 625. Failure of clerk to endorse judgment on verified statements does not render his judgments by confession thereon void. *Cline v. Cline*, 531.

628(b), (h). Validity of statute prescribing that persons presenting themselves to vote should prove to register ability to read and write sections of Constitution *held* properly presented by proceedings under Declaratory Judgment Act. *Allison v. Sharp*, 477.

798. Facts found *held* to support judgment denying motion to vacate service by attachment and publication. *Banner v. Button Corp.*, 697.

899, *et seq.* Examination of adverse party before trial may be read at the trial, and adverse party may not cross-examine witnesses at the trial in respect to the prior examination. *McGraw v. R. R.*, 432.

987. Agreement *held* original promise not within statute. *Brown v. Benton*, 285.

1003. 4101. Where deed of trust is executed in substitution for purchase money lien without discharging original debt, dower does not attach. *Case v. Fitzsimons*, 783.

1297, 1317. Bonds for county jail *held* for necessary, special purpose given special legislative approval, and taxes therefor are not subject to limitation on tax rate. *Castevens v. Stanly County*, 75.

Consolidated Statutes—*continued.*

SEC.

1321(a), 1334(8) (a), (d). Bonds for county jail *held* for necessary, special purpose given special legislative approval, and taxes therefor are not subject to limitation on tax rate. *Castevens v. Stanly County*, 75.

1412. Where error vitiating judgment appears on face of record, judgment may not be affirmed. *In re Will of Roediger*, 470.

1436. Superior Court has original jurisdiction of all civil actions whereof exclusive original jurisdiction is not given some other court. *Bryan v. Street*, 284.

1608(cc). Appeal from county court must be taken to next term of Superior Court commencing after adjournment of county court. *Grogg v. Graybeal*, 575.

1723. Petitioners in condemnation proceedings may abandon proceedings after report but before confirmation. *Light Co. v. Mfg. Co.*, 560.

1743. Possession is not necessary to action to quiet title. *Vick v. Winslow*, 540.

1744. Proceeding for sale of contingent remainder *held* properly constituted, all persons having interest in property, vested or contingent, being parties. *Lancaster v. Lancaster*, 673.

1795. Attorney formerly holding note for collection is not "interested party" within meaning of the statute. *Vannoy v. Stafford*, 748.

1799. Instruction in respect to defendant's right not to testify *held* without error. *S. v. Horne*, 725.

2306. Plaintiffs seeking to enjoin consummation of foreclosure for usury must pay principal of debt, with interest. *Smith v. Bryant*, 213. Plaintiff must show that holder of note received usurious charge. *Ibid.*

2309. Insurer *held* liable for interest on amount of policy from receipt of proof of death of insured until payment. *Bank v. Ins. Co.*, 17.

2352. In absence of agreement by lessor to repair, gradual disrepair of premises will not justify abandonment by lessee. *Mortgage Co. v. Massie*, 146.

2365. Summary ejectment before justice of the peace is not exclusive, but action may be brought in Superior Court. *Bryan v. Street*, 284.

2430. Plaintiff may recover actual damages sustained, although defendant publishes retraction of false, defamatory statement, but may not recover punitive damages in such case. *Lay v. Publishing Co.*, 134.

2583. Statutory procedure for appointment of substitute trustee, not having been followed, appointment of substitute trustee by purchaser of notes *held* void under terms of the instrument. *Ins. Co. v. Lassiter*, 156.

2621(45). Evidence *held* for jury on issues of negligence and proximate cause in this action for injuries to child struck by car as she crossed highway to enter school bus. *Smith v. Miller*, 170.

2621(51). Burden is on plaintiff to establish that defendant was driving on wrong side of highway. *Cheek v. Brokerage Co.*, 569.

Consolidated Statutes—*continued.*

SEC.

2710(4), 2718, 2720. Assessments for public improvements and charges for water and gas connections do not constitute preferred claim against estate of life tenant. *Rigsbee v. Brogden*, 510.

2787(36), as amended by ch. 279, Public Laws of 1935. Ordinance requiring liability insurance or bonds for vehicles operated for hire *held* valid. *Watkins v. Iscley*, 256.

3092. Endorser is "party" to note. *Vannoy v. Stafford*, 748.

3309. Parol contract to convey *held* invalid as to creditors of vendor. *Hood, Comr., v. Macclesfield Co.*, 280.

3315. Deed of gift not registered in two years after execution is void. *Reeves v. Miller*, 362; *Allen v. Allen*, 744.

3379. Ch. 493, Public Laws of 1935, does not repeal general prohibition statute in counties not named in the act, *S. v. Jones*, 49, nor affect provisions of general act making possession for purpose of sale illegal even in the counties named. *S. v. Langley*, 178.

3379(2). Evidence *held* sufficient to support directed verdict of guilty in this prosecution for possession of liquor for sale. *S. v. Langley*, 178.

3411(j). Person may possess intoxicating liquor for personal consumption only in structure used exclusively as dwelling. *S. v. Hardy*, 83.

3545, 3553. Failure of register of deeds to properly index instruments is breach of bond, for which person injured may sue. *Bank v. McKinney*, 668.

3846(bb). Plaintiffs *held* remitted to remedy under this section, and could not maintain action to restrain taking of property. *Reed v. Highway Com.*, 648.

4133. Interlineations and annotation made on will by testator *held* not to effect revocation, the intent to revoke not being apparent. *In re Will of Roediger*, 470.

4145, 4158. Probate in common form is conclusive until set aside in caveat proceedings, and devisees are not liable for rents for period from probate to final judgment setting the will aside. *Whitehurst v. Hinton*, 392.

4159. Issue raised by caveat must be tried by jury, and parties may not submit agreed facts. *In re Will of Roediger*, 470.

4162. A devise will be construed to be in fee unless it is plainly indicated that testator intended to convey an estate of less dignity. *Morris v. Waggoner*, 183.

4236. Sentence of twenty-five to thirty years for violation of this section *held* within court's discretionary power. *S. v. Cain*, 275.

4268. Fraudulent intent is essential element of embezzlement. *S. v. McLean*, 38.

4447. As amended by ch. 290, Public Laws of 1925, constitutes offense of willful abandonment and failure to support minor child a continuing offense. *S. v. Hinson*, 187.

Consolidated Statutes—*continued.*

SEC.

4606. Defendant must aptly tender plea in abatement to present contention that crime was committed in another county. *S. v. Ray*, 772.

4622. Court may consolidate for trial three indictments each charging defendant with embezzlement from his employer on separate dates. *S. v. McLean*, 38.

4647. Evidence of conviction in municipal court *held* incompetent under statute upon trial in Superior Court. *S. v. Moore*, 44.

4649. State may appeal in criminal prosecutions from judgment for defendant upon a special verdict, upon a demurrer, upon a motion to quash, and upon arrest of judgment. *S. v. Parker*, 32.

4650. Appeal to Supreme Court in criminal prosecution will lie only from final judgment. *S. v. Blades*, 56.

4654. Attention called to duty of clerk relative to notifying the Attorney-General of appeals in criminal cases. *S. v. McLeod*, 54.

5596(a). County may incur liability for premiums for fire insurance on school buildings in mutual company without submitting question to vote. *Fuller v. Lockhart*, 61.

5939. *Held* constitutional. *Allison v. Sharp*, 477.

5960, 6055. Absentee Ballot Law is applicable to municipal elections. *Phillips v. Slaughter*, 543.

6287. Laws in force at time of execution of insurance policy become part of insurance contract. *Fuller v. Lockhart*, 61.

6304. Payment of initial premium on life policy to insurer's soliciting agent *held* payment to insurer, but payment of subsequent premiums to local agent without obtaining insurer's official receipt *held* not payment to insurer. *Mills v. Ins. Co.*, 296.

6348, 6351. Policyholders in mutual fire insurance company are not stockholders and are in no way liable for debts of the company beyond the contingent liability fixed in the policy. *Fuller v. Lockhart*, 61. Statutes do not prohibit county from insuring school property with mutual company. *Ibid.*

6393(a). Collection agents of mutual benefit association *held* agent of association and not agent of members. *Shackelford v. Woodmen of the World*, 633.

6418, 6435. In construing policy as to amount of property covered, it will not be presumed that insurer charged larger premium than allowed by law. *Williams v. Ins. Co.*, 765.

6437. Insurer paying mortgagee under provisions of mortgage clause *held* not entitled to subrogation against mortgagor. *Buckner v. Ins. Co.*, 640.

6508. Beneficiary has no vested interest in policy, nor does payment of dues or premiums create lien on policy. *Sorrell v. Woodmen of the World*, 226.

7251(W). Statute regulating use of milk bottles *held* void as unnecessary interference with rights of citizens. *S. v. Brockwell*, 209.

Consolidated Statutes—*continued.*

SEC.

7880(2), (177). Property acquired by municipality by tax foreclosure and rented by it *held* not exempt from taxation. *Benson v. Johnston County*, 751.

7982. Estate of life tenant is liable for taxes assessed prior to his death as preferred claim. *Rigsbee v. Brogden*, 510.

8028. Tax-sale certificate in hands of remainderman does not constitute preferred claim against estate of life tenant. *Rigsbee v. Brogden*, 510.

8037. Bidder at foreclosure sale of tax certificate acquires no rights in land prior to confirmation. *Richmond County v. Simmons*, 250.

8081(h), (gg). Industrial Commission has exclusive jurisdiction of claim against insurer for failure to provide medical attention. *Hedgepeth v. Casualty Co.*, 45.

8081(i). Evidence that employee contracted pneumonia from change of temperature in going from hot room into open air in performance of duties *held* insufficient to show that death was result of "accident." *Slade v. Hosiery Mills*, 823.

8081(r). Construing the amendment by ch. 449, Public Laws of 1933, *it is held* that injured employee may maintain action in own name against third person tort-feasor when employer fails to institute such action within six months. *Ikerd v. R. R.*, 270.

Constitution, Sections of, Construed. (For convenience in annotating.)

ART.

I, sec. 11. Court's permitting private counsel to assist solicitor does not impinge this section. *S. v. Carden*, 404.

I, secs. 12, 13, 17. Defendant is not twice put in jeopardy by second arraignment after continuance. *S. v. Watson*, 229.

I, sec. 13. Act permitting trial by court upon conditional plea of guilty *held* unconstitutional, since jury trial may not be abrogated. *S. v. Camby*, 50; *S. v. Crump*, 52; *S. v. Hill*, 53.

I, sec. 14. Sentence of twenty-five to thirty years for violation of C. S., 4236, *held* not cruel nor unusual punishment. *S. v. Cain*, 275.

II, sec. 1. Court has power and duty to declare whether act is constitutional when its validity is properly challenged. *S. v. Brockwell*, 209.

II, sec. 29. Act providing for establishment of recorders' courts in particular county *held* unconstitutional. *S. v. Williams*, 57.

IV, sec. 2. Court has power and duty to declare whether act is constitutional when its validity is properly challenged. *S. v. Brockwell*, 209.

IV, sec. 13. In absence of exceptions to findings of fact by the court under agreement of the parties, his findings are conclusive. *Odom v. Palmer*, 93.

V, sec. 4. County's insuring school property in mutual company does not lend credit of State to private corporation. *Fuller v. Lockhart*, 61.

Constitution—*continued.*

ART.

V, sec. 5. Property acquired by municipality by tax foreclosure and rented by it *held* not exempt from taxation. *Benson v. Johnston County*, 751.

V, sec. 6. Bonds for county jail *held* for necessary, special purpose given special legislative approval, and taxes therefor are not subject to limitation on tax rate. *Castevens v. Stanly County*, 75.

VI, secs. 3, 4. *Held* to authorize Legislature to enact C. S., 5939, requiring persons presenting themselves to vote to prove to register ability to read and write sections of Constitution. *Allison v. Sharp*, 477.

VII, sec. 2. County may assume liability for township bonds issued for necessary roads. *Thomson v. Harnett County*, 662.

VII, sec. 7. County may incur liability for premiums in mutual fire company for insurance of school building without submitting question to a vote. *Fuller v. Lockhart*, 61.

VII, sec. 7. County may not assume liability for special charter school district bonds without vote when such bonds were not necessary to maintenance of constitutional school term. *Greensboro v. Guilford County*, 655. County may assume liability for township bonds issued for necessary highways. *Thomson v. Harnett County*, 662.

VII, sec. 7. Bonds for county jail *held* not to require vote. *Castevens v. Stanly County*, 75.

VII, sec. 9. Assumption by county of bonds issued by certain townships therein for necessary highways *held* not to tax one community for benefit of another, since county bonds would be paid by proportionate taxes in the respective townships. *Thomson v. Harnett County*, 662.

VIII, sec. 1. Statute imposing liability upon stockholders of industrial bank *held* within legislative power. *Hood, Comr., v. Hewitt*, 810.

X, sec. 2. Homestead right is not forfeited by fraudulent conveyance. *Casualty Co. v. Dunn*, 736.

Constitutional Law. (Constitutional requirements and restrictions in enactment of statutes see Statutes A; in taxation see Taxation A.)

A Construction of Constitution.

a In General

Our Constitution is not static, but must be liberally construed to meet changing conditions. *Thomson v. Harnett County*, 662.

B Governmental Branches and Powers.

c Judicial

1. The courts of this State have the power and duty, when the constitutionality of a statute is challenged in a proper proceeding, to declare whether or not the statute is valid. N. C. Const., Art. II, sec. 1; Art. IV, sec. 2. *S. v. Brockwell*, 209.

2. A statute will not be declared unconstitutional by the courts unless it appears beyond a reasonable doubt that its enactment was in violation of constitutional limitations, and all reasonable doubt will be resolved in favor of its validity. *Ibid.*

Constitutional Law B c—*continued.*

3. The courts must declare the law as written, the wisdom of the enactments being a question for the Legislature. *Reed v. Highway Com.*, 648.

C Police Powers. (Of municipal corporations see Municipal Corporations H.)

a Scope of Police Power of State in General

The exercise by the General Assembly of the police power vested in it as the legislative department of the State government is left largely to its discretion, and the power of the courts cannot be invoked to control this discretion, unless its exercise results in an unnecessary interference with the rights of the citizen. *S. v. Brockwell*, 209.

c Sanitation and Health

Ch. 284, Public Laws of 1933, N. C. Code, 7251 (W), regulating the use of milk bottles and other dairy products containers, *is held* unconstitutional and void as an unwarranted exercise of the police power, since its provisions prohibiting the use of milk bottles by the owner, or person in lawful possession thereof, for purposes other than the distribution of milk bears no relation to the public health, or ordinarily with the susceptibilities of the public, unless such container, after its use for other purposes, is used or intended to be used for the distribution of milk. *S. v. Brockwell*, 209.

E Obligations of Contract. (Impairment of vested rights see hereunder I c.)

b Changes Effecting Impairment of Obligations

N. C. Code, 225 (o), imposing a statutory liability upon holders of stock in industrial banks is constitutional and valid even in regard to stock sold by industrial banks prior to the enactment of the statute which, as between the bank and stockholders is fully paid up and nonassessable, since such liability is imposed by the statute only for debts contracted by industrial banks after the effective date of the statute, and since the contract between the stockholders and the banks, providing that the stock is fully paid up and nonassessable, is not affected, the liability imposed by the statute not being for the benefit of the banks, but for the benefit of their depositors and creditors upon insolvency, and the statute being within the constitutional power of the General Assembly to alter the law under which the industrial banks were organized, N. C. Const., Art. VIII, sec. 1. *Hood, Comr., v. Hewitt*, 810; *Hood, Comr., v. Williams*, 816.

F Constitutional Guarantees to Persons Accused of Crime. (Cruel and unusual punishments see Criminal Law K d.)

a Right of Accused Not to Be Compelled to Testify Against Self

The court's remarks to the jury in instructing them that defendant was within his rights in not testifying, and that his failure to testify should not be considered against him, *are held* without error upon defendant's exception. C. S., 1799. *S. v. Horne*, 725.

d Trial by Jury

1. The constitutional right to trial by jury in the Superior Court, Art. I, sec. 13, may not be waived by the accused after a plea of not guilty, nor may the General Assembly permit this to be done by statute,

Constitutional Law F d—*continued.*

and ch. 23, Public Laws of 1933, as amended by ch. 469, is unconstitutional in that it provides, in effect, for trial by the court as upon a plea of "Not guilty," when a defendant enters a "conditional plea" under the act, and a judgment entered upon a trial under the act will be stricken out upon appeal and the cause remanded for trial according to law. *S. v. Camby*, 50; *S. v. Crump*, 52.

2. A defendant in a criminal prosecution for a felony or a misdemeanor may not waive his constitutional right to trial by jury in the Superior Court after entering a plea of "Not guilty," without changing his plea, nor may the General Assembly permit him to do so by statute, ch. 23, Public Laws of 1933, and where the court, after a plea of "Not guilty," finds the defendant guilty without a jury trial, the judgment will be stricken out and the cause remanded. Art. I, sec. 13. Special verdicts distinguished in that the jury finds all essential facts under such procedure. *S. v. Hill*, 53.

e Former Jeopardy

Where each defendant has been separately arraigned and has pleaded to the bill of indictment, following which the cases are continued to the next term of court, defendants are not twice put in jeopardy by a second arraignment when the cases are called for trial the following term. N. C. Const., Art. I, secs. 12, 13, 17. *S. v. Watson*, 229.

G Privileges and Immunities and Class Legislation.

a In General

An ordinance requiring operators of taxicabs or other motor vehicles for hire to secure liability insurance or enter into bond with personal or corporate surety is a valid exercise of the police power and expressly authorized by statute, C. S., 2787 (36), as amended by ch. 279, Public Laws of 1935, and does not violate the Fourteenth Amendment of the Federal Constitution, the operation of vehicles for gain being a special and extraordinary use of the city's streets, which it has the power to condition by ordinance uniform upon all coming within the classification. *Watkins v. Iseley*, 256.

K Full Faith and Credit to Foreign Judgments. (Actions on foreign judgments see Judgments N.)

a Nature and Extent of Mandate

Under mandate of the Federal Constitution, Art. IV, sec. 1, and the acts of Congress enacted thereunder, the validity and effect of a judgment of another state must be determined by reference to its laws, and the judgment must be given such faith and credit as it would have in the courts of the state rendering it. *Dansby v. Ins. Co.*, 127.

I Due Process of Law: Law of the Land. (In taxation see Taxation.)

c Altering Vested Rights and Remedies

1. Section 2 of ch. 433, Public-Local Laws of 1923, providing that no action for compensation or damages for rights of way used by domestic electric companies for transmission lines should be maintained against such companies unless brought within six months after the passage of the act when such transmission lines were in

Constitutional Law I c—*continued.*

use for two years prior to the enactment of the statute, *is held* unconstitutional and void for failure to give a reasonable time, under the circumstances, for the institution of an action before the bar of the statute takes effect, in contravention of the Fourteenth Amendment of the Federal Constitution, the limitation in effect prior to the statute being twenty years. *Blevins v. Utilities*, 683.

2. The Legislature may prescribe a limitation for the bringing of suits where none previously existed, or shorten the time for bringing suits on existing causes of action, provided a reasonable time is allowed by the new law for the bringing of suits before the bar takes effect, and what is a reasonable time must be determined by the facts and circumstances of each particular case. *Ibid.*

3. Section 1 of ch. 433, Public-Local Laws of 1923, providing that C. S., 440, applicable to railroad companies, should also apply to all electric companies operating in certain counties of this State so that actions against them for damages for use of land for transmission lines should be barred unless commenced within five years after the accrual of the cause of action, *is held* constitutional and valid as giving a reasonable time for the institution of actions before the bar of the statute becomes effective. *Ibid.*

4. A statute enacted subsequent to intestate's death may not change the law of descent so as to divest property rights which had vested in accordance with the law in effect at the time of the death of the intestate. *Carter v. Smith*, 788.

Contracts. (Contracts to convey see Vendor and Purchaser; lease contracts see Landlord and Tenant; contracts of sale see Sales; contracts to purchase property at foreclosure sale and reconvey to trustor see Mortgages H r; *quasi* contracts see Money Received; contracts required to be in writing see Frauds, Statute of.)

A Requisites and Validity.

d Consideration

Plaintiff's automobile agency contract provided that it might be terminated at any time at the will of either party. Plaintiff declared on a contract under the terms of which he agreed to resign his agency, and continue to service cars made by defendant until defendant could obtain another dealer, etc., in consideration of defendant's agreement to repurchase equipment on hand. Plaintiff testified that he resigned his agency and performed all other acts to be done by him under the agreement. *Held:* Defendant's motion to nonsuit, on the ground that as the agency contract was terminable at will, there was no consideration sufficient to support the contract declared on, should have been denied, since plaintiff's evidence discloses some detriment suffered by plaintiff or benefit accruing to defendant. *Grubb v. Motor Co.*, 88.

B Construction and Operation.

a General Rules of Construction

1. In determining the meaning of an indefinite or ambiguous contract, the construction placed upon it by the parties themselves is to be considered by the court. *Fayetteville Light Infantry v. Dry Cleaners*, 14.

Contracts B a—*continued.*

2. A contract must be construed as written. *Ins. Co. v. Lassiter*, 156.

c Conditions and Covenants (Rescission of contract for breach of condition see Cancellation and Rescission of Instruments.)

Whether conditions of a contract are conditions concurrent, precedent, or subsequent, divisible or entire, must be determined from the intent of the parties as expressed in the instrument. *Jenkins v. Myers*, 312.

C Modification.

b Evidence and Proof of Agreements for Modification

In this action on a contract, a defendant contended that plaintiff agreed to release him from the obligation of the contract upon the defendant's transfer to plaintiff of certain shares of stock in a bank, and that defendant transferred to plaintiff the stock in accordance with the agreement, and that the other parties to the contract agreed to the release of the defendant. Defendant's evidence tending to establish the defense was contradicted by evidence introduced by plaintiff. *Held:* The conflicting evidence was properly submitted to the jury, and its verdict in plaintiff's favor is sustained. *Queen v. DeHart*, 414.

E Performance or Breach.

a In General

Contract obligating defendant to execute note to plaintiff *held* breached upon defendant's successfully resisting recovery on the note on the grounds that his signature was conditional. *Queen v. DeHart*, 414.

F Actions for Breach.

a Parties Who May Sue

Trustor *held* entitled to maintain action for breach of *cestui's* agreement to bid in and convey property to trustor's son. *Bowling v. Bank*, 463.

c Pleadings, Evidence, and Burden of Proof

1. In an action for breach of contract, a demurrer cannot be sustained if the allegations of the complaint are sufficient to entitle plaintiff to at least nominal damages. *Bowen v. Bank*, 140.

2. Contract for purchase of property at sale by *cestui* and conveyance to trustor's son *held* not demurrable for indefiniteness. *Bowling v. Bank*, 463.

3. Judgment on the pleadings on unambiguous contract is error when pleadings allege that the contract was procured by fraud. *Breece v. Oil Co.*, 527.

e Damages Recoverable

When plaintiff proves breach of contract he is entitled to nominal damages at least, but may recover substantial compensatory damages only upon proof of such damages by the greater weight of the evidence, and that such damages were naturally and proximately caused by the breach of contract. *Bowen v. Bank*, 140.

Contribution see Torts B b; among coinsurers see Insurance O d.

Controversy Without Action.

A Right to Submit.

a Subject Matter and Real Controversy

The probate of a will in solemn form is a proceeding *in rem*, and the issue raised by the caveat must be tried by a jury, C. S., 4159, and the propounder and caveator may *not* waive trial by jury and submit the issue to the court under an agreed statement of facts. *In re Will of Roediger*, 470.

B Jurisdiction and Proceedings.

d Conclusiveness of Facts Agreed

Where the parties submit an agreed statement of facts, the court should render judgment thereon, and it is error for the court to submit the issue involved to the jury, the agreed statement of facts being conclusive unless set aside for mutual mistake or fraud. *Hood, Comr., v. Johnson*, 112.

Corporations. (Banking corporations see Banks and Banking.)

E Stockholders.

c Right to Maintain Suit in Corporation's Behalf

Plaintiff alleged that defendant, in consideration of certain collateral turned over to defendant by plaintiff, agreed with plaintiff not to foreclose for a period of one year against assets belonging to a corporation of which plaintiff was a stockholder and president, that defendant breached the contract by instituting foreclosure proceedings against the corporation within the one-year period, and purchased the property at the sale at a grossly inadequate price. *Held:* The damages alleged to have resulted from the wrongful seizure and purchase of the assets of the corporation at a grossly inadequate price were incurred primarily by the corporation, and in the absence of allegation of demand on the corporation or its receiver, in case of receivership, to bring the action, plaintiff may not maintain the action, the case not coming within the exceptions to the rule that stockholders of a corporation may not maintain an action to recover losses sustained by it unless the representatives of the corporation have failed to act. *Wheeler v. Bank*, 258.

G Corporate Powers and Liabilities. (Corporation may not practice law see Attorney and Client A; corporation may not be appointed next friend see Infants G b.)

i Torts of Corporations

Evidence that the general manager of a corporation, in charge of losses, accused the shipping clerk in charge of checking out merchandise from the corporation's warehouse with allowing drivers to take out merchandise and splitting the purchase price with them, and threatened to ask for the clerk's removal, *is held*, in the absence of a plea of privilege, justification, or mitigating circumstances, C. S., 542, sufficient to be submitted to the jury on the question of whether the general manager was acting within the scope of his authority in uttering the slanderous words in an action therefor against the corporation. *Alley v. Long*, 245.

Counties.
A Governmental Powers and Functions. (Schools see Schools and School Districts.)
a In General
A county is but an agency of the State, and is subject to almost unlimited legislative control in the exercise of ordinary governmental functions. *Thomson v. Harnett County*, 662.

E Fiscal Management, Debts, and Securities. (Taxation see Taxation.)
a Authorization and Validity of Debts and Charges
A county board of education has the authority to insure school property in a mutual fire insurance company authorized to do business in this State, and assume the contingent liability limited to the amount of the cash premium, and the execution of such policy does not lend the credit of the State to a private corporation, Art. V, sec. 4, nor create a debt for other than a necessary expense, Art. VII, sec. 7, nor constitute the county the owner of stock in a private corporation, nor a partner in a private business. *Fuller v. Lockhart*, 61.

b County Expenses and Assumption of Debt Therefor
1. Where a special charter school district and a city operating schools within a special charter school district coterminous with its corporate limits, issue bonds, respectively, for school sites, buildings, and maintenance of schools in order to provide better schools within the districts than those provided by the General Assembly for the county generally, in accordance with intent of the General Assembly in creating such special charter districts, but at the time such bonds are issued they are not reasonably essential and necessary for the operation of schools in the districts for the minimum constitutional term of six months, Art. IX, sec. 2, the city and special charter school district are not entitled to *mandamus* to force the county to assume such bonds upon the taking over by the county of the buildings as a part of the general system of public schools. Liability for the bonds may not be imposed upon the county without the approval of a majority of the qualified voters of the county, Art. VII, sec. 7. *Greensboro v. Guilford County*, 655.

2. Under the provisions of ch. 342, Public-Local Laws of 1935, defendant county proposed to issue county bonds to refinance bonds issued by the townships of the county. The proceeds of the township bonds were used in the construction of highways constituting a part of the general highway system of the county, which highways were later taken over by the county, ch. 293, Public-Local Laws of 1925, and thereafter taken over for maintenance and improvement by the State. *Held:* The proposed county bond issue is for a county purpose within the meaning of Art. V, sec. 6, of the Constitution of North Carolina. *Thomson v. Harnett County*, 662.

Courts. (Supreme Court see Appeal and Error, Criminal Law L; courts as branch of Government see Constitutional Law B c; original jurisdiction of Supreme Court see State E b.)
A Superior Courts.
b Concurrent Original Jurisdiction
The Superior Court has original jurisdiction of all civil actions whereof exclusive original jurisdiction is not given to some other court. C. S., 1436. *Bryan v. Street*, 284.

Courts A—*continued.*

c Appeals from Inferior Courts

1. The statute creating the municipal court in which defendant was convicted provided that the right of appeal should be the same as provided in case of appeals from justices of the peace, and that trial in the Superior Court should be *de novo*, and the statute regulating appeals from justices of the peace provides that trial in the Superior Court shall be anew and without prejudice from the former proceedings. Upon defendant's appeal the trial court admitted evidence of his conviction in the municipal court. *Held:* The evidence of his conviction was not without prejudice to defendant from the former proceedings, C. S., 4647, and defendant is entitled to a new trial. *S. v. Moore*, 44.

2. An appeal from judgment of a general county court must be taken to the term of the Superior Court commencing next after the adjournment of the term of the county court at which the judgment was entered, and where the record is not docketed in the Superior Court within the time prescribed, the appeal is properly dismissed, it being provided by statute that appeals from the general county court shall be governed by the rules governing appeals from the Superior Courts to the Supreme Court, 3 C. S., 1608 (cc), and dismissal in such circumstances being mandatory under Rule of Practice in the Supreme Court No. 5. *Grogg v. Graybeal*, 575.

f Hearings or Motions After Orders or Judgment of Another Superior Court Judge.

The findings of fact and order of the clerk refusing a motion to remove the cause to another county, on the ground of the residence of the parties, were approved and affirmed on appeal by the judge of the Superior Court at term. Upon trial of the cause at a subsequent term, movant excepted to the refusal of the trial court to remove the cause. *Held:* Movant's rights were determined by the confirmation of the clerk's order, and his exception to the trial court's refusal to order the cause removed cannot be sustained, since no appeal will lie from a determinative order of one judge of the Superior Court to another. *Rutherford College v. Payne*, 792.

B County and Municipal and Recorders' Courts.

a Establishment

Act providing for establishment of recorders' courts in particular county *held* unconstitutional. *S. v. Williams*, 57.

b Jurisdiction

The Superior Courts are given exclusive original equity jurisdiction, except such equity jurisdiction as is directly given courts inferior to the Superior Courts by statute, and a recorder's court not given equity jurisdiction, ch. 390, Public-Local Laws of 1931, is without power to decree the cancellation and rescission of an insurance policy for fraud upon such defense raised by insurer in an action instituted by insured to recover disability benefits in a sum within the jurisdiction of the recorder's court, since such decree affords affirmative equitable relief and goes beyond the power of the court to consider equitable matters raised merely as a defense to an action within its jurisdiction. *Mauney v. Ins. Co.*, 499.

Covenants. (See Deeds C h.)

Criminal Law. (Indictment see Indictment; constitutional guarantees to persons accused of crime see Constitutional Law F; bail see Bail; particular crimes see Particular Titles of Crimes.)

D Jurisdiction and Venue.

a Place of Commission of Crime

Evidence that the prosecuting witness and defendant were married in another state and there separated, that later defendant returned to the home of his parents in this State and that the prosecuting witness thereafter returned to live with her parents residing in the same city in this State, bringing with her her infant daughter born after the marriage, and that defendant refused to support said minor child although repeated demands were made on him after the parties had returned to this State, *is held* to show that the offense of willful abandonment and failure to support said minor child was committed by the defendant in this State, since the amendment of C. S., 4447, by ch. 290, Public Laws of 1925, provides that the abandonment by the father of a minor child shall constitute a continuing offense, and defendant's prayer for a directed verdict of "Not guilty," based upon his contention that the offense, if any, committed by defendant was committed in another State, was properly refused. *S. v. Hinson*, 187.

F Former Jeopardy.

a Necessity for and Time of Making Plea

Defendants failing to plead former jeopardy and to offer supporting evidence thereon, waive their rights to have the question of former jeopardy adjudicated. *S. v. Stamey*, 581.

b Time From Which Jeopardy Attaches

Defendant is not twice put in jeopardy by second arraignment after continuance. *S. v. Watson*, 229.

G Evidence. (In prosecutions for particular crimes see Particular Titles of Crimes.)

b Facts in Issue and Relevant to Issues

1. In a prosecution for unlawful possession of intoxicating liquor evidence that officers of the law had found liquor on defendants' premises on two previous occasions within a year of the occasion made the basis of the prosecution is competent on the question of knowledge and motive. *S. v. Hardy*, 83.

2. While ordinarily evidence of guilt of crimes other than that charged in the bill of indictment is not competent, the rule is subject to the exception that when guilty knowledge is an essential element of the crime charged, evidence of guilt of other crimes is competent when such evidence tends to establish guilty knowledge or *scienter*, and in this prosecution for receiving stolen goods knowing them to have been stolen, evidence tending to show that defendant had in his possession stolen goods bearing no consignee marks, or which had had the consignee marks removed, on three separate occasions other than the occasion charged in the indictment, the collateral occasions having occurred, respectively, two weeks prior to the date charged in the indictment, and three and ten days thereafter, *is held*

Criminal Law G b—*continued.*

competent as tending to show defendant's knowledge at the time of receiving the goods as charged in the indictment that same had been stolen. *S. v. Ray*, 772.

c Character Evidence as Substantive Proof of Innocence (Impeaching and corroborating witness see hereunder G r.)

Defendant in a criminal prosecution may put his character in issue as substantive evidence of innocence, and this he may do without testifying in his own behalf, and even by cross-examination of a State's witness. *S. v. Huskins*, 727.

i Expert and Opinion Evidence

1. Where a witness testifies that he has had special training and experience in taking and classifying finger prints, his testimony that the fresh finger prints found at the scene of the crime were identical with those of defendant is competent as tending to show that defendant was present when the crime was committed, and that he at least participated in its commission. *S. v. Huffman*, 10.

2. It is competent for a finger print expert, in the presence of the jury, to demonstrate his method of taking finger prints and explain how he identifies them. *Ibid.*

3. Nonexpert may testify from observation as to sanity or insanity of defendant. *S. v. Horne*, 725.

j Testimony of Defendant, Codefendants, Accomplices, and Convicts

1. The instruction of the court in regard to the testimony of defendant in his own behalf *held* not in the usually approved form. *S. v. Rhinehart*, 150.

2. The court should instruct the jury to examine the testimony of a defendant in his own behalf in order to ascertain whether it is influenced by his interest in their verdict, but that if they should find that his testimony as a witness has not been influenced by his interest, they should disregard the fact of his interest and give the testimony the same weight as that of a disinterested witness, and the charge of the court in this case to the effect that it was the jury's duty to scrutinize the testimony of defendant, which meant they should take into consideration defendant's interest in the verdict, but that the duty to scrutinize did not mean they should not believe his testimony, but that they should give it such credibility as they saw fit, *is held* in substantial accordance with the rule and not to constitute reversible error. *S. v. Davis*, 242.

l Confessions

Testimony of statements made by defendant to witnesses immediately after defendant had killed deceased, which statements disclosed that defendant killed deceased after premeditation and with deliberation, is competent when the evidence shows that the statements were voluntarily made in conversations with the witnesses, and that the witnesses did not make any promises or threats. *S. v. Hester*, 99.

m Evidence at Former Trial

1. Evidence of conviction in municipal court *held* incompetent under statute upon trial in Superior Court. *S. v. Moore*, 44.

Criminal Law G m—*continued.*

2. Defendant pleaded guilty in the municipal court, but on appeal to the Superior Court pleaded not guilty. *Held:* Proof of the plea of guilty on the prior trial is competent in the Superior Court, and the introduction of the original warrants, fully identified as the records of the municipal court, for the purpose of corroborating the evidence of the plea in the municipal court, is without error, and is not objectionable as proof of proceedings in a court of record by evidence outside the record. *S. v. Libby*, 363.

r Impeaching and Corroborating Testimony

1. It is reversible error to admit testimony of specific acts of misconduct of a material witness for defendant for the purpose of impeaching the testimony of such witness, the State being confined to the general reputation of the witness in impeaching his credibility. *S. v. Shinn*, 22.

2. Testimony that the witness had known the person in question seven or eight years and had been in her company off and on during that period, is sufficient foundation for the witness' testimony that the character of such person was good, although the witness states that she had never heard her character discussed. *S. v. Carden*, 404.

3. Defendant's exception to the exclusion of evidence contradicting the statement of a State's witness, made on defendant's cross-examination of the witness as to collateral matters incriminating the witness, is not sustained, the answers elicited by defendant on cross-examination being conclusive, since they do not tend to connect the witness directly with the cause or the parties, or tend to show motive, malice, temper, disposition, conduct, or interest of the witness toward the cause or parties, and the exclusion of the evidence by the court in its discretion is not held prejudicial or reversible error. *Ibid.*

4. The cross-examination of a witness is not limited to matters elicited on his examination-in-chief, but may extend to and include any matter relevant to the inquiry. *S. v. Huskins*, 727.

t Best and Secondary Evidence

The contents of a specified box car was a material fact involved in this prosecution for receiving stolen goods knowing them to have been stolen. The State introduced witnesses who testified from their own knowledge as to the contents of the car. Defendant objected to the testimony on the ground that the records of the railroad company were the best evidence as to the contents of the car. *Held:* The best and secondary evidence rule applies in proving the contents of a written instrument but is inapplicable in proving the contents of the box car, and defendant's objection is untenable. *S. v. Ray*, 772.

H Time of Trial.

c Continuance

Defendant moved for a continuance, and later moved to set aside the verdict for that he was not given sufficient time to procure certain witnesses. The trial court denied the motions in his discretion upon his finding that no statement in writing had been made or

Criminal Law H c—*continued.*

filed as to the evidence proposed to be elicited from or given by the witnesses. *Held:* The findings of the trial court supported his orders denying the motions. *S. v. Buffkin*, 117.

I Trial. (In prosecutions for particular crimes see Particular Titles of Crimes; right to trial by jury see Constitutional Law F d.)

c Course and Conduct of Trial

1. The denial of a motion by defendant that counsel allowed by the court to assist the solicitor should be required to state by whom they were retained, will not be held for error. *S. v. Carden*, 404.

2. The trial court has discretionary power to allow private counsel to assist the solicitor in the trial of the case, it being the duty of the court to permit only such assistance as fairness and justice may require, and such power does not impinge the provisions of Art. I, sec. 11, of the Constitution of North Carolina. *Ibid.*

f Consolidation of Indictments for Trial

It is not error for the court to consolidate for trial three indictments each charging defendant with embezzlement from his employer on separate specified dates. C. S., 4622. *S. v. McLean*, 38.

g Instructions

1. Exceptions to the statement of the contentions of the parties will not be sustained when the objections are not brought to the attention of the trial court in apt time. *S. v. McLean*, 38; *S. v. Buffkin*, 117; *S. v. Harris*, 579.

2. Defendant's objection to the charge on the ground that it unduly stressed the contentions of the State is not sustained, it appearing that the charge gave the contentions of the State and of the defendant fairly, and fully charged the law applicable to the evidence. C. S., 564. *S. v. Hester*, 99.

3. Exceptions to the charge based upon its arrangement and to the force of the language used in stating the contentions, without exception to its correctness in stating the law, cannot be sustained. *S. v. Buffkin*, 117.

4. If defendant desires fuller or more specific instruction on any point, he should aptly make request therefor. *S. v. Cagle*, 114.

5. Under C. S., 564, it is the duty of the trial court to state in his charge in plain and correct manner the evidence given in the case, and declare and explain the law arising thereon, and the court may not express an opinion as to the facts, the weight of the evidence, or the credibility of the witnesses, directly or indirectly, by manner, undue emphasis, arrangement and form of presentation of the evidence, or by the general tenor and tone of the trial. *S. v. Rhinehart*, 150.

6. Instruction in this case *held* erroneous as containing expression of opinion by the court. *Ibid.*

7. The charge of the court in this case, when construed contextually as a whole, *is held* to sufficiently instruct the jury that they were required to find defendant guilty of each of the essential elements of the crime beyond a reasonable doubt before they could convict

Criminal Law I g—*continued.*

him, and defendant's objection to the charge on the ground that the court failed to instruct the jury that the burden of proof was on the State, and failed to define the term, is untenable. *S. v. Ray*, 772.

h Argument and Conduct of Counsel

Defendant's counsel objected to the solicitor reading to the jury excerpts from a decision of the Supreme Court. The trial court thereupon cautioned the jury that counsel could not read the facts of another case except for the purpose of explaining the law set forth in such case, and that the facts of the case read should not be considered by the jury. *Held:* Defendant's objection cannot be sustained. *S. v. Buffkin*, 117.

j Nonsuit and Directed Verdict

1. On motion to nonsuit, the court is required merely to ascertain whether there is any competent evidence to sustain the allegations of the indictment. *S. v. Landin*, 20; *S. v. McLean*, 38.

2. Where, under defendant's testimony, he is not guilty of the offense charged in the bill of indictment, it is error for the court to peremptorily instruct the jury to convict the defendant if they believe the evidence beyond a reasonable doubt, although there may be plenary evidence of guilt on the part of the State, since the conflicting or equivocal evidence raises a question for the determination of the jury. *S. v. Lawson*, 59.

3. Where all the evidence at the trial of a criminal action, if believed by the jury, shows facts sufficient under the provisions of a valid statute in force at the time of the alleged crime and at the time of the trial to establish the guilt of defendant, and there is no evidence to the contrary, the court may direct a verdict of guilty if the jury believe the evidence, since the credibility of the evidence alone should be submitted to the jury in such case. *S. v. Langley*, 178.

4. Upon motion to nonsuit, the evidence is to be taken in the light most favorable to the State, and it is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom. *S. v. Eubanks*, 758.

5. Upon motion to nonsuit, only the evidence favorable to the State will be considered. *Ibid.*

6. The competency, admissibility, and sufficiency of evidence is for the court to determine, the weight, effect, and credibility is for the jury. *Ibid.*

K Judgment and Sentence.

b Suspended Judgments and Executions

It is error for the court to suspend judgment upon stipulated terms over the objection of defendant. *S. v. Webb*, 302.

d Cruel and Unusual Punishment

A sentence of not less than twenty-five nor more than thirty years in the State's Prison, upon a plea of guilty of possession of weapons and implements for house breaking, in violation of C. S., 4236, is within the discretion of the court conferred by the statute, and is

Criminal Law K d—*continued.*

not objectionable as a cruel and unusual punishment within the meaning of Art. I, sec. 14, of the Constitution of North Carolina. *S. v. Cain*, 275.

c In Capital Cases

The statute, ch. 294, Public Laws of 1935, substituting execution of a death sentence by lethal gas instead of electrocution, *is held* to apply, by the terms of the statute, only to crimes committed after the effective date of the statute, 1 July, 1935, and the statute will not support a sentence of death by lethal gas imposed for a capital crime committed prior to the effective date of the statute although defendant was tried and convicted after the effective date thereof. *S. v. Hester*, 99; *S. v. Dingle*, 293.

L Appeal in Criminal Cases.

a Nature and Grounds of Appellate Jurisdiction of Supreme Court (Of Superior Courts see Courts A c.)

The right to appeal to the Supreme Court is wholly statutory, and a defendant in a criminal prosecution may appeal only from a conviction in the Superior Court, or from some judgment of that court that is final in its nature, C. S., 4650, and an appeal from the denial of defendant's plea in abatement will be dismissed as being an appeal from an interlocutory judgment. *S. v. Blades*, 56.

b Making Out and Service of Case on Appeal

Where 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 appeal will be dismissed upon motion of the Attorney-General, but where defendant has been convicted of a capital felony this will be done only when no error appears upon the face of the record. Attention is again directed to the duty of the clerk relative to notifying the Attorney-General of appeals in criminal cases, as required by C. S., 4654. *S. v. McLeod*, 54; *S. v. Long*, 300; *S. v. Pressley*, 300.

c Appeal and Certiorari

1. The State may appeal in criminal prosecutions from judgment for defendant upon a special verdict, upon a demurrer, upon a motion to quash, and upon arrest of judgment. C. S., 4649. *S. v. Parker*, 32.

2. One of defendants appealed from conviction, and the judgment of the lower court was reversed, the Supreme Court holding that the defendant was entitled to a hearing upon his plea of former jeopardy. Thereupon, a writ of *certiorari* in the nature of a writ of error was allowed as to the other defendants. Upon return of the writ it appeared that such other defendants failed to preserve their rights to have the question of former jeopardy adjudicated by failing to enter plea. *Held:* The petition for *certiorari* must be dismissed, it appearing that the writ was improvidently granted. *S. v. Stamey*, 581.

e Filing and Docketing Appeal, Record and Briefs

1. An appeal must be brought to the first term of the Supreme Court beginning after the rendition of the judgment and same docketed

Criminal Law L e—*continued.*

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. McLeod*, 54.

2. The failure of defendants to file a brief in the Supreme Court works an abandonment of the assignments of error, except, in cases where defendants have been convicted of a capital crime, those appearing on the face of the record, which are cognizable *ex mero motu*. *S. v. Dingle*, 293.

3. Exceptions not brought forward and discussed in appellant's brief will be deemed abandoned. Rule of Practice in the Supreme Court, No. 28. *S. v. Wells*, 358.

4. Where the charge of the trial court is not in the record it will be presumed on appeal that the charge correctly stated the law applicable to the evidence. *S. v. Carden*, 404; *S. v. Eubanks*, 758.

f Review

1. Where a new trial is awarded defendant for error in the exclusion of evidence, other exceptions, relating to other rulings upon the evidence and the charge of the court need not be considered. *S. v. Mitchell*, 1.

2. Where a new trial is awarded defendant for error in the admission of certain evidence, other assignments of error need not be considered. *S. v. Shinn*, 22.

3. Where it is determined on appeal that defendant's motion to nonsuit should have been allowed, other assignments of error, relied on for a new trial, need not be considered. *S. v. Benton*, 27.

4. Where a new trial must be awarded for error in the instructions to the jury, exceptions to the admission of evidence need not be considered. *S. v. Edmundson*, 716.

5. The verdict of the jury upon conflicting evidence is final when no reversible error is committed upon the trial. *S. v. Godwin*, 60.

6. Where the culpable negligence of defendant is abundantly established by the evidence, error in a question asked one of the witnesses on this aspect of the case will not be held for reversible error. *S. v. Harris*, 579.

7. A slight misstatement of the evidence in stating the State's contentions on a certain aspect of the case *is held* not to constitute reversible error, defendant not having been prejudiced thereby in view of the fact that there was plenary evidence on this aspect of the case correctly stated in the charge. *Ibid.*

8. The rule that an exception to the exclusion of testimony will not be considered where the record does not show what the answer of the witness would have been had he been permitted to testify, does not apply when the question is asked an adversary witness on cross-examination. *S. v. Huskins*, 727.

9. 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. *S. v. Swan*, 836.

Criminal Law L f—*continued.*

g Disposition of Appeal

1. Where a defendant in a capital case has been sentenced to death by lethal gas instead of by electrocution, as required by statute, the case will be remanded to the Superior Court in order that proper judgment may be imposed. *S. v. Hester*, 99; *S. v. Dingle*, 293.

2. Where judgment has been suspended over the defendant's objection, the cause will be remanded on appeal in order that final judgment may be entered in order that defendant may appeal to test its validity. *S. v. Webb*, 302.

Curtesy.

B Transfer of Property by Tenant by Curtesy Consummate.

a Title and Rights of Wife's Heirs

Where a tenant by the curtesy consummate in lands sells such lands by deed of bargain and sale with covenants of seizin, and invests the proceeds of sale in other lands, and thereafter dies, the sole heir at law of his wife, who died seized of the lands, may not recover from the estate of the tenant by the curtesy the funds received by the tenant from the sale of the lands nor claim a lien against the lands purchased with the proceeds of sale, the proceeds of sale belonging to the tenant subject only to the right of action of the purchaser for breach of covenants, and the heir is relegated to an action for the land against the purchaser from the tenant, his title not being rebutted by the tenant's general warranties and covenants of seizin. *Hussey v. Kidd*, 232.

Damages.

A Nature and Grounds for Recovery of Damages in General. (For breach of contract see Contracts F e; for breach of covenant of seizin see Deeds C h; for ponding water see Waters and Water Courses; in actions for libel and slander see Libel and Slander D e.)

a Compensatory Damages

Compensatory damages are allowed to recompense a party for an injury, and should as nearly as possible place the injured party in the position he would have occupied had he not suffered the injury complained of. *Bowen v. Bank*, 140.

F Pleading, Evidence, and Assessment.

a Pleading and Evidence as Necessary Foundation for Recovery

1. Where plaintiff shows that she had been attended by three physicians and had spent some time in the hospital as the result of her injuries, and that her condition was such as would require medical attention in the future, a charge to the jury that plaintiff might recover, as an element of damage, the actual expenses for nursing and medical attention paid by plaintiff, or for which she had become indebted, and such further expenses as the jury should find from the evidence plaintiff would be put to in the future, is without error, although plaintiff failed to introduce evidence that she had actually paid for any medical services, since it must be presumed from the evidence introduced that plaintiff had incurred liability therefor. *Williams v. Stores Co.*, 591.

Damages F a—*continued.*

2. The complaint alleged that as the proximate result of defendant's negligence in driving his automobile, plaintiff suffered damages in a large sum. *Held:* The allegation was sufficiently broad to permit plaintiff to introduce in evidence, as an element of damage, the amount of the hospital bills paid by plaintiff, defendant's remedy, if the complaint failed to sufficiently disclose the nature of plaintiff's injuries, being by motion to make the complaint more definite and certain, C. S., 537, or by motion for a bill of particulars, C. S., 534. *Sparks v. Holland*, 705.

Death.

A Proof of Death.

a Presumption of Death from Seven Years Absence

The absence of a person for seven years without being heard from by those who would be reasonably expected to hear from him if living, raises a presumption that such person is dead at the end of seven years, but not that he died at any particular time during this period. *Bridgers v. Ins. Co.*, 282.

Deeds. (Cancellation and rescission see Cancellation and Rescission of Instruments; contracts to convey see Vendor and Purchaser; proceedings to establish boundaries see Boundaries.)

A Requisites and Validity.

b Consideration

A deed executed in consideration of the marriage of the grantee to grantor is supported by a valuable consideration, and is not a voluntary deed. *Whitley v. Whitley*, 25.

f Registration of Deeds of Gift

1. Where a deed appearing on its face to be a deed of gift is not registered in two years from its execution as required by C. S., 3315, it is void, and may be set aside in an action by creditors of the grantor regardless of whether it was executed in defraud of creditors. *Reeves v. Miller*, 362.

2. Deeds of gift executed and delivered by the grantors in escrow and therefore not registered by the grantees within two years thereafter, are void under the terms of the statute, C. S., 3315. *Allen v. Allen*, 744.

C Construction and Operation.

f Agreements and Conditions

A promise by the grantee to take care of the grantor so long as they both should live is a condition subsequent, and the breach of the condition does not affect the validity of the deed. *Whitley v. Whitley*, 25.

h Covenants and Warranties

1. The measure of damages for partial breach of covenant of seizin is the proportion of the value of the land as to which title fails bears to the whole tract, estimated on the basis of the consideration paid and not on the basis of the increased value of the land when its value has appreciated after the transaction, and where the vendee has in turn sold the land at an increased price, the damages sustained by the purchaser by reason of the partial failure of the

Deeds C h—*continued.*

covenant of seizin in his deed may not be recovered against the original vendor. *Bank v. Williams*, 104.

2. A warranty deed was not registered until several years after the death of the grantor, during which time several judgments were obtained against the personal representative of the grantor. The grantee in the deed sold same after the judgments had been docketed to a purchaser for value by warranty deed. The purchaser instituted this action against his grantor, contending that the judgments against the estate of the original grantor constituted a lien on the land in violation of the warranty against encumbrances. *Held:* Under the provisions of statutes. N. C. Code, 131, 132, 166, the judgments did not constitute a lien on the land in violation of the warranty against encumbrances. *Tucker v. Almond*, 333.

Descent.

B Persons Entitled to Inherit.

c Illegitimate Persons and Their Heirs

Representatives of brothers of mother of illegitimate person *held* not entitled to inherit from him, the provisions of ch. 256, Public Laws of 1935, not being applicable to estates of persons dying prior to its enactment. *Carter v. Smith*, 788.

Discovery. (See Bill of Discovery.)

Dower.

A Nature, Rights, and Incidents of Estate.

b Land to Which Dower Attaches

By agreement between the grantor and grantee, the debt secured by a duly executed purchase money deed of trust was divided, and two deeds of trust securing same were executed and substituted for the original purchase money deed of trust, which was canceled, the substitution of the two deeds of trust, constituting a first and second lien, for the original purchase money deed of trust being made for the convenience of the grantee in making payment. The wife of the grantee did not join in executing any of the deeds of trust. The trial court found, upon submission of controversy, that the substituted deeds of trust constituted a continuation of the original debt. *Held:* The wife of the grantee acquired no dower right in the land, the original debt for the purchase money not having been extinguished. N. C. Code, secs. 1003, 4101. *Case v. Fitzsimons*, 783.

Easements.

A Creation.

e By Purchase or Payment of Damage

Where permanent damage is awarded for injury to land, defendant is entitled to an easement therein. *Teseneer v. Mills Co.*, 615.

Education. (See Schools and School Districts.)

Ejectment.

B Summary Ejectment.

a Jurisdiction

1. Where plaintiff mortgagee bases his title in summary ejectment upon his past due but unforeclosed mortgage and his purchase of the

Ejectment B a—*continued.*

property at a tax foreclosure sale, the action is properly dismissed for want of jurisdiction, since defendant mortgagor has an interest in the land. *Pearce v. Montague*, 42.

2. A landlord may institute suit in the Superior Court to eject his tenant, the remedy of summary ejectment before a justice of the peace, C. S., 2365, not being exclusive, and in such action the Superior Court certainly acquires jurisdiction where the defendant denies plaintiff's title, controverts the allegation of tenancy, and pleads betterments. *Bryan v. Street*, 284.

C Parties and Pleadings.

a Parties and Process

Where lessor has contracted to sell the leased premises and the lessee refuses to vacate, action in ejectment is properly brought in the name of the lessor. *Fayetteville Light Infantry v. Dry Cleaners*, 14.

Election of Remedies.

B Acts Constituting Election.

a Election by Conduct

Plaintiff mortgagors' failure to attack foreclosure until nearly three years after the sale and the transfer of the land by the mortgagee, who bid in the property, to third persons, and failure to protest, *held* to constitute election to rely upon right of action against mortgagee for breach of contract to reconvey and to estop plaintiffs from attacking deed of purchasers from mortgagee. *Dennis v. Dixon*, 199.

Elections. (Enjoining holding of election under repeal statute see Injunctions B e.)

A Right to Suffrage.

c Educational Qualifications (Statute prescribing educational qualification properly challenged by proceedings under Declaratory Judgment Act, see Actions B g.)

The provisions of N. C. Code, 5939, that a person presenting himself for registration shall, before he is registered, prove to the satisfaction of the registrar his ability to read and write any section of the Constitution, is valid, since such qualification is prescribed by the Constitution, Art. VI, sec. 4, and authority therein granted the Legislature to enact general legislation to carry out the provisions of the article, Art. VI, sec. 3, and the provision of the act placing the duty upon the registrar being logical and reasonable, and not constituting class legislation, since its provisions apply to all classes, and there being an adequate remedy at law if a registrar, in bad faith or in abuse of power or discretion, should refuse to register a person duly qualified. *Allison v. Sharp*, 477.

F Absentee Voters.

a Application of Absentee Ballot Law

Construing N. C. Code, 5960, *et seq.*, known as the Absentee Ballot Law, with N. C. Code, 6055, *et seq.*, known as the Australian Ballot Law, *it is held* that the Absentee Ballot Law is applicable to municipal elections, and the machinery for its application in such elections is clearly provided. *Phillips v. Slaughter*, 543.

Elections—*continued.*

I Contested Elections.

a Right to Relief

The result of an election will not be disturbed, nor one in possession of an office removed, unless the votes illegally counted or refused are sufficient to alter the result of the election. *Phillips v. Slaughter*, 543.

Electricity.

A Duties and Liabilities in Respect Thereto.

e Contributory Negligence.

Evidence that plaintiff's intestate drove his car off the highway, hit defendant's pole, causing an electric transmission wire supported thereby to sag, that intestate left the car where it stopped against a tree, but was killed when he returned and came in contact with the sagging wire which had caught on the car, is insufficient to resist defendant's motion to nonsuit, the evidence failing to establish negligence of defendant and disclosing contributory negligence on the part of plaintiff's intestate. *Stanley v. Power Co.*, 829.

Embezzlement.

A Elements of the Crime.

b Intent

Fraudulent intent is a necessary element of the statutory offense of embezzlement, C. S., 4268, and the State must prove such intent beyond a reasonable doubt, but direct proof is not necessary, it being sufficient if facts and circumstances are shown from which it may be reasonably inferred. *S. v. McLean*, 38.

B Prosecution and Punishment.

c Evidence

1. An exception to the refusal of the court to permit the defendant, on trial for embezzlement, to testify that the prosecuting witness obtained full value for the money appropriated by defendant will not be sustained when it appears that defendant testified as to every fact relative to the transaction, the testimony sought to be introduced by defendant being of a conclusion from such facts. *S. v. McLean*, 38.

2. Fraudulent intent within the meaning of the statute defining embezzlement is the intent to willfully or corruptly use or misapply the property of another for purposes other than that for which it is held, and evidence tending to show that defendant, without authorization, applied funds of his employer to his own use, although defendant testified that he used the funds to pay a debt due him by his employer, is sufficient to be submitted to the jury on the question of fraudulent intent. *Ibid.*

Eminent Domain.

A Nature and Extent of Power.

a Public Use

1. Private property may not be taken, even upon payment of just compensation, except for a public use or purpose, and although what is a "public purpose" must first be passed upon by administrative

Eminent Domain A a—*continued.*

bodies, the Legislature cannot deprive the courts of their power and duty to determine the question when properly presented, nor may the courts be precluded by the declarations of administrative bodies as to whether the use is public or private. *Reed v. Highway Com.*, 648.

2. In taking over a road as a part of the highway system, the scenic value of such road and its necessity as a part of the system of scenic highways for the public may be considered in determining whether taking over the road is for a public or private purpose. *Ibid.*

3. Under the provisions of ch. 145, Public Laws of 1931, the county commissioners petitioned the State Highway Commission that certain roads in the county be taken over as a part of the county system. Plaintiff, owner of part of the land involved, obtained a temporary injunction prohibiting the taking over of the road, claiming the taking was for a private and not a public purpose. Upon the return of the temporary order, the court found that the taking was for a public purpose, and dismissed the action, it appearing from the pleadings considered as affidavits that the proposed road would give four families access to the county seat and that the road would constitute a part of a through scenic highway. *Held:* The judgment dismissing the action is affirmed, there being no evidence upon the record showing that the taking over of the road was for a private purpose sufficient to raise an issue of fact, and plaintiff being remitted to his rights under N. C. Code, 3846 (bb), 1716, for the recovery of just compensation. *Ibid.*

D Proceedings to Take Land and Assess Compensation.

e Abandonment of Proceedings

Petitioners in condemnation proceedings may abandon the proceedings and take a voluntary nonsuit, upon payment of costs, even after the commissioners appointed by the court have made their appraisal and report and petitioners have filed exceptions thereto, provided petitioners abandon the proceedings before confirmation of the commissioners' report, since it is provided by C. S., 752, that special proceedings shall be governed as near as may be by the rules governing civil actions, and since the respondents have suffered no loss, the right to sell the land not being defeated by the institution of the proceedings, and petitioners not having entered into possession and having no right to do so until payment of the appraised value into court, C. S., 1723, and judgment that the proceedings be dismissed on motion of petitioners, and the cause retained for assessment of costs against petitioners, is upheld in this case. *Light Co. v. Mfg. Co.*, 560.

Employer and Employee. (See Master and Servant.)

Equity. (Particular equitable rights and remedies see Particular Titles of Rights and Remedies.)

A Maxims of Equity.

c Equity Regards That as Done Which Ought to Be Done

The maxim that equity regards that as done which ought to be done will not be enforced to the injury of innocent third parties. *Hood, Comr., v. Trust Co.*, 367.

Equity—*continued.*

B Laches.

a In General

Where it is agreed that the party entitled to equitable relief had no knowledge of the facts constituting the basis of her rights until shortly before suit, the question of laches cannot arise. *Speight v. Trust Co.*, 564.

Escheat.

A Property Reverting to the State.

a Failure of Heirs

The provisions of ch. 256, Public Laws of 1935, do not affect the distribution of an estate of a person dying prior to the enactment of the statute, the provision of the statute that it should apply to estates of such persons whose estates had not then been distributed being inoperative, and an illegitimate person dying prior to the enactment of the statute leaving only the brothers of his mother, or their legal representatives, him surviving, leaves no person him surviving entitled to inherit from him, and his property, both real and personal, vests immediately in the University of North Carolina under the Constitution and laws of this State. *Carter v. Smith*, 788.

Estates. (Estates created by Will see Wills E; created by deed see Deeds C; life estates see Life Estates.)

B Special Estates.

b Contingent Remainders

The forfeiture of a life estate will not destroy a contingent limitation over for want of a particular estate to support it, but, under the more modern doctrine, the person to whom the estate is forfeited takes only the interest of the life tenant without disturbing the contingent limitations over. *Corl v. Corl*, 7.

Estoppel. (Election of remedies see Election of Remedies; after acquired title see Mortgages F d; Tenants in Common.)

C Equitable Estoppel. (Estoppel from setting up defense of statute of frauds see Frauds, Statute of, D.)

b Estoppel by Conduct

Held: Bank receiver was estopped by his conduct from denying validity of pledge by the bank. *Pasquotank County v. Hood, Comr.*, 552.

d Inconsistent or Conflicting Claims

The State, claiming under an appearance bond, may not be heard to attack its validity. *S. v. Thomas*, 722.

Evidence. (In criminal prosecutions see Criminal Law G and Particular Titles of Crimes; in particular actions see Particular Titles of Actions; bill of discovery see Bill of Discovery.)

B Burden of Proof.

a General Rules

The burden of proof is a substantial right, and the erroneous placing of the burden of proof entitles appellant to a new trial. *Davis v. Dockery*, 272.

Evidence B—*continued.*

b Defenses

1. The burden of proof is on defendant to establish affirmative defenses pleaded by him in his answer. *Pittman v. Downing*, 219.

2. Burden is on defendant to prove payment relied on by him as defense to plaintiff's recovery. *Davis v. Dockery*, 272; *Stephenson v. Honeycutt*, 701.

d Counterclaims and Offsets

The burden is on defendant to prove an offset claimed by him. *Trust Co. v. Levy*, 834.

D Relevancy, Materiality, and Competency.

b Transactions or Communications with Deceased

An attorney formerly holding a note for collection is not an interested party in an action on the note within the meaning of C. S., 1795, prohibiting testimony by interested parties as to transactions with or declarations of a decedent. *Vannoy v. Stafford*, 748.

f Impeaching and Corroborating Testimony

Testimony of a witness on redirect examination relating to matters elicited on cross-examination *held* competent, the testimony not containing statements of controverted fact. *Williams v. Stores Co.*, 591.

h Similar Facts and Transactions

Plaintiff instituted action to recover damage alleged to have resulted from drinking bottled Coca-Cola containing a deleterious substance, which plaintiff had purchased from a retailer and which had been bottled by defendant. Evidence was admitted, over defendant's objection, tending to show that deleterious substances had been found in other Coca-Cola bottled by defendant, but the evidence failed to show when such other bottles had been sold by defendant to the retailers from which they were purchased. *Held:* The evidence was erroneously admitted, since the required proximity of time was not established to render such other instances competent on the question of negligence. *Collins v. Bottling Co.*, 821.

k Pleadings and Evidence at Former Trial (In criminal cases see Criminal Law G m.)

1. The admission of the pleadings in the original action and in a former proceeding between the same parties is upheld on authority of *Alsworth v. Cedar Works*, 172 N. C., 17. *Odom v. Palmer*, 93.

2. Plaintiff sued the driver of a car and his employer to recover for injuries inflicted by the driver. All of plaintiff's evidence tended to show that the driver willfully inflicted the injury out of spite and personal enmity. In the recorder's court the driver testified to the effect that the injury was accidental, and such testimony was introduced upon the trial in the Superior Court upon appeal. *Held:* The driver's testimony in the recorder's court was competent as against himself, but incompetent as against the employer, and is insufficient to raise a conflict in the evidence upon the employer's defense that the injury was inflicted by the driver willfully and out of personal hatred and malice, and the employer's motion to nonsuit was properly allowed. *Jackson v. Scheiber*, 441.

Evidence—*continued.*

E Admissions.

b In Pleadings on During Trial

The fact that an order making a person a party defendant is entered by consent is not an admission of liability of such person nor a waiver of his right to demur *ore tenus* to the complaint. *Jones v. Franklin Estate*, 585.

d By Agents

1. Where agency is admitted, declarations of agent *held* competent to prove that at the time agent was acting within scope of employment. *Smith v. Miller*, 170.

2. A letter written by an agent is properly admitted against the principal when it is made to appear that the principal subsequently acted upon and ratified the letter. *Turner v. Chevrolet Co.*, 587.

G Demonstrative Evidence.

b Purposes for which Competent and Restriction of Evidence Thereto

An exception to the production before the jury of a duplicate of the globe which struck plaintiff *is held* without merit, defendants having previously exhibited parts of the same instrumentality and having failed to request the court to restrict the testimony to the illustration of the witness' testimony. *Williams v. Stores Co.*, 591.

H Hearsay Evidence.

a General Rules

Certain lands were deeded to husband and wife by entireties. The wife predeceased her husband, and after the husband's death his administrator sought to sell the lands to make assets to pay debts. A daughter of the tenants by entireties resisted the proceeding, claiming an interest in the land as heir at law of her mother, and attempted to show a resulting trust in the lands in her mother's favor by showing that her mother had furnished the major part of the purchase price, although the lands had been deeded to the grantees as tenants by the entireties. In support of her contentions, the daughter offered testimony of a witness to the effect that the wife had told the witness she had furnished a certain amount of the purchase price. *Held:* The testimony was properly excluded under the hearsay rule. *Trust Co. v. Blackwelder*, 252.

I Documentary Evidence.

b Accounts, Ledgers, Records, and Private Writings

1. Letters offered in evidence by caveator *held* competent as links in chain of circumstances tending to show fraud. *Winborne v. Lloyd*, 483.

2. Where a party introduces in evidence parts of certain letters, it is competent for the adverse party to introduce the other parts of the letters in evidence when such other parts tend to explain the parts introduced, but this rule does not extend to allow such adverse party to introduce in evidence an *ex parte* statement enclosed in the letters, which statement does not tend to explain the portion of the letters introduced. *Ibid.*

3. Plaintiff, suing upon an open account, offered testimony of the manager of the store in charge of the books, to the effect that the owner of the store made certain entries on the books before the witness

Evidence I b—*continued.*

was hired, and that he had charge of the books thereafter, that he had discussed the account with the debtor, who did not deny its correctness, and that the account was in the sum claimed by plaintiff. *Held:* The witness was competent to identify the account, and an exception to his testimony is untenable. *Stephenson v. Honeycutt*, 701.

J Parol or Extrinsic Evidence Affecting Writings.

a Admissibility in General

1. Plaintiff's contract with defendant motor company provided that upon the termination of the agency contract defendant might repurchase from plaintiff dealer, at its option, products of defendant in plaintiff's possession at the price paid, plus freight, and that the contract might not be enlarged, varied, or modified except in writing. Plaintiff offered evidence of a parol agreement entered into more than a year thereafter in which plaintiff agreed to resign his agency and defendant agreed to repurchase accessories and equipment in plaintiff's possession at seventy-five per cent of list price. *Held:* Evidence of the separate, subsequent parol agreement in accord with the original written contract was competent. *Grubb v. Motor Co.*, 88.

2. No verbal agreement between the parties to a written contract, made before or at the time of the execution of such contract, is admissible to vary its terms or to contradict its provisions. The exceptions to the general rule are enumerated and discussed by *Stacy, C. J. Ins. Co. v. Morehead*, 174.

3. Testimony of verbal agreement that instrument should not become effective until happening of condition *held* competent. *Ibid.*

b In Establishing Resulting Trusts

1. Evidence of conditional delivery of quitclaim deed *held* competent in grantor's action to establish trust. *Ins. Co. v. Dial*, 339.

2. Plaintiffs claimed under a parol trust and under a later executed written contract to convey. *Held:* Evidence of the parol agreement in conflict with the later executed written contract is incompetent. *Gray v. Worthington*, 582.

K Expert and Opinion Evidence.

a Conclusions and Opinions in General

Plaintiff's intestate was killed in a collision between his car and a truck driven by the individual defendant. The driver of the truck was the only surviving eye-witness of the accident, and did not testify at the trial. The liability of defendants was based mainly on plaintiff's contention that the truck was being driven on the wrong side of the highway. A witness who came upon the scene of the accident shortly after it occurred was allowed to describe to the jury the position of the cars, the location of the glass and other physical facts at the scene of the collision. The court excluded his testimony, based upon the physical conditions at the scene, that at the time the cars collided the truck was a foot and a half over the center of its side of the highway. *Held:* The testimony was properly excluded as invading the province of the jury. *Cheek v. Brookerage Co.*, 569.

Evidence K—*continued.*

b Subjects of Expert and Opinion Testimony

1. The admission of testimony of experienced trainmen, found by the court to be experts, as to the cause and effect of the stopping of a train from a given speed to a given lower speed, within a certain distance, *is held* without error. *McGraw v. R. R.*, 432.

2. A medical expert testified to the effect that he had attended the person in question for a period of twelve years, that he had last observed her twelve days before her execution of the instruments attacked by plaintiff, that at the time he last observed her she was mentally irresponsible from senile dementia, which condition would not improve, but would get worse with time. *Held:* An exception to his testimony as to the mental incapacity of the person in question at the time of her execution of the instruments, on the ground that the witness had not observed such person sufficiently near the time of the execution of the instruments, cannot be sustained. *Winborne v. Lloyd*, 483.

3. The testimony of medical experts as to the permanency of plaintiff's injuries and their nature and effect, based upon personal examination of plaintiff and deduced from their technical knowledge and experience, *is held* competent. *Williams v. Stores Co.*, 591.

4. The male plaintiff was allowed to testify to the effect that defendant's dam caused large quantities of sand to be deposited on plaintiffs' land by ponding water thereon. Plaintiffs' expert witness testified to the same effect without objection, as did other nonexpert witnesses for plaintiffs. *Held:* An exception to the admission of plaintiff's testimony cannot be sustained, the testimony being of a common condition not capable of being made palpable to the jury and being based upon plaintiff's observations made at the time. *Teseneer v. Mills Co.*, 615.

Executors and Administrators. (Limitation of actions of bonds see Limitation of Actions B b.)

C Control and Management of Estate.

c Liability of Estate on Contracts Executed or Debts Created by Representative

1. Plaintiff's complaint alleged that testatrix executed a note to plaintiff in her representative capacity, and it appeared from the face of the complaint that the note was executed subsequent to the death of testator, and the complaint did not allege that the note was executed for a debt existing at the time of testator's death. *Held:* A judgment by default against the estate for want of an answer is irregular as contrary to the course and practice of the courts, the estate not being liable on the note upon the facts alleged, since a personal representative may not bind the estate by contract arising wholly out of matters occurring after the death of the testator, and the judgment also failing to comply with statutory provisions relative to judgments against estates of decedents. N. C. Code, 130, 131. *Hood, Comr., v. Stewart*, 424.

2. The principle that an executor cannot bind the estate on matters arising wholly after the death of testator does not apply when the will expressly authorizes the executor to incur such liability. *Meares v. Williamson*, 448.

Executors and Administrators C—*continued.*

d Personal Liability of Executor or Administrator on Contracts Made for Estate

An executrix, in buying merchandise necessary to the operation of the business of the estate, may escape personal liability therefor by making an agreement with the seller to that effect, and evidence in this case tending to show that the executrix explained to the seller's agent that she was buying the goods to continue operating a dairy belonging to the estate, that he understood the estate would be liable, that the goods were delivered pursuant to the understanding as ordered by the manager of the dairy, that the seller knew the manager was operating the dairy for the estate, and that the seller filed his claim with the estate and received dividends thereon from the estate, and made no demand on the executrix in her individual capacity until the institution of the action, *is held* sufficient to be submitted to the jury on the question of an agreement between the parties that the executrix should not be individually liable, and a directed verdict against the executrix in her individual capacity was error. *Bessire & Co. v. Ward*, 266.

D Allowance and Payment of Claims.

d Claims Arising from Payment of Obligations of Estate or from Receipt by Deceased of Moneys Belonging to Claimant

A remainderman proving that the life tenant received the proceeds of a fire insurance policy on the property and failed to account therefor prior to his death does not entitle the remainderman to recover the entire amount of the proceeds of the policy from the estate of the life tenant, since the life tenant may have been entitled to part of the proceeds, or may have spent the proceeds of the policy in repairing the damage caused by the fire, and where the remainderman shows receipt of the proceeds of the policy by the life tenant and failure on the part of the life tenant to account therefor before his death, without more, the remainderman is not entitled to judgment therefor against the estate of the life tenant. *Rigsbee v. Brogden*, 510.

e Priorities and Payment

1. Estate of life tenant is liable for taxes assessed prior to his death as preferred claim. *Rigsbee v. Brogden*, 510.

2. Assessments for public improvements assessed prior to death of life tenant do not constitute preferred claim against his estate. *Ibid.*

3. Charges for water and gas connections, incurred prior to death of life tenant, do not constitute preferred claim against his estate. *Ibid.*

4. Tax sale certificate in the hands of remainderman does not constitute preferred claim against the estate of life tenant. *Ibid.*

f Judgments and Liens

Ordinarily, judgment against representative is not a lien on lands of estate. *Tucker v. Almond*, 333.

h Actions

An action to recover for personal services rendered testator's wife, involving a construction of the will and an accounting, is properly brought in the Superior Court. C. S., 135. *Meares v. Williamson*, 448.

Executors and Administrators—*continued.*

E Sales and Conveyances Under Orders of Court.

b Funds and Assets Subject to Attachment and Sale by Executor

1. Where the heirs at law, in their suit to declare a resulting trust in certain lands deeded by intestate during his lifetime, obtain a consent judgment providing that the lands be sold and part of the proceeds paid to the heirs, the heirs' share of the proceeds are chargeable with the debts of the estate, since their right to the funds is based upon their claim to the land in the capacity of heirs, and their demurrer to the administrators' pleading, alleging the facts and insufficiency of the assets of the estate to pay debts, is properly overruled. C. S., 74. *Odom v. Palmer*, 93.

2. In the suit of heirs at law to declare a resulting trust in lands deeded by intestate during his lifetime, judgment was entered that the lands be sold and part of the proceeds paid the heirs, and the cause retained. *Held:* An order allowing the administrators to interplead and claim the funds allotted to the heirs in order to pay debts of the estate was proper under the facts. *Ibid.*

False Imprisonment.

A Nature and Elements of the Crime.

c Willfulness in Procuring Arrest

Defendant must have willfully procured arrest of plaintiffs in order to be liable in action for false imprisonment. *Ellis v. Trust Co.*, 247.

Federal Employers' Liability Act. (See Master and Servant E.)

Food.

A Liability of Manufacturer to Consumer.

a Deleterious and Foreign Substances

1. Plaintiff's evidence tended to show that he was injured by particles of glass eaten by him in sausage prepared by defendant manufacturer, and that a short time prior to his injury plaintiff had found grit in similar sausage prepared by defendant, and that the deleterious substances were found inside the casings in which the sausage was stuffed. *Held:* The evidence was sufficient to be submitted to the jury on the issue of defendant's negligence. *Daniels v. Swift & Co.*, 567.

2. Evidence must show time when product was bottled for evidence of deleterious substances therein to be competent. *Collins v. Bottling Co.*, 821.

Fraud. (Cancellation of instruments for, see Cancellation and Rescission of Instruments; in misrepresenting number of acres conveyed see Vendor and Purchaser F b.)

A Deception Constituting Fraud.

b Misrepresentation

Plaintiffs alleged that defendant induced them not to sell their land by falsely representing that defendant could later obtain a much higher price for same. Defendant demurred to the complaint for failure to state a cause of action. *Held:* The demurrer was properly sustained, mere promissory representations not being generally regarded as fraudulent in law. *McCormick v. Jackson*, 359.

Frauds, Statute of.

A Promise to Answer for Debt or Default of Another.

a Applicability

1. Defendants agreed orally to be personally responsible for merchandise shipped to a corporation of which they were the main stockholders, and which they later took over. *Held:* Under the evidence, the agreement was an original promise not coming within the statute of frauds. C. S., 987. *Brown v. Benton*, 285.

2. Evidence on behalf of plaintiff tended to show that defendants ordered two or three cars of lumber to be shipped to a corporation of which they were the main stockholders, both defendants being present and promising to be personally responsible therefor. The first car was shipped, and thereafter one of the defendants went to plaintiff and told him to ship another car under the same arrangements. The first car was paid for, and plaintiff instituted this suit against the individual defendants to recover the purchase price of the second car. *Held:* The evidence was sufficient to be submitted to the jury on the question whether the original promise of both defendants, made when both were present, covered the second car as well as the first. *Ibid.*

D Estoppel and Waiver of Defense.

a Transactions and Representations Constituting Estoppel or Waiver

Party obtaining forbearance during life of written contract by extending its terms by oral agreement may not plead statute of frauds to defeat action on oral agreement. *Dixson v. Realty Co.*, 354.

Fraudulent Conveyances. (Parol contract to convey not good as against creditors of vendor see Trusts C d.)

C Actions to Set Aside.

a Parties

Creditors of the grantor may maintain an action to set aside a deed of gift on the ground that it was not registered within two years after its execution. *Reeves v. Miller*, 362.

Highways. (Use of highways and law of the road see Automobiles C; condemnation of land for highways see Eminent Domain.)

E Neighborhood Public Roads.

a Establishment

Persons living along a highway which had been taken over by the State Highway Commission, and subsequently abandoned by it, are "interested citizens" within the meaning of ch. 302, Public Laws of 1933, and may maintain a proceeding to have the road established as a "neighborhood public road." *Grady v. Grady*, 749.

Homestead.

D Abandonment, Waiver, or Forfeiture.

b Fraudulent Conveyance

Defendant allowed judgment by default to be taken against him in an action to set aside his deed as being fraudulent as to creditors, the deed embracing practically all property of defendant, real or personal. Judgment was entered that the deed be set aside and a com-

Homestead D b—*continued.*

missioner was appointed to sell the land, and the cause retained. Prior to sale, defendant prayed that his homestead be allotted in the land. *Held:* The right to the homestead exemption guaranteed by the Constitution, Art. X, sec. 2, is not forfeited by a fraudulent conveyance, and the judgment was properly modified by order directing that defendant be allotted his homestead in the land which should be exempt from sale by the commissioner. *Casualty Co. v.* Dunn, 736.

Homicide. (Manslaughter in operation of car see Automobiles G b.)

B Murder.

a Murder in the First Degree

A murder is premeditated if it is thought over and the intent to kill formed, regardless of how short a time elapses before the intent is executed, and it is deliberate if it is committed in a cool state of blood in furtherance of such intent. *S. v. Buffkin*, 117.

G Evidence in Homicide Prosecutions.

b Presumptions and Burden of Proof

1. Where the State shows by evidence that defendant killed deceased with a deadly weapon, defendant's motion for judgment as of nonsuit is properly refused, since the State's evidence raises the presumption that defendant is guilty of murder in the second degree, with the burden on the defendant to show matters in mitigation or excuse. *S. v. Cagle*, 114.

2. A killing with a deadly weapon raises the presumption that the homicide was murder in the second degree, and if the State seeks a conviction of murder in the first degree it has the burden of proving beyond a reasonable doubt that the homicide was committed with deliberation and premeditation. *S. v. Perry*, 604.

c Dying Declarations

1. Where it appears that deceased, a few hours before his death, made the dying declarations sought to be admitted in evidence by defendant, that at the time of making the declarations deceased was in imminent danger of death as the result of five gunshot wounds, that he was in a very weakened condition and stated to one witness that he felt he was "fading out," *is held* sufficient basis for the admission of his dying declarations in evidence, it not being required that deceased should actually express his apprehension of imminent death, but only that it satisfactorily appear from the relevant facts and circumstances that he did apprehend the danger of imminent death. *S. v. Mitchell*, 1.

2. The evidence disclosed that deceased and defendant, a white man, were well acquainted. Defendant offered testimony of dying declarations of deceased, after laying proper predicate for their admission in evidence, to the effect that deceased recognized his assailant as a white man and recognized his dress and build, but did not have any idea who his assailant was. *Held:* Testimony of the dying declarations was material to the issue as tending to show that the assailant was someone other than defendant, and its exclusion constitutes reversible error. *Ibid.*

Homicide G c—*continued.*

3. Evidence tending to show that defendant shot his wife five times, that immediately after the shooting she told the witness she knew she was going to die and that her husband had shot and killed her, that she substantially repeated these declarations in the hospital two days thereafter, and died the following day from her wounds, *is held* sufficient predicate for the admission of testimony of the declarations. *S. v. Carden*, 404.

d Competency and Relevancy in General

1. The movements of defendant's and his victim's cars and circumstances tending to show that defendant mistook his victim's car for the car of another with whom he had had an altercation in regard to a woman in defendant's car and in regard to such person's "butting in on their party," *is held* competent as tending to show the circumstances attending the homicide and motive actuating defendant in committing the homicide. *S. v. Buffkin*, 117.

2. In a prosecution for homicide committed with a pistol it is competent for the State to show that defendant had a pistol on his person with one chamber exploded at the time of his arrest a short while after the commission of the crime. *Ibid.*

3. Proof of motive is not necessary to make out the State's case of murder in the first degree when there is sufficient evidence of premeditation and deliberation. *Ibid.*

4. Premeditation and deliberation may be shown by all the attendant circumstances, and the absence of provocation is a competent circumstance to be considered by the jury in determining the question. *Ibid.*

5. Although flight of defendant after commission of the crime is a competent circumstance to be considered by the jury in connection with other circumstances as an implied admission of guilt, in a prosecution for homicide, flight is not evidence of premeditation and deliberation, and where, upon proffer of evidence by the State relating to the search for defendant immediately after the commission of the crime, the court admits the evidence over defendant's objection, remarking at the time that he thought it competent on the question of premeditation and malice, a new trial will be awarded defendant on appeal, although the charge of the court to the jury correctly states the law relating to the scope of such evidence. *S. v. Lewis*, 191.

6. Nonexpert witnesses are competent to testify from their observation of defendant that defendant was sound mentally, and where defendant in a homicide prosecution contends that he was mentally incapable of premeditation and deliberation, such testimony is properly admitted for the consideration of the jury upon the question. *S. v. Horne*, 725.

7. The State's evidence tended to show that defendant and his wife had become separated because of defendant's mistreatment of her, that defendant was greatly upset by the separation, and sought to get his wife to return to him, and that after her refusal to return to him, he went to the place where she was working, made an unprovoked attack upon her, cutting her throat and causing her

Homicide G d—*continued.*

death. *Held:* Evidence that some four weeks before the homicide, and prior to their separation, defendant ran after his wife and threatened to cut her with a knife, is competent as tending to show a circumstance which the jury could properly consider on the question of premeditation and deliberation. *Ibid.*

H Trial.

b Sufficiency of Evidence and Nonsuit

1. Where the State shows by evidence that defendant killed deceased with a deadly weapon, defendant's motion for judgment as of nonsuit is properly refused, since the State's evidence raises the presumption that defendant is guilty of murder in the second degree, with the burden on defendant to show matters in mitigation or excuse. *S. v. Cagle*, 114; *S. v. Buffkin*, 117.

2. Evidence of premeditation and deliberation *held* sufficient to go to jury on question of murder in the first degree. *S. v. Buffkin*, 117; *S. v. Lewis*, 191.

3. The State's evidence tended to show that while defendant's brother and another were engaged in a fight, defendant ran past them and cut the throat of his brother's assailant with a knife, causing his death. Defendant's evidence was to the effect that deceased had the knife in his hand as they were fighting and that defendant's brother got possession of the knife and inflicted the mortal wound. *Held:* The evidence, though conflicting, was sufficient to be submitted to the jury on the question of defendant's guilt of murder in the second degree or manslaughter, there being no evidence that defendant, if he did inflict the mortal wound, did so in defense of himself or the necessary defense of his brother. *S. v. Edmundson*, 716.

4. The evidence favorable to the State tended to show that deceased was attacked by a person with an axe handle, that deceased took the axe handle away from his assailant, and that thereupon his assailant called upon defendant, a constable, to arrest deceased for assault, that defendant went up and took hold of deceased, that deceased backed away across the highway and both shoulders of the road to his son's filling station, that several persons called to defendant not to shoot, but that defendant followed him, and then shot him four times, causing his death, that prior to the homicide defendant had made threats against deceased, and that after the shooting defendant cursed deceased. *Held:* The evidence was sufficient to be submitted to the jury on the question of defendant's guilt of manslaughter, either upon the theory that defendant shot the deceased for revenge, or used unnecessary and excessive force in attempting to arrest deceased. *S. v. Eubanks*, 758.

c Instructions

1. Where, in a prosecution for homicide, the defendant admits his guilt of murder in the second degree, it is not error for the trial court to act upon the admission, and after fully charging the elements of murder in the first degree, and defining murder in the second degree, to instruct the jury to return a verdict of murder in the second degree if they should fail to find any one of the elements

Homicide H c—*continued.*

of first degree murder, as defined, beyond a reasonable doubt. *S. v. Grier*, 298.

2. It is only when all the evidence tends to show that the homicide was committed by means of poison, lying in wait, imprisonment, starving, torture, or in the perpetration or attempt to perpetrate a felony, that the court may instruct the jury to return a verdict of guilty of murder in the first degree or not guilty, and where the evidence tends to show that defendant killed deceased with a deadly weapon and no evidence that the homicide was committed by lying in wait or in the perpetration or attempt to perpetrate a felony, the court must submit the question of murder in the second degree to the jury, although there is ample evidence of premeditation and deliberation, the evidence of premeditation and deliberation being for the jury upon the question of whether the crime was murder in the first or second degree. *S. v. Perry*, 604.

3. The State's evidence tended to show that while defendant's brother and another were engaged in a fight, defendant ran past them and cut the throat of his brother's assailant with a knife. The evidence disclosed that defendant's brother had previously shot his assailant and that either wound was sufficient to cause death, and that each wound was a contributing factor in causing death. Defendant contended that he did not cut deceased, but that deceased had the knife in his hand as they were fighting and that defendant's brother got possession of the knife and inflicted the wound. The court instructed the jury that if they should find from the evidence beyond a reasonable doubt that defendant cut the deceased, as contended by the State, and that such wound caused death or was a contributing cause of death, they should return a verdict of guilty of second degree murder. *Held:* The instruction is erroneous for failing to charge the jury upon the facts that if they should fail to find that the act of the defendant was malicious they should return a verdict of guilty of manslaughter, there being evidence from which the jury might find that if defendant cut the deceased as contended by the State, he did so, not from malice, but from sudden passion aroused by the assault which deceased was then making upon his brother. *S. v. Edmundson*, 716.

Husband and Wife. (Curtesy see Curtesy; dower see Dower; constructive trust from husband's appropriation of wife's lands see Trusts A b; abandonment of child see Parent and Child A b; wife's possession is constructive possession of husband see Intoxicating Liquor B b.)

Indictment. (Consolidation of indictments for trial see Criminal Law I f.)

C Motions to Quash or Dismiss.

g Effect of Quashal or Dismissal

The court may not adjudge the defendant not guilty upon sustaining defendant's demurrer to the indictment, the defendant being entitled only to his discharge upon judgment sustaining his demurrer. *S. v. Parker*, 32.

E Issues, Proof, and Variance.

f Procedure to Take Advantage of Variance

Defendant moved to quash the indictment in this prosecution for receiving stolen goods knowing them to have been stolen, on the

Indictment E f—*continued.*

ground that the evidence showed that the property, if stolen, was stolen in another county, and, if received by defendant, was received by him in a third county. *Held:* The motion to quash was correctly denied, even without taking into consideration the provisions of C. S., 4250, since, under the provisions of C. S., 4606, the crime is presumed to have been committed in the county laid in the bill of indictment unless defendant aptly enters a plea in abatement. *S. v. Ray*, 772.

Infants.

G Actions.

b Appointment of Next Friend

Only a person whose fitness has first been ascertained by the court is eligible for appointment by the court as next friend of a minor to institute suit, and neither a foreign nor domestic corporation may be appointed next friend of an infant. Rule of Practice in the Superior Courts, No. 16; C. S., 450. *In re Will of Roediger*, 470.

Injunctions.

B Subjects of Injunctive Relief. (Enjoining enforcement of city ordinance see Municipal Corporations H e.)

e Enjoining Proceedings Under Statutes on Grounds of Unconstitutionality

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 sale of intoxicating liquor under county supervision and control, and provided that sale otherwise as permitted by the statute should be a misdemeanor. Plaintiffs did not 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. *Held:* In the absence of such allegations, plaintiffs are not entitled to the injunctive relief sought, and judgment of the lower court requiring defendants to give bond as a condition precedent to the holding of the election is error. *Hill v. Comrs. of Greene*, 4.

D Preliminary and Interlocutory Injunctions.

b Continuing, Modifying, and Dissolving Temporary Orders

1. It is error to dissolve temporary order when issues of fact are raised determinable by jury. *Tomlinson v. Cranor*, 688.

2. Ordinarily, a restraining order will be continued to the final hearing where no harm can come to the defendant by such continuance and where injury might result to plaintiff from a dissolution thereof. *Banner v. Button Corp.*, 697.

Insurance.

B Insurance Companies.

b Mutual Companies (Right of county to insure in mutual companies see Counties E a.)

The policyholders in a mutual fire insurance company are not stockholders therein, and are in no way liable for the debts of the com-

Insurance B b—*continued.*

pany beyond the contingent liability fixed in the policy. N. C. Code, 6348, 6351, as amended by ch. 89, Public Laws of 1935. *Fuller v. Lockhart*, 61.

C Insurance Agents.

b Authority

1. Payment of the initial premium on a policy of life insurance to insurer's soliciting agent is payment to the company. C. S., 6304. *Mills v. Ins. Co.*, 296.

2. Payment of note for second premium to insurer's agent without obtaining note or insurer's receipt *held* not payment to insurer. *Ibid.*

E The Contract in General.

b Statutory Provisions and Construction and Operation of Insurance Contracts in General

1. Laws in force at the time of executing a policy of insurance are binding on the insurer and become a part of the insurance contract. N. C. Code, 6287. *Fuller v. Lockhart*, 61.

2. A provision in an accident policy that the policy should not cover any person under 18 years of age or over 65 years of age, and that any premium paid to the company for any period not covered by the policy would be returned on request, is a provision limiting liability and not a condition working forfeiture, and where such policy is issued to a person over the specified age, insured's recovery on the policy is limited to a return of premiums paid. *McCabe v. Casualty Co.*, 577.

3. Subordinate conditions and provisos limiting and restricting the primary object of the policy to afford protection upon the happening of certain contingencies, should be strictly construed against insurer. *Thompson v. Accident Asso.*, 678.

4. An insurance policy will be construed strictly against insurer. *Williams v. Ins. Co.*, 765.

c Reformation

1. A policy of insurance, like other written instruments, may be reformed for mutual mistake or for mistake induced by fraud or inequitable conduct of the adverse party, and parol evidence is competent to establish the right to such equitable relief, but the proof must be clear, strong, and convincing. *Williams v. Ins. Co.*, 765.

2. Plaintiffs' evidence tended to show that defendant's local agent issuing the fire insurance policy in suit was a tenant in one of the stores insured, and paid rent to plaintiffs, who owned the property as heirs at law. The application was made in the name of plaintiffs' ancestor, and the policy issued in his name. *Held:* The question of whether the policy was issued in the name of the ancestor, who was dead at the time of application therefor, instead of the names of plaintiffs owning the property as heirs at law, through the mutual mistake of the parties was properly submitted to the jury, the knowledge of the local agent of insurer at the inception of the policy being imputed to insurer. *Ibid.*

Insurance—*continued.*

F Group Insurance.

b Termination of Contract by Termination of Employment

1. Plaintiff was insured under a group policy providing disability benefits to those becoming totally and permanently disabled while insured under the master policy, each employee's insurance thereunder to terminate upon the termination of his employment. Insured brought action claiming that he was disabled at the time of the termination of his employment, but his evidence tended to show that for over a year after the termination of his employment he was employed at intervals on several jobs of the general nature of his former employment. *Held:* The evidence was insufficient to show permanent and total disability while the insurance was in force, and defendant insurer's motion to nonsuit should have been allowed. *Whiteside v. Assurance Society*, 536.

2. Whether employee was disabled at time of termination of employment *held* for jury under conflicting evidence. *Fore v. Assurance Society*, 548.

I Avoidance of Policy for Misrepresentation or Fraud.

b Matters Relating to Insured

1. Insurer *held* entitled to rescission of disability clause for fraud. *Smith v. Ins. Co.*, 504.

2. Insured's application for a policy of accident insurance stated that insured's occupation was a lumber buyer and salesman on the yards of his employer, not handling lumber. Insurer's evidence tended to show that insured inspected and checked lumber bought and sold, and supervised the loading and unloading of lumber by other employees. *Held:* Insurer's evidence does not establish fraud in the application, the acts established by the evidence being ordinarily incidental to the occupation of a buyer and seller of lumber as stated in the application. *Ins. Co. v. Nichols*, 817.

J Forfeiture of Policy for Breach of Covenant or Condition Subsequent

b Nonpayment of Premiums

1. Insured paid the first annual premium on the policy in question, and several months thereafter left his domicile and was not heard from by those who would be reasonably expected to have heard from him if he were alive, for a period of over seven years. No further premiums were paid, and at the expiration of the seven-year period, the beneficiary instituted suit on the policy. *Held:* There was no presumption that insured was dead at the time the second annual premium was due, and the policy was forfeited under its term for failure to pay premiums. *Bridgers v. Ins. Co.*, 282.

2. The policy in question provided that premiums were payable at the home office of insurer and were payable to a duly authorized agent only in exchange for insurer's official receipt. Plaintiff's evidence showed payment of a note given for the second semiannual premium to insurer's authorized agent without obtaining the note or insurer's official receipt, and there was no evidence that insurer ever received any part of the payment. In insured's action against insurer to recover the premium paid after insurer had declared the policy forfeited, *it is held*, insurer's motion to nonsuit was

Insurance J b—*continued.*

properly allowed, payment to the agent under the circumstances not constituting payment to insurer. *Mills v. Ins. Co.*, 296.

K Estoppel, Waiver, or Agreements Affecting Right to Avoid or Forfeit Policy.

a Knowledge of Facts Relied on for Forfeiture

1. Where a policy of accident insurance contains a provision limiting insurer's liability under the policy to a return of premiums paid if the person insured is over a stipulated age, knowledge of insurer's local agent that insured was over the stipulated age at the time the policy was issued will not effect a waiver of the provision, the provision being a limitation of liability which may not be waived, and not a condition working a forfeiture, which may be waived. *McCabe v. Casualty Co.*, 577.

2. Where an applicant for life or health insurance discloses to insurer's local soliciting agent all material facts and circumstances relative to the risk, knowledge of the local agent is imputed to insurer, and constitutes a waiver by insurer of the right to declare the policy void for fraud in the failure of the application to state material matters relative to the health of applicant at the time of the inception of the policy, when the agent does not participate in the alleged fraud, and conflicting evidence as to the knowledge of the local agent raises an issue for the determination of the jury. *Thompson v. Accident Asso.*, 678; *Cox v. Assurance Society*, 778.

3. Plaintiff's evidence disclosed that he told insurer's soliciting agent that he had had trouble with his eyes and had had them treated, but that upon medical examination for the policy he failed to disclose that he had had an operation on one eye a little over a year before the examination and an operation on the other eye less than a year prior thereto, although the examination blank specifically called for the disclosure of such information and plaintiff signed same immediately below a declaration that he had read same carefully and that each of his answers was full, complete, and true. six years after the policy became effective, plaintiff became practically blind, and instituted this suit on the disability provision of the policy. *Held:* The disclosure to the soliciting agent that he had had trouble with his eyes and had been treated for them is insufficient to impute to insurer knowledge that insured had been in a hospital and had his eyes operated upon, especially in the face of his statement to the contrary made to the medical examiner of the company. *Smith v. Ins. Co.*, 504.

b Acceptance and Retention of Premiums

1. Where an insurance policy specifically provides that acceptance of premiums by insurer's agents after due date should reinstate the policy only as to losses resulting after such reinstatement, plaintiff's contention that according to the course of dealing between insurer and insured, premiums were accepted and paid at the convenience of insured, and that insurer should accept payment of premium due prior to insured's death which plaintiff tendered subsequent to insured's death, is untenable as there was no reinstatement of the policy prior to insured's death. *Lindley v. Ins. Co.*, 116.

Insurance K b—*continued.*

2. Plaintiff's evidence tended to show that for a period of fifteen years it had been the custom of defendant mutual benefit association's collecting agents, N. C. Code, 6393 (a), to collect dues from members after the due date but within thirty days thereof, that defendant's home office knew of this custom, or should have known of it in the exercise of due care, and that insured made payment of the dues for the preceding month within thirty days of the due date and died prior to the customary time for the collection of dues for the following month. *Held:* The evidence was sufficient to be submitted to the jury on the question of defendant's waiver of the provisions of its certificate and by-laws, requiring certificate of good health before reinstating a policy upon paymenf of premium after due date, and upon the verdict of the jury in her favor, plaintiff, who was named beneficiary in the certificate, is entitled to judgment for the amount of the policy, less the dues for the month not paid because of the death of insured prior to the customary time for collecting same. The distinction is made between waiver by local agents of defendant prohibited by N. C. Code, 6503, and a custom of dealing established over a period of years to the knowledge of the home office. *Shackelford v. Woodmen of the World*, 633.

f Incontestability Clauses

1. An incontestability clause in a policy of life insurance precludes insurer, after the lapse of the time therein stipulated, from setting up the defense of fraud in the procurement of the policy, and all other defenses except nonpayment of premiums. *Mauney v. Ins. Co.*, 499.

2. In order for insurer to rescind for fraud a policy containing an incontestability clause, it is necessary that insurer, within the time allowed in the incontestability clause, bring an action therefor or set up such defense in an action instituted in a court having jurisdiction to grant the affirmative relief of rescission, and such defense set up by insurer within the time allowed in the policy in an action on the policy instituted by insured in a recorder's court having no equitable jurisdiction, is insufficient, and the incontestability clause will prevent the insurer from setting up the defense in a second action in the Superior Court thereafter instituted by insured after expiration of the time provided in the contract in which insurer might contest the policy. In this case judgment was rendered in the recorder's court decreeing rescission, and insured appealed, took a voluntary nonsuit in the Superior Court, and instituted a new action. *Ibid.*

3. Where plaintiff's evidence in an action on the disability clause of a policy of insurance establishes that the disability provisions in his policy were procured by false statements and the suppression of material facts as to insurability, made by insured to insurer's medical examiner, plaintiff may not recover, and insurer is entitled to judgment rescinding the disability provisions upon the return of premiums paid therefor, with interest, the disability clause expressly providing that the provisions of the incontestability clause should not apply to the disability insurance. *Smith v. Ins. Co.*, 504.

Insurance—*continued.*

L Extent of Liability of Insurer.

a Upon Death of Insured in Life Policy

Where, under the terms of a policy of insurance, payment is to be made to the beneficiary immediately upon receipt of due proof of death of insured, the failure of the insurer to make payment until more than a year after receipt of such due proof entitles the beneficiaries to interest on the amount from the date of insurer's receipt of due proof, and payment of interest will not be excused because payment by insurer was delayed by reason of the fact that the trust agreement under which the policy was assigned was changed without notice to insurer by adding an individual trustee, and the fact that the corporate trustee became insolvent before payment and a substituted trustee appointed and insurer did not have notice of such substitution until a much later date, insurer having had the use of the money during the period of delay. C. S., 2309. *Bank v. Ins. Co.*, 17.

d Fire Insurance

1. Plaintiffs' property consisted of one building, divided into stores or compartments, two facing on one street and one facing on another street. The evidence tended to show that the amount of the policy was greatly in excess of the value of one store, and amounted to a little more than the value of the whole building, and that the policy described the building, and provided that the insurance should be effective only while the property was occupied by "tenants" as "stores," but designated the property by number and block of one of the stores. The building caught on fire and each of the stores was damaged thereby. Defendant insurer contended that the policy covered only one store, and not the whole building. *Held:* The policy was ambiguous as to the property covered thereby, and the question was properly submitted to the jury as to whether the entire building was covered by the policy. *Williams v. Ins. Co.*, 765.

2. Plaintiffs' property consisted of one building containing three compartments or stores. Insurer contended that the policy issued covered only one of the stores and not the entire building. It appeared that the amount of the policy was greatly in excess of the value of the one store, but was about the value of the entire building, and that insured paid the premium based upon the amount for which the policy was issued. *Held:* In construing the policy as to whether it covered the one store or the entire building, it will not be presumed that insurer charged a premium based upon a valuation greatly in excess of the value of the property insured in violation of law, N. C. Code, 6418, 6435, but that the policy covered the entire building, the value of which would justify the amount of the policy and the charge of the premium paid. *Ibid.*

M Notice and Proof of Death or Loss.

a Presumption of Death from Seven Years Absence

The absence of a person for seven years without being heard from by those who would be reasonably expected to hear from him if living, raises a presumption that such person is dead at the end of seven years, but not that he died at any particular time during this period. *Bridgers v. Ins. Co.*, 282.

Insurance M—*continued.*

d Mental and Physical Incapacity as Excuse for Failure to Give Notice

1. Where insured contends that his failure to give notice of disability within one year of its inception, as required by the policy, was due to mental incapacity excusing such failure, he must show such mental incapacity during the period specified, and where his evidence is insufficient to show such incapacity during the stipulated period, evidence of mental incapacity after the expiration of the one-year period and that he was thereafter committed to a hospital for the insane is immaterial. *Whiteside v. Assurance Society*, 536.

2. Evidence *held* insufficient to show mental incapacity sufficient to excuse insured's failure to give notice of disability. *Ibid.*

e Waiver of Notice and Proof

Where insurer denies liability, insured is not required to furnish proof of loss as stipulated in the policy, the denial of liability constituting a waiver of proof. *Williams v. Ins. Co.*, 765.

N Persons Entitled to Proceeds.

a Life Insurance

In this action involving the right to proceeds from a mutual benefit certificate, it appeared that insured's wife was named beneficiary therein, and kept the certificate in force for a number of years by paying the necessary dues and assessments, that after her death insured's brother, who, upon the death of insured's wife, became the beneficiary under the terms of the certificate as insured's nearest blood relation, kept the certificate in force by paying the dues and assessments until the death of the insured a short time thereafter. The wife left a will in which she attempted to devise her interest in the policy to her nephew. *Held:* Under the terms of the certificate the insured's brother was entitled to the proceeds thereof, to the exclusion of the wife's nephew, the payment of dues or premiums alone being insufficient to create a lien against the certificate, or the proceeds thereof, and the wife at no time having any vested interest as the named beneficiary which she could bequeath by will, C. S., 6508. *Sorrell v. Woodmen of the World*, 226.

c Fire Insurance

A remainderman proving that the life tenant received the proceeds of a fire insurance policy on the property and failed to account therefor prior to his death does not entitle the remainderman to recover the entire amount of the proceeds of the policy from the estate of the life tenant, since the life tenant may have been entitled to part of the proceeds, or may have spent the proceeds of the policy in repairing the damage caused by the fire, and where the remainderman shows receipt of the proceeds of the policy by the life tenant and failure on the part of the life tenant to account therefor before his death, without more, the remainderman is not entitled to judgment therefor against the estate of the life tenant. *Rigsbee v. Brogden*, 510.

O Payment and Subrogation.

b Subrogation to Rights of Insured

1. Defendant insurer denied liability to the owner mortgagor of the property because of alleged breach of the arbitration clause of the

Insurance O b—*continued.*

policy, but paid a sum agreed upon to the mortgagee in discharge of its liability to the mortgagee under the standard mortgage clause. Under provisions of the policy, insurer took from the mortgagee an agreement subrogating insurer for the amount paid, and assigning to insurer a proportionate part of the mortgage debt. The mortgagor brought this action to have the amount paid to the mortgagee applied on the debt and to have the subrogation agreement between the mortgagee and insurer canceled. *Held:* Agreements in the policy contrary to statutory provisions are void, and the only statutory provision relating to subrogation, N. C. Code, 6437, does not provide that insurer should be subrogated to rights of the mortgagee against mortgagor, and under the facts of this case insurer is not entitled to the subrogation claimed upon any equitable principle, and insurer's subrogation receipt from the mortgagee is not valid or binding as against the owner mortgagor. *Buckner v. Ins. Co.*, 640.

2. Upon paying the loss by fire, insurer is entitled to subrogation to the rights of insured against the third person tort-feasor causing the loss, to the extent of the amount paid, both by provision of statute, N. C. Code, 6437, and under equitable principles. *Ibid.*

d Contribution Among Coinsurers

Judgment was awarded against insurer on a policy of automobile accident insurance, and insurer asked that another insurer be joined, and that it have judgment against such other insurer for one-half plaintiff's judgment, alleging that such other insurer had also issued a policy of accident insurance on the same car. The other insurer demurred, contending that its policy was invalid. *Held:* The demurrer should have been overruled, the invalidity of the policy not being raised by demurrer. *Sutton v. Ins. Co.*, 826.

P Actions on Policies.

a Parties and Pleadings

The invalidity of a policy may not be presented by demurrer, but must be raised by answer. *Sutton v. Ins. Co.*, 826.

b Policy Provisions Limiting Time for Institution of Action

Insurer denied liability to the owner mortgagor, but paid a sum agreed to the mortgagee in discharge of its liability under the standard mortgage clause of the policy, and took from mortgagee a subrogation receipt as against the owner mortgagor. The owner mortgagor brought this action to have the sum paid applied to the mortgage debt and to have the subrogation agreement canceled. *Held:* The provision of the policy prescribing the time within which action on the policy must be brought has no application, plaintiff's action being an independent action to have the proceeds of the policy applied upon the debt under the provision of the policy giving him the right to direct such application of the proceeds. *Buckner v. Ins. Co.*, 640.

c Relevancy and Competency of Evidence

An exception to the admission of the testimony of the former collecting agent for defendant mutual benefit association, tending to establish

Insurance P c—*continued.*

a custom of defendant in accepting dues within thirty days after due date, *is held* untenable. *Shackelford v. Woodmen of the World*, 633.

R Accident and Health Insurance.

a Accidental Injuries

1. Insured, under a policy of accident and health insurance, suffered an accidental injury, and accepted from insurer a fixed amount in settlement for all claims for the injury under the policy. About three months thereafter, insured accidentally fell and became totally disabled. *Held:* Whether the disability resulted solely from the first accident or whether the first accident was a contributing cause of the disability, in which events insurer would not be liable under the terms of the policy, or whether the disability resulted independently and exclusively from the second accident, in which event insurer would be liable, is a question for the determination of the jury upon conflicting evidence. *Dilling v. Ins. Co.*, 546.

2. Provision in accident policy that person over stipulated age should not be covered thereby *held* provision limiting liability. *McCabe v. Casualty Co.*, 577.

3. The policy in question provided two schedules of benefits for illness causing total temporary disability and loss of time, and necessitating regular visits by a physician, the larger benefits to be paid for such illness which continuously confined insured within doors, and the smaller schedule for such illness which did not continuously confine insured indoors. Plaintiff's evidence tended to show illness causing total temporary disability and necessitating regular attendance by a physician, but that on orders of his physician he took infrequent walks of not more than two blocks from his home. *Held:* The provision relating to continuous confinement within doors was to describe the character and extent of illness rather than to prescribe limitations upon insured's conduct, and the evidence was properly submitted to the jury under correct instructions by the court on the question of whether insured's illness and disability came within the provision for the greater or lesser benefits. *Thompson v. Accident Asso.*, 678.

4. The policy in suit insured defendant for accidental injuries sustained in his occupation of buyer and seller of lumber on the yards of his employer, and provided for a smaller rate of compensation if accidental injury occurred while insured was engaged in a more hazardous duty. The evidence disclosed that insured was injured while directing other employees in moving a car loaded with lumber when the car accidentally ran over his foot. *Held:* The evidence discloses that insured was injured while engaged in a duty incidental to his occupation as a buyer and seller of lumber, and not one requiring the handling of lumber, and insured's recovery is not governed by the schedule for injuries sustained in more hazardous duties. *Ins. Co. v. Nichols*, 817.

c Disability Clauses in Life Policies

1. The evidence in this case *is held* to show that insured's disability resulted from a disease existing prior to the issuance of the policy,

Insurance R c—*continued.*

which, by the terms of the policy, was excluded from the disability benefits. *Smith v. Ins. Co.*, 504.

2. Evidence *held* sufficient to be submitted to jury on issue of insured's total and permanent disability. *Leonard v. Ins. Co.*, 523.

3. Evidence *held* insufficient to show insured was totally disabled while the policy was in force. *Whiteside v. Ins. Co.*, 536.

4. Whether employee was disabled at time of termination of employment *held* for jury under conflicting evidence. *Fore v. Assurance Society*, 548.

Interest.

B Items Which Draw Interest.

b Debts in General

A debt draws interest from the date it becomes due, and when interest is not made payable on the face of the instrument, payment of interest will be imposed by law in the nature of damages for the retention of the principal of the debt. C. S., 2309. *Bank v. Ins. Co.*, 17.

Interveners. (See Parties A c.)

Intoxicating Liquor. (Enjoining proceedings under repeal statute see Injunctions B e; delivery of intoxicating liquor does not constitute payment see Payment C d.)

B Possession.

a Legal and Illegal Possession

The provision of N. C. Code, 3411 (j), that a person may legally possess intoxicating liquor in his dwelling for his personal consumption and the consumption of his family and *bona fide* guests is limited by the terms of the statute to a private dwelling occupied and used exclusively as a dwelling, and a person may not lawfully possess intoxicating liquor in a building or structure used and operated by such person as a filling station and dwelling combined when the parts of the structure used for the respective purposes are connected. *S. v. Hardy*, 83.

b Actual and Constructive Possession

Where a husband has knowledge of his wife's illegal possession of intoxicating liquor on the premises, and permits her to keep it there, the husband is equally guilty with the wife of illegal possession. *S. v. Hardy*, 83.

G Prosecution and Punishment.

d Instructions and Directed Verdict

Evidence that defendant had over a gallon of intoxicating liquor in a bedroom in the back of a filling station operated by him, together with a siphon and several empty bottles, and that in the front room of the filling station there were several glasses smelling strongly of whiskey, and that defendant had been seen passing pint bottles containing some white liquid to several customers of the station, and that he was arrested as he came out of the back room with a pint bottle of whiskey in his hand, *is held* sufficient to overrule defendant's motion for judgment as of nonsuit in a prosecution for

Intoxicating Liquor G d—*continued.*

possession of intoxicating liquor for the purpose of sale, and under the presumption raised by such possession under the provisions of C. S., 3379 (2), to support a directed verdict of guilty in the absence of evidence explaining such possession or showing that it was lawful. *S. v. Langley*, 178.

e Effect of Repeal Statute

1. The general prohibition law of the State was not repealed by ch. 493, Public Laws of 1935, as to counties not named in the latter act, its provisions applying by express provision only to the counties therein named, and it is unlawful to possess intoxicating liquor for the purpose of sale in any counties of the State not named in the act of 1935. C. S., 3379. *S. v. Jones*, 49.

2. Defendants were indicted, tried, and convicted of having illegal possession of intoxicating liquor before the effective date of a statute repealing the prohibition statute in the county. *Held:* The repeal of the statute after the conviction of defendants does not entitle defendants to be discharged. *S. v. Hardy*, 83.

3. C. S., 3379, providing that the possession of intoxicating liquor for the purpose of sale is illegal and that possession of more than one gallon of intoxicating liquor shall constitute *prima facie* proof of a violation of the statute is still in force in all the counties of the State, unaffected by ch. 493, Public Laws of 1935, the act of 1935 not being in conflict therewith, since it purports to repeal only the Turlington Act, Art. 8, ch. 66, C. S., Vol. III, and to provide for sale and possession in the designated counties only by the control boards therein provided for. *S. v. Langley*, 178.

Judges. (One Superior Court Judge may not hear matter determined by another Superior Court Judge see Courts A f.)

Judgments.

B Judgments by Consent. (Attack and setting aside see hereunder K a.)

a Nature and Essentials in General

A consent judgment is an agreement of the parties with the sanction of the court, having the force and effect of a judgment, and its validity depends upon the consent of the parties, either in person or by a duly authorized attorney acting within the scope of his authority, and the court has no authority to modify or amend the judgment except by consent of the parties. *Dietz v. Bolch*, 202.

C Judgments by Confession.

b Form and Requisites

Where verified statements, sufficient in form and contents under the statute to confer jurisdiction on the clerk to render judgments by confession, are filed in the office of the clerk, and the clerk enters on his judgment docket the judgment which the debtor authorized the court to render on each statement, but fails to endorse the judgment of the court on the verified statements, such failure is an irregularity, but does not affect the validity of the judgments by confession, which the entries on the judgment docket show were rendered by the court, and such judgments are erroneously set aside upon motion thereafter made by a subsequent judgment creditor. C. S., 624, 625. *Cline v. Cline*, 531.

Judgments—*continued.*

D Judgments by Default.

a In General

A judgment by default on a complaint failing to state a good cause of action is irregular. *Hood, Comr., v. Stewart*, 424.

H Lien.

a Attachment of Lien

A judgment against an executor or administrator in his representative capacity merely establishes the debt sued on and does not constitute a lien upon the lands of the estate, in the absence of a stipulation in the judgment to the contrary, until leave of court is granted for execution for failure of the representative to pay the ratable part of such judgment. N. C. Code, 131, 132, 166. *Tucker v. Almond*, 333.

K Attack and Setting Aside. (Attack of summary stock assessment judgment see Banks and Banking H a.)

a Consent Judgments

A consent judgment was entered against two defendants, jointly and severally, upon a note, the judgment being signed by the parties and their attorneys, and approved by the court. Thereafter a modification of the judgment was entered by which the liability of one defendant was made primary and the other secondary, the modification being signed by attorneys purporting to act for the parties and approved by the court. Thereafter the defendant, whose liability was made primary by the modification of the original judgment, filed a petition alleging that the modification was made without his consent, and that the attorney purporting to act for him had not been employed by him and was without authority. *Held:* The petitioner was entitled to a hearing upon the petition, since the modification of the judgment was invalid, in the absence of his consent either personally or by duly authorized counsel, and whether his liability on the note was primary or secondary is immaterial, since the original judgment imposing joint and several liability upon defendants, having been consented to by both defendants, stands until modified by consent or until impeached by appropriate action. *Dietz v. Bolch*, 202.

d Irregular Judgments

Judgment by default was entered against the estate upon a complaint alleging the execution of a note to plaintiff by the executrix of the estate, but failing to allege that the note was for a debt existing at the date of testator's death. Thereafter the executrix filed a motion in the cause to set aside the judgment, the heirs at law not being made parties. *Held:* The judgment against the estate was irregular and was properly set aside upon the executrix' motion, the motion to set aside having been made within a reasonable time, and a meritorious defense having been shown on behalf of the estate. *Hood, Comr., v. Stewart*, 424.

f Procedure to Attack or Set Aside

1. A motion in the cause is the proper procedure to attack a consent judgment on the ground that in fact movant had not consented to the judgment, either personally or by duly authorized counsel. *Dietz v. Bolch*, 202.

Judgments K f—*continued.*

2. A judgment by default on a complaint stating a good cause of action in a defective manner is erroneous, and may be corrected only by appeal, while a judgment by default on a complaint wholly insufficient to state a cause of action is irregular, and may be set aside by motion in the cause upon a showing of merit and the absence of laches. *Hood, Comr., v. Stewart*, 424.

3. C. S., 600, has no application to a motion to set aside a judgment on the ground that the judgment is irregular. *Ibid.*

4. An independent action to vacate the order of confirmation is the proper remedy to attack a foreclosure sale for fraud and collusion, and defendants' contention that the remedy is by motion in the cause is untenable. *Bundy v. Sutton*, 571.

L Operation of Judgments as Bar to Subsequent Actions.

a Judgments as of Nonsuit

The finding by the court that the evidence offered by plaintiff was substantially the same as that offered in a prior action between the same parties which had been nonsuited, is sufficient to sustain the court's judgment dismissing the action on the ground of *res judicata*. *Batson v. Laundry*, 223.

b Matters Concluded or Embraced in Pleadings

1. Question of dower *held* not involved in prior suit against widow individually and judgment *held* no bar to claim of dower. *Odom v. Palmer*, 93.

2. Judgment exempting endorser from liability on note on grounds that his signature was conditional *held* not to bar payee's action on original contract requiring the execution of the note by the endorser. *Queen v. DeHart*, 414.

3. In an action for disability benefits instituted by insured in a recorder's court, within the time allowed in the incontestability clause for rescission by insurer, judgment was rendered in insurer's favor adjudging that insured recover nothing, and that the policy be canceled and rescinded for fraud in its procurement. Insured appealed but took a voluntary nonsuit in the Superior Court, and thereafter instituted a new action, after the expiration of the time allowed in the policy for rescission by insurer, to recover disability benefits accruing since the rendition of the judgment in the recorder's court. *Held:* The recorder's court was without jurisdiction to grant the affirmative equitable relief of rescission, and its judgment of rescission was void and does not bar insured from setting up in the second action the incontestability clause in the policy to prevent insurer from setting up the right to rescind the policy for fraud in its procurement. *Mauney v. Ins. Co.*, 499.

N Suits on Foreign Judgments.

b Defenses

1. The only defenses that may be interposed to an action on a judgment of another state are that the court rendering the judgment was without jurisdiction, or that the judgment was procured by fraud. *Dansby v. Ins. Co.*, 127.

Judgments N b—*continued.*

2. Where, in a suit on a judgment of another state, the defendant demurs, the only defense that may be considered is whether the court rendering the judgment had jurisdiction, since whether the judgment was procured by fraud cannot be considered on a demurrer, and the question of jurisdiction will be determined in accordance with the facts alleged in the complaint and recited in the judgment attached thereto, since the demurrer admits for its purposes the facts properly pleaded. *Ibid.*

3. This action was instituted upon a judgment by default rendered by a county court of the State of Mississippi upon a policy of insurance issued by a domestic company. It appeared from the complaint and the judgment attached thereto that at the time of instituting action in the courts of Mississippi defendant company was no longer doing business in Mississippi, and process was served on it by service on its Insurance Commissioner, Mississippi Code of 1930, sec. 497, and *alias* summons served by delivering a true copy of same to the resident agent who represented defendant company at the time the policy was issued, and by mailing a copy by registered mail to the home office of defendant company in this State. Mississippi Code of 1930, sec. 4167. *Held:* Under the statutes of the State of Mississippi, as construed by its Supreme Court, the county court of Mississippi obtained jurisdiction of the action, and defendant's demurrer in the action on the judgment of the Mississippi court was properly overruled. *Ibid.*

P Assignment of Judgments.

b Rights of Assignee

Plaintiff assignee of a judgment against an executor in his representative capacity for a stock assessment made on shares of stock of a bank in liquidation, sought by subsequent proceedings to charge the executor personally with liability upon allegations that the executor personally owned the bank stock, legally or equitably. *Held:* The mere assignment of the judgment, without more, transferred only the rights of the assignor of the judgment in his status of judgment creditor and not his personal rights not incident to such status, and plaintiff was not entitled to set up the personal liability of the executor. *Jones v. Franklin Estate*, 585.

Judicial Sales.

C Title and Rights of Purchaser.

a In General

The last and highest bidder at a judicial sale is merely a preferred bidder with no rights in the property in law or equity until his bid has been accepted and confirmed by the court. *Richmond County v. Simmons*, 250.

Jury. (Right to trial by, see Constitutional Law F d; waiver of jury trial in civil actions see Controversy Without Action, Trial H.)

A Competency of Jurors, Challenges, and Exceptions.

b Challenges for Principal Cause

In this prosecution for homicide it appeared that one of the juror's deceased uncle's wife's sister had married the father of deceased.

Jury A b—*continued.*

Held: The juror was not related to deceased in law either by consanguinity or marriage, and a challenge to the juror's competency was properly denied. *S. v. Buffkin*, 117.

c Challenges to the Favor

Defendant challenged the competency of one of the jurors during trial on the ground that before trial the juror had expressed an opinion as to defendant's guilt, although he had stated on his *voir dire* that he had formed no opinion. The trial court heard evidence and found as a fact that the witness was impartial and competent. *Held:* The challenge was to the favor rather than a challenge for principal cause, and the finding of the trial court is not reviewable. *S. v. Buffkin*, 117.

d Examination and Questioning Prospective Jurors

The court has discretionary power, upon its finding that the inquiry is in good faith, to allow plaintiff's counsel to ask prospective jurors if they have any business connections with a certain insurance company, it having been made to appear to the court that defendant's car, involved in the collision in suit, was insured by such company, and an exception to the court's allowing such inquiry is untenable. *Sparks v. Holland*, 705.

Laches. (See Equity B.)

Landlord and Tenant. (Ejectment of tenant see Ejectment.)

B Leases in General.

c Duty to Repair

Lessors are not obligated to keep the premises in repair in the absence of an agreement in the lease in respect thereto. *Mortgage Co. v. Massie*, 146.

D Terms for Years.

b Assignment and Subleasing

Where the lessee forfeits and surrenders all rights under his lease, the lessor may recover the premises from a sublessee of the lessee, even though the sublease has not terminated under its terms. *Lange v. Evans*, 747.

c Termination by Destruction or Disrepair of Premises

Where lessors do not agree to keep the leased premises in repair, neither the lessee nor the assignee of the lessee may abandon the premises because they become gradually unfit for use, even though the lessee or sublessee give notice and there is evidence that the repairs necessary would cost more than the amount of a year's rent, the lessors not being under obligation to keep the premises in repair in the absence of an agreement to that effect, and the evidence being insufficient to show such damage to the building as would have enabled the lessee or sublessee to surrender the premises under the provisions of C. S., 2352. *Mortgage Co. v. Massie*, 146.

d Termination or Cancellation by Terms of the Lease

The lease in question provided that it was made subject to an option given a third person by lessor. A letter written by lessees prior to the execution of the lease in which lessees stated they could not

Landlord and Tenant D d—*continued.*

obtain a lease without a provision that they should vacate upon the exercise of the option, was admitted in evidence, and there was evidence that upon the exercise of the option by the third person and demand for the premises by lessor, lessees agreed to vacate. *Held:* The court's holding, upon agreement of the parties to trial by the court, that the lease terminated upon the exercise of the option by the third person, is without error, the instrument being construed in the light of the interpretation given it by the parties themselves. *Fayetteville Light Infantry v. Dry Cleaners*, 14.

Libel and Slander.

A Elements and Essentials of Right of Action.

a Words Actionable Per Se

Plaintiff was a textile operative. Defendant publishing company printed in its newspaper a news item falsely stating that defendant had been arrested as a ringleader in a disturbance occurring during a strike. *Held:* The words were actionable *per se* as tending to injure plaintiff by preventing him from securing employment in his calling as a textile operative, entitling plaintiff to recover nominal damages, at least. *Lay v. Publishing Co.*, 134.

b Defamation and Damage

Where plaintiff's evidence establishes a false publication, and defendant's evidence shows that the publication was made in good faith through error, and that a correction and retraction was published upon defendant's ascertaining the facts, plaintiff is entitled to recover the actual damage sustained by him. C. S., 2430. *Lay v. Publishing Co.*, 134.

c Publication

1. In an action for slander, a motion to nonsuit on the ground that there was no conscious publication of the slanderous remarks is improperly granted when the evidence shows that a third person was present and heard the slanderous remarks, although he could not have been seen by the person uttering them, and there is evidence of facts sufficient to support the inference that the person uttering the remarks was conscious of the presence of such third person. *Alley v. Long*, 245.

2. The evidence disclosed that plaintiff, a shipping clerk in charge of checking out merchandise from the corporate defendant's warehouse, was charged by the individual defendant, the corporation's general manager, with allowing drivers to take out merchandise and selling it and "splitting" with the drivers, the general manager adding that "all the drivers you have over there are crooked," and that the only person overhearing the conversation of the general manager with plaintiff was one of the drivers referred to. *Held:* The driver overhearing the remarks was not directly charged with participating in the crime, and the corporate defendant's motion to nonsuit on the ground that there was no publication sufficient to support an action for slander should have been overruled. *Ibid.*

d Malice

Malice may not be inferred by the jury from a false publication when defendant's uncontradicted evidence rebuts the presumption by

Libel and Slander A d—*continued.*

showing that the publication was made in good faith through error, and that a correction and retraction was published upon defendant's ascertaining the facts. *Lay v. Publishing Co.*, 134.

D Actions.

d Sufficiency of Evidence and Nonsuit

1. Where plaintiff in an action for libel introduces evidence tending to show a false publication of words actionable *per se*, defendant's motion for judgment as of nonsuit should be denied, especially when plaintiff introduces evidence of actual damage resulting from such publication. *Lay v. Publishing Co.*, 134.

2. Plaintiff instituted this suit for libel against a magazine and the publisher thereof, and introduced evidence that an article published in the magazine tended to hold her up to ridicule and contempt by charging she kept a number of dogs in her house under conditions which would make her place insanitary and her manner of living indecent. Defendants did not plead privilege, justification, or mitigating circumstances, C. S., 542. *Held:* The granting of defendants' motion to nonsuit was error, since plaintiff has shown the article to be libelous, and since, on the state of the pleadings, it is immaterial whether the article was libelous *per se* or only *per quod*. *Harrell v. Goerch*, 741.

e Damages Recoverable

Plaintiff may not recover punitive damage of a defendant in an action for libel or slander in the absence of malice, or wantonness and recklessness on the part of defendant. C. S., 2430. *Lay v. Publishing Co.*, 134.

Life Estates and Remainders.

B Rights and Liabilities of Life Tenants as Against Remaindermen.

c Taxes and Assessments

1. A life tenant is liable for taxes assessed against the property during his lifetime, C. S., 7982, and when he dies without paying same they constitute a claim against his estate for taxes assessed previous to his death within the meaning of C. S., 93, and are payable in the third class stipulated by the statute fixing priority of payment of claims against the estate of an insolvent. *Rigsbee v. Brogden*, 510.

2. Street and sidewalk assessments constitute a lien against the property not collectible out of other properties belonging to the owner, and by provision of statute a life tenant of the property is not liable for the whole assessment, C. S., 2718, but such assessment is to be proportioned between the life tenant and remainderman, C. S., 2720, and upon the death of the life tenant the assessments for public improvements levied against the property prior to his death do not constitute a preference against his estate payable in the third class of priority as a tax assessed on the estate prior to his death. C. S., 93. *Ibid.*

3. Charges for water and gas connections, incurred during the lifetime of a life tenant and unpaid at his death, do not constitute a preferred claim against his estate as taxes assessed on the estate prior

Life Estates and Remainders B c—*continued.*

to his death, C. S., 93, since in no event would such charges stand upon a higher plane than assessments for permanent improvements. C. S., 2710 (4), 2718. *Ibid.*

4. A tax-sale certificate in the hands of a remainderman, representing taxes paid by the remainderman during the lifetime of the life tenant, may not be proved as a preferred claim against the estate of the life tenant, since the remainderman's sole remedy upon the tax-sale certificate is by foreclosure under the provisions of C. S., 8028. *Ibid.*

d Proceeds of Fire Insurance Policies

Proof of life tenant's receipt of proceeds of fire insurance does not alone entitle remainderman to amount thereof from life tenant's estate. *Rigsbee v. Brogden*, 510.

C Sale of Estate for Reinvestment.

a Parties and Procedure

All persons having interest in estate, vested or contingent, having been made parties, the proceedings were properly instituted, and the joinder of other persons, having no interest in the estate under a proper interpretation of the will creating the estate, was not necessary. *Lancaster v. Lancaster*, 673.

Limitation of Actions.

A Statutes of Limitation. (Legislative power to change periods of limitation see Constitutional Law I c.)

b Actions Barred in Two Years

Where an action to recover the penalty for usury is not instituted until more than two years after the last payment of interest, the action is barred by the statute of limitations. C. S., 442. *Woody v. Ins. Co.*, 364.

d Actions Barred in Ten Years

1. The ten-year statute of limitations applies to principals in an indemnity bond under seal, but not to sureties therein. C. S., 437. *Trust Co. v. Williams*, 806.

2. Right to foreclose deed of trust given as additional security by person not liable on note *held* governed by ten-year statute and not three-year statute. *Carter v. Bost*, 830.

B Computation of Period of Limitation.

a Accrual of Cause of Action

1. An action to recover the penalty for usury accrues upon payment of the usurious charge, and is barred when instituted more than two years after the last payment. *Woody v. Ins. Co.*, 364.

2. The evidence favorable to plaintiffs tended to show that defendant's dam had been erected for over twenty years, that defendant had periodically opened the flood gates and cleaned the pond, that for several years prior to the institution of the action defendant had not so cleaned the pond, and that the bed of the stream had gradually built up, and that after heavy rains the water was ponded on plaintiffs' land and deposited sand thereon until at the time of institution of the action the sand was over two feet in depth, ren-

Limitation of Actions B a—*continued.*

dering it unfit for cultivation, but that the land had not been substantially damaged or rendered unfit for cultivation except during the two years prior to the institution of the action. *Held:* Whether the action was barred by the three-year statute of limitations was properly submitted to the jury upon the evidence under instructions that if all the damage was caused by a wrongful act committed more than three years before the institution of action the action was barred, and that recovery of all damage inflicted more than three years prior to the institution of the action was barred, and the jury's finding from the evidence that the action was not barred is upheld. C. S., 441 (3). *Teseneer v. Mills Co.*, 615.

3. A cause of action on a bond of a register of deeds accrues at the time of the register's failure to properly register an instrument, and not at the time of the discovery of such failure. *Bank v. McKinney*, 668.

4. Ordinarily, a cause of action does not accrue on an indemnity bond until loss or damage is sustained, or where the bond provides payment of loss upon demand by those indemnified, at the time of such demand. *Trust Co. v. Williams*, 806.

b Fraud, Concealment, and Discovery of Cause of Action

1. Action to surcharge and falsify administrator's account is not barred when cause of action is concealed by fraud. *Hanna v. Howard*, 161.

2. Action against register's bond for failure to register instrument accrues at time of failure and not its discovery. *Bank v. McKinney*, 668.

d Disabilities

Where, at the time of the accrual of the cause of action, the person entitled to bring action is not under disability, the statute of limitations will not cease to run because thereafter the right passes to an infant. *In re Will of Evans*, 828.

g Institution of Action

1. Defendant insurer contended that the policy in question covered only one store, comprising a compartment in plaintiffs' building. Plaintiffs filed a reply, alleging that the policy was intended to cover and did cover the whole building, which contained three compartments or stores. Defendant, in its rejoinder, set up the defense of the three-year statute of limitations, claiming that plaintiffs' right to reformation of the policy as to the property covered was barred, since more than three years had elapsed since the issuance of the policy and the damage to the property by fire. *Held:* Plaintiffs' right to relief is based upon a construction of the policy and not upon reformation thereof as to the property covered, and under the pleadings and facts the statute of limitations is not applicable. *Williams v. Ins. Co.*, 765.

2. Where action is instituted by a bank as holder of an indemnity bond, and thereafter, upon insolvency of the holder, the statutory receiver is made a party or allowed to intervene as the equitable owner or pledgor, the cause of action is not changed, but is a continuation

Limitation of Actions B g—*continued.*

of the original action, and the period of limitation will be computed as of the date of the institution of the original action. C. S., 547. *Trust Co. v. Williams*, 806.

C Matters Effecting Waiver of Plea or Estoppel.

a Partial Payment

1. Evidence disclosing only that defendant paid plaintiff a sum of money and obtained a receipt therefor, without evidence of the contents of the receipt, or what passed between the parties, is insufficient to show a partial payment on the debt sued on so as to prevent the bar of the statute of limitations, since partial payment, to be effective under the statute, C. S., 416, must be made under circumstances warranting the clear inference that the debtor recognizes the debt sued on as then existing and his obligation to pay same. *Bryant v. Kellum*, 112.

2. Payment of interest and part payment of principal by the maker of a note, without agreement for extension of time for payment of the principal of the note for a definite period or to a date certain, does not prevent the running of the statute of limitations in favor of the endorsers, even though the note provides on its face for waiver by all parties to the note of extension of time for payment. *Miller v. Bumgarner*, 735.

b New Promise and Agreements to Remain Bound

A bank assigned its assets to another bank for liquidation, and certain officers and stockholders of the assignor bank executed as sureties a bond of the assignor bank indemnifying the assignee bank from loss in such liquidation. Thereafter, in order to have the assets of the assignor bank transferred from the assignee bank to the statutory receiver for liquidation, the officers and stockholders executed a resolution addressed to the statutory receiver, agreeing to remain bound on the indemnity bond until the assignee bank had been reimbursed for moneys advanced in the liquidation of the assets of the assignor bank. *Held:* The resolution, although directed to the statutory receiver, was executed for the benefit of the assignee bank, and was supported by sufficient consideration, and constituted a new promise from which the statute of limitations began to run. *Trust Co. v. Williams*, 806.

E Pleadings, Evidence, and Trial.

c Evidence and Burden of Proof

1. Where the statute of limitation is pleaded, the burden is on plaintiff to show that the action was brought within the time allowed by the statute. *Bryant v. Kellum*, 112.

2. Exclusion of evidence tending to show that cause of action was not concealed *held* error. *Hanna v. Bryant*, 161.

3. Where there is conflict in the evidence as to whether defendant's increased use of its easement for a transmission line by the addition of new wires and a substation on plaintiffs' land resulted in adding to the burden of the easement theretofore acquired by defendant by adverse user, and it appears that plaintiffs' action to recover the alleged additional damage was instituted within the time allowed by the applicable statute of limitations pleaded by defendant, the

Limitation of Actions E c—*continued.*

conflicting evidence on the question of additional damage inflicted since the bar of the statute should be submitted to the jury, and an instruction directing that plaintiffs' action was not barred is reversible error. *Blevins v. Utilities, Inc.*, 683.

4. Where, in an action for libel, defendants admit that the article was published in defendant magazine on a certain date, and plaintiff shows that the action was instituted one day less than a year thereafter, defendant is not entitled to nonsuit upon his plea of the one-year statute of limitations, C. S., 443 (3). *Harrell v. Goerch*, 741.

Manslaughter. (See Automobiles G b.)

Marshaling.

A Nature and Scope of Remedy.

c Where Three Liens Are Involved

Equity will not decree marshaling in favor of second lienor to the prejudice of third lienor. *Hood, Comr., v. Macclesfield Co.*, 277.

Master and Servant.

C Master's Liability for Injuries to Servant.

b Tools, Machinery, and Appliances and Safe Place to Work

In action to recover for injuries to employee sustained in fall as she was walking to work on path not under employer's control, evidence of negligence *held* insufficient. *Allen v. Cotton Mills*, 238.

D Liabilities for Injuries to Third Persons. (Employer's liability for employee's negligent driving see Automobiles E b.)

b Scope of Employment

Ordinarily, a master is not liable for a willful and intentional injury inflicted by the servant to vent his personal spite and hatred, although at the time the servant is on his master's business. *Jackson v. Scheiber*, 441.

e Liability of Servant to Third Persons

1. Agent or servant is liable to third person injured by negligence of malfeasance or nonfeasance. *Trust Co. v. R. R.*, 304.

2. A servant may be held liable by a third person for an injury sustained as a result of the servant's negligence in the performance of a duty owed to the public as well as to the master. *Williams v. Stores Co.*, 591.

f Liability of Independent Contractor to Third Persons

Ordinarily, an independent contractor is not liable to a third person for an injury sustained after completion of the contract and the acceptance of the work, but he may be held liable in such circumstances when he turns the work over in such a defective condition that it is imminently dangerous to third persons. *Williams v. Stores Co.*, 591.

E Federal Employers' Liability Act.

b Nature and Extent of Employer's Liability

1. Plaintiff was employed in the operation of a ditching machine mounted on a flat car. The evidence favorable to plaintiff tended

Master and Servant E b—*continued.*

to show that as plaintiff was climbing on the flat car in the usual manner, with his foot on the track on which the machine was mounted on the car, the engineer, defendant's *alter ego*, who could have seen plaintiff, pulled the lever moving the shovel without giving signal or warning, and that the machine, which had been held back by the shovel resting on the flat car, rolled down the inclined track and crushed plaintiff's foot. *Held:* The evidence was sufficient to be submitted to the jury on the issues of negligence and proximate cause under the Federal Employers' Liability Act. *Ford v. R. R.*, 108.

2. Evidence *held* sufficient for jury on question of whether flagman was thrown from rear platform of train by reason of negligent operation of train. *McGraw v. R. R.*, 432.

c Contributory Negligence and Assumption of Risks

1. The evidence disclosed that plaintiff employee, while engaged in scraping rust from a bridge in the performance of his duties in interstate commerce, was injured when a piece of rust flew in his eye, that plaintiff understood the hazards of the work, and some two weeks before the injury had asked his foreman to furnish him goggles for the work, and that the foreman had promised to do so as soon as possible. *Held:* Whether more than a reasonable time elapsed between the promise and the injury and whether the work was so intrinsically dangerous and injury so imminent that a reasonably prudent man would not have relied upon the promise and continued in the employment are questions for the jury under the evidence, the rule being that an employee may rely upon such promise for a reasonable time if the danger is not so imminent that a reasonably prudent man would not rely thereon, and that during such time the employer impliedly agrees to assume the risk, and that what is a reasonable time under the circumstances is ordinarily a question for the jury. *Etheridge v. R. R.*, 326.

2. Under the Federal rule, assumption of risk is a complete bar to recovery by an employee under the Employers' Liability Act. *Ibid.*

3. Plaintiff employee testified that, aware of the danger inherent in the work of scraping rust from a bridge preparatory to painting it, he asked his foreman for goggles, and that the foreman promised to furnish same as soon as possible, that he resumed work and was injured about two weeks thereafter when a piece of rust flew in his eye. On cross-examination plaintiff employee was asked whether he thought he would get the goggles and plaintiff's objection to the question was sustained, and defendant excepted. *Held:* Defendant's exception must be sustained, the question being competent on the issue of whether plaintiff employee continued to work in reliance on the promise to furnish goggles. *Ibid.*

4. Evidence *held* for jury on issue of assumption of risks under the Federal Act. *McGraw v. R. R.*, 432.

F Workmen's Compensation Act.

a Nature, Construction, and Operation in General

1. Plaintiff employee brought action against the insurance carrier and its agent, alleging that after plaintiff's injury by accident arising

Master and Servant F a—*continued.*

out of and in the course of his employment, the agent, on behalf of insurer, induced plaintiff to dispense with the services of his physician and consult physicians selected by insurer, and that insurer promised to provide hospitalization and surgical services recommended by insurer's physicians, but failed to do so to plaintiff's permanent injury. *Held:* Insurer's obligation to furnish medical attention necessary to plaintiff's complete recovery was founded on the Workmen's Compensation Act, N. C. Code, 8081 (h), (gg), and the Industrial Commission has exclusive jurisdiction of plaintiff's claim, and the demurrer of each defendant was properly sustained. *Hedgepeth v. Casualty Co.*, 45.

2. Construing the amendment of the Workmen's Compensation Act by sec. 1, ch. 449, Public Laws of 1933, *it is held:* An injured employee may maintain an action in his own name against a third person tort-feasor when the employer has failed to institute such action within six months after the injury, and any recovery should be paid in the same manner as if the employer had brought the action. *Ikerd v. R. R.*, 270.

b Injuries Compensable

1. In order for a death to be compensable under the Workmen's Compensation Act, it is necessary that the death result from an injury by accident, which is an injury produced by a fortuitous cause. C. S., 8081 (i), prior to the amendment of ch. 123, Public Laws of 1935. *Slade v. Hosiery Mills*, 823.

2. The evidence tended to show that the employee was required to wash certain machines and remove ashes from the furnaces, that the day in question was hot, but not excessively so, that the employee got wet in washing the machines, although furnished with special clothes, including rubber boots, and that in removing the ashes he got in the sunshine and open air, and that the sudden change in temperature in going from the hot room into the open air caused him to contract pneumonia, from which he died. *Held:* The evidence does not disclose any accidental injury, there being nothing unusual or unexpected in the employee getting wet in washing the machines or in getting into the sunshine and open air in removing the ashes, and compensation should have been denied. *Ibid.*

d Proceedings and Hearings

A proceeding under the Workmen's Compensation Act to determine liability of defendants to the next of kin of a deceased employee should not be brought in the name of the deceased employee. *Slade v. Hosiery Mills*, 823.

Money Received.

A Right of Action and Defenses.

b Acceptance of Goods or Choses in Action Under Implied Agreement

An instruction to the jury that if plaintiff turned over to defendants certain choses in action against a bank, and if defendants received said choses in action and used them for the purposes intended, and never restored same to plaintiff, said choses in action being the consideration of the contract under which defendants promised to

Money Received A b—*continued.*

execute a note in plaintiff's favor for the amount of the choses in action, that the law would imply a promise on the part of defendants to pay plaintiff the amount called for in the contract, although one defendant refused to execute the note called for in the contract, *is held* without error under the facts of this case. *Queen v. DeHart*, 414.

Mortgages.

A Form, Requisites, and Validity.

b Conveyance of Legal Title to Trustee

A deed of trust executed to an individual trustee in trust for a corporate *cestui que trust* should convey the legal title to the trustee, "his heirs and assigns forever," and not to him, "its successors and assigns forever." *Ins. Co. v. Lassiter*, 156.

C Construction and Operation.

f Office, Appointment, and Tenure of Trustee

1. The trustee named in a deed of trust acts in a dual capacity for the trustor and *cestui que trust* to carry out the provisions of the instrument. *Ins. Co. v. Lassiter*, 156.

2. Purchaser of debt secured by deed of trust *held* not empowered to appoint substitute trustee under terms of the instrument. *Ins. Co. v. Lassiter*, 156; *Ins. Co. v. Lambeth*, 294.

F Transfer of Mortgaged Property.

d Purchase at Tax Sale by Mortgagee

A mortgagor's equity of redemption is not extinguished by the mortgagee's purchase of the property at a tax foreclosure sale, since the mortgagee holds the superior title thereby acquired in trust for the benefit of himself and the mortgagor, and the mortgagor is entitled to redeem the land by paying the amount due on the mortgage plus the sum paid by the mortgagee by way of taxes. *Pearce v. Montague*, 42.

H Foreclosure.

b Right to Foreclose and Defenses

1. It appeared from the facts alleged in the complaint that defendants required trustors to pay the cost of advertisement and commissions to the trustee before calling off an advertised sale of the property under the terms of the deed of trust, defendants being the *cestui* in the deed of trust and its agent, and that at the time of the advertisement of the property for sale, negotiations were pending, to the knowledge of all parties, for the refinancing of the deed of trust, which was in default. *Held:* Trustors are not entitled to recover the sum voluntarily paid by them to have the sale called off, the trustors having received the consideration agreed upon, and there being no facts alleged tending to show that the payment was induced by fraud on the part of defendants, or mistake on the part of plaintiffs. *Boyles v. Ins. Co.*, 556.

2. Trustors in a deed of trust instituted negotiations for the refinancing of the debt, trustors being in default in payment, and the *cestui* submitted to the proposed lender the amount required by it to cancel

Mortgages H b—*continued.*

its lien. Several months thereafter, the *cestui* had the property advertised for sale under the terms of the instrument. Prior to sale the trustors succeeded in borrowing the money to refinance the deed of trust, and paid the debt and the *cestui* canceled its deed of trust. Trustors instituted this action to recover damages resulting from loss of credit and standing caused by the advertisement of their land for sale. *Held:* The *cestui* had a right, under the terms of the instrument, to advertise the land for sale, and if such advertisement caused injury to trustors, such injury is *damnum absque injuria. Ibid.*

h Execution of Power of Sale

1. Powers of sale in deeds of trust and mortgages will be strictly construed, and all parties to the instrument are entitled to have the power of sale exercised in accordance with its terms. *Ins. Co. v. Lassiter*, 156.

2. Notice of sale and deed to purchaser referring to mortgage and mortgage referring to prior deed sufficiently describing property, *held* to sufficiently identify lands foreclosed. *Blount v. Basnight*, 268.

3. An attack of a foreclosure sale under power of sale contained in the deed of trust on the ground that the sale was not advertised for 22 consecutive days is unavailing, since ch. 96, Public Laws of 1933, changed the statutory minimum for such advertisement from 22 days to 21 days. *Little v. Harrison*, 360.

4. The burden is on the trustor attacking foreclosure for failure of due advertisement to prove such failure, since the execution of the power of sale contained in the instrument is presumed regular. *Little v. Harrison*, 360; *Elkes v. Trustee Corp.*, 832.

j Right of Mortgagee, Trustee, or Cestui to Bid in Property

1. The purchase of property at a foreclosure sale of a deed of trust by the *cestui que trust* will be upheld in the absence of fraud and collusion. *Bunn v. Holliday*, 351.

2. The *cestui que trust* advised the trustee by telephone that it would bid a certain amount for the property. The trustee announced the bid at the sale, and there being no other bid, the bid was reported, confirmed, and deed made accordingly. *Held:* The sale is not voidable on the ground that the trustee could not buy in at his own sale, since it appears that the bid was entered by the *cestui*, who is entitled to bid in the property at the trustee's sale. *Elkes v. Trustee Corp.*, 832.

o Consummation of Sale and Right to Redeem or to Demand Resale

1. Where plaintiffs seek to enjoin the consummation of a foreclosure sale on the ground that the debt was tainted with usury, and ask for an accounting, they must tender the principal of the debt, with legal interest, since the penalties for usury may not be invoked when equitable relief is demanded. C. S., 2306. *Smith v. Bryant*, 213.

2. Where plaintiffs, trustors in a deed of trust, seek to enjoin the consummation of a foreclosure sale had under the power contained in the instrument, and alleged that the price bid at the sale was

Mortgages H o—*continued.*

grossly inadequate, which allegation is denied in the answer, it is error for the court to grant defendants' motion to nonsuit, plaintiffs being entitled to a hearing and a determination of the issue under the provisions of ch. 275, Public Laws of 1933. *Ibid.*

3. Where, in a suit to enjoin the consummation of a foreclosure sale under the provisions of ch. 275, Public Laws of 1933, the issue of whether the bid at the sale was grossly inadequate is raised by the pleadings, the parties are not entitled as a matter of law to have the issue determined by a jury, but the court may hear evidence and determine the issue, and should dismiss the action if he should find that the amount of the bid is the fair value of the land, or should enjoin the consummation of the sale if he should find that the bid is grossly inadequate, in which event a resale may be made by the trustee, either under the power contained in the instrument or under orders of the court. *Ibid.*

p Attack of Foreclosure

1. Complaint *held* to show that plaintiff mortgagors elected to rely upon their right of action for damages against the mortgagee, who had purchased property at the foreclosure sale, for breach of its contract to reconvey the lands to the mortgagors, and plaintiffs were estopped to attack validity of foreclosure and attempt to upset deeds to defendants, who had purchased the property from the mortgagee as purchaser at the sale. *Dennis v. Dixon*, 199.

2. The deed under which the mortgagor acquired title contained a full and accurate description of the land, and the mortgage referred to the deed by book and page number and identified the land as the same embraced in the deed. The notice of foreclosure sale referred to the mortgage by book and page number, as did the deed to the purchaser at the foreclosure sale. *Held:* Under the doctrine of *id certum est quod certum reddi potest*, the description of the lands in the mortgage, the notice of sale, and the deed to the purchaser were sufficient, and the mortgagor's contention that the sale was ineffectual because of insufficient description in the instruments cannot be sustained. *Blount v. Basnight*, 268.

3. The *cestui que trust* purchased the land in question at the foreclosure sale of the deed of trust, and thereafter rented the land to the former owner for three years, the rent for each year being paid by the former owner. *Held:* The former owner is estopped by his acquiescence and attornment to the purchaser from attacking the validity of the foreclosure sale. *Bunn v. Holliday*, 351.

4. The recital of due advertisement contained in the trustee's deed is *prima facie* evidence thereof, and the trustor attacking the foreclosure on the ground that due advertisement was not made has the burden of overcoming such *prima facie* evidence, and when his evidence fails to show that the sale was not advertised as provided by law, defendant's motion to nonsuit is properly allowed, although the evidence may not affirmatively show due advertisement. *Little v. Harrison*, 360; *Elkes v. Trustee Corp.*, 832.

5. Evidence *held* sufficient for jury in this action to set aside foreclosure sale for fraud. *Bundy v. Sutton*, 571.

Mortgages H p—*continued.*

6. Mere inadequacy of purchase price is not sufficient, standing alone, to upset a foreclosure sale. *Elkes v. Trustee Corp.*, 832.

7. An independent action to vacate the order of confirmation is the proper remedy to attack a foreclosure sale for fraud and collusion, and defendants' contention that the remedy is by motion in the cause is untenable. *Ibid.*

r Agreements to Purchase for Benefit of Mortgagor

1. Complaint *held* to show election by plaintiff mortgagors to rely upon breach of mortgagee's breach of contract to reconvey if it became purchaser at sale, and plaintiffs were estopped to attack foreclosure and deed to purchasers from the mortgagee. *Dennis v. Dixon*, 199.

2. Trustor *held* entitled to maintain action for breach of *cestui's* agreement to bid in and convey property to trustor's son. *Bowling v. Bank*, 463.

3. Contract for purchase of property at sale by *cestui* and conveyance to trustor's son *held* not demurrable for indefiniteness. *Ibid.*

s Actions for Damages for Wrongful Foreclosure

Mortgagor *held* entitled to nominal damages only for wrongful foreclosure in absence of showing of actual damages. *Bowen v. Bank*, 140.

t Title and Rights of Purchaser

Facts admitted *held* sufficient to sustain finding that purchaser at sale was not innocent purchaser for value, and purchaser could not resist the setting up of a resulting trust in the lands. *Ins. Co. v. Dial*, 339.

Municipal Corporations. (Taxation see Taxation; election of officers see Elections.)

E Torts of Municipal Corporations.

a Liability in General

Plaintiff brought suit for the death of her intestate, alleging that intestate was killed as she was swinging in a municipal park operated by defendants, and that her death was caused by the negligence of defendant city and of defendant municipal park commission. Defendants demurred on the ground that it appeared from the complaint that they were engaged at the time in the performance of a governmental function. *Held:* The facts alleged in the complaint failing to show as a matter of law that defendants in maintaining the park and providing swings therein were engaged solely in a governmental function, the demurrer was properly overruled, leaving the facts relied on by defendants in support of their defense to be developed on the trial of the action on its merits. *White v. Charlotte*, 574.

c Defects or Obstructions in Streets

1. The complaint in this action against a municipality for wrongful death alleged in effect that the car in which plaintiff's intestate was riding was struck by another car which was negligently operated, and that the car in which intestate was riding was thrown by the impact against a foot-high curb surrounding an unpaved eight-foot

Municipal Corporations E c—*continued.*

space maintained by defendant city in the center of the street, without signals or warnings, and that the curb caused the car in which intestate was riding to overturn, resulting in the death of intestate. *Held:* Whether the defendant city was negligent in maintaining the unpaved space surrounded by a curb in the center of the street is immaterial to plaintiff's right to recover, since defendant city would not be liable to plaintiff under any circumstances, defendant city's negligence, if any, being passive, and the negligence of the driver of the car which struck the car in which intestate was riding being active and the sole proximate cause of intestate's death. *Smith v. Monroe*, 41.

2. The evidence disclosed that piles of sand, intended to be spread over defendant city's unpaved sidewalk, had been allowed to remain at intervals along the sidewalk for a period of some two months, that a pedestrian stepped off the sidewalk into the street in order to avoid the piles of sand, and was struck and killed by an automobile driven by the codefendant. There was evidence that the street was straight and unobstructed, and that the driver of the car was guilty of negligence. *Held:* In an action to recover for the pedestrian's death, the defendant city's motion to nonsuit was properly allowed, since, even conceding that the city was negligent, such negligence was insulated by the intervening negligence of the driver of the car, the negligent operating of a car and the resulting injury to a pedestrian, forced into the street by reason of the piles of sand, not being reasonably foreseeable by the city as a result of the condition of the sidewalk. *Newell v. Darnell*, 254.

3. A guest injured in an automobile accident instituted action against the administrator of the person driving the car at the time of the accident, alleging that her injuries were caused by the driver's negligence. Defendant moved that the town in which the accident occurred be made a party defendant, and upon its joinder, filed answer alleging that the town was negligent in failing to keep its streets in a reasonably safe condition, and that such negligence was the sole proximate cause of the injury. The town filed answer denying negligence on its part and alleging that the negligence of the original defendant's intestate was the sole proximate cause of the injury. Upon the call of the case for trial the town demurred *ore tenus* to the complaint. *Held:* Even construing the complaint and answer of the original defendant, together with the answer of the town under the doctrine of aider, the town's demurrer was properly sustained, since the pleadings allege active negligence on the part of the driver of the car, which insulated the negligence of the town, and must be considered the sole proximate cause of the injury. *Banks v. Joyner*, 261.

G Public Improvements.

i Nature of Lien, Priorities, and Enforcement

Street and sidewalk assessments constitute a lien against the property not collectible out of other properties belonging to the owner, and by provision of statute a life tenant of the property is not liable for the whole assessment, C. S., 2718, but such assessment is to be proportioned between the life tenant and remainderman, C. S., 2720, and upon the death of the life tenant the assessments for public

Municipal Corporations G i—*continued.*

improvements levied against the property prior to his death do not constitute a preference against his estate payable in the third class of priority as a tax assessed on the estate prior to his death. C. S., 93. *Rigsbee v. Brogden*, 510.

H Police Powers and Regulations.

d Public Health and Safety

Ordinance requiring liability insurance or bonds for vehicles operated for hire *held* valid. *Watkins v. Iseley*, 256.

e Violation and Enforcement

Ordinarily, the validity of a municipal ordinance may not be challenged by proceedings to enjoin its enforcement. *Watkins v. Iseley*, 256.

Murder. (See Homicide.)

Negligence.

A Acts and Omissions Constituting Negligence. (In operation of automobiles see Automobiles C; criminal negligence in operation of automobiles see Automobiles G; negligence of cities see Municipal Corporations E; in preparation of food see Food; in transmitting electricity see Electricity.)

c Condition and Use of Lands and Buildings

1. Evidence tending to show that plaintiff, while a patron in defendant's store, slipped on a beet lying on the floor of the store between vegetable bins and fell to her injury, without evidence as to how the beet got on the floor or how long it had been there, is insufficient to resist defendant's motion to nonsuit, since the doctrine of *res ipsa loquitur* is inapplicable and plaintiff must show negligence on the part of defendant. *Fox v. Tea Co.*, 115.

2. In this action to recover damages sustained by plaintiff when he entered defendant's store as an invitee and fell down an elevator shaft at the rear entrance of the building, the complaint *is held* sufficient to state a cause of action against defendant, and not to show upon its face patent and unquestionable contributory negligence, and defendant's demurrer thereto should have been overruled. *Ramsey v. Furniture Co.*, 165.

3. While the proprietor of a store is not an insurer of the safety of customers while on the premises, he owes them the duty to exercise ordinary care to keep the premises in a reasonably safe condition and to give warning of hidden perils or unsafe conditions known to him, or which he could have discovered by reasonable inspection and supervision. *Williams v. Stores Co.*, 591.

4. Evidence of negligence and proximate cause *held* sufficient for jury as against store proprietor. *Ibid.*

5. Evidence *held* for jury on issue of liability of company repairing fixture for injury caused by fixture's fall. *Ibid.*

e Res Ipsa Loquitur

The doctrine of *res ipsa loquitur* does not apply to injuries received by patron of store in fall caused by stepping on vegetable in aisle. *Fox v. Tea Co.*, 115.

Negligence—*continued.*

B Proximate Cause.

c Intervening Negligence

1. Active negligence of third person *held* sole proximate cause of accident causing death. *Smith v. Monroe*, 41; *Newell v. Darnell*, 254; *Banks v. Joyner*, 261.

2. In order for primary negligence to be insulated by intervening negligence, the intervening negligence must be such as to break the sequence of events, must be palpable and gross, and must begin to operate subsequent to the primary negligence and continue to operate until the instant of injury. *Williams v. Stores Co.*, 591.

d Concurrent Negligence

All persons whose negligence was a proximate cause of the injury in any degree are liable to the injured party, since none may escape liability unless the total causal negligence be attributed to another or others. *Trust Co. v. R. R.*, 304.

g Primary and Secondary Liability

1. The burden on the issue of primary and secondary liability is upon the defendant claiming that its codefendant is primarily liable. *Williams v. Stores Co.*, 591.

2. The question of primary and secondary liability between defendants *held* properly submitted to the jury under the rule laid down in *Johnson v. Asheville*, 196 N. C., 550. *Ibid.*

D Actions.

a Pleadings

Contributory negligence must be pleaded in the answer and proved on the trial, the burden on the issue being upon defendant, C. S., 523, and a demurrer to the complaint on the ground of contributory negligence will not be sustained unless upon the face of the complaint itself contributory negligence is patent and unquestionable. The distinction between motion to nonsuit under C. S., 567, and a demurrer to the complaint is pointed out. *Ramsey v. Furniture Co.*, 165.

c Sufficiency of Evidence and Nonsuit

Where plaintiff's evidence raises only conjecture of defendant's negligence, nonsuit is proper. *Check v. Brokerage Co.*, 569.

d Instructions

Defendant excepted to an excerpt from the charge instructing the jury that if they found from the greater weight of the evidence that plaintiff was injured by the negligence of defendant they should answer the issue in the affirmative, defendant contending that the excerpt was erroneous for failing to make reference to proximate cause. It appeared that in the preceding portion of the charge the court defined proximate cause and correctly stated the burden of proof. *Held:* Defendant's exception is untenable, the charge being construed as a whole, and the excerpt complained of not being in conflict with the preceding portions of the charge. *Sparks v. Holland*, 705.

Negligence—*continued.*

E Culpable Negligence.

a Negligence of Defendant

Culpable negligence is such recklessness or carelessness, proximatety resulting in injury or death, as imports a thoughtless disregard of consequences, or a heedless indifference to the safety and rights of others. *Wright v. Pettus*, 732.

New trial. (Motions to set aside verdict see Trial G e.)

Nonsuit. (See Trial D a, Criminal Law I j.)

Parent and Child.

A Rights and Liabilities of Parent. (Criminal liability of parent for failure to support illegitimate child see Bastards B c.)

b Support and Abandonment

Evidence that the prosecuting witness and defendant were married in another state and there separated, that later defendant returned to the home of his parents in this State, and that prosecuting witness thereafter returned to live with her parents residing in the same city in this State, bringing with her her infant daughter born of the marriage, and that defendant refused to support said minor child although repeated demands were made on him after the parties had returned to the State, *is held* sufficient to overrule defendant's motion as of nonsuit in a prosecution for willful abandonment and failure to support his minor child, C. S., 4447, the amendment of the statute by ch. 290, Public Laws of 1925, providing that the abandonment by the father of a minor child shall constitute a continuing offense. *S. v. Hinson*, 187.

c Custody and Control (Rights of parents by adoption see Adoption.)

The right of the mother, if a suitable person, to the custody of her minor illegitimate child is not absolute, but may be voluntarily relinquished by her for the good of the child as determined by her. *In re Foster*, 489.

Parties.

A Parties Plaintiff. (In particular actions see Particular Titles of Actions.)

c Intervenors

Where final judgment adjudicating the rights of the parties has been rendered, but the subject matter of the action is still in the custody of the court, the court has the discretionary power to allow a person having an interest in the subject matter of the action, but who was not made a party thereto, to intervene and assert his rights, since the intervener, not being a party to the action, is not bound by the provisions of the judgment. *Carter v. Smith*, 788.

Payment.

A Proof of Payment.

c Burden of Proof

1. Plaintiff instituted suit to recover the balance alleged to be due on the purchase price of land sold defendant. Defendant admitted the contract to purchase and the amount of the purchase price as alleged by plaintiff, but contended that he had made full payment

Payment A c—*continued.*

of the stipulated price. *Held:* The burden of proving the affirmative defense of payment was on defendant alleging same, and it was error for the trial court to place the burden of proof on plaintiff, although the form of the issue was whether defendant breached the contract by failing to pay the full purchase price. *Davis v. Dockery*, 272.

2. The plea of payment is an affirmative one, and the burden of proof is upon the party asserting payment. *Stephenson v. Honeycutt*, 701.

C Transactions Operating as Payment.

d Delivery of Illegal Merchandise

Defendant contended that he made payment on his account by delivering intoxicating liquor to the creditor. *Held:* The law recognizes no property right in or growing out of intoxicating liquor sold or transferred in violation of the law, and the delivery of the intoxicating liquor does not support the plea of payment. *Stephenson v. Honeycutt*, 701.

Perjury.

B Prosecution and Punishment.

c Sufficiency of Evidence

In prosecutions for perjury it is required that the falsity of the oath be established by two witnesses, or by one witness and adminicular circumstances sufficient to turn the scales against the defendant's oath. *S. v. Rhinehart*, 150.

Pleadings. (In particular actions see Particular Titles of Actions.)

A Complaint.

a Contents, Form, and Requisites

It is the policy and purpose of our procedure to determine all matters in a given controversy in one action whenever possible. *Odom v. Palmer*, 93.

C Reply, Counterclaims, and Set-offs.

b Scope and Subject Matter

Matter alleged in reply *held* within limitations upon scope of reply imposed by statute. *Bryan v. Mfg. Co.*, 720.

D Demurrer.

a For Failure of Complaint to State Cause of Action

1. A demurrer admits the truth of all material facts properly alleged, and the demurrer cannot be sustained if the complaint, liberally construed, or any portion of it, presents facts sufficient to constitute a cause of action. C. S., 535. *Ramsey v. Furniture Co.*, 165.

2. A demurrer *ore tenus* on the ground that the complaint is insufficient to state a cause of action will not be sustained unless the complaint is wholly insufficient, construed in the light favorable to the pleader. C. S., 535. *Bowling v. Bank*, 463.

c Effect and Office of Demurrer

1. A demurrer admits facts properly pleaded, but not inferences or conclusions of law. *Distributing Corp. v. Maxwell, Comr.*, 47; *Hussey v. Kidd*, 232; *Oliver v. Hood, Comr.*, 291; *Phillips v. Slaughter*, 543; *Sutton v. Ins. Co.*, 826.

Pleadings D e—*continued.*

2. A demurrer admits, for the purpose, the truth of the allegations of fact and challenges the right of the pleader in any view of the matter. *Odom v. Palmer*, 93; *Ramsey v. Furniture Co.*, 165.

E Amendment of Pleadings.

d Amendment After Judgment Sustaining Demurrer

1. After judgment overruling defendant's demurrer is reversed on appeal, plaintiff may ask to be allowed to amend his complaint, if so advised. C. S., 515. *Oliver v. Hood, Comr.*, 291.

2. Whether the court should allow plaintiff to amend after sustaining a demurrer to the complaint is a matter in its sound discretion, and its ruling thereon is not reviewable. C. S., 515. *Hood, Comr., v. Motor Co.*, 303.

G Issues, Proof, and Variance.

a In General

Allegation without proof and proof without allegation are equally fatal. *Bowen v. Bank*, 140.

I Motions.

a Motions to Strike Out Allegations of Pleadings

The trial court may refuse to strike out certain paragraphs of the complaint on motion when the matter may be better determined by rulings upon the competency of evidence, if and when offered. *Hardy v. Dahl*, 746.

Pledges. (Right of pledgee to maintain action on note pledged see Bills and Notes H a.)

Police Powers. (See Constitutional Law C; Municipal Corporations H.)

Principal and Agent. (Insurance agents see Insurance C; principal's liability for agent's negligent driving see Automobiles E b.)

C Rights and Liabilities as to Third Persons.

a Proof of Agency (Admissions and declarations of agent see Evidence E d.)

Where there is plenary evidence that the principal ratified the contract of his agent, objection to the admission of evidence of the contract on the ground that the authority of the agent to make the contract had not been shown, is untenable. *Turner v. Chevrolet Co.*, 587.

b Scope of Authority

1. Plaintiff's automobile agency contract provided that it might not be enlarged, varied, modified, or canceled except by an instrument executed by defendant motor company's president, vice-president, secretary, or assistant secretary. Plaintiff testified that in consequence of differences between him and defendant company, he went to defendant's branch office, and was told that the matter would be taken up by defendant's zone manager, that thereafter he entered into an agreement with the zone manager under which he agreed to resign his agency and defendant company agreed to repurchase equipment on hand at a stipulated price, that he mailed his resignation to the same branch office of defendant, which accepted same on behalf of defendant company. *Held:* Defendant's zone manager had apparent authority, under plaintiff's evidence,

Principal and Agent C b—*continued.*

to enter the agreement for the resignation of the agency and the repurchase of equipment by defendant, and defendant company's motion to nonsuit on the ground that the zone manager was without authority to make the agreement should be denied. *Grubb v. Motor Co.*, 88.

2. Plaintiff declared on an alleged contract of employment for life made on defendant's behalf by her agent. *Held:* In the absence of evidence tending to show the authority of the agent to make the alleged contract or ratification of same by defendant, defendant's motion to nonsuit should have been allowed. *Stevens v. Cecil*, 738.

d Liability of Agent to Third Persons (Of liability of servant to third persons see Master and Servant D e.)

1. An agent may not be held liable by a third person for acts done in the scope of his authority for a disclosed principal, the acts of the agent in such instance being the acts of the principal alone. *Hedgepeth v. Casualty Co.*, 45.

2. An agent or servant is liable to a third person injured as a result of the negligence of the agent or servant in the performance of his duties in the scope of the employment, whether the negligence consists in positive acts or in failure to perform an affirmative duty for the protection of the public. *Trust Co. v. R. R.*, 304.

Process.

B Service of Process.

c By Publication and Attachment

Plaintiff instituted suit against defendant, a domestic corporation, and, upon return of summons not served, attached a judgment owing defendant and obtained an order restraining defendant from issuing execution on the judgment. Defendant entered a special appearance and moved to vacate the proceedings. The court found summons had been issued in the county in which the action was instituted and in the county to which defendant had moved, and that both of them had been returned "Defendant not to be found," that plaintiff had filed affidavit that defendant had removed its property from the State with intent to hinder, delay, and defraud creditors, that so far as appeared from the evidence, defendant had no other property out of which plaintiff's claim might be satisfied, in whole or in part, defendant having removed all other property from the State, and that plaintiff has a *bona fide* claim against defendant as provided by C. S., 798. *Held:* The findings support the court's judgment denying the motion to vacate the proceedings, and continuing the order restraining execution on the judgment by defendant to the hearing. *Banner v. Button Corp.*, 697.

Prohibition. (See Intoxicating Liquor.)

Public Officers.

C Duties and Liabilities.

b Wrongful Withholding of Public Funds

Penalty provided by C. S., 357, *held* inapplicable to demand against bank receiver for county funds held by the bank in capacity of county treasurer. *Pasquotank County v. Hood, Comr.*, 552.

Quieting Title.

A Nature and Grounds of Remedy.

b Possession

In an action under C. S., 1743, to remove cloud upon title it is not required that plaintiffs show possession of the land in controversy. *Vick v. Winslow*, 540.

B Proceedings.

d Sufficiency of Evidence and Nonsuit

Plaintiffs' evidence showing *prima facie* title in them and that defendants' title is void as to plaintiffs *held* sufficient to overrule defendants' motion to nonsuit. *Vick v. Winslow*, 540.

Railroads.

C Rights of Way.

d Licensees

Licensee may not be ejected when occupancy of right of way is not reasonably necessary for railroad purposes. *Powell v. Ice Co.*, 195.

D Operation.

a Persons and Companies Liable for Negligent Operation

The complaint liberally construed alleged that plaintiff's testator was struck and killed at a railroad grade crossing, that defendant watchman was on duty at the crossing at the time, and that he negligently failed to warn testator of the approach of the corporate defendant's train, and that such negligent failure was one of the proximate causes of the accident resulting in testator's death. *Held:* The complaint alleged a cause of action for actionable negligence against the watchman, and his demurrer to the complaint cannot be sustained. *Trust Co. v. R. R.*, 304.

Reformation of Instruments. (Of insurance contracts see Insurance E c.)

Receiving Stolen Goods.

B Prosecution and Punishment.

c Sufficiency of Evidence and Nonsuit

Evidence tending to show that the prosecuting witness had several twenty-dollar bills in his possession, to the knowledge of defendants, while riding in an automobile with defendants, that the next morning his money was gone, that he went to the house of appealing defendant, who gave him a twenty-dollar bill upon being informed of the loss or theft of the money, the appealing defendant stating that he supposed it belonged to the prosecuting witness, with testimony of the appealing defendant that he did not know before the conversation that prosecuting witness had lost any money, and that he had found the twenty-dollar bill on the ground as the party got out of the car to go into a filling station, *is held* insufficient to be submitted to the jury on the issue of appealing defendant's guilt of receiving stolen goods knowing at the time they had been stolen. *S. v. Gaddy*, 34.

Reference.

A Nature and Scope of Remedy.

a In General

Statutes relating to trials by referees should be liberally construed. *Haywood County v. Welch*, 583.

Reference A—*continued.*

b Pleas in Bar

In this action on the bond of a public official involving a long account, defendant surety pleaded a settlement made by the public official with the county commissioners. Plaintiff county replied and alleged that any purported settlement was incomplete and was based upon fraudulent statements. *Held:* Plaintiff sought to surcharge and falsify the account and settlement, and the plea of the settlement is not such a plea in bar as to require determination before the court could order a compulsory reference, a mere denial of plaintiff's cause of action being insufficient to defeat a reference. *Haywood County v. Welch*, 583.

Registers of Deeds.

B Duties and Liabilities. (Limitation of actions against bonds see Limitation of Actions.)

b Properly Registering Instruments

The register of deeds of a county is required by statute to register written instruments properly presented to him for registration, and to properly index and cross index such instruments as an essential part of their registration, C. S., 3553, and the failure of the register of deeds to register such instruments or his failure to properly index and cross index them is a breach of his statutory bond, C. S., 3545, for which he and the surety on his bond are liable to the person injured by such breach, C. S., 3555. *Bank v. McKinney*, 668.

Removal of Causes.

C Citizenship of Parties.

b Separable Controversy and Fraudulent Joinder

1. Plaintiff instituted this action against a railroad company and the engineer operating the train which struck plaintiff's testator, and the watchman on duty at the crossing where plaintiff's testator was injured, the complaint alleging that the engineer failed to give any warning by bell or signal, that the watchman, on duty at the time, failed to warn plaintiff's testator of the approach of the train and did not arrive at the scene until the train was in the intersection, and that plaintiff, relying on the watchman, required by city ordinance to be at the crossing at the time of the accident, was struck as he went upon the crossing, and that testator was not guilty of negligence, and that his death was proximately caused by the concurrent negligence of defendants. *Held:* The complaint stated a cause of action for actionable negligence against defendants as joint tort-feasors, and defendant railroad company's motion to remove to the Federal Court for diverse citizenship and separable controversies was properly denied. *Trust Co. v. R. R.*, 304.

2. Upon a motion to remove a cause to the Federal Court on the ground of diverse citizenship and separable controversy, the complaint alone determines whether the cause alleged is joint or separable, and where the complaint alleges a joint action, defendants cannot create a separable controversy by setting up separate defenses. *Ibid.*

3. Where the complaint states a cause of action against the resident defendant, the nonresident defendant's motion to remove is cor-

Removal of Causes C b—*continued.*

rectly denied, although its petition for removal alleges facts sufficient, under some circumstances, to constitute a defense as to the resident defendant. *Howell v. R. R.*, 589.

Sales.

H Remedies of Buyer.

a Recovery of Purchase Price

1. Where the article sold is not reasonably fit for the use for which it was intended there is a total failure of consideration, and the purchaser may recover from the retailer, and the retailer may recover from the manufacturer, regardless of the terms of warranty prescribing the time within which the article must be returned to the manufacturer after discovery of defect therein, the warranty not being binding, since it fails with the entire contract for want of consideration. *Williams v. Chevrolet Co.*, 29.

2. It is error for the court to direct a verdict on the issue of whether the automobile sold was reasonably fit for the purpose for which it was intended upon evidence that the engine was defective, the scope of the issue being broader than a breach of warranty, and the question being for the determination of the jury. *Ibid.*

Schools and School Districts.

B Fiscal Management and Debts. (Taxation see Taxation.)

a Issuance of Bonds and Administrative Units Liable Therefor

County may not be forced to assume liability for special charter school district bonds not necessary to maintenance of constitutional school term. *Greensboro v. Guilford County*, 655.

d Charges and Operating Expenses in General

1. By the School Machinery Act of 1935, salaries, plant operation, and other major items of current school expenses were transferred from the county boards of education to the State, but maintenance expense and fixed charges, including insurance, were left with the county boards of education. Ch. 455, sec. 9, Public Laws of 1935. *Fuller v. Lockhart*, 61.

2. The selection of a company to carry insurance on the public school buildings is a matter in the discretion of the county board of education, and its action in regard thereto is not ordinarily reviewable. *Ibid.*

3. N. C. Code, 6348, 6351, as amended by ch. 89, Public Laws of 1935, do not indicate legislative intent to prohibit county boards of education insuring property in mutual companies by failing to expressly grant such authority, sec. 6348 being an enabling statute relating solely to trustees, and sec. 6351 prescribing the method and allowing the operation of mutual companies in this State. *Ibid.*

e Expenditures and Budgets

Where a county board of education desires to purchase insurance in a mutual company, it may set up in its budget the cash premium and the contingent liability, not exceeding the cash premium. *Fuller v. Lockhart*, 61.

Schools and School Districts—*continued.*

D Government and Officers.

a Administrative Agencies in General

A county board of education is an administrative agency of the State in the maintenance and operation of the State public school system. *Fuller v. Lockhart*, 61.

Specific Performance. (Of contract to convey realty see Vendor and Purchaser F a.)

State. (Division of governmental powers see Constitutional Law B; State police power see Constitutional Law C.)

A Conflict of Laws. (Full faith and credit to foreign judgments see Constitutional Law K; Judgments N.)

a Transitory Actions

An action instituted in the courts of this State, involving an automobile accident occurring in another state, is governed by the laws of such other state. *Wright v. Pettus*, 732.

E Claims Against the State.

a Actions and Consent to Be Sued

1. In this suit against the North Carolina Emergency Relief Administration and certain officers thereof, the complaint alleged that the "Administration" is a State agency, and sought to recover damages sustained by reason of the agency's interference with plaintiff's contract rights with a city, and to enjoin further interference by the agency. *Held:* A demurrer for want of jurisdiction was properly allowed as to the "Administration" upon the allegation in the complaint that it was an agency of the State, the plaintiff seeking to control and enforce liability against it as such agency, constituting the suit in effect a suit against the State. *Vinson v. O'Berry*, 287.

2. Where, in a suit against an agency of the State and certain officers of such agency, the individual defendants defend the action on the ground of sovereign immunity, a demurrer as to the individuals is improperly allowed, since they must show authority. *Ibid.*

b Original Jurisdiction of Supreme Court

The original jurisdiction of the Supreme Court to hear claims against the State may not be invoked upon a complaint which presents no serious question of law, but bases the right to recover upon allegations of fact. *Vinson v. O'Berry*, 289.

Statutes. (Enjoining proceedings under, on ground of constitutionality see Injunctions B e; testing validity by proceedings under Declaratory Judgment Act see Actions B g; table of statutes construed see Consolidated Statutes.)

A Requisites and Validity. (Constitutionality of substantive provisions of statutes see Constitutional Law.)

b Special Acts Relating to Certain Matters Prohibited

Ch. 286, Public-Local Laws of 1925, providing for the establishment of township recorder's courts in one specified county *is held* unconstitutional and void as being a local act relating to the establishment of courts inferior to the Superior Court, prohibited by Art. II, sec. 29. *S. v. Williams*, 57.

Statutes A—*continued.*

e Construction of Statutes in Regard to Constitutionality

The presumption is in favor of the constitutionality of a statute, and when a statute is susceptible to two interpretations, one constitutional and the other not, the constitutional interpretation will be adopted, and no statute will be declared unconstitutional except in a case properly calling for the determination of its validity. *S. v. Williams*, 57.

B Construction and Operation.

a General Rules of Construction

1. Statutes relating to the same subject matter must be construed *in pari materia*. *Castevens v. Stanly County*, 75; *Phillips v. Slaughter*, 543.

2. Where the terms of a statute are ambiguous or its grammatical construction is doubtful, the courts may control the language to give effect to what they suppose to have been the real legislative intent. *Ikerd v. R. R.*, 270.

C Repeal and Revival.

b Repeal by Implication and Construction

1. Ordinarily, a special statute prevails over a repugnant general statute as an exception to the general statute. *Burt v. Biscoe*, 70.

2. The courts will try to harmonize inconsistent and conflicting statutes relative to the same subject matter in order to give effect to the legislative intent as gathered from the statutes construed together. *Ibid.*

Submission of Controversy. (See Controversy Without Action.)

Taxation.

A Constitutional Requirements and Restrictions.

a Necessity of Vote to Issuance of Bonds or Incurrence of Debt

1. Premiums for insurance of its public school buildings is a necessary public expense of a county, and the incurring of liability therefor need not be submitted to the voters. N. C. Code, 5596 (a); Art. VII, sec. 7. *Fuller v. Lockhart*, 61.

2. Municipality may issue bonds for necessary purpose without vote under Emergency Bond Act, notwithstanding provisions of local act. *Burt v. Biscoe*, 70.

3. A county may issue its bonds for a necessary special purpose with the special approval of the General Assembly, or to raise funds necessary to the maintenance of the constitutional school term, without submitting the issuance of the bonds to a vote, notwithstanding the provisions of a special statute requiring a vote, ch. 443, Public-Local Laws of 1927, when the purpose of the bond issue is to provide the county's part of the expense of a project for which a Federal grant is available, and the proposed bond issue comes within the provisions of the Emergency County Bond Act, ch. 427, Public Laws of 1935, the special act being harmonized with the Emergency Act to effectuate the legislative intent. *Castevens v. Stanly County*, 75.

Taxation A a—*continued.*

4. A public-local statute prohibiting the issuance of bonds without a vote does not prevent a county named in the act from issuing bonds to provide funds for the purpose of erecting school buildings, making additions to old building, and purchasing equipment necessary to the maintenance of the constitutional school term, since the county, in issuing bonds for such purpose, is an administrative agency of the State, and the public-local statute applies only to local matters. *Ibid.*

5. Defendant county proposed to issue bonds to refinance bonds issued by its townships, the proceeds of the township bonds having been used to build highways thereafter taken over by the county as a part of the county highway system. *Held:* The township bonds were for a necessary county expense, and the approval of the majority of the qualified voters of the county is not a prerequisite to the issuance of the refunding bonds, N. C. Constitution, Art. VII, sec. 7. *Thomson v. Harnett County*, 662.

b Limitation on Tax Rate

1. Where a county has assumed all indebtedness of its political subdivisions for school purposes, and a proposed bond issue to provide funds necessary to the maintenance of the constitutional school term in the county is within the limitations of N. C. Code, 1334 (17), and comes within the provisions of the Emergency Bond Act, ch. 427, Public Laws of 1935, taxes for the payment of principal and interest of the proposed bond issue will not be subject to any limitation on the tax rate. *Castevens v. Stanly County*, 75.

2. Where it is stipulated in the agreed facts that defendant county's jail is unsafe and insanitary, and the erection of a new jail is a public necessity, bonds necessary to provide funds for the erection of a new jail, with plumbing, heating, and electrical work, are for a special necessary county expense, N. C. Code, 1297, 1317, and the issuance of such bonds is given special legislative approval, N. C. Code, 1321 (a), 1334 (8) (a), (d), and taxes necessary to pay principal and interest of such bond issue by the county are not subject to limitation on the tax rate. N. C. Const., Art. V, sec. 6, Art. VII, sec. 7. *Ibid.*

c Uniform Rule and Ad Valorem

Under the provisions of ch. 342, Public-Local Laws of 1935, defendant county proposed to issue county bonds bearing 4% interest to refinance township road bonds issued by the townships of the county, the township bonds to remain valid and to be acquired by the county and held in a sinking fund, and the county bonds to be paid by a tax equal to 6% of the bonds issued by each township to be levied in the respective townships. *Held:* The proposed county bond issue is merely to refinance the township unit bonds, and the possibility of a deficit requiring payment by the county as a whole is remote, and plaintiff taxpayer's contention that the statute violates Art. I, sec. 17, of the State Constitution, prohibiting the taking of property but by the law of the land, is untenable. *Thomson v. Harnett County*, 662.

Taxation A—*continued.*

e Prohibition Against Lending Credit of State to Person, Firm, or Corporation

The insuring of school property in a mutual company does not lend the credit of the State to the insurer, since the contingent liability for assessment is limited to the amount of the initial premium. *Fuller v. Lockhart*, 61.

f Tax on One Community for Benefit of Another

Under the provisions of ch. 342, Public-Local Laws of 1935, defendant county proposed to issue county bonds bearing 4% interest to refinance township road bonds issued by the townships of the county, the township bonds to remain valid and outstanding and to be acquired by the county and held in a sinking fund, and the county bonds to be paid by a tax equal to 6% of the bonds issued by each township to be levied in the respective townships. The proceeds of the township bonds were used in the construction of highways later taken over by the county as a part of the county highway system. *Held:* Since the proceeds of the township bonds were used for a necessary county expense and the entire county received the benefit of the expenditure by the townships, and since N. C. Constitution, Art. VII, sec. 2, imposes the duty on the county commissioners to supervise roads, the levying of taxes and finances of the county objection to the proposed county bond issue on the ground that the statute authorizing the bond issue violates N. C. Constitution, Art. VII, sec. 9, by granting the power to tax one community or local tax district for the exclusive benefit of another, is untenable. *Thomson v. Harnett County*, 662.

B Liability of Persons and Property.

d Property Exempt from Taxation

1. Exemptions of property from taxation are to be strictly construed. *Benson v. Johnston County*, 751.

2. Plaintiff municipality acquired certain property within its corporate limits by tax foreclosure. After acquisition of the property the municipality rented same, and received the rents therefrom. The county levied *ad valorem* taxes against the property, and the municipality contended that the property was exempt from taxation from the date the municipality acquired title. *Held:* The property is liable for the county taxes, since it is not used by the city for a governmental purpose, and therefore does not come within the constitutional provision for the exemption of property from taxation, N. C. Constitution, Art. V, sec. 5, or within the scope of the statutes enacted pursuant thereto. N. C. Code, 7880 (2), (177). *Ibid.*

D Lien and Priority and Persons Liable.

a Attachment of Lien on Realty and Persons Liable

A life tenant is liable for taxes assessed against the property during his lifetime, C. S., 7982, and when he dies without paying same they constitute a claim against his estate for taxes assessed previous to his death within the meaning of C. S., 93, and are payable in the third class stipulated by the statute fixing priority of payment of claims against the estate of an insolvent. *Rigsbee v. Brogden*, 510.

Taxation—*continued.*

E Remedies for Wrongful Collection.

c Recovery of Tax Paid

Plaintiff failed to observe the statutory method provided for testing the validity of the tax paid under the Revenue Act, but instituted suit alleging that the tax was paid under compulsion in that plaintiff was notified that it would be subject to fine and imprisonment if it did business in the State without first paying the tax, that the tax is discriminatory and unlawful, and that the statutory procedure prescribed for the recovery of the tax is unconstitutional as applied to plaintiff. *Held:* The allegation that the tax was paid under compulsion was a mere conclusion of the pleader, and the demurrer of the Commissioner of Revenue was properly sustained. *Distributing Corp. v. Maxwell, Comr.*, 47.

H Tax Sales and Foreclosures.

a Tax-sale Certificates

A tax-sale certificate in the hands of a remainderman, representing taxes paid by the remainderman during the lifetime of the life tenant, may not be proved as a preferred claim against the estate of the life tenant, since the remainderman's sole remedy upon the tax-sale certificate is by foreclosure under the provisions of C. S., 8028. *Rigsbee v. Brogden*, 510.

b Foreclosure of Tax-sale Certificates

The title of tenants in common who are not made parties is not affected by a tax foreclosure suit and commissioner's deed executed in pursuance thereof. *Bailey v. Howell*, 712.

c Title and Rights of Purchaser

1. Where mortgagee buys in property at tax foreclosure sale, he holds title thus acquired in trust for benefit of mortgagor. *Pearce v. Montague*, 42.

2. Where, in a proceeding to foreclose a tax-sale certificate, the land has been sold under order but before confirmation of the bid a resale is ordered under the provisions of C. S., 2591, for an advance bid, and pending a resale the taxpayer pays the judgment for the taxes and the county takes a voluntary nonsuit, the last and highest bidder at the sale is not entitled to be made a party to the action and contest the validity of the judgment as of nonsuit, the order of resale being a rejection of his bid and a release of his liability thereunder, and the fact that he had placed the last and highest bid at the sale conferring no rights in the property to him. C. S., 8037. *Richmond County v. Simmons*, 250.

3. One tenant in common listed the entire tract for taxation in her name. Thereafter the land was sold for taxes and deed made to a stranger, who transferred title back to the tenant a few days thereafter, taking a mortgage in himself, the tenant remaining in possession throughout. *Held:* The reconveyance of the tax title to the tenant in common inured to the benefit of her cotenants, and the tenant's mortgaging of the property did not convey the interest of her cotenants nor destroy the tenancy in common. *Bailey v. Howell*, 712.

Tenants in Common.

A Nature and Incidents of Tenancy. (Adverse possession by tenant as against cotenants see Adverse Possession A f.)

c Mutuality of Interests and Estoppel of One Tenant from Defeating Rights of Cotenants

1. The possession of one tenant in common is the possession of all. *Bailey v. Howell*, 712.

2. The acquisition of an outstanding adverse title by one tenant in common in possession, including titles based upon tax deeds, inures to the benefit of all the cotenants. *Ibid.*

3. The mortgaging of the entire tract by one tenant in common, who remains in possession, does not destroy the tenancy in common, nor does the subsequent foreclosure of the mortgage destroy the interest of the cotenants. *Ibid.*

Torts. (Particular torts see Negligence and Particular Titles of Torts; liability of municipal corporations for see Municipal Corporations E; of private corporations see Corporations G i.)

B Joint Torts.

a Determination of Whether Injury is Result of Joint Tort

An injured party may sue jointly all persons whose negligence was a proximate cause of the injury in any degree, since none may escape liability unless the total causal negligence be attributable to another or others. *Trust Co. v. R. R.*, 304.

b Right to Contribution (Among coinsurers see Insurance O d.)

C. S., 618, providing for contribution between tort-feasors, does not apply to liability of insurance carriers of tort-feasors. *Gaffney v. Casualty Co.*, 515.

Trespass. (Committed by ponding water see Waters and Water Courses.)

Trial. (Of criminal prosecutions see Criminal Law I; of particular actions see Particular Titles of Actions.)

D Taking Case or Question from Jury.

a Nonsuit (In criminal cases see Criminal Law I j.)

1. On a motion to nonsuit, the evidence must be considered in the most favorable aspect for plaintiff. *Grubb v. Motor Co.*, 88; *Williams v. Stores Co.*, 591; *Teseneer v. Mills Co.*, 615; *Harrell v. Goerch*, 741.

2. On motion to nonsuit, only the evidence favorable to plaintiff will be considered. *Ford v. R. R.*, 108; *Teseneer v. Mills Co.*, 615.

3. Where defendant relies upon affirmative defenses pleaded in his answer, his motion to nonsuit, based upon such defenses, is properly refused unless all the evidence, considered in the light most favorable to plaintiff, sustains the defenses relied upon in bar of recovery. *Pittman v. Downing*, 219.

4. Where defendant does not renew his motion to nonsuit at the close of all the evidence he waives his right to have the sufficiency of the evidence considered on appeal. C. S., 567. *Stephenson v. Honeycutt*, 701.

Trial D—*continued.*

b Directed Verdict

The court may direct a verdict on an issue against the party having the burden of proof on the issue when such party fails to introduce evidence on the issue or when the evidence offered and taken to be true fails to make out a case. *Trust Co. v. Levy*, 834.

e Voluntary Nonsuit

In a civil action where no counterclaim is set up and no rights have accrued, plaintiff may take a voluntary nonsuit at any time before the rendition of a complete verdict sufficient to support a judgment. *Light Co. v. Mfg. Co.*, 560.

E Instructions. (In criminal cases see Criminal Law I g.)

c Form, Requisites, and Sufficiency

In apt time defendant tendered a request for special instructions embodying principles of law, correctly stated, applicable to the evidence. The trial court gave the jury the instructions requested, and then instructed the jury that the requested instructions given constituted the defendant's contentions. *Held:* The designation of the special instructions of law as "contentions" of defendant constitutes reversible error, since it may have misled the jury to defendant's prejudice. *Rice v. Hotel Co.*, 519.

c Requests for Instructions

An exception to the refusal of the court to give instructions requested will not be sustained when it appears that the requested instructions were substantially given, and that the court inserted therein or added thereto correct instructions of law or instructions which were not prejudicial when the charge is construed as a whole. *Williams v. Stores Co.*, 591.

f Objections and Exceptions

1. Errors in the statement of the contentions of the parties will not ordinarily be considered on appeal when not brought to the trial court's attention at the time. *Williams v. Stores Co.*, 591; *Sparks v. Holland*, 705.

2. Where appellant, in apt time, excepts and assigns error to the charge, a formal objection to the charge is not needed for the exception to be considered on appeal. *Rice v. Hotel Co.*, 519.

g Construction of Instructions Upon Review

1. A charge of the court will be construed as a whole, and an exception to the charge will not be sustained when the charge, so construed, is not prejudicial to appellant. *Queen v. DeHart*, 414; *Williams v. Stores Co.*, 591; *Teseneer v. Mills Co.*, 615; *Sparks v. Holland*, 705.

2. Where the charge is correct when read contextually as a whole, an exception thereto on the ground that it was biased will not be sustained, certainly in the absence of a request by appellant that other or further contentions or instructions be given. *Winborne v. Lloyd*, 483.

3. An exception to the charge for that it stated the jury would be "warranted" in answering an issue in the affirmative if they found the determinative facts by the greater weight of the evidence, will not

Trial E g—*continued.*

be sustained when it appears that in the preceding paragraphs, in stating the same principle of law in almost identical language, the court correctly instructed the jury that it would be their "duty" to so answer the issue if they were satisfied of the existence of the determinative facts by the greater weight of the evidence. *Williams v. Stores Co.*, 591.

F Issues.

a Form and Sufficiency

1. Where the issues fairly present all phases of the controversy, appellant's exception thereto cannot be sustained, especially in the absence of objection to the issues submitted at the time or tender of other issues. *Teseneer v. Mills Co.*, 615.

2. In this action to foreclose a mortgage, and recover any deficiency after sale, defendants alleged that contemporaneously with the execution of the notes and mortgage, the mortgagee agreed with defendants by parol not to foreclose the mortgage, but to accept a reconveyance of the land and cancel the notes if defendants were unable to pay same. Issues as to the execution of the notes and mortgage, the existence of the parol agreement, and indebtedness, were submitted to the jury. *Held:* A new trial must be awarded on plaintiff's exceptions to the issues and to the judgment rendered thereon, since the issues submitted are insufficient to support the judgment, in that the issues did not require defendants to prove, or afforded plaintiff opportunity to disprove, that defendants were unable to pay the balance due on the notes, which, under the pleadings and evidence, was a condition precedent to defendants' right to have the notes canceled upon a reconveyance of the land, C. S., 584. *Stanback v. Haywood*, 798.

c Tender of Issues

The refusal to submit an issue tendered will not be held for error when the issues submitted to the jury, tendered by the same party, are sufficient to embrace every phase of the controversy upon the theory upon which the case was tried. *Queen v. DeHart*, 414.

G Verdict.

c Acceptance of Verdict

A verdict is not complete until accepted by the court, and the court has the discretionary power upon the coming in of a doubtful verdict to have the jury again retire and make the verdict clear. *Queen v. DeHart*, 414.

e Motions to Set Aside

A motion to set aside the verdict as being contrary to the weight of the evidence is addressed to the discretion of the trial court, and the court's determination of the motion is not ordinarily reviewable. *Stephenson v. Honeycutt*, 701; *Anderson v. Holland*, 746.

H Trial by Court by Agreement. (Submission of facts agreed see Controversy Without Action.)

a Waiver of Jury Trial and Agreement of Parties

Where the case on appeal recites that the parties agreed that the court might render judgment out of term and out of the district, and the

Trial H a—*continued.*

judgment recites that the parties agreed to trial by the court and the rendition of judgment out of term and out of the district, appellant's contention that trial by the court had not been agreed upon cannot be sustained, since trial by jury would be impossible under the agreement that judgment might be rendered out of term and out of the district, and there is no conflict between the recitals in the case on appeal and the judgment, nor objection to failure to submit the case to a jury. *Odom v. Palmer*, 93.

Trusts.

A Creation and Validity.

b Resulting and Constructive Trusts

1. Where a person obtains legal title to property by the violation of a fiduciary relationship or by the neglect to discharge some duty or obligation with respect to the property, or in any other unconscientious manner, equity will impress a constructive trust upon the property in favor of the one who is in good conscience entitled to it. *Speight v. Trust Co.*, 563.

2. Plaintiff signed her husband's note as surety for the accommodation of her husband, and executed a mortgage, with joinder of her husband, on land belonging to her individually as security for the note. Upon default, the mortgage was foreclosed and the land purchased at the sale by the husband who paid off the debt with his own money and took title in himself. *Held:* The land was impressed with a constructive trust in the hands of the husband, since the husband owed the wife the duty to fully indemnify her for loss occasioned her as surety on his note, and upon the husband's death, she is entitled to recover the land as against the husband's estate. *Ibid.*

C Establishment and Enforcement of Trusts.

b Right to Follow Trust Property or Proceeds of Sale

Heir of wife *held* not entitled to follow proceeds from sale of land by tenant by the curtesy consummate. *Hussey v. Kidd*, 232.

c Actions

1. Evidence offered to establish resulting trust *held* properly excluded under hearsay rule. *Trust Co. v. Blackwelder*, 252.

2. *Held:* Parol evidence is competent to establish the conditional delivery of a quitclaim deed by defendant appellee under her claim of a resulting trust in the lands, the rule that a grantor in a warranty deed may not set up a parol trust in his favor having no application to the facts disclosed by the record. *Ins. Co. v. Dial*, 339.

3. Plaintiffs claimed under a parol trust and under a later executed written contract to convey. *Held:* Evidence of the parol agreement in conflict with the later executed written contract is incompetent. *Gray v. Worthington*, 582.

d Rights of Third Parties

Petitioner alleged that he paid full purchase price for the lands in question under a parol contract to convey by the owner. The owner of the land, a corporation, was thereafter thrown into receivership, and the lands in question were sold by the receiver. Petitioner

Trusts C d—*continued.*

seeks to set aside the receiver's sale and recover the lands. *Held:* The receiver represents the creditors, and as to the creditors the parol contract to convey is void, for even if the conveyance had been executed to petitioner, it would not have been valid against the creditors but from its registration, C. S., 3309, and since petitioner is not entitled to recover on the facts alleged, the receiver's demurrer was properly allowed. *Hood, Comr., v. Macclesfield Co.*, 280.

E Management of Trust Property.

d Sale and Reinvestment of Assets (Failure of bank trustee to sell bank stock does not relieve estate of statutory liability see Banks and Banking H a; nor entitle estate to preferred claim see Banks and Banking H e.)

In an action to recover for alleged mismanagement of the trust estate by the trustee in failing to sell certain assets for reinvestment, the trustor's expressed desire that such assets should not be sold, and his imposition of restrictions upon their sale without the consent of certain interested persons, and whether the requisite consent could have been obtained, and the good faith of the trustee in retaining the assets, are all germane and properly to be considered, and the exclusion of evidence relating thereto is erroneous. Young *v. Hood, Comr.*, 801.

Usury.

A Usurious Contracts and Transactions.

b Where Equitable Relief Is Demanded

Plaintiffs seeking to enjoin consummation of foreclosure for usury must pay principal of debt, with interest. *Smith v. Bryant*, 213.

c Payment of Usurious Charge to Creditor

1. Where there is no evidence that any holder of the note executed by plaintiffs has charged or received interest thereon in excess of six per cent, in an action on the note plaintiffs may not invoke the forfeiture of interest for usury. C. S., 2306. *Smith v. Bryant*, 213.

2. A sum paid as an attorney's fee in a settlement between the parties after foreclosure of the property securing the debt and the repurchase of the property by the trustor by paying the original debt, *is held* not usurious under the evidence in this case. *Woody v. Ins. Co.*, 364.

C Actions. (Limitation of actions see Limitation of Actions.)

b Evidence and Burden of Proof

The burden is on plaintiff, seeking to recover the statutory penalty for usury, to show that a commission charged on the loan, and constituting the basis of the claim, was received by the lender. *Woody v. Ins. Co.*, 364.

Vendor and Purchaser.

F Remedies of Purchaser. (Rights of parties upon payment of purchase price under parol contract to convey see Trusts C d.)

a Specific Performance

A purchaser under a contract to convey may not specifically enforce the contract as against grantees of the vendor for value who hold prior registered title. *Gray v. Worthington*, 582.

Vendor and Purchaser F—*continued.*

b Action for Damages for Shortage of Acreage

1. Where there is evidence that the vendor represented the tract sold to contain a certain number of acres, including two tracts upon which were situate tenant houses, and that in fact it contained a substantially smaller number of acres, and failed to include the tracts upon which the houses were situate, and evidence of facts from which it could be reasonably inferred that the vendor, at the time knew the tract to contain a smaller number of acres, and knew it did not include the tracts upon which the houses were situate, the evidence is sufficient to be submitted to the jury on the issue of vendor's fraudulent misrepresentations in the purchaser's action to recover damages sustained by reason of the shortage. *Haywood v. Morton*, 235.

2. A vendor's motion to nonsuit an action by his purchaser for damage resulting from a shortage of acreage in the tract sold on the ground that the purchaser had an opportunity of ascertaining the land purchased, is properly denied when there is allegation and evidence that the purchaser failed to ascertain the acreage because of the vendor's fraudulent representations as to the acreage, and tracts included, which misrepresentations were made to deceive the purchaser. *Ibid.*

Venue.

A Nature and Subject of Action.

d Residence of Parties

An action on a note by the Commissioner of Banks and the liquidating agent of an insolvent bank, the payee of the note, and the Reconstruction Finance Corporation, the pledgee of the note, is properly brought in the county in which the insolvent bank is situate and of which the liquidating agent is a resident, and defendants' motion for change of venue to the county of their residence is properly refused. N. C. Code, 446, 469, 218 (c), (7). *Hood, Comr., v. Progressive Stores*, 36.

C Change of Venue.

b Upon Joinder or Dismissal of Parties

Upon dismissal of action as to defendant town, action was properly remanded to county in which defendant administrator qualified and in which plaintiff resides. *Banks v. Joyner*, 261.

Waters and Water Courses.

C Dams and Ponds.

b Injury to Lands of Riparian Owners

Plaintiffs' evidence tended to show that defendant had periodically opened the flood gates of its dam and cleaned the pond for many years prior to the institution of the action, and that plaintiffs' land during this time had not been substantially damaged, but that for several years prior to the institution of the action defendant had not cleaned the pond because of the scarcity of water, that the bed of the stream had gradually filled up so that any heavy rain caused the water to overflow plaintiffs' land and deposit sand thereon, rendering the land incapable of cultivation, and that the sand was deposited by reason of the ponding of still water thereon, and the

Water and Water Courses C b—*continued.*

failure to clean out the sand from the stream bed above the dam. *Held:* The evidence was sufficient to be submitted to the jury on the issue of defendant's negligent operation of the dam and damage resulting therefrom. *Tesenecr v. Mills Co.*, 615.

D Damages.

b Evidence and Proof of Damage

Plaintiffs instituted this action to recover damages to their land for the three years prior to the institution of the suit, the injury to the land resulting from defendant's wrongful act causing sand to be deposited thereon by ponded water. Plaintiffs were allowed to introduce evidence of the value of the land prior to the three years in controversy. *Held:* The admission of the testimony cannot be held for reversible error, since a certain latitude must be allowed in the introduction of evidence bearing on the question of damage, and since it appears that defendant introduced testimony of the value of the land prior to the three-year period in conflict with plaintiff's evidence. *Tesenecr v. Mills Co.*, 615.

E Judgments.

b For Permanent Damage

Where permanent damages are allowed for damage resulting to plaintiffs' land from defendant's ponding of water thereon, the judgment should grant defendant, its successors and assigns, an easement to pond water on the land in controversy. *Tesenecr v. Mills Co.*, 615.

Wills.

C Requisites and Validity.

g Revocation

Where testator, in his own handwriting, makes certain interlineations and annotations upon his will, which had been properly executed, and marks through certain words of the will, and it appears that such alterations are insufficient to constitute a holographic will and were made with the intent of altering the will at some future date in accordance with the notations, but that such alterations were not made with the intent to revoke the will in whole or in part, such interlineations and annotations are insufficient to show a revocation of the will, intent to revoke being essential to revocation by defacement or obliteration of the will by testator under the provisions of C. S., 4133. *In re Will of Roediger*, 470.

D Probate and Caveat.

b Procedure

The probate of a will in solemn form is a proceeding *in rem*, and the issued raised by the caveat must be tried by a jury, C. S., 4159, and the propounder and caveator may not waive trial by jury and submit the issue to the court under an agreed statement of facts. *In re Will of Roediger*, 470.

h Evidence in Caveat Proceedings (Opinion evidence as to mental capacity of testator see Evidence K b.)

In this action to set aside a purported will and certain other instruments executed in favor of propounder, caveator offered in evidence certain letters written by the attorney who had drawn up the

Wills D h—*continued.*

papers, and who had testified for propounder, which letters were written a few days after the execution of the instruments, and stated that testatrix had engaged the writer to settle her business affairs, and that he desired to cash for her certain certificates of stock. One of the instruments attacked assigned the certificates of stock to propounder. *Held:* The letters were competent as links in a chain of circumstances tending to show fraud and undue influence in the procurement of the execution of the instruments and as tending to contradict certain phases of the attorney's testimony for propounder. *Winborne v. Lloyd*, 483.

l Judgment

The finding by the jury that an alleged testator did not have sufficient mental capacity to execute a will is sufficient to support judgment for caveator, irrespective of the issue of fraud or undue influence. *Winborne v. Lloyd*, 483.

n Operation and Effect of Judgment Setting Aside Will and Respective Rights of Parties

1. Judgment setting aside will does not affect title of devisees' vendees for value without notice. *Whitehurst v. Hinton*, 392.

2. Devisees named in probated will *held* not liable for rents and profits except from date of judgment setting the will aside. *Ibid.*

E Construction and Operation.

a General Rules of Construction

1. The intent of the testator must prevail in the interpretation of the will unless contrary to public policy or some positive rule of law. *Corl v. Corl*, 7.

2. In construing a will, the primary purpose is to ascertain the intent of the testator as gathered from the instrument, taking into consideration the attendant circumstances and the condition of testator and his family. *Morris v. Waggoner*, 183; *Anderson v. Bridgers*, 456.

3. A devise will be construed to be in fee unless it is plainly indicated that testator intended to convey an estate of less dignity. C. S., 4162. *Ibid.*

4. Where a will is susceptible to two constructions, one disposing of the entire estate and the other disposing of only a part, the courts will prefer the construction disposing of the whole estate. *Ibid.*

b Estates and Interests Created

Testatrix devised all of her estate to a designated brother and sister, "to use as they please so long as they live," and thereafter provided that if her mother should survive either of the beneficiaries she should share in the estate during her lifetime, and that the "last to survive shall share all the estate to use as they please." Testatrix' mother predeceased testatrix. There was no residuary clause in the will. It appeared that testatrix and her brother and sister named in the will lived together on the home place inherited from their father, until the brother married, and that he then moved to adjacent land, and that testatrix and her sister, both unmarried, continued to live in the home place, and that all three worked

Wills E b—*continued.*

together in maintaining the place and in defraying living expenses. *Held:* Construing the will in the light of the facts surrounding the testatrix before, at the time of, and after making the will, the brother and sister named in the will took a life estate in common, with remainder over to the survivor, to the exclusion of other brothers and sisters of testatrix and their children. *Morris v. Waggoner*, 183.

d Vested and Contingent Interests

1. Testator devised certain land in trust for his son for his life with contingent limitation over to his son's legitimate children him surviving. The will provided that if any beneficiary should contest the will the beneficial interest of such beneficiary should be forfeited and should go to another son in fee simple, discharged from any trust created for such beneficiary. The son first named contested the will, and in the caveat proceedings the validity of the will was upheld. *Held:* The son contesting the will forfeited the life estate created in trust for him, but such forfeiture did not destroy the contingent limitation over to his children, and the son to whom the estate was forfeited did not take a fee simple in the lands forfeited, but only the life estate forfeited free from the trust. *Corl v. Corl*, 7.

2. Testatrix' will provided that a certain sum should be used by her executor in the purchase of a home for each of the children of a specified person, who was no kin to testatrix, that each of the named beneficiaries should have a life estate in the property purchased for him or her, with remainder over to the child or children surviving such beneficiary. Testatrix later executed a codicil directing that if any one of the named beneficiaries should die before testatrix' death, "and the payment to him or her by my executor of his or her devise after my death," the share of such beneficiary should be used for the other beneficiaries of the class, share and share alike. *Held:* Upon the death of any one of the named beneficiaries without issue him or her surviving, real estate purchased for such beneficiary under the provisions of the will would not revert to the estate of testatrix and descend to her heirs at law, but would go to the brothers and sisters of such beneficiary as members of the class. *Lancaster v. Lancaster*, 673.

f Designation of Devisees and Legatees and Their Respective Shares

1. Will *held* to authorize executor to pay for special medical attention necessary for testator's wife. *Meares v. Williamson*, 448.

2. Trustees of church *held* entitled to one-third of net estate under the will in this case. *Anderson v. Bridgers*, 456.

3. Judgment that a bequest of personalty to testator's wife, "to be used as she sees fit," and at her death to go to testator's daughter if living, and if not, to testator's brother and sisters, gave the wife the right to use not only the income, but also so much of the principal thereof as should be necessary for her comfort and support, *is held* without error upon the appeal of the daughter. As to whether a limitation over after a life estate may be created in personalty by executory devise, *quære? Black v. Trembly*, 743.

Wills E—*continued.*

g Conditions and Restrictions

A provision in a devise to a sister and brother that if either should marry, their husband or wife should have no share or control of the property, is inoperative, since the law in such instance would impose the right of dower and curtesy, respectively, on their lands. *Morris v. Waggoner*, 183.

i Actions to Construe Wills

Judgment stipulating amount due certain beneficiary under the will without adjudicating amount due other beneficiaries *held* not error under the facts of this case. *Anderson v. Bridgers*, 456.

F Rights and Liabilities of Devisees and Legatees. (Sale of lands or attachment of proceeds of sale to pay debts of estate see Executors and Administrators E.)

h Lapsed and Void Legacies

Where a beneficiary under a will predeceases the testator, the devise or bequest to such beneficiary lapses. *Morris v. Waggoner*, 183.

Witnesses. (Impeaching and corroborating, see Criminal Law G r; Evidence D f.)

Workmen's Compensation Act. (See Master and Servant F.)